

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 12925

COASTAL CONSERVATION
ASSOCIATION d/b/a CCA NORTH
CAROLINA; BRUCE C. ABBOTT;
CHARLES P. ADAMS, JR.; CONSTANTINE
A. ARETAKIS, II; FREDERICK L. BERRY;
ANDREW R. BOYD; HARRY T. BRANCH;
TROY D. BRANHAM; RUPERT D.
BROWN; JUDITH C. BULLOCK; WILLIAM
L. BYRD, JR.; JOHNNY L. CANUP;
MICHAEL D. CARTER; WILLIE T. CLOSS,
JR.; KENNETH D. COOPER, JR.; L. AVERY
CORNING, IV; PAUL N. COX; BENJAMIN
M. CURRIN; DANIEL E. DAWSON; MARY
F. DAWSON; CHARLES B. EFIRD; FRANK
K. EILER; CHRISTOPHER ELKINS; DAN E.
ESTREM; ANDREW P. GILLIKIN; LELAN
E. HALLER, JR.; JOHN M. HISLOP;
RAYMOND Y. HOWELL; JOEY S.
HUMPHREY; THOMAS G. HURT; CLARK
W. HUTCHINSON, JR.; ANDREW G.
JONES, JR.; GEORGE M. KIVETT, JR.;
JOHN C. KNIGHT, JR.; BRADFORD A.
KOURY; CHARLES H. LAUGHRIDGE;
CASEY M. LLOYD; MARILYN R. LOWE;
CHARLIE LOYA, JR.; NICKIE N. LUCAS;
BRUCE D. MACLACHLAN; EULISS D.
MADREN; WILLIAM W. MANDULAK;
DARRELL G. MCCORMICK; TERESA A.
D. MCCULLOUGH; SAMUEL B. MCLAMB,
III; JAMES M. MCMANUS, JR.; JOHN W.
MCQUAID; GEORGE R. MODE; JOHN V.
MOON; DENNIS K. MOORE; KENNETH N.
MOORE, JR.; WARREN S. MOORING;
ELIJAH T. MORTON; DANIEL J. NIFONG;
SADIE R. NIFONG; ROBERT B. NOWELL,
JR.; ELBERT W. OWENS, JR.; WYATT E.
PARCEL; VAN B. PARRISH; JAMES H.
PARROTT; BRYAN C. PATE;
ALEXANDRA S. PEYTON; HUNTER L.
PEYTON; JEFFREY P. PICKERING;
ROBERT R. RICE, II; ROBERT T. RICE;

**MOTION TO INTERVENE BY
NORTH CAROLINA FISHERIES
ASSOCIATION**

ORICE A. RITCH, JR.; MARK A. RUFFIN;
PEARCE RUFFIN; ERIC J. SATO; SEAN P.
SCULLY; LENNY T. SMATHERS;
CARROLL W. SPENCER; JOHN R.
SPRUILL; DAVID M. SUMMERS; JOHN B.
TAGGART; JESSE H. WASHBURN, II;
ANDREW J. WEBSTER; MELISSA N.
WILLIAMS; VANDEXTER WILLIAMS;
DONALD A. WILLIS, JR.; A. REXFORD
WILLIS, III; JAN L. WILLIS; PHILLIP R.
WOOD; RAYE P. WOODIN, III; JOSEPH G.
YAGER,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

Proposed Intervenor-Defendant North Carolina Fisheries Association, Inc. (the "NCFA"), by and through the undersigned counsel, and pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure, hereby moves to intervene as a defendant in this matter, either as of right pursuant to Rule 24(a) of the North Carolina Rules of Civil Procedure, or, in the alternative, permissively pursuant to Rule 24(b). In support of this Motion, the NCFA is filing concurrently herewith the Affidavit of John Glenn Skinner, Jr. ("Skinner Aff."). In further support of this Motion, the NCFA would show the Court as follows:

1. This action was filed on November 10, 2020 by the Coastal Conservation Association (the "CCA") and eighty-six individual Plaintiffs (referred to collectively herein as the "Plaintiffs"), alleging that the management and regulation of North Carolina's coastal

fisheries resources by the State of North Carolina (the "State") violates the public trust doctrine and North Carolina Constitution.

2. The CCA is a non-profit corporation, incorporated in Texas, with chapters in multiple states, including a North Carolina chapter headquartered in Raleigh, North Carolina. The CCA is a sportfishing advocacy group advocating for the management of fisheries resources in the interest of recreational fishers and the recreational fishing industry, including by reallocating fisheries resources from commercial to sport sectors.

3. Plaintiffs' prayer for relief is twofold. First, Plaintiffs seek a judicial declaration that the State's management of coastal fisheries resources has violated the common law public trust doctrine and the North Carolina Constitution. Second, Plaintiffs seek an injunction to prohibit the State from continuing to administer the existing, legislatively-crafted regulatory regime for managing coastal fisheries resources, and asking the Court to assume and "retain jurisdiction" to "enforce the State's compliance" with that injunction.

4. The NCFA seeks to intervene in this action to participate fully as a party-defendant. The NCFA meets all the requirements for intervention of right under Rule 24(a)(2) of the North Carolina Rules of Civil Procedure, which states that

Anyone shall be permitted to intervene in an action ... [w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

5. The NCFA is a non-profit trade association established in 1952 by North Carolina's commercial fishermen. (Skinner Aff. ¶ 3.) Its members include, but are not limited to, commercial fishermen from all coastal counties in North Carolina, seafood dealers,

processors, distributors, and other persons and businesses directly affected by Marine Fisheries rules, regulations and proclamations. (Skinner Aff. ¶ 3.)

6. Many of the NCFA's members hold commercial fishing licenses issued by the Division of Marine Fisheries ("DMF") (Skinner Aff. ¶ 5) and have property interests in those licenses. *See Izydore v. Tokuta*, 242 N.C.App. 434, 440, 775 S.E.2d 341, 346 (2015) (quoting *Tripp v. City of Winston-Salem*, 188 N.C.App. 577, 582, 655 S.E.2d 890, 893 (2008) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))). The right to fish commercially is limited, has value, and may be revoked for cause. These holders of commercial fishing licenses have paid for those licenses and have invested in commercial fishing gear they are authorized to use under those licenses to work and earn a living. (Skinner Aff. ¶ 6.) The NCFA's members rely for their livelihoods on their ability to fish in accordance with duly-promulgated state regulations. (Skinner Aff. ¶ 7.)

7. The NCFA serves fishing families by advocating for sustainable fisheries, preserving fishing heritage, and promoting wild-caught North Carolina seafood. (Skinner Aff. ¶ 8.) The NCFA is the only commercial fishermen's trade association in North Carolina. (Skinner Aff. ¶ 8.) As such, the NCFA represents the collective economic interests of North Carolina's commercial fishermen, which are directly impacted by the State's regulation of fisheries resources. (Skinner Aff. ¶ 8.) The NCFA is committed to presenting an accurate portrait of the industry and the hardworking people comprising it. (Skinner Aff. ¶ 8.)

8. The NCFA participates in every aspect of the fishery management process and actively lobbies policymakers on behalf of North Carolina's fishing families. (Skinner Aff. ¶ 10.) The NCFA's mission is to study, promote, and develop the growth, conservation, and use of fish, seafood, and other marine resources; to assemble and disseminate information with respect

to conservation, preservation and use of products of the sea; to gather and disseminate information which will be beneficial to those engaged in catching, taking, preparing, preserving, distributing, or using any form of marine life; and, to cooperate with other organizations and state and federal agencies created for any of the foregoing purposes. (Skinner Aff. ¶ 9.) The NCFA's advocacy is carried out by staff professionals and volunteers monitored by a board of directors representing all of the State's coastal regions and every facet of the industry. (Skinner Aff. ¶ 11.)

9. In pursuit of their mission, the NCFA has engaged in years of advocacy and participation in the State's administratively mandated rulemaking process, which is described in 15A N.C. Admin. Code 03P .0301–.0304; N.C. Gen. Stat. § 150B-43. (Skinner Aff. ¶ 12.) The NCFA engages in a wide scope of public awareness projects, appearances before and lobbying of the Marine Fisheries Commission (“MFC”) and Division of Marine Fisheries (“DMF”). (Skinner Aff. ¶ 13.) NCFA members also participate on various councils, commissions, and advisory committees associated with the MFC, Atlantic States Marine Fisheries Commission, Mid-Atlantic Fisheries Management Council, and South Atlantic Fisheries Management Council. (Skinner Aff. ¶ 13.)

10. NCFA's members will be directly impacted by the resolution of this action, which seeks to alter coastal fishing regulations while bypassing the existing fisheries management regime. Traditionally, coastal fishing regulations are created, amended, or overturned through a carefully-crafted administrative process. *See e.g.* 15A N.C. Admin. Code 03P .0301–.0304. The State designed this process to be scientifically cognizant and to provide notice and opportunity to interested parties to participate. By attempting to utilize this Court to circumvent the existing regulatory regime, Plaintiffs are effectively excluding the NCFA—the recognized voice of

commercial fishermen's interests—from the otherwise inclusive rulemaking process. Plaintiffs' Complaint alleges that (among other things) North Carolina's fisheries resources have been harmed by the State's sanctioning of various commercial gear and fishing methods including trawling in estuarine waters and the use of "unattended" gillnets. (Compl. ¶¶ 10–13.)

Specifically, Plaintiffs allege that sanctioned methods of commercial fishing have resulted in the reduction of various species of fish found in North Carolina's fisheries stocks. (Compl. ¶¶ 15–17.) Plaintiffs also allege that fishing limits have become more restrictive. (Compl. ¶¶ 18–19.)

11. The relief the Plaintiffs seek would fundamentally alter the State's regulatory regime regarding management and regulation of coastal fisheries resources, and directly implicate and adversely impact the interests of the NCFA and its members, including countless commercial fishermen.

12. Plaintiffs' action is an attempt to avoid the established administrative rulemaking procedure whereby the MFC reviews proposed changes to fisheries management practices and allows interested persons to support or contest the proposed change. 15A N.C. Admin. Code 03P .0301–.0304. Plaintiffs have filed this complaint with the intention of substantially affecting the regulation of North Carolina's coastal resources without the participation of commercial fishermen. While Plaintiffs plainly allege that the State is biased towards the interests of commercial fishermen (Compl. ¶¶ 40, 44), they have intentionally excluded from this action those commercial fishermen or the longstanding voice of commercial fishermen, the NCFA.

13. Unless the NCFA is allowed to intervene, the NCFA's ability to protect its members' interests in the management and use of fisheries resources will be practically impaired by this action. The granting of the relief sought by Plaintiffs would necessarily impact the rules and regulations that apply to North Carolina's coastal fisheries resources and, in turn, the

economic viability of commercial fishing. Without intervention, commercial fishermen's livelihoods could be directly affected without them having been granted any opportunity to advocate for their significant interests or share their unique perspectives.

14. In addition to circumventing the standard rulemaking process, Plaintiffs raise false and misleading allegations about the health of North Carolina's fisheries stocks and the impact that longstanding commercial fishing methods, such as trawling and gill netting, have on these stocks. The NCFA has decades of unique experiential knowledge, perspective, expertise, and a firsthand understanding of North Carolina's fishery stocks, all of which is critical to a complete understanding of the matters at issue in this litigation. (Skinner Aff. ¶ 18.) Further, to the extent this action survives a motion to dismiss, the NCFA will provide evidence that challenges Plaintiffs' numerous factual allegations. Unless the NCFA is allowed to intervene, the NCFA's specific expertise and perspective will be excluded from this case.

15. The NCFA's interests are not adequately represented by the existing parties in the case. Plaintiffs represent recreational fishing interests, while the NCFA is the trade association representing North Carolina's commercial fishing interests. The CCA and NCFA have engaged in years of debate over the proper management of North Carolina's fisheries. (Skinner Aff. ¶ 16.) The State does not adequately represent the interests of the NCFA because the State represents the general public interest. While the general public interest includes the NCFA's interests, it also includes other North Carolina residents, including Plaintiffs and their supporters. There is a substantial risk that the State could advocate a position or even settle the case in a manner adverse to the interests of the NCFA and its membership.

16. Alternatively, the NCFA, as the commercial fishermen's trade association with a special interest in the regulation and use of fisheries resources, also meets the requirements for

permissive intervention pursuant to Rule 24(b)(2). Rule 24(b)(2) allows the court broad discretion to allow intervention where a timely applicant shows its “claim or defense and the main action have a question of law or fact in common.” In exercising its discretion, the court shall consider “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” N.C. Gen. Stat. § 1A-1, Rule 24(b)(2).

17. As stated above, the NCFA’s defenses regarding the regulation and management of North Carolina’s coastal fisheries have questions of law and fact in common with the pending action. The Plaintiffs claim that the State has breached the public trust doctrine because the longstanding rulemaking process has allegedly resulted in the mismanagement of North Carolina’s fisheries resources. The NCFA asserts that the State’s existing regulatory framework is the result of a thoughtful and inclusive process which Plaintiffs seek to circumvent in an attempt to further their own interests while ignoring the interests and unique expertise of commercial fishermen and the public at large. The resolution of these claims is grounded upon common questions of law and fact—specifically, whether, the public trust doctrine constitutes an appropriate basis for Plaintiffs to challenge the State’s management of coastal fisheries.

18. Additionally, intervention will neither unduly delay nor prejudice the adjudication of this matter because the NCFA is seeking intervention at an early stage of the case.

19. The motion is timely. The complaint in the matter was filed on November 10, 2020. There have been no substantive proceedings in this matter, no additional pleadings have been filed, and the time for the defendant to answer or otherwise plead has not lapsed.

20. The undersigned counsel has conferred with counsel for the Plaintiffs and for the Defendant and notified them of the NCFA’s intention to file this Motion. The Defendant

consents to the NCFA's motion to intervene in this matter. Plaintiffs have not yet advised as to their position on the NCFA's motion to intervene.

21. Attached as Exhibit A is a copy of the NCFA's proposed Motion to Dismiss the Complaint, which pursuant to Rule 24(c) provides notice of the claims and defenses for which NCFA seeks intervention.

WHEREFORE, the NCFA respectfully requests that the Court grant its Motion to Intervene as a matter of right, pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure, or, in the alternative, that the NCFA be granted permissive intervention, pursuant to Rule 24(b).

Respectfully submitted this 28th day of January, 2021.

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*Attorneys for North Carolina Fisheries
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EXHIBIT A

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 12925

COASTAL CONSERVATION
ASSOCIATION d/b/a CCA NORTH
CAROLINA *et al.*,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant,

and

NORTH CAROLINA FISHERIES
ASSOCIATION,

Intervenor-Defendant.

**[PROPOSED] MOTION TO DISMISS
PLAINTIFFS' COMPLAINT OF NORTH
CAROLINA FISHERIES ASSOCIATION,
INC.**

Intervenor-Defendant North Carolina Fisheries Association, Inc. ("NCFA"), pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, by and through the undersigned counsel, hereby moves to dismiss the Complaint filed herein by plaintiffs and this civil action with prejudice. In support hereof, the NCFA would show unto the Court that each of Plaintiffs' First and Second Claims for Relief asserted in the Complaint must be dismissed because neither states a claim upon which relief can be granted. For these reasons, this civil action must be dismissed.

In further support hereof, the NCFA would show the Court that the first and second claims for relief asserted in the Complaint are deficient in at least the following ways:

1. Plaintiffs mischaracterize the public trust doctrine, which provides no basis for their claims against the State. (Compl. ¶ 1.) The public trust doctrine is a fixture of the common law, recognized by North Carolina in *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39 (1903) (citing *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892)). However, contrary to Plaintiffs' assertion (Compl. ¶ 1) the public trust doctrine has never been incorporated into the Constitution of North Carolina. See *Gwathmey v. State Dep't of Env't, Health, & Nat. Res.*, 342 N.C. 287, 304, 464 S.E.2d 674, 684 (N.C. 1995) (holding that, given "the absence of a constitutional basis for the public trust doctrine," the doctrine "cannot be used to invalidate acts of the legislature" and that that no constitutional provision expressly or impliedly prevents the General Assembly from abrogating the public trust doctrine).

2. Article XIV, Section 5 of the North Carolina Constitution does not constitutionalize the public trust doctrine. Instead, Section 5 merely declares a policy of conservation and protection of land and water, while reciting several guiding principles such as control of air, water and noise pollution, as well as preservation of recreational areas and "places of beauty."

3. Plaintiffs also misconstrue the 2018 constitutional amendment articulating the right of "people to hunt and fish" in Article I, Section 38 which also does not create a constitutional public trust. The plain language of Article I, Section 38, does not include any phrase or language suggesting that the amendment constitutionalizes the public trust doctrine. Additionally, the plain language of Article I, Section 38 specifically notes that people's right to hunt and fish are subject to "laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly" for the purposes of, "promot[ing] wildlife conservation and management[.]" Article I, Section 38 cannot form the basis of Plaintiffs' challenge to the very laws and rules the

State has adopted for its management of coastal fisheries, such as The Fisheries Reform Act of 1997, 1997 N.C. Sess. Laws 1114, ("FRA") and rules enacted thereunder.

4. Accordingly, the public trust doctrine is not a basis by which Plaintiffs can challenge the actions of the State under the FRA.

5. Plaintiffs have failed to establish a constitutional basis for their public trust claims because such a basis does not exist. Given the absence of a constitutional basis for the public trust doctrine, the doctrine cannot be used to invalidate otherwise lawful actions of the legislature. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Accordingly, the FRA abrogated the common law public trust doctrine to the extent it conflicts with the FRA.

6. Other than their unsupportable constitutional claims, Plaintiffs do not provide an alternative basis for their claims.

7. Both by plain meaning and by fact, Article XIV, Section 5, does not create a private right of action or otherwise provide a basis for relief for Plaintiffs in this case. Instead Section 5 is a general policy statement concerning the conservation and protection of land and water, which establishes only that it "shall be a proper function" of the State to acquire land for the purposes of preserving, for example, forests, wetlands, historical sites, and "places of beauty."

8. Both by plain meaning and by fact, Article I, Section 38, does not create a private right of action or otherwise provide a basis for relief for Plaintiffs in this case. To the extent Article I, Section 38 creates a right in the public to hunt and fish by traditional means, such right is expressly made subject to laws enacted by the General Assembly and rules adopted pursuant thereto for the purposes of wildlife conservation and management. The FRA is a valid statute purposed for wildlife resource management.

NCFA reserves the right to assert other appropriate bases for its Motion to Dismiss as may appear. In further support of this Motion to Dismiss, in addition to the Plaintiffs' Complaint, NCFA will rely on its forthcoming memorandum in support of this Motion, and all other matters properly before the Court pursuant to Rule 12(b)(6).

WHEREFORE, the undersigned respectfully move that the Court enter an order dismissing Plaintiffs' Complaint with prejudice, and granting unto NCFA such other and further relief as the Court deems just and appropriate.

This the 28th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Intervene upon all parties to this matter by placing a copy in the United States Mail, First Class, postage prepaid and addressed as follows:

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This the 28 day of January, 2020.



Tess S. Rogers
*Attorneys for North Carolina Fisheries
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