IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION

Case No.: 4:20-cv-151-FL

NORTH CAROLINA COASTAL FISHERIES REFORM GROUP; JOSEPH WILLIAM ALBEA; DAVID ANTHONY SAMMONS; CAPTAIN SETH VERNON; CAPTAIN RICHARD ANDREWS; and DWAYNE BEVELL,	)	
Plaintiffs,	)	**DEFENDANT NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF MARINE FISHERIES' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
v.	)	
CAPT. GASTON LLC; ESTHER JOY, INC.; HOBO SEAFOOD, INC.; LADY SAMAIRA, INC.; TRAWLER CAPT. ALFRED, INC.; TRAWLER CHRISTINA ANN, INC.; TRAWLERS GARLAND and JEFF, INC.; and NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF MARINE FISHERIES,	)	**[Fed. R. Civ. R. 12(b)(1), 12(b)(2) and 12(b)(6)]**
Defendants.	)	

NOW COMES Defendant North Carolina Department of Environmental Quality, Division of Marine Fisheries ("NCDMF"), through its undersigned counsel, and respectfully submits this Memorandum of Law in support of its Motion to Dismiss.

NATURE OF THE CASE

The Plaintiffs allege certain injuries to natural resources of the State which the Plaintiffs allegedly use and enjoy. The Plaintiffs claim that the private parties named as defendants injure those resources and that NCDMF has failed to properly exercise its authority to protect those resources. The Plaintiffs assert claims under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* and under state law and seek injunctive relief against NCDMF.

FACTS PERTAINING TO NCDMF'S MOTION TO DISMISS

The Plaintiffs are recreational fishers, fishing guides, a tackle shop owner and a fishing organization. (ECF 1 ¶¶ 6-13). The Plaintiffs have brought their Complaint against several commercial shrimp trawling operations ("Shrimp Trawlers") as well as NCDMF. (ECF 1 ¶¶ 14-32). NCDMF is an agency of the State of North Carolina with jurisdiction over marine and estuarine resources. (*See* ECF 1 ¶ 30).

The Plaintiffs allege in their first and second claims for relief that the Shrimp Trawlers are violating the CWA. They allege that the Shrimp Trawlers' method of fishing incidentally catches species other than shrimp. (ECF 1 ¶ 38). This other catch is commonly called "bycatch." (ECF 1 ¶ 39). According to the Plaintiffs, this unwanted bycatch is caught, injured, killed or discarded. (ECF 1 ¶ 39). The Plaintiffs further assert that the Shrimp Trawlers' methods for catching shrimp disturb, remove, and re-deposit sediment in the Pamlico Sound. (ECF 1 ¶¶ 48, 62). The Shrimp Trawlers' activities harm fish and other marine species and threaten their ability to sustain their populations, the Complaint states. (ECF 1 ¶ 53).

The Plaintiffs do not mention NCDMF anywhere within the factual allegations pertaining to their first and second claims for relief. (ECF 1 ¶¶ 56-72). In particular, the Plaintiffs do not allege that NCDMF itself conducts any shrimp trawling.

In their third claim for relief, the Plaintiffs assert that the Shrimp Trawlers are violating North Carolinians' public trust rights, and specifically the Plaintiffs' own public trust rights, due to the alleged impacts of shrimp trawling on North Carolina's coastal waters. (ECF 1 ¶ 78). They charge that NCDMF has "impermissibly abdicated its responsibilities under North Carolina's Public Trust Doctrine" by allegedly "failing to adequately regulate the Defendant shrimp trawlers." (ECF 1 ¶ 79).

ARGUMENT

I. All three of the Plaintiffs' claims against NCDMF are barred by the Eleventh Amendment.

The Eleventh Amendment protects states from suits in federal court. *E.g. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Such immunity applies equally to "state agents and state instrumentalities," which are considered "arm[s] of the State." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997) (citations and quotations omitted). As further explained below, all three of the Plaintiffs' claims against NCDMF are barred by the Eleventh Amendment.

A. NCDMF is an arm of the State.

In order to determine whether an entity is an arm of the state, the Court should consider the "provisions of state law that define the agency's character." *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 138 (4th Cir. 2014) (quoting *Regents*, 519 U.S. at 429 n. 5). The Fourth Circuit in *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012) (hereinafter, "*Oberg I*"), highlighted four nonexclusive factors courts should consider when determining whether an entity is an arm of the state. These factors are:

> (1) whether any judgment against the entity as defendant will be paid by the State . . .;
>
> (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;
>
> (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
>
> (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

Oberg I, 681 F.3d at 580 (citations omitted).

It is highly unlikely that NCDMF's status as an "arm of the State" can be seriously disputed. NCDMF clearly is an arm of the state. *E.g., Sullivan v. Ga. Dep't of Nat. Res.,* 724 F.2d 1478, 1479 (11th Cir. 1984) (recounting that whether an action against the Georgia Department. of Natural Resources was against the state was "not seriously disputed"). Indeed, the Plaintiffs refer to NCDMF as a "state agency." (ECF 1 ¶ 30).

The *Oberg I* factors point unerringly to NCDMF being an arm of the state. With regard to the first factor—whether any judgment against NCDMF will be paid by the State—the Plaintiffs are not seeking monetary damages from NCDMF. However, if the Court were to order NCDMF to take actions to further reduce bycatch, as the Plaintiffs are seeking, employees paid with state funds would undoubtedly implement such an order, thereby impacting the state treasury. Any other incidental costs of implementation would also likely be paid with state funds. (Murphey Decl. ¶ 9).[1]

With regard to the second factor identified in *Oberg I*—the degree of autonomy—the director of NCDMF ("Fisheries Director") is appointed by the Secretary of the North Carolina Department of Environmental Quality ("NCDEQ"). (Murphey Decl. ¶ 2). NCDEQ is a State Agency within the State's executive branch. N.C. Gen. Stat. § 143B-279.1. The Fisheries Director can be removed by the Secretary of NCDEQ without cause. (Murphey Decl. ¶ 3)/ All

[1] "[T]he Fourth Circuit has not ruled on whether dismissing a suit on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Blackburn v. Tr. of Guilford Tech. Comty. Coll.*, 822 F. Supp. 2d 539 (M.D.N.C. 2011) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 481 (4th Cir. 2005)) (internal citations omitted). Therefore, NCDMF brings its Eleventh Amendment defense under both rules. With regard to Rule 12(b)(1) motions, the Court may consider evidence outside the pleadings, including the declaration attached to this memorandum. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

NCDMF funds, including any funds from federal grants and license receipts, are held by the State Treasury and are expended pursuant to state rules and policies. (Murphey Decl. ¶ 6).

With regard to the third and fourth factors identified in *Oberg I*—whether NCDMF is involved with issues of state concern and how it is treated under state law—NCDMF is a division under NCDEQ. N.C. Gen. Stat. § 143B-279.3(8). NCDMF is "charged with protecting the State's marine and estuarine fisheries." (ECF 1 ¶30). In short, NCDMF is a component of a core state agency, NCDEQ, charged with protecting natural resources of the State. There is therefore no question that NCDMF is an "arm of the State."

B. The Plaintiffs have failed to allege that Eleventh Amendment immunity has been abrogated or waived.

"Once a defendant has [proven that it is an arm of the state], the burden to prove that immunity has been abrogated or waived" falls to the Plaintiff. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019). Barring waiver of Eleventh Amendment immunity, consent to suit, or congressional abrogation, none of which have even been alleged here, NCDMF is immune from suit in federal court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Pense v. Md. Dep't of Pub. Safety & Corr. Servs.* 926 F.3d 97, 101 (4th Cir. 2019); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 291-92 (4th Cir. 2001). Therefore, the Plaintiffs' claims should be dismissed against NCDMF under Rule 12(b)(1) or (6).[2]

[2] As stated in footnote 1, "the Fourth Circuit has not ruled on whether dismissing a suit on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Blackburn*, 822 F. Supp. 2d 539 (M.D.N.C. 2011) (citing *Constantine*, 411 F.3d at 481) (internal citations omitted). Therefore, NCDMF brings its Eleventh Amendment defense under both rules.

C. The CWA does not abrogate NCDMF's Eleventh Amendment immunity.

Even if the Plaintiffs had averred waiver, consent or abrogation under the CWA, those allegations would fail. For example, the CWA does not abrogate NCDMF's Eleventh Amendment immunity. Under the CWA, a citizen can sue "to enjoin any person (including (i) the United States, and (ii) any other governmental instrumentality or agency *to the extent permitted by the eleventh amendment to the Constitution*), who is alleged to be in violation . . . ." 33 U.S.C. § 1365(a)(1) (emphasis added). Rather than abrogating the state defendant's Eleventh Amendment immunity, the CWA specifically confirms that immunity. The Fourth Circuit has held that when a citizen-suit provision in a federal statute permits an action against a state regulatory authority "to the extent permitted by the eleventh amendment to the Constitution," such language preserves the state's immunity. *Bragg,* 248 F.3d at 298; *see also Farricielli v.Holbrook*, 215 F.3d 241 (2nd Cir. 2000) (similar RCRA citizen-suit language does not abrogate Eleventh Amendment immunity); *Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999) (concluding that similar language in other statutes does not evidence Congress' intent to abrogate a state's immunity); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1483 n.3 (10th Cir. 1995) (by explicitly allowing suits only to the extent permitted by the Eleventh Amendment, SMCRA does not abrogate states' immunity).

Furthermore, even if Congress intended to abrogate state immunity, it did not have the authority to do so. The CWA was enacted pursuant to the authority provided by the Interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *See Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282 (1981). The Supreme Court has held that Congress cannot, in the exercise of its Article I powers, abrogate a state's Eleventh Amendment immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996). Thus, the CWA does not authorize suit against

NCDMF unless the action is consistent with the Eleventh Amendment. Because NCDMF is an arm of the State, this suit is not "permitted by the eleventh amendment." 33 U.S.C. § 1365(a)(1).

D. The *Ex parte Young* exception does not apply in this case.

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits claims for prospective injunctive relief against a state official who is violating federal law as a limited exception to the official's Eleventh Amendment immunity. This doctrine is predicated on the notion that a suit challenging a state official's unlawful action is not, in effect, a suit against the state. *Pennhurst,* 465 U.S. at 102. However, the *Ex parte Young* exception does not apply to an action against the state itself or a state agency; it only applies if a state official is sued in his official capacity for prospective relief. When a state or its agencies are sued, the relief sought by a plaintiff is irrelevant to the issue of Eleventh Amendment immunity. As this Court has noted, when a state agency is the defendant, "[t]here is thus no question of invoking the legal fiction created by the Supreme Court in *Young*." *Brown v. N.C. Div. of Motor Vechicles,* 987 F. Supp. 451, 459 (E.D.N.C. 1997), *aff'd*., 166 F.3d 698 (4th Cir. 1999).

E. The Plaintiffs' third claim for relief should also be dismissed as the Eleventh Amendment bars the Plaintiffs from bringing State claims against NCDMF in federal court.

The Plaintiffs allege, pursuant to their third claim for relief, that NCDMF has not adequately regulated commercial shrimp trawlers and seeks an order from the Court instructing NCDMF to take action to decrease the alleged level of bycatch by the Shrimp Trawlers. (ECF 1 ¶ 79 & p. 17). This claim for relief is based entirely on state law, specifically the North Carolina public trust doctrine.

As explained above, the Eleventh Amendment protects states from suit against citizens in federal court. *Metcalf,* 506 U.S. at144. Likewise, the *Ex parte Young* exception does not apply to

the Plaintiffs' third claim for relief. This is not only because, as explained above, the Plaintiffs have sued a state agency as opposed to an official, but also because the Plaintiffs' third claim is entirely based on state law. It is well-established law that the Eleventh Amendment prevents federal courts from enjoining state officials based on state law claims. *Pennhurst,* 465 U.S. at 124; *See also Antrican v. Odom*, 290 F.3d 178, 187 (4th Cir. 2002) (finding that the *Ex parte Young* exception "does not apply to actions against State officials seeking to compel their compliance with State law."). "[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Pennhurst,* 465 U.S. at 121. As the Supreme Court has noted: "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. Therefore, the Plaintiffs' third claim for relief against NCDMF may be dismissed on this additional ground.

II. All three of the Plaintiffs' claims against NCDMF should also be dismissed for failing to state a claim upon which relief may be granted.

As explained further below, with regard to their first and second claims for relief, the Plaintiffs have failed to allege facts showing that NCDMF is violating the CWA. Furthermore, with regard to the Plaintiffs' third claim for relief, there is no state law allowing the Plaintiffs to bring such a claim against NCDMF. Therefore, in addition to being barred by the Eleventh Amendment, all three claims against NCDMF should also be dismissed for failing to state a claim upon which relief may be granted.

A. The Plaintiffs have failed to allege facts that, if taken as true, show that NCDMF is violating the CWA.

The Plaintiffs' claims for relief pursuant to the CWA should be dismissed under Rule 12(b)(6) for failing to state a claim upon which relief may be granted. On a motion under Rule 12(b)(6) to dismiss for failure to state a claim, all well pleaded allegations are presumed to be true. *United States v. Gaubert*, 499 U.S. 315, 329 (1991). However, to survive the motion, the

complaint must contain "sufficient factual matters . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)); *see also Robinson v. Am. Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

In paragraphs 2 and 4 of their prayer for relief, the Plaintiffs seek a judicial declaration that NCDMF has violated the CWA and an order instructing NCDMF "to take such steps as are necessary and in compliance with the [CWA]." (ECF 1 pp. 16-17). However, the Plaintiffs have failed to allege any facts that establish a claim that NCDMF is violating the CWA. The Plaintiffs rely on sections 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344. (ECF 1 ¶¶ 56, 63). Section 301(a) makes it unlawful to discharge a pollutant without a permit. Section 404 requires that any person who discharges dredged or fill material into navigable waters must first obtain a permit. The Plaintiffs do not allege that NCDMF engaged in either of these activities. The Complaint only alleges discharges by the Shrimp Trawlers. Nowhere in the Complaint do the Plaintiffs allege that NCDMF conducts any shrimp trawling or any activity that results in a discharge that is barred by the CWA. Indeed, NCDMF is not mentioned at all in either the Plaintiffs' first or second claims.[3] The aforementioned conclusory statements in the prayer for relief are not sufficient to overcome a motion to dismiss for failure to state a claim because the

[3] In their first claim, the Plaintiffs mention a "Section 401 Certification from the North Carolina Department of Environmental Quality." (ECF 1 ¶ 71). Section 401 certifications are issued by the Division of Water Resources, not NCDMF. *See* 15A N.C. Admin. Code 2H .0501(c)(6), (7), .0507(b).

Plaintiffs nowhere allege "that *the defendant* is liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 678 (emphasis added). Therefore, to the extent that the Plaintiffs have brought claims under the CWA against NCDMF, such claims should be dismissed for failing to state a claim.

B. The Plaintiffs' third claim for relief should be dismissed because the Plaintiffs have no claim under the North Carolina public trust doctrine.

The Plaintiffs' third claim for relief is the only claim in the Complaint in which the Plaintiffs assert factual allegations against NCDMF. The Plaintiffs' third claim alleges a common law cause of action to enforce the public trust doctrine. (ECF 1 ¶ 72). There is no state common law that supports their claim, and even if there were, any such claim would be barred by sovereign immunity. Therefore, even if this Court does not dismiss the Plaintiffs' third claim pursuant to the Eleventh Amendment, the Plaintiffs' third claim should nevertheless be dismissed pursuant to state law.

If the Eleventh Amendment does not bar this action, the State's sovereign immunity does.[4] A state's immunity from suit extends beyond the limits of the Eleventh Amendment. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) ("[T]he letter of the Eleventh Amendment" does not "exhaust[ ] the restrictions upon suits against non-consenting States."). In determining whether a state is immune from suits by its own citizens, courts look to the law of the state. *See, e.g., Dyson v. Le'Chris Health Sys., Inc.*, No. 4:13-CV-224-BO, 2015 U.S. Dist. LEXIS 2483, at *11 (E.D.N.C. Jan. 9, 2015). "Under the doctrine of sovereign immunity, the

[4] The North Carolina courts have not specified whether a motion to dismiss based on sovereign immunity arises under Rule 12(b)(1), (2) or (6). *Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P.*, 160 N.C. App. 626, 629, 586 S.E.2d 812, 815, *aff'd,* 358 N.C. 218, 593 S.E.2d 585 (2004) (acknowledging that the sovereign immunity defense has been discussed as both a 12(b)(1) and 12(b)(2) defense); *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (discussing sovereign immunity as a 12(b)(6) defense). Accordingly, the State's motion is based on all three subsections.

state [of North Carolina] and its agencies are immune from suit absent a waiver of immunity." *Russ v. Causey*, 732 F. Supp. 2d 589, 610 (E.D.N.C. 2010) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)), *aff'd,* 468 F. App'x 267 (4th Cir. 2012).

The core of the Plaintiffs' contention against NCDMF is that NCDMF allegedly "fail[ed] to adequately regulate . . . shrimp trawling operations." (ECF 1 ¶ 79). The Plaintiffs' claim is against a state agency and is grounded specifically and exclusively on the state public trust doctrine. (ECF 1 ¶ 79; *see also id.* p. 14 ("North Carolina Public Trust Doctrine")); *id.* pp. 16-17 ¶¶ 1-4). The public trust doctrine is a state common law principle under which the State holds in trust certain resources for the benefit of the public. *State ex rel. Rohrer v. Credle,* 322 N.C. 522, 527-28, 369 S.E.2d 825, 828 (1988). "[P]ublic trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common . . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n,* 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (quoting N.C. Gen. Stat. § 1-45.1) (emphasis removed). "[T]he public trust doctrine 'uniquely implicates [a state's] sovereign interests.'" *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 27 (2005) (quoting *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 284 (1997)); *see also Neuse River Found. v. Smithfield Foods, Inc.,* 155 N.C. App. 110, 119, 574 S.E.2d 48, 54 (2002) (recognizing "[t]he state's exclusive authority to regulate its public trust waters"). Accordingly, the sovereign immunity bar applies.

The Plaintiffs bear the burden to allege facts that, if true, would amount to a waiver of sovereign immunity or consent to suit. *Fabrikant,* 174 N.C. App. at 38, 621 S.E.2d at 25; *see*

also Myers v. AT&T Inc., No. 5:12-CV-714-BO, 2016 U.S. Dist. LEXIS 5900, at *9 (E.D.N.C. Jan. 19, 2016) (holding that, under North Carolina law, "a plaintiff . . . must allege and prove . . . whether the officials have waived their sovereign immunity or otherwise consented to suit"). The Plaintiffs have neither asserted any waiver or consent, nor alleged any facts that would show waiver or consent. Therefore, sovereign immunity bars the Plaintiffs' public trust doctrine claim.

Furthermore, even if the Eleventh Amendment and sovereign immunity allowed the Plaintiffs to proceed, there is no law to support their claim. The public trust doctrine imbues the State with certain authority and the State may invoke judicial remedies to enforce the public trust. Indeed, "[t]he state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters." *Neuse River Found.*, 155 N.C. App. at 118, 574 S.E.2d at 54. Other entities, even local governments, are not permitted to enforce generalized public trust rights. *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 70, 723 S.E.2d 156, 158 (2012) (prohibiting a town from enforcing public trust rights).

The Plaintiffs' request—that this Court force the State to regulate public trust resources in the manner that they prefer (ECF 1 p. 17 ¶ 4)—not only would eviscerate the State's unique power to regulate the public trust, but usurp that power altogether by subjugating it to the Plaintiffs' wishes. This would allow the Plaintiffs to accomplish through the federal judiciary exactly what North Carolina law prohibits. No common law right allows this. Therefore, the Plaintiffs' common law claim should be dismissed.

The Plaintiffs' claim suffers from yet another fatal flaw. The Plaintiffs allege that NCDMF is "charged with protecting the State's marine and estuarine fisheries through," among other things, "regulation," and that the agency is "responsible for regulating" shrimp trawling. (ECF 1 p. 2 & ¶ 30). They claim that NCDMF violated the public trust doctrine by "failing to

adequately regulate" that practice. (ECF 1 ¶ 79). To remedy this alleged violation, they request that this Court "order" NCDMF to "regulate" commercial shrimp trawling. (ECF 1 p. 17 ¶ 4).

To the extent that the Plaintiffs seek to have the Court order NCDMF to promulgate rules, the Plaintiffs cannot state a claim. The North Carolina General Assembly has delegated the authority to "[i]mplement the laws relating to coastal fisheries, coastal fishing, shellfish, crustaceans, and other marine and estuarine resources . . . *by the adoption of rules*" to the State's Marine Fisheries Commission, not NCDMF. N.C. Gen. Stat. § 143B-289.51 (emphasis added). Assuming that the Complaint alleges that NCDMF has the authority to adopt rules, that is a legal conclusion that is contrary to law. This Court need not accept as true the Plaintiffs' incorrect legal assertion simply because the Plaintiffs couched it as a factual allegation. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Revene v. Charles Cnty. Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). Because the Plaintiffs' request for relief would force NCDMF to exceed its authority, the claim should be dismissed.[5]

The Plaintiffs seek to buttress their public trust claim with references to North Carolina statutes and the State's Constitution. (ECF 1 ¶¶ 74-76). Even if the Plaintiffs had asserted separate statutory and state constitutional claims—which they have not—these efforts would fail.

A state statute does not create any private cause of action unless the General Assembly has "expressly provided" one. *Willett v. Chatham Cnty. Bd. of Educ.*, 176 N.C. App. 268, 272, 625 S.E.2d 900, 903 (2006) (quoting *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003)). The Plaintiffs have not identified any statutory language that "expressly provide[s]" them with a cause of action.

[5] Any action against the Marine Fisheries Commission that sought to force the Commission to adopt the Plaintiffs' preferred rules would fail for the myriad other reasons set forth herein.

The North Carolina courts recognize "a direct claim against the State under our Constitution" when one's "state constitutional rights have been abridged" (unless an alternative state-law remedy exists). *Corum v. Univ. of N.C.* 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). The Plaintiffs cite article XIV, section 5 of the North Carolina Constitution, which provides in part:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

This provision does not create a "constitutional right" in the Plaintiffs. It speaks of a "policy" and the "proper function of the State . . . and its political subdivisions." It does not speak in terms or any right, duty, obligation or other mandate. No court has ever recognized a private right of action under this provision, much less a right of a member of the general public to force the State to regulate a resource in the manner that the individual prefers.

III. In the alternative, this Court should abstain from hearing the Plaintiffs' third claim for relief against NCDMF.

If the Court does not dismiss the Plaintiffs' third claim for any of the several reasons set forth above, the Court should nevertheless abstain from hearing this claim. The Supreme Court in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), held that a federal court may decline to exercise its jurisdiction "if abstention is necessary to show proper regard for a state government's domestic policy." *Pomponio v. Fauquier Cnty Bd. of Supervisors,* 21 F.3d 1319, 1324 (4th Cir. 1994) (citing *Buford,* 319 U.S. at 317-18). Under the *Burford* abstention doctrine, federal district courts should abstain from a case when adjudication may undermine the "independence of state action" on issues that are local and important to a state's sovereignty. *Quackenbush v. Allstate*

Ins. Co., 517 U.S. 706, 728 (1996). The doctrine advances federal and state comity by permitting courts to abstain where "an incorrect federal decision might embarrass or disrupt significant state policies." *Nature Conservancy v. Machipongo Club, Inc.* 579 F.2d 873, 875 (4th Cir. 1978). The Supreme Court has specified two contexts in which the *Burford* doctrine applies:

> (1) [w]hen there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989).

The underlying basis of the Plaintiffs' third claim is the North Carolina public trust doctrine. As stated above, "the public trust doctrine 'uniquely implicates [a state's] sovereign interests.'" *Fabrikant,* 174 N.C. App. at 42, 621 S.E.2d at 27 (quoting *Coeur d'Alene,* 521 U.S. at 284). "[P]ublic trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common." *Friends of Hatteras Island,* 117 N.C. App. at 574, 452 S.E.2d at 348 (quoting N.C. Gen. Stat. § 1-45.1). As noted by the Plaintiffs, "the State's policy of protecting its land and waters for the benefit of all its citizenry" has been enshrined into the State Constitution. N.C. Const. art. XIV, § 5. Issuing a ruling impacting how the state regulates particular users of the State's own public trust resources would clearly be disruptive to state policy.

In *Town of Nags Head v. Toloczko,* 728 F.3d 391 (4th Cir. 2013), the Fourth Circuit discussed the use of the *Buford* doctrine by the district court in a case involving the North Carolina public trust doctrine, albeit in a different context—land use law. The *Toloczko* case involved the issue of whether a cottage was located within a public trust area on a beach and whether the Town of Nags Head had the authority to enforce North Carolina's public trust

doctrine through its nuisance ordinance. *Id.* at 397. The district court had abstained. The Fourth Circuit noted that "[t]he scope of the public trust common law doctrine remains the exclusive province of the North Carolina courts to define." *Id.* at 397 n.6. The Fourth Circuit went on to rule that the district court erred by abstaining. However, in doing so, the Fourth Circuit made it clear that the reason why the district court should not have abstained was because there was already clear state case law holding that the Town of Nags Head did not have the authority to enforce the public trust doctrine. *Id.* at 397. The Fourth Circuit also noted that, had the district court needed to rule on the issue of whether the cottage was located in the public trust area, "it would obviously offend federalism and comity." *Id*.

As explained in the previous section, NCDMF maintains that there is no cause of action that is recognized under the North Carolina public trust doctrine that permits a citizen to force the State to change how it regulates its public trust resources. Thus, here, in contrast to *Toloczko*, this Court would have to create an entirely new action by, as the Plaintiffs seem to contend, stitching together pieces of the State Constitution, state statutes and the common law. The Court would also have to ignore case law that commits enforcement of public trust rights to the State alone. This would disrupt state efforts to establish a coherent policy with respect to the State's public trust doctrine. Creating a new cause of action by which an individual could invoke federal jurisdiction to bend the State's policy choices to the individual's will would be far more intrusive on the State's sovereignty than what the Circuit Court found objectionable in *Toloczko*. Therefore, the Court should abstain.

Furthermore, 28 U.S.C. § 1367(c) provides additional authority upon which the Court may decline jurisdiction over the Plaintiffs' third claim for relief. A court may decline to exercise supplemental jurisdiction if:

(1) The claim raises a novel or complex issue of state law,
(2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) The district court has dismissed all claims over which it has original jurisdiction, or
(4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction

28 U.S.C. § 1367(c).

As stated above, the Plaintiffs' third claim would raise a novel issue of state law by seeking to create a heretofore unrecognized cause of action allowing the Plaintiffs to force the State to regulate the State's public trust resources in the manner preferred by the Plaintiffs. Again, there is no North Carolina case law creating such a cause of action. Case law in fact contradicts the argument that entities other than the State may enforce generalized public trust rights.

Finally, "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995). As explained above, the Plaintiffs' federal claims against the State pursuant to the CWA should be dismissed for failing to state a claim. Indeed, the only claim upon which the Plaintiffs plead supporting factual allegations against NCDMF are contained in their third claim for relief. Considering the novelty and policy aspects of the Plaintiffs' third claim against the State, if this Court does not otherwise dismiss the Plaintiffs' third claim pursuant to the Eleventh Amendment, North Carolina's own doctrine of sovereign immunity, or the complete lack of support for the claim in state law, the Court should use its discretion under 28 U.S.C. § 1367(c) to decline to exercise supplemental jurisdiction over the Plaintiffs' third claim for relief against NCDMF.

CONCLUSION

For the foregoing reasons, NCDMF respectfully requests that all of Plaintiffs' claims against it be dismissed.

Respectfully submitted, this 29th day of September 2020.

JOSHUA H. STEIN
Attorney General

/s/ Scott A. Conklin
Scott A. Conklin
Assistant Attorney General
N.C. Bar No. 28257
sconklin@ncdoj.gov

/s/ Marc D. Bernstein
Marc D. Bernstein
Special Deputy Attorney General
N.C. Bar No. 21642
mbernstein@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6600 - Phone
(919) 716-6767 - Fax

Attorneys for Defendant North Carolina Department of Environmental Quality, Division of Marine Fisheries

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing document titled Defendant North Carolina Department of Environmental Quality, Division of Marine Fisheries' Memorandum of Law in Support of Motion to Dismiss complies with the requirements of Local Civil Rule 7.2(f)(2) for the U.S. District Court for the Eastern District of North Carolina. Specifically, the word court for the entire document, including all the elements required by Local Civil Rule 7.2(f)(3), contains no more than **8347 words** as calculated by Microsoft's WORD 2016 software program, the program used to prepare the document.

Electronically submitted this the 29th day of September, 2020.

/s/ Scott A. Conklin
Scott A. Conklin
Assistant Attorney General
N.C. Bar No. 28257
sconklin@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6600 - Phone
(919) 716-6767 - Fax

Attorney for Defendant North Carolina Department of Environmental Quality, Division of Marine Fisheries

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2020, I electronically filed the forgoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Respectfully submitted,

/s/ Scott A. Conklin_____
Scott A. Conklin
Assistant Attorney General
N.C. Bar No. 28257
sconklin@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
(919) 716-6600 - Phone
(919) 716-6767 - Fax

Attorney for Defendant North Carolina Department of Environmental Quality Division of Marine Fisheries