

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

GREGORY P. NIES AND DIANE )  
S. NIES, )

Plaintiffs-Appellants, )

v. )

TOWN OF EMERALD )  
ISLE, A NORTH CAROLINA )  
MUNICIPALITY, )

Defendant-Appellee. )

From Carteret County  
No. COA 15-169

\*\*\*\*\*

BRIEF OF AMICI CURIAE  
DEPARTMENT OF ENVIRONMENTAL QUALITY,  
DEPARTMENT OF COMMERCE, AND  
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES

\*\*\*\*\*

INDEX

TABLE OF AUTHORITIES ..... ii

INTEREST OF DEPARTMENTS AS *AMICI CURIAE* ..... 1

ISSUES PRESENTED ..... 2

STATEMENT OF FACTS ..... 2

ARGUMENT ..... 3

    I.    THE COURT OF APPEALS CORRECTLY  
         HELD THAT PUBLIC TRUST RIGHTS  
         EXTEND TO THE DRY SAND BEACH ON  
         THE STATE’S ATLANTIC OCEAN  
         BEACHES ..... 3

    II.   PROGRAMS MANAGED AND  
         ENFORCED BY DEQ’S DIVISION OF  
         COASTAL MANAGEMENT AND  
         DIVISION OF MARINE FISHERIES WILL  
         BE NEGATIVELY IMPACTED IF THE  
         COURT FINDS THAT THE PUBLIC  
         TRUST RIGHTS DO NOT EXTEND TO  
         THE DRY SAND BEACHES ..... 4

        A.   DCM’S BEACH ACCESS GRANT  
             PROGRAM AND BEACH  
             NOURISHMENT EFFORTS WILL  
             BE SIGNIFICANTLY IMPACTED  
             BY A DECISION LIMITING PUBLIC  
             TRUST RIGHTS TO BELOW MEAN  
             HIGH WATER ..... 4

          1.   DCM’S BEACH ACCESS  
             PROGRAM ..... 5

          2.   IMPACTS TO BEACH  
             NOURISHMENT ..... 5

B.	DMF’S DUTIES TO REGULATE SEINE AND SURF FISHING ALONG THE STATE’S ATLANTIC OCEAN BEACHES WILL BE IMPACTED BY A DECISION TO LIMIT PUBLIC TRUST RIGHTS TO BELOW MEAN HIGH WATER .....	7
1.	SEINE FISHING.....	8
2.	SURF FISHING .....	9
3.	FISHERIES IMPACTS.....	10
III.	COASTAL TRAVEL AND TOURISM ARE IMPORTANT PARTS OF THE STATE’S ECONOMY THAT WOULD BE NEGATIVELY IMPACTED BY A REVERSAL OF THE COURT OF APPEALS’ DECISION .....	11
IV.	THE DEPARTMENT OF NATURAL AND CULTURAL RESOURCES’ EFFORTS TO PROTECT AND REHABILITATE SEA TURTLES AT THE NORTH CAROLINA AQUARIUMS WILL BE NEGATIVELY IMPACTED BY A REVERSAL OF THE COURT OF APPEALS’ DECISION .....	13
	CONCLUSION.....	15
	CERTIFICATE OF COMPLIANCE WITH RULE 32(A).....	18
	CERTIFICATE OF SERVICE.....	19

TABLE OF AUTHORITIES

Cases:

*Bell v. Smith*, 171 N.C. 116, 87 S.E. 987 (1916)..... 7

*Peele v. Morton*, 396 F. Supp. 584 (E.D.N.C. 1975) ..... 8

*Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756  
(1986)..... 10

Statutes:

N.C. Gen. Stat. § 77-20 ..... 3

N.C. Gen. Stat. § 113A-107(b)..... 4

N.C. Gen. Stat. § 113A-134..... 5, 6

N.C. Gen. Stat. § 113A-115.1..... 7

N.C. Gen. Stat. § 160A-308..... 9

N.C. Gen. Stat. § 143B-135.180..... 13

N.C. Gen. Stat. § 143B-135.184..... 13

Rules:

15A N.C. Admin. Code 7M .0300..... 5, 15

15A N.C. Admin. Code 7M .0301(a) ..... 5

15A N.C. Admin. Code 7M .0202..... 6

15A N.C. Admin. Code 7M .0202(e) ..... 6, 7

15A N.C. Admin. Code 7H .0308(a)(2) ..... 7

15A N.C. Admin. Code 7M .0202(f)..... 7

Other Authorities:

Cooperative Agreement Application for 2016-17 Fiscal Year from DCM to NOAA, 11 .....	5
Glenn Morris, <i>North Carolina Beaches</i> 352 (3rd ed. 2005) .....	8
<i>M-28-2015, Proclamation, RE: Stop Nets – Mullet Beach Seine Fishery – Atlantic Ocean – Carteret County – Season Extension</i> , (December 3, 2015), <a href="http://portal.ncdenr.org/web/mf/proclamation-m-28-2015">http://portal.ncdenr.org/web/mf/proclamation-m-28-2015</a> .....	8
DMF, License and Statistics Section, 2015 Ann. Rep. II-107, (November 19, 2015), <a href="http://portal.ncdenr.org/c/document_library/get_file?Uuid=868c91b9-e27c-412f-b204-7580b4c88639&amp;groupId=38337">http://portal.ncdenr.org/c/ document_library/get_file? Uuid =868c91b9-e27c-412f- b204-7580b4c88639&amp;groupId=38337</a> .....	9
Robert J. Goldstein, <i>Coastal Fishing in the Carolinas: From Surf, Pier, and Jetty</i> 3 (John F. Blair ed., 1986) .....	9
<i>Fast Facts: 2014 Impact of Visitor Spending</i> , VISIT NC (2015), <a href="https://partners.visitnc.com/files/files/fast-facts/2014-Visitor-Spending-Fast-Facts.pdf">https://partners.visitnc.com/files/files/fast-facts/2014- Visitor-Spending-Fast-Facts.pdf</a> .....	10
<i>2014 North Carolina Regional Travel Summary</i> , 4, 11, VISIT NC (2015), <a href="https://partners.visitnc.com/files/files/visitor-profiles/2014-North-Carolina-Regional-Visitor-Profile.pdf">https://partners.visitnc.com/files/files/visitor- profiles/2014-North-Carolina-Regional-Visitor- Profile.pdf</a> .....	11
NCDENR, <i>N.C. Beach Inlet Mgmt. Plan, Final Rep.</i> , 13 (April 2011), <a href="https://ncdenr.s3.amazonaws.com/s3fs-public/Coastal%20Management/documents/PDF/BIMP/BIMP%20Section%20IV%20-%20Socio-Economic%20Value%20of%20NC%20Beaches%20and%20Inlets_Formatted.pdf">https://ncdenr.s3.amazonaws.com/s3fs- public/Coastal%20Management/ documents/ PDF/BIMP/BIMP%20Section%20IV%20-%20Socio- Economic%20Value%20of%20NC%20Beaches%20and %20Inlets_Formatted.pdf</a> .....	12
<i>2014 County Tourism Statistics by NC Prosperity Zone</i> , VISIT NC (2015), <a href="https://partners.visitnc.com/files/files/teim/2014-Visitor-Spending-by-Prosperity-Zone.pdf">https://partners.visitnc.com/files/files /teim/2014-Visitor-Spending-by-Prosperity-Zone.pdf</a> .....	12

NCWRC, *Sea Turtle Fact Sheet* (2005), available at  
[http://www.ncwildlife.org/Portals/0/Conserving/  
documents /FactSheets/nongame\\_seaturtle\\_hires.pdf](http://www.ncwildlife.org/Portals/0/Conserving/documents/FactSheets/nongame_seaturtle_hires.pdf).  
(last visited Jul. 27, 2016) ..... 14

Elena Boffetta, *Rescued Green Sea Turtles Receive Care at  
Triangle Veterinary Referral Hospital*, THE NEWS &  
OBSERVER, Feb. 23, 2016,  
[http://www.newsobserver.com/news/local/counties/durha  
m-county/ article62114322.html](http://www.newsobserver.com/news/local/counties/durham-county/article62114322.html) ..... 14

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

GREGORY P. NIES AND DIANE )  
S. NIES, )

Plaintiffs-Appellants, )

v. )

From Carteret County  
No. COA 15-169

TOWN OF EMERALD )  
ISLE, A NORTH CAROLINA )  
MUNICIPALITY, )

Defendant-Appellee. )

\*\*\*\*\*

BRIEF OF AMICI CURIAE  
DEPARTMENT OF ENVIRONMENTAL QUALITY,  
DEPARTMENT OF COMMERCE, AND  
DEPARTMENT OF NATURAL AND CULTURAL RESOURCES

\*\*\*\*\*

INTEREST OF DEPARTMENTS AS AMICI CURIAE

The North Carolina Department of Environmental Quality (DEQ), the North Carolina Department of Commerce (Commerce), and the North Carolina Department of Natural and Cultural Resources (DNCR) (collectively the Departments), have a direct interest in the result of this litigation, as programs they implement and administer could be significantly impacted if this Court were to

reverse the unanimous decision of the Court of Appeals. For this reason, the Departments have moved this Court to participate as *Amici* to assist the Court in understanding the possible impacts of finding that no public trust rights exist landward of mean high water on the beaches within the State.

### **ISSUES PRESENTED**

- I. WHETHER THE SUPERIOR COURT AND COURT OF APPEALS PROPERLY FOUND THAT PUBLIC TRUST RIGHTS EXTEND TO THE DRY SAND BEACH ON THE BEACHES OF THE STATE?
- II. WHETHER REVERSAL OF THE COURT OF APPEALS DECISION WILL HAVE AN EFFECT ON COASTAL AND MARINE FISHERIES RESOURCES?
- III. WHETHER REVERSAL OF THE COURT OF APPEALS DECISION WOULD AFFECT THE STATE'S ECONOMY BECAUSE OF THE IMPACT ON TOURISM AND TRAVEL?
- IV. WHETHER REVERSAL OF THE COURT OF APPEALS DECISION WOULD AFFECT DNCR'S EFFORTS TO PROTECT AND REHABILITATE SEA TURTLES?

### **STATEMENT OF FACTS**

Amici adopt by reference the Statement of Facts in the Defendant-Appellee's New Brief. *See* N.C. R. App. P. 28(f).



**ARGUMENT**

**I. THE COURT OF APPEALS CORRECTLY HELD THAT PUBLIC TRUST RIGHTS EXTEND TO THE DRY SAND BEACH ON THE STATE’S ATLANTIC OCEAN BEACHES.**

The Court of Appeals reviewed and acknowledged “the long-standing customary right of access of the public to the dry sand beaches of North Carolina as well as current legislation mandating such.” (Slip Op. at 16) Its decision was supported by a comprehensive examination of the common law of this State, as well as a review of statutes related to the extent of public trust rights in this State. The Court of Appeals also adopted the standard found in N.C. Gen. Stat. § 77-20(e), for delineating the landward-extent of where public trust rights extend onto the private property of littoral owners on the beach. (Slip Op. at 19) Finally, the Court of Appeals held that the Petitioners in this case never had the right “to prevent the public from enjoying the dry sand portion of the Property.” (Slip Op. at 19)

The Departments agree with the legal reasoning of the Court of Appeals and its conclusion recognizing the extent and reach of public trust rights on the dry sand beaches of this State. The Departments urge this Court to reject Petitioners’ claims and affirm the Court of Appeals.

**II. PROGRAMS MANAGED AND ENFORCED BY DEQ'S DIVISION OF COASTAL MANAGEMENT AND DIVISION OF MARINE FISHERIES WILL BE NEGATIVELY IMPACTED IF THE COURT FINDS THAT THE PUBLIC TRUST RIGHTS DO NOT EXTEND TO THE DRY SAND BEACHES.**

Petitioners argue that “North Carolina law limits the public trust doctrine to wet beaches located seaward of the mean high water mark” and that the doctrine “does not apply to private upland areas.” (Pet. Br. at 20) If this Court were to adopt Petitioners’ position, it would have dire impacts on the statutorily mandated duties of the Division of Coastal Management (DCM) and the Division of Marine Fisheries (DMF). Accordingly, this Court should reject Petitioners’ narrow interpretation of the extent of public trust rights on the State’s beaches.

A. DCM’s Beach Access Grant Program and Beach Nourishment Efforts Will be Significantly Impacted by a Decision Limiting Public Trust Rights to Below Mean High Water

DCM administers the State’s coastal management program. N.C. Gen. Stat. § 113A-107(b). The Public Beach and Coastal Waterfront Access Program and the process of beach nourishment, which is permitted by the coastal development regulations, will be negatively impacted if this Court were to reverse the decision of the Court of Appeals.

1. DCM's Beach Access Program

DCM has administered the Public Beach and Coastal Waterfront Access Program since it was established by the General Assembly in 1981. The enabling legislation states that:

Public purposes would be served by providing *increased* access to ocean beaches, public parking facilities, or other related public uses. The program provides matching grants to local governments for low-cost capital projects designed to improve pedestrian access to the state's beaches and waterways.

N.C. Gen. Stat. § 113A-134.1 (emphasis added). The program offers matching grant funds primarily to local governments throughout the twenty coastal counties. Since 1981, over 432 public access sites have been acquired or improved at a cost of over \$45 million in grant funds. *See* Cooperative Agreement Application for 2016-17 Fiscal Year from DCM to NOAA, 11. The Coastal Resources Commission's (CRC) administrative rules for this grant program are found at 15A N.C. Admin. Code 7M .0300 *et seq.*, stating, *inter alia*,

[t]he public has traditionally and customarily had access to enjoy and freely use the ocean beaches and estuarine and public trust shorelines of the coastal region for recreational and the State has a responsibility to provide continuous access to these resources.

15A N.C. Admin. Code 7M .0301(a).

Many of the oceanfront beach access sites acquired through this grant program are for publicly-owned littoral property, which provides perpendicular access to the dry sand beach where the public can then exercise their public trust

rights in moving along the dry sand beaches parallel to the shoreline. If this Court reverses the Court of Appeals' decision, the public would be limited to these publicly-owned access strips, the publicly-owned lands below mean high water, and any other parcels of the dry sand beach where easements are obtained by a public body (through condemnation or otherwise). The Public Beach and Coastal Waterfront Access Program could not support a large-scale purchase of use rights on the dry sand beach from oceanfront owners. The existing accesses would no longer provide the intended scope of access. Access to public trust areas would be severely limited in the dry sand beach, contrary to N.C. Gen. Stat. § 113A-134 and the customary and traditional uses of the ocean beaches in North Carolina.

## 2. Impacts to Beach Nourishment

Beach nourishment is a "soft" method to combat beach erosion, as compared to hardened erosion control structures, and has been the preferred response of the State's coastal municipalities. 15A N.C. Admin. Code 7M .0202. The ability to fund nourishment projects will be impaired if public trust rights are limited to the public trust areas below mean high water. Condemnation costs for nourishment projects will increase, as the value of dry sand property increases, if owners could exclude the public. The increase could make nourishment projects unaffordable for the sponsoring governmental agency. As a result, oceanfront homeowners will turn predictably to the use of sandbags as allowed by 15A N.C. Admin. Code 7M

.0202(e) and 7H .0308(a)(2). As a further result, oceanfront owners will likely pressure the General Assembly to relax or eliminate the current limitations on hardened structures for erosion control measures in order to install bulkheads, seawalls, revetments, jetties, groins and breakwaters to protect their property from erosion. *See* N.C. Gen. Stat. § 113A-115.1; 15A N.C. Admin. Code 7M .0202(f). The increased use of sandbags and hardened structures as erosion control measures will further reduce public access to the ocean beaches. For these reasons, DCM asks this Court to find that dry sand beaches are subject to public trust rights.

B. DMF's Duties to Regulate Seine and Surf Fishing Along the State's Atlantic Ocean Beaches Will be Impacted by a Decision to Limit Public Trust Rights to Below Mean High Water.

In a 1916 case involving a seine fishing dispute between the upland owner and seine fishermen in Carteret County, this Court held that “[t]he right of fishing in the navigable waters of the state belongs to the people in common.” *Bell v. Smith*, 171 N.C. 116, 118, 87 S.E. 987, 989 (1916). Two popular and long-practiced methods of fishing in the navigable waters of the Atlantic Ocean within the State take place along the ocean beaches--seine fishing, as is described in *Bell v. Smith*, and surf fishing. These methods require the use by fishermen of the dry sand beaches of the State. If this Court were to find that public trust rights are limited to areas below mean high water, fishing methods along the ocean beaches would become nearly impossible to continue.

1. Seine Fishing

Seine fishing has long taken place on Bogue Banks in Carteret County. In the late 1800s, residents of Bogue Banks would fish for mullet along the ocean shorelines. *See Glenn Morris, North Carolina Beaches* 352 (3rd ed. 2005). Seine fishing uses two nets, a long stop net often hundreds of yards long, and a smaller a mesh nylon net. Historically, vehicles have been used in the dry sand portion of the beach to retrieve seine nets and load the catch for transport.

Seine fishing is also undertaken on the Outer Banks beaches as discussed in *Peele v. Morton*, in which the court noted:

Plaintiffs . . . ply their trade by hauling seine nets onto the beaches of North Carolina's Outer Banks as their ancestors have done for centuries. In 1958 some seventy-five miles of beaches along the Atlantic coast of Bodie, Hatteras and Ocracoke Islands were acquired by the United States as part of the Cape Hatteras National Seashore. Since that time plaintiffs have continued with their commercial fishing activities, but they have often been forced to share use of the beaches with increasing numbers of sport fishermen who are attracted by the surf fishing opportunities at Cape Hatteras.

396 F. Supp. 584, 585-86 (E.D.N.C. 1975).

Seine fishing is still undertaken today. In 2015, DMF issued a proclamation regulating “the use of stop nets in the mullet beach seine fishery.”<sup>1</sup> DMF’s Annual

---

<sup>1</sup> *See M-28-2015, Proclamation, RE: Stop Nets – Mullet Beach Seine Fishery – Atlantic Ocean – Carteret County – Season Extension* (December 3, 2015), <http://portal.ncdenr.org/web/mf/proclamation-m-28-2015>.

Report notes that in 2012, the year this lawsuit commenced, seine nets caught 102,399 pounds of fish with a market value of \$45,634.<sup>2</sup>

The General Assembly acknowledged commercial fisheries' presence on the beaches in 1973 when it passed N.C. Gen. Stat. § 160A-308, which provided that municipalities "shall not prohibit the use of such specified vehicles from the foreshore, beach strand and barrier dune system by commercial fishermen for commercial activities." Seine fishing, especially along the Bogue Banks, including Emerald Isle, would be rendered nearly impossible without the use of the dry sand beach by vehicles to haul in the catch and get it to market.

## 2. Surf Fishing

Surf fishing is a popular method of fishing in North Carolina along the State's ocean beaches. *See* Annual Report at III-14. This report notes that in 2012, the year this lawsuit commenced, there were an estimated 1,599,759 trips to the beach/banks. *Id.* While surf fishing can involve a fisherman walking onto the beach, many fishermen drive vehicles onto the ocean beach to fish. Robert J. Goldstein, *Coastal Fishing in the Carolinas: From Surf, Pier, and Jetty* 3 (John F. Blair ed., 1986).

---

<sup>2</sup> *See* DMF, License and Statistics Section, 2015 Ann. Rep. II-107, (November 19, 2015), [http://portal.ncdenr.org/c/document\\_library/get\\_file?Uuid=868c91b9-e27c-412f-b204-7580b4c88639&groupId=38337](http://portal.ncdenr.org/c/document_library/get_file?Uuid=868c91b9-e27c-412f-b204-7580b4c88639&groupId=38337) (hereinafter referred to as "Annual Report").

This Court in *Town of Emerald Isle v. State* noted:

[t]he stipulated facts in this case disclose that the ocean front and inlet beaches within the Town of Emerald Isle are frequented on a regular basis by numerous sport fishermen operating vehicles on the beaches. These beach areas adjacent to Bogue Inlet in particular are noted for excellent fishing, and annually attract numerous fishermen. Because no parking is available within two miles of the vehicle access ramp in this area, many of the fishermen are forced to drive along the beaches in order to gain access to the fishing areas.

320 N.C. 640, 651, 360 S.E.2d 756, 763 (1986).

### 3. Fisheries Impacts

If this Court reverses the Court of Appeals and holds that public trust rights are limited to the area below mean high water, it would have significant detrimental impacts on both seine and surf fishing in the State. Without risking a trespass claim, fishermen could not cross private property, by car or by foot, or anchor their nets above mean high water.

If seine fishermen are forced off the privately-owned upland littoral property, they will have nowhere to unload their catch or to pull their boats to shore. Likewise, if surf fishermen are forced off the privately-owned upland littoral property, they will have to first locate a public access that they can use to cross the beach perpendicularly from a public road or parking lot below mean high water. At high tide, fishermen would be forced to wade or drive through water to access fishing spots.



A reversal of the Court of Appeals' unanimous decision would have detrimental economic effects on these two historic fisheries. DMF respectfully asks this Court to consider these impacts in making its decision.

**III. COASTAL TRAVEL AND TOURISM ARE IMPORTANT PARTS OF THE STATE'S ECONOMY THAT WOULD BE NEGATIVELY IMPACTED BY A REVERSAL OF THE COURT OF APPEALS' DECISION**

Maintained and accessible public beaches encourage tourists to travel to the coast to enjoy the beaches, aquariums, and natural and historic landmarks unique to the North Carolina coastline. A decision by this Court to limit public trust rights would inhibit tourism to North Carolina's beaches.

North Carolina is the sixth most-visited state in the country behind California, Florida, Texas, New York, and Pennsylvania.<sup>3</sup> Approximately 5.4 million overnight tourists to North Carolina report beach activity during their visit.<sup>4</sup>

---

<sup>3</sup> *Fast Facts: 2014 Impact of Visitor Spending*, VISIT NC (2015), <https://partners.visitnc.com/files/files/fast-facts/2014-Visitor-Spending-Fast-Facts.pdf>.

<sup>4</sup> *2014 North Carolina Regional Travel Summary*, 4, 11, VISIT NC (2015), <https://partners.visitnc.com/files/files/visitor-profiles/2014-North-Carolina-Regional-Visitor-Profile.pdf>. In 2014 there were "approximately 8.7 million overnight person-trips" to North Carolina's coastal region. Of those overnight visitors, 62.3% included in their trip a visit to a beach. From this, Commerce estimates approximately 5.4 million overnight visitors to North Carolina's beaches in 2014.

Coastal tourists spend, on average, over \$513 per person per trip. *Id.* at 6, 9.<sup>5</sup>

Surveys show an estimated direct economic impact of over \$2.77 billion in spending by overnight tourists who report beach activity in the State.<sup>6</sup> In Emerald Isle, the 2008 estimated annual total economic impact, including sales and business activity for beach recreation, exceeded \$214 million.<sup>7</sup>

According to the U.S. Travel Association, tourist spending in coastal North Carolina counties with significant shorelines totaled over \$2.83 billion in 2014.<sup>8</sup>

---

<sup>5</sup> In 2014, “[t]he average travel party size for all Coastal Region overnight visitors was 2.0 people.” As the chart on Page 9, titled “Average Spending by Overnight Visitor Parties” conveys, the total trip expenditures in 2014 for these overnight visitor parties was \$1,027. With 2.0 people spending \$1,027, the average per-person expenditure for overnight visitors is half of \$1,027, or \$513.50.

<sup>6</sup> With 5.4 million beach visitors in 2014, each spending an average of \$513, then the total expenditure is \$2,770,200,000.

<sup>7</sup> NCDENR, *N.C. Beach Inlet Mgmt. Plan, Final Rep.*, 13 (April 2011), [https://ncdenr.s3.amazonaws.com/s3fs-public/Coastal%20Management/documents/PDF/BIMP/BIMP%20Section%20IV%20-%20Socio-Economic%20Value%20of%20NC%20Beaches%20and%20Inlets\\_Formatted.pdf](https://ncdenr.s3.amazonaws.com/s3fs-public/Coastal%20Management/documents/PDF/BIMP/BIMP%20Section%20IV%20-%20Socio-Economic%20Value%20of%20NC%20Beaches%20and%20Inlets_Formatted.pdf).

<sup>8</sup> See *2014 County Tourism Statistics by NC Prosperity Zone*, VISIT NC (2015), <https://partners.visitnc.com/files/files/teim/2014-Visitor-Spending-by-Prosperity-Zone.pdf>. This \$2.8 billion number is derived from adding the total expenditures in each North Carolina county with a significant amount of shoreline, including Brunswick, Carteret, Currituck, Dare, Hyde, New Hanover, Onslow and Pender Counties.

In North Carolina, tourism spending directly supports 30,830 jobs, for a payroll of \$556 million in eight coastal counties.<sup>9</sup>

Public beaches are critical to supporting North Carolina's economy. The Court of Appeals' decision recognizes the longstanding practice in this State of providing the public access to the dry sand beach. A reversal of that decision would deter tourists from visiting North Carolina beaches and jeopardize the State's economy.

**IV. THE DEPARTMENT OF NATURAL AND CULTURAL RESOURCES' EFFORTS TO PROTECT AND REHABILITATE SEA TURTLES AT THE NORTH CAROLINA AQUARIUMS WILL BE NEGATIVELY IMPACTED BY A REVERSAL OF THE COURT OF APPEALS' DECISION**

North Carolina Aquariums are a division of DNCR. N.C. Gen. Stat. § 143B-135.180. The stated purpose of the North Carolina Aquariums includes promoting awareness and understanding of North Carolina's Oceans and aquatic environments. N.C. Gen. Stat. § 143B-135.184. Aquariums are also vital for the conservation of aquatic wildlife. The long-term health and sustainability of these animals is a top priority for the Aquariums.

---

<sup>9</sup> *Id.* These figures are derived from the "2014 Employment" and "2014 Payroll" columns on the chart for Brunswick, Carteret, Currituck, Dare, Hyde, New Hanover, Onslow and Pender Counties. The reference to "30,830 full and part time jobs" represents to the total "2014 Employment" for the eight listed counties. The reference to "a payroll of \$556 million" represents to the total "2014 Payroll" for the eight counties.

The Aquariums are especially concerned with the conservation of threatened and endangered wildlife, including sea turtles. The Aquariums work with conservation groups to protect and rehabilitate thousands of sea turtles that come ashore on North Carolina's beaches each year.

North Carolina's beaches are the annual nesting grounds for hundreds of sea turtles.<sup>10</sup> In addition to nesting, many animals become stranded on the shoreline due to injury or illness. Closing the dry sand beaches to the public would make it problematic for the Aquariums and volunteer groups to protect these animals.<sup>11</sup> Neither State conservationists nor citizen volunteers could access nesting grounds or stranded animals without entering into individual agreements with property owners or risking a trespass claim.

The Aquariums and volunteer groups hold public events on the dry sand beaches to raise public awareness about conservation.<sup>12</sup> Under the Court of

---

<sup>10</sup> NCWRC, *Sea Turtle Fact Sheet* (2005), available at [http://www.ncwildlife.org/Portals/0/Conserving/documents/FactSheets/nongame\\_seaturtle\\_hires.pdf](http://www.ncwildlife.org/Portals/0/Conserving/documents/FactSheets/nongame_seaturtle_hires.pdf) (last visited Jul. 27, 2016).

<sup>11</sup> For example, in January, 2016, over 2,000 sea turtles washed up on North Carolina's coast, many of which were saved and rehabilitated by Aquarium staff and volunteers. See Elena Boffetta, *Rescued Green Sea Turtles Receive Care at Triangle Veterinary Referral Hospital*, THE NEWS & OBSERVER, Feb. 23, 2016, <http://www.newsobserver.com/news/local/counties/durham-county/article62114322.html>.

<sup>12</sup> See Ashley Morris, *13 Turtles Go Back Out in Surf City Release*, STARNEWS ONLINE, June 15, 2016, <http://www.starnewsonline.com/news/20160615/13-turtles-go-back-out-in-surf-city-release>.

Appeals' holding, these groups will continue to have access to the dry sand portion of the beaches. Reversal of the lower court would make it far more difficult to access and protect these animals.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals and hold that public trust rights extend landward from mean high water, over the dry sand beach, and up to the first line of stable, natural vegetation, the toe of the frontal dune, and the storm trash line, as provided by N.C. Gen. Stat. § 77-20, and as adopted by the Court of Appeals in its decision. This Court should also consider impacts to long-standing and important programs within the Departments which will negatively impact the public if the Petitioners' proposed delineation of public trust rights is adopted.

Respectfully submitted this the 27<sup>th</sup> day of July 2016.

/s/ Sam M. Hayes  
Sam M. Hayes  
General Counsel  
State Bar No. 25552  
[Sam.Hayes@ncdenr.gov](mailto:Sam.Hayes@ncdenr.gov)

North Carolina Department of Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601  
Telephone: (919) 707-8600

*Attorney for Amicus Curiae  
North Carolina Department of Environmental Quality*

N.C. App. R. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed.

/s/ David B. Efirm  
David B. Efirm  
General Counsel  
State Bar No. 32665  
[David.Efirm@nccommerce.com](mailto:David.Efirm@nccommerce.com)

Beth A. Onyenwoke  
Attorney  
State Bar No. 49437

North Carolina Department of Commerce  
4301 Mail Service Center  
Raleigh, NC 27699-4301  
Telephone: (919) 807-7300

*Attorney for Amicus Curiae  
North Carolina Department of Commerce*

/s/ Kevin V. Howell  
Kevin Howell  
General Counsel  
State Bar No. 39770  
[Kevin.Howell@ncdcr.gov](mailto:Kevin.Howell@ncdcr.gov)

North Carolina Department of Natural and Cultural  
Resources  
4601 Mail Service Center  
Raleigh, NC 27699-4601  
Telephone: (919) 807-7300

*Attorney for Amicus Curiae North Carolina  
Department of Natural and Cultural Resources*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

(Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements and Type Style Requirements)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
  
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14.

Respectfully submitted this the 27<sup>th</sup> day of July 2016.

/s/ Sam M. Hayes

Sam M. Hayes

General Counsel

State Bar No. 25552

[Sam.Hayes@ncdenr.gov](mailto:Sam.Hayes@ncdenr.gov)

North Carolina Department of  
Environmental Quality

1601 Mail Service Center

Raleigh, NC 27699-1601

Telephone: (919) 707-8600

*Attorney for Amicus Curiae*

*North Carolina Department of  
Environmental Quality*



**CERTIFICATE OF SERVICE**

I certify that on 27 July 2016, a copy of the foregoing document was served upon all counsel of record by depositing a copy in the United States Mail, first class, postage prepaid, addressed as follows:

*Attorneys for Plaintiff-Appellant Gregory and Diane Nies*

J. David Breemer  
Pacific Legal Foundation  
930 G. Street  
Sacramento, CA 95814

Keith P. Anthony  
Morningstar Law Group  
630 Davis Drive, Suite 200  
Morrisville, NC 27560

*Attorneys for Defendant-Appellee Town of Emerald Isle*

Brian E. Edes  
Norwood P. Blanchard, III  
Crossley McIntosh Collier Hanley & Edes, PLLC  
5002 Randall Parkway  
Wilmington, NC 28403

*Attorney for Civitas Institute*

Elliot Engstrom  
Civitas Institute  
100 S. Harrington Street  
Raleigh, NC 27603

*Attorneys for Owners' Counsel of America, et al.*

Jason T. Campbell  
Law Office of James Scott Farrin  
7819 Emperor Boulevard, Suite 200  
Durham, NC 27703

Robert H. Thomas  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, 16th Floor  
Honolulu, HI 96813

*Attorneys for North Carolina Coastal Federation  
and North Carolina Wildlife Federal*

Geoffrey R. Gisler  
Derb S. Carter, Jr.  
Southern Environmental Law Center  
601 W. Rosemary Street, Suite 220  
Chapel Hill, NC 27516-2345

This the 27th day of July, 2016.

/s/ Sam M. Hayes  
Sam M. Hayes, NC Bar No. 25552  
General Counsel  
North Carolina Department of  
Environmental Quality