

# **NC COASTAL RESOURCES COMMISSION (CRC)**

**August 24-25, 2011**

**NOAA/NCNERR Auditorium**

**Beaufort, NC**

## **Present CRC Members**

Bob Emory, Chairman

Joan Weld, Vice-Chair

David Webster (absent 8/25)

Jerry Old

Bill Peele (present at 9:10 a.m. 8/25)

Veronica Carter

Melvin Shepard

Ed Mitchell

Lee Wynns

Pat Joyce (present at 11:00 a.m. 8/25)

## **Present Attorney General's Office Members**

Mary Lucasse

Christine Goebel

Ward Zimmerman

## **CALL TO ORDER/ROLL CALL**

Chairman Emory called the meeting to order and reminded Commissioners of the need to state any conflicts due to Executive Order Number One and also the State Government Ethics Act. Chairman Emory stated the State Government Ethics Act mandates that at the beginning of each meeting the Chair remind all members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. If any member knows of a conflict of interest or a potential conflict of interest, please state so when the roll is called.

Angela Willis called the roll. Veronica Carter stated she had dealt with the planner on the Brunswick County Land Use Plan and would abstain from voting and discussion. No other conflicts were reported. James Leutze, Renee Cahoon, Charles Elam, and Jamin Simmons were absent. Based upon this roll call, Chairman Emory declared a quorum.

## **CONTESTED CASES**

### **Busik v. DCM and 1118 Longwood Avenue Realty Corporation (10 EHR 8355)**

Mary Lucasse of the Attorney General's Office stated this matter arises from a contested case petition that was filed by a third party petitioner, Kevan Busik, objecting to the issuance of a Minor CAMA Permit that was issued to the respondent-intervenor. The ALJ issued an order and decision and granted Petitioner's motion for summary judgment on July 1, 2011. The decision by the ALJ indicated that the decision by the Respondent, DCM, should be reversed and found that the CAMA Permit should be revoked and modified accordingly. The CRC should make a final agency decision based on the official record. The CRC shall adopt each finding of fact contained in the ALJ's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the CRC and each finding of fact made by the CRC, the agency shall set forth the reasons for not adopting the findings of fact and where in the record the CRC has found the foundation for making the decision.

Christine Goebel of the Attorney General's Office represented the Respondent, Division of Coastal Management. William Raney, Jr. of Wessell & Raney represented the Respondent-Intervenor, 1118 Longwood Avenue Realty Corporation. Kenneth Shanklin and Cynthia Baldwin of Shanklin & Nichols represented the Petitioner, Kevan Busik.

Ms. Goebel stated the disagreement in this case is the interpretation of CRC rule 7H .0306. This case deals with two adjacent oceanfront lots on Bald Head Island. The Petitioner's house is next door to the building site and the Petitioner's house was built pursuant to the old setback rules. In their case all residential structures were subject to the 30-times the erosion rate setback. The erosion rate at this location is two feet per year. The Petitioner's home was subject to a 60-foot erosion setback from the first line of vegetation. The permittee in this case under the new setback rules is trying to build essentially the same house design, but it is building it after this rule was updated. In this case, petitioners challenged the interpretation of the new rule. Our position is the items on a lot should be looked at structure by structure and building by building. These should not be added up cumulatively in order to come up with the floor area for the setback. This interpretation is supported by affidavits of both Director Jim Gregson and Major Permit Manager Doug Huggett. We interpret it this way because of the language of the setback rule which is singular, disjunctive language. Staff concluded that read it its entirety evaluates total floor area separate structure by separate structure. In this case the four separate structures are each separately subject to a 60-foot setback and should be allowed pursuant to the CAMA Minor Permit that was issued by the Bald Head Island Local Permit Officer. We would ask you to adopt the Respondent and Intervenor-Respondent's exceptions which overturn the ALJ's decision because the ALJ's decision is contrary to the evidence in this case.

Mr. Raney stated the lot was purchased in 2003. In 2009, plans began to develop for permitting. This boils down to a question of the interpretation of the rule 7H .0306. Both parties believe the language in this rule supports their position. We believe that it supports the position that DCM has taken on this rule and that the Local Permit Officer based their decision. The first part of the rule establishes generalities. The second part of the rule provides the specific guidance for the setback. The rule says the setback is determined for a building or a structure and does not say that you are establishing a setback for the development. The courts have held that the construction of a rule by those who execute and administer the rule is highly relevant. We believe that the CRC should pay a lot of attention to the position of DCM in connection with the interpretation of this rule. The Staff is integral in the rule making process. They draft the rule and bring it to the CRC and discuss them in committee meetings, hear and analyze public comments, and follow the rule to adoption. The ALJ decided that he did not like the interpretation, but could not figure out a way to interpret the rule using just the language of the rule to reach his conclusion. He created some additional definitions that he applied to the rule, which we do not think are relevant. He has rewritten the rule and has not interpreted it as it was adopted. We would request that the Commission accept the exceptions that we have filed and adopt the rationale for those as the CRC's position on this case.

Ms. Baldwin stated she would like the CRC to review the Order, particularly the signature page. Please note who signed the Order and who wrote the Order. This Senior ALJ is well known for considering the facts and considering the effect of his Orders. I don't believe he is known for rewriting rules. The plain language of the rule is something that needs to be looked at. This is a lengthy rule. Setbacks have a purpose to protect life and property. Over the course of the last decade, North Carolina has become progressively more strict with their setbacks. Our policy is relocation, but it is also retreat. We don't want massive buildings on the oceanfront. This is one of the most risky zones you can build in. This rule addresses it and limits the mass on the oceanfront.

Development size is defined by total floor area for structures and buildings. What is total floor area? It is different than square footage. Total floor area is defined as the total square footage of heated or air conditioned living space, total square footage of parking elevated above ground level, and the total square footage of non-heated or non-air conditioned areas elevated above ground level excluding attic space that is not designed to be load bearing. The exclusions are listed. Every word in a rule is important. Every word has meaning. The word "and" is pretty important. Petitioner feels that the rule reads that the permittee falls under the total floor area definition of over 5,000 square feet. The permittee and DCM believe that it falls under structure by structure. In the Order, the ALJ explains why building is more than the primary residence. This is an example of cooperation of State and local government. Other parts would not exist without a primary residence. That's when you look to the Village of Bald Head. There is an overlay concept when you have a local jurisdiction. If anything has a gap in a rule or a statute then you look to how things are with the local jurisdiction. With the Village of Bald Head they have a definition for building and structure. In their protective covenants they explain that a building includes its accessory structures. In the old setback rules of 2007, commercial structures were limited by size and single family residences could have mega mansions. This was found inappropriate. In the written arguments and exceptions, the Respondent references past coastal development and how things were interpreted in the past under the old setback rules. In a 2010 Court of Appeals opinion, the issue was the routine application of a particular CAMA regulation. It was deemed that DCM is not afforded the deference that we were trying to encourage. Instead it is the Agency, the CRC, that is entitled the deference. The CRC's decision will have far-reaching effects. Respondent list in their arguments other rules that they say proves that things should be looked at structure by structure, but no provision cited by Respondent say that buildings and structures must be analyzed separately. We argue that if the structures are supposed to be looked at individually then it should be stated in the rule. As you are considering these final thoughts, please look at Conclusion of Law #5 and Conclusion of Law #8.

Ms. Goebel stated Petitioner's Counsel pointed out that Judge Morrison did not take this decision lightly and we agree. Staff believes that Judge Morrison got it wrong. He didn't just read the unambiguous rule; instead he created ambiguity into the rule and then went outside of the rule in order to solve the problem in the Petitioner's favor. He shouldn't have done this. CAMA is cooperation between State and local government; however it does this through the process of local Land Use Plans and the participation of the Coastal Resources Advisory Council as well as other things. It does not require the CRC's rules to be incorporating local ordinances in order to define the CRC's rules.

**Joan Weld made a motion to reject the ALJ's decision as clearly contrary to the preponderance of the admissible evidence in the record and to amend the Findings of Fact and Conclusions of Law for the specific reasons set forth in the Respondent and Respondent-Intervenor's exceptions and arguments. Melvin Shepard seconded the motion.**

**Melvin Shepard made a motion to strike Finding of Fact 11. Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion to strike Finding of Fact 12. Bill Peele seconded the motion. The motion passed with eight votes in favor (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Old) and one opposed (Webster).**

**Melvin Shepard made a motion that the last sentence of Finding of Fact 13 should be stricken. Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion that Finding of Fact 18 is incomplete where it describes that the new setback rules use total floor area as the sole determining factor when determining the setback. This Finding of Fact ignores the second part of 15A NCAC 07H .0306(a)(1) which uses total area of footprint in determining the size of development other than structures and buildings. This additional information should be added to ensure a complete characterization of this relevant rule. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Jerry Old made a motion to correct a typographical error in Finding of Fact 29 which incorrectly lists the Administrative Code quoted. This Finding of Fact should cite 15A instead of ISA. Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Jerry Old made a motion to correct a typographical error in Finding of Fact 30 which incorrectly quotes the rule cited as “a building or structure” and should read “a building or other structure”. Joan Weld seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Veronica Carter made a motion to change Conclusion of Law 6 to read: The New Setback Rules require a building or other structure less than 5,000 square feet to be located 30 times the 2-foot erosion rate, or 60 feet, from the line of vegetation as set by the LPO. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Jerry Old made a motion to change Conclusion of Law 7 to read: The New Setback Rules require a building or other structure greater than or equal to 5,000 square feet but less than 10,000 square feet to be located 60 times the 2-foot erosion rate, or 120 feet, from the line of vegetation, as set by the LPO. Melvin Shepard seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Veronica Carter made a motion to change the use of the term “development” in Conclusion of Law 8 to the use of the actual rule language of “a building or other structure”. Joan Weld seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion to remove Conclusion of Law 9. Bill Peele seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion to change Conclusion of Law 10 to read: The LPO acted correctly in calculating the total floor area for each building or other structure and correctly applied the appropriate setback of 60 feet (30 x 2 feet per year) for each building or other structure proposed. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Bill Peele made a motion to change Conclusion of Law 11 to read: The total floor area of the single family residence totals less than 5,000 square feet, and respondent DCM, through the Village's CAMA LPO, correctly determined the setback to be 60 feet (30 x 2 feet per year). Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion to change Conclusion of Law 12 to read: Pursuant to 15A NCAC 07H .0306(a)(2)(A), the appropriate setback for each building or other structure in the proposed project is 60 feet from the first line of stable and natural vegetation determined by the LPO. Bill Peele seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion to change Conclusion of Law 13 to read: CAMA Minor Permit 2010-05 properly allows each of the structurally separate buildings or other structures to be place 60 feet or more from the vegetation line. The motion was seconded by Veronica Carter. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Veronica Carter made a motion to strike Conclusion of Law 15. Melvin Shepard seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard made a motion that portions of the Decision section should be changed to reflect a Decision and Order in favor of Respondent DCM's Motion for Summary Judgment, in opposition to Petitioner's Motion for Summary Judgment, and affirm the issuance of CAMA Minor Permit 2010-05 to the Intervenor-Respondent. Bill Peele seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

#### **VARIANCES**

**Sugar Creek II (CRC VR 11-03)  
Dare County, Buffer**

**Ward Zimmerman of the Attorney General's Office represented Staff. Mr. Zimmerman stated E. Crouse Gray, Jr. is present to represent Petitioners. Mr. Zimmerman stated Petitioner is Mr. Ervin Bateman, the owner of Sugar Creek Restaurant in Nags Head. This is a restaurant on the waterfront in the estuarine shoreline. Petitioner proposes to construct a pergola over tables on a grassy area adjacent to the restaurant. The proposed development is inconsistent with 15A NCAC 7H .0209(d)(10).**

**Mr. Zimmerman reviewed the stipulated facts of this variance request. Mr. Zimmerman stated Staff and Petitioner agree on the first criteria. Staff agrees that the strict application to applicable development rules would cause the Petitioner unnecessary hardship. Staff and Petitioner disagree on the second and third statutory criteria. Staff do not believe that any hardship is a result of conditions peculiar to the Petitioner's property. This property is similar to other pieces of property up and down the coast. Staff believes any hardship is a result of actions taken by the Petitioner. Petitioner purchased this property in 2005 and these rules were in place at that time. Staff and Petitioner agree on the fourth criteria and Staff agrees that the granting of this variance request**

would be consistent with the spirit, purpose and intent of the rules; would secure public safety; and would preserve substantial justice.

Crouse Gray, attorney for Petitioner, stated the CRC has rules for water quality and Petitioner does not believe the proposed development will degrade the water quality. This is the core concept before the CRC. There is nothing in the CRC's exceptions that specifically exempts pergolas. But the CRC could not think of everything that would need to be listed as an exception. This is why there is a variance process. The first criteria is the hardship issue and Staff agrees that adherence to the applicable development rules would cause Petitioner hardship. The Staff disagrees with the Petitioner on the second criteria. Staff doesn't believe the property is peculiar enough. This is a subjective standard. Peculiar means that something is different. Staff disagrees with Petitioner on the third criteria because when we bought the property in 2005 the rules were the same. However, this has been a restaurant since 1984. The logic you are being asked to accept is that there should be no variance for any piece of property since these rules were in place. The rule says that if Petitioner can come before the CRC and show that the actions that we are taking are actions that do not degrade the water then the CRC has the authority to grant a variance. Staff and Petitioner agree on the fourth criteria.

**Veronica Carter made a motion that strict application of the applicable development rules, standards, or orders issued by the Commission cause the Petitioner unnecessary hardship. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Jerry Old made a motion that hardships result from conditions peculiar to Petitioner's property. Veronica Carter seconded the motion. This motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Veronica Carter made a motion that hardships do not result from actions taken by the Petitioner. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Jerry Old made a motion that the variance requested by the Petitioner will be consistent with the spirit, purpose and intent of the rules; secure the public safety and welfare; and preserve substantial justice. Bill Peele seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**Melvin Shepard offered an amendment to the motion to include a condition on the permit that prohibits a covered roof or floor on the pergola. Joan Weld seconded the amendment. Jerry Old agreed to the amendment. David Webster further amended the motion to include allowing native vegetation to cover the pergola. Melvin Shepard accepted the friendly amendment. The amendment passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

**This variance request was granted with conditions.**

#### **PUBLIC INPUT AND COMMENT**

Steve Powers, waterfront property owner, stated I am a professional land surveyor in Carteret County. I have been surveying in North Carolina for about 31 years. I have subcontracted work for the Army Corps of Engineers' beach erosion studies. I have walked shorelines in South Carolina to

Virginia and I know erosion. I have surveyed wetlands in coastal counties from private land owners to be reviewed and approved by the Corps of Engineers. I know about wetlands. I have surveyed the layout and performed as-built surveys for the rock sill and I may have been the first in the state back in 1997 at Silver Lake in Ocracoke. The ferries were prop-washing and destroying private properties as they were turning into the terminal. I know about sills. I have lived on Harkers Island for 22 years. I know about Back Sound. Sand is pushed and pulled to and from the shore depending on the seasons and the storm events. The high water mark on bulkheads on uplands and rock sills on wetlands have worked very well for decades. A couple of years ago a rock sill was installed to the west of my property. We opposed this sill from the very beginning. After two years, this sill has drawn all of the sand off of my sister's beach which is adjacent to me. There are numerous e-mails and letters and photographs documenting what this sill has done to the shoreline all of these years. This offshore sill and the right application works well. In the wrong application, it has a tendency to rob all of the sand off of our beaches. The measures that we were permitted to put in to protect our wetlands that were identified and documented with the Corps of Engineers are now falling into Back Sound. A couple of weeks ago I called Ted Tyndall and Ted said that maybe it would be a good idea if the CRC heard about this type of application and what it is doing to adjacent property owners on Back Sound. Ted said the CRC probably needed to hear some of the emotion that I have about this. The email pretty well explains what has happened over three years. I have left contact information. I think there was a study that was made in the past six, seven or eight months about this particular case and we haven't heard anything. I don't pay that much attention to it because it hasn't affected me that much to this point, but I went out to the shore the other day and a concrete monument that normally sticks out of the sand is about to fall over. They were allowed to go 30 feet out in to ORW waters. I know for a fact if you look at one photograph, you will see the SAV out there. That rock sill was installed in SAV. The wetlands were never identified on this piece of property. I know wetlands. I know what constitutes wetlands. Now the sand has dammed up the mouth of the wetlands on that property and there are other drainage problems. CAMA has all of the permits on our properties and on this subject property where the rock sill is. I would appreciate somebody looking in to this and see what kind of remedies that we can have because this isn't the end of it. I don't know what kind of situation we are going to have when this storm rolls through if it does. I have a feeling that all of this sand is going to settle out and that their shoreline is going to erode and fall back behind this sill. Then they are going to come back to the CRC and ask for a permit to protect their property. I told them that I didn't think that a rock sill was going to afford them the protection that they wanted. When the tide is four to five feet over the top of this sill and lapping at their shoreline it is going to eat out and erode their shoreline again. It breaks my heart to work all over the state of North Carolina and abide by every rule and regulation and have somebody come in my backyard and break every rule in the book. From a professional standpoint, I have watched this construction of the house and seawall and had numerous conversations with them and conversations with the CAMA office before this was ever put in and told them that this would happen. Now here we are. No one will listen. I am asking for somebody to listen.

## **MINUTES**

**Lee Wynns made a motion to approve the minutes of the May 2 and July 29, 2011 CRC meetings. Veronica Carter seconded the motion. The motion passed unanimously (Weld, Old, Peele, Carter, Shepard, Mitchell, Wynns).**

## **EXECUTIVE SECRETARY'S REPORT**

DCM Director Jim Gregson gave the following report.

### **Hurricane Irene**

Hurricane Irene, the first hurricane of the 2011 Atlantic storm season, is currently expected to impact most of the East Coast from Florida to New York. It looks like it will be a Category 4 as it passes Florida and projected to be a Category 2 or 3 as it makes landfall in North Carolina. The latest projections are for landfall somewhere near Cape Hatteras late Saturday or early Sunday morning. The Division will be closely monitoring Hurricane Irene and preparing for any needed post-storm recovery. One of the biggest responsibilities we have following a hurricane is with roads and Highway 12. We have not had a significant hurricane make landfall in North Carolina since Isabel in 2003.

### **Clean Boater Program**

The N.C. Clean Marina program implemented the new North Carolina Clean Boater program this spring. The Clean Boater program is an important part of the North Carolina Clean Marina program, which is designed to assist marinas and boatyards in protecting our environment through the use of best management and operation practices. Both programs are strictly voluntary, but they show that marinas and boaters care about the environment. Interested boaters can learn about the program through DCM's website or through brochures at local marinas. Boaters commit to clean boating by signing a pledge to protect North Carolina's coastal waters, and receive a Clean Boater sticker from DCM to place on their vessel. So far, 19 boaters have signed the pledge.

### **Clean Marina**

The Washington Waterfront Docks in Washington, N.C., is the newest facility to be certified as a North Carolina Clean Marina, a designation given to marinas that exceed minimum regulatory requirements.

### **Estuaries Outreach**

DCM's Coastal Reserve-National Estuarine Research Reserve Program was recently awarded a \$27,000 grant from the Albemarle-Pamlico National Estuary Program to conduct an estuarine shoreline outreach and education campaign within the APNEP region. As part of the campaign, DCM is conducting a Did You Know (DYK) campaign using Facebook and Twitter to raise awareness of issues related to N.C. estuaries, shoreline stabilization, and sea-level rise.

### **Staff News**

Wilmington District Manager Steve Everhart retired from DCM on June 1. Debbie Wilson is the new district manager in the Wilmington office. Raleigh office policy analyst Scott Geis has left DCM to move with his family to Boston, Massachusetts. Reserve education coordinator Scott Kucera left DCM last month. Steve Underwood, formerly assistant director for Policy and Planning, is now DCM's coastal hazards analyst. His former position was eliminated in the budget bill. Jason Dail has moved from the Wilmington Reserve office staff to a position as a field representative in the Wilmington district office. Claudia Jones' position, field representative in the Elizabeth City office, was also eliminated. She is currently in a temporary position as the Northern Sites Manager for the Coastal Reserve Program. Two DCM staff and one UNCW contract staff person were impacted by the budget reductions this year, and are no longer working for the division: Morehead City receptionist Lowana Barrett, major permits clerk Robin Beveridge and Wilmington Reserve GIS analyst Jacqui Ott. Finally, it is with very mixed feelings that I will be leaving my position as



DCM Director effective September 6. I have accepted a position as the Regional Water Quality Supervisor for the Division of Water Quality in the Wilmington Regional Office.

### **CHAIRMAN'S COMMENTS**

Bob Emory stated Jim Gregson has been a wonderful director for the Division of Coastal Management. If we get this hurricane then there may be times that we may have to get the Commission together for quick action. We have some standing emergency permits that can be exercised, but there may be a situation that arises that we have not anticipated so be prepared to meet by phone on short notice. Robin Smith is here from DENR.

### **DENR ASSISTANT SECRETARY COMMENTS**

Robin Smith stated there are a number of things that have happened during the Legislative session in terms of budget and Jim just mentioned some of the impacts on DCM staff. There were also a number of substantive pieces of legislation that will affect the Commission and you will be hearing today about the terminal groin legislation. You have heard about some of the changes under the amendments to the Administrative Procedures Act and how it will affect rulemaking. It will add a number of additional steps to the rulemaking process. It won't be a significant new burden on the rulemaking side. One of the changes that may generate a lot of interest is how fiscal impact statements are handled and making the fiscal analysis part of the public notice and comment process. The other half of the APA Bill had to do with contested cases. This gives the ALJ the final decision making authority in contested cases. The CRC can look forward to fewer large hearing records, but it will be a learning experience for everyone as far as how well this will work. It will put the Division and Commission in the position of making a decision to appeal administrative ruling. There is a new exemption from SEPA from CAMA development permits. I expect there will be some interpretation questions about this that we will be dealing with the Division and the Attorney General's office. We will try to discern and follow the intent of the legislation. On the Department level, overall reductions in the Department's budget were about 12.5%. In the grand scheme of things, compared to some other agencies in State government, it was in the middle of the cuts. Since January 2009, the Department has taken a cut of about 30% which is a significant reduction in State appropriations. One of the things to know about that is because we have to protect the core functions in the Department, and in particular with the federally delegated programs such as Coastal Management that operate under federal grants and guidelines, we have to protect these functions first. What happens, unfortunately, is the programs that are easiest to find State dollar cuts to tend to be the conservation programs. We have seen over the last several years cuts to these programs and essentially a freeze to land acquisitions. This hurts us on the regulatory side because it takes away a non-regulatory tool to help us meet some of our environmental protection and conservation goals.

### **COMMITTEE REPORTS**

Estuarine and Ocean Systems Subcommittee  
Bill Peele, Chair

Bill Peele stated the subcommittee discussed marsh sills. There was a panel discussion and the subcommittee wanted to come up with some ideas of what we could do to better facilitate the attractiveness of the marsh sill in the permitting process. The subcommittee discussed the fact that we may need to go to a Major Permit because it could be conducted in a shorter time line. We agreed some disincentives for the other options may be a place to go but there is a complication with dealing with the legalities involved and liabilities of taking away choices. The estuarine

shoreline is diverse and it gives us an opportunity to study the best things to use for shoreline stabilization in different areas. We need to give property owners a choice.

Ocean Hazards Subcommittee  
Lee Wynns, Chair

Lee Wynns stated the subcommittee looked at the sandbag stakeholder recommendations. We reviewed the comments from the meetings. We all agree that there are updates needed in our sandbag rules, but there was not a consensus on exactly what should be done. We learned a lot from the stakeholder meetings. Veronica Carter stated that staff provided some recommendations on rule language changes that would extend the time limit to eight years while a community is actively pursuing beach nourishment.

**Veronica Carter made a motion to direct staff to come back to the CRC with rule language that would address extending the time limit for sandbags to eight years for communities actively pursuing beach nourishment while maintaining the spirit of public access to the beach. Lee Wynns seconded the motion. The motion passed unanimously (Mitchell, Wynns, Peele, Weld, Shepard, Carter, Old).**

Veronica Carter will be Vice-Chair of this subcommittee.

Science Panel Update  
Margery Overton, Chair

Margery Overton stated the Science Panel just met this week. There were a number of things on the agenda and one of them was the terminal groin question from DCM. We have created a set of by-laws and will be better poised in the future to deal with things coming from DCM and reporting back to the CRC.

### **ACTION ITEMS**

Fiscal Analysis Approval – 15A NCAC 07K .0214

Fiscal Analysis Approval – 15A NCAC 07H .0312

Tancred Miller stated this is a new requirement for the CRC following Session Law 2011-398. We are now required to present the CRC the fiscal analysis of any rule changes or rule adoptions. The Law now requires the CRC to approve these before the rule can be published for public comment in the State Register. Fiscal notes are required if there is any increase in expenditure of state budget funds, if there is an impact on the budget of the local government, or if there is a substantial economic impact which is defined as \$500,000 or more cumulatively in a 12 month period. Analysis is also required for the D.O.T. and whether there is an impact on their permitting and budgeting as a result of a rule change. The fiscal analysis is provided in the CRC meeting packet for review before the meeting.

7K .0214 is a straight forward, simple rule. The CRC has already approved the rule language. This rule would exempt certain regulatory signs from permitting requirements. The net impact of this rule change is a minor savings. We looked at how many signs we permit per year and what is the cost. If the permit costs \$100 and we do ten or less per year. This would be a cost savings to the local government. 7H .0312 Technical Standards for Beachfill Projects is a little more involved. There is a large potential cost savings to local governments. We used the example of Carteret

County wanting to do sampling of a borrow area and the inlet. The cost is substantial for sampling these areas. This would not be a substantial impact since this is not a once per year activity.

**Jerry Old made a motion to approve the fiscal analysis for 7K .0214 and 7H .0312 for public hearing. David Webster seconded the motion. The motion passed unanimously (Mitchell, Joyce, Wynns, Peele, Weld, Shepard, Carter, Webster, Old).**

#### Fiscal Analysis Approval – 15A NCAC 07H .0304

Mike Lopazanski stated there are assumptions that have to be made when looking at private property owners and development in ocean hazard areas that need minor permits. The minor permit fee is \$100.00 but an exemption fee is \$50.00. More people would qualify for the exemption for a single family residence. We have averaged a little more than 1,000 minor permits per year. The total number of lots in the OEA now versus the change of this rule will be about 16.5% reduction in the number of properties coast-wide. The savings in permit fees as well as ancillary costs will be about \$1000.00 in addition to the permit fee. It turns out to be \$178,000.00 savings to property owners. On top of that will be the 1,500 or so properties that fall out of permitting jurisdiction and will not need a permit will be \$156,000.00 in potential savings. We are getting a net savings from this action of about \$344,000.00 to property owners. This factors in removing the 100-year storm recession line. When removing the unvegetated beach designation it will affect the folks in the vicinity of Hatteras Village. Looking at aerial photography we've determined that the vegetation line in many of the areas has returned to their pre-Isabel conditions so the measurement line is more restrictive now than if the calculation for the setbacks would be based on the existing stable, natural vegetation. Since those determinations are made in the field, we cannot estimate the number of properties that will benefit by this. The real benefit to the property owners will depend on the square footage of development that is being proposed. The vegetation line in most cases is less restrictive than the measurement line. The benefit to the property owners will be increased building envelopes as the vegetation continues to recover. That will present more opportunities for development. Removing the inlet hazard designation for the area formerly known as Mad Inlet will affect the properties that were in the inlet hazard area. They will get relief from the density restrictions that accompany the use standards in the inlet hazard areas. There are 126 properties or so located in this area. Less than 10 are currently undeveloped. Without the inlet hazard designation they won't be required to adhere to the density and size restrictions. They will be treated as the rest of the property is in the ocean hazard areas. The primary benefit would be to any large, undeveloped and unsubdivided properties. D.O.T. will not be affected by the maximum setback factors. The State reimburses local governments for participating in the Minor Permit program. The cost is \$115.00 per permit for counties, \$95.00 for municipalities, and \$25.00 for every exemption they issue. Based on the number of permits that are issued by LPOs on the coast, the estimated savings to the Division is about \$13,000.00 from reimbursements. Local governments will save on the public notices and will see a reduction in permit receipts as well as the reimbursement from the Division equal to our savings. The benefits of all three of these actions is the decreased regulatory burden in the ocean hazard area, more properties would be eligible for a CAMA permit exemption, a slight decrease in the number of properties needing permits, reduces overlapping jurisdiction within the ocean hazard area, not duplicating federal efforts, and responding to natural changes on the coast to limit development restrictions where it no longer applies.

**Veronica Carter made a motion to approve the fiscal analysis for 7H .0304 for public hearing. Joan Weld seconded the motion. The motion passed unanimously (Mitchell, Wynns, Peele, Weld, Shepard, Carter, Old).**

#### Brunswick County LUP Amendment (CRC 11-17)

John Thayer stated the Brunswick County land use plan was certified by the Commission in November 2007. They have previously amended their plan and this is the second amendment that needs certification. The amendment has four components. The most notable one is they made about 17 adjustments to their future land use plan map, they made some policy and implementation statement adjustments, and the other adjustments to the plan are principally background and support information. There are no issues that Staff sees with this amendment. Staff believes they have met the substantive requirements for the amendment. Staff recommends certification.

**Melvin Shepard made a motion to certify the Brunswick County Land Use Plan amendment. Jerry Old seconded the motion. The motion passed with six votes in favor (Mitchell, Wynns, Peele, Weld, Shepard, Old) and one abstention (Carter).**

#### City of Jacksonville LUP Certification (CRC 11-21)

John Thayer stated per the 2002 updated land use plan rules; the City of Jacksonville has updated their land use plan in total. We have received no comments regarding the local adoption of the plan. Staff has determined that they have met all of the substantive requirements for certification and staff recommends certification.

**Lee Wynns made a motion to certify the City of Jacksonville Land Use Plan amendment. Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Wynns, Peele, Weld, Shepard, Carter, Old).**

#### **PRESENTATIONS**

Amendments to 15A NCAC 07H .0304(1)(b)

100 Year Storm Recession Line and Extent of Ocean Erodible AEC (CRC 11-19)

Mike Lopazanski

Mike Lopazanski stated this rule has already been approved for public hearing. There are three components of it. We looked at changing the calculation of the ocean erodible area AEC, we removed the unvegetated beach designation for Hatteras Village, and we removed the inlet hazard area designation for the area that was formerly Mad Inlet in Brunswick County. In the course of doing the fiscal analysis we were looking at what the results of the calculation of the ocean erodible area was going to mean and it turned out that it was going to be a substantial increase in the permitting jurisdiction of the Commission. Upon further review of the factors that go into the calculating of the AEC, we are proposing an additional change to the calculation having to do with the 100-year storm recession line. There will also be one more change in not allowing the unvegetated beach designation to be used in inlet hazard areas.

The ocean erodible area AEC is defined by the oceanward end by the mean low water and landward by the distance measured from the first line of stable vegetation equal to sixty times the long-term annual erosion rate. The landward extent of the OEA also includes the distance of the shoreline recession that would be generated from a 100- year storm event. The shoreline recession model has

a minimum and maximum value for our coast of 25 and 330 feet depending on where you are. It is greater in the south and less toward the north. The inlet hazard areas, the ocean erodible areas and the high hazard flood areas make up the ocean hazard AEC. Since 2009, when the CRC adopted a graduated setback, it substantially increased the ocean erodible area. There are cases, because of the 100-year storm recession line; it substantially increases the permitting jurisdiction of the Commission. The 100-year storm recession line was originally completed in 1979. It was done prior to the establishment of the erosion rates. The idea was modeling that was done to predict a 100-year storm after 30 years of erosion. It was a dune protection idea. By changing the maximum setback factor from 60 to 90, we have substantially increased the ocean erodible area by about 30% geographically. It results in a 15% increase in areas that don't have AECs. According to a GIS analysis, it results in an increase of about 3,600 properties in the ocean hazard AEC. These are properties that did not need a permit prior to this action. If we remove the 100-year storm recession line it will decrease the width of the OEA in the south. There will be a slight increase in the north. This will also increase the number of properties that will be eligible for the single family exemption. Single family residences that are outside of the OEA are eligible for this exemption provided that they meet certain construction standards and that they sign the ocean hazard notice. This will not have an impact on the setbacks. The maximum setback factor will still be 90 times the erosion rate for structures greater than 100,000 square feet.

**Veronica Carter made a motion to send 15A NCAC 07H .0304 to public hearing. Melvin Shepard seconded the motion. The motion passed unanimously (Mitchell, Wynns, Peele, Weld, Shepard, Carter, Old).**

#### 2011-2013 CHPP Implementation Plan Mike Lopazanski

Mike Lopazanski stated this relates to the 1997 action by the General Assembly and the passing of the Fisheries Reform Act which created a program to focus on improvement of fisheries through the protection and enhancement of habitats. The CHPP is divided into six important habitats. The Act requires the three regulatory commissions to work together to prepare and adopt a Coastal Habitat Protection Plan that is aimed at protecting and restoring habitats vital to the state's fisheries. DENR is charged with developing the CHPP and Marine Fisheries is the lead in that activity. Over the last year we have worked with the CHPP Steering Committee. The CHPP was updated in 2010. That was presented in November 2010 and was approved. The recommendations remained essentially unchanged so the focus will continue to be actions to address the recommendations.

**Melvin Shepard made a motion to approve the 2011-2013 CHPP Implementation Plan. Veronica Carter seconded the motion. The motion passed with six votes in favor (Mitchell, Peele, Weld, Shepard, Carter, Old) and one opposed (Wynns).**

#### Terminal Groins – CRC Study & Recommendations, Legislation and Permit Process Jim Gregson and Doug Huggett

Jim Gregson stated the General Assembly mandated through House Bill 709 that the CRC study the feasibility and the advisability of the construction of terminal groins in North Carolina. The Bill said that the CRC would coordinate with DCM and the Division of Land Resources. We decided early on that the Science Panel needed to be intimately involved early on in the process. Moffatt and Nichol was already working on the Beach and Inlet Management Plan so we extended that

contract. The total project was seven months and the report was due to the ERC and the General Assembly April 1, 2010. The Bill required three public hearings but we held five. A subcommittee of the CRC met twice to come up with the final recommendations to be presented on March 25, 2010. The CRC found that the study determined that terminal groins in combination with beach nourishment can be effective at controlling erosion. Since all of the inlets are different, the analysis for terminal groins needs to be done on a site specific basis. The findings were mixed regarding the effects on wildlife and marine resources. The CRC determined if it was the desire of the General Assembly to lift the limitations then there were several things that needed to be looked at when drafting a Bill. The first was that terminal groins should only be allowed after all other non-structural measures including relocation of threatened structures are found to be impracticable. The effect on a terminal groin should include the citing and construction that avoid interruption of the sand movement to the downdrift beaches. Any proposal should be accompanied by an environmental impact statement. There should be third party review of the environmental impact statement. And recognizing that terminal groins could affect properties a long way from the structure and all the property owners that could potentially be affected by a terminal groin should be notified during the permitting process. Because the effects were unknown and some of the effects could be expensive with the construction of the terminal groin as well as removal of it, the CRC recommended that there be some financial assurance in the form of a bond or insurance policy for the removal of the structure and restoring any affected properties or beaches. The CRC said that the use of a terminal groin should have an adequate monitoring plan to ensure that the effects on resources and adjacent properties don't exceed what was anticipated in the environmental document. The monitoring should be done by a third party and not by the applicant. Finally, the CRC recommended that any terminal groin project in North Carolina should be part of a beach nourishment project that had no less than a 25 year design life. This year there was a Bill introduced that became law, Senate Bill 110, which authorized the permitting and construction of up to four terminal groins as a pilot program. The Bill has six sections. One of the big changes to some of the earlier proposed legislation was the definition of a terminal groin. Senate Bill 110 limited terminal groins to those structures that were on the side of an inlet at the terminus of an island. Senate Bill 110 mandates that the applicant has demonstrated that there are threatened structures and that non-structural approaches are found to be impractical. SB110 says that the construction won't result in significant adverse impact to private property or to public recreational beach and in making this finding the CRC should take into account all the mitigation measures that are in place as well as the accompanied beach fill project. There are also sections in the amendment to CAMA. One of those is the things that have to be included in a permit application and then there is a list of things that the Commission has to find before a permit is granted. The CRC recommended that there be a third party review of the environmental documents that are required. SB110 does not address a third party review of the environmental document. The CRC recommended that all property owners that could potentially be affected by notified. SB110 says that the applicant shall provide proof that the property owners and local governments have been notified of the application for construction of the terminal groin. The CRC requested that there be some financial assurance for the removal or restoration of the site. SB110 says the Commission has to find the proof of financial assurance in the form of a bond, insurance policy or escrow that is adequate to cover long-term maintenance and monitoring, modification or removal of the structure and restoration of public or private property if it is determined that it has an adverse impact. The CRC recommended that there be an adequate monitoring program to ensure that the effects on coastal resources don't exceed what was in the environmental document. SB110 requires that there be a plan for the management of the inlet and that the inlet management plan is adequate for the purposes of monitoring the impacts of the groin and then mitigating any adverse impacts. The CRC recommended that the groin be part of a large-scale nourishment project that would achieve a

design life of no more than 25 years. SB110 says that the applicant shall submit a plan for the construction and maintenance and an accompanying beach fill project. It doesn't specify that it be a large-scale project or a project with a 25 year design life, the only stipulation is that it be accompanied by a beach fill project to pre-fill the groin. We may ask the Science Panel for some clarification and guidance on this part. The assumption is that pre-filling the groin will put enough sand there to immediately start to bypass. That is very different than the CRC's recommendation. Section 3 of the Bill says the Commission shall adopt any rules necessary to implement the Act. Currently, staff is not recommending any rule changes. We feel like there is enough information in SB110 to begin to process a permit application if we should receive one. Besides the pre-fill of the groin, we are going to talk with the Science Panel about defining what adverse impacts along the shoreline are or what triggers significant impacts. Section 4 is a statement that no state funds can be spent for any of the activities related to the terminal groin or its beach fill project. Section 5 is the restrictions on where the money has to come from.

Doug Huggett stated the CRC's permit processing rules that are in Subchapter 7J are already robust enough to allow us to process an application for a dock, sulfur smelter, or concrete plant. We think the robustness that is already built into the review process for CAMA Major Permits is sufficient to allow us to fit this unique project into it. While there are certainly some unique components to this process for terminal groins, the process as we envision is not dissimilar from the template we have used successfully used for some of our beach nourishment projects and projects that involved inlet relocation. An application for a terminal groin will fit into this process. There are requirements in the groin legislation that can be folded into this process to help us get to a permit decision. The first thing the applicant would do is have a scoping meeting with members of the public and resource agencies. The process that we have in place to develop these beach nourishment projects or terminal groin projects is something that starts with a project delivery team. This is predicated on the fact that the first step in this process has to be the preparation of an environmental impact statement to satisfy the groin legislation at the state level and to satisfy federal permitting requirements. A study area is looked at where you are likely to get direct impacts from the proposed project. The second part is a study area where you are likely to get indirect impacts from the projects. We have to identify the property owners and governments that may be impacted by the terminal groin. We will do this in coordination with the consultants and the engineers. The project delivery team will come up with alternatives to study and then narrow the alternatives down and setup mitigation and monitoring. The alternatives analysis is going to include several things. The first is a no action requirement. There will be alternatives for buy-out, relocation, or abandonment, beach nourishment without inlet relocation, beach nourishment with inlet relocation, and structural response alternatives that would be studied. You also have to look at borrow site selections and do alternatives for those. As we are choosing an alternative to go forward with, there is going to have to be information provided in the environmental assessment that demonstrates that structures or infrastructure are imminently threatened. Secondly, non-structural approaches to erosion control including relocation have to be shown to be impractical. You will try to make a determination that a terminal groin or a project that involves the construction of a terminal groin is the preferred alternative. At that point in time you start developing the plan. The plan is going to have to involve the construction and maintenance of the groin and its accompanying beach fill project. This will have to be prepared by a professional engineer. The plan has to include post construction activities that the applicant is going to undertake to monitor the impacts. Methodology for determining the baseline for assessing impacts has to be included as well as thresholds for when these adverse impacts must be mitigated. If the adverse impacts cannot be mitigated then the plan must provide for modification or removal. After the environmental document comes up with a preferred plan, it must look at post and pre-project monitoring. The groin legislation requires

certain things to be included in the monitoring aspect and the mitigation aspect and some financial assurance requirements. The environmental impact statement will satisfy both State and National Environmental Policy Acts. This begins the permit application process. During the permit application process, there are already a lot of findings that we have to make under our program before a permit for any activity can be issued. The project cannot have more than minimal adverse impact on the biological integrity of a lot of coastal resources. You cannot violate water quality standards. The project can't represent significant damage or threat to historical or cultural resources. The project has to be timed to have minimal adverse impacts on fish movement, turtles, and birds. Navigational impacts are always something we have to look at. We cannot issue a permit that would be in violation of any other law of the state of North Carolina or the local government where the project takes place. The groin legislation sets up some additional findings that we have to make before we can issue a permit. First, if the applicants have complied with all of the requirements of the permit application. Second, the applicant must have demonstrated that structures are imminently threatened and that non-structural approaches to erosion, including relocation, are impractical. The terminal groin has to be accompanied by a concurrent beach fill project to pre-fill the groin. The construction and maintenance of the groin will not result in significant adverse impact to private property or the public recreational beach. Mitigation efforts can be factored into this decision. If there is a potential adverse impact to the public beach then mitigation measures can downgrade the potential impact to a point where it would be permissible. We have to make a determination that the inlet management plan is adequate for monitoring the impacts of the terminal groin and mitigate any adverse impacts. The project also has to comply with all of the other rules of the Coastal Resources Commission. There are some funding issues. We have to make a finding of this before we can issue a permit. We don't have much expertise in this area. We will be looking for some additional legal help in terms of making sure that these requirements are satisfied. The Commission may issue no more than four permits for the construction of a groin. There is a lot of concern with this requirement. The legal opinion that we have gotten is that it will be whichever four projects get to the point of getting a permit issued then these are the four that will be issued. DCM does not recommend any changes to 7J of the CRC rules that deal with processing permit applications. The development of the environmental impact statement is not a short term process. From the time the applicant makes the decision to begin the EIS until the time of actually getting the permit it will be about a two year process.

#### Estuarine Shoreline Mapping – Preliminary Results (CRC 11-18)

Lisa Cowart

Lisa Cowart stated estuaries are significant due to their ecological significance with absorbing wave energy and habitat for fisheries and shellfish. They are also heavily populated areas. The goal of the estuarine shoreline mapping project was to delineate an accurate estuarine shoreline for the 20 CAMA counties in North Carolina, to quantify the mileage of various shoreline types, and to count the number of shoreline structures. The objectives of the project were to understand the effects of development on estuarine shoreline and to further understand how permitting activities affect coastal residents in an estuarine environment. The project began in December 2006 and from December 2006 until June 2007 a pilot project was conducted to try to see if they could automate the project of delineating the shoreline. This was not fruitful. In December 2007, the estuarine shoreline mapping summit was held which gathered various members of people that were interested and also advisors to try to hash out a methodology and approach to conduct the project another way. From the summit, in August 2008, a methodology was drafted and circulated throughout the estuarine shoreline mapping group. Once the methodology was defined, ECU was contracted to digitize the shorelines on a county by county basis. We are anticipating this will be completed by



December 2011. Aerial photography was used to digitize the shorelines. From that, three GIS layers are created. These layers are the estuarine shoreline, shoreline stabilization structures, and structures over water. The estuarine shoreline is delineated as the land/water interface. The shoreline stabilization structures are composed of boat ramps, breakwaters, groins, sills, riprap, unknown and bulkhead. The structures over water were digitized as polygons because we wanted to calculate the area. Of the 20 CAMA counties 17 have been digitized. Once the counties are digitized, they are brought in house and checked for quality accuracy and quality control by DCM staff. Except for Tyrrell County, the four other counties are dominantly bulkhead along the estuarine shoreline with riprap being second. If we look at all of the structures that were digitized we can see that the dominant amount has bulkheads. The sills, breakwaters and boat ramps are minimal. Once the summaries were completed then we wanted to go into more depth into the data to see what we could find. For Washington County less than 5% of the shoreline is marsh and there are no modification structures near the marsh areas. There was no bulkhead or riprap present. We also looked at shading within Washington County. In total there was 15.62 acres of water shaded by structures within Washington County. There is only one acre of structures that are landward of the water. There are 23 boat ramps within Washington County that average around 20 feet in width. There are 58 groins within Washington County with a mean length of 25 feet. There were no break waters present within Washington County, but there were six sills present. The sills had an average length of 80 feet. This additional analysis will be done on the other counties as they are finalized. We are also collaborating with Shellfish Sanitation to field check some of the data. We have also discussed doing some spatial analysis. There has also been talk about trying to perform some shoreline change analysis.

With no further business, the CRC adjourned.

Respectfully submitted,

  
Ted Tyndall, DEM Assistant Director

  
Angela Willis, Recording Secretary