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REPLY TO:
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CRC-22-15

September 12, 2022

M. Renee Cahoon, Chair and Commissioners
North Carolina Coastal Resources Commission
Division of Coastal Management, DEQ
400 Commerce Ave.
Morehead City, North Carolina 28557

Re: Analysis regarding the Commission's authority to regulate floating structures in shellfish leases and related issues

Dear Chair Cahoon and Commissioners:

Over the past two years, the North Carolina Coastal Resources Commission ("Commission") has had several discussions related to shellfish aquaculture leases and the Division of Coastal Management's ("DCM") role in permitting certain structures associated with aquaculture operations as "development" under the Coastal Area Management Act of 1974 ("CAMA"). During its February 2022 meeting, the Commission was scheduled to consider proposed Amendments to 15A NCAC 7M .0600 and 7H .0208 – Floating Structures Associated with Shellfish Lease. *See* January 27, 2022 Memo to the Commission from Braxton Davis attached. Shortly before the Commission's February meeting, the Commission received a communication from the North Carolina Shellfish Growers Association ("Shellfish Growers") asserting that oyster farmers who hold shellfish leases and franchisees are entitled to the agricultural exemption from requiring a development permit under N.C.G.S. § 113A-103(b)(4). *See* February 9, 2022 communication from Shellfish Growers attached.

At its February 2022 meeting, the Commission requested counsel review and analyze several issues related to CAMA and the Commission's ability to adopt rules impacting aquaculture in North Carolina. In discussions with the Commission's Staff at DCM, the issues on which analysis was sought were further refined. The questions presented and my responses are set out below.¹

¹ This letter has not been reviewed and approved under the procedures for issuance of an Attorney General's Opinion.

I. Does the Coastal Resources Commission have the authority to regulate platforms and floating structures as “development” within a franchise or shellfish lease granted by the Division of Marine Fisheries or are these structures “not [to] be deemed development” under the agricultural exemption in CAMA?

Short Answer: The legislature has explicitly defined development to include “the placement of a floating structure” in the Public Trust Areas and Estuarine Waters AECs. N.C.G.S. § 113A-103(5)(a). The exceptions to this definition do not explicitly refer to aquaculture, floating structures, navigable waters, shellfish, or submerged lands. Accordingly, under the plain language of CAMA, the Coastal Resources Commission has statutory authority to require a CAMA permit for development, including platforms and floating structures, within a franchise or shellfish lease granted by the Division of Marine Fisheries.

Explanation: Whether the Commission has authority under CAMA to adopt regulations that impact shellfish leases and franchises presents a multifaceted question of statutory interpretation. Legal principles of statutory construction guide our analysis of the scope of the Commission’s authority under CAMA. The cardinal rule of statutory construction is that the plain language of the statute controls. “Statutory interpretation properly begins with an examination of the plain words of the statute.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). However, where a statute’s language is ambiguous, it must be construed to accomplish the General Assembly’s intention. *See, e.g., State v. Blackstock*, 314 N.C. 232, 240, 333 S.E.2d 245, 251 (1985). “The best indicia of that legislative intent are the language of the act, the spirit of the act, and what the act seeks to accomplish.” *In re North Carolina Sav. & Loan League*, 302 N.C. 458, 467, 276 S.E.2d 404, 410 (1981) (cleaned up and citation omitted).

A. CAMA Defines Floating Structures as Development.

The plain language of the N.C.G.S. § 113A-118 provides that a CAMA permit is required for development in an area of environmental concern (“AEC”). Under CAMA, “development” is defined as “Any activity. . . involving. . . the construction or enlargement of a structure; . . . or placement of a floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).” N.C.G.S. § 113A-103(5)(a). Thus, the General Assembly’s definition of development specifically includes the placement of a floating structure in the Public Trust Areas and Estuarine Waters AECs.

The General Assembly also provided a definition for “Floating structure,” which is “any structure, not a boat, supported by a means of floatation, designed to be used without a permanent foundation, which is used or intended for human

habitation or commerce.” N.C.G.S. § 113A-103(5a). *See* relevant portions of CAMA attached.

The Shellfish Growers Association has asserted that “shellfish farming activities are exempt from the [CAMA’s] definition of ‘development’ based on our planting, growing, and harvesting of crops (agriculture).” *See* Shellfish Growers’ Communication, p 2. This is their basis for claiming that the Commission should not promulgate rules regulating the use of floating structures in shellfish leases or franchises nor should it require a CAMA permit for such structures. However, the Shellfish Growers’ analysis omits the key statutory language included in CAMA’s definition of development.

It appears that the Shellfish Growers Association believes that the question posed may be answered simply by including “aquaculture” within the definition of “agriculture.” While it is true that agriculture may be defined to include aquaculture in certain instances (*see, e.g.*, N.C.G.S. §§ 106-581.1 and -759(a)), CAMA does not include “aquaculture,” “submerged lands,” or “shellfish,” within N.C.G.S. § 113A-103(5)(b)(4). Therefore, the fact that there are examples in other statutes in which “agriculture” includes “aquaculture” is not dispositive in the present context.

The Shellfish Growers argue the exception applies because they “plant, grow, and harvest shellfish crops.” *See* Shellfish Growers’ Communication, p 2 (emphasis added). The Shellfish Growers also assert that CAMA permits should not be required on “shellfish leases, shellfish franchises, and affiliated properties” because the land is “used in the normal and incidental operations of our farms.” *See* Shellfish Growers’ Communication, p 2.

This argument is incorrect. The language of the “agricultural exception” in CAMA simply states:

The use of any land for the purposes of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, or for other agricultural purposes except where excavation or filling affecting estuarine waters ... or navigable waters is involved.

N.C.G.S. § 113A-103(5)(b)(4). The words of the CAMA exception do not include “aquaculture,” “shellfish,” or “submerged lands” in the activities listed. Moreover, the definition of “development” in CAMA includes “the placement of a floating

structure in the Public Trust Areas and Estuarine Waters AECs].” N.C.G.S. § 113A-103(5)(a). Together this language clearly conveys legislative intent to allow the Commission to develop use standards and policies to guide DCM’s evaluation of CAMA permit applications for floating structures.

The North Carolina Supreme Court has held that when one section of a statute deals with a certain subject matter more specifically than another dealing with that same subject matter, the more detailed and specific section controls. *See State ex rel. Utils. Comm’n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). Therefore, the answer to the question posed by the Commission is not answered by recognizing that in North Carolina the definition of agriculture may include aquaculture when the specific provisions in CAMA include floating structures in the definition of development and the language of the exception does not specifically except them from this definition. The plain language in CAMA is controlling and supports a determination that the exception does not apply to floating structures.

B. The Exceptions to CAMA’s Definition of Development Must Be Narrowly Construed.

Another reason for concluding that the exception does not apply to floating structures or aquaculture is that under the canons of statutory construction, exceptions must be narrowly construed. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 313 (1999) (holding equitable process not excluded because if the legislature had “intended to exclude equitable processes from the statute, it would have said so.”); *Good Hope Hosp., Inc. v. N.C. Dep’t of Health and Human Servs.*, 175 N.C. App. 309, 314, 623 S.E.2d 315, 319 *aff’d* 360 N.C. 641, 636 S.E.2d 564 (2006) (exception to certificate of need requirement allowing for total replacement of health services facility narrowly applied since to allow other exceptions would contravene the manifest purpose of the legislature, as otherwise expressed.); *News & Observer Publishing Co. v. Interim Board of Education*, 29 N.C. App. 37, 223 S.E.2d 580 (1976.) (exceptions to the Open Meeting statute must be narrowly construed since they derogate the general policy of open meetings.).

In CAMA, the legislature has explicitly defined “placement of a floating structure in an area of environmental concern” as development. N.C.G.S. § 113A-103(5)(a). The section of CAMA exempting certain activities from the definition of development does not mention “aquaculture,” “shellfish,” or “floating structures.” N.C.G.S. § 113A-103(5)(b). It is presumed that the General Assembly does not intend to enact a statute that is internally inconsistent. *Young v. Davis*, 182 N.C. 200, 108 S.E. 630 (1921). It would be internally inconsistent to conclude, without clear language to the contrary, that the definition of development would not apply to floating platforms placed in a shellfish leasehold or franchise located within an AEC.

Moreover, in the exception itself, there is an explicit statement that this exemption does not apply if “excavation or filling affecting estuarine waters or navigable waters is involved.” N.C.G.S. § 113A-103(b)(4). It would be internally inconsistent to prohibit excavation impacting estuarine or navigable waters and not regulate floating structures given their impact on the same resources. Accordingly, it appears that the legislature did not intend the agricultural exemption in CAMA to apply to floating structures used in aquaculture.

Another rule of statutory construction that supports this conclusion is the rule that when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list. *See Evans v. Diaz*, 333 N.C. 774, 430 S.E. 2d 244 (1993). The explicit language of the exemption does not mention development in Public Trust Areas and Estuarine Waters AECs, submerged lands, the use of navigable waters, shellfish, or aquaculture. Instead, the exemption simply refers to “the use of any land” and includes “raising livestock or poultry,” plants, and trees. Thus, the natural and ordinary meaning of this exemption appears designed to apply to privately held land used for agriculture or forestry.

In other statutes, the legislature has specifically equated aquaculture with agriculture. If it had wanted to exclude floating structures and platforms placed in shellfish leases within AECs from development and include that activity in this exception, it could have expressly exempted those activities from the definition of development based on their location in shellfish leases and franchises. But it did not do so. Therefore, this exception should be strictly construed not to include such activities. *See Sara Lee Corp.*, 351 N.C. at 36, 519 S.E.2d at 313.

C. The Purpose and Spirit of CAMA are Designed to Protect Submerged Lands and Navigable Waters Held in Public Trust for the Benefit of the Citizens of North Carolina.

Unlike privately held farmland, lands submerged by navigable waters are held “in public trust for the use and benefit of all its citizens” based on common law rights. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 525-26, 369 S.E.2d 825, 827-28 (1988). Furthermore, “[o]ur state constitution mandates the conservation and protection of public lands and waters for the benefit of the public.” *State ex rel. Rohrer*, 322 N.C. at 532, 369 S.E.2d at 831 quoting N.C. Const. art. XIC, § 5 (amend. 1972). The purpose and spirit of CAMA align with the protections provided by the North Carolina Constitution and support this analysis. *Faulkner v. New Bern-Craven County Bd. Of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 291 (1984) (“It is . . . well settled that every statute is to be considered in the light of the state constitution and with a view to its intent.”).

The North Carolina Supreme Court discussed and the long-standing common law public trust rights in *Gwathmey v. State ex rel. Dep't of Env't, Health, &*

Natural Res., 342 N.C. 287, 464 S.E.2d 674 (1995). The test for determining navigable waters is “the capacity of the water for use in navigation.” *Gwathmey*, 342 N.C. at 299, 301, 464 S.E.2d at 682 (punctuation and quotation omitted). The Court further explained that “if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose.” *Id.* Therefore, the question is not whether boats navigate within a shellfish lease. Instead, submerged lands are within the Public Trust Areas AEC because they can be navigated by watercraft in their natural capacity.

Public trust rights are associated with public trust lands but are not inextricably tied to ownership of these lands. For example, the General Assembly may convey ownership of public trust land to a private party but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by the clearest and most express terms. *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 780 S.E.2d 187 (2015).

The legislature has authorized the Commission to designate by rule AECs including estuarine waters and “[a]reas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution.” N.C.G.S. § 113A-113(b)(2) and (5). As authorized by CAMA, the Commission has established the Public Trust Areas and Estuarine Waters AECs and promulgated standards for their use. 15A N.C. Admin. Code, Subchapter 07H.

To guide the Commission’s work, the legislature established goals for the coastal area management program including “preserving and managing the natural ecological conditions of the estuarine system . . . so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values” and authorized the Commission to establish policies for the “[p]rotection of present common-law and statutory public rights in the lands and waters of the coastal area.” N.C.G.S. § 113A-102(b)(1) & (4)(f).

As authorized, the Commission has established policies relating to floating structures designed to protect public trust rights in the coastal areas: 1) Floating structures used for residential or commercial purposes shall not infringe upon the public trust rights nor discharge into the public trust waters of the coastal area of North Carolina; 2) Floating structures shall not be allowed or permitted within the public trust waters of the coastal area except in permitted marinas; and 3) Floating structures shall be in conformance with local regulations for on-shore sewage treatment. 15A N.C. Admin. Code 07M .0601 and .0603(a) and (b).

The Commission has also developed management objectives for the general and specific use of the Public Trust Areas AEC, which include protecting “public rights for navigation and recreation and to conserve and manage the public trust areas so as to safeguard and perpetuate their biological, economic and aesthetic value.” 15A N.C. Admin. Code 07H .0207(c). The Commission’s use standards hold “that projects caus[ing] degradation of shellfish waters are [not compatible] with the management policies of public trust areas.” 15A N.C. Admin. Code 07H .0207(d).

The policy in the North Carolina Constitution and in the policies articulated by the legislature in CAMA prioritize the protection of our state’s natural resources for the benefit of the public. These policies provide a valuable aid in determining how to understand the definition of development and the exceptions to that definition in CAMA. It would be contrary to the goals of CAMA to read the exception in N.G.S.C. § 113A-103(b)(4) so broadly as to exclude the placement of a floating structure in an AEC from the definition of development simply because it is within a shellfish lease or franchise.

D. Commercial Shellfishing in Public Trust Waters is Allowed by the North Carolina General Assembly.

The history of legislative involvement in commercial shellfishing in North Carolina goes back close to two hundred years.² In the past, the General Assembly granted “perpetual franchise[s] to cultivate shellfish.” *Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271 (1997). More recently, the Legislature authorized the leasing of non-productive submerged land and the adjacent water column to encourage the cultivation of shellfish. N.C.G.S. §§ 113-202 and 113-202.1.

The North Carolina Division of Marine Fisheries (“DMF”) is responsible for granting exclusive leases for the cultivation of shellfish in commercial quantities for commercial purposes. N.C.G.S. §§ 113-201, 113-202, 113-202.1. DCM and DMF have discussed the interplay between their authorizing statutes. They agree that “All cages, poles, anchoring systems, and any above-water frames or structural supports used to suspend or hold in place aquaculture equipment should be considered as “gear” in accordance with N.C.G.S.143B-289.52, and therefore regulated through the DMF shellfish lease and not as “development” under CAMA. *See* January 27, 2022 Memo CRC-202-07 to the Commission from Braxton Davis, p 2. DCM and DMF further agree that the placement of floating structures within shellfish leases

² For those interested, a memorandum written by former Special Deputy Attorney General Allen Jernigan in 1983 to the Submerged Land Task Force covering that history up to 1983 is attached for reference. *See* September 27, 1983 Memo attached.

located in the Public Trust Areas and Estuarine Waters AECs will require a CAMA permit and will not be addressed through shellfish leases. *Id.*

E. An Interest in Submerged Lands is Subject to Government Regulation.

Although an individual may hold an interest in submerged lands allowing commercial shellfishing, that interest is “not acquired free of government regulation.” *State v. Sermons*, 169 N.C. 285 287, 84 S.E. 337, 338 (1915); *Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271 (1997) (“plaintiffs' reasoning confuses [the] grant of a franchise . . . to harvest shellfish on a given tract of submerged land, with” the State’s right to limit “the methods an exclusive franchise holder may employ in harvesting shellfish.”). As the North Carolina Supreme Court explained, the right to use

the navigable waters of the State belongs to the people in common, to be exercised by them with due regard to the rights of each other and cannot be reduced to exclusive or individual control.

RJR Technical Co. v. Pratt, 339 N.C. 588, 591, 453 S.E.2d 147,149, *reh’g denied*, 340 N.C. 118, 456 S.E.2d 319 (1995).(citation omitted).

This line of cases supports our interpretation that the intention of the legislature in enacting CAMA, including the definition of development and exceptions to that definition, allows the Commission to regulate floating platforms within shellfish leases located in the Estuarine Waters and the Public Trust Areas AECs in order to protect public trust resources that belong to the people in common.

F. Given the Absence of an Explicit Exemption Prohibiting the Regulation of Floating Structures and Platforms in Shellfish Leases or Franchises, the Commission Has the Authority to Regulate Such Development.

In CAMA, the legislature requires that the Commission “establish policies, guidelines, and standards for . . . [p]rotection of common-law and statutory public rights in the lands and waters of the coastal area.” N.C.G.S. § 113A-102(b)(4)(f). As explained in more detail above, the plain language of the statute, and the spirit and purpose of CAMA support this opinion that the Commission is authorized to establish policies, guidelines, and standards for the protection of the Public Trust Areas and Estuarine Waters AECs. Nothing in CAMA, not even the exception for land used for agricultural purposes, indicates that the placement of a floating structure within a shellfish lease in the Public Trust Areas and Estuarine Waters

AECs would prevent the Commission from regulating a floating structure as development.

In sum, from a careful review of the plain language of CAMA, legislative findings and goals included in CAMA, the definition of development, which specifically includes floating structures, and the exemption which does not explicitly apply to the Public Trust Areas and Estuarine Waters AECs, I conclude that floating structures on shellfish leases or franchises meet the definition of development under CAMA. Moreover, the Commission has the authority to set standards, including requiring a CAMA permit, before such development is allowed.

II. Whether local governments have jurisdiction over coastal waters within the Town limits to regulate the placement of structures within shellfish leases or franchises. If so, what is the basis for that jurisdiction?

III. If the local governments do have jurisdiction over coastal waters within Town or County limits, is it best practice to regulate these structures through local ordinance and/or CAMA land use plans?

Whether a local government has jurisdiction over coastal waters varies.³ For example, at one time, the zoning jurisdiction and extraterritorial jurisdiction (“ETJ”) for the Town of Nags Head extended one mile into adjacent coastal waters. On the other hand, the city limits and zoning jurisdiction for the City of Wilmington stop at the edge of the Cape Fear River (exceptions apply to upland excavated marinas such as Port City Marina). Some jurisdictions have zoning overlay districts over portions of coastal waters to regulate outdoor recreational uses such as rentals of personal watercraft. In order for a city or town to have zoning jurisdiction over coastal waters that have not been annexed, an ETJ agreement granting jurisdiction from the county to the city or town is required.

A reference to determine if a specific local government boundary extends into coastal waters can be found at this link [Powell Bill Maps](#) or by consulting the zoning maps for local governments which are mostly available on the local government websites in PDF or interactive map formats. There is also a GIS [map service](#) for the Powell Bill city boundaries. Further information, including a description of the corporate boundaries, is available by consulting local government charters available here: [NGCA City Charters](#). This resource also provides access to specific legislation relating to local governments.

³ Any town or county with specific questions regarding these issues should consult with its own attorneys.

Recently, the General Assembly consolidated the local government enabling statutes for development regulations previously set out in Chapters 153A and 160A into the new single, unified Chapter 160D of the North Carolina General Statutes. Included in this chapter is a provision stating, “local government[s] may regulate development, including floating homes, over estuarine waters and over lands covered by navigable waters owned by the State pursuant to G.S. 146-12.” See N.C.G.S. § 160D-702(a) attached. As a result, if a local government has jurisdiction over coastal waters based on its corporate limits or ETJ agreement, it may regulate floating structures through a zoning ordinance.

A review of the 20 coastal county land use plans identified fourteen with “floating home/ structure policies with nine using the 15A NCAC 07M .0601 definition. Of the fourteen counties with floating structure policies, ten oppose floating homes and one prohibits floating structures within the jurisdiction altogether.” See May 25, 2021 Memorandum to Commission from Mike Lopazanski (CRC-21-17) attached. Moreover, “local governments, through their CAMA lands use plan policies, have often addressed floating structures more generally in the context of floating homes” in “public trust areas” even if they did not “specifically address floating structures on shellfish leases.” *Id.*

The final question raised by the Commission inquires as to the best method for local governments with jurisdiction over coastal waters to regulate floating structures. As the Commission is aware through its recent work on the 07B rules, if the revisions to these rules are adopted, each local government will be required to identify the enforceable policies in its LUP used to review CAMA permit application. The most effective way for local governments to regulate floating structures is through ordinances and/or through the enforceable policies in its CAMA LUP.

* * * * *

I trust this response is helpful to the Commission’s further consideration of proposed rules relating to floating structures and look forward to discussing it in more detail with the Commission during the upcoming meeting.

Very truly yours,



Mary L. Lucasse
Special Deputy Attorney General

Attachments:

1. January 27, 2022 Memo to the Commission from DCM Director Braxton Davis (CRC-202-07)
2. February 9, 2022 Shellfish Growers Communication
3. Relevant sections of the Coastal Area Management Act of 1974, Article 7
4. September 27, 1983 Memorandum to the Submerged Land Task Force from former Special Deputy Attorney General Allen Jernigan
5. N.C.G.S. § 160D-702(a)
6. May 25, 2021 Memo to Commission from Mike Lopazanski (CRC-21-17)

cc w/o attachments:

Dan Hirschman, Senior Deputy Attorney General Environmental Division
Phillip T. Reynolds, Special Deputy Attorney General, CCA Section
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NORTH CAROLINA
Environmental QualityROY COOPER
GovernorELIZABETH S. BISER
SecretaryBRAXTON DAVIS
Director

CRC-22-07

January 27, 2022

MEMORANDUM

TO: Coastal Resources Commission

FROM: Braxton Davis

SUBJECT: Proposed Amendments to 15A NCAC 7M .0600 and 7H .0208 – Floating Structures Associated with Shellfish Lease

Over the past two years, the commission has had several discussions related to shellfish aquaculture leases and DCM's role in permitting aquaculture operations as "development" under the Coastal Area Management Act. Due to the rapid growth of the industry and expanding use of water column leases and associated gear and infrastructure, in 2016 DCM began providing the N.C. Division of Marine Fisheries (DMF) with comments on proposed lease sites on a case-by-case basis. These comments address potential impacts to navigation and other concerns, such as preserving a buffer between the lease operation and adjacent salt marshes. In 2020, the Division worked with the Coastal Resources Commission (CRC) to draft rules for floating upweller systems ("Flupsies") by specifically allowing these platforms in permitted marinas and at private docking facilities consistent with existing platform size limitations (through amendments to 15A NCAC 07H.0208 Docks and Piers and 07M.0600 Floating Structure Policy rules). DCM also worked with DMF staff to address concerns related to water column leases. DMF and the Marine Fisheries Commission (MFC) have continued to implement measures to help address issues/concerns with shellfish leases including launching a new interactive shellfish aquaculture mapping tool in 2020 to assist the public in finding information about shellfish leases in North Carolina. In 2021, the MFC adopted multiple rule amendments to limit the overall number of allowable lease boundary corner markers to 8 (not exceeding 12" in diameter), establish a 250' buffer between adjacent leases and increased the buffer from 100' to 250' from developed shorelines, add cumulative impact language, enhance training requirements for shellfish lease applicants to include user conflict information, and require reflective tape on corner markers.¹ The General Assembly also established a third-party appeal process, similar to that of the CRC's, for shellfish leases granted by DMF. DMF also addressed some of the CRC/DCM concerns through changes in the leasing process (requiring more descriptive drawings, updates to management plans, and adjacent riparian owner notification).

¹ Additional rule changes intended to lessen user conflicts, which were required by the legislature, were adopted by the RRC but are pending legislative review per SL 2019-198.



Most recently, DCM and the CRC have had presentations and discussions regarding potential rules for allowing floating processing facilities, potentially through further amendments to the Floating Structure Policy rules. At the November 2021 CRC meeting, due to continuing overlap between CRC/DCM and MFC/DMF interests and authorities, the continued growth of the industry, and the emergence of even more types of gear associated with water column leases, DCM requested a pause in further rulemaking to allow time for DCM, DMF, and DEQ leadership to discuss the recommended roles of each division going forward. DCM staff outlined a number of legal and practical considerations based on the different approaches, rules, authorities, and capacities of each division. In early-January 2022, a meeting was held with DMF staff, DEQ leadership and representatives of the DEQ Office of General Counsel, where agreement was reached on a proposed path forward to present to both the CRC and MFC for consideration, as follows:

- 1) All cages, poles, anchoring systems, and any above-water frames or structural supports used to suspend or hold in place aquaculture equipment should be considered as “gear” in accordance with N.C.G.S. 143B-289.52, and therefore regulated through the DMF shellfish lease and not as “development” under CAMA at N.C.G.S. 113A-103(5)a. This will allow shellfish growers to experiment with different types of gear and potentially reposition gear within their lease over time without being subject to CAMA permitting and enforcement.
- 2) All platforms and floating structures will require CAMA permits and will not be authorized through a DMF shellfish lease. In all cases, a CAMA Major Permit would be required. This is consistent with past practice and with recent changes to 7M.0600 related to floating upweller systems.

Under #2, applications for proposed platforms and floating structures, including floating processing facilities, at most shellfish leases would be denied by DCM based on the current 7M.0600 rules and would require a variance from the CRC. During recent discussions, DCM and DMF staff agreed that, at least initially, this approach is appropriate so that the CRC can review each proposal on a case-by-case basis, especially given the potential for conflicts and lack of existing spatial plans and zoning for these types of structures. In addition, DCM may receive unique concerns or comments from other federal and state resource agencies and local governments that should be considered by the Commission on a case-by-case basis.² Finally, CRC variance rules require a petitioner for a CRC variance to notify adjacent riparian property owners and all who commented to DCM during the permit review process. DCM could also provide notice to all who commented to DMF on the original lease proposal, so that the CRC can consider all public and adjacent property owner concerns on a case-by-case basis. Staff believe that over time, CRC rules and standards allowing floating processing facilities may be better justified based on lessons learned from reviews of specific project proposals, experience with any processing facilities that are granted variances, and spatial planning efforts to help identify and “de-conflict” certain areas that are most suitable and in need of floating structures or processing facilities.

I look forward to discussing this approach in more detail at your February meeting.

² The Corps of Engineers Nationwide Permit #48 applies to all DMF-issued shellfish leases but does not authorize floating (enclosed) structures and would therefore require a federal permit review and a State 401 Water Quality Certification.





02/09/2022

PETITION

To: Coastal Resource Commission
From: North Carolina Shellfish Growers Association
Subject: Floating Structures and Coastal Area Management Act's Development Exemption for Agriculture

The North Carolina Shellfish Growers Association and the undersigned farmers actively engaged in agriculture object to all of the Division of Coastal Management's recent determinations of "development" on any lands leased or owned (including shellfish leases, shellfish franchises, and affiliated properties) used in the normal and incidental operations of our farms. The Coastal Area Management Act explicitly states that agriculture is exempt from the definition of "development" unless farmers are engaged in excavating or filling that affects estuarine waters. Shellfish farmers do not excavate or fill in the normal course of their operations. None of DCM's determinations of "development" on shellfish leases and franchises over the past two years involve excavation or filling and therefore need to be reversed.

NCGS § 113A-103. Definitions.

(5) a. "Development" means any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision)...

b. The following activities including the normal and incidental operations associated therewith shall not be deemed to be development under this section:

4. The use of any land for the purposes of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, or for other agricultural purposes except where excavation or filling affecting estuarine waters (as defined in G.S. 113-229) or navigable waters is involved;

As a North Carolina shellfish farmer, I plant, grow, and harvest shellfish crops. I am recognized as a farmer engaged in agriculture by the US Department of Agriculture, the US Internal Revenue Service, and the NC Department of Agriculture. In addition, the Food and Agriculture Sector, responsible for food manufacturing, processing, and storage is designated a 'Critical Infrastructure Sector' by the Department of Homeland Security. The agricultural exemption (or "development" exception) probably exists because like utility and road development, food production is critical infrastructure and naturally serves the best interests of the citizens of North Carolina.

As a North Carolina shellfish farmer, I am farming submerged lands owned by the State of North Carolina and leased by me (or sold by the State as perpetual franchises and owned by me) for the cultivation of shellfish. North Carolina gained ownership of its submerged lands when the colonies took sovereign powers from King George III through the Declaration of Independence and victory in the Revolutionary War. No homeowner or boater owns or leases the viewshed surrounding shellfish farms. Any material issues with prospective farming activities should be addressed prior to DMF executing a lease. Once DMF grants a lease for shellfish cultivation and imposes production minimums, a farmer should be afforded



every opportunity within reason to maximize the productivity of the land leased as his or her livelihood is at stake.

As a North Carolina shellfish farmer, I do more to “enhance water quality” (part of DCM’s mission) in the estuaries of North Carolina than any other industry or organization. I do not get compensated for the ecosystem services my shellfish crops provide the State of North Carolina. In other states, shellfish farmers have the potential to be compensated by a nutrient credit program that seeks to offset the detrimental impacts of developers.

Looking at the complete list of exemptions to “development” (utility work, road maintenance, etc.) within NC’s coastal area management laws, only shellfish farming has a substantial net positive impact on our coast and estuary. Of all the types of agriculture out there, it makes the most sense to have an agricultural exemption for oyster farmers, who only farm coastal land, and improve it by doing so.

“In an unprecedented display of bipartisanship, the North Carolina General Assembly has recognized the potential shellfish aquaculture offers to a uniquely economically stressed region of the state. Following the Legislative mandate to study and recommend a shellfish aquaculture strategy, the North Carolina General Assembly unanimously (in both houses) adopted many of the key recommendations of that Strategy in 2019. The Strategy set out an ambitious goal for the shellfish aquaculture industry: achieve \$100 million in value and creating 1,000 jobs by 2030. The state government and other partners have shown a strong commitment in supporting the rapidly-growing shellfish aquaculture industry. A wide array of regulatory, scientific and legal support has contributed to the industry’s expansion.” From North Carolina’s Oyster Blueprint

Not only is DCM out of bounds (or unlawful) in its practice of defining normal and incidental farming operations as “development” using the Coastal Area Management Act, in doing so it is impeding growth in the shellfish aquaculture industry. One shellfish farmer has already left the industry as a direct result of the floating structures issue and suffered damages in the process. The strategy to rapidly grow our industry was approved by every member of North Carolina’s Senate and House of Representatives during a time of extreme political polarization! Shellfish farmers simply need more floating workspace to achieve the goals approved by our General Assembly.

The CRC must recognize that shellfish farming activities are exempt from the Coastal Area Management Act’s definition of “development” based on our planting, growing, and harvesting of crops (agriculture). Instead of impeding the growth of our industry, the CRC should be focused on supporting shellfish farmers and treating them as valuable allies that are actively improving the water quality of our estuaries.

Respectfully Submitted,

Chris Matteo	President North Carolina Shellfish Growers Association Farmer / Owner Chadwick Oysters and Siren’s Cove Shellfish
Adam Tyler	Farmer / Owner Core Sound Oyster Company
Tyler Chadwick	Farmer / Owner Carolina Gold Oyster Company



Kyle Frey	Farmer / Owner Crystal Coast Oyster Company
Greg Huin	Farmer / Owner Swanquarter Oyster Company
Fletcher O'Neal	Farmer / Owner Ocracoke Mariculture
Alex Adams	Farmer / Owner Lighthouse Shoal Oyster Company
Phillip Lannon	Farmer / Owner Shephard Point Oyster Company
Doug Cross	Farmer / Owner Pamlico Packing
Robbie Mercer	Farmer / Owner I&M Oyster Company
Ryan Gadow	Farmer / Owner Three Little Spat Oyster Company
Skip Kemp	Retired Farmer / Aquaculture Educator
Bobby Smith	Farmer / Owner Savage Inlet Oyster Company
Chase Starling	Farmer / Owner C-Star Oyster Company
Charlie Van Salisbury	Farmer / Owner Good Time Charlie's
Tom Cannon	Farmer / Owner Soundside Oyster Company
Matt Schwab	Farmer / Owner Holdfast Oyster Company
Ryan Bethea	Farmer / Owner Oysters Carolina
Katherine McGlade	Farmer / Owner Slash Creek Oyster Farm
Spurgeon Stowe	Farmer / Owner Slash Creek Oyster Farm
Michael Starks	Farmer / Owner Bell's Reef Oysters
Eduardo Mera	Farmer / Owner Mera Brothers Oyster Company
Fernando Mera	Farmer / Owner Mera Brothers Oyster Company
Roberto Mera	Farmer / Owner Mera Brothers Oyster Company
Keith Walls	Farmer / Owner Falling Tide Oyster Company
James Hargrove	Farmer / Owner Middle Sound Mariculture
Conor MacNair	Farmer / Owner N Sea Oyster Company
Mandy Uticone	Farmer / Owner Carolina Beach Oyster Company
James Stroud	Farmer / Owner Jimmy Stroud Oysters

There has been no meaningful public opposition in prior CRC public hearings with respect to floating structures, only strong feelings presented by DCM staff. For this CRC meeting, we have been informed that a member of the commission was intimately involved in developing public opposition by deploying a website, social media accounts, and an online petition platform. If there are any members of the CRC who were involved in the creation or development of www.nofloatingstructures.org and its ancillary efforts, we feel that that person should recuse him or herself going forward for any vote on shellfish farming topics. If any members have been involved in any lawsuits against oyster farmers, we think they also need to recuse themselves from votes on shellfish farming topics.

CC: North Carolina Farm Bureau
North Carolina Department of Agriculture
North Carolina Division of Marine Fisheries
North Carolina Division of Coastal Management
Steve Weeks, Wheatly Law Group
Mark Sigmon, Sigmon Law
North Carolina Coastal Federation

§ 113A-103. Definitions.

As used in this Article:

- (1) "Advisory Council" means the Coastal Resources Advisory Council created by G.S. 113A-105.
- (1a) "Boat" means a vessel or watercraft of any type or size specifically designed to be self-propelled, whether by engine, sail, oar, or paddle or other means, which is used to travel from place to place by water.
- (2) "Coastal area" means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean (extending offshore to the limits of State jurisdiction, as may be identified by rule of the Commission for purposes of this Article, but in no event less than three geographical miles offshore) or any coastal sound. The Governor, in accordance with the standards set forth in this subdivision and in subdivision (3) of this section, shall designate the counties that constitute the "coastal area," as defined by this section, and his designation shall be final and conclusive. On or before May 1, 1974, the Governor shall file copies of a list of said coastal-area counties with the chairmen of the boards of commissioners of each county in the coastal area, with the mayors of each incorporated city within the coastal area (as so defined) having a population of 2,000 or more and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean, and with the Secretary of State. By way of illustration, the counties designated as coastal-area counties under this subdivision as of July 1, 2012, are Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington. The coastal-area counties and cities shall transmit nominations to the Governor of members of the Coastal Resources Commission as provided in G.S. 113A-104(d).
- (3) "Coastal sound" means Albemarle, Bogue, Core, Croatan, Currituck, Pamlico and Roanoke Sounds. For purposes of this Article, the inland limits of a sound on a tributary river shall be defined as the limits of seawater encroachment on said tributary river under normal conditions. "Normal conditions" shall be understood to include regularly occurring conditions of low stream flow and high tide, but shall not include unusual conditions such as those associated with hurricane and other storm tides. Unless otherwise determined by the Commission, the limits of seawater encroachment shall be considered to be the confluence of a sound's tributary river with the river or creek entering it nearest to the farthest inland movement of oceanic salt water under normal conditions. For purposes of this Article, the aforementioned points of confluence with tributary rivers shall include the following:
 - a. On the Chowan River, its confluence with the Meherrin River;
 - b. On the Roanoke River, its confluence with the northeast branch of the Cashie River;
 - c. On the Tar River, its confluence with Tranters Creek;
 - d. On the Neuse River, its confluence with Swift Creek;
 - e. On the Trent River, its confluence with Ready Branch.

Provided, however, that no county shall be considered to be within the coastal area which: (i) is adjacent to, adjoining or bounded by any of the above points of confluence and lies entirely west of said point of confluence;

or (ii) is not bounded by the Atlantic Ocean and lies entirely west of the westernmost of the above points of confluence.

- (4) "Commission" means the Coastal Resources Commission created by G.S. 113A-104.
- (4a) "Department" means the Department of Environmental Quality.
- (5) a. "Development" means any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision) involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal; or placement of a floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).
- b. The following activities including the normal and incidental operations associated therewith shall not be deemed to be development under this section:
1. Work by a highway or road agency for the maintenance of an existing road, if the work is carried out on land within the boundaries of the existing right-of-way, or for emergency repairs and safety enhancements of an existing road as described in an executive order issued under G.S. 166A-19.30(a)(5).
 2. Work by any railroad company or by any utility and other persons engaged in the distribution and transmission of petroleum products, water, telephone or telegraph messages, or electricity for the purpose of inspecting, repairing, maintaining, or upgrading any existing substations, sewers, mains, pipes, cables, utility tunnels, lines, towers, poles, tracks, and the like on any of its existing railroad or utility property or rights-of-way, or the extension of any of the above distribution-related facilities to serve development approved pursuant to G.S. 113A-121 or 113A-122;
 3. Work by any utility and other persons for the purpose of construction of facilities for the development, generation, and transmission of energy to the extent that such activities are regulated by other law or by present or future rules of the State Utilities Commission regulating the siting of such facilities (including environmental aspects of such siting), and work on facilities used directly in connection with the above facilities;
 4. The use of any land for the purposes of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, or for other agricultural purposes except where excavation or filling affecting estuarine waters (as defined in G.S. 113-229) or navigable waters is involved;
 5. Maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements or to

- prevent damage to imminently threatened structures by the creation of protective sand dunes.
6. The construction of any accessory building customarily incident to an existing structure if the work does not involve filling, excavation, or the alteration of any sand dune or beach;
 7. Completion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to ratification of this Article and which development was initiated prior to the ratification of this Article;
 8. Completion of installation of any utilities or roads or related facilities not otherwise in violation of law, within a subdivision that was duly approved and recorded prior to the ratification of this Article and which installation was initiated prior to the ratification of this Article;
 9. Construction or installation of any development, not otherwise in violation of law, for which an application for a building or zoning permit was pending prior to the ratification of this Article and for which a loan commitment (evidenced by a notarized document signed by both parties) had been made prior to the ratification of this Article; provided, said building or zoning application is granted by July 1, 1974;
 10. It is the intention of the General Assembly that if the provisions of any of the foregoing subparagraphs 1 to 10 of this paragraph are held invalid as a grant of an exclusive or separate emolument or privilege or as a denial of the equal protection of the laws, within the meaning of Article I, Secs. 19 and 32 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions.
- c. The Commission shall define by rule (and may revise from time to time) certain classes of minor maintenance and improvements which shall be exempted from the permit requirements of this Article, in addition to the exclusions set forth in paragraph b of this subdivision. In developing such rules the Commission shall consider, with regard to the class or classes of units to be exempted:
1. The size of the improved or scope of the maintenance work;
 2. The location of the improvement or work in proximity to dunes, waters, marshlands, areas of high seismic activity, areas of unstable soils or geologic formations, and areas enumerated in G.S. 113A-113(b)(3); and
 3. Whether or not dredging or filling is involved in the maintenance or improvement.
- (5a) "Floating structure" means any structure, not a boat, supported by a means of floatation, designed to be used without a permanent foundation, which is used or intended for human habitation or commerce. A structure shall be considered a floating structure when it is inhabited or used for commercial purposes for more than thirty days in any one location. A boat may be considered a floating structure when its means of propulsion has been removed or rendered inoperative.

- (6) "Key facilities" include the site location and the location of major improvement and major access features of key facilities, and mean:
 - a. Public facilities, as determined by the Commission, on nonfederal lands which tend to induce development and urbanization of more than local impact, including but not limited to:
 - 1. Any major airport designed to serve as a terminal for regularly scheduled air passenger service or one of State concern;
 - 2. Major interchanges between the interstate highway system and frontage-access streets or highways; major interchanges between other limited-access highways and frontage-access streets or highways;
 - 3. Major frontage-access streets and highways, both of State concern; and
 - 4. Major recreational lands and facilities;
 - b. Major facilities on nonfederal lands for the development, generation, and transmission of energy.
- (7) "Lead regional organizations" means the regional planning agencies created by and representative of the local governments of a multi-county region, and designated as lead regional organizations by the Governor.
- (8) "Local government" means the governing body of any county or city which contains within its boundaries any lands or waters subject to this Article.
- (9) "Person" means any individual, citizen, partnership, corporation, association, organization, business trust, estate, trust, public or municipal corporation, or agency of the State or local government unit, or any other legal entity however designated.
- (10) Repealed by Session Laws 1987, c. 827, s. 133.
- (11) "Secretary" means the Secretary of Environmental Quality, except where otherwise specified in this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 913, s. 1; c. 932, s. 2.1; 1987, c. 827, s. 133; 1989, c. 727, s. 126; 1991 (Reg. Sess., 1992), c. 839, ss. 1, 4; 1995, c. 509, s. 58; 1997-443, s. 11A.119(a); 2012-202, s. 1; 2014-100, s. 14.7(l); 2015-241, s. 14.30(u), (v).)



State of North Carolina

Department of Justice

P. O. Box 629
RALEIGH
27602

RUFUS L. EDMISTEN
ATTORNEY GENERAL

September 27, 1983

MEMORANDUM

TO: Submerged Lands Task Force
FROM: Allen Jernigan
Re: Shellfish grants, perpetual franchises and leases.

I. INTRODUCTION

North Carolina's law concerning shellfish rights, particularly grants, perpetual franchises and leases of public bottom land, has evolved through numerous legislative enactments and court decisions into the State's modern leasing regulations under G.S. 113-202. In order to determine ownership of the State's bottom lands with regard to claims filed under G.S. 113-205, it is necessary to retrace the somewhat intricate evolution of the law in this area.

Certain session laws discussed below may cause confusion as to who retains title to oyster bottoms leased, licensed and granted by the State in the past. Several counties, for example, were subject to session laws that affected only the bottom lands in that county. The clauses of session laws often delegate to certain counties various powers to regulate the shellfish fisheries within

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its waters. The session laws were also continuously amended, with exemptions for different counties enacted, and then repealed.

Set out below is a general exposition of the historical development of the State's shellfish law, and an overview of applicable court decisions.

II. HISTORICAL PERSPECTIVE

The first significant regulation of North Carolina's shellfish resources occurred in 1859, when the legislature enacted the State's initial oyster bed licensing law. That statute authorized the courts of common pleas and quarter sessions to issue perpetual licenses for the exclusive use of bottom land. The law included certain restrictions, the most important of which were a ban on the licensing of natural shellfish beds, and a two-acre size limitation. Onslow County was specifically excluded from the operation of the statute. In 1872, the General Assembly amended the statute by increasing the acreage limit to ten acres, repealing the exclusion of Onslow County and conferring upon the Superior Courts the authority to issue licenses.

The legislature rewrote the law in 1883, retaining the ten-acre minimum, but vesting licensing authority in the clerks of Superior Court. All licenses were to be distinctly marked with stakes, but were not to infringe upon natural beds or to interfere

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with the "free navigation" of the waters. The statute also empowered county commissioners to survey and examine all licensed beds in their county. A shellfish license was voidable if a licensee had included a natural bed or more than ten acres within the stated boundaries, or had failed to cultivate the bed within two years.

Chapter 119 of the 1887 Session Laws instituted a moratorium on licensing shellfish beds in the Pamlico Sound vicinity. The legislation created the Board of Commissioners of Shellfish Fisheries, who were to survey and map the area's natural beds, and open other areas for entry and grant of perpetual shellfish franchises for the exclusive use of the bottom. Such franchises were granted by the Secretary of State and were limited to ten acres within two miles of shore and 640 acres beyond the two-mile limit.

In 1889 the General Assembly enacted Chapter 179 of the Session Laws, which authorized any citizen to purchase and hold title in fee simple to any grounds entered, or to enter any grounds subject to entry beneath the waters of Pamlico Sound. The statute required a certain level of oyster cultivation in order to maintain fee title to the bottom land.

During the same era, many statutes were enacted regulating the production and cultivation of oysters in particular counties. Chapter 90 of 1889 Session Laws, for example, authorized the selection of an Onslow County Board of Shellfish Commissioners.

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The Commissioners' duty was to survey and stake out natural beds for public use, and to set aside other bottom land for grant by the Secretary of State.

After the turn of the century, the General Assembly provided for a uniform leasing system for oyster and clam bottoms. In 1905 a leasing system providing for yearly rental fees was first established. Power to lease, like the power to license, was originally vested in the clerks of Superior Court, but was ultimately transferred to the Shellfish Commission in 1909. By 1919, the Board of Commissioners of Shell Fisheries was authorized to specify the acreage which could be leased in several coastal counties.

In 1933, the legislature enacted a number of statutes which authorized the Board of Conservation and Development to lease shellfish beds to North Carolina citizens. The statutes provided for renewable leases of a 20-year period at a minimal rental rate. In 1967, revised leasing system, G.S. 113-202, was established largely as a response to the 1966 case of Oglesby v. Adams, 268 NC 272, which held that a statute raising the rent on such leases during the lease term unconstitutionally abrogated the State's contractual obligation under the lease. The new leasing regulations, which exempt Brunswick County, gave the Marine Fisheries Commission exclusive discretionary power to grant or deny leases of public bottom for shellfish cultivation. The new statute expressly repealed all laws in conflict with it.

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III. LEGAL ANALYSIS

The courts have held that shellfish leases granted under State law since at least 1933 (and probably since 1905) are not perpetual franchises but are merely leasehold interests which terminate and may be renewed at the end of the term of the lease. Oglesby v. McCoy, 41 N. C. App. 735 (1979); Oglesby v. Adams, 268 N. C. 272 (1966). Grants under session laws occurring since 1854, however, are potentially more damaging to the State's interest. This is particularly true of purported fee simple interests granted under the session laws between 1887 and 1893.

In State v. Spencer, 114 N. C. 770 (1894), the court undertakes a significant intervention of the numerous changes in the law during that time period. At page 777, it appears that the Court considered all the changes and concluded:

"The final decision of the board (Board of Commissioners of Shell Fisheries) was to be published, and entries might be made on any ground which had not been designated as public ground, and after payment therefore, grants were to issue, to the enterer, of a perpetual franchise to cultivate oysters within a certain limit and upon a certain condition...

There is no question but that the locality of the grant was upon the land covered by the waters of Pamlico Sound, which is navigable water, and that the same was not subject to grant under the general laws regarding entries and grants, and became so subject in a qualified sense by virtue of the

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of the act of 1887.

It will be conceded, also, that there was no stretching of the power of the Legislature in delegating to a board of commissioners the authority to designate what portions of the public domain not free to entry already should be opened to entry for the special purposes designated."

In the case of State v. Young, 138 NC 571 (1905), our Court held that a license, issued under those statutes, was not an interest in land. The basis of that decision was that lands being covered by navigable water were not subject to grant under the general law of the State, citing the entry and grant law. In support of that holding, the Court cited Rea v. Hampton, 101 NC 51 (1888) and State v. Connor, 197 NC 931 (1890). In Rea, the Court held:

"The Constitution of the State, unlike that of the United States, contains limitations on, and not grants of, legislative power. Albermarle Sound being navigable, is not subject to entry, and every citizen of the State has the liberty and privilege of fishing therein, subject to such regulations of the right as the Legislature may establish."

The Connor case does not speak to this point. The Rea case cited and relied on two earlier opinions of the Court concerning exclusive and several fishery rights in Albemarle Sound. Skinner v. Hettrick, 73 NC 53 (1875); Hettrick v. Page, 82 NC 65 (1880).

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In Skinner, the Court stated "a few general principles" of law:

"1. Albemarle Sound, being a navigable water, is not subject to entry, but every citizen of the State has the liberty and privilege of fishing therein.

2. While the owner of a beach has the right of drawing his seine to his beach, in exclusion of others, yet he cannot acquire the sole right of fishing, independently of all others, in a certain portion of the waters of the sound.

3. To constitute a several fishery there must be a right of soil, which no person has in Albemarle Sound.

4. At common law, there could not be a several fishery in a navigable stream.

5. The regulation of the right of fishing in navigable streams is a proper subject to legislation, and has been treated as such in this State, by acts establishing lay days, and the like."

These principles were reaffirmed in the Page case.

During the late 19th and early 20th century, our courts

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have considered grants of public bottom made during that era. Those cases, when read together, lead to the conclusion that any statutes attempting to establish a system to grant bottom lands were in excess of the Legislative authority, and all such grants are void. As a result, the cases tend to indicate that such grants properly could be construed as franchises or leases.

§ 160D-702. Grant of power.

(a) A local government may adopt zoning regulations. Except as provided in subsections (b) and (c) of this section, a zoning regulation may regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lots that may be occupied; the size of yards, courts, and other open spaces; the density of population; the location and use of buildings, structures, and land. **A local government may regulate development, including floating homes, over estuarine waters and over lands covered by navigable waters owned by the State pursuant to G.S. 146-12.** A zoning regulation shall provide density credits or severable development rights for dedicated rights-of-way pursuant to G.S. 136-66.10 or G.S. 136-66.11. Where appropriate, a zoning regulation may include requirements that street and utility rights-of-way be dedicated to the public, that provision be made of recreational space and facilities, and that performance guarantees be provided, all to the same extent and with the same limitations as provided for in G.S. 160D-804 and G.S. 160D-804.1.

(b) Any regulation relating to building design elements adopted under this Chapter may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings except under one or more of the following circumstances:

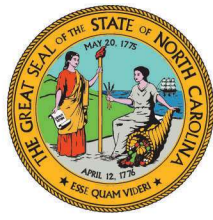
- (1) The structures are located in an area designated as a local historic district pursuant to Part 4 of Article 9 of this Chapter.
- (2) The structures are located in an area designated as a historic district on the National Register of Historic Places.
- (3) The structures are individually designated as local, State, or national historic landmarks.
- (4) The regulations are directly and substantially related to the requirements of applicable safety codes adopted under G.S. 143-138.
- (5) Where the regulations are applied to manufactured housing in a manner consistent with G.S. 160D-908 and federal law.
- (6) Where the regulations are adopted as a condition of participation in the National Flood Insurance Program.

Regulations prohibited by this subsection may not be applied, directly or indirectly, in any zoning district or conditional district unless voluntarily consented to by the owners of all the property to which those regulations may be applied as part of and in the course of the process of seeking and obtaining a zoning amendment or a zoning, subdivision, or development approval, nor may any such regulations be applied indirectly as part of a review pursuant to G.S. 160D-604 or G.S. 160D-605 of any proposed zoning amendment for consistency with an adopted comprehensive plan or other applicable officially adopted plan.

For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot, (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of neighbors, or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.

Nothing in this subsection affects the validity or enforceability of private covenants or other contractual agreements among property owners relating to building design elements.

(c) A zoning regulation shall not set a minimum square footage of any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 15, 51(a), (b), (d).)



NORTH CAROLINA
Environmental Quality

ROY COOPER
Governor

DIONNE DELLI-GATTI
Secretary

BRAXTON DAVIS
Director

CRC-21-17

May 25, 2021

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Floating Structure Policies and Shellfish Leases

The Commission has had a number of discussions and presentations related to shellfish aquaculture leases, public trust, CAMA jurisdictional issues, and the Division's involvement in the review of proposed shellfish leases. You will recall that the Division informed the Commission that it was noting an increase in requests that incorporate structural components associated with leases that may require a CAMA permit. These components often include pilings, gear anchors, and platforms.

At your February 2020 meeting, DMF staff reported on rulemaking efforts that included buffers between leases, a maximum number of marker pilings, increased public notice, and a requirement that any leases not meeting MFC standards will require a CAMA permit as part of the formal lease review process. At their February 2021 meeting, the MFC voted to approve these lease rules but the final effective date is delayed till June 2022 due to the required legislative review of the rules per S.L. 2019-198, related to regulatory crimes. However, these MFC rules do not address structures sited on a lease, and DMF defers to DCM on permitting this type of activity.

Last year, the Commission discussed Floating Upweller Systems (FLUPSYs) in relation to the Floating Structure Policies at 15A NCAC 07M .0600. In response, amendments were approved to incorporate FLUPSYs into the policy which would allow these floating structures to be sited in a permitted marina or associated with a private docking facility, subject to the platform area limitations that apply to private docking facilities elsewhere in your rules.

More recently, the Division has seen other floating structures placed within open water leases, whose primary purpose appears to be to provide shelter for equipment and processing operations associated with the lease. The Division views these structures from the perspective of balancing many interests and concerns, including public trust rights, potential resource impacts (e.g. from shading or grounding), use of permanent moorings, riparian property rights, aesthetics, and the



rapid expansion and growth potential in the commercial cultivation of shellfish. The Commission's original intent of the Floating Structures Policies was to protect public trust rights and water quality, primarily focused on health and safety concerns related to sewage disposal. However, the Commission was also focused on how these structures might be inconsistent with the Commission's standards as they are considered a non-water dependent use.

The Floating Structure Policies (attached with latest amendments) were originally adopted in 1983. The provisions include the definition of a boat, and define a "floating structure" as

“..any structure, not a boat, supported by a means of flotation, designed to be used without a permanent foundation, which is used or intended for human habitation or commerce. A structure will be considered a floating structure when it is inhabited or used for commercial purposes for more than thirty days in any one location. A boat may be deemed a floating structure when its means of propulsion has been removed or rendered inoperative and it contains at least 200 square feet of living space area.”

Floating structures must also conform with local regulations for on-shore sewage disposal, and not infringe upon public trust rights. Due to difficulties with enforcement and the CAMA definition of development (problems were encountered in cases where no pilings, excavation or filling was involved), the floating structure definition was incorporated into the CAMA definition of development in 1993, making it a regulated activity.

Since 1993, there have been a number of cases where owners have attempted to circumvent the policy by claiming that the structure met the definition of a boat by adding propulsion of sorts and registering the structure with the Wildlife Resources Commission. Over the years, several structures have been removed from state waters such as trailers on barges, mobile duck blinds and processing facilities associated with shellfish leases.

With the renewed interest in siting floating structures in shellfish leases, the Division is asking the Commission's renewed guidance concerning the general policy in 15A NCAC 07M .0601, which states “... that the general welfare and public interest require that floating structures to be used for residential or commercial purposes not infringe upon the public trust rights nor discharge into the public trust waters of the coastal area of North Carolina,” In particular, DCM seeks guidance on how these limitations can be incorporated into a supportive management strategy for the expanding shellfish industry while limiting public trust impacts.

NC G.S. 113-202, New and Renewal Leases for Shellfish Cultivation, states that “Cultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing and recreation.”

Additionally, local governments, through their CAMA lands use plan policies, have often addressed floating structures more generally in the context of floating homes. A review of the 20 coastal county land use plans shows 14 having floating home/structure policies with nine using the 15A NCAC 07M .0601 definition. Of the 14 counties with floating structure polices, 10 oppose floating homes and one prohibits floating structures within the jurisdiction altogether.

While these policies don't specifically address floating structures on shellfish leases, it is clear that local governments are concerned about the potential for occupancy of these structures in public trust areas.

Gear and structure-intensive aquaculture in other states has not been without controversy, with most vocal groups being waterfront property owners concerned about viewshed and interference with other public trust uses including navigation and fishing. We will also hear from the NC Coastal Federation about increased interest in floating processing facilities for shellfish leases, and potential interactions with the 7M Floating Structure Policies. I look forward to discussing the Floating Structure Policies and their relationship to shellfish cultivation at our upcoming meeting in Beaufort.