

# NC COASTAL RESOURCES COMMISSION

September 24-26, 2008

Sea Trail Resort & Convention Center

Sunset Beach, NC

The State Government Ethics Act (Chapter 138A of the General Statutes) and Executive Order No. 1 mandates that the Chair (1) remind members of their duty to avoid conflicts of interest or appearances of conflict, and (2) inquire as to whether any member knows of any known conflict of interest or appearance of conflict with respect to matters before the Commission. If any member knows of a conflict of interest or appearance of conflict, please so state when requested by the Chairman.

## Wednesday, September 24<sup>th</sup>

**3:00 COMMISSION CALL TO ORDER** (Jones Byrd Salons 2&3) Joan Weld, Vice Chair

- Roll Call

### VARIANCES

- Butler – (CRC-VR-08-46) Emerald Isle, Septic in oceanfront setback Amanda Little
- Town of Kure Beach – (CRC-VR-08-45) Kure Beach, Oceanfront setback Amanda Little
- Wilmington Light Infantry Beach Club - (CRC-VR-08-47) Wrightsville Beach, Combined finger piers, T's and decks exceed four sq.ft. per linear foot of shoreline Amanda Little
- NC Aquarium (CRC-VR-08-50) Nags Head, Pier House in oceanfront setback Christine Goebel
- Ocean Isle Beach (CRC-VR-08-51) Sandbag structure dimensions Christine Goebel

**6:00 Executive Committee Meeting**(TBD) Bob Emory, Chair

## Thursday, September 25<sup>th</sup>

**8:00 COMMISSION CALL TO ORDER** (Jones Byrd Salons 2&3) Bob Emory, Chair

- Roll Call
- Approval of July 23-25, 2008 Meeting Minutes
- Executive Secretary's Report Jim Gregson
- Chairman's Comments Bob Emory
- South Carolina Coastal Program – S.C. Coastal Issues Update Carolyn Boltin,  
Deputy Commissioner  
SC OCRM

### CONTESTED CASES

- Cowell/Dressler v. DCM & Westphal; 06 EHR 1185 Christine Goebel
- NC Coastal Federation v. DCM & Wind Over Waves, LLC; 07 EHR 0345 Christine Goebel

### 10:00 PRESENTATIONS

- CRAC Report Dara Royal
- Offshore Wind Energy Bob Leker,  
State Energy Office
- Offshore Wind Energy in NC: Legal Framework Lisa Schiavinato,  
NC Sea Grant
- Overview of Local Wind Ordinances Joe Kalo, UNC Law School
- Environmental Management Commission's Renewable Energy Committee Paul Quinlan,  
NC Sustainable Energy Assoc.  
Steve Smith, EMC

### ACTION ITEMS

- Currituck County Land Use Plan Amendment(CRC-08-37)
- Carolina Beach Land Use Plan Amendment(CRC-08-38)

Bob Emory

**12:15 LUNCH**

**1:15 PRESENTATIONS**

- Wind Energy Panel Presentations Steve Smith, EMC  
- Audubon, DMF, DOA, DCM, WRC, State Energy Office, Marine Corps, Carteret County, NCSEA

**3:00 PUBLIC HEARINGS**

Bob Emory, Chair

- 15A NCAC 7H .0205 Coastal Wetlands
- 15A NCAC 7H .1401, .1402, .1404, .1405 GP for Construction of Groins in Estuarine & Public Trust Waters
- 15A NCAC 7H .2101, .2102, .2104, .2105 GP for Marsh Enhancement Breakwaters
- 15A NCAC 7H .2401, .2402, .2404, .2405 GP for Placement of Riprap for Wetland Protection
- 15A NCAC 7J .0701, .0703 Variance Petitions
- 15A NCAC 7M .0301, .0302, .0303, .0306, .0307 Shorefront Access Policies

**3:30 Wind Energy Panel Discussion**

Steve Smith, EMC

**Friday, September 26<sup>th</sup>**

**8:30 COMMISSION CALL TO ORDER (Jones Byrd Salons 1&2)**

Bob Emory, Chair

**PRESENTATIONS**

- CAMA Major Permit and Dredge & Fill Review Process(*CRC-08-39*) Doug Huggett
- CHPP Shoreline Stabilization Subcommittee Update Bob Emory
- Ocean Policy Study Committee Update(*CRC-08-40*) Scott Geis
- Beach and Inlet Management Plan Update(*CRC-08-41*) Steve Underwood
- Public Comment Summary-15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas & 15A NCAC 7J .1200 Static Line Exception Procedures (*CRC-08-42*) Jeff Warren
- Staff Recommendations-15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas & 15A NCAC 7J .1200 Static Line Exception Procedures (*CRC-08-43*) Jeff Warren

**11:00 PUBLIC INPUT AND COMMENT**

**ACTION ITEMS**

Bob Emory

- Adopt 15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas
- Adopt 15A NCAC 7J .1200 Static Line Exception Procedures

**OLD/NEW BUSINESS**

Bob Emory

- CRAC Nominating Committee
- Future Agenda Items

**12:00 ADJOURNMENT**

**NEXT MEETING:**  
November 19-21, 2008  
Crystal Coast Civic Center  
Morehead City, NC



N.C. Division of Coastal Management  
[www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)





CRC-VR-08-46

State of North Carolina

Department of Justice

P. O. Box 629

RALEIGH

27602-0629

ROY COOPER  
ATTORNEY GENERAL

TO: Coastal Resources Commission

FROM: Amanda P. Little *APL*  
Assistant Attorney General

DATE: September 12, 2008 (for the September 24-26, 2008 CRC Meeting)

RE: **Variance Request by Richard and Linda Butler**

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Petitioner applied for a CAMA minor permit to install (upgrade) the septic system at 509 Ocean Drive in Emerald Isle, Carteret County, NC. All of the proposed development is seaward of the applicable ocean erosion setback line, which at this location is 60 feet landward of the static vegetation line. Petitioner applied for this variance seeking relief from strict application of the Commission's ocean hazard rules at 15A NCAC 7H .0306(a) and .0309(b).

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Petitioners' and Staff's Positions to Criteria  
Attachment D: Petitioners' Variance Request Materials  
Attachment E: Stipulated Exhibits

cc: Richard and Linda Butler, Petitioners  
Jim Gregson, DCM Director  
Ted Tyndall, DCM Assistant Director  
Ed Brooks, DCM Minor Permit Program Coordinator  
James Taylor, Town of Emerald Isle LPO  
Jennie Hauser, CRC Counsel



**RELEVANT STATUTES OR RULES**

**15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas**

- (a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.
  - (1) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.
  - (2) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located seaward of the primary dune. In such cases, the development shall be located landward of the long-term erosion setback line and shall not be located on or in front of a frontal dune. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.
  - (3) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal dune or landward of the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable.

**15A NCAC 7H .0309 Use Standards for Ocean Hazard Areas: Exceptions**

a) The following types of development may be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campsites;
- (2) parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding a footprint of 500 square feet;
- (4) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single-story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;
- (7) temporary amusement stands;
- (8) swimming pools; and
- (9) sand fences.

In all cases, this development shall only be permitted if it is landward of the vegetation line; involves no significant alteration or removal of primary or frontal dunes or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures may be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.
  - (A) All pilings have a tip penetration that extends to at least four feet below mean sea level;
  - (B) The footprint of the structure be no more than 1,000 square feet or 10 percent of the lot size, whichever is greater.
- (5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system must be submitted as part of the CAMA permit application.

ATTACHMENT B

**STIPULATED FACTS**

1. Petitioners, Richard Butler and wife, Linda Butler, own a .258 acre tract of land, described as Lots 12, 13, and 14 of Block 3, Emerald Isle By-the-Sea (“the property”) located at 509 Ocean Drive in Emerald Isle, Carteret County, NC. The property was platted in 1954. Petitioners purchased the property in 1997.
2. In February 1981, an Operation Permit was issued for this property by the Carteret County Health Department for a wastewater system for a 2 bedroom house. (See Attachment E)
3. A one-story single family residence is located on the property. Prior to Petitioners’ purchase in 1997, the property was advertised for rent as a 4 bedroom house and was listed for sale as a 4 bedroom house. The Petitioners were using and had advertised the residence for rent as a 4 bedroom house.
4. On July 5, 2007, Petitioners received a Notice of Violation from the Carteret County Health Department. The notice stated that the wastewater system serving the property was not in compliance with the advertised use. According to a rental listing with a local realty company, the property was being advertised as a 4 bedroom residence, however the 1981 Operation Permit specified a 2 bedroom residence, limiting the use and rental of the residence to only 2 bedrooms with a maximum of 4 occupants. (See Attachment E)
5. Petitioners complied with the Health Department’s notice and is currently advertising the property as a 2 bedroom house.
6. Petitioners applied for an Improvement Permit to upgrade their current wastewater system to comply with the Health Department’s requirements for a 4-bedroom residence.
7. The Environmental Health Division of Carteret County Health Department issued Improvement Permit A-897 and an Authorization for Wastewater System Construction (as shown on the submitted site plan) to Petitioners on November 20, 2007, provided that both were contingent upon Petitioner’s receiving a CAMA permit prior to any site disturbance.
8. Petitioners applied for a CAMA Minor Development Permit to install a septic system in accordance with the Carteret County Health Department Permit No. A-897 and a proposed 8' by 30' (total 240 sq. ft.) concrete parking area. The application was dated February 21, 2008.
9. The property is located within the Ocean Erodible Area of Environmental Concern (AEC), a subcategory of the Ocean Hazard AEC designated by the Coastal Resources Commission

(CRC) in 15A NCAC 7H .0304.

10. Effective in 1979, the CRC adopted an erosion setback requirement that applies to structures along the oceanfront. Rule 15A NCAC 7H .0306(a).
11. The property is located within the boundaries of a large scale beach nourishment project that occurred in 2003, for which the static vegetation line was set on December 4, 2002.
12. The annual long-term erosion rate at this property is 2 feet per year, making the ocean erosion setback for the property 60 feet landward of the static vegetation line, which became effective on December 4, 2002, and as shown on the survey dated January 25, 2008.
13. When the 60' setback is applied on Petitioner's property, based on the December 4, 2002 static vegetation line, the proposed development on the property is located entirely seaward of the required setback, but landward of static vegetation line.
14. Both adjacent riparian owners have no objections to the proposed development on the property.
15. The CRC's rules prohibit any development on property seaward of the erosion setback line except for those listed as exceptions in 15A NCAC 7H .0309.
16. The local permit officer for the Town of Emerald Isle, James Taylor, denied the Petitioner's CAMA Minor Development Permit application by letter dated March 7, 2008.
17. Petitioners filed this variance request on July 23, 2008, seeking relief from strict application of the Ocean Hazard AEC erosion setback rules and the exceptions to those rules in 15A NCAC 7H .0306(a) and .0309.

ATTACHMENT C

**PETITIONERS' AND STAFF'S POSITIONS TO CRITERIA**

**I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.**

**Petitioner's Position: Yes.**

If our variance request is denied, we will be unable to comply with an order from the Carteret County Health Department. The property for which the variance is requested (509 Ocean Drive, Emerald Isle, NC) includes a 4-bedroom house. We purchased this house nearly fifteen years ago and were unaware (until recently notified by the Health Department) that the septic system installed when the house was built did not meet Health Department regulations for a 4-bedroom house. Since being notified by the Health Department, we have had several meetings with Health Department officials and our Local Permit Officer to try to devise a plan that would allow us to comply with the order of the Health Department. We have devised a plan to remedy this pre-existing condition that meets the approval of the Health Department. We intend to use the property as a retirement home, spending part of the year in Ohio and the remainder in Emerald Isle. We also intend to invite friends and family (as we have done for the past fifteen years) to Emerald Isle. While the 4 bedrooms will remain useful, we still will be out of compliance with the Health Department order. From the time we purchased the property, we have had no problems with the current septic system and did not initiate a request to install a new septic system but are still willing to do whatever is necessary to comply with the Health Department order. Further, there is now in place in Emerald Isle a beach renourishment project that may have altered the mean line of stable vegetation upon which the sixty-foot-setback relies. The approved septic system plan is located on the north (land side) and not the south (dune or ocean side) of the property.

**Staff's Position: No.**

There is no order from the Health Department requiring Petitioners to enlarge the septic system. Rather the order stated that Petitioners must advertise as 2 bedroom, and not a 4 bedroom rental. Petitioners did so and now are in compliance with the health department order. Petitioners can still use their property without a variance and an enlargement of their septic system as long as they advertize the property as a 2 bedroom. Petitioners however, wish to advertize the property as a 4 bedroom, presumably for the higher rental price. Missing out on a higher rental price by not being allowed to increase the septic capacity on property which does not meet the ocean erosion setback is not a hardship caused by the CRC's rules.

**II. Do such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property? Explain.**

**Petitioner's Position: Yes.**

The property at 509 Ocean Drive in Emerald Isle, NC, is beachfront property and has been affected by beach erosion and the resultant redetermination of the mean line of stable vegetation and the sixty-foot-setback line. Because of the depth of the lot, there is not enough room to install the new septic system required by the Carteret County Health Department within the CAMA boundaries.

**Staff's Position: No.**

There are no conditions peculiar to the Petitioner's property, rather it is similarly situated to surrounding properties. The static vegetation line was surveyed before the large scale nourishment project in 2002, a project that Petitioner's property and others have benefitted from. Petitioners are correct that this property has been affected by beach erosion, something which is common and not peculiar to Petitioner's property, and which affected the location of the static line. Also, the annual long-term erosion rate at the property is 2 feet per year, a minimal rate which is the most common rate along much of the North Carolina oceanfront.

**III. Do the hardships result from actions taken by the Petitioner? Explain.**

**Petitioner's Position: No.**

According to Health Department officials and the Local Permit Officer, had the septic system been sized appropriately for the house at the time of construction, there would be no problem. Since this is not the case, this is a pre-existing condition and we have taken no actions to create this hardship. We are willing to bring the septic system into compliance.

**Staff's Position: Yes.**

The hardship is a direct result of Petitioner's actions. The Petitioner is currently in compliance with the Health Department order by advertising their property for rent as a 2 bedroom house (as permitted) instead of 4 bedroom occupancy. Petitioner chooses to try to upgrade and enlarge the septic system, presumably for the increase in rental income. Moreover, it cannot be determined at this date if the property even at the time of construction was suitable for a 4 bedroom septic system instead of the permitted 2 bedroom system. Petitioners could have discovered the 2 bedroom septic classification at the time of sale through due diligence, and could have addressed this with the seller or not purchased this property. Petitioners are not required to

enlarge the septic system to continue current use, rather the larger system will benefit them economically in allowing them to advertise the property as 4 bedroom.

**IV. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

**Petitioner's Position: Yes.**

If a goal of the CRC is to preserve and protect the North Carolina coastline, granting this variance will help to meet this goal by allowing a minor rule waiver in order to ensure that a modern, functional septic system is located on our property. This can significantly help reduce the risk of a septic system failure and any resultant environmental problems. Further, this variance will allow us both to remedy a pre-existing condition for which we had no responsibility and to comply with an order from another governmental agency. Finally, complying with the Health department order is, in and of itself, supportive of public safety.

**Staff's Position: No.**

Staff contend that Petitioner's characterization of this variance as a minor rule waiver is misstated. The purpose of the Ocean Hazard Area rules are to minimize losses to life and property resulting from storms and long-term erosion, preventing encroachment of permanent structures on public beach areas, preserving the natural ecological conditions of the barrier dune and beach systems, and reducing the public costs of inappropriately sited development. The proper location and design of structures within the Ocean Hazard Areas is the foundation of the CRC's rules for that area. To allow the septic system to be enlarged and placed within the ocean erosion setback increases the risks of failure and discharge of pollutants into the ocean system. It also increases the possibility of the septic becoming an immanently threatened structure. It would be contrary to public safety and welfare to expand a septic system within a non-conforming area within the setback, and further threaten the ocean system, both by the septic tank structure on the beach and sewage contaminants. Staff feels strongly that allowing an expansion of a septic system located within the setback is contrary to the management objectives of the Ocean Hazard Area and not consistent with the spirit, purpose, and intent of the CRC's rules.

The variance would also not preserve substantial justice. The ocean erosion setbacks have been effective since 1979, and the static line in this case was set in December 2002 after Petitioners purchased their property. They could have discovered their septic system's capacity through due diligence before they purchased this property, or increased their septic capacity before the designation of the static line, had the earlier locations of the vegetation line allowed. To allow them now to increase the septic system within the setback would be unjust, and is not "required" by the health department.



**CRC-VR-08-46**

**ATTACHMENT D**

Attached are Petitioner's variance request materials.

08-46

Petitioner supplies the following information:

Your Name:

**Richard and Linda Butler  
270 S. Broadmoor Blvd.  
Springfield, OH 45504  
Phone: 937-399-7192  
Email: rick1949@mac.com**

Name of Your Attorney:  
not applicable

Have you received a decision from the Division of Coastal Management (DCM) or a Local Permit Officer denying your application for a CAMA permit?

no (You are not entitled to request a variance until your permit application has been denied.)

yes (You may proceed with a request for a variance.)

What did you seek a permit to do?

**We sought a permit to upgrade the septic system at 509 Ocean Drive in Emerald Isle, NC. The upgrade is required by the Carteret County Health Department.**

What Coastal Resource Commission Rule(s) prohibit this type of development?

**Our upgrade plan would violate the sixty-foot set-back rule.**

Can you redesign your proposed development to comply with this rule? No If your answer is no, explain why you cannot redesign to comply with the rule?

**After several discussions with both the Health Department and the Local Permit Officer, we have been advised that there is no redesign possible that would comply with the permit already granted by the Health Department.**

Can you obtain a permit for a portion of what you wish to do? No If so, please state what the permit would allow.

**We have a permit from the Health Department for installing a new septic system. We cannot obtain a CAMA permit from the Local Permit Officer.**

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

**As a result of the denial of our permit application, we are not able to comply with an order from the Carteret County Health Department that we upgrade the septic system at 509 Ocean Drive in Emerald Isle, NC. We have a permit from the Health Department approving our upgrade plan.**

RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to consider. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. {*Williams v. NCDENR, DCM, and CRC, 144 N.C. App. 479, 548 S.E.2d 793 (2001).*}]

**If our variance request is denied, we will be unable to comply with an order from the Carteret County Health Department. The property for which the variance is requested (509 Ocean Drive, Emerald Isle, NC) includes a 4-bedroom house. We purchased this house nearly fifteen years ago and were unaware (until recently notified by the Health Department) that the septic system installed when the house was built did not meet Health Department regulations for a 4-bedroom house. Since being notified by the Health Department, we have had several meetings with Health Department officials and our Local Permit Officer to try to devise a plan that would allow us to comply with the order of the Health Department. We have devised a plan to remedy this pre-existing condition that meets the approval of the Health Department. We intend to use the property as a retirement home, spending part of the year in Ohio and the remainder in Emerald Isle. We also intend to invite friends and family (as we have done for the past fifteen years) to Emerald Isle. While the 4 bedrooms will remain useful, we still will be out of compliance with the Health Department order. From the time we purchased the property, we have had no problems with the current septic system and did not initiate a request to install a new septic system but are still willing to do whatever is necessary to comply with the Health Department order. Further, there is now in place in Emerald Isle a beach renourishment project that may have altered the mean line of stable vegetation upon which the sixty-foot setback relies. The approved septic system plan is located on the north (land side) and not the south (dune or ocean side) of the property.**

II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.

**The property at 509 Ocean Drive in Emerald Isle, NC, is beachfront property and has been affected by beach erosion and the resultant redetermination of the mean line of stable vegetation and the sixty-foot setback line. Because of the depth of the lot, there is not enough room to install the new septic system required by the Carteret County Health Department within the CAMA boundaries.**

III. Explain why your hardship does not result from action you have taken.

**According to Health Department officials and the Local Permit Officer, had the septic system been sized appropriately for the house at the time of construction, there would be no problem. Since this is not the case, this is a pre-existing condition and we have taken no actions to create this hardship. We are willing to bring the septic system into compliance.**

IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.

**If a goal of the CRC is to preserve and protect the North Carolina coastline, granting this variance will help to meet this goal by allowing a minor rule waiver in order to ensure that a modern, functional septic system is located on our property. This can significantly help reduce the risk of a septic system failure and any resultant environmental problems. Further, this variance will allow us both to remedy a pre-existing condition for which we had no responsibility and to comply with an order from another governmental agency. Finally, complying with the Health Department order is, in and of itself, supportive of public safety.**

Please attach copies of the following:

Permit Application and Denial documents (**Attached**)

Site Drawing with Survey and Topographical Information (**Attached**)

Any letters filed with the DCM or the LPO commenting on or objecting to you project (**Attached**)

Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criteria, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree on. Those facts will be the only facts the Commission will consider in determining whether to grant your variance request.]

1. Septic upgrade required by Carteret County Health Department
2. Septic upgrade permit granted by Carteret County Health Department
3. Resizing of septic system made necessary as a result of a pre-existing condition
4. Beach renourishment project has had a significant positive impact on the current mean line of stable vegetation (**photo attached**)

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: 7-18-08 Signature: Richard J. Butler

Date: 7-18-08 Signature: Linda J. Butler

*This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.*

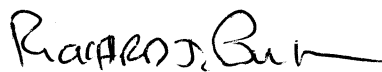
## CERTIFICATE OF SERVICE

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Copy: Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 18<sup>th</sup> day of **July, 2008**.



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Richard Butler



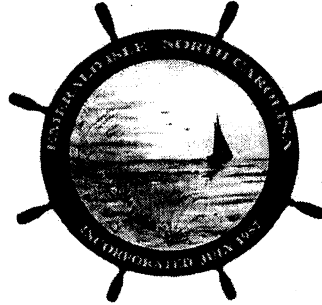
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Linda Butler

# Town of Emerald Isle

Reviewed  
7-902  
per office  
visit to  
CAMA  
(not mailed to  
7500 Emerald Drive  
Emerald Isle, NC 28594  
Voice 252-354-3338  
Fax 252-354-5387

Department of Planning and  
Inspections  
Kevin B. Reed, AICP, Director  
[kreed@emeraldisle-nc.org](mailto:kreed@emeraldisle-nc.org)



03/07/08

**CERTIFIED MAIL – 7006 0100 0003 9945 8736**  
**RETURN RECEIPT REQUESTED**

**MR RICK BUTLER**  
**270 SO BROADMOOR BLVD.**  
**SPRINGFIELD, OH 45504**

**RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT**  
**APPLICATION NUMBER – 08-15**  
**509 OCEAN DR. EMERALD ISLE, NC 28594**

Dear Mr. Butler:

After reviewing your application in conjunction with the development standards required by the Coastal Area Management Act (CAMA) and our locally adopted Land Use Plan and Ordinances, it is my determination that no permit may be granted for the project which you have proposed.

This decision is based on my findings that your request violates NCGS 113A-120(a) (8) which requires that all applications be denied which are inconsistent with CAMA guidelines. You have applied for a permit to install a septic system in accordance with the Environmental Health Division of Carteret County Health Department permit number A-897 and an 8' x 30' total 240 sq. ft. of proposed concrete within the ocean front setbacks.

The exceptions to the Ocean Hazard set back requirements found in 15A NCAC07H.030q which states that: The following types of development shall be permitted seaward of the oceanfront setback requirements of Rule .0306 (a) of the subchapter if all other provisions of this Subchapter and other State and Local Regulations are met:

- (1) campsites;
- (2) parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding a footprint of 500 square feet;
- (4) beach access ways consistent with Rule .0308 (c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single –story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;



- (7) temporary amusement stands;
- (8) sand fences; and
- (9) Swimming pools.

Therefore I have concluded that your request is inconsistent with these rules. Should you wish to appeal my decision to the Coastal Resource Commission or request variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. The Division of Coastal Management Morehead City Headquarters Office must receive appeal notices within twenty (20) days of the date of this letter in order to be considered.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'J. Taylor', written over a faint circular stamp or watermark.

James Taylor, LPO  
Town of Emerald Isle / Carteret County  
7500 Emerald Dr.  
Emerald Isle, NC 28594



# APPLICATION FOR CAMA MINOR DEVELOPMENT PERMIT

In 1974, the North Carolina General Assembly passed the Coastal Area Management Act and set the stage for guiding development in fragile and productive areas that border the state's sounds and oceanfront. Along with requiring special care by those who build and develop, the General Assembly directed the Coastal Resources Commission (CRC) to implement clear regulations that minimize the burden on the applicant.

This application for a minor development permit under CAMA is part of the Commission's effort to meet the spirit and intent of the General Assembly. It has been designed to be straightforward and require no more time or effort necessary from the applicant. Please go over this folder with the Local Permit Officer (LPO) for the locality in which you plan to build to be certain that you understand what information he or she needs.

Under CAMA regulations, the minor permit is to be issued within 25 days once a complete application is in hand. Often less time is needed if the project is simple. The process generally takes about 18 days. You can speed the approval process by making certain that your application is complete and signed, that your drawing meets the specifications given inside and that your application fee is attached.

Other permits are sometimes required for development in the coastal area. While these are not CAMA-related, we urge you to check with the Local Permit Officer to determine which of these you may need. A listing is included on page 2 of this folder.

We appreciate your cooperation with the North Carolina Coastal Management Program and your willingness to build in a way that protects the resources of our beautiful and productive coast.

Coastal Resources Commission  
Division of Coastal Management

APPLICATION:

LOCALITY:

Locality \_\_\_\_\_ Permit Number \_\_\_\_\_

Ocean Hazard  Estuarine Shoreline \_\_\_\_\_ ORW Shoreline \_\_\_\_\_ Public Trust Shoreline \_\_\_\_\_ Other \_\_\_\_\_  
(For official use only)

**GENERAL INFORMATION**

**LAND OWNER**

Name RICHARD AND LINDA BUTLER  
Address ~~509 OCEAN~~ 270 S. BROADMOOR BLVD.  
City SPRINGFIELD State OHIO Zip 45504 Phone 937-399-7192

**AUTHORIZED AGENT**

Name N/A  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

**LOCATION OF PROJECT:** (Address, street name and/or directions to site. If not oceanfront, what is the name of the adjacent waterbody?) ADDRESS: 509 OCEAN DRIVE, EMERALD ISLE, NC

**DESCRIPTION OF PROJECT:** (List all proposed construction and land disturbance.) \_\_\_\_\_

- (1) INSTALL/UPGRADE SEPTIC SYSTEM TO COMPLY WITH HEALTH DEPARTMENT ORDER
- (2) MINOR NORTH STAIR WORK
- (3) SOME CONCRETE REMOVAL

**SIZE OF LOT/PARCEL:** 11,250 (<sup>75x150</sup>) square feet \_\_\_\_\_ acres

**PROPOSED USE:** Residential  (Single-family  Multi-family \_\_\_\_\_ ) Commerical/Industrial \_\_\_\_\_  
Other \_\_\_\_\_

**TOTAL ENCLOSED FLOOR AREA OF A BUILDING IN THE OCEAN HAZARD AREA OF ENVIRONMENTAL CONCERN (AEC):** 1840 ft<sup>2</sup> square feet (includes all floors and roof-covered decks)

**SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OR BUILT-UPON SURFACES IN THE COASTAL SHORELINE AREA OF ENVIRONMENTAL CONCERN (AEC):** N/A sq. ft.

(Calculations include the area of the roof/drip line of all buildings, driveways, covered decks, concrete or masonry patios, etc. that are within the applicable AEC. Attach your calculations with the project drawing.)

**Choose the AEC area that applies to your property:**

- (1) within 75 feet of Normal High Water for the Estuarine Shoreline AEC
  - (2) within 575 feet of Normal High Water for the Estuarine Shoreline AEC, adjacent to Outstanding Resource Waters
  - (3) within 30 feet of the Public Trust Shoreline AEC
- (Contact your Local Permit Officer if you are not sure which AEC applies to your property.)

**STATE STORMWATER MANAGEMENT PERMIT:** Is the project located in an area subject to a State Stormwater Management Permit issued by the N.C. Division of Water Quality?

YES \_\_\_\_\_ NO

If yes, list the total built-upon area/impervious surface allowed for your lot or parcel. \_\_\_\_\_ square feet.

**OTHER PERMITS MAY BE REQUIRED:** The activity you are planning may require permits other than the CAMA minor development permit. As a service we have compiled a list of the kinds of permits that might be required. We suggest you check over the list with your LPO to determine if any of these apply to your project: Zoning, Drinking Water Well, Septic Tank (or other sanitary waste treatment system), Building, Electrical, Plumbing, Heating and Air Conditioning, Insulation and Energy Conservation, FIA Certification, Sand Dune, Sediment Control, Subdivision Approval, Mobile Home Park Approval, Highway, Connection, and others.

**STATEMENT OF OWNERSHIP:**

I, the undersigned, an applicant for a CAMA minor development permit, being either the owner of property in an AEC or a person authorized to act as an agent for purposes of applying for a CAMA minor development permit, certify that the person listed as landowner on this application has a significant interest in the real property described therein. This interest can be described as: (check one)

an owner or record title. Title is vested in CARTERET COUNTY REGISTRY, see Deed Book MB 3 page 57 in the CARTERET County Registry of Deeds.

an owner by virtue of inheritance. Applicant is an heir to the estate of \_\_\_\_\_; probate was in \_\_\_\_\_ County.

if other interest, such as written contract or lease, explain below or use a separate sheet and attach to this application.

**NOTIFICATION OF ADJACENT PROPERTY OWNERS:**

I furthermore certify that the following persons are owners of properties adjoining this property. I affirm that I have given **ACTUAL NOTICE** to each of them concerning my intent to develop this property and to apply for a CAMA permit.

(Name)	(Address)
(1) <u>GEORGE R. HALL, JR.</u>	<u>2551 ALBEMARLE AVENUE, RALEIGH, NC, 27610</u>
(2) <u>EDITH L. SKINNER</u>	<u>3616 WESTRIDGE CIRCLE DRIVE, ROCKY MOUNT, NC 27804</u>
(3) _____	_____
(4) _____	_____

**FOR DEVELOPERS IN OCEAN HAZARD AND ESTUARINE HAZARD AREAS:**

I acknowledge that the land owner is aware that the proposed development is planned for an area which may be susceptible to erosion and/or flooding. I acknowledge that the local permit officer has explained to me the particular hazard problems associated with this lot. This explanation was accompanied by recommendations concerning stabilization and floodproofing techniques.

**PERMISSION TO ENTER ON LAND:**

I furthermore certify that I am authorized to grant and do in fact grant permission to the local permit officer and his agents to enter on the aforementioned lands in connection with evaluating information related to this permit application.

This application includes: general information (this form), a site drawing as described on the back of this application, the ownership statement, the AEC hazard notice where necessary, a check for \$100.00 made payable to the locality, and any information as may be provided orally by the applicant. The details of the application as described by these sources are incorporated without reference in any permit which may be issued. Deviation from these details will constitute a violation of any permit. Any person developing in an AEC without permit is subject to civil, criminal and administrative action.

This the 21 day of February, 20 08  
RICHARD BUTLER

Landowner or person authorized to act as his agent for purpose of filing a CAMA permit application.

# SITE DRAWING/APPLICATION CHECKLIST

Please make sure your site drawing includes the following information required for a CAMA minor development permit. The drawing may be simple and not necessarily to scale. The Local Permit Officer will help you, if requested.

## PHYSICAL DIMENSIONS

- \_\_\_\_\_ Label roads
- \_\_\_\_\_ Label highways right-of-ways
- \_\_\_\_\_ Label local setback lines
- \_\_\_\_\_ Label any and all structures and driveways currently existing on property

## PHYSICAL CHARACTERISTICS

- \_\_\_\_\_ Draw and label mean high water mark
- \_\_\_\_\_ Draw location of on-site wastewater system

If you will be working in the ocean hazard area:

- \_\_\_\_\_ Draw and label dune ridges (note height)
- \_\_\_\_\_ Draw and label toe of dune
- \_\_\_\_\_ Identify and locate first line of stable vegetation
- \_\_\_\_\_ Draw and label setback line under CAMA
- \_\_\_\_\_ Draw and label topographical features (optional)

If you will be working in an estuarine shoreline area:

- \_\_\_\_\_ Draw and label landward limit of AEC
- \_\_\_\_\_ Describe terrain (slope)

## DEVELOPMENT PLANS

- \_\_\_\_\_ Draw and label areas that will be disturbed
- \_\_\_\_\_ If a house is to be placed on lot, describe location of house
- \_\_\_\_\_ Note size of piling and depth to be placed in ground
- \_\_\_\_\_ Draw and label all areas to be paved or graveled
- \_\_\_\_\_ Describe composition of surface
- \_\_\_\_\_ Note and list fully all trees and vegetation to be removed or relocated
- \_\_\_\_\_ Show landscaping

## NOTE TO APPLICANT

Have you:

- completed all blanks and / or indicated if not applicable?
- notified and listed adjacent property owners?
- included your site drawing/
- signed both application and statement of ownership?
- enclosed the \$100.00 fee?
- completed an AEC Hazard Notice, if necessary?

### FOR STAFF USE

Site Notice Posted \_\_\_\_\_ Final Inspection \_\_\_\_\_ Fee Received \_\_\_\_\_

Site Inspections

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date of Action: Issued \_\_\_\_\_ Exempted \_\_\_\_\_ Denied \_\_\_\_\_ Appeal Deadline (20 days) \_\_\_\_\_

Revised 3/2003

# AEC HAZARD NOTICE

Project Is In An:  Ocean Erodible Area  High Hazard Flood Area  Inlet Hazard Area

Property Owner: RICHARD AND LINDA BUTLER

Property Address: 509 OCEAN DRIVE, EMERALD ISLE, NC

Date Lot Was Platted: 1954

This notice is intended to make you, the applicant, aware of the special risks and conditions associated with development in this area, which is subject to natural hazards such as storms, erosion and currents. The rules of the Coastal Resources Commission require that you receive an AEC Hazard Notice and acknowledge that notice in writing before a permit for development can be issued.

The Commission's rules on building standards, oceanfront setbacks and dune alterations are designed to minimize, but not eliminate, property loss from hazards. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development. Permits issued in the Ocean Hazard Area of Environmental Concern include the condition that structures be relocated or dismantled if they become imminently threatened by changes in shoreline configuration. The structure(s) must be relocated or dismantled within two (2) years of becoming imminently threatened, and in any case upon its collapse or subsidence.

The best available information, as accepted by the Coastal Resources Commission, indicates that the annual long-term average ocean erosion rate for the area where your property is located is 2 feet per year.

The rate was established by careful analysis of aerial photographs of the coastline taken over the past 50 years.

Studies also indicate that the shoreline could move as much as 50 feet landward in a major storm.

The flood waters in a major storm are predicted to be about 14 feet deep in this area.

Preferred oceanfront protection measures are beach nourishment and relocation of threatened structures. Hard erosion control structures such as bulkheads, seawalls, revetments, groins, jetties and breakwaters are prohibited. Temporary sand bags may be authorized under certain conditions.

The applicant must acknowledge this information and requirements by signing this notice in the space below. Without the proper signature, the application will not be complete.

**SPECIAL NOTE:** This hazard notice is required for development in areas subject to sudden and massive storms and erosion. Permits issued for development in this area expire on December 31 of the third year following the year in which the permit was issued. Shortly before work begins on the project site, the Local Permit Officer must be contacted to determine the vegetation line and setback distance at your site. If the property has seen little change since the time of permit issuance, and the proposed development can still meet the setback requirement, the LPO will inform you that you may begin work. Substantial progress on the project must be made within 60 days of this setback determination, or the setback must be remeasured. Also, the occurrence of a major shoreline change as the result of a storm within the 60-day period will necessitate remeasurement of the setback. It is important that you check with the LPO before the permit expires for official approval to continue the work after the permit has expired. Generally, if foundation pilings have been placed and substantial progress is continuing, permit renewal can be authorized. It is unlawful to continue work after permit expiration.

*For more information, contact:*

\_\_\_\_\_  
Local Permit Officer

\_\_\_\_\_  
Address

\_\_\_\_\_  
Locality

\_\_\_\_\_  
Phone Number

Richard Butler  
Applicant Signature

2-21-08  
Date

# BEFORE YOU BUILD

## Setting Back for Safety: A Guide to Wise Development Along the Oceanfront

When you build along the oceanfront, you take a calculated risk. Natural forces of water and wind collide with tons of force, even on calm days.

Man-made structures cannot be guaranteed to survive the force of a hurricane. Long-term erosion (or barrier island migration) may take from two to ten feet of the beach each year, and, sooner or later, will threaten oceanfront structures. These are the facts of life for oceanfront property owners.

The Coastal Resources Commission (CRC) has adopted rules for building along the oceanfront. The rules are intended to avoid an unreasonable risk to life and property, and to limit public and private losses from storms and long-term erosion. These rules lessen but do not eliminate the element of risk in oceanfront development.

As you consider building along the oceanfront, the CRC wants you to understand the rules and the risks. With this knowledge, you can make a more informed decision about where and how to build in the coastal area.

### The Rules

When you build along the oceanfront, coastal management rules require that the structure be sited to fit safely into the beach environment.

Structures along the oceanfront must be behind the frontal dune, landward of the crest of the primary dune, and set back from the first line of stable natural vegetation a distance equal to 30 times the annual erosion rate (a minimum of 60 feet). Large structures (multi-family residential structures greater than 5,000 square feet and nonresidential structures greater than 5,000 square feet) must be set back from the first line of natural stable vegetation a distance equal to 60 times the annual erosion rate of 120 feet, whichever

is greater. If the erosion rate is greater than 3.5 feet/year, the setback is 30 times the erosion rate plus 105 feet.

### The Reasons

The beachfront is an ever-changing landform. The beach and the dunes are natural "shock absorbers," taking the beating of the wind and waves and protecting the inland areas. By setting back 30 or 60 times the annual long-term erosion rate, you have a good chance of enjoying the full life of the structure. At first, it seems very inviting to build your dream house as close to the beach as possible, but in five years you could find the dream has become a nightmare as high tides and storm tides threaten your investment.

### The Exception

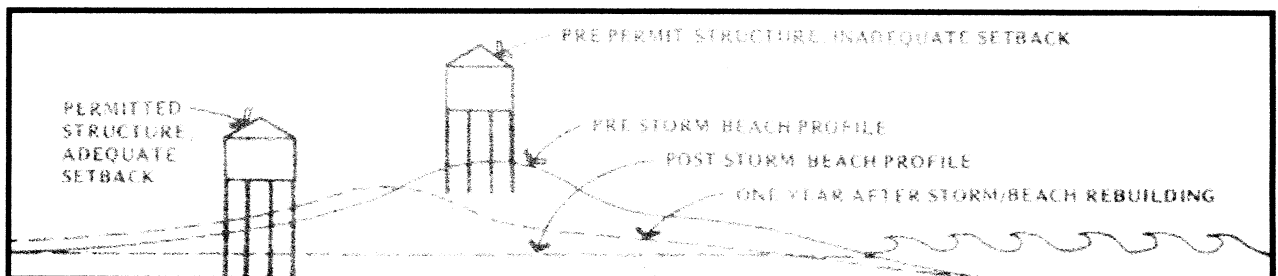
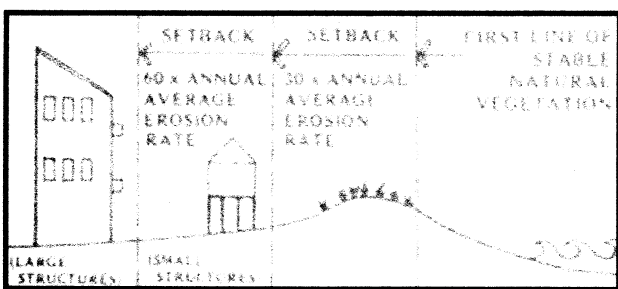
The Coastal Resources Commission recognized that these rules, initially passed in June 1979, might prove a hardship for some property owners. Therefore, they established an exception for lots that cannot meet the setback requirement. The exception allows buildings in front of the setback line if the following conditions apply:

- (1) the lot must have been platted as of June 1, 1979, and is not capable of being enlarged by combining with adjoining land under the same ownership;
- (2) development must be as far back on the property as possible and in no case less than 60 feet landward of the vegetation line;
- (3) no development can take place on the frontal dune;
- (4) special construction standards on piling depth and square footage must be met;
- (5) all other CAMA, state and local regulations must be met.

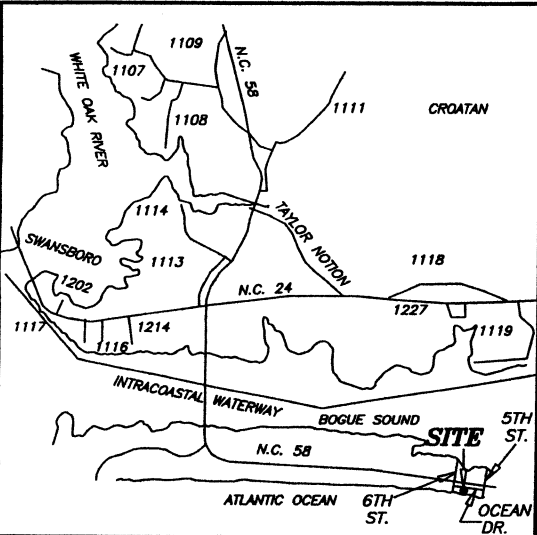
The exception is not available in the Inlet Hazard Area.

To determine eligibility for the exception, the Local Permit Officer will make these measurements and observations:

- \_\_\_\_\_ required setback from vegetation line
- \_\_\_\_\_ exception setback (maximum feasible)
- \_\_\_\_\_ rear property line setback
- \_\_\_\_\_ max. allowable square footage on lowest floor
- \_\_\_\_\_ lot area as calculated from vegetation line
- \_\_\_\_\_ piling length needed to extend 4 feet below MSL



*After the storm, the house on the dune will be gone. The other house has a much better chance of survival.*



VICINITY MAP—NOT TO SCALE

ATLANTIC OCEAN

APPROXIMATE LOCATION  
MEAN HIGH WATER LINE

NOTE: COMPUTED LINE &  
CORNERS PER M.B. 3, PG. 57

NORTH PER  
M.B. 8, PG. 79

**LEGEND**

- E.I.P. - EXISTING IRON PIPE
- N.I.P. - NEW IRON PIPE
- + NON MONUMENTED POINT
- C/L - CENTERLINE
- M.B.L. - MINIMUM BUILDING LINE
- R/W - RIGHT OF WAY

**TOTAL LOT AREA**

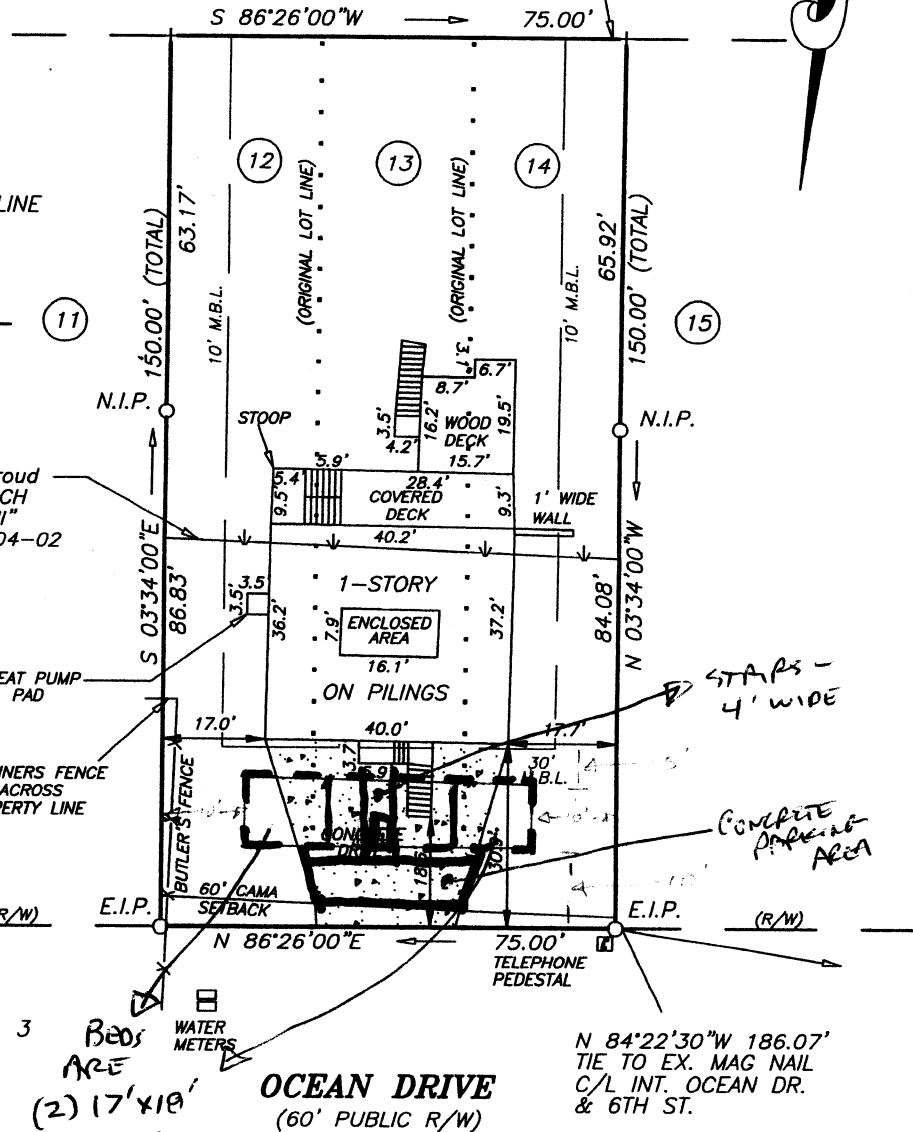
11,250 Sq. Ft.  
(Coord. Method)

Note: Vegetation Line Per Map By Stroud  
Engineering Titled "BOGUE BANKS BEACH  
NOURISHMENT PROJECT 2002 PHASE II"  
For Town of Emerald Isle Dated 12-04-02

NOTE: SETBACKS PER  
TOWN OF EMERALD ISLE

NOTE: STEPS 11.4' ACROSS  
30' FRONT SETBACK  
(TOWN ALLOWS 3')

REFERENCE: LOTS 12-13-14, BLK. 3  
"EMERALD ISLE BY THE SEA"  
M.B. 3, PG. 57  
CARTERET COUNTY REGISTRY



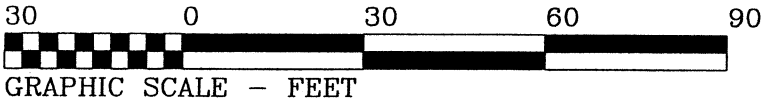
STAIRS -  
4' WIDE

CONCRETE  
PAVING  
AREA

BEES  
ARE  
(2) 17' x 10'

OCEAN DRIVE  
(60' PUBLIC R/W)

N 84°22'30"W 186.07'  
TIE TO EX. MAG NAIL  
C/L INT. OCEAN DR.  
& 6TH ST.



GRAPHIC SCALE - FEET

NOT FOR RECORDING

P.I.N.: 6324.11 55 5552  
FLOOD ZONE: VE(15') (7-16-03)  
Per Firm 370047 6324 J  
SUBD. REC.: 1954



KIRK FREE  
255-315-1314  
A-897 TAX

Name: Butler, Rick + Linda

Location: 509 Ocean Dr.

**Environmental Health Division**  
Carteret County Health Department  
Morehead City, NC 28557 • (252) 728-8499

Page 1 of 2

**Improvement Permit**

- \* NO BUILDING PERMIT SHALL BE ISSUED UNTIL AUTHORIZATION TO CONSTRUCT IS ISSUED.
- \* NO AUTHORIZATION TO CONSTRUCT SHALL BE ISSUED UNTIL MODIFICATION (IF REQUIRED) IS APPROVED.

G.S. 130a-336

**Improvement Permit**

Subject to revocation if site plans or if site is altered or intended use is changed.

Date: 11/20/07 M.E. Classification: IIA

Permit valid for 5 yrs from date of issue

- New Construction
- Repair
- Existing System

Improvements Permit by:

Amy H. Keith, RS Len Milstrap, RS  
Environmental Health Specialist

\* This permit DOES NOT constitute CAMA approval. CAMA approval must be obtained prior to any site disturbance.

(Rev. 10/02) CW  
IP

Name: Butler, Rick + Linda

Location: 509 Ocean Dr.

**Environmental Health Division**  
Carteret County Health Department  
Morehead City, NC 28557 • (252) 728-8499

**Authorization for Wastewater System Construction**

(NO CERTIFICATE OF OCCUPANCY SHALL BE ISSUED UNTIL OPERATION PERMIT HAS BEEN ISSUED)

Page 1 of 2 I.P. A-897

G.S. 130a-336

Valid for Five (5) years from date of issuance

Subject to revocation if site plans or if site is altered or intended use is changed.

Date: 11/20/07 M.E. Classification: IIA

- New Construction
- Repair
- Existing System

Authorization for Wastewater System Construction by:

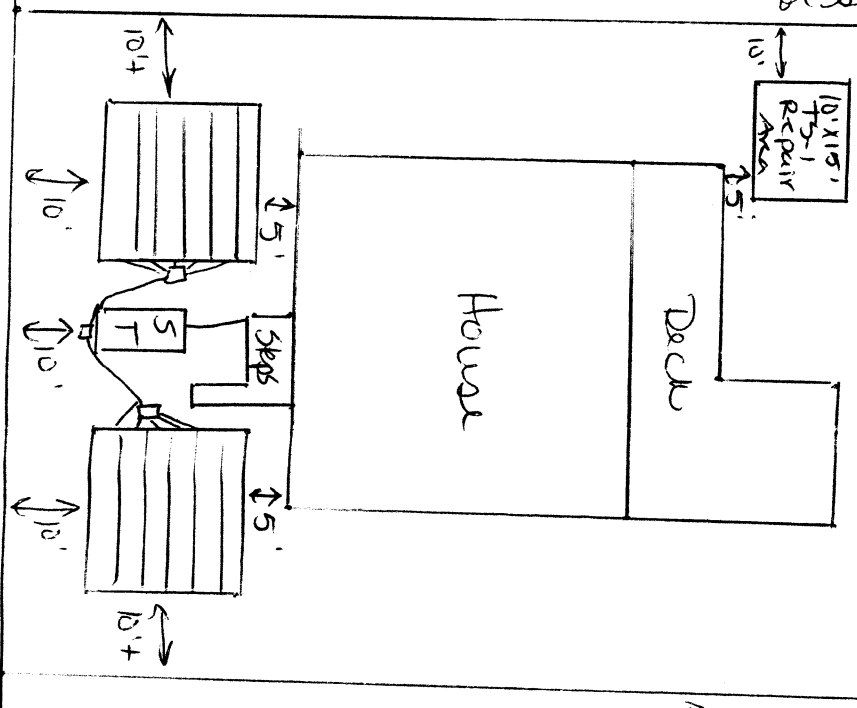
Amy H. Keith, RS Len Milstrap, RS  
Environmental Health Specialist

\* This permit DOES NOT constitute CAMA approval. CAMA approval must be obtained prior to any site disturbance.

(Rev. 10/02) CW  
IP

**SITE PLAN**

*\*This system must be installed prior to entering or selling as 4 bedrooms*



**\*\*\* THIS PERMIT DOES NOT CONSTITUTE CMAA APPROVAL. CMAA APPROVAL MUST BE OBTAINED PRIOR TO ANY SITE DISTURBANCE \*\*\***  
*\*Water line must be relocated to maintain least 10' from any part of septic system.*

75'  
 Ocean Dr.

Ocean

*\*Existing septic tank must be properly abandoned.*

*A cd will be necessary to barricade system after installation to prevent vehicular traffic*

**\*SYSTEM SHALL NOT BE INSTALLED UNDER WET CONDITIONS**

\*Trench bottom depth to be no deeper than 24" ~~depth~~ naturally occurring surface.

**ELECTRICAL PERMIT REQUIRED: YES ( ) NO (x)**  
 OWNER: Rick + Linda Butler  
 ADDRESS: 270 S. Broadmoor Blvd, Springfield  
Ohio 45504 PHONE 937-399-2742  
 TAX PARCEL: 6324 11.55.5552  
 PROPERTY LOCATION: 509 Ocean Dr.

SUBDIVISION: \_\_\_\_\_  
 LOT: \_\_\_\_\_ BLOCK: \_\_\_\_\_ SEC: \_\_\_\_\_  
 TYPE STRUCTURE: Single family  
 NO. BEDROOMS: 4 NO. BATHS: 3  
 NO. PEOPLE: ≤ 8 DESIGN FLOW: 480 gpd  
 GARBAGE GRINDER: YES (x) NO ( ) \_\_\_\_\_  
 SEPTIC TANK: 1000 GAL. PUMP TANK: \_\_\_\_\_ GAL. at  
 NO. LINES: 10 total (5 each way) WIDTH: 1" each bed / 2" total  
 TOTAL LENGTH: 18 each way FT. TOTAL 612 total SQ. FT.  
 WATER SOURCE: Community  
 HORIZONTAL DISTANCE FROM WELL: 50' + FT.  
 SITE MODIFIED: YES ( ) NO (x)

DRAINAGE REQUIREMENTS: provide positive surface drainage away from septic system.

**\*STRUCTURE SHALL BE PLACED SO THAT GRAVITY FLOW IS ACHIEVED OR PUMP SYSTEM SHALL BE REQUIRED.**  
**\*DO NOT PARK, PAVE, DRIVE, OR BUILD OVER ANY PART**

Easement Required: \_\_\_\_\_ Yes \_\_\_\_\_  No  
 Drainage Maintenance Req. Surface ( ) Subsurface ( )  
 Maintain Minimum 10' From Water Line **\*\*\***

Comments: Recommend a 1500 gal septic tank or pump it out annually.

\*Prior to any changes in system layout, approval must be obtained from Health Department.

\*NOTICE: Construction must comply with all state and local regulations. Do not install well until well site has been approved on inspection.

\*NOTICE: Beware much property in Carteret County is subject to Wetland Regulations and properties containing wetlands should receive approval from U.S. Army Corp. of Engineers prior to development.

7007 0220 0002 7302 5925

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at [www.usps.com](http://www.usps.com)

ROCKY MOUNT, NC 27804  
**OFFICIAL USE**

Postage	\$ 00.41	0501
Certified Fee	\$2.65	06
Return Receipt Fee (Endorsement Required)	\$0.00	Postmark Here
Restricted Delivery Fee (Endorsement Required)	\$0.00	
Total Postage & Fees	\$ 03.06	01/14/2008

**IPARIAN PROPERTY OWNER  
FOR CAMA MINOR PERMITS**

adjacent to BUTLER'S CAMP COTTAGE's

(Name of Property Owner)

Sent To EDITH & SUSAN SKINNER  
 Street, Apt. No. or PO Box No. 3616 WESTRIDGE CIRCLE DRIVE  
 City, State, ZIP+4 ROCKY MOUNT, NC 27804

EMERALD ISLE DRIVE

(Address, Lot, Block, Road, etc.)

EMERALD ISLE, N.C.

(Town and/or County)

(Waterbody)

He has described to me as shown in the attached application and project drawing(s), the development he is proposing at that location, and, I have no objections to his proposal.

(APPLICATION AND DRAWING OF PROPOSED DEVELOPMENT ATTACHED)

Edith L. Skinner  
Signature

Edith L. Skinner  
Print or Type Name

252-451-7854  
Telephone Number

1-25-08  
Date

RT65 E0E2 2000 0220 7007

U.S. Postal Service  
**CERTIFIED MAIL RECEIPT**  
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

**OFFICIAL USE**

Postage	\$ 00.41	0501
Certified Fee	\$2.65	06
Return Receipt Fee (Endorsement Required)	\$0.00	Postmark Here
Restricted Delivery Fee (Endorsement Required)	\$0.00	
Total Postage & Fees	\$ 03.06	01/14/2008

**PARIAN PROPERTY OWNER  
FOR CAMA MINOR PERMITS**

adjacent to BUTLER'S  
~~SEA~~ CAMP COTTAGE's

(Name of Property Owner)

SEAN DRIVE

(Address, Lot, Block, Road, etc.)

in EMERALD ISLE, N.C.  
(Town and/or County)

Sent To GEORGE HALL, JR.  
Street, Apt. No.,  
or PO Box No. 2551 ALBEMARLE AVENUE  
City, State, ZIP+4 RALEIGH, NC 27610

PS Form 3800, August 2006 See Reverse for Instructions

(Waterbody)

He has described to me as shown in the attached application and project drawing(s), the development he is proposing at that location, and, I have no objections to his proposal.

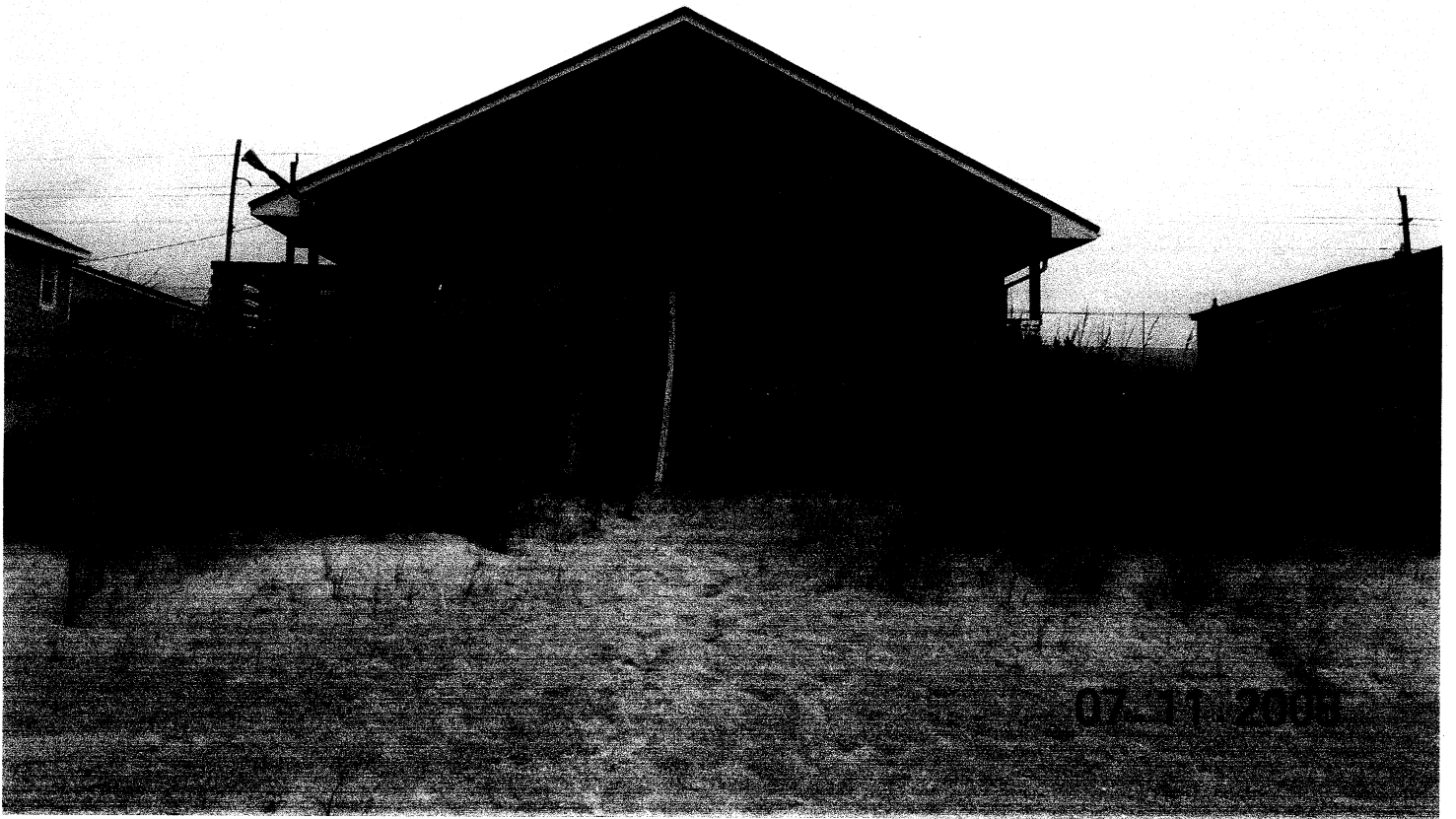
(APPLICATION AND DRAWING OF PROPOSED DEVELOPMENT ATTACHED)

  
Signature

GEORGE R. HALL, JR.  
Print or Type Name

(919) 231-4164  
Telephone Number

JANUARY 17, 2008  
Date



**STIPULATED EXHIBITS**

1. 1981 Improvement/Operation Permit (89345) issued by Carteret County Health Department, Public Health Sanitation Division.
2. Realty company listing advertising property as a 4 bedroom house.
3. Notice of violation from Carteret County Health Department dated July 5, 2007.
4. Realty company listing advertising property as a 2 bedroom house.

10:00



89345

Form: HB-296  
CCHD

PUBLIC HEALTH SANITATION DIVISION  
CARTERET COUNTY HEALTH DEPARTMENT

509 Ocean Dr

CERTIFICATE OF COMPLETION Madison Road City PSM Sewage Disposal System - G-S Chapter 130 - Article 13c

OWNER: William J. Camp

DATE: 2-3-81

INSTALLER: R.E. Willis

DATE COMPLETED: 4 June 1981

Notice: This certification of completion in no way binds the Public Health Sanitation Division of Carteret County Health Department nor implies a guarantee that this system will function in all circumstances, but that the system is properly installed in accordance with applicable rules and regulations of the Carteret County Health Department and can reasonably be expected to perform properly under normal conditions of use and maintenance.

By: [Signature]

PUBLIC HEALTH SANITATION DIVISION  
CARTERET COUNTY HEALTH DEPARTMENT

LAND USE  
IMPROVEMENT PERMIT

89345

OWNER: William J. Camp

PHONE:

DATE: 2-3-81

ADDRESS: 104 Brass St

PROPERTY LOCATION: Lot 12, 13, 14

TYPE STRUCTURE: 1 unit

NO. BEDROOMS: 2 NO. BATHS: 1

WATER SOURCE: Common

GARBAGE GRINDER: YES ( ) NO ()

AUTO DISHWASHER: YES () NO ( )

AUTO WASHING MACHINE: YES () NO ( )

Perc. Rate (if applicable):           

SIZE OF TANK: 1,000 GAL.

NO. LINES: 1 WIDTH: 36"

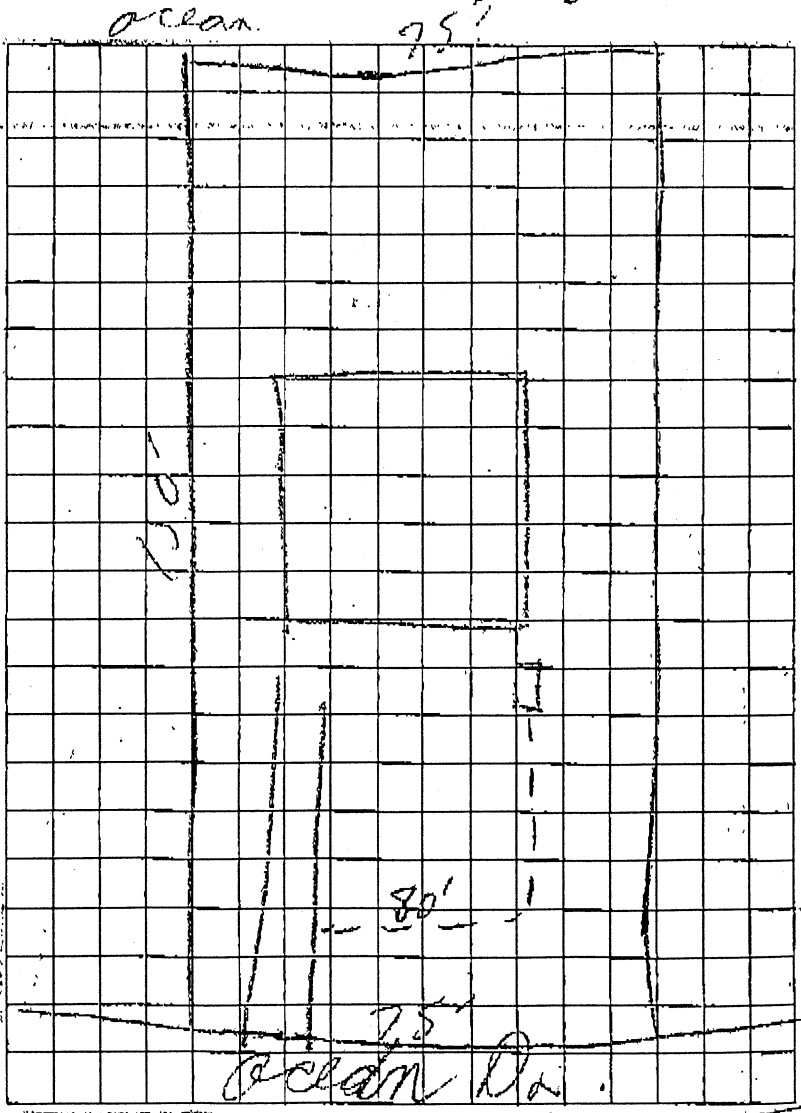
TOTAL: 240 SQ. FT.

TOTAL LENGTH: 80' FT.

HORIZONTAL DISTANCE FROM WELL: at ft.

NOTICE: Construction must comply with all state and local regulations. Do not install well until well site has been approved. Do not cover any portion of system until approved on final inspection.

IMPROVEMENTS PERMIT BY: [Signature]  
Agent



PL  
CAR

Exhibit 1

VT

CARTERET COUNTY HEALTH DEPARTMENT

LAND USE  
IMPROVEMENT PERMIT

OWNER: William T. Camp

PHONE:

89345

DATE: 2-3-81

ADDRESS: 104 Bragg St.

PROPERTY LOCATION: Wilson N.C.  
lot 12, 13, 14

TYPE STRUCTURE: well

NO. BEDROOMS: 2 NO. BATHS: 1

WATER SOURCE: sump

GARBAGE GRINDER: YES ( ) NO (x)

AUTO DISHWASHER: YES (x) NO ( )

AUTO WASHING MACHINE: YES ( ) NO ( )

Perc. Rate (if applicable):

SIZE OF TANK: 1,000 GAL.

NO. LINES: 1 WIDTH: 36"

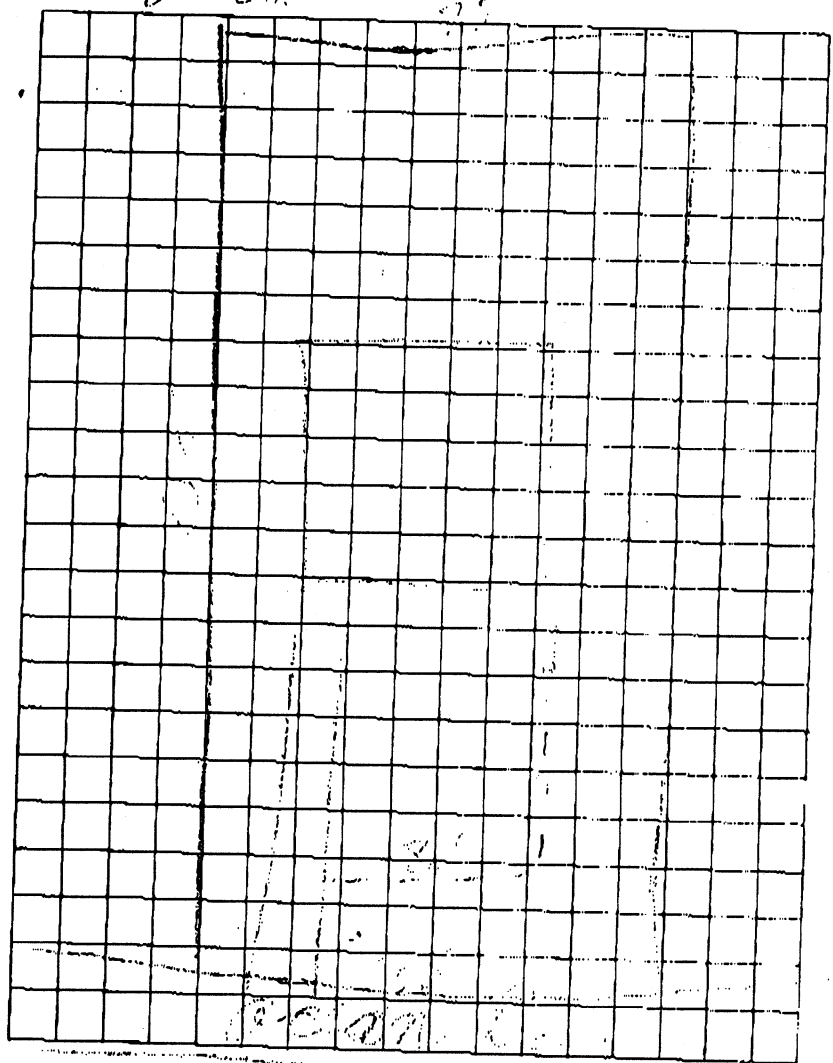
TOTAL: 240 SQ. FT.

TOTAL LENGTH: 80 FT.

HORIZONTAL DISTANCE FROM WELL: city FT.

NOTICE: Construction must comply with all state and local regulations. Do not install well until well site has been approved. Do not cover any portion of system until approved on final inspection.

IMPROVEMENTS PERMIT BY: [Signature]  
Agent



PUBLIC HEALTH SANITATION DIVISION  
CARTERET COUNTY HEALTH DEPARTMENT  
BEAUFORT, N. C. 28516

HERALD PRINTING CO., MOREHEAD CITY, N. C.

10'00



89345

PUBLIC HEALTH SANITATION DIVISION  
CARTERET COUNTY HEALTH DEPARTMENT

509 Ocean or

Form: HB-296  
CCHD

The following options are available to achieve compliance of the Operation Permit:

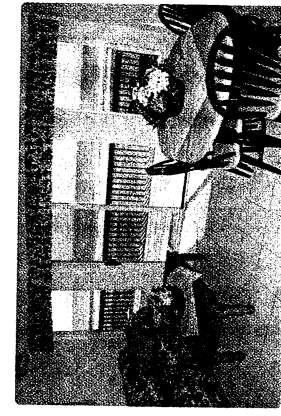
- 1. The facility must be listed, rental or sale, according the design flow approved on the Operation Permit. According to the rental listing, you are advertising a 4 bedroom





2,150  
2,025  
1,550  
975  
N/A

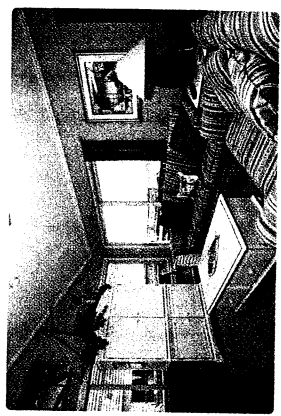
fans throughout. Covered porch with furniture, picnic table, 2 enclosed hot/cold outside showers (1 on deck). No pets.



## California Dreamin'

Cottage, 2 BR, 2 B, Q ♦ QSS. *Island Club* linens provided. Both BRs have full baths and open to oceanfront deck. Central air and heat, ceiling fans, dishwasher, washer/dryer, microwave, 3 color cable TVs, VCR, DVD player, stereo, 3 telephones, high speed Internet access (computer with network card required). Full wrap around deck with built in seating and patio furniture, charcoal grill, hot/cold outside shower. Fantastic ocean and sound views from all rooms. Professionally landscaped. Weekly only. No smoking. No pets.

**RENTS**  
Saturday-Saturday  
1,900  
1,800  
1,055  
800



## Calypso

Cottage, 4 BR (all are oceanfront), 2 B, K ♦ Q ♦ Q ♦ 2B (1 w/trundle) ♦ QSS ♦ SSS. *Sand Dollar Club* linens provided. Central air and heat, ceiling fans, cathedral ceiling in living/dining/kitchen area, dishwasher, washer/dryer, microwave, 4 color TVs (3 with cable), 4 VCRs, 2 DVD players, stereo with CD player, telephone, computer. Large furnished deck, picnic table, gas grill, outside shower with changing room, fish-cleaning station. Great ocean view. No smoking. No pets.

**RENTS**  
Saturday-Saturday  
2,960  
2,660  
1,760  
1,450  
900



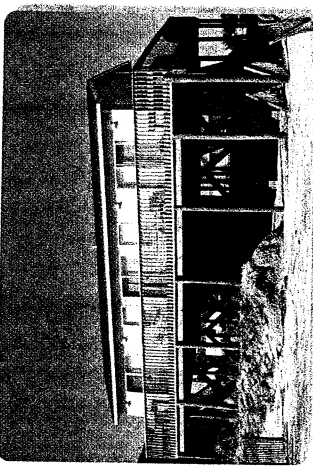
## Camp Cottage

Cottage, 4 BR, 2 B, Q ♦ Q ♦ 2S ♦ QSS ♦ full-size crib. *Island Club* linens provided. Central air and heat, washer/dryer, dishwasher, garbage disposal, microwave, 2 color cable TVs, HBO, VCR, 2 DVD players, high speed Internet access with wireless connectivity (computer required), cable outlets in all BRs, telephone, ceiling fans throughout. Sundeck, covered porch with rockers and picnic table, outside shower, basketball hoop. No smoking. No pets.

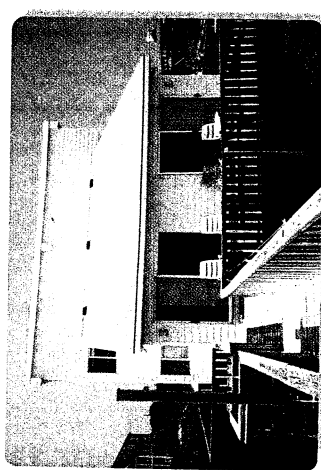
**RENTS**  
Saturday-Saturday  
2,650  
2,450  
1,550  
1,150  
N/A



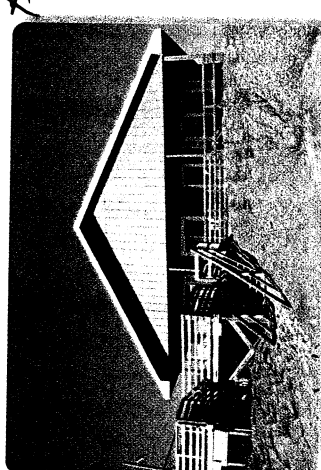
2307 OCEAN DRIVE



405 OCEAN DRIVE



6609 OCEAN DRIVE



509 OCEAN DRIVE

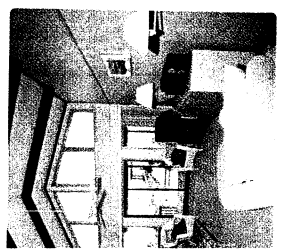


Exhibit 2

**CARTERET COUNTY HEALTH DEPARTMENT****3820-A Bridges Street, Morehead City, NC 28557**

J.T. Garrett, Ed. D., M.P.H.

July 5, 2007

**Richard Butler**  
270 B Broadmor Blvd  
Springfield, OH 45504**Subject: Notice of Violation: 509 Ocean Dr., Emerald Isle, Lot 12 14, Block 3, (PIDN 6324.11.55.5552)**

Dear Mr. Butler,

Our records indicate that the wastewater system serving the above site is not in compliance. In **February 1981** an Operation Permit was issued for a wastewater system for 2 bedrooms only.

According to the rental listing, the above property is being advertised as a 4 bedroom residence. Enclosed is a copy of the Operation Permit which specifies a 2 bedroom residence. This limits the use and the rental of the facility to 2 bedrooms with a maximum of 4 occupants. The Operation Permit is the legal document that represents the approved number of bedrooms in which the facility was approved. Facilities having more bedrooms than permitted on the Operation Permit are usually the result of converting rooms shown on plans as dens, offices, studies, recreation rooms to bedrooms, or construction of unapproved bedrooms.

**You are in violation of G.S. 130A-335(a) and 15A NCAC 18A .1949(a).**

GS 130A-335(a) states: *A person owning or controlling a residence, place of business or a place of public assembly shall provide an approved wastewater system.*

15A NCAC 18A .1949(a) states: *In determining the volume of sewage from dwelling units, the flow rate shall be 120 gallons per day per bedroom. The minimum volume of sewage from each dwelling unit shall be 240 gallons per day and each additional bedroom above two bedrooms shall increase the volume of sewage by 120 gallons per day. In determining the number of bedrooms in a dwelling unit, each bedroom and any other room or addition that can reasonably be expected to function as a bedroom shall be considered a bedroom for design purposes. When the occupancy of a dwelling unit exceeds two persons per bedroom, the volume of sewage shall be determined by the maximum occupancy at a rate of 60 gallons per person per day.*

Health Department (252) 728-8550  
Fax (252) 222-7739Health Director  
(252) 728-8550Environmental Health (252) 728-8499  
Fax (252) 222-7753

Exhibit 3

Operation Permit. According to the rental listing, you are advertising a 4 bedroom residence. Immediate action must be taken to reduce the number of bedrooms listed to 2 with a maximum occupancy of 4 people as approved on the Operation Permit.

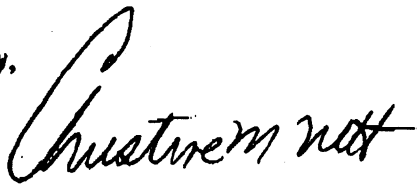
2. Apply for an Improvement Permit for a possible expansion of the wastewater system based on the desired number of bedrooms and or occupants. Expansions of wastewater systems are not possible with all properties. When expansions can be permitted, they must meet all the Laws and Rules for Sewage Treatment and Disposal Systems (15A NCAC 18A .1900). Compliance is not achieved until the approved expansion system has been installed and then approved by the Carteret County Health Department. In some cases it is recommended that the owner consult with a licensed soil consultant familiar with NC wastewaters systems to determine if a wastewater system can be designed to overcome the limitation(s) sited by the Carteret County Health Department.

Permit compliance is required upon notification of this letter. Immediate action must be taken to change the advertised number of bedrooms to the number reflected on the attached Operation Permit.

Failure to comply with the laws, rules and this notice will subject you to the following legal remedies: Injunction Relief [G.S. 130A-18], Administrative Penalties [G.S. 130-22(e)], Suspension or Revocation of Permits [G.S. 130-23], and Criminal Penalties [G.S. 130-25].

Please call our office at (252) 728-8499 if you have any questions.

Sincerely,



Christine M. Nitt  
Environmental Health Specialist  
On-Site Wastewater Program

Cc: Emerald Isle Realty  
Emerald Isle Building Inspections Dept.



6609 OCEAN DRIVE

## Calypso

Cottage, 4 BR (all are oceanfront), 2 B. K ♦ Q ♦ Q ♦ 2B (1 w/trundle) ♦ QSS ♦ SSS. *Sand Dollar Club* linens provided. Central air and heat, ceiling fans, cathedral ceiling in living/dining/kitchen area, dishwasher, washer/dryer, microwave, 4 color TVs (3 with cable), 4 VCRs, 2 DVD players, stereo with CD player, telephone, computer. Large furnished deck, picnic table, gas grill, outside shower with changing room, fish-cleaning station. Great ocean view. No smoking. No pets.

RENTS Saturday-Saturday  
3,240 2,940 1,915 1,605 1,055



509 OCEAN DRIVE

## Camp Cottage

Cottage, 2 BR (4 BR septic upgrade in process), 2 B. Q ♦ Q ♦ 2S ♦ 2S ♦ QSS ♦ full-size crib. *Island Club* linens provided. Central air and heat, washer/dryer, dishwasher, garbage disposal, microwave, 2 color cable TVs, HBO, VCR, 2 DVD players, high speed Internet access with wireless connectivity, cable outlets in all BRs, telephone, ceiling fans throughout. Sundeck, covered porch with rockers and picnic table, outside shower, basketball hoop. Available year 'round. No smoking. No pets.

RENTS Saturday-Saturday  
2,650 2,450 1,550 1,150 950



211 OCEAN DRIVE

## C-Chelle

Cottage, 3 BR, 3 B. Q ♦ 2D ♦ B, 2S ♦ QSS. *Island Club* linens provided. Central air and heat, washer/dryer, dishwasher, microwave, Jenn-air range, 2 color cable TVs, 2 VCRs, telephone, ceiling fans. Decks and covered porch with furniture, hot/cold outside shower. Weekly only. No smoking. No pets.

RENTS Saturday-Saturday  
2,955 2,830 1,805 1,330 N/A



6811 OCEAN DRIVE

## Circle of Friends

Cottage, 5 BR, 4 B. K ♦ Q ♦ Q ♦ Q ♦ B, S ♦ dybd. *Island Club* linens provided. Oceanfront 21' x 9' kidney shaped swimming pool. Heated pool is available for an additional \$300 per week. One level living with panoramic ocean views from the hexagonal great room. Central air and heat, dishwasher, washer/dryer, microwave, icemaker, 4 color cable TVs, 4 VCRs, DVD player, stereo with CD player, fireplace, telephones, answering machine, ceiling fans. Spiral stairs to observation room. Decks with porch furniture, rockers and picnic table. Weekly only. Available year 'round. No smoking. No pets.

RENTS Saturday-Saturday  
5,805 5,505 3,255 2,155 1,455



## Crew's Nest

Cottage, 3 BR, 2 B. Q ♦ Q ♦ 2S ♦ QSS. *Island Club*

2,00

Cottages

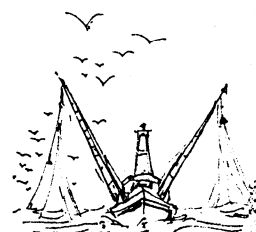


Exhibit 4

**1:15 PRESENTATIONS**

- Wind Energy Panel Presentations Steve Smith, EMC  
- Audubon, DMF, DOA, DCM, WRC, State Energy Office, Marine Corps, Carteret County, NCSEA

**3:00 PUBLIC HEARINGS**

Bob Emory, Chair

- 15A NCAC 7H .0205 Coastal Wetlands
- 15A NCAC 7H .1401, .1402, .1404, .1405 GP for Construction of Groins in Estuarine & Public Trust Waters
- 15A NCAC 7H .2101, .2102, .2104, .2105 GP for Marsh Enhancement Breakwaters
- 15A NCAC 7H .2401, .2402, .2404, .2405 GP for Placement of Riprap for Wetland Protection
- 15A NCAC 7J .0701, .0703 Variance Petitions
- 15A NCAC 7M .0301, .0302, .0303, .0306, .0307 Shorefront Access Policies

**3:30 Wind Energy Panel Discussion**

Steve Smith, EMC

**Friday, September 26<sup>th</sup>**

**8:30 COMMISSION CALL TO ORDER (Jones Byrd Salons 1&2)**

Bob Emory, Chair

**PRESENTATIONS**

- CAMA Major Permit and Dredge & Fill Review Process(*CRC-08-39*) Doug Huggett
- CHPP Shoreline Stabilization Subcommittee Update Bob Emory
- Ocean Policy Study Committee Update(*CRC-08-40*) Scott Geis
- Beach and Inlet Management Plan Update(*CRC-08-41*) Steve Underwood
- Public Comment Summary-15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas & 15A NCAC 7J .1200 Static Line Exception Procedures (*CRC-08-42*) Jeff Warren
- Staff Recommendations-15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas & 15A NCAC 7J .1200 Static Line Exception Procedures (*CRC-08-43*) Jeff Warren

**11:00 PUBLIC INPUT AND COMMENT**

**ACTION ITEMS**

Bob Emory

- Adopt 15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas
- Adopt 15A NCAC 7J .1200 Static Line Exception Procedures

**OLD/NEW BUSINESS**

Bob Emory

- CRAC Nominating Committee
- Future Agenda Items

**12:00 ADJOURNMENT**

**NEXT MEETING:**  
November 19-21, 2008  
Crystal Coast Civic Center  
Morehead City, NC



N.C. Division of Coastal Management  
[www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)



CRC-VR-08-45


## State of North Carolina

Department of Justice

ROY COOPER  
ATTORNEY GENERAL

P. O. Box 629  
RALEIGH  
27602-0629

TO: Coastal Resources Commission

FROM: Amanda P. Little   
Assistant Attorney General

DATE: September 12, 2008 (for the September 24-26, 2008 CRC Meeting)

RE: **Variance Request by Town of Kure Beach**

---

Petitioner applied for a CAMA minor permit to construct a dune infiltration system to treat stormwater at the existing ocean outfall at K Avenue and Atlantic Avenue, beside Kure Beach Pier in Kure Beach, New Hanover County. All of the proposed development is landward of the static vegetation line within the ocean front setback. Petitioner applied for this variance seeking relief from strict application of the Commission's ocean hazard rules at 15A NCAC 7H .0306(a), .0309(b) and .0601.

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Summary of Petitioners' Position and Staff's Responses to Criteria  
Attachment D: Petitioners' Variance Request Materials

cc: A.A. Canoutas, Kure Beach Town Attorney  
Henry E. Becker, Kure Beach Public Works Director  
Mason Herndon, DOT Division 3 Environmental Officer  
Jim Gregson, DCM Director  
Ted Tyndall, DCM Assistant Director  
Ed Brooks, DCM Minor Permit Program Coordinator  
Stephen Lane, DCM Field Representative  
Jennie Hauser, CRC Counsel



**RELEVANT STATUTES OR RULES**

**15A NCAC 7H .0306 General Use Standards for Ocean Hazard Areas**

- (a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.
  - (1) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.
  - (2) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located seaward of the primary dune. In such cases, the development shall be located landward of the long-term erosion setback line and shall not be located on or in front of a frontal dune. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.
  - (3) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal dune or landward of the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable.

**15A NCAC 7H .0309 Use Standards for Ocean Hazard Areas: Exceptions**

a) The following types of development may be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campsites;
- (2) parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding

a footprint of 500 square feet;

- (4) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single-story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;
- (7) temporary amusement stands;
- (8) swimming pools; and
- (9) sand fences.

In all cases, this development shall only be permitted if it is landward of the vegetation line; involves no significant alteration or removal of primary or frontal dunes or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures may be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.
  - (A) All pilings have a tip penetration that extends to at least four feet below mean sea level;
  - (B) The footprint of the structure be no more than 1,000 square feet or 10 percent of the lot size, whichever is greater.
- (5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system must be submitted as part of the CAMA permit application.



**15A NCAC 7H .0601 No Violation of Any Rule**

No development shall be allowed in any AEC which would result in a contravention or violation of any rules, regulations, or laws of the State of North Carolina or of local government in which the development takes place.

**STIPULATED FACTS**

1. Petitioner, the Town of Kure Beach owns the ocean outfall at K Avenue and Atlantic Ave. (“the project site”), Kure Beach, New Hanover County, NC.
2. The Town of Kure Beach has a number of stormwater outfalls that discharge on to the beach, sometimes directly flowing into the ocean with little infiltration into the sand.
3. The Department of Environment and Natural Resources, Division of Environmental Health-Shellfish Sanitation and Recreational Water Quality Section monitors the State’s waters by regular bacteriological testing. Due to the elevated bacteria levels in nearby swimming areas, Petitioner proposes to install a dune infiltration system at the project site to improve stormwater treatment at the existing outfall on Kure Beach.
4. In 2005, North Carolina Department of Transportation (NCDOT), North Carolina State University (NCSU) and the Town of Kure Beach began collaborating to address the water quality issues associated with existing stormwater outfalls on the beach. The existing ocean outfalls carry runoff from US-421 and surrounding roads, parking lots, and rooftops. The Town requested assistance from NCSU Department of Biological and Agricultural Engineering to design a low-cost, effective alternative to treat this runoff. The result was the design of a Dune Infiltration System (DIS). Two of these systems were installed in February 2006 to capture stormwater runoff from the L Ave. outfall and the M Ave. outfall. These systems have been monitored since their installation following storm events. Water quality testing of collected samples showed the system to be very efficient in reducing stormwater flow and bacterial transport to the ocean areas.
5. Petitioner, through its authorized agent Mason Herndon, the Division 3 Environmental Officer with NCDOT, applied for a CAMA Minor Development Permit to install a dune infiltration system (DIS) to treat stormwater at the existing K Ave. outfall. The application was dated May 13, 2008 and the project will be funded by NCDOT. The project proposes the installation of 26 stormchambers for stormwater storage and infiltration, a splitter box, and modification or retro fit of existing drop inlets and outfall pipe. The design will divert inflow from 3 outfalls near K avenue into a single DIS, and by combining these outfalls into one system, allows for subsurface infrastructure to be avoided.
6. The project site is located within the Ocean Erodible Area of Environmental Concern (AEC) and the High Hazard Flood AEC, subcategories of the Ocean Hazard AEC designated by the Coastal Resources Commission (CRC) in Rule 15A NCAC 7H .0304.

7. Effective in 1979, the CRC adopted an erosion setback requirement that applies to structures along the oceanfront. Rule 15A NCAC 7H .0306(a). The general rule is that development must be set back at a distance of 30 times the long-term annual erosion rate from the applicable vegetation line. Rule 15A NCAC 7H .0306(a)(1).
8. The annual long-term erosion rate at this property is 2 feet per year, making the ocean erosion setback for the property 60 feet from the static vegetation line.
9. The existing outfall terminates at the bulkhead along Atlantic Avenue. The Kure Beach static line is also located along this bulkhead, however, a well established dune system, frontal dune and first line of stable natural vegetation extend approximately 85 feet oceanward of the bulkhead and the improvements needed at the project site must be made at the central collection point of the outfall within the ocean front setback.
10. Petitioner proposes to restore the disturbed area at the project site to natural contours and vegetated with native species.
11. The N.C. Division of Coastal Management Representative, Stephen Lane, denied the minor permit application by letter dated July 2, 2008, because the proposed development was inconsistent with Rule 15A NCAC 7H .0306(a)(3).
12. Petitioner filed this variance request on July 15, 2008, seeking relief from strict application of the Ocean Hazard AEC erosion setback rules and the exceptions to those rules in 15A NCAC 7H .0306(a)(1) and .0309.

ATTACHMENT C

**SUMMARY OF STAFF AND PETITIONER'S POSITIONS**

**I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.**

**Petitioner's Position: Yes.**

The existing outfall for the drainage system for this area is on the property seaward of the static vegetation line. Effective treatment of the stormwater can only be accomplished at the central collection point at the existing outfall. If a variance is not granted for this project, the proposed underground Dune Infiltration System can not be constructed and the stormwater discharging from the site can not be treated.

**Staff's Position: Yes.**

Staff agrees that strict application of the rules will cause Petitioner unnecessary hardships. The NCDOT and the Town are working to reduce the impacts to water quality and restrictions on use of the beach for swimming at this site through the use of this innovative DIS system. This DIS system is required to be buried under the dunes at the location of the central collection system in order to work effectively, and so the proposed location is the only place for the system to be placed.

**II. Do such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property? Explain.**

**Petitioner's Position: Yes.**

The property is located seaward of Atlantic Avenue and K Avenue adjacent to the Kure Beach Pier. The property is a vegetated dune system approximately 16.5 ft above MSL and has an existing 24" outfall structure. This area has a history of public swimming advisories resulting from elevated bacteria levels discharging from the existing outfall.

**Staff's Position: Yes.**

The fact that the site is an existing stormwater structure that pre-dates the Coastal Area Management Act and CAMA permitting makes the conditions of this site peculiar. The DIS is an innovative system attempting to address the problems with ocean stormwater outfalls. The DIS systems are required to be located at the central collection site, within the dune systems in order to

work effectively in treating stormwater through infiltration. Additionally, the site was chosen because of the Town's ownership of this property, and the existing dune system. Therefore, the location of this system is decided by the topography of the dune systems and the pre-existing location of the central collection system.

**III. Do the hardships result from actions taken by the Petitioner? Explain.**

**Petitioner's Position: No.**

The hardship does not result from actions taken since the proposed project is an improvement to a preexisting drainage system that has been impacted by growth and development within the drainage area.

**Staff's Position: No.**

The hardships do not result from actions taken by the Petitioner. Again, this is a pre-existing stormwater outfall. The Town of Kure Beach is attempting to improve the situation for the betterment of the many residents and visitors that use the public beach at this location.

**IV. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

**Petitioner's Position: Yes.**

Granting the variance would benefit the environment as well as public safety and health. No sand will be removed from the site and all disturbed areas will be restored to natural contours and revegetated.

**Staff's Position: Yes.**

The proposed project addresses an existing, pre-CAMA stormwater outfall with a history of elevated bacteria levels and addresses public safety and health issues, by installing a system to provide treatment and disposal of the stormwater and removing its discharge from the public beach. On November 17, 2006, CRC received a presentation at a meeting in Atlantic Beach, NC about the benefits of infiltration systems near sensitive waterbodies, and included results from DIS in the presentation. Members of the Commission at that time gave positive feedback regarding the system, which NCDOT took as an unofficial endorsement of continued study and further implementation.

**CRC-VR-08-45**

**ATTACHMENT D**

Attached are the Petitioner's Variance Request.

**CAMA VARIANCE REQUEST**

08-45

Petitioner supplies the following information:

Your Name                      Town of Kure Beach  
Address                         117 Settlers Lane  
Telephone                     910-458-8216  
Fax and/or Email             910-458-7421

RECEIVED

JUL 15 2008

N.C. ATTORNEY GENERAL  
Environmental Division

Name of Your Attorney (if applicable)  
Address  
Telephone  
Fax and/or Email

Have you received a decision from the Division of Coastal Management (DCM) or a Local Permit Officer denying your application for a CAMA permit?

\_\_\_\_\_ no       (You are not entitled to request a variance until your permit application has been denied.)

  X   yes       (You may proceed with a request for a variance.)

What did you seek a permit to do? Install a Dune Infiltration System (DIS) to treat storm water at the existing K Avenue outfall. The project will require 26 StormChambers and a splitter box seaward of the long-term erosion setback line and modification or retro fitting of the existing drop inlets and outfall pipe.

What Coastal Resources Commission rule(s) prohibit this type of development?  
15A NCAC 07H .0309  
15A NCAC 07H .0601

Can you redesign your proposed development to comply with this rule?   No   If your answer is no, explain why you cannot redesign to comply with the rule.

It is impossible to intercept and treat the storm water from the drainage system in this area, anywhere other than at the outfall.

Can you obtain a permit for a portion of what you wish to do?   No   If so, please state what the permit would allow.

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

Denial of this permit does will not allow the Town of Kure Beach and cooperating partners to collect and treat the stormwater at this location before it discharges into the ocean. The underground StormChambers and splitter box must be installed at the central collection point at the outfall.

**RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:**

- I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to be considered. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. [*Williams v. NCDENR, DCM, and CRC*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).]

The existing outfall for the drainage system for this area is on the property seaward of the static vegetation line. Effective treatment of the stormwater can only be accomplished at the central collection point at the existing outfall. If a variance is not granted for this project, the proposed underground Dune Infiltration System can not be constructed and the stormwater discharging from the site can not be treated.

- II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.

The property is located seaward of Atlantic Avenue and K Avenue adjacent to the Kure Beach Pier. The property is a vegetated dune system approximately 16.5 ft above MSL and has an existing 24" outfall structure. This area has a history of public swimming advisories resulting from elevated bacteria levels discharging from the existing outfall.

- III. Explain why your hardship does not result from actions that you have taken.

The hardship does not result from actions taken since the proposed project is an improvement to a preexisting drainage system that has been impacted by growth and development within the drainage area.



- IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.

Granting the variance would benefit the environment as well as public safety and health. No sand will be removed from the site and all disturbed areas will be restored to natural contours and revegetated

Please attach copies of the following:

Permit Application and Denial documents  
Site Drawing with Survey and Topographical Information  
Any letters filed with DCM or the LPO commenting on or objecting to your project

Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criterion, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree upon. Those facts will be the only facts that the Commission will consider in determining whether to grant your variance request.]

#### Unnecessary Hardship

1. Proposed project is necessary improvements for stormwater treatment to an existing outfall structure on the property.
2. Improvements can only be made at the central collection point of the outfall within the static vegetation line.

#### Conditions peculiar to property

1. Existing outfall has a history of elevated bacteria levels creating swimming advisories, public safety and health issues.
2. Existing outfall is inside the static vegetation line.

#### Hardship not result of own undertaking

1. Improvements to system required due to growth within the drainage area.

#### Request for variance is consistent with the intent of the CRC's rules and public safety.

1. Treatment of stormwater will reduce discharge of pollutants, benefitting water quality and public health.
2. Disturbed area will be restored to natural contours and vegetated with native species.

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: 7/10/08

Signature: Henry E. Burt

*This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.*

**CERTIFICATE OF SERVICE**

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

copy: Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 10 day of July, 2008

Henry E. Beuda Jr.  
Signature of Petitioner or Attorney



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

July 2, 2008

**CERTIFIED MAIL – 7005 1160 0003 1590 7034**  
**RETURN RECEIPT REQUESTED**

**RECEIVED**

JUL 07 2008

**DIVISION 3 OFFICE**

Town of Kure Beach  
C/o - N.C. Department of Transportation  
Attn: Mason Herndon – Div. 3 Env. Officer  
124 Division Drive  
Wilmington, NC 28401

**RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT**  
**APPLICATION NUMBER - KB08-06**  
**PROJECT ADDRESS- Intersection of K Avenue and Atlantic Avenue**  
Kure Beach, North Carolina

Dear Mr. Herndon:

After reviewing the application you submitted on behalf of the Town of Kure Beach in conjunction with the development standards required by the Coastal Area Management Act (CAMA) and our locally adopted Land Use Plan and Ordinances, it is my determination that no permit may be granted for the project which you have proposed.

This decision is based on my findings that your request violates NCGS 113A-120(a)(8) which requires that all applications be denied which are inconsistent with CAMA guidelines. You have applied to construct a dune infiltration system for stormwater, seaward of the long-term erosion setback line, which is inconsistent with 15A NCAC 07H .0306(a)(3), which states that: "...development shall be set landward of the frontal dune or landward of the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line...".

The proposed development also violates 15A NCAC 07H .0309 which lists the exceptions that are allowed seaward of the oceanfront setback requirements of Rule .0306(a) since your proposed development is not one of the listed exceptions. Finally, the proposed development violates 15A NCAC 07H .0601 which states "No development shall be allowed in any AEC which would result in a contravention or violation of any rules, regulations, or laws of the State of North Carolina or of local government in which the development takes place."

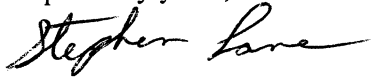
Should you wish to appeal my decision to the Coastal Resource Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information

400 Commerce Avenue, Morehead City, North Carolina 28557  
Phone: 252-808-2808 \ FAX: 252-247-3330 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

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you may require. The Division of Coastal Management in Morehead City must receive appeal notices within twenty (20) days of the date of this letter in order to be considered.

Respectfully yours,

A handwritten signature in cursive script that reads "Stephen Lane".

Stephen Lane

Coastal Management Representative

cc: Doug Huggett, DCM  
Steve Everhart, DCM  
Ed Brooks, DCM  
John Batson, LPO



STATE OF NORTH CAROLINA  
DEPARTMENT OF TRANSPORTATION

MICHAEL F. EASLEY  
GOVERNOR

DIVISION OF HIGHWAYS

LYNDO TIPPETT  
SECRETARY

May 13, 2008

**MEMO TO:** Stephen Lane, Field Representative  
North Carolina Division of Coastal Management

**FROM:** Mason Herndon, Division 3 Environmental Officer  
North Carolina Department of Transportation

**SUBJECT:** CAMA Minor Permit Application for Dune Infiltration System  
(DIS) for Stormwater Treatment from Ocean Outfall at K Avenue  
and Atlantic Ave., Kure Beach, New Hanover County

**Work Order Number:** 36068

**TIP Number:** N/A

**Category:** \$100.00 fee

Locality

Permit Number

Ocean Hazard

Estuarine Shoreline

ORW Shoreline

Public Trust Shoreline

Other

(For official use only)

### GENERAL INFORMATION

#### LAND OWNER

Name: Town of Kure beach

Address: 117 Settlers Lane

City: Kure Beach

State: NC

Zip: 28449

Phone: 910-458-8216

#### AUTHORIZED AGENT

Name: Mason Herndon

Address: 7023 Springer Rd

City: Wilmington

State: NC

Zip: 28411

Phone: 910-793-075

**LOCATION OF PROJECT:** (Address, street name and/or directions to site. If not oceanfront, what is the name of the adjacent waterbody.) Adjacent to the intersection of K Ave. and Atlantic Ave. beside Kure Beach Pier

**DESCRIPTION OF PROJECT:** (List all proposed construction and land disturbance.) Install a Dune Infiltration System (DIS) to treat stormwater at the existing K Ave. outfall. The project will require installation of 26 Storm Chambers, splitter box, modification or retro fit of existing drop inlets and outfall pipe. Impacts are listed in Table 2 of the attached proposal.

**SIZE OF LOT/PARCEL:** N/A square feet N/A acres

**PROPOSED USE:** Residential  (Single-family  Multi-family ) Commerical/Industrial  Other

**TOTAL ENCLOSED FLOOR AREA OF A BUILDING IN THE OCEAN HAZARD AREA OF ENVIRONMENTAL CONCERN (AEC):** 2200 square feet (includes all floors and roof covered decks)

**SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OR BUILT-UPON SURFACES IN THE COASTAL SHORELINE AREA OF ENVIRONMENTAL CONCERN (AEC):** N/A square feet (Calculations includes the area of the roof/drip line of all buildings, driveways, covered decks, concrete or masonry patios, etc. that are within the applicable AEC.) (Attach your calculations with the project drawing .)

**Choose the AEC area that applies to your property:**

(1) within 75 feet of Normal High Water for the Estuarine Shoreline AEC

(2) within 575 feet of Normal High Water for the Estuarine Shoreline AEC, adjacent to Outstanding Resource Waters

(3) within 30 feet of the Public Trust Shoreline AEC

(Contact your Local Permit Officer if you are not sure which AEC applies to your property.)

**STATE STORMWATER MANAGEMENT PERMIT:** Is the project located in an area subject to a State Stormwater Management Permit issued by the NC Division of Water Quality? YES  NO

If yes, list the total built upon area/impervious surface allowed for your lot or parcel. \_\_\_\_\_ square feet.

**OTHER PERMITS MAY BE REQUIRED:** The activity you are planning may require permits other than the CAMA minor development permit. As a service we have compiled a listing of the kinds of permits that might be required. We suggest you check over the list with your LPO to determine if any of these apply to your project. Zoning, Drinking Water Well, Septic Tank (or other sanitary waste treatment system), Building, Electrical, Plumbing, Heating and Air Conditioning, Insulation and Energy Conservation, FIA Certification, Sand Dune, Sediment Control, Subdivision Approval, Mobile Home Park Approval, Highway Connection, and others.

**STATEMENT OF OWNERSHIP:**

I, the undersigned, an applicant for a CAMA minor development permit, being either the owner of property in an AEC or a person authorized to act as an agent for purposes of applying for a CAMA minor development permit, certify that the person listed as landowner on this application has a significant interest in the real property described therein. This interest can be described as: (check one)

an owner or record title, Title is vested in \_\_\_\_\_, see Deed Book \_\_\_\_\_ page \_\_\_\_\_ in the \_\_\_\_\_ County Registry of Deeds.

an owner by virtue of inheritance. Applicant is an heir to the estate of \_\_\_\_\_; probate was in \_\_\_\_\_ County.

if other interest, such as written contract or lease, explain below or use a separate sheet and attach to this application. property is public property managed by the Town of Kure Beach

**NOTIFICATION OF ADJACENT PROPERTY OWNERS:**

I furthermore certify that the following persons are owners of properties adjoining this property. I affirm that I have given **ACTUAL NOTICE** to each of them concerning my intent to develop this property and to apply for a CAMA permit.

(Name)	(Address)
(1) <u>Mike Robertson</u>	<u>101 Atlantic Ave., Kure Beach, NC 28449</u>
(2) _____	_____
(3) _____	_____
(4) _____	_____

**FOR DEVELOPERS IN OCEAN HAZARD AND ESTUARINE HAZARD AREAS:**

I acknowledge that the land owner is aware that the proposed development is planned for an area which may be susceptible to erosion and/or flooding. I acknowledge that the local permit officer has explained to me the particular hazard problems associated with this lot. This explanation was accompanied by recommendations concerning stabilization and floodproofing techniques.

**PERMISSION TO ENTER ON LAND:**

I furthermore certify that I am authorized to grant and do in fact grant permission to the local permit officer and his agents to enter on the aforementioned lands in connection with evaluating information related to this permit application.

This application includes: general information (this form), a site drawing as described on the back of this application, the ownership statement, the AEC hazard notice where necessary, a check for \$100.00 made payable to the locality, and any information as may be provided orally by the applicant. The details of the application as described by these sources are incorporated without reference in any permit which may be issued. Deviation from these details will constitute a violation of any permit. Any person developing in an AEC without permit is subject to civil, criminal and administrative action.

This the 13th day of May, 20 08

  
\_\_\_\_\_

Landowner or person authorized to act as his agent for purpose of filing a CAMA permit application



# SITE DRAWING/APPLICATION CHECKLIST

Please make sure your site drawing includes the following information required for a CAMA minor development permit. The drawing may be simple and not necessarily to scale. The Local Permit Officer will help you, if requested.

## PHYSICAL DIMENSIONS

- Label roads
- Label highways right-of-ways
- Label local setback lines
- Label any and all structures and driveways currently existing on property

## PHYSICAL CHARACTERISTICS

- Draw and label mean high water mark
- Draw location of on-site wastewater system

If you will be working in the ocean hazard area:

- Draw and label dune ridges (note height)
- Draw and label toe of dune
- Identify and locate first line of stable vegetation
- Draw and label setback line under CAMA
- Draw and label topographical features (optional)

If you will be working in an estuarine shoreline area:

- Draw and label landward limit of AEC
- Describe terrain (slope)

## DEVELOPMENT PLANS

- Draw and label areas that will be disturbed
- If a house is to be placed on lot, describe location of house
- Note size of piling and depth to be placed in ground
- Draw and label all areas to be paved or graveled
- Describe composition of surface
- Note and list fully all trees and vegetation to be removed or relocated
- Show landscaping

## NOTE TO APPLICANT

Have you:

- completed all blanks and / or indicated if not applicable?
- notified and listed adjacent property owners?
- included your site drawing?
- signed both application and statement of ownership?
- enclosed the \$100.00 fee?
- completed an AEC Hazard Notice, if necessary?

### FOR STAFF USE

Site Notice Posted \_\_\_\_\_ Final Inspection \_\_\_\_\_ Fee Received \_\_\_\_\_

Site Inspections

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date of Action: Issued \_\_\_\_\_ Exempted \_\_\_\_\_ Denied \_\_\_\_\_ Appeal Deadline (20 days) \_\_\_\_\_

# AEC HAZARD NOTICE

Project Is In An:  Ocean Erodible Area  High Hazard Flood Area  Inlet Hazard Area

Property Owner: \_\_\_\_\_

Property Address: \_\_\_\_\_

Date Lot Was Platted: \_\_\_\_\_

This notice is intended to make you, the applicant, aware of the special risks and conditions associated with development in this area, which is subject to natural hazards such as storms, erosion and currents. The rules of the Coastal Resources Commission require that you receive an AEC Hazard Notice and acknowledge that notice in writing before a permit for development can be issued.

The Commission's rules on building standards, oceanfront setbacks and dune alterations are designed to minimize, but not eliminate, property loss from hazards. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development. Permits issued in the Ocean Hazard Area of Environmental Concern include the condition that structures be relocated or dismantled if they become imminently threatened by changes in shoreline configuration. The structure(s) must be relocated or dismantled within two (2) years of becoming imminently threatened, and in any case upon its collapse or subsidence.

The best available information, as accepted by the Coastal Resources Commission, indicates that the annual long-term average ocean erosion rate for the area where your property is located is 2 feet per year.

The rate was established by careful analysis of aerial photographs of the coastline taken over the past 50 years.

Studies also indicate that the shoreline could move as much as 300 feet landward in a major storm.

The flood waters in a major storm are predicted to be about 14 feet deep in this area.

Preferred oceanfront protection measures are beach nourishment and relocation of threatened structures. Hard erosion control structures such as bulkheads, seawalls, revetments, groins, jetties and breakwaters are prohibited. Temporary sand bags may be authorized under certain conditions.

The applicant must acknowledge this information and requirements by signing this notice in the space below. Without the proper signature, the application will not be complete.

Henry E. Beebe 6/9/08  
Applicant Signature Date

**SPECIAL NOTE:** This hazard notice is required for development in areas subject to sudden and massive storms and erosion. Permits issued for development in this area expire on December 31 of the third year following the year in which the permit was issued. Shortly before work begins on the project site, the Local Permit Officer must be contacted to determine the vegetation line and setback distance at your site. If the property has seen little change since the time of permit issuance, and the proposed development can still meet the setback requirement, the LPO will inform you that you may begin work. Substantial progress on the project must be made within 60 days of this setback determination, or the setback must be remeasured. Also, the occurrence of a major shoreline change as the result of a storm within the 60-day period will necessitate remeasurement of the setback. It is important that you check with the LPO before the permit expires for official approval to continue the work after the permit has expired. Generally, if foundation pilings have been placed and substantial progress is continuing, permit renewal can be authorized. It is unlawful to continue work after permit expiration.

For more information, contact:

Stephen Lane  
~~Local Permit Officer~~ Coastal Management Representative  
400 Commerce Avenue  
Address  
Morhead City, NC 28557  
Locality  
(252) 808-2808  
Phone Number

**Setting Back for Safety: A Guide to Wise Development Along the Oceanfront**

When you build along the oceanfront, you take a calculated risk. Natural forces of water and wind collide with tons of force, even on calm days.

Man-made structures cannot be guaranteed to survive the force of a hurricane. Long-term erosion (or barrier island migration) may take from two to ten feet of the beach each year, and, sooner or later, will threaten oceanfront structures. These are the facts of life for oceanfront property owners.

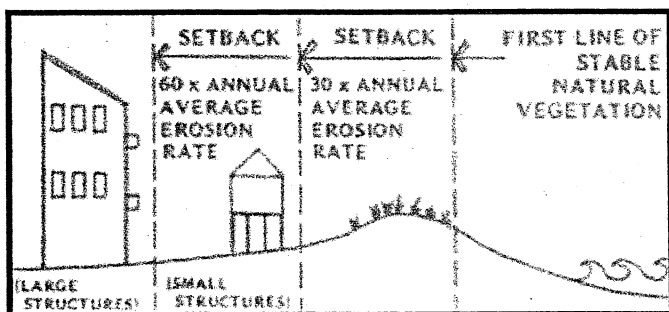
The Coastal Resources Commission (CRC) has adopted rules for building along the oceanfront. The rules are intended to avoid an unreasonable risk to life and property, and to limit public and private losses from storms and long-term erosion. These rules lessen but do not eliminate the element of risk in oceanfront development.

As you consider building along the oceanfront, the CRC wants you to understand the rules and the risks. With this knowledge, you can make a more informed decision about where and how to build in the coastal area.

**The Rules**

When you build along the oceanfront, coastal management rules require that the structure be sited to fit safely into the beach environment.

Structures along the oceanfront must be behind the frontal dune, landward of the crest of the primary dune, and set back from the first line of stable natural vegetation a distance equal to 30 times the annual erosion rate (a minimum of 60 feet). Large structures (multi-family residential structures greater than 5,000 square feet and nonresidential structures greater than 5,000 square feet) must be set back from the first line of natural stable vegetation a distance equal to 60 times the annual erosion rate of 120 feet, whichever



is greater. If the erosion rate is greater than 3.5 feet/year, the setback is 30 times the erosion rate plus 105 feet.

**The Reasons**

The beachfront is an ever-changing landform. The beach and the dunes are natural “shock absorbers,” taking the beating of the wind and waves and protecting the inland areas. By setting back 30 or 60 times the annual long-term erosion rate, you have a good chance of enjoying the full life of the structure. At first, it seems very inviting to build your dream house as close to the beach as possible, but in five years you could find the dream has become a nightmare as high tides and storm tides threaten your investment.

**The Exception**

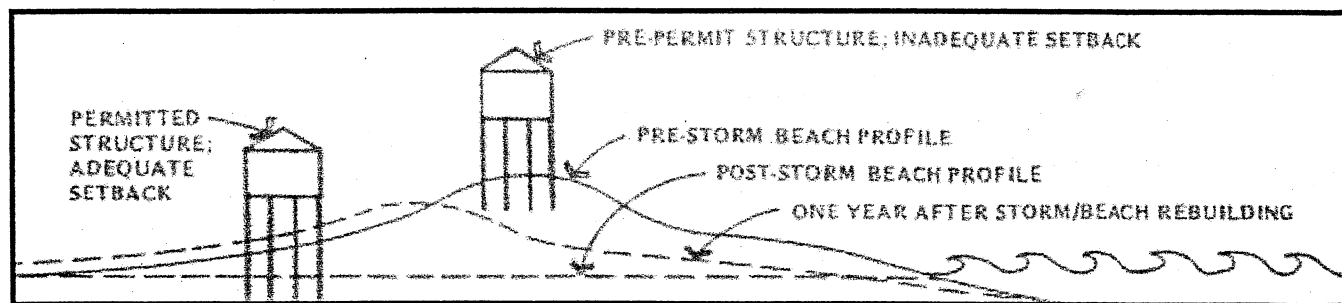
The Coastal Resources Commission recognized that these rules, initially passed in June 1979, might prove a hardship for some property owners. Therefore, they established an exception for lots that cannot meet the setback requirement. The exception allows buildings in front of the setback line if the following conditions apply:

- (1) the lot must have been platted as of June 1, 1979, and is not capable of being enlarged by combining with adjoining land under the same ownership;
- (2) development must be as far back on the property as possible and in no case less than 60 feet landward of the vegetation line;
- (3) no development can take place on the frontal dune;
- (4) special construction standards on piling depth and square footage must be met;
- and (5) all other CAMA, state and local regulations must be met.

The exception is not available in the Inlet Hazard Area.

To determine eligibility for the exception, the Local Permit Officer will make these measurements and observations:

- N/A required setback from vegetation line
- N/A exception setback (maximum feasible)
- N/A rear property line setback
- N/A max. allowable square footage on lowest floor
- N/A lot area as calculated from vegetation line
- N/A piling length needed to extend 4 feet below MSL



*After the storm, the house on the dune will be gone. The other house has a much better chance of survival.*



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

Date June 6, 2008

Applicant Name Town of Kure Beach

Mailing Address 117 Settlers Lane

Kure Beach, N.C. 28449

I certify that I have authorized (agent) Mason Herndon (NCDOT) to act on my behalf, for the purpose of applying for and obtaining all CAMA Permits necessary to install or construct (activity) a Dune Infiltration System to treat stormwater at the existing outfall, at (location) K Ave. and Atlantic Ave. beside Kure Beach Pier.

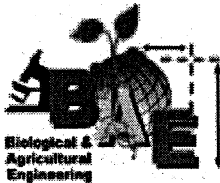
This certification is valid thru (date) 6/9/09.

Signature Henry E. Beebe

**Proposal**  
**Reducing stormwater flows and pollution from ocean outfalls at Kure Beach NC**  
**using Dune Infiltration Systems**

*Submitted to:*  
**NC Department of Transportation**

*Submitted by:*  
**NCSU Biological and Agricultural Engineering Department**



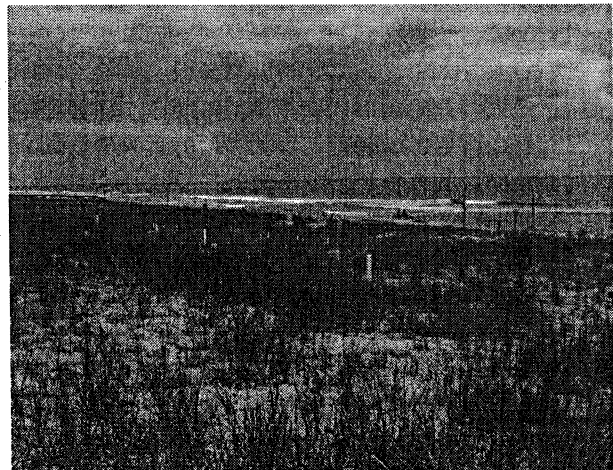
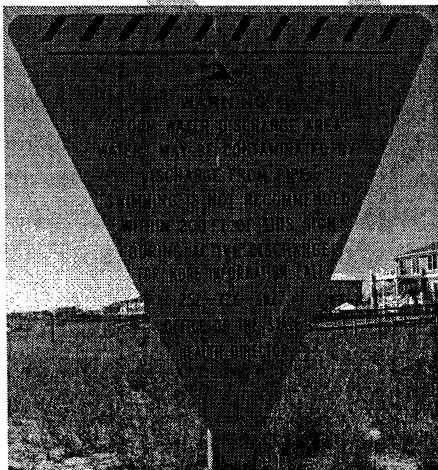
*Date submitted:*  
March 2008

*Project budget period:*  
August 1, 2008 – December 31, 2010

*Amount requested:*  
\$249,578

*Principle Investigators*

Michael R. Burchell, Ph.D.- Assistant Professor & Extension Specialist (*Project contact*)  
William F. Hunt, Ph.D, PE- Assistant Professor & Extension Specialist  
George M. Chescheir, Ph.D. - Research Associate Professor



## BACKGROUND

As populations increase near our beaches, new development and increased imperviousness generates more stormwater. Coastal towns traditionally discharge stormwater containing, among other pollutants, bacteria and pathogens to the ocean via ocean outfalls. More development equates to more stormwater flowing into the oceans under current management techniques, increasing the potential for serious diseases to recreational swimmers.

The Town of Kure Beach, NC has a number of stormwater outfalls that discharge on to the beach, sometimes directly flowing into the ocean with little infiltration into the sand. Stormwater samples collected during 2005-2006 from two outfalls draining from the town had *Enterococcus* levels that ranged from <10 CFU/100 ml to 4,010 CFU/100 ml with most of the samples exceeding 1,000 CFU/100 ml. Out of nearly 50 samples collected, only 3 did not exceed the state's single sample standard of 104 CFU/100ml for human contact waters (Bright, 2006; Burchell et al., 2007). Die off of bacteria, such as *E.coli*, is typically a rapid event in a saline environment, but can survive 3-5 days (Gerba and McLeod 1975). Given the importance of tourism to coastal towns, beach closures or human illness from swimming in a contaminated ocean could be detrimental to a local economy.

In 2005, our department, NCDOT, and the Town of Kure Beach began collaborating to address the issue of stormwater outfalls. The ocean outfalls carry runoff from US-421 and surrounding roads, parking lots, and rooftops. Town officials requested a low-cost, effective alternative to treat this runoff.

The result was the design of the Dune Infiltration System (DIS), thought to be the first of its kind in the region. Borrowing from existing sand infiltration and subsurface stormwater storage practices, this system was designed to divert stormwater from the outfalls into the dunes with a bypass system for more intense storm events (>0.5 in/hr). The dunes at Kure Beach have a relatively high elevation (~16.5 ft) above MSL), while the groundwater elevation, though subject to tidal influences, is relatively low (1-3 ft). Coupled with high infiltration rates common with beach sand, this makes for an ideal location for infiltration.

Two of these systems were installed in February 2006 to capture stormwater runoff from the L Ave. outfall (4.7 acre watershed) and M Ave. outfall (8.5 acre watershed). Both watersheds had similar mixed urban/residential development. Commercially available StormChambers, 3 ft tall x 5 ft wide x 8 ft long open bottomed polyethylene chambers, were installed beneath the dunes to infiltrate stormwater diverted from the outfalls into the dunes. The designed DIS for L Ave. required 12 chambers and was approximately 100 ft long, while the M Ave. system required 22 chambers and was approximately 200 ft long. Stormwater was diverted into each system from the outfalls in a subsurface concrete vault. These systems were installed 160 ft from the mean high tide line. Additional details of the design procedure and installation of the DIS can be found in Bright (2006) and Burchell et al. (2007).

Following storm event data collection in 2006, the system appeared to be very efficient in reducing stormwater flow and bacterial transport to the ocean areas. Stormwater exported from the two outfalls combined was reduced by 97%, with brief overflows occurring at the M Ave. site (known as Site M) during only 5 of 25 storms measured. Nearly 790,00 gallons of stormwater were diverted into the dunes rather than

discharging directly on the beach. The groundwater *Enterococcus* levels measured 25 ft downslope of the systems ranged from 5 CFU/100 ml to 64 CFU/100 ml with a median of 5 CFU/100 ml at Site L, and ranged from 5 CFU/100 ml to 2,005 CFU/100 ml with a median of 26 CFU/100ml at Site M. These groundwater samples were significantly less than the stormwater *Enterococcus* concentrations that would have been exported from the outfalls ( $p < 0.01$ ). None of the groundwater samples at Site L exceeded the state's *Enterococcus* standard, but six samples from the groundwater at Site M did (Bright, 2006; Burchell et al., 2007).

On November 17, 2006, we briefed the NC Coastal Resources Commission at a meeting in Atlantic Beach, NC. There, we discussed the benefits of infiltration systems near sensitive waterbodies, and included our results from DIS in the presentation. Members of the commission gave positive feedback regarding the system, which we took as an unofficial endorsement of continued study and further implementation.

However, to NCSU and NCDOT, our initial study of the system was considered a demonstration of a potential new BMP, so post-construction monitoring was to assess the feasibility of the practice. While the initial results of that level of monitoring appeared promising, the fate and transport of the bacteria in the dunes beneath the DIS was still not clearly understood. The increased groundwater *Enterococcus* concentrations observed particularly at Site M, the larger system, made it imperative that a more rigorous monitoring procedure be employed to determine if the DIS would have any negative effects as the groundwater migrated towards the ocean. Groundwater samples in the first study were collected only 25 ft down-gradient of the DIS, leaving approximately 135 ft of dune and beach for the groundwater to travel through before encountering the surf zone. We hypothesized early that bacteria levels near the system would likely be elevated, but would decrease as it moved laterally towards the beach.

In May 2007, through a one-year grant from WRRI, research at the site was intensified to test this hypothesis by studying the groundwater hydrology and bacteria levels in transects that extended from above the DIS system to the dune-beach interface, with added monitoring of a nearby dune system to serve as an experimental control. The water table and bacterial data are still being analyzed, but interesting trends have begun to emerge that appear positive for further implementation of the system. Initial indications are that groundwater mounding beneath the systems occurs briefly following storm events as expected. Mounding beneath the larger Site M system may be more significant than at Site L. Tidal influence may play a large role in understanding the dynamics of infiltration from the DIS through the dune profile. Bacterial concentrations measured in the groundwater during the first six-months of this study did not appear to be higher at the dune-beach interface (75 ft down slope of the DIS) at Site L or M than at the control location. If this trend continues, and we can clearly understand the dynamic groundwater hydrology of the system, we are cautiously optimistic that the Dune Infiltration System could be recommended for implementation at other locations as an alternate practice to direct stormwater discharge from ocean outfalls.

On August 3, 2006 while DIS testing at the L and M site was continuing under the original NCDOT funding, a swimming advisory was issued by NCDENR-DEH-Shellfish Sanitation and Recreational Water Quality Section at the Kure Beach Fishing Pier at K avenue. Triplicate test results of 124, 150, and 124 Enterococci per 100 mL sample exceeded the EPA standard of 104 Enterococci per 100 mL for contact waters at Tier 1

sites (Leonard, 2006)

[http://www.deh.enr.state.nc.us/pubinfo/pubview1\\_maint.asp?pubview1Page=7&ArticleID=298](http://www.deh.enr.state.nc.us/pubinfo/pubview1_maint.asp?pubview1Page=7&ArticleID=298).

Rainfall during the last week in July 2006 was 2.9 inches, likely resulting in a significant amount of stormwater entering the ocean from three outfalls near the pier, and that would have contributed to the elevated bacteria levels measured. The watersheds contributing runoff to these outfalls were more impervious than those contributing to the L and M DIS sites. The three sub-watersheds contributing stormwater to these outfalls include sections of US 421 between K and L avenue, and a stormwater inventory indicated runoff from this highway is piped directly into the largest outfall, located at K avenue near Kure Beach pier. Beside source from the residential and highway portions of the watersheds, visual inspection of the areas near the pier revealed many potential sources of bacteria. Several restaurants with garbage dumpsters are clustered in this area, attracting a large population of sea-gulls and other birds. Excrement from these warm-blooded creatures is very evident on the streets. Although not observed, potential bacteria sources may be from other mammals that may be feeding near the dumpsters at night. Together, this bacteria can be washed into the stormwater outfalls very quickly and transported into the ocean. This may explain why the site has been a hot-spot for elevated bacteria counts over the years. Figure 1 shows the largest outfall at K avenue. This outfall has in addition become a maintenance nightmare for the Kure Beach Public Works Department. Keeping it open requires frequent maintenance and leaves this dune un-natural looking.

Based on the initial success of the DISs at L and M avenue, the Town of Kure Beach, through a continued effort to update its stormwater infrastructure and improve the safety of its beaches, has pledged its support for another system to be installed in the dunes near K avenue. This system will be a somewhat different and more challenging design than the systems installed previously. The design will divert inflow from 3 outfalls near K avenue into a single DIS approximately the size of the system at M avenue. Combining outfalls into one system will require avoidance of subsurface infrastructure (i.e. sewers, water lines, etc.) more so than at the L and M avenue sites. Enhancement of at least one outfall (K avenue) will be required to ensure safety to the new DIS during high rainfall events.

NCSU Department of Biological and Agricultural Engineering requests support from NCDOT for the final design, construction costs, and construction oversight for a new DIS near the Kure Beach Fishing Pier at K avenue. This system will serve as a stormwater retrofit for NCDOT in a sensitive environmental area, treating stormwater runoff from US 421, as well as from nearby residential and commercial areas. In addition, support of monitoring and research on this new system and continued support of monitoring the new systems at L and M avenue, which also receive a portion of stormwater from US 421, is requested. Runoff from approximately 1800 ft of US 421 will be addressed with all three of these systems.



## OBJECTIVES AND PROJECT OUTCOMES

- Implement a new Dune Infiltration System near the Kure Beach Fishing Pier and K avenue to address advisories for elevated bacteria levels in the nearby swimming areas. This system will treat stormwater runoff from US 421, residential areas, and commercial areas.
- Evaluate the feasibility of routing flows from multiple stormwater pipes into one DIS by monitoring the hydrologic performance and estimating the percentage of overall flow from the watershed that is diverted into the dunes
- Compare stormwater bacteria concentrations near the pier with those at L and M avenue
- Document and analyze the groundwater response beneath the DISs with respect to hydrology and bacteria concentrations at the already well instrumented L and M avenue sites in years 3-5 following construction.
- Document and analyze the groundwater response beneath the new system near the Kure Beach Fishing Pier and K avenue with respect to hydrology and bacteria concentrations in years 0-2 following construction.
- Make recommendations based on 5 years of observation on the suitability of implementation of this technology at various sites
- Disseminate Dune Infiltration System design recommendations, procedures, and performance in at least one Extension document, 1 peer reviewed journal article, and 1 NCDOT final report. Also present findings at NCDOT sponsored meetings, national and state conferences, coastal stormwater workshops, or other relevant training events in North Carolina and the Southeast.

## PROCEDURES AND METHODS

### *TA 2007-10 - Initial Design*

The initial investigations and design for this project were begun through a Technical Assistance request (TA 2007-10). The following steps have been completed:

1. Site at K avenue and Atlantic Avenue near the Kure Beach Pier identified as a critical location for water quality improvement with respect to bacteria in stormwater runoff from 3 sub-watersheds that include US-421.
2. Obtained support from officials of the Town of Kure Beach
3. Multiple on-site meetings with NCDOT personnel and Town of Kure Beach Public Works Department to discuss feasibility of installing a new DIS with respect to existing infrastructure.
4. Site surveyed and survey maps created by NCDOT
5. Stormwater inventory provided by Town of Kure Beach
6. Watersheds identified and delineated for each of the three outfall pipes to be addressed with new system
7. Initial phase of hydrologic analysis of the contributing watersheds
8. Initial phase of the design of the new DIS, contingent upon sewer, stormwater, electrical, and water infrastructure that may be encountered prior to construction

### Operation of the DIS at site M

Figure 2 shows a plan view schematic of the system at M avenue (known henceforth as Site M). The stormwater is diverted from the outfall into the center of the dune. The chambers, buried to accommodate the elevation of the stormwater outfall, rested on a 6-12 in. layer of gravel. The stormwater flowed into the chambers, first filling the voids of the gravel bed along the length of the system, distributing the infiltration front across the dune. As flow rates increased, the depth of water within the start chambers began to increase, and vertical and lateral flow of the stormwater into the dunes began to increase. A water table mound formed beneath and near the perimeter of the system with maximum elevation near the start chambers, and then subsided soon after an infiltration event. This water then moved laterally through the dunes with the groundwater. Pollutants concentrations (we have studied bacteria) were reduced as the groundwater slowly moved toward and discharged into the ocean through the benthic layers. Flow that exceeded the system's capacity backed-up in the diversion vault and overflowed to the existing outfall. During these rare occasions there was simultaneous infiltration in the DIS and overflow. An example of water table response beneath the dunes at site M, as compared to the water table response in a dune with no DIS, is shown in Figure 3.

### Initial design of the Site K DIS

The initial design of the new DIS has been generated based on performance of the Site M, watershed delineation, determination of watershed land-use, stormwater and sewer infrastructure, and existing land and stormwater pipe elevations near the location of the proposed system.

The watershed at M avenue was determined to be approximately 8.5 acres - nearly the same size as the three sub-watersheds that will flow into the new system at K avenue (known henceforth as the new Site K). However the watersheds draining to the new site K are more impervious, and will generate more stormwater flow per storm event.

Data generated from the Site M indicated during 2006 and 2007 that the system handled inflows from storms greater than the design intensity of 0.5 in/hr, because there was less runoff from the watershed than predicted. The Rational Equation ( $Q=CiA$ ) was used to predict peak runoff from the watershed for these storms. Lower observed peak flows are likely to be due to flow and infiltration of stormwater into sandy lawns and even directly from the streets into the dunes, reducing the amounts predicted to enter the stormwater conveyance, and ultimately the outfalls to be diverted into the Site M DIS. The system, designed with 22 chambers, handled 96% of the stormwater flow that entered the outfall. Storms with intensities <1.1 inches/hr were completely handled by the Site M system, which exceeded our original design goal and performance expectations. It appeared that the system was limited by the 12 in. PVC inflow pipe to the system. Maximum flow through this pipe was estimated to be > 2 cfs during design, because the pipe was designed to be installed at a steeper slope than was possible during construction. The actual slope of the pipe installed was approximately 0.002 ft/ft, reducing the maximum flow into the system to around 2.1 cfs, theoretically. Our observed data later showed that overflow events occurred when flows into the system reached 1.9-2.1 cfs - in other words, this diversion pipe limited flow of stormwater to the system to a maximum rate of approximately 2 cfs.

Design of the new Site K system is based on a maximum inflow rate of <3.0 cfs. This is based on the peak flow rates calculated from the three sub-watersheds we intend to treat with this system (see Figure 4) during a 0.5 in/hr storm, performance of site M, and the elevations of the outfalls that will flow to this system. Table 1 shows a summary of the initial design parameters for the Site K system.

**Table 1.** Summary of design parameters for the DIS at Site K.

Watershed	Size (acre)	Estimated C	Peak Flow 0.5 in/hr storm (cfs)	Distribution pipe size (in)	Estimated pipe flow to chambers at 0.002 slope (cfs)	Number of chambers required
1	0.96	0.87	0.42	6	0.4	3
2	6.5	0.74	2.41	12	2.1	16-20
3	0.81	0.89	0.36	6	0.4	3
<b>Total</b>	8.27	0.77	3.19	-----	2.9	22-26

The most important parameter generated in Table 1 are the number of chambers required to treat the design flow. Performance at Site M suggests that the system may be slightly oversized (i.e. too many chambers), since we have observed higher water table mounding in the center of the system compared to the ends of the system, and the system was designed for flows greater than the observed maximum of 2.0 cfs. Our initial calculations of infiltration (infiltration rates of 125 in/hr were measured using a double-ringed infiltrometer) for the system require a range of 22-26 chambers to treat the maximum 3.0 cfs flow that will enter the Site K DIS. Further design scenarios will be explored to determine if fewer chambers can be used, which would reduce the overall footprint of the system within the dunes. However, the savings realized by installing fewer chambers is not great. Installing 5 less chambers would only save approximately \$3000 and less than 400 sq ft in dune disturbance. A conservative design early in the development of this stormwater BMP is recommended by our team.

***Construction sequencing and estimated dune disturbance***

Our design strives to minimize disturbance to the dune system during installation of the K avenue DIS. Construction will be conducted after November 2008 to avoid sea-turtle nesting season. A single back-hoe excavator will be used to cut the trench required to install the required distribution pipes and the StormChambers. Experience from the prior installation at L and M avenue will undoubtedly be beneficial in protecting the dunes from unnecessary traffic. Common ingress and egress points will be used for entry into the dunes from Atlantic Avenue, that runs parallel to the site. Dune disturbance will be limited to areas between the easternmost line of the chambers to Atlantic avenue along the length of the system.

Estimates of dune disturbance during installation is important since we must apply for a CAMA permit from NC Division of Coastal Management to work within the static vegetation line. Figure 5 shows the survey of the proposed area conducted by NCDOT in the summer of 2007, and also shows the location of the static vegetation line, 60 ft offset line and the 120 ft offset line. Figure 6 shows the location of portions of the system overlain on the survey, while Figure 7 shows the proposed location of the system

on an aerial map. Table 2 shows the estimated maximum area of the dunes disturbed during construction activities. These number were generated based on the use of 26 chambers, and a 10 ft wide x 3.5 ft deep trench for installation. The total area to be smoothed and revegetated is based on a 50 ft wide swath between where the chambers are to be installed and Atlantic avenue along 220 linear feet of dune.

**Table 2.** Estimates of dune disturbance during installation of the Site K DIS.

Invert elevation of chambers (NGVD88 ft)	Avg. water table location (NGVD88 ft)	Max. linear feet of dune disturbed	Max. Area of dune disturbance to install chambers (sq ft)	Max. estimated cut (cu yds)	Max. estimated gravel base (cu yds)	Total area to be smoothed and revegetated (sq ft)
7.6	2-3	220 ft	2200	285	50	11,000

Construction sequencing will be as follows. Installation will be performed by employees of the Kure Beach Public Works Department and overseen by NCSU-BAE.

1. Stakeout of system location, removal of old dune fence, and temporary disassembly of boardwalks to allow for excavation.
2. Installation of the chambers. Installation of the DIS will be with a single linear configuration near the middle of the dunes. This will maximize the seepage face between the dunes and the high tide line. A trench will then be created in the dunes with a backhoe. The trench will be approximately 8-10 ft wide and 3.5 ft in depth. After excavation, the trench will be lined with a 4-ounce non-woven fabric, and then crushed, washed, 1-2 in. stone will be added to a depth of 6 in. The base level will be at zero grade. The StormChamber™'s will then be placed in the trench, connected and backfilled with sand until they are no longer visible. Figure 8 shows a cross section of one chamber at the designed elevations.
3. Existing stormwater drop inlets outside of the dune system will be expanded to include a sediment trap, a connection to the DIS, and a high flow bypass to the existing outfalls. The new basin will also be large enough to install automatic water samplers and flow measurement devices, and keep them secure. Kure Beach town engineers will assist in this retrofit.
4. Install distribution pipes from the stormwater drop inlets to the chambers located in the dunes
5. Retrofit or installation of a new of K avenue outfall for by passing high-flow events
6. Final connection to the flow splitter/observation manholes
7. Install water table and water quality observation wells
8. Dune re-grading and dune vegetation will then be replanted on the area.

Dune vegetation following construction at site L and M established quickly following planting and fertilization. American Beach grass and sea-oats will be planted as well at this site. Figure 9 shows the dunes at Site L in May 2007.

## Post Construction Monitoring and System Evaluation

The new system at K will be monitored in addition to the existing sites at L and M avenue. Monitoring elements can be separated into stormwater inflow and quality, and groundwater hydrology and quality. Tables 3 and 4 indicate the monitoring instrumentation and frequency of monitoring or water quality sampling.

**Table 3.** Instrumentation to evaluate DIS performance at Kure Beach

Site	Stormwater Flow/water quality stations (location)	WT Wells	WQ wells	Stage within Chambers	Rain gauges
K <sup>1</sup>	2 (street)	2	3	4	0
L	1 (dune)	5	8	2	1
M	1 (dune)	5	8	2	1
Control Dune	N/A	1	3	N/A	0
<b>Total</b>	4	13	22	8	2

1 - Instrumentation and wells at site K will be installed as part of this proposal. Sites L, M and the control Dune are currently instrumented to the level indicated.

**Table 4.** Proposed monitoring and sampling frequency

Site	Flow	Stormwater sampling ( <i>Enterococcus</i> / Nutrients)	Water table Elevation	Groundwater <i>Enterococcus</i>	Groundwater Nutrients
K	Continuous (5 min. interval)	Entero-20x/year Nutrients- 5x/year	Continuous (20 min. interval)	Monthly	Quarterly
L	Continuous (5 min. interval)	Entero-20x/year Nutrients- 5x/year	Continuous (20 min. interval)	Monthly	Quarterly
M	Continuous (5 min. interval)	Entero-20x/year Nutrients- 5x/year	Continuous (20 min. interval)	Monthly	Quarterly
Control Dune	N/A	N/A	Continuous (20 min. interval)	Monthly	Quarterly

### Stormwater outfall monitoring

Stormwater flow into the DIS will be monitored in the stormwater drop inlets (Site K) or the existing monitoring vaults (Site L and M). Stormwater samples entering each DIS will be collected using an ISCO 6712 Portable Sampler connected to an ISCO 730 Bubbler Module (Teledyne Isco, Inc.) that will use stage, slope and roughness of the pipe to calculate flow volumes and trigger the sampler. Peak flows and volume of stormwater treated by the DISs will be calculated. Samples from approximately 20 rainfall events per year will be collected and analyzed for *Enterococcus* (ASTM method #D6503-99 as used by NC Shellfish Sanitation or equivalent). Samples will be collected by NCSU personnel and delivered to a local state certified analytical lab (most likely Tri-Test, Wilmington, NC) for bacterial analysis within EPA recommended holding times. Nutrients (nitrogen and phosphorous) and TSS that are commonly associated with stormwater will also be measured following 5 rainfall events/year. The Environmental Analysis Laboratory in the Department of Biological and Agricultural Engineering Analytical Lab will be used for these analyses.

## Groundwater elevation and water quality monitoring

Wells and water table dataloggers are currently installed at sites L and M in a manner similar to the schematic presented in Figure 2. One transect of water table and two transects of water quality wells (with one well upslope of the DIS) comprise the groundwater monitoring surrounding the DISs. In addition, a control dune, located between Sites L and M have a transect of water quality wells and 1 water table well located at the mid-point of the dune system. Only one transect comprised of 3 water quality wells (located at 1 ft, 25 ft and 75 ft downslope of the DIS) and two continuously water table wells (located 1 ft and 25 ft downslope of the DIS) will be installed at the proposed Site K. Fewer wells are proposed for this site based on previous observations at site L and M, and to reduce the impact to the aesthetic quality of the dunes in the high viability area near the Kure Beach Pier.

Wells at site K will be surveyed to identify groundwater elevations and relate them to automatically recorded values. Water table measurements will be logged continuously at 20 minute intervals with either INFINITY (Infinities USA, Inc.) or HOBO (Onset Computer Corporation) water level recorders. The direction of groundwater flow will then be measured seasonally, at various tidal stages, and following precipitation events. A three point method will be employed to identify the 2-dimensional flow direction of the groundwater to verify if the groundwater is moving towards the ocean and at what rate, to estimate retention time of the stormwater in the dune system. Wells at Site L and M have been surveyed and instrumented, and groundwater movement there is being and will continue to be analyzed as stated above. Precipitation will also be monitored with an automatic tipping bucket rain gauge attached to a datalogger (ONSET Computer Corporation), and verified using a manual gauge.

Groundwater quality samples will be collected and delivered within EPA recommended holding times and temperature, and analyzed for *Enterococcus* monthly and nutrients quarterly as described above in the stormwater monitoring section. Groundwater samples will be collected with disposable bailers following purging of 3 well volumes.

Further groundwater hydrology studies may include implementation of a tracer study and development of a groundwater flow model. All of these elements will help to better understand and predict the groundwater and bacteria movement in the dunes following infiltration events.

## TIMELINE

TASK	COMPLETION DATE
Site ID of New DIS	COMPLETE
Initial design of K Avenue DIS	COMPLETE
Application for CAMA permit	JUNE 2008
Finalize permitting process	AUG 2008
Execute Grant Proposal with NCSU	AUG 2008
Hire NCSU M.S. graduate student	AUG 2008
Begin Monitoring at Site L and M	AUG 2008
Finalize K Ave DIS Plans/Address infrastructure concerns	SEPT/OCT 2008
Purchase K avenue Monitoring Supplies/Equipment	NOV 2008
Construction of Site K DIS	NOV/DEC 2008
Install K avenue Monitoring Equipment	JAN 2009
Begin Monitoring Site K DIS	JAN/FEB 2009
Monitoring Ends/ Submit DRAFT Final Report	DEC 2010

DRAFT

## BUDGET (FISCAL YEAR)

<b>BUDGET ITEM</b>	<b>Year 1</b>	<b>Year 2</b>	<b>Year 3</b>
<b>A. Salaries and Wages</b>			
1. Senior Personnel and EPA personnel			
Chescheir	6875	7500	3750
Shaffer	5042	5500	2750
2. Other Personnel:			
a. Research Technician	0	0	0
b. Graduate Student (PHD)	0	0	0
Graduate student (MS)	9,500	19,000	19,000
c. Undergraduate Students	1,000	2,000	2,000
<b>Total Salaries and Wages</b>	<b>22,417</b>	<b>34,000</b>	<b>27,500</b>
<b>B. Fringe Benefits</b>	<b>4,394</b>	<b>6,080</b>	<b>4,455</b>
<b>C. Total Salaries, Wages, and Fringe Benefits</b>	<b>26,811</b>	<b>40,080</b>	<b>31,955</b>
<b>D. Equipment</b>	<b>11,000</b>	<b>0</b>	<b>0</b>
<b>E. Supplies and Materials</b>			
Construction	25,000		
Monitoring	14,000	2,000	1,000
<b>F. Current Services-Travel</b>	<b>3,350</b>	<b>4,500</b>	<b>3,600</b>
<b>G. Current Services - Communication and Printing</b>	<b>250</b>	<b>250</b>	<b>250</b>
<b>H. Student Aid (tuition)</b>	<b>5,636</b>	<b>5,636</b>	<b>2,850</b>
<b>I. Fixed Charges</b>			
Stormwater and Groundwater Analysis - Bacteria	8,600	9,500	4,750
Stormwater and Groundwater Analysis - Nutrients	3,780	4,200	2,170
Conference Registration	0	500	500
<b>J. Total Direct Costs (TDC) (sum of A to I)</b>	<b>98,427</b>	<b>66,666</b>	<b>47,075</b>
<b>K. Indirect Costs (20% NCDOT)</b>	<b>16,358</b>	<b>12,206</b>	<b>8,845</b>
Does not include Equipment or Tuition			
<b>L. Total Direct and Indirect Costs (sum A to K)</b>	<b>114,786</b>	<b>78,872</b>	<b>55,920</b>
<b>TOTAL REQUESTED FROM AGENCY PER YEAR</b>	<b>114,786</b>	<b>78,872</b>	<b>55,920</b>
<b>THREE YEAR TOTAL</b>			<b>249,578</b>

### BUDGET JUSTIFICATION

Salaries and wages include 0.1 FTE of Co-PI Chescheir, 0.1 FTE Extension Associate (Shaffer), and 4.5 months of an undergraduate summer assistant, with fringe benefits of 25% and 8.5%, respectively. Hunt and Burchell will not be paid directly from this grant.



Equipment are items that will cost >\$5000, and for this grant includes the infiltration chambers and delivery, which are being supplied by StormChamber at reduced cost.

Construction costs will be paid to the Town of Kure Beach on subcontract - they are donating labor costs.

Supplies include automatic water samplers, stormwater flow measuring devices, water table level dataloggers, batteries and solar panels, above-ground enclosures for water quality samplers, PVC wells and well screen, water sampling supplies (pumps, bailers, bottles, acid, etc.), and soil sampling supplies (augers, probes, etc.).

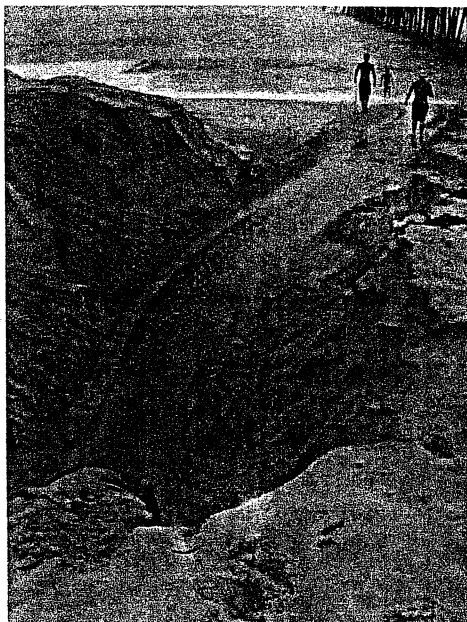
Travel includes 24 round trips from Raleigh to Kure Beach (300 miles) per year, for sampling and meetings, plus occasional per diem and lodging for overnight stays. Vehicles used will be associated with the BAE department and BAE extension. Field travel is based on mileage charge for MFMD vehicles which NCSU codes as a fixed charge. Travel costs also include funds to support presentations on the results of this research at conferences and workshops.

Student aid is based on in-state tuition for 1 graduate student for a maximum of 5 semesters.

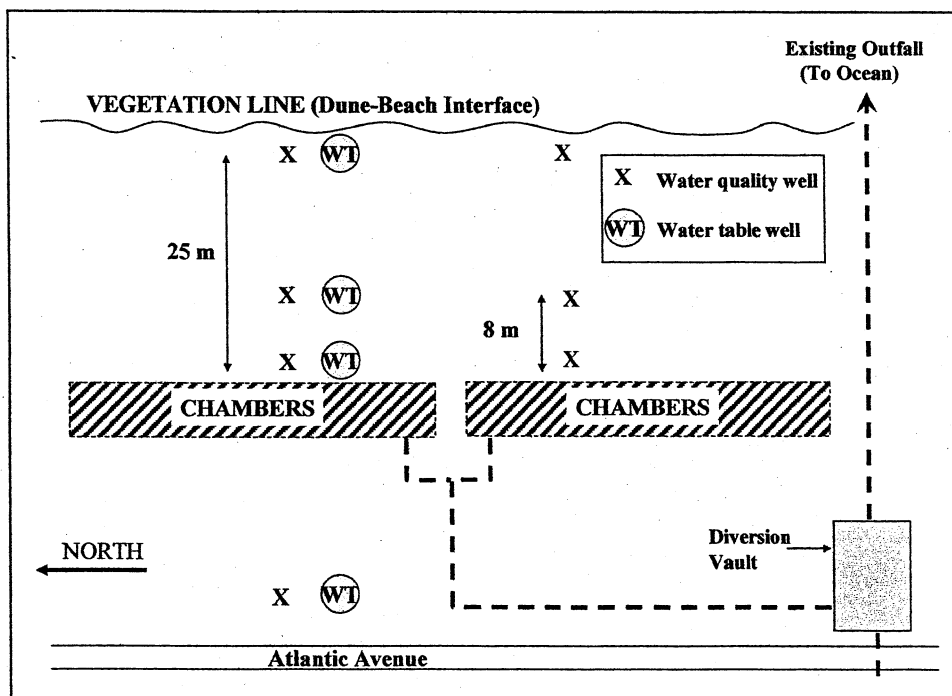
Fixed charges are related mostly to analysis of stormwater for bacteria, nutrients, and TSS based on a quote from Tri-Test in Wilmington, NC (Enterococcus = \$25/sample) and the NCSU-BAE EAL (TSS and nutrients combined = \$25/sample). Bob Maestro of StormChamber has pledged \$2000-\$3000 to help intensify the number of samples for nutrient analysis we may conduct. Other fixed costs include conference registration for PIs or the M.S. graduate student to present results of the study at a scientific conference.

## REFERENCES

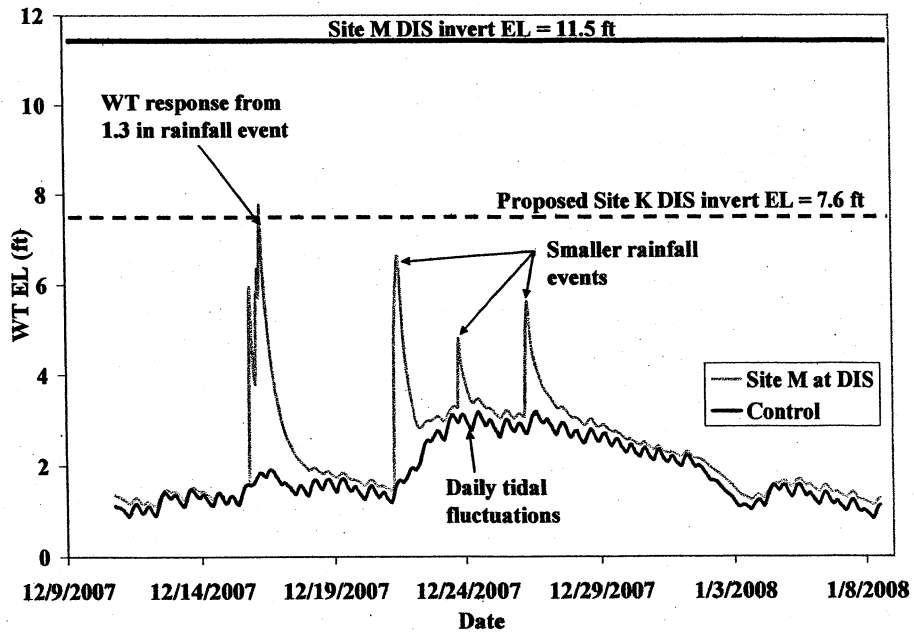
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- Gerba, C.P. and J.S. McLeod. 1975. "Effect of Sediments on the Survival of *Escherichia Coli* in Marine Waters." *Applied and Environmental Microbiology*, 32(1) 114-120.



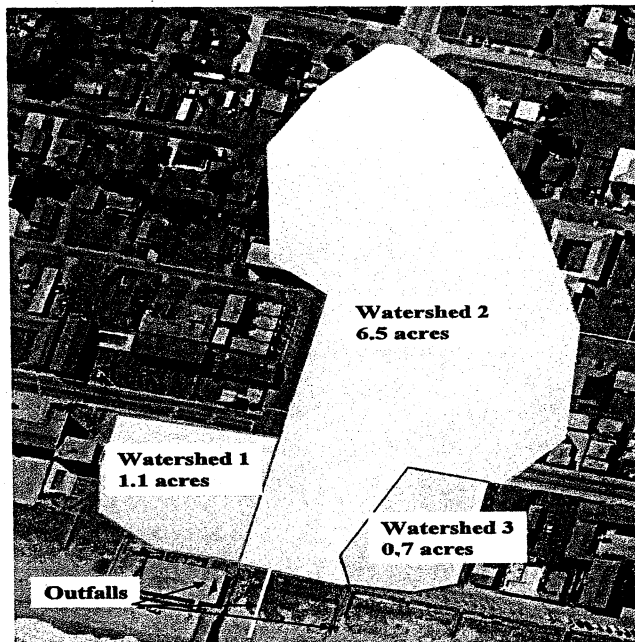
**Figure 1.** A 24 in outfall draining K avenue near the pier at Kure Beach. This outfall requires frequent maintenance to keep it open for drainage. Unfortunately, it provides an opportunity for swimmers to come in direct contact with the stormwater drainage. We would like to divert this water into the dunes and away from bathers.



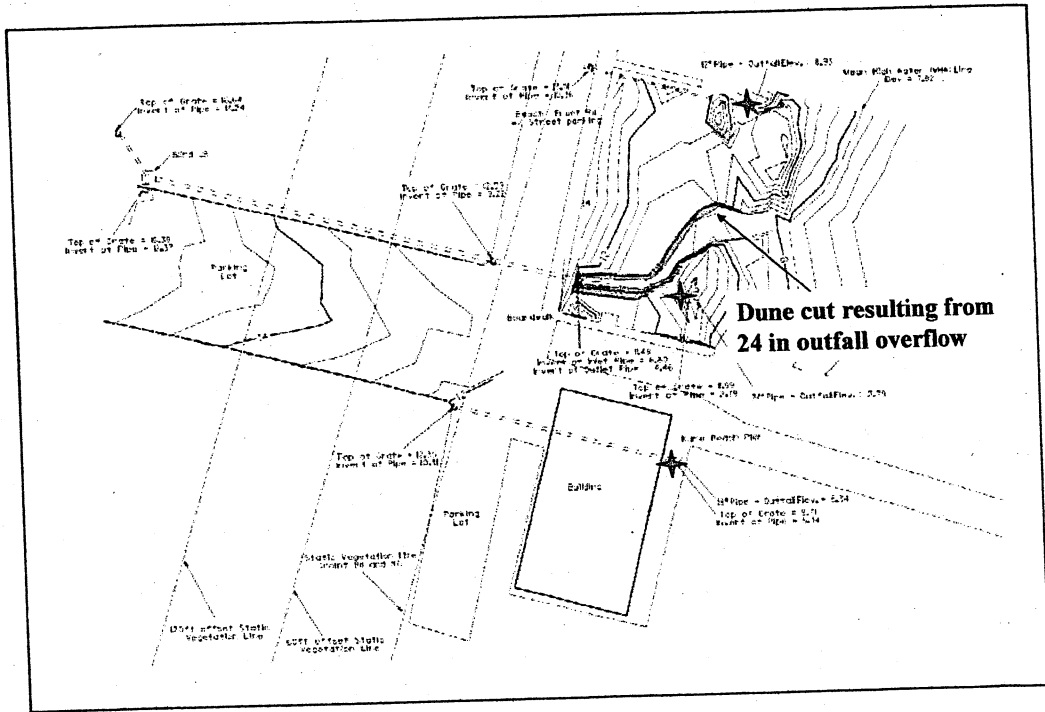
**Figure 2.** Plan view of the Dune Infiltration System at Site M, currently treating stormwater runoff from an 8 acre watershed at Kure Beach. Stormwater entering the diversion vault flows into the chambers, where it can infiltrate both vertically and laterally into the sand dunes. The chambers are buried below the sand and out of view.



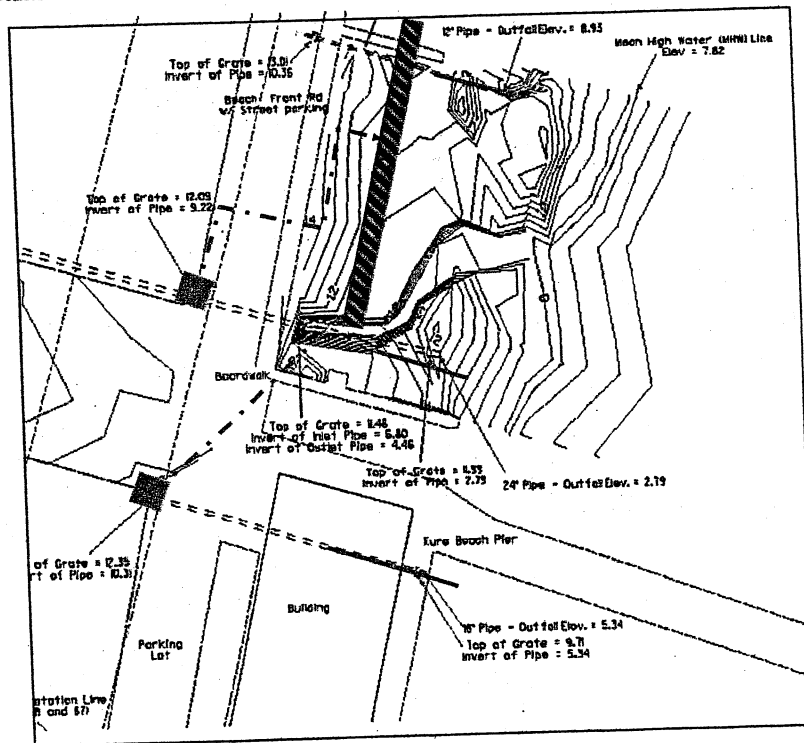
**Figure 3.** Water table response beneath the DIS at Site M. Note the sudden rise and fall of the water table near the chambers (light blue line) soon after an infiltration event. That level then returns to elevations similar to those measured in the dunes with no DIS (control - dark blue). During the 1.3 inch rainfall event, the water table was still 3.5 ft. below the invert of the chambers. The new system at site K must be installed lower due to current stormwater infrastructure located there. Small peaks that occur twice a day are the result of tidal influence from the ocean.



**Figure 4.** The three subwatersheds we propose to treat with the new DIS at K avenue



**Figure 5.** NCDOT survey of the site using NGVD88. Noted are the outfalls and the deep trench that has formed within the dune as a result of overflow events from the 24 in K avenue outfall. The work in the dunes would be well inside the static vegetation line.



**Figure 6.** Schematic of proposed site K DIS system overlain on NCDOT survey. Dotted lines indicate diversion pipes connected to the new DIS (hatched rectangular area).

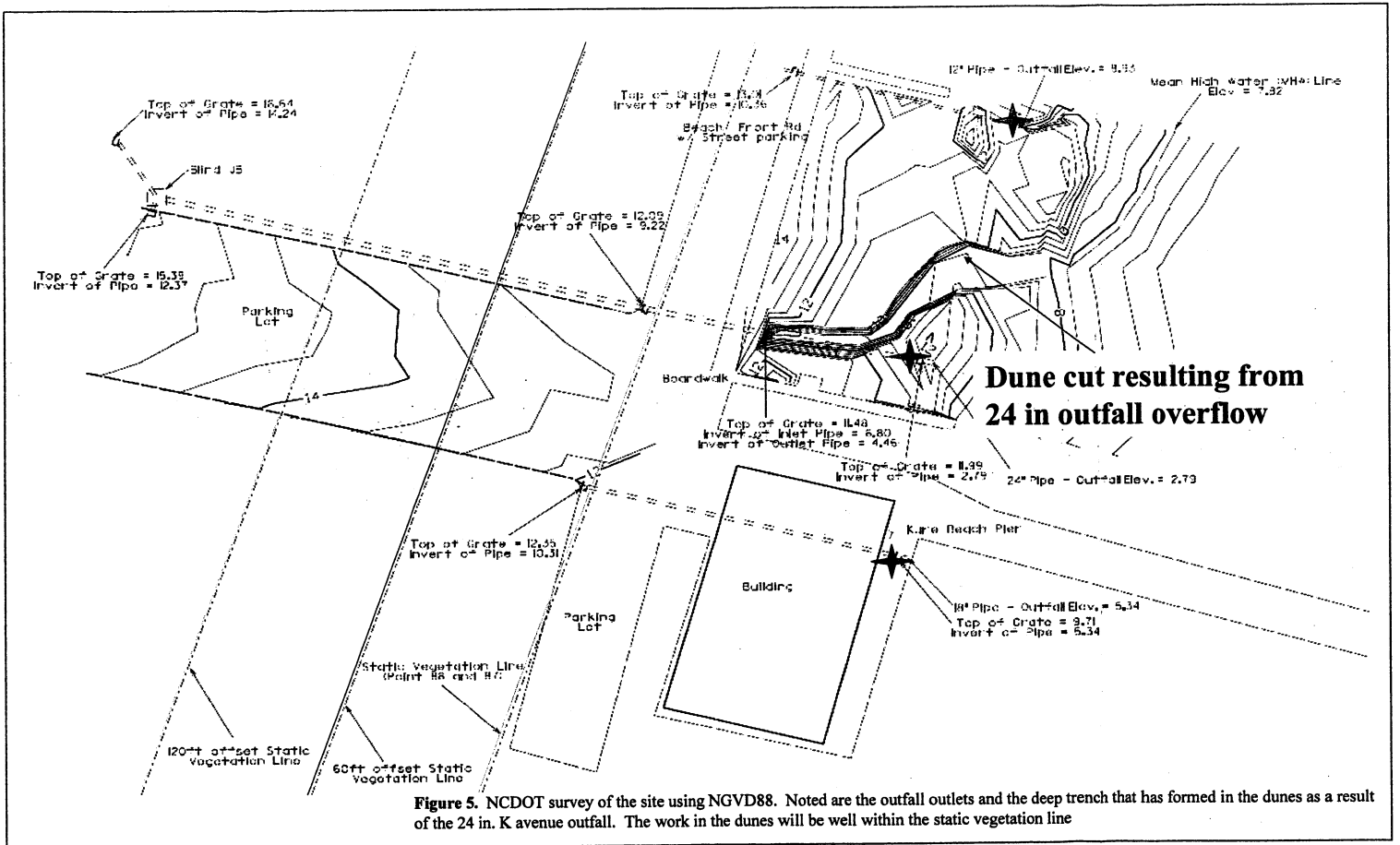
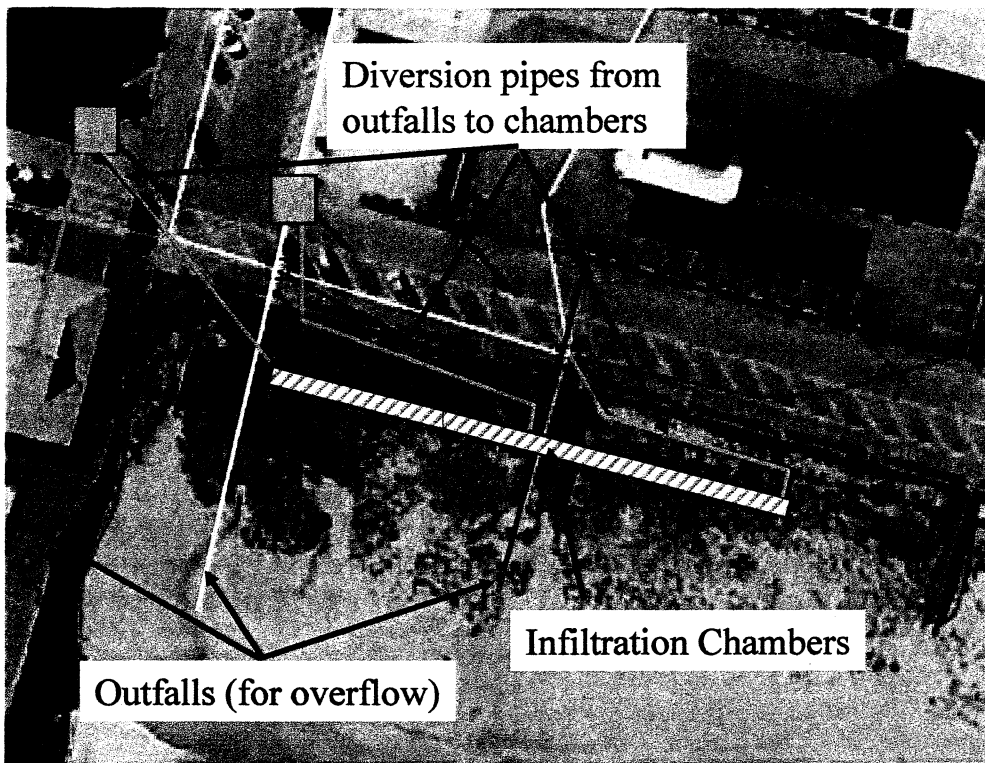
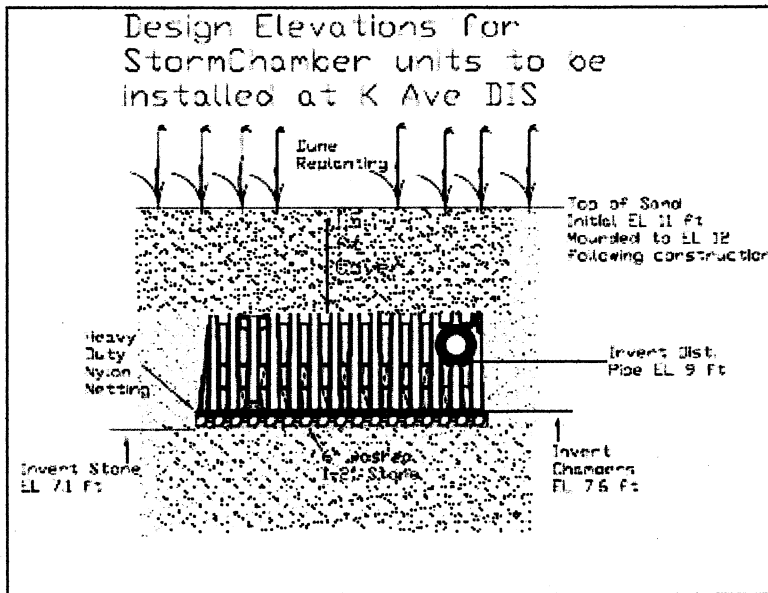


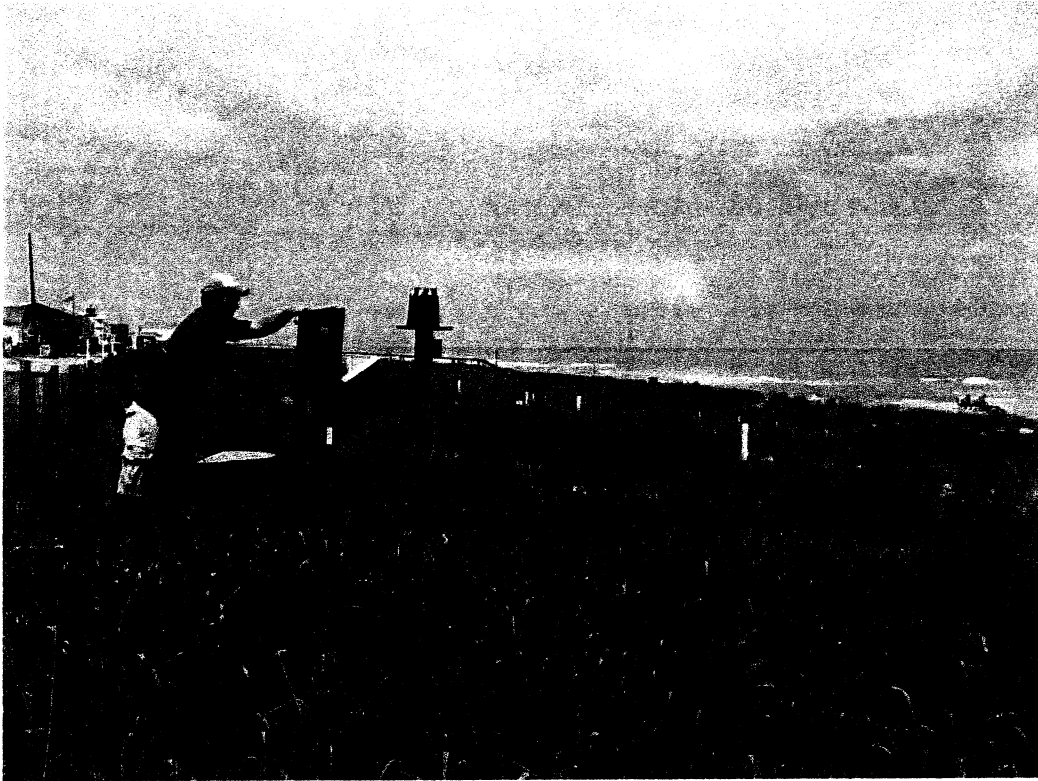
Figure 5. NCDOT survey of the site using NGVD88. Noted are the outfall outlets and the deep trench that has formed in the dunes as a result of the 24 in. K avenue outfall. The work in the dunes will be well within the static vegetation line



**Figure 7.** Location of the proposed Site K DIS within the dune system



**Figure 8.** Cross section of dune system with the proposed elevations for installing the Site K DIS.



**Figure 9.** Vegetation at site L reestablished very quickly to levels that exceeded the density prior to construction.



CRC-VR-08-47


State of North Carolina

Department of Justice

ROY COOPER  
ATTORNEY GENERAL

P. O. Box 629  
RALEIGH  
27602-0629

TO: Coastal Resources Commission

FROM: Amanda P. Little   
Assistant Attorney General

DATE: September 12, 2008 (for the September 24-26, 2008 CRC Meeting)

RE: **Variance Request by Wilmington Light Infantry Club**

---

Petitioner applied for a CAMA major permit to replace an existing docking facility with a new fixed pier, gazebo, and floating docks in Wilmington, New Hanover County. The proposed development exceeds a combined total area of four square feet per linear foot of shoreline. Petitioner applied for this variance seeking relief from strict application of the Commission's ocean hazard rules at 15A NCAC 7H .0208(b)(6)(D).

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Petitioners' and Staff's Position to Criteria  
Attachment D: Petitioners' Variance Request Materials  
Attachment E: Stipulated Exhibits

cc: Ralph Mullis, Wilmington Light Infantry Beach Club, President  
Jim Gregson, DCM Director  
Ted Tyndall, DCM Assistant Director  
Steve Everhart, District Manager, Wilmington DCM Office  
Jon Giles, DCM Field Representative  
Jennie W. Hauser, CRC Counsel





**RELEVANT STATUTES OR RULES**

**15A NCAC 7H .0208 Use Standards**

*(b) Specific Use Standards*

(6) Docks and Piers.

(A) Docks and piers shall not exceed six feet in width. Wider docks and piers shall be permitted only if the greater width is necessary for safe use, to improve public access; or to support a water dependent use that cannot otherwise occur.

(B) Any portion of a dock or pier (either fixed or floating) extending from the main structure and six feet or less in width shall be considered either a "T" or a finger pier.

(C) Any portion of a dock or pier (either fixed or floating) greater than six feet wide shall be considered a platform or deck.

**(D) The combined area of all "T"s, finger piers, platforms, and decks must not exceed a combined total area of four square feet per linear foot of shoreline. Projects requiring dimensions greater than those stated in this Rule shall be permitted only if the greater dimensions are necessary for safe use, or to support a water dependent use that cannot otherwise occur.**

(E) "T"s, platforms and decks shall have no more than six feet of any dimension extending over coastal wetlands.

(F) Docks, piers, "T"s and associated structures built over wetlands must be elevated at least three feet over the wetland substrate measured from the bottom of the decking.

(G) Boathouses shall not exceed 400 square feet except to accommodate a demonstrated need for a larger boathouse and shall have sides extending no farther than one-half the height of the walls and only covering the top half of the walls. Measurements of square footage shall be taken of the greatest exterior dimensions. Boathouses shall not be allowed on lots with less than 75 linear feet of shoreline. Size restrictions shall not apply to marinas.

(H) The total area enclosed by boat lifts shall not exceed 400 square feet.

(I) Piers, docks, decks, platforms and boat houses shall be single story. They may be roofed but shall not be designed to allow second story use.

(J) Pier length shall be limited by:

(i) not extending beyond the established pier length along the same shoreline for similar use; (This restriction shall not apply to piers 100 feet or less in length unless necessary to avoid unreasonable interference with navigation or other uses of the waters by the public);

(ii) not extending into the channel portion of the water body; and

(iii) not extending more than one-fourth the width of a natural water body, or human-made canal or basin. Measurements to determine widths of the water body, canals or basins shall be made from the waterward edge of any coastal wetland vegetation which borders the water body. The one-fourth length limitation shall not apply in areas where the U.S. Army Corps of Engineers, or a local government in consultation with the Corps of Engineers, has established an official pier-head line. The one-fourth length limitation shall not apply when the proposed pier is located between longer piers within 200 feet of the applicant's property. However, the proposed pier cannot be longer than the pier head line established by the adjacent piers, nor longer than 1/3 the width of the water body.

(K) Piers longer than 400 feet shall be permitted only if the proposed length gives access to deeper water at a rate of at least one foot each 100 foot increment of pier length longer than 400 feet, or, if the additional length is necessary to span some obstruction to navigation. Measurements to determine pier lengths shall be made from the waterward edge of any coastal wetland vegetation which borders the water body.

(L) Piers shall not interfere with the access to any riparian property and shall have a minimum setback of 15 feet between any part of the pier and the adjacent property owner's areas of riparian access. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the pier commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development of the pier. Application of this Rule may be aided by reference to the approved diagram in 15A NCAC 7H .1205(q) illustrating the rule as applied to various shoreline configurations. Copies of the diagram may be obtained from the Division of Coastal Management. When shoreline configuration is such that a perpendicular alignment cannot be achieved, the pier shall be aligned to meet the intent of this Rule to the maximum extent practicable.

(M) Applicants for authorization to construct a dock or pier shall provide notice of the permit application or exemption request to the owner of any part of a shellfish franchise or lease over which the proposed dock or pier would extend. The applicant shall allow the lease holder the opportunity to mark a navigation route from the pier to the edge of the lease.

(emphasis added).

ATTACHMENT B

**STIPULATED FACTS**

1. Petitioner, Wilmington Light Infantry Club, a private club, owns a .14 acre tract of land (the "property") located at 10 Channel Avenue adjacent to Banks Channel in Wrightsville Beach, New Hanover County, NC. The property was deeded to the Trustees of the Club in 1936.
2. Currently, the Wilmington Light Infantry Club contends its membership is 43 people ranging from young children to World War II veterans (this number does not reflect the member's families or extended families that are given access to the club through member).
3. The property has a 2-story clubhouse, a concrete bulkhead and an existing pier with a gazebo and swimming platform, which Petitioner contends were all built prior 1965. The existing pier, gazebo and swimming platform as they currently stand are nonconforming to current regulations, which include the 4 square foot rule (15A NCAC 07H .0208(b)(6)(D)) and the 15' riparian corridor setback requirement (15A NCAC 07H .0208(b)(6)(L)). Petitioner contends the existing docking facility is a total of 396 square feet.
4. The property is located within the Estuarine Waters Area of Environmental Concern (AEC) and the Public Trust Areas AEC designated by the Coastal Resources Commission (CRC) in Rules 15A NCAC 7H .0206 and .0207.
5. Petitioner, through Ralph Mullis, Club President, applied for a CAMA Major Development Permit to replace the existing docking facility and rebuild a new 6' x 48' fixed pier leading to a 16' x 16' gazebo. Along the side of the pier, near the gazebo, is proposed 2 tie pilings on each side of the pier for the purpose of transient day docking for shallow draft boats less than 16' in length. Beyond the gazebo, Petitioner proposes to construct a 6' x 46' floating dock that will run perpendicular to the channel allowing for 4 boats slips (2 per side) with a 8' x 20' floating t-head for use as a swimming platform as well as possible transient docking (creating a maximum of 7 proposed boat slips).
6. The proposed docking facility would extend approximately 15' waterward from the end of the existing docking facility. The Division of Coastal Management (DCM), however, determined that due to the waterward extension of the new docking facility relative to the existing docking facility, the non-conforming development standards in 15A NCAC 07J .0211 are not applicable. Also, the proposed new docking facility will not extend waterward of the established Town of Wrightsville Beach Pier Head Line.
7. Petitioner has approximately 51 feet of shoreline along Banks Channel, as measured along the normal high water line.

8. CRC Rule 15A NCAC 07H .0208(b)(6)(D) provides “the combined area of all “T”s, finger piers, platforms, and decks must not exceed a combined total area of four square feet per linear foot of shoreline. Projects requiring dimensions greater than those stated in this Rule shall be permitted only if the greater dimensions are necessary for safe use, or to support a water dependent use that cannot otherwise occur”.
9. In accordance with the standards set forth in 15A NCAC 07H .0208(b)(6)(D), the DCM determined that the maximum allowable platform area for the property is 204 square feet (51 linear feet of shoreline x 4 square feet).
10. In accordance with the standards set forth in 15A NCAC 07H .0208(b)(6), DCM determined that the proposed development would result in a total platform size of 320 square feet. The proposed development is 116 square feet beyond the maximum allowable platform area.
11. The N.C. Division of Water Quality (DWQ) has approved the proposed development by letter dated March 13, 2008, as long as all conditions of General Water Quality Certification No. 3687 are met. (DWQ Project # 08-0344)
12. The Department of Army, Corps of Engineers, Regulatory Division has authorized the proposed development under Regional General Permit No. 197800056, which was issued on March 12, 2008.
13. The N.C. Division of Marine Fisheries had no comment on the proposed development and the N.C. Wildlife Resources Commission did not object to the proposed development.
14. The adjacent riparian owners to the north and south (Town of Wrightsville Beach) had no objections to the proposed development, but did not waive the 15' setback requirement. The existing pier is located along the southwestern side of the Petitioners' riparian corridor. The proposed pier will originate more from the center of the property and will not encroach into either adjacent 15' riparian corridor setback.
15. The N.C. Division of Coastal Management Director, James H. Gregson denied the permit application by letter dated June 18, 2008 because the proposed development was inconsistent with Rule 15A NCAC 7H .0208(b)(6)(D).
16. Petitioners filed this variance request on July 29, 2008, seeking relief from strict application of the Estuarine Waters and Public Trust Areas AEC rule set forth in 15A NCAC 7H .0208(b)(6)(D).

ATTACHMENT C

**Summary of Petitioner and Staff Positions**

**I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.**

**Petitioner's Position: Yes.**

Our club is a group of families with small children and older adults that gather to enjoy the amenities that the club offers with a pier area for fishing and crabbing, a gazebo for sitting or rocking and a swim platform for sunning or swimming/diving. This must all be done safely by the various ages of our membership. It is an expectation of the members to have these amenities/congregation areas available.

Our current dock/gazebo/pier was constructed before CAMA issued rules for pier and dock construction. In fact, we believe our improvements are around 45 years old. They have survived this long due to a lot of careful maintenance and good fortune given the number of storms/hurricanes during that period. The hardships created would include: limited access/enjoyment of our members, safety of older/younger members, expectation of use by members for ongoing benefit of members and reduced ability to hold club events on pier/dock.

**Staff's Position: No.**

Strict application of the rules does not cause the petitioner unnecessary hardships. The current pier which was built before the CAMA was enacted no longer meets the CRC's pier rules, specifically the 4 square foot rule, which became effective in 1998. Consequently, the current structure is non-conforming and replacing it requires that the new pier meets the current rules, either 7H.0208(use standards) or 7J.0211(non-conforming development). There are numerous configurations which meet the 4 square foot rule that could be permitted without a variance that will still provide safe use for Petitioner's membership. For example, if Petitioner reduced its 16' x 16' gazebo to 11' x 16' and reduced the swim platform from 8' x 20' to 10' x 10' they could get a permit without a variance, and still use the property for the same uses.

**II. Do such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property? Explain.**

**Petitioner's Position: Yes.**

- cannot acquire any additional footage as area is fully developed to the north and a utility right of way borders our property to the south. We would need 18 feet of additional shoreline to meet guideline.
- existing improvements built before CAMA rules in effect
- 6 ft. corridor should not be counted in total sq footage (per local CAMA permit officer)
- we currently are not extended waterward in line with the other properties pierhead thereby restricting our view/enjoyment of our property
- we are a club zoned accordingly, and therefore have increased foot traffic requiring proposed improvements unlike a single family residence.
- In a high boat traffic area creating ongoing boatwake thereby requiring size of swim platform for safety/stability.

**Staff's Position: No.**

There are no conditions peculiar to this property which cause what Petitioner alleges is a hardship. While Petitioner notes the length of the shoreline (which is 51'), and indicates it cannot acquire more frontage length, Staff note that 51' of frontage along the Wrightsville Beach shoreline is not uncommonly narrow. Staff also note that the permit was not denied based on a pier head length issue, or zoning issues. Additionally, staff note that the 6' wide walkway area was not included in the calculation of the total platform area as Petitioner alleges.

**III. Do the hardships result from actions taken by the Petitioner? Explain.**

**Petitioner's Position: No.**

- club designation zoned by town of WB
- current improvements built in 1965 +/-
- existing club operation for almost 90 years
- membership diverse in age, sex, familial status
- club status, not single family residence

**Staff's Position: Yes.**

Any hardships result from actions taken by the Petitioner, and their proposed design choice. Petitioner can design a smaller total platform area and meet the rules without a variance, as discussed in Staff's position on I., above.

**IV. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

**Petitioner's Position: Yes.**

The WLI Beach Club is attempting to bring improvements up to current standards with a new dock, pier and gazebo designed attractively and built with new materials. Additionally, we are centering the proposed improvements to comply with riparian setback requirements. Finally, we are reducing our existing square footage of platform areas by 31%. We feel that we have exhibited maximum effort to be consistent with the spirit, purpose and intent of the CRC's rules, standards and orders. Additionally, in order for our 42 members and families to enjoy these improvements safely we feel we have designed our proposal accordingly. Finally, we feel justified that we are not asking for anything that will negatively affect water quality, CAMA concerns or Town of Wrightsville Beach issues. This is evidenced by the fact that all of those agencies including the Army Corps of Engineers approved our proposal as submitted.

**Staff's Position: No.**

The purpose of the 4 square foot rule is to provide for a fair distribution of the public trust areas based on shoreline length, to limit usurpation of the public trust areas by riparian owners, to prevent or ease congestion along a shoreline, and to limit potential storm debris. While they reduce the total platform area from what exists now with the pre-CAMA non-conforming structure, they are required to meet the current rule limitations because it is the replacement of the pier and not repair. Petitioner can design a project that meets the limitation set by the rule, and has not designed the project to meet 7J.0211(3 & 4). Public safety and welfare are not met by Petitioner's design because their design places more platform area and material in the water than allowed by rule which could become storm debris. Substantial Justice requires that replacement of a non-conforming structure meets the current rules for this Petitioner, as is required of others who are replacing non-conforming structures. Finally, staff note that this project was not denied based on navigation issues (as evidenced by the Corps permit) or on water quality issues (as evidenced by the DWQ permit).

**CRC-VR-08-47**

**ATTACHMENT D**

Attached are the Petitioner's Variance Request Materials.



**WLI BEACH CLUB  
10 CHANNEL AVENUE  
WRIGHTSVILLE BEACH NC  
VARIANCE REQUEST  
JULY 28, 2008**





meetings and small cookouts. A list of those would be the Veterans of Foreign Wars, American Legion-Post 10, Wrightsville Beach Longboard Association, and several faith based groups. Our existing improvements of 396 sqft. would be reduced by almost half to meet CRC guidelines.

Can you obtain a permit for a portion of what you wish to do?  No  If so, please state what the permit would allow

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

- limited access / use of swim platform if reduced in size
- limited use of gazebo area if reduced in size
- safety issues by reduced size of improvements overall by anticipated foot traffic of membership at current levels
- continued viability of club with amenity of pier/gazebo/dock severely impeded by its' members

#### RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

- I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to be considered. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. [*Williams v. NCDENR, DCM, and CRC*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).]

Our club is a group of families with small children and older adults that gather to enjoy the amenities that the club offers with a pier area for fishing and crabbing, a gazebo for sitting or rocking and a swim platform for sunning or swimming/diving. This must all be done safely by the various ages of our membership. It is an expectation of the members to have these amenities/congregation areas available.

Our current dock/gazebo/pier was constructed before CAMA issued rules for pier and dock construction. In fact, we believe our improvements are around 45 years old. They

have survived this long due to a lot of careful maintenance and good fortune given the number of storms/hurricanes during that period. The hardships created would include: limited access/enjoyment of our members, safety of older/youngest members, expectation of use by members for ongoing benefit of members and reduced ability to hold club events on pier/dock.

II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.

- cannot acquire any additional footage as area is fully developed to the north and a utility right of way borders our property to the south. We would need 18 feet of additional shoreline to meet guideline.
- existing improvements built before CAMA rules in effect
- 6 ft. corridor should not be counted in total sq footage(per local CAMA permit officer)
- we currently are not extended waterward in line with the other properties pierhead thereby restricting our view/enjoyment of our property
- we are a club zoned accordingly, and therefore have increased foot traffic requiring proposed improvements unlike a single family residence.
- In a high boat traffic area creating ongoing boatwake thereby requiring size of swim platform for safety/stability.

III. Explain why your hardship does not result from actions that you have taken.

- club designation zoned by town of WB
- current improvements built in 1965 +/-
- currently encroaches on riparian setback requirements
- existing club operation for almost 90 years
- membership diverse in age, sex, familial status
- club status , not single family residence

IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.

The WLI Beach Club is attempting to bring improvements up to current standards with a new dock, pier and gazebo designed attractively and built with new materials.

Additionally, we are centering the proposed improvements to comply with riparian setback requirements. Finally, we are reducing our existing square footage of platform areas by 31%. We feel that we have exhibited maximum effort to be consistent with the spirit, purpose and intent of the CRC's rules, standards and orders. Additionally, in order for our 42 members and families to enjoy these improvements safely we feel we have designed our proposal accordingly. Finally, we feel justified that we are not asking for anything that will negatively affect water quality, CAMA concerns or Town of Wrightsville Beach issues. This is evidenced by the fact that all of those agencies including the Army Corps of Engineers approved our proposal as submitted.

Please attach copies of the following:

Permit Application and Denial documents

Site Drawing with Survey and Topographical Information

Any letters filed with DCM or the LPO commenting on or objecting to your project

Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criterion, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree upon. Those facts will be the only facts that the Commission will consider in determining whether to grant your variance request.]

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: July 28, 2008

Signature: *Ralph Mullis, Pres.  
WFI Beach Club*

*This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.*

**CERTIFICATE OF SERVICE**

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

copy: Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 28<sup>th</sup> day of            July           , 2008    .

Ralph Mullis, Pres - WLI  
Signature of Petitioner or Attorney Beach Club



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

February 18, 2008

Sean Ricketts, Agent for Wilmington Light Infantry c/o Ralph Mullis  
P.O. Box 15375  
Wilmington, N.C. 28408

Dear Mr. Ricketts:


The Division of Coastal Management hereby acknowledges receipt of your application, acting as agent for Wilmington Light Infantry Club c/o Ralph Mullis (President), for State approval for development of property located at 10 Channel Ave. adjacent to Banks Channel, in Wrightsville Beach, New Hanover County. It was received complete on February 7, 2008, and appears to be adequate for processing at this time. The projected deadline for making a decision is April 22, 2008. An additional 75-day review period is provided by law when such time is necessary to complete the review. If you have not been notified of a final action by the initial deadline stated above, you should consider the review period extended. Under those circumstances, this letter will serve as your notice of an extended review. However, an additional letter will be provided on or about the 75<sup>th</sup> day.

If this agency does not render a permit decision within 70 days from February 7, 2008, you may request a meeting with the Director of the Division of Coastal Management and permit staff to discuss the status of your project. Such a meeting will be held within five working days from the receipt of your written request and shall include the property owner, developer, and project designer/consultant.

NCGS 113A-119(b) requires that Notice of an application be posted at the location of the proposed development. Enclosed you will find a "Notice of Permit Filing" postcard which must be posted at the property of your proposed development. You should post this notice at a conspicuous point along your property where it can be observed from a public road. Some examples would be: Nailing the notice card to a telephone pole or tree along the road right-of-way fronting your property; or at a point along the road right-of-way where a private road would lead one into your property. Failure to post this notice could result in an incomplete application.

An onsite inspection will be made, and if additional information is required, you will be contacted by the appropriate State or Federal agency. Please contact me if you have any questions and notify me in writing if you wish to receive a copy of my field report and/or comments from reviewing agencies.

Sincerely,

  
Robb L. Mairs  
Field Representative

Enclosure

cc: Doug Huggett, DCM  
Steven Everhart, DCM  
Dave Timpy, COE  
Kelly Traynham, Wrightsville Beach (LPO)



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

June 18, 2008

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Mr. Ralph Mullis  
Wilmington Light Infantry Club  
503 Colony Circle N.  
Wilmington, NC 28409

Dear Mr. Mullis:

This letter is in response to your application for a Major Permit under the Coastal Area Management Act (CAMA), in which authorization was requested to replace an existing docking facility with a new fixed pier, gazebo, and floating docks, in New Hanover County. Processing of the application, which was received as complete by the Division of Coastal Management's Wilmington Office on February 7, 2008, is now complete. Based on the state's review, the Division of Coastal Management has made the following findings:

- 1) The subject property has approximately 51 feet of shoreline, as measured along the normal high water line.
- 2) In accordance with the standards set out in 15A NCAC 07H.208(b)(6)(D), the Division has determined that the maximum allowable platform area for the subject property is 204 square feet.
- 3) In accordance with the standards set out in 15A NCAC 07H.0208(b)(6), the Division has determined that the proposed project would result in a total platform size of 320 square feet.
- 4) There currently exists an existing pier originating off the subject property. The proposed pier would extend approximately 15 feet waterward from the end of the existing pier structure.
- 5) Based upon the above referenced findings, the Division has determined that the proposed project is inconsistent with the following rule of the Coastal Resources Commission:
  - a) 15A NCAC 07H.208(b)(6)(D), which states "The combined area of all "T"s, finger piers, platforms, and decks must not exceed a combined total area of four square feet per linear foot of shoreline. Projects requiring dimensions greater than those stated in this Rule shall be permitted only if the greater dimensions are necessary for safe use, or to support a water dependent use that cannot otherwise occur."

400 Commerce Avenue, Morehead City, North Carolina 28557  
Phone: 252-808-2808 \ FAX: 252-247-3330 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)



- 6) The Division has further determined that, due to the waterward extension of the new docking facility relative to the existing docking facility, the non-conforming development standards found in 15A NCAC 07J.0211 do not apply.

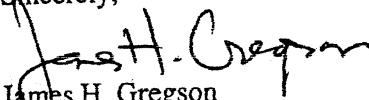
Given the preceding findings, it is necessary that your request for issuance of a CAMA Major Permit under the Coastal Area Management Act be denied. This denial is made pursuant to N.C.G.S. 113A-120(a)(8) which requires denial for projects inconsistent with the state guidelines for Areas of Environmental Concern or local land use plans.

If you wish to appeal this denial, you are entitled to a hearing. The hearing will involve appearing before an Administrative Law Judge who listens to evidence and arguments of both parties and then makes a recommendation to the Coastal Resources Commission. Your request for a hearing must be in the form of a written petition, complying with the requirements of §150B of the General Statutes of North Carolina, and must be filed with the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, within twenty (20) days from the date of this letter. A copy of this petition should be filed with this office.

Also, you are advised that as long as this state permit denial stands, your project must be deemed inconsistent with the N.C. Coastal Management Program, thereby precluding the issuance of federal permits for this project. The Federal Coastal Zone Management Act (CZMA) gives you the right to appeal this finding to the U.S. Secretary of Commerce within thirty days of receipt of this letter. Your appeal must be on the grounds that the proposed activity is (1) consistent with the objectives or purposes of the CZMA, or (2) is necessary in the interest of national security, and thus, may be federally approved.

Members of my staff are available to assist you should you desire to modify your proposal in the future. If you have any questions concerning this matter, please contact Mr. Doug Huggett or Mr. Daniel Govoni at (252) 808-2808.

Sincerely,

  
James H. Gregson

cc: Colonel John Pulliam – U.S. Army Corps of Engineers, Wilmington, NC  
David Kennedy, Director – OCRM/NOAA, Silver Spring, MD  
David Timpy, ACOE  
DCM - Morehead City  
DCM – Wilmington  
George Wood, PO Box 3368, Kill Devil Hills, NC 27948





Michael F. Easley, Governor

William G. Ross Jr., Secretary  
North Carolina Department of Environment and Natural Resources

Coleen H. Sullins, Director  
Division of Water Quality

March 13, 2008

New Hanover County  
DWQ Project #: 08-0344

Wilmington Light Infantry Club  
Attn: Ralph Mullis  
503 Colony Circle North  
Wilmington, NC 28409

**Subject Property: Wilmington Light Infantry Club**  
**NO WRITTEN CONCURRENCE NEEDED**

Dear Mr. Mullis:

You have our approval, in accordance with the attached conditions, to replace the existing docking facility with a new pier, gazebo, and floating docks, as described in your CAMA Major application received by DWQ on February 22, 2008. After reviewing your application, we have decided these impacts are below the threshold for written authorization as long as all conditions of General Water Quality Certification Number 3687 (GC3687) is met. This certification may also be viewed on our website at <http://h2o.enr.state.nc.us/nwetlands>. This Certification allows you to use the Regional General # 198700056 Permit when issued by the US Army Corps of Engineers.

This approval is only valid for the purpose and design that is described in your application. If you change your project, you must notify us and you may be required to send us a new application. If the property is sold, the new owner must be given a copy of this Certification and approval letter and is thereby responsible for complying with all conditions. If total wetland fills for this project (now or in the future) exceed one acre, compensatory mitigation may be required as described in 15A NCAC 2H .0506 (h) (6) and (7). This approval shall expire when the corresponding Nationwide Permit expires or as otherwise provided in the General Certification. For this approval to be valid, you must follow the conditions listed in the attached certification and any additional conditions listed below.

**Conditions of Certification:**

- 1) Upon completion of the project, the applicant shall complete and return the enclosed "Certification of Completion Form" to notify DWQ that all the work included in the 401 Certification has been completed. The responsible party shall complete the attached form and return it to the 401/Wetlands Unit of the Division of Water Quality.

Violations of any condition herein set forth may result in revocation of this Certification and may result in criminal and/or civil penalties.

One  
North Carolina  
*Naturally*

North Carolina Division of Water Quality  
Internet: [www.ncwaterquality.org](http://www.ncwaterquality.org)

1617 Mail Service Center  
Location: 512 N. Salisbury St.

Raleigh, NC 27699-1617  
Raleigh, NC 27604

Phone (919) 733-7015  
Fax (919) 733-2496

Customer Service  
1-877-623-6748

If you do not accept any of the conditions of this certification, you may ask for an adjudicatory hearing. You must act within 60 days of the date that you receive this letter. To ask for a hearing, send a written petition, which conforms to Chapter 150B of the North Carolina General Statutes to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714. This certification and its conditions are final and binding unless you ask for a hearing.

This letter completes the review of the Division of Water Quality under Section 401 of the Clean Water Act. If you have any questions, please telephone Ian McMillan at (919) 733-1786 or myself at our Wilmington Regional Office at (910) 796-7215.

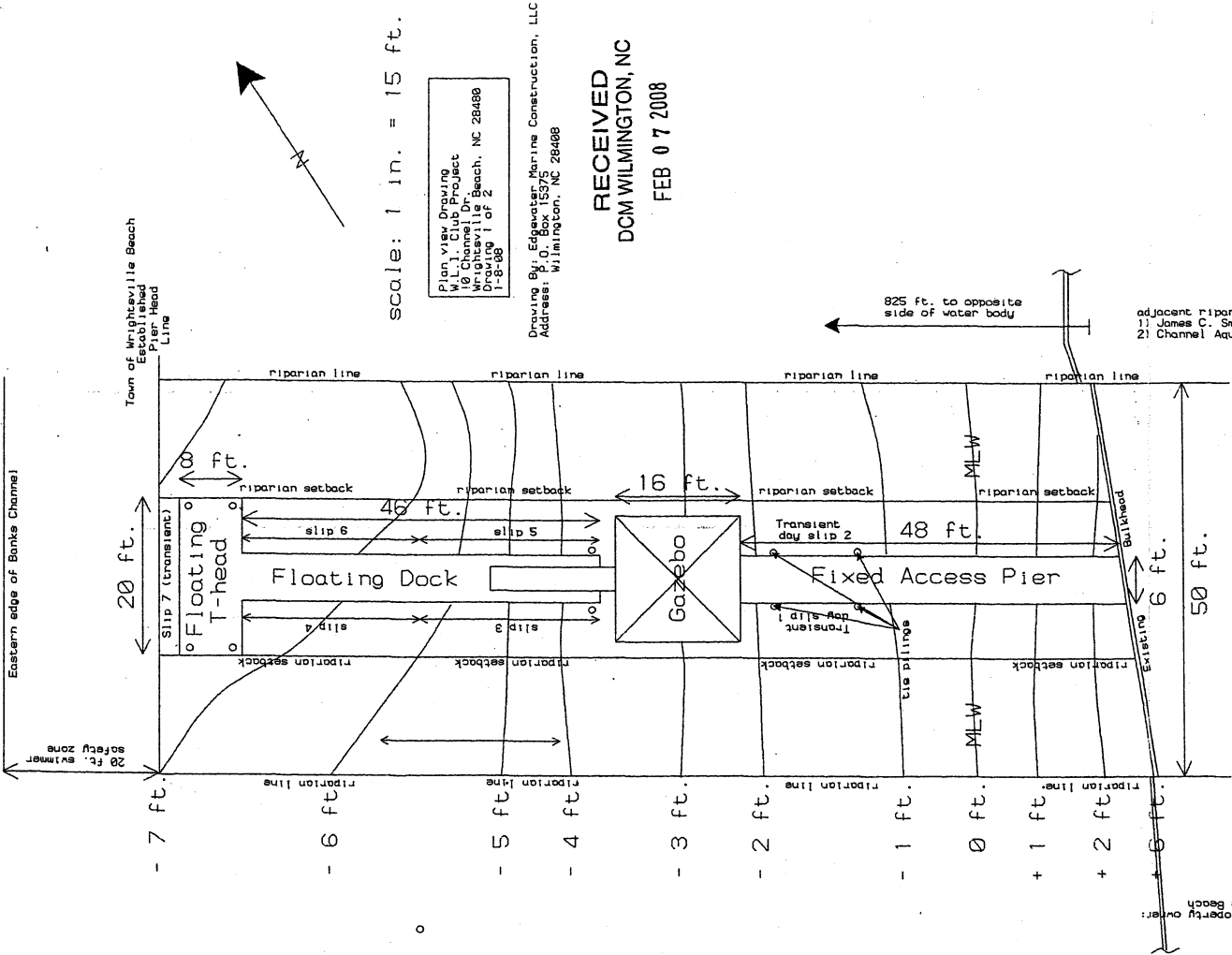
Sincerely,



Chad Coburn  
Senior Environmental Specialist

Enclosures: GC 3687  
Certification of Completion

cc: Ian McMillan - DWQ 401 Oversight Unit  
David Timpy - Corps of Engineers Wilmington  
Doug Huggett - DCM Morehead City  
Robb Mairs - DCM Wilmington  
Sean Ricketts - Edgewater Marine Construction, P.O. Box 15375, Wilmington NC 28408  
Central Files  
WiRO



Scale: 1 in. = 15 ft.

Plan view Drawing  
 W.L.I. Club Project  
 10 Channel Ave.  
 Wrightsville Beach, NC 28480  
 Drawing 1 of 2  
 1-8-08

Drawing By: Edgewater Marine Construction, LLC  
 Address: Wilmington, NC 28408

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adjacent riparian property owner:  
 1) James C. Smith  
 2) Channel Acquisition, LLC

Wilmington Light Infantry Club  
 10 Channel Ave.  
 Wrightsville Beach, NC 28480

adjacent riparian property owner:  
 Town of Wrightsville Beach

Cross Sectional Drawing

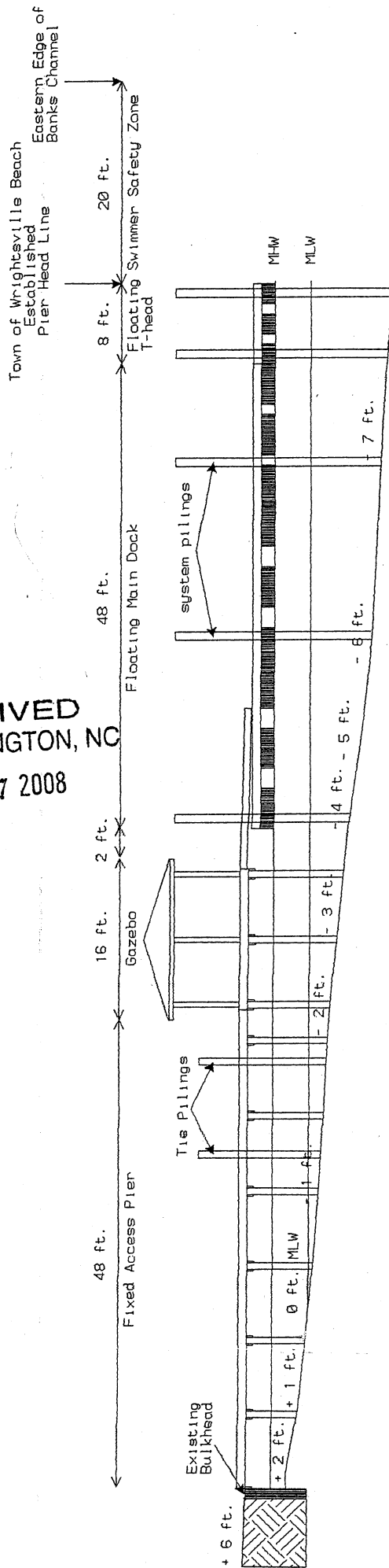
Wilmington Light Infantry Club  
 10 Channel Ave.  
 Wrightsville Beach, NC 28480

scale: 1 in. = 15 ft.

Cross-Sectional Drawing  
 W.L.I. Club Project  
 10 Channel Dr.  
 Wrightsville Beach, NC 28480  
 Drawing 2 of 2  
 1-8-08

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Drawing By: Edgewater Marine Construction, LLC  
 Address: P.O. Box 15375  
 Wilmington, NC 28408





## W.L.I. Club Pier and Dock Construction

### Points for Appeal

1. Total number of members at present time is 43 people
  - this does not include members' families or extended families that are given access to the club thru member
  - 23 of the 43 members are senior citizens which takes safety into a major consideration and this is why deck and t-head (congregation areas) size is of great importance
2. Pier was built prior to 1965 before CAMA issued rules for pier and dock construction
3. Present pier violations
  - encroaches on 15 ft. riparian setbacks to the north and south side of property
  - exceeds allowable square footage for "t's finger piers, platforms and decks by 196 square feet
4. New pier construction intent and corrections to try to conform
  - center new pier and dock construction as to not encroach upon riparian setbacks to the north and south
  - reduce the total number of square footage of "t's, finger piers, platforms and decks" to closer conform to existing rules
    - Existing Structure = 396 sq/ft
    - New Structure = 272 sq/ft
    - This is 72 sq/ft more than is allowed excluding 6 ft. wide corridor given by CAMA if no "t's, finger piers, platforms or Decks" were constructed.
    - 72 sq/ft = 18 linear ft. of shoreline
    - This is a reduction of 124 sq/ft



**5. Approved By:**

- Local CAMA Office – Robb Mairs (approved application for submittal)
- Army Corp. of Engineers 3-12-08
- Division Water Quality 3-13-08
- Neighbors to the North – Riparian Notification
- Neighbors to the South – Town of Wrightsville Beach – Riparian Notification

**WLI BEACH CLUB  
10 CHANNEL AVENUE  
WRIGHTSVILLE BEACH NC  
VARIANCE REQUEST  
JULY 28, 2008**

**TOWN OF WRIGHTSVILLE BEACH  
HISTORIC LANDMARK DESIGNATION  
ORDINANCE ISSUED  
JANUARY 26, 2006**

**ORDINANCE NO. (2006) 1494**

Board of Aldermen  
Town of Wrightsville Beach, North Carolina  
Date: January 26, 2006

AN ORDINANCE OF THE BOARD OF ALDERMEN OF  
THE TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA  
DESIGNATING THE PROPERTY KNOWN AS  
WILMINGTON LIGHT INFANTRY BEACH CLUB  
LOCATED AT 10 CHANNEL AVENUE  
AS A HISTORIC LANDMARK  
TAX PARCEL NUMBER R06308-012-005-000

WHEREAS, all of the prerequisites to the adoption of this ordinance prescribed in Part 3C, Article 19, Chapter 160A (Historic Districts and Landmarks) of the General Statutes of North Carolina and Section 32.52 of the Code of Ordinances for the Town of Wrightsville Beach have been met; and

WHEREAS, the Board of Aldermen of the Town of Wrightsville Beach has taken into full consideration all statements and information in the survey/research report prepared by Trustees-WLI Beach Club and presented to the Board of Aldermen on the 26th day of January, 2006, on the question of designating property known as the Wilmington Light Infantry Beach Club located at 10 Channel Avenue as a historic landmark; and

WHEREAS, the Wilmington Light Infantry Beach Club cottage was constructed in 1935-1936 by members of the Wilmington Light Infantry; and

WHEREAS, the Wilmington Light Infantry Beach Club is an excellent example of the modest cottages that once characterized much of the Town; and

WHEREAS, the Wilmington Light Infantry Beach Club remains essentially unchanged since its construction; and

WHEREAS, the Wilmington Light Infantry Beach Club is now owned by the members and is used primarily as a clubhouse for use by the members; and

WHEREAS, the Town of Wrightsville Beach Historic Landmark Commission has demonstrated the historic, architectural and cultural significance of the property known as Wilmington Light Infantry Beach Club; and

WHEREAS, the Division of Archives and History of the North Carolina Department of Cultural Resources has reviewed and commented on the findings of the Town of Wrightsville Beach Historic Landmark Commission.

NOW, THEREFORE, by order of the Board of Aldermen of the Town of Wrightsville Beach, North Carolina:

1. The structure and the land on which the structure is located known as the Wilmington Light Infantry Beach Club, Tax Parcel Number R06308-012-005-000, and located on property having an address of 10 Channel Avenue, Wrightsville Beach, NC, is hereby designated as a historic landmark pursuant to Part 3C, Article 19, Chapter 160A of the General Statutes of North Carolina and Section 32.52 of the Code of Ordinances of the Town of Wrightsville Beach.

The Town of Wrightsville Beach is informed and believes that the entity whose name and address is set forth below is the entity who may have or claims to have an interest or estate in the property insofar as the same can, by reasonable diligence, be ascertained:

Wilmington Light Infantry Beach Club  
10 Channel Avenue  
Wrightsville Beach, NC 28480

2. That the exterior of such building may be materially altered, restored, remodeled, moved or demolished only following the issuance of a Certificate of Appropriateness pursuant to Section 32.52 of the Code of Ordinances of the Town of Wrightsville Beach. Nothing herein, with the exceptions stated in N.C.G.S. Section 160A-400.14(c), shall be construed to prevent or delay the effective date of demolition of a designated structure or object for more than three hundred and sixty-five (365) days from the date of such certificate.

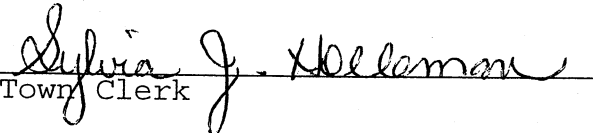
3. That nothing in this ordinance shall be construed to prevent the ordinary maintenance or repair of any architectural feature in or on said property that does not involve a change in design, material or outer appearance thereof, after first obtaining the necessary permits and official approval for said stated repair. Nothing herein shall prevent the construction, alteration, restoration, demolition or removal of any such feature when a building inspector or similar official certifies to the Commission that such action is required for the public safety because of an unsafe condition. Furthermore, nothing shall be construed to prevent the property owner from making any use of this property not prohibited by other statutes, ordinances or regulations.

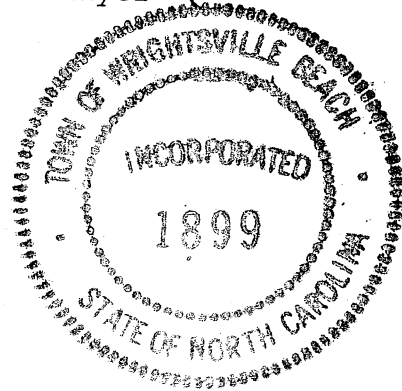
4. That the owner and occupants of the property known as Wilmington Light Infantry Beach Club be given notice of this ordinance as required by applicable law and that copies of this ordinance be filed and indexed in the office of the Town Clerk, New Hanover County Register of Deeds, New Hanover County Tax Supervisor and the Town Building Inspections Division, as required by applicable law.

5. That this ordinance shall become effective immediately upon its adoption. Duly adopted this 26th day of January, 2006.

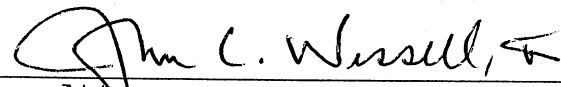
  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
Town Clerk  
(SEAL)



APPROVED AS TO FORM:

  
\_\_\_\_\_  
Town Attorney

**WLI BEACH CLUB  
10 CHANNEL AVENUE  
WRIGHTSVILLE BEACH NC  
VARIANCE REQUEST  
JULY 28, 2008**

**AERIAL PHOTO FROM  
COMMERCIAL AD  
WRIGHTSVILLE BEACH MAGAZINE  
JUNE 2008  
SHOWING ACTUAL PIERHEAD LINE**



**CRC-VR-08-47**

**ATTACHMENT E**

**STIPULATED EXHIBITS**

1. Petitioner's CAMA Major Permit Application
2. Adjacent Riparian Property Owner Notification/Waiver Forms
3. Warranty Deed for Property
4. Water Quality Certification No. 3687



# APPLICATION for Major Development Permit

(last revised 12/27/06)



North Carolina DIVISION OF COASTAL MANAGEMENT

<b>1. Primary Applicant/ Landowner Information</b>			
Business Name Wilmington Light Infantry Club		Project Name (if applicable) W.L.I. Club Project	
Applicant 1: First Name Ralph	MI	Last Name Mullis (Club President)	
Applicant 2: First Name	MI	Last Name	
<i>If additional applicants, please attach an additional page(s) with names listed.</i>			
Mailing Address 503 Colony Circle N.		PO Box	City Wilmington
			State NC
ZIP 28409	Country USA	Phone No. 910 - 632 - 9349 ext.	FAX No.
Street Address (if different from above)		City	State
			ZIP
Email			

<b>2. Agent/Contractor Information</b>			
Business Name Edgewater Marine construction, LLC			
Agent/ Contractor 1: First Name Sean	MI	Last Name Ricketts	
Agent/ Contractor 2: First Name	MI	Last Name	
Mailing Address		PO Box 15375	City Wilmington
			State NC
ZIP 28408		Phone No. 1 910 443 1106 ext.	Phone No. 2 ext.
FAX No. 910 799-3402	Contractor #		
Street Address (if different from above)		City	State
			ZIP
Email sricketts@edgewatermarineconstruction.com			

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<b>3. Project Location</b>			
County (can be multiple) New Hanover	Street Address 10 Channel Ave.	State Rd. #	
Subdivision Name Oceanic Hotel Area Station One	City Town of Wrightsville Beach	State NC	Zip 28480
Phone No. 910 262 1351 ext.	Lot No.(s) (if many, attach additional page with list) 98A 98C		
a. In which NC river basin is the project located? Cape Fear River Basin	b. Name of body of water nearest to proposed project Banks Channel		
c. Is the water body identified in (b) above, natural or manmade? <input checked="" type="checkbox"/> Natural <input type="checkbox"/> Manmade <input type="checkbox"/> Unknown	d. Name the closest major water body to the proposed project site. Banks Channel		
e. Is proposed work within city limits or planning jurisdiction? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	f. If applicable, list the planning jurisdiction or city limit the proposed work falls within. Town of Wrightsville Beach		

<b>4. Site Description</b>	
a. Total length of shoreline on the tract (ft.) 51.35 Ft.	b. Size of entire tract (sq.ft.) 841.5 sq/ft
c. Size of individual lot(s) <i>(If many lot sizes, please attach additional page with a list)</i>	d. Approximate elevation of tract above NHW (normal high water) or NWL (normal water level) <input checked="" type="checkbox"/> NHW or <input type="checkbox"/> NWL + 4 ft.
e. Vegetation on tract	
f. Man-made features and uses now on tract  2 story Frame Residence used as Club House Concrete Bulkhead Existing Club Pier with Gazebo and Docks	
g. Identify and describe the existing land uses adjacent to the proposed project site.  North Side: 3 story Framed Duplex Residence  South Side: Town of Wrightsville Beach Planning and Parks Access	
h. How does local government zone the tract?  C-1	i. Is the proposed project consistent with the applicable zoning? (Attach zoning compliance certificate, if applicable) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA
j. Is the proposed activity part of an urban waterfront redevelopment proposal? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
k. Has a professional archaeological assessment been done for the tract? If yes, attach a copy. <input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> NA  If yes, by whom?	
l. Is the proposed project located in a National Registered Historic District or does it involve a National Register listed or eligible property? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> NA	

<Form continues on next page>

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m. (i) Are there wetlands on the site?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(ii) Are there coastal wetlands on the site?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
(iii) If yes to either (i) or (ii) above, has a delineation been conducted? <i>(Attach documentation, if available)</i>	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
n. Describe existing wastewater treatment facilities.  Town of Wrightsville Beach	
o. Describe existing drinking water supply source.  Town of Wrightsville Beach	
p. Describe existing storm water management or treatment systems.	

<b>5. Activities and Impacts</b>	
a. Will the project be for commercial, public, or private use? Private Club Use Only	<input type="checkbox"/> Commercial <input type="checkbox"/> Public/Government <input checked="" type="checkbox"/> Private/Community
b. Give a brief description of purpose, use, and daily operations of the project when complete.  Club pier with gazebo used for relaxation of members and meetings Floating dock with four boat slips T-head used as a swimming platform	
c. Describe the proposed construction methodology, types of construction equipment to be used during construction, the number of each type of equipment and where it is to be stored. Typical wood construction using CCA 2.5 treated pilings and ACQ treated framing. Floating dock will use rotary molded dock floatation. All pilings will be set using a water jet.	
d. List all development activities you propose. Construction of 6 ft. x 48 ft. Fixed Pier Construction of 16 ft. x 16 ft. Gazebo Construction of 6 ft. x 46 ft. floating dock w/ 8 ft. x 20 ft. floating t-head (swim platform)	
e. Are the proposed activities maintenance of an existing project, new work, or both? removal of existing structures and replacing with new	
f. What is the approximate total disturbed land area resulting from the proposed project? 544 sq/ft. fixed structure 436 sq/ft. floating structure total: 980 sq/ft.	
<input checked="" type="checkbox"/> Sq.Ft or <input type="checkbox"/> Acres	
g. Will the proposed project encroach on any public easement, public accessway or other area that the public has established use of?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> NA	
h. Describe location and type of existing and proposed discharges to waters of the state.	
i. Will wastewater or stormwater be discharged into a wetland?	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> NA	
If yes, will this discharged water be of the same salinity as the receiving water?	
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> NA	
j. Is there any mitigation proposed? If yes, attach a mitigation proposal.	
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> NA	

<Form continues on back>

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**6. Additional Information**

In addition to this completed application form, (MP-1) the following items below, if applicable, must be submitted in order for the application package to be complete. Items (a) – (f) are always applicable to any major development application. Please consult the application instruction booklet on how to properly prepare the required items below.

a. A project narrative.

b. An accurate, dated work plat (including plan view and cross-sectional drawings) drawn to scale. Please give the present status of the proposed project. Is any portion already complete? If previously authorized work, clearly indicate on maps, plats, drawings to distinguish between work completed and proposed.

c. A site or location map that is sufficiently detailed to guide agency personnel unfamiliar with the area to the site.

d. A copy of the deed (with state application only) or other instrument under which the applicant claims title to the affected properties.

e. The appropriate application fee. Check or money order made payable to DENR.

f. A list of the names and complete addresses of the adjacent waterfront (riparian) landowners and signed return receipts as proof that such owners have received a copy of the application and plats by certified mail. Such landowners must be advised that they have 30 days in which to submit comments on the proposed project to the Division of Coastal Management.

Name James C. Smith Phone No. 910 509-0084  
Address 8 Channel Ave. Wrightsville Beach, NC 28480

Name Channel Aquisition, LLC Jeffrey Zimmer - LLC Administrator Phone No. 910 763-4669  
Address

Name Wrightsville Beach Planning and Parks - Kelly Traynham Phone No. 910 509-5019 ext. 204  
Address

g. A list of previous state or federal permits issued for work on the project tract. Include permit numbers, permittee, and issuing dates.

\_\_\_\_\_  
\_\_\_\_\_

h. Signed consultant or agent authorization form, if applicable.

i. Wetland delineation, if necessary.

j. A signed AEC hazard notice for projects in oceanfront and inlet areas. (Must be signed by property owner)

k. A statement of compliance with the N.C. Environmental Policy Act (N.C.G.S. 113A 1-10), if necessary. If the project involves expenditure of public funds or use of public lands, attach a statement documenting compliance with the North Carolina Environmental Policy Act.

**7. Certification and Permission to Enter on Land**

I understand that any permit issued in response to this application will allow only the development described in the application. The project will be subject to the conditions and restrictions contained in the permit.

I certify that I am authorized to grant, and do in fact grant permission to representatives of state and federal review agencies to enter on the aforementioned lands in connection with evaluating information related to this permit application and follow-up monitoring of the project.

I further certify that the information provided in this application is truthful to the best of my knowledge.

Date 1/25/08

Print Name Ralph Mullis (OrLI President)

Signature Ralph Mullis

Please indicate application attachments pertaining to your proposed project.

DCM MP-2 Excavation and Fill Information

DCM MP-5 Bridges and Culverts

DCM MP-3 Upland Development

DCM MP-4 Structures Information

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# STRUCTURES

(Construction within Public Trust Areas)

Attach this form to Joint Application for CAMA Major Permit, Form DCM MP-1. Be sure to complete all other sections of the Joint Application that relate to this proposed project. Please include all supplemental information.

## 1. DOCKING FACILITY/MARINA CHARACTERISTICS

This section not applicable

a. (i) Is the docking facility/marina:  
 Commercial  Public/Government  Private/Community

b. (i) Will the facility be open to the general public?  
 Yes  No

c. (i) Dock(s) and/or pier(s)  
(ii) Number 1 pier; 1 floating dock  
(iii) Length 48 ft. pier; 46 ft. floating dock  
(iv) Width 6 ft. pier; 6 ft. floating dock  
(v) Floating  Yes  No

d. (i) Are Finger Piers included?  Yes  No  
If yes:  
(ii) Number 1  
(iii) Length 20 ft.  
(iv) Width 8 ft.  
(v) Floating  Yes  No

e. (i) Are Platforms included?  Yes  No  
If yes:  
(ii) Number 1  
(iii) Length 16 ft.  
(iv) Width 16 ft.  
(v) Floating  Yes  No  
*Note: Roofed areas are calculated from dripline dimensions.*

f. (i) Are Boatlifts included?  Yes  No  
If yes:  
(ii) Number \_\_\_\_\_  
(iii) Length \_\_\_\_\_  
(iv) Width \_\_\_\_\_

g. (i) Number of slips proposed  
7  
(ii) Number of slips existing  
7

h. Check all the types of services to be provided.  
 Full service, including travel lift and/or rail, repair or maintenance service  
 Dockage, fuel, and marine supplies  
 Dockage ("wet slips") only, number of slips: 6  
 Dry storage; number of boats: \_\_\_\_\_  
 Boat ramp(s); number of boat ramps: \_\_\_\_\_  
 Other, please describe:  
\_\_\_\_\_

i. Check the proposed type of siting:  
 Land cut and access channel  
 Open water; dredging for basin and/or channel  
 Open water; no dredging required  
 Other; please describe:  
\_\_\_\_\_

j. Describe the typical boats to be served (e.g., open runabout, charter boats, sail boats, mixed types).  
\_\_\_\_\_  
Shallow draft boats no longer than 20 ft.

k. Typical boat length: - 20 ft.

l. (i) Will the facility be open to the general public?  
 Yes  No

m. (i) Will the facility have tie pilings?  
 Yes  No  
(ii) If yes number of tie pilings?  
4

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**2. DOCKING FACILITY/MARINA OPERATIONS**

This section not applicable

a. Check each of the following sanitary facilities that will be included in the proposed project.

Office Toilets

Toilets for patrons; Number: \_\_\_\_\_; Location: \_\_\_\_\_

Showers

Boatholding tank pumpout; Give type and location: \_\_\_\_\_

b. Describe treatment type and disposal location for all sanitary wastewater.

\_\_\_\_\_  
\_\_\_\_\_

c. Describe the disposal of solid waste, fish offal and trash.

\_\_\_\_\_  
\_\_\_\_\_

d. How will overboard discharge of sewage from boats be controlled?

\_\_\_\_\_  
\_\_\_\_\_

e. (i) Give the location and number of "No Sewage Discharge" signs proposed.

\_\_\_\_\_

(ii) Give the location and number of "Pumpout Available" signs proposed.

\_\_\_\_\_

f. Describe the special design, if applicable, for containing industrial type pollutants, such as paint, sandblasting waste and petroleum products.

\_\_\_\_\_

g. Where will residue from vessel maintenance be disposed of?

\_\_\_\_\_

h. Give the number of channel markers and "No Wake" signs proposed. \_\_\_\_\_

i. Give the location of fuel-handling facilities, and describe the safety measures planned to protect area water quality.

\_\_\_\_\_

j. What will be the marina policy on overnight and live-aboard dockage?

\_\_\_\_\_

\_\_\_\_\_

k. Describe design measures that promote boat basin flushing?

\_\_\_\_\_

l. If this project is an expansion of an existing marina, what types of services are currently provided?

\_\_\_\_\_

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- m. Is the marina/docking facility proposed within a primary or secondary nursery area?  
 Yes  No
- n. Is the marina/docking facility proposed within or adjacent to any shellfish harvesting area?  
 Yes  No
- o. Is the marina/docking facility proposed within or adjacent to coastal wetlands/marsh (CW), submerged aquatic vegetation (SAV), shell bottom (SB), or other wetlands (WL)? If any boxes are checked, provide the number of square feet affected.  
 CW \_\_\_\_\_  SAV \_\_\_\_\_  SB \_\_\_\_\_  
 WL \_\_\_\_\_  None
- p. Is the proposed marina/docking facility located within or within close proximity to any shellfish leases?  Yes  No  
 If yes, give the name and address of the leaseholder(s), and give the proximity to the lease.  
 \_\_\_\_\_  
 \_\_\_\_\_

**3. BOATHOUSE** (including covered lifts)  This section not applicable

- a. (i) Is the boathouse structure(s):  
 Commercial  Public/Government  Private/Community
  - (ii) Number \_\_\_\_\_
  - (iii) Length \_\_\_\_\_
  - (iv) Width \_\_\_\_\_
- Note: Roofed areas are calculated from dripline dimensions.*

**4. GROIN** (e.g., wood, sheetpile, etc. If a rock groin, use MP-2, Excavation and Fill.)  This section not applicable

- a. (i) Number \_\_\_\_\_
- (ii) Length \_\_\_\_\_
- (iii) Width \_\_\_\_\_

**5. BREAKWATER** (e.g., wood, sheetpile, etc.)  This section not applicable

- a. Length \_\_\_\_\_
- b. Average distance from NHW, NWL, or wetlands \_\_\_\_\_
- c. Maximum distance beyond NHW, NWL or wetlands \_\_\_\_\_

**6. MOORING PILINGS and BUOYS**  This section not applicable

- a. Is the structure(s):  
 Commercial  Public/Government  Private/Community
- b. Number \_\_\_\_\_
- c. Distance to be placed beyond shoreline \_\_\_\_\_  
*Note: This should be measured from marsh edge, if present.*
- d. Description of buoy (color, inscription, size, anchor, etc.)  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- e. Arc of the swing \_\_\_\_\_

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7. GENERAL

a. Proximity of structure(s) to adjacent riparian property lines

15 ft.

Note: For buoy or mooring piling, use arc of swing including length of vessel.

b. Proximity of structure(s) to adjacent docking facilities.

North 30 ft. South 50 ft.

c. Width of water body

825 ft.

d. Water depth at waterward end of structure at NLW or NWL

12-13 ft. NLW

e. (i) Will navigational aids be required as a result of the project?

Yes  No  NA

(ii) If yes, explain what type and how they will be implemented.

8. OTHER

This section not applicable

a. Give complete description:

Project Summary:

6 ft. x 48 ft. Fixed Access Pier

16 ft. x 16 ft. Gazebo Platform

6 ft. x 46 ft. Floating Dock with Four Slips

8 ft. x 20 ft. Floating T-head Swimming Platform

Date

W.L.I. Club Project

Project Name

Ralph Mullis (WLI President)

Applicant Name

Ralph Mullis

Applicant Signature

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DIVISION OF COASTAL MANAGEMENT  
ADJACENT RIPARIAN PROPERTY OWNER NOTIFICATION/WAIVER FORM

Name of Individual Applying For Permit: Wilmington Light Infantry Club

Address of Property: 10 Channel Ave.  
(Lot or Street #, Street or Road)

Wrightsville Beach, New Hanover County  
(City and County)

I hereby certify that I own property adjacent to the above-referenced property. The individual applying for this permit has described to me as shown on the attached drawing the development they are proposing. A description or drawing, with dimensions, should be provided with this letter.

I have no objections to this proposal.

If you have objections to what is being proposed, please write the Division of Coastal Management, 127 Cardinal Drive Extension, Wilmington, NC 28405 or call 910-796-7215 within 10 days of receipt of this notice. No response is considered the same as no objection if you have been notified by Certified Mail.

WAIVER SECTION

I understand that a pier, dock, mooring pilings, breakwater, boat house or boat lift must be set back a minimum distance of 15' from my area of riparian access - unless waived by me. (If you wish to waive the setback, you must initial the appropriate blank below.)

\_\_\_\_\_ I do wish to waive the 15' setback requirement.

\_\_\_\_\_ I do not wish to waive the 15' setback requirement.

James C. Smith  
\_\_\_\_\_  
Sign Name

11/14/07  
\_\_\_\_\_  
Date

JAMES C. SMITH  
\_\_\_\_\_  
Print Name

910.509.0084  
\_\_\_\_\_  
Telephone Number with Area Code



*North property to WLI Club Colownen*

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State of North Carolina

NEW HANOVER County

WARRANT DEED:

THIS INDENTURE, Made this 19th day of August, A. D. 1924, by and between C. B. Parmele and wife, Emily D. Parmele and Frederick Willetts and wife, Eleanor H. Willetts, of the City of Wilmington County of New Hanover and State of North Carolina, of the first part, and A. B. Rhodes, Kenneth Weeks, and G. E. Morse of North Carolina, Trustees of the W.L.L. Club of Wrightsville Beach, of the second part.

WITNESSETH, That the said part of the first part, for and in consideration of the sum of Ten & no/100 Dollars, and other valuable considerations to them in hand paid by the said part of the second part; the receipt whereof is hereby acknowledged, have given, granted, conveyed, and sold, aliened and conveyed, and by these presents do hereby give, grant, bargain and sell, alien, convey and confirm unto the said part of the second part and to their heirs and assigns forever, all that certain lot of land, situated, lying and being in the County of New Hanover

and State of North Carolina, bounded and described as follows, to-wit: BEGINNING in the Northern line of Channel Avenue at a point 105 feet Westwardly from the Western line of Lumina Avenue, runs thence Northwardly and parallel with Lumina Avenue thirty (30) feet; thence Westwardly and parallel with Channel Avenue 91 feet more or less to the low-water mark of the Eastern side of Banks Channel; thence Southwardly along the said low-water mark of Banks Channel 50 feet more or less to the Northern line of Channel Avenue; thence Eastwardly along the said Northern line of Channel Avenue 99 feet more or less to the point of beginning. Same being tract marked "sold" and Lot #90C, Block #0 of the subdivision of the Oceanic Hotel Area, Station #1, Wrightsville Beach according to map prepared by J. L. Becton, C.E., in the Register of Deeds office, New Hanover County, Map Book #3 Page #7.

Excepting and reserving the perpetual right of way and easement for the use of the public for ingress and egress through, over and upon that portion of the lands and premises hereinabove described and conveyed, which said easement and right of way is more particularly described as follows:

Beginning at a point in the Northern line of Channel Ave. 105 feet Westwardly from the Western line of Lumina Avenue; runs thence Northwardly and parallel with Lumina Ave. 50 feet; thence Westwardly and parallel with Channel Avenue 10 feet; thence Southwardly and parallel with Lumina Ave. 50 feet to the Northern line of Channel Ave; thence Eastwardly along the said Northern line of Channel Avenue 10 feet to the point of Beginning.

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together with all and singular, the lands, tenements, contents and appurtenances thereto belonging, or in anywise appertaining.

TO HAVE AND TO HOLD the above granted and described premises, together with all and singular, the rights, privileges, tenements, contents and appurtenances thereto belonging, or in anywise appertaining unto the said part of the second part, their heirs and assigns, in fee simple, FOREVER.

And the said part of the first part, for themselves, their heirs, executors and administrators do covenant to and with the said part of the second part, their heirs and assigns that they are, and they are well and their heirs, executors and administrators shall WARRANT and DEFEND the title to the same against the lawful claims and demands of any and all persons whomsoever.

IN WITNESS WHEREOF, the said part of the first part by C. B. Parmele and wife, Emily D. Parmele and Frederick Willetts and wife, Eleanor H. Willetts, the day and year above written.

C. B. Parmele (Seal) Emily D. Parmele (Seal) Frederick Willetts (Seal) Eleanor H. Willetts (Seal)

STATE OF NORTH CAROLINA, County of New Hanover. I, Notary Public in and for the State and County aforesaid, do hereby certify that before me this day and acknowledged the due execution of the annexed instrument, and the said being by me privately examined, separate and apart from her said husband touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband, or any other person, and that she doth still voluntarily consent thereto.

Witness my hand and seal, this day of 1924. My commission expires day of 1924. Notary Public.

STATE OF NORTH CAROLINA: COUNTY OF NEW HANOVER:

I, Hooper Johnson, a Notary Public in and for the State and County aforesaid, do hereby certify that C. B. Parmele and Emily D. Parmele, his wife, and Frederick Willetts and Eleanor H. Willetts, his wife, personally appeared before me this day and acknowledged the due execution of the annexed instrument, and the said Emily D. Parmele, wife of C. B. Parmele, and Eleanor H. Willetts, wife of Frederick Willetts, being by me privately examined, separate and apart from her said husband touching her voluntary execution of the same, each for herself, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband, or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and seal this 31 day of August, 1924. Hooper Johnson, Notary Public

(Notarial Seal) My commission expires: My Commission Expires May 7, 1927. (.50 U. S. Rev. Doc. Stamp)

EXHIBIT 3

# Water Quality Certification N<sup>o</sup>. 3687

**GENERAL CERTIFICATION FOR PROJECTS ELIGIBLE FOR U.S. ARMY CORPS OF ENGINEERS NATIONWIDE PERMIT NUMBERS: 3 (MAINTENANCE), 4 (FISH AND WILDLIFE HARVESTING, ENHANCEMENT, AND ATTRACTION DEVICES AND ACTIVITIES), 5 (SCIENTIFIC MEASUREMENT DEVICES—25 CUBIC YARDS FOR WEIRS AND FLUMES), 6 (SURVEY ACTIVITIES—25 CUBIC YARDS FOR TEMPORARY PADS), 7 (OUTFALL STRUCTURES AND ASSOCIATED INTAKE STRUCTURES), 19 (MINOR DREDGING), 20 (OIL SPILL CLEANUP), 22 (REMOVAL OF VESSELS), 25 (STRUCTURAL DISCHARGE), 30(MOIST SOIL MANAGEMENT FOR WILDLIFE), 32 (COMPLETED ENFORCEMENT ACTIONS), 36 (BOAT RAMPS [IN NONWETLAND SITES]), AND REGIONAL PERMIT 197800056 (PIERS, DOCKS AND BOATHOUSES), AND REGIONAL PERMIT 197800125 (BOAT RAMPS) AND RIPARIAN AREA PROTECTION RULES (BUFFER RULES)**

Water Quality Certification Number 3687 is issued in conformity with the requirements of Section 401, Public Laws 92-500 and 95-217 of the United States and subject to the North Carolina Division of Water Quality (DWQ) Regulations in 15 NCAC 2H, Section .0500 and 15 NCAC 2B .0200 for the discharge of fill material to waters and wetland areas which are waters of the United States as described in 33 CFR 330 Appendix A (B) (3, 4, 5, 6, 7, 19, 20, 22, 25, 30, 32, and 36) of the Corps of Engineers regulations and Regional Permits 197800056 and 19780125 and for the Riparian Area Protection Rules (Buffer Rules) in 15A NCAC 2B .0200.

The State of North Carolina certifies that the specified category of activity will not violate applicable portions of Sections 301, 302, 303, 306 and 307 of the Public Laws 92-500 and 95-217 if conducted in accordance with the conditions hereinafter set forth.

**Activities meeting any one (1) of the following thresholds or circumstances require written approval for a 401 Water Quality Certification from the Division of Water Quality (the "Division"):**

- a. Impacts equal or greater than 40 linear feet of additional permanent stream impact at an existing stream crossing location, or
- b. Temporary or permanent impacts equal to or exceeding: one-third (1/3) acre of wetlands East of Interstate-95, or one-tenth (1/10) of acre of wetlands West of Interstate-95; or
- c. Any impact associated with a Notice of Violation or an enforcement action initiated by the Division and/or the Division of Land Resources; or
- d. Projects with any impacts to streams, wetlands, and/or waters that have received a Notice of Violation from the Division and/or Division of Land Resources; or
- e. Any impacts to streams and/or buffers in the Neuse, Tar-Pamlico, Randleman and Catawba River Basins (or any other basins with Riparian Area Protection Rules [Buffer Rules] in effect at the time of application) *unless* the activities are listed as "EXEMPT" from these Rules.

In accordance with North Carolina General Statute Section 143-215.3D(e), written approval for a 401 Water Quality General Certification must include the appropriate fee. If a project also requires a CAMA Permit, then one payment to both agencies shall be submitted and will be the higher of the two fees.

**Activities included in this General Certification and below the thresholds listed above do not require written approval from the Division of Water Quality as long as they comply with the Conditions of Certification listed below. If any of these Conditions cannot be met, written approval from the Division is required.**

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Water Quality Certification No.

3687

DCM WILMINGTON



# Water Quality Certification N<sup>o</sup>. 3687

## Conditions of Certification:

### 1. No Impacts Beyond Those Authorized for this General Certification

No waste, spoil, solids, or fill of any kind shall occur in wetlands, waters, or riparian areas beyond the thresholds established for use of this General Certification, or beyond the footprint of the impacts authorized in the written approval, including incidental impacts. All construction activities, including the design, installation, operation, and maintenance of sediment and erosion control Best Management Practices, shall be performed so that no violations of state water quality standards, statutes, or rules occur.

### 2. Standard Erosion and Sediment Control Practices

Erosion and sediment control practices must be in full compliance with all specifications governing the proper design, installation and operation and maintenance of such Best Management Practices:

- a. Design, installation, operation, and maintenance of the sediment and erosion control measures must be such that they equal, or exceed, the requirements specified in the most recent version of the *North Carolina Sediment and Erosion Control Manual*. The devices shall be maintained on all construction sites, borrow sites, and waste pile (spoil) projects, including contractor-owned or leased borrow pits associated with the project.
- b. For borrow pit sites, the erosion and sediment control measures must be designed, installed, operated, and maintained in accordance with the most recent version of the *North Carolina Surface Mining Manual*.
- c. Reclamation measures and implementation must comply with the reclamation in accordance with the requirements of the Sedimentation Pollution Control Act and the Mining Act of 1971.
- d. Sufficient materials required for stabilization and/or repair of erosion control measures and stormwater routing and treatment shall be on site at all times, except for publicly funded linear transportation projects when materials can be accessed offsite in a timely manner.
- e. If the project occurs in waters or watersheds classified as Primary Nursery Areas (PNAs), Trout (Tr), SA, WS-I, WS-II, High Quality (HQW), or Outstanding Resource (ORW) waters, then the sediment and erosion control requirements contained within *Design Standards in Sensitive Watersheds* (15A NCAC 04B .0124) supercede all other sediment and erosion control requirements.

### 3. No Sediment and Erosion Control Measures in Wetlands or Waters

Sediment and erosion control measures should not be placed in wetlands or waters outside of the permitted impact areas without prior approval from the Division. If placement of sediment and erosion control devices in wetlands and waters is unavoidable, then the design and placement of temporary erosion control measures shall not be conducted in a manner that may result in dis-equilibrium of wetlands or stream beds or banks, adjacent to or upstream and down stream of the above structures. All sediment and erosion control devices shall be removed and the natural grade restored within two (2) months of the date that the Division of Land Resources or locally delegated program has released the project.

### 4. Construction Stormwater Permit NCG010000

Upon the approval of an Erosion and Sedimentation Control Plan issued by the Division of Land Resources (DLR) or a DLR delegated local erosion and sedimentation control program, an NPDES General stormwater permit (NCG010000) administered by the Division is automatically issued to the project. This General Permit allows stormwater to be discharged during land disturbing construction activities as stipulated by conditions in the permit.

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# Water Quality Certification N°. 3687

activity is covered by this permit [applicable to construction projects that disturb one (1) or more acres], full compliance with permit conditions including the sedimentation control plan, self-monitoring, record keeping and reporting requirements are required. A copy of this permit and monitoring report forms may be found at [http://h2o.enr.state.nc.us/su/Forms\\_Documents.htm](http://h2o.enr.state.nc.us/su/Forms_Documents.htm).

NCDOT shall be required to be in full compliance with the conditions related to construction activities within the most recent version of their individual NPDES (NCS000250) stormwater permit.

## 5. Work in the Dry

All work in or adjacent to stream waters shall be conducted in a dry work area. Approved best management practices from the most current version of the NC Sediment and Erosion Control Manual, or the NC DOT Construction and Maintenance Activities Manual, such as sandbags, rock berms, cofferdams, and other diversion structures shall be used to minimize excavation in flowing water. Exceptions to this condition require submittal to, and approval by, the Division.

## 6. Construction Moratoriums and Coordination

If activities must occur during periods of high biological activity (i.e. sea turtle or bird nesting), then biological monitoring may be required at the request of other state or federal agencies and coordinated with these activities. This condition can be waived through written concurrence on a case by case basis upon reasonable justification.

All moratoriums on construction activities established by the NC Wildlife Resources Commission (WRC), US Fish and Wildlife Service (USFWS), NC Division of Marine Fisheries (DMF), or National Marine Fisheries Service (NMFS) to protect trout, anadromous fish, larval/post-larval fishes and crustaceans, or other aquatic species of concern shall be obeyed. This condition can be waived through written concurrence on a case by case basis upon reasonable justification.

Work within the twenty-five (25) designated trout counties or identified state or federal endangered or threatened species habitat shall be coordinated with the appropriate WRC, USFWS, NMFS personnel.

## 7. Riparian Area Protection Rules (Buffer Rules)

Activities located in the protected 50-foot wide riparian areas (whether jurisdictional wetlands or not) within the Neuse, Tar-Pamlico, Randleman, Catawba (or any other basin with buffer rules), shall be limited to "uses" identified within and constructed in accordance with 15A NCAC 2B .0233, .0259, .0250, and .0243, and shall be located, designed, constructed, and maintained to have minimal disturbance to protect water quality to the maximum extent practicable through the use of best management practices. All riparian area protection rule requirements, including diffuse flow requirements, must be met.

## 8. Water Supply Watershed Buffers

The 100-foot wide (high-density development) or the 30-foot wide vegetative buffer (all other development) must be maintained adjacent to all perennial waters except for allowances as provided in the Water Supply Watershed Protection Rules [15A NCAC 2B .0212 through .0215].

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# Water Quality Certification N°. 3687

## 9. Placement of Culverts and Other Structures in Waters and Wetlands

The application must include construction plans with cross-sectional details in order to indicate that the current stability of the stream will be maintained or enhanced (i.e., not result in head cuts).

Culverts required for this project shall be designed and installed in such a manner that the original stream profiles are not altered and allow for aquatic life movement during low flows. Existing stream dimensions (including the cross section dimensions, pattern, and longitudinal profile) must be maintained above and below locations of each culvert. Placement of culverts and other structures in waters, streams, and wetlands must be placed below the elevation of the streambed by one foot for all culverts with a diameter greater than 48 inches, and 20 percent of the culvert diameter for culverts having a diameter less than 48 inches, to allow low flow passage of water and aquatic life, unless otherwise justified and approved by the Division.

Installation of culverts in wetlands must ensure continuity of water movement and be designed to adequately accommodate high water or flood conditions. Additionally, when roadways, causeways or other fill projects are constructed across FEMA-designated floodways or wetlands, openings such as culverts or bridges must be provided to maintain the natural hydrology of the system as well as prevent constriction of the floodway that may result in destabilization of streams or wetlands.

Any rip rap required for normal pipe burial and stabilization shall be buried such that the original stream elevation is restored and maintained.

The establishment of native, woody vegetation and other soft stream bank stabilization techniques must be used where practicable instead of rip-rap or other bank hardening methods.

10. If concrete is used during the construction, then a dry work area should be maintained to prevent direct contact between curing concrete and stream water. Water that inadvertently contacts uncured concrete should not be discharged to surface waters due to the potential for elevated pH and possible aquatic life/fish kills.
11. Applications for riprap groins proposed in accordance with 15A NCAC 07H .1401 (NC Division of Coastal Management General Permit for construction of Wooden and Riprap Groins in Estuarine and Public Trust Waters) must meet all the specific conditions for design and construction specified in 15A NCAC 07H .1405.
12. Temporary Fills and/or Access Roads

All temporary fill and culverts shall be removed and the impacted area returned to the original grade, including each stream's original cross sectional dimensions, plan form pattern, and longitudinal bed and bed profile after construction is complete or within two (2) months of the establishment of the crossing, whichever is sooner, and the various sites shall be stabilized with natural woody vegetation (except for the maintenance areas of permanent utility crossings) and restored to prevent erosion. If the crossings are not completely removed and restored as described above within the specified time above, then written approval from the Division must be obtained to modify this condition.

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# Water Quality Certification N<sup>o</sup>. 3687

13. For activities requiring written approval, additional site-specific conditions may be added to the approval letter in order to ensure compliance with all applicable water quality and effluent standards.

## 14. Certificate of Completion

When written authorization is required for use of this certification, upon completion of all permitted impacts included within the approval and any subsequent modifications, the applicant shall be required to return the certificate of completion attached to the approval. One copy of the certificate shall be sent to the DWQ Central Office in Raleigh at 1650 Mail Service Center, Raleigh, NC, 27699-1650.

15. If an environmental document is required under NEPA or SEPA, then this General Certification is not valid until a Finding of No Significant Impact (FONSI) or Record of Decision (ROD) is issued by the State Clearinghouse.
16. This General Certification shall expire three (3) years from the date of issuance of the written approval or on the same day as the expiration date of these corresponding Nationwide and Regional General Permits. In accordance with General Statute 136-44.7B, certifications issued to the NCDOT shall expire only upon expiration of the federal 404 Permit. The conditions in effect on the date of issuance of Certification for a specific project shall remain in effect for the life of the project, regardless of the expiration date of this Certification. If the construction process for approved activities will overlap the expiration and renewal date of the corresponding 404 Permit and the Corps allows for continued use of the 404 Permit, then the General Certification shall also remain in effect without requiring re-application and re-approval to use this Certification for the specific impacts already approved.
17. The applicant/permittee and their authorized agents shall conduct all activities in a manner consistent with State water quality standards (including any requirements resulting from compliance with §303(d) of the Clean Water Act), and any other appropriate requirements of State and Federal Law. If the Division determines that such standards or laws are not being met, including failure to sustain a designated or achieved use, or that State or Federal law is being violated, or that further conditions are necessary to assure compliance, then the Division may reevaluate and modify this General Water Quality Certification.

Non-compliance with or violation of the conditions herein set forth by a specific fill project shall result in revocation of this General Certification for the project and may result in criminal and/or civil penalties.

The Director of the North Carolina Division of Water Quality may require submission of a formal application for Individual Certification for any project in this category of activity if it is determined that the project is likely to have a significant adverse effect upon water quality, including state or federally listed endangered or threatened aquatic species, or degrade the waters so that existing uses of the wetland or downstream waters are precluded.

Public hearings may be held for specific applications or group of applications prior to a Certification decision if deemed in the public's best interest by the Director of the North Carolina Division of Water Quality.

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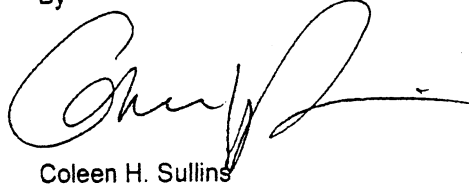
**MAR 14 2008**

# Water Quality Certification N°. 3687

Effective date: November 1, 2007

DIVISION OF WATER QUALITY

By



Coleen H. Sullins

Director

*History Note: Water Quality Certification Number 3687 replaces Water Quality Certification Number 3376 issued on March 18, 2002, Water Quality Certification Number 3494 issued December 31, 2004, and Water Quality Certification Number 3624 issued March 2007. This General Certification is rescinded when the Corps of Engineers re-authorizes any of these Nationwide or Regional Permits or when deemed appropriate by the Director of the Division of Water Quality.*

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Water Quality Certification No.

3687

DCM WILMINGTON, NC




CRC-VR-08-50

State of North Carolina

Department of Justice  
PO Box 629  
Raleigh, North Carolina  
27602

ROY COOPER  
ATTORNEY GENERAL

TO: Coastal Resources Commission

FROM: Christine A. Goebel   
Assistant Attorney General

DATE: September 12, 2008 (for the September 24-26, 2008 CRC Meeting)

RE: **Variance Request by The North Carolina Aquariums**

---

Petitioner is division of the NC Department of Natural Resources, created pursuant to Article 289.41 of Chapter 143B of the General Statutes. It owns property located on the oceanfront near the intersection of NC 12 and NC 158 in Nags Head, Dare County. Petitioner applied for a CAMA Major Permit to construct a ocean fishing pier and educational public pier facility on the oceanfront at the site of the old Janette's Pier. A permit was denied on August 14, 2008 for the proposed development because (1) the pier house, pump house and bath house do not meet applicable oceanfront erosion setbacks, (2) the proposed 2.5-story pier house exceeds the existing height limit in the CRC's rules, and because (3) at the time of the permit decision, the project did not meet local zoning (the zoning has since been amended so that this project complies). Petitioner filed this variance request seeking relief from the cited rules.

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Petitioner's Position and Staff's Responses to Criteria  
Attachment D: Petitioner's Variance Request Materials & Other attachments

cc: David Griffin, Aquarium Director & Petitioner  
Anita LeVeaux, Asst. AG and Attorney for Petitioner  
Jim Gregson, DCM Director  
Ted Tyndall, DCM Assistant Director, Permits and Enforcement  
Doug Huggett, DCM Major Permits Manager  
Frank Jennings, DCM District Manager  
DCM Staff  
Jennie Hauser, Special Deputy AG & CRC Counsel

ATTACHMENT A

RELEVANT STATUTES OR RULES

15A NCAC 7H .0306      GENERAL USE STANDARDS FOR OCEAN  
HAZARD AREAS

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.

(1) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.

\*\*\*

(4) Because large structures located immediately along the Atlantic Ocean present increased risk of loss of life and property, increased potential for eventual loss or damage to the public beach area and other important natural features along the oceanfront, increased potential for higher public costs for federal flood insurance, erosion control, storm protection, disaster relief and provision of public services such as water and sewer, and increased difficulty and expense of relocation in the event of future shoreline loss, a greater oceanfront setback is required for these structures than is the case with smaller structures. Therefore, in addition to meeting the criteria in this Rule for setback landward of the primary or frontal dune or both the primary and frontal dunes, for all multi-family residential structures (including motels, hotels, condominiums and moteliminiums) of more than 5,000 square feet total floor area, and for any non-residential structure with a total area of more than 5,000 square feet, the erosion setback line shall be twice the erosion setback as established in Subparagraph (a)(1) of this Rule, provided that in no case shall this distance be less than 120 feet. In areas where the rate is more than 3.5 feet per year, this setback line shall be set at a distance of 30 times the long-term annual erosion rate plus 105 feet.

**15A NCAC 07H.0309**

**USE STANDARDS FOR OCEAN HAZARD AREAS:  
EXCEPTIONS**

\*\*\*

- (e) Where application of the oceanfront setback requirements of Rule .0306(a) of this Section would preclude replacement of a pier house associated with an existing ocean pier, replacement of the pier house shall be permitted if each of the following conditions are met.

\*\*\*

- (3) The pier house shall not be enlarged beyond its original dimensions as of January 1, 1996;

**15A NCAC 7H.0601**

**NO VIOLATION OF ANY RULE**

No development shall be allowed in any AEC which would result in a contravention or violation of any rules, regulations, or laws of the State of North Carolina or of local government in which the development takes place.

STIPULATED FACTS

1. Petitioner is the North Carolina Aquariums, a division of the NC Department of Environment and Natural Resources. Under Article 289.41 of Chapter 143B of the General Statutes, the Aquariums are authorized by the General Assembly to inspire appreciation and conservation of North Carolina's aquatic environments (See N.C.G.S. 143B-289.42).
2. On November 21, 2007, the State of North Carolina received the property at issue through a gift deed from the non-profit North Carolina Aquarium Society. The donation was made for the purpose of preserving and reconstructing an educational ocean fishing pier. This property was originally purchased by the North Carolina Aquarium Society in 2002 with a grant from the NC Clean Water Management Trust Fund. The grant was given to the NC Aquarium Society to help preserve the property for historical and cultural uses (pier fishing, beach access), and to address the stormwater issues in the Whalebone Junction area.
3. The grant funds which have supported this project include the previously mentioned NC Cleanwater Management Trust Fund for \$4.6 million, from the Waterfront Access and Marine Industry Fund (WAMI Fund) for \$1.5 million, and pending grants from the NC Rural Development Center for \$500,000 and from the NC Cleanwater Management Trust Fund for \$2.2 million.
4. The site is located near the intersection of NC Highway 12 and NC Highway 158 in Nags Head. This oceanfront site is the former site of Jennette's Pier. The site once included a pier, a one-story pier house, 7 cottage efficiencies, paved parking, septic system, and one small out-building. Portions of the pier were destroyed in Hurricane Isabel in 2003. The remaining pier and pier house were demolished in May 2008.
5. The proposed development is located in the High Hazard Flood Area, Ocean Erodible Area, Public Trust Areas and Estuarine Waters Areas of Environmental Concern (AECs).
6. The long-term average annual erosion rate at the site is 2 feet per year.

7. The Legislative Waterfront Access Study Committee found that ocean fishing piers were disappearing rapidly due to economic pressures to redevelop the ocean-front property for greater financial gains. In its final report, the Committee recommended that "...the North Carolina Aquariums be authorized and funded to pilot the design, development, and operation of three (3) public fishing piers that not only would provide angling access, but also would offer public educational opportunities." (page 27, Final Report, Waterfront Access Study Committee, April 13, 2007). The section related to ocean piers, of the N.C. Waterfront Access Study Committee's April 2007 Report to the CRC, MFC, and the NC Joint Legislative Commission on Seafood and Aquaculture, is attached and incorporated.
8. By application received as complete by DCM on July 11, 2008, Petitioner applied for a CAMA Major Permit to construct a new ocean pier, 2.5-story pier house containing both a traditional pier store and educational spaces, a bath house, a pump house, and associated parking and sidewalks. The proposed project is shown on an attached survey, a full-size copy of which will be available at the CRC meeting. These plans are attached and incorporated.
9. As a part of the permit process, notice was given to the adjacent riparian owners and to the public. DCM received no comments in opposition to the proposed project.
10. As a part of the permit process, information on the proposed development was given to state and federal agencies for comment. No adverse comments were received by DCM.
11. Correspondence from the U.S. Army Corps of Engineers indicated that they would keep their permit process open while Petitioner sought this variance.
12. The proposed 1000-foot long pier and 2.5-story pier house are located within the footprint of the old Jennette's Pier and pier house.
13. The proposed project would include access to traditional ocean pier fishing, beach access, educational exhibits and programs, functional and educational sustainable practices and alternative energy generation, and innovative storm water and waste water treatment applications. The project will be constructed and operated to meet LEED gold certification.
14. The building was increased from one-story to 2.5-stories in order to allow for both the traditional pier store as well as for educational exhibits and public space.
15. Parking requirements have pushed all of the structures as far east as they are being proposed. If the structures were moved landward, the loss of parking spaces would not comply with local ordinance requirements.

16. In order to minimize damage from waves and floodwaters, the pier is proposed to be elevated 25 feet above MSL; the pier house will be elevated 23 feet above MSL.
17. The pier and pier house foundation will be constructed with round concrete piles and concrete bents. The pier deck and railing will be constructed of wood and built in sections that can float off, free from its support girders.
18. The pier house will be constructed to withstand hurricanes up to category 3.
19. The permit was denied on August 14, 2008 (See denial letter in the Attachments). The permit was denied because (1) the bathhouse and pump house buildings, and part of the parking lot and pavilion don't meet the small structure oceanfront setback, (2) the parking area and plaza area do not meet the large structure oceanfront setback, (3) the 2.5-story pier house exceeds the original dimensions limit within the CRC's rules, (4) the project, at the time of the permit decision, was inconsistent with the Town's ordinances.
20. Petitioner filed this variance request on May 25, 2004, seeking relief from application of the setback rules of 15A NCAC 7H.0306(a)(1) and .0306(a)(4), from the pier house height limitations of 15A NCAC 7H .0309(e)(3), and from 15A NCAC 7H.0601 for the (then) current inconsistency with the Town's ordinances. Petitioner seeks permission to build the proposed pier and pier complex as proposed in the plans submitted to DCM and attached. Petitioner's variance request materials are attached hereto as Attachment D and are incorporated by reference.
21. The Town of Nags Head and the North Carolina Aquariums have partnered in the planning and designing this project.
22. While one basis for denial was the inconsistency with 7H.0601 for being inconsistent with the Town's zoning ordinance, the Town amended its ordinance on September 3, 2008 so that the proposed project would not be inconsistent. Therefore, a variance from the CRC on this issue is no longer needed.



**Petitioner and Staff Positions**

- I. Will practical difficulties or unnecessary hardships result from strict application of the guidelines, rules, standards or other restrictions applicable to the property?**

**Petitioner's Position: Yes**

The North Carolina Aquariums are proposing to reconstruct a pre-existing ocean fishing pier (Jennette's Pier) into a state-owned, educational, ocean fishing pier for the citizens of North Carolina. This reconstruction is being undertaken to provide ocean fishing access, beach access and educational programming for the citizens of North Carolina, at a time when ocean fishing piers are disappearing. The application of the current Coastal Area Management Act rules and the subsequent denial of a CAMA permit would preclude the construction of this project. In so doing, a hardship would be created, not for the Aquariums, but for the state of North Carolina, its citizens, as well as every visitor that has an appreciation for the beauty and richness of our coastal resources.

**Staff's Position: Yes.**

Staff recognizes that Petitioner's project satisfies an important and growing need for public access to public resources and a better understanding of the coastal resources of the State. The hardship in this case arises from the Aquarium's efforts to maximize the public access resources, both educational and traditional, within the space provided by the site, and to maximize access for the public funds used for this project. Their proposed design takes many steps to avoid the need for a variance by tailoring their design to meet the rules where possible, while still proposing facilities Petitioner felt was needed to meet the need outlined in the N.C. Waterfront Access Study Committee's April 2007 Report to the CRC, MFC, and the NC Joint Legislative Commission on Seafood and Aquaculture. While a smaller pier structure could still be effective for its intended purposes, this is a case where hardship results from the competing public interests associated with maximizing use of a public facility paid for with public money, and the increased risks associated with development within the Ocean Hazard AEC. On balance, in this particular case, staff agrees that the strict application of the current rules results in a hardship to the Petitioner.

**II. Do such difficulties or hardships result from conditions which are peculiar to the property involved?**

**Petitioner's Position: Yes.**

The location of this project was prescribed by the location of the pre-existing Jennette's Pier. The construction of new and/or replacement ocean fishing piers is prescribed by the availability of oceanfront land. This tract of land (5.12 acres of oceanfront property) is the largest undeveloped tract of land available on the Outer Banks, and therefore the most logical choice for the construction of a State-owned educational ocean fishing pier.

**Staff's Position: Yes.**

Staff agree that the hardships result from the peculiarities of the site, including the fact that this site has long-been used for a pier and pierhouse. Also unique is the large size of this undeveloped property on the intensely developed Nags Head shoreline, and it's location at the heavily traveled and highly visible juncture of NC 12 and NC 158, which makes for the perfect setting for a public access project.

**III. Do the hardships result from actions taken by the Petitioner?**

**Petitioner's Position: No.**

The North Carolina Aquariums, on behalf of the State of North Carolina, are attempting to respond to an identified need for ocean fishing access and ocean beach access. The Legislative Waterfront Access Study Committee found that ocean fishing piers are rapidly disappearing, due to increasing economic pressures. In its report, the Commission recommended that the North Carolina Aquariums build and operate three ocean fishing piers as a pilot program (see attached copies of excerpts from the Committee's Final Report). The Aquariums concur with this finding and recommendation, and are moving to build the first of three planned educational ocean fishing piers. Without this Aquarium initiative, the citizens of the State will continue to lose access to ocean fishing and beach access. While the Aquariums are initiating this action, it is being undertaken on behalf of, and for the benefit of the citizens of North Carolina.

**Staff's Position: No.**

In order to meet the multiple needs of such a facility on this site, the project was designed to obtain the most benefit from the public funds on this public site to include as much space for both the educational and traditional pier facility needs, including parking. Staff believes that this project was designed to meet the rules as much as possible, and reduces the overall impact on the public resources. For example, the Petitioner reduces the impacts to the public resources by using wind turbines for power, pumping salt water for the Manteo aquarium instead of making salt water from city water, and building the structure to high energy-efficiency standards.

**IV. Is the proposed development consistent with (1) the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice?**

**Petitioner's Position: Yes.**

The construction of the pier and pier house as planned are consistent with the proposed CAMA revised ocean pier rules that are currently in the process of rule making (i.e., the pier house would be built within the footprint of the pre-existing pier house of Jennette's Pier, and enlarged via a second floor). Should the submittal of the CAMA permit application for this project have been later, these revised rules would have allowed the pier and pier house as currently proposed to be permitted. The intent of most CAMA oceanfront regulations is to protect the ocean beach area for the use and enjoyment by the public, and to provide for the safety of the public from storm-damaged oceanfront structures. This project is a public project, designed to directly benefit the public, providing access to ocean fishing and to the ocean beach area. The project includes a bath house for use by the public when visiting and enjoying the public beach area. The project is also being designed to minimize damage to the pier and pier house from storm events.

**Staff's Position: Yes.**

Staff believes that the variance is consistent with the spirit, purpose, and intent of the rules. The Petitioner did an admirable job of designing the project to meet the CRC's current rules as much as possible, while still maximizing the public facilities and access for the public to the pier facility, as well as by including design features that reduce the project's impacts on the public resources. Staff contends that the proposal is consistent with the spirit, purpose, and intent of the rules by providing public access for educational, fishing, and other recreational purposes. It also returns the original functions of the old Janette's pier which is a consideration under the current oceanfront pier rules. Public safety and welfare are secured through the innovative design elements which reduce the project's impacts on the public resources. This variance would preserve substantial justice because the project provides increased public access to, and use of, the public's ocean resources and offers educational opportunities about those resources, goals the general assembly has found to be an important one for the citizens of North Carolina.



NORTH CAROLINA  
AQUARIUMS

3125 Poplarwood Court, Suite 160, Raleigh, NC 27604 • (919) 877-5500 • Fax: (919) 981-5224 • ncaquariums.com  
David R. Griffin, Director

RECEIVED

AUG 21 2008

NC ATTORNEY GENERAL  
BUREAU OF LEGAL COUNSEL

August 21, 2008

Jim Gregson, Director  
North Carolina Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

*Jim*  
Dear ~~Director~~ Gregson:

Please find attached a completed form seeking a variance from the Coastal Resources Commission for the proposed reconstruction of an educational, ocean fishing pier at Nags Head, Dare County. This variance request is being made pursuant to the denial of the North Carolina Aquariums' application for a CAMA major permit for the project (reference your later dated August 14, 2008). I have not submitted a set of facts regarding this case, but will work with your staff, and staff of the Attorney General's Office to reach a set of facts that we can all agree upon.

I look forward to working with your staff and staff of the Attorney General's Office toward a variance request hearing before the Coastal Resources Commission at their September 24 - 25, 2008 meeting at Sunset Beach, NC.

I am providing a copy of this letter and the completed variance forms to the Attorney General's Office as directed.

Should you have questions and/or need additional information, please do not hesitate to contact me.

Sincerely,

David R. Griffin  
Director

Cc: Attorney General's Office  
file

attachments



ACCREDITED BY THE  
ASSOCIATION  
OF ZOOS &  
AQUARIUMS

08-50

Petitioner supplies the following information:

Your Name North Carolina Aquariums (represented by David R. Griffin, Director)  
Address 3125 Poplarwood Court, Suite 160, Raleigh, NC 27604  
Telephone 919-877-5500  
Fax and/or Email 919-981-5224 david.griffin@ncmail.net

Name of Your Attorney (if applicable) N/A  
Address  
Telephone  
Fax and/or Email

Have you received a decision from the Division of Coastal Management (DCM) or a Local Permit Officer denying your application for a CAMA permit?

no (You are not entitled to request a variance until your permit application has been denied.)

yes (You may proceed with a request for a variance.)

What did you seek a permit to do?

**Construct an educational, state-owned ocean fishing pier, along with pier house, associated parking, and public beach bath house on the former site of the Jennette's Pier, Nags Head, Dare County.**

What Coastal Resources Commission rule(s) prohibit this type of development?

**NCAC T15A: 07H.0306(a)(1), NCAC T15A: 07H.0306(a)(4), NCAC T15A: 07H.0309(e)(3), and NCAC T15A 07H.0601**

Can you redesign your proposed development to comply with this rule?  No  Yes If your answer is no, explain why you cannot redesign to comply with the rule.

**The proposed pier house is designed to allow educational programs, seminars and presentations to be made to educate the public about oceans, climate change, barrier island ecology, etc. A smaller pier house will not allow for the traditional uses of a pier house (tackle shop, food vending, pier admissions, etc) and the planned educational uses. Required parking for the project places a portion of the parking oceanward of the large structure setback; moving the parking landward of the large structure setback will not allow enough parking to meet local zoning requirements. The bath house and pump/utility building are currently located slightly oceanward of the small structure setback. Moving**

these structures landward to meet the small structure setback will cause the loss of parking; no parking spaces can be lost and still allow the project to comply with local zoning requirements.

Can you obtain a permit for a portion of what you wish to do? Yes If so, please state what the permit would allow.

**Current CAMA regulations would allow:**

- **The construction of an ocean fishing pier, with the same size pier house in the same footprint as Jennette's Pier. This reduced pier house would not allow for the offering of public educational programs.**
- **A bath house and pump/utility building located landward of the small structure setback.**
- **Significantly reduced parking so as to be located landward of the large structure setback.**

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

**This project is proposed as an extension of the North Carolina Aquariums and its educational programming efforts. The project must be constructed as presented in order to be able to conduct educational programs as planned. The denial of any part of this project will cause the entire project to fail.**

#### RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

- I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to be considered. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. [*Williams v. NCDENR, DCM, and CRC*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).]

**The North Carolina Aquariums are proposing to reconstruct a pre-existing ocean fishing pier (Jennette's Pier) into a state-owned, educational, ocean fishing pier for the citizens of North Carolina. This reconstruction is being undertaken to provide ocean fishing access, beach access and educational programming for the citizens of North Carolina, at a time when ocean fishing piers are disappearing. The application of the current Coastal Area Management Act rules and the subsequent denial of a CAMA permit would preclude the construction of this project. In so doing, a hardship would be created, not for the Aquariums, but for the state of North Carolina, its citizens, as well as every visitor that has an appreciation for the beauty and richness of our coastal resources.**

- II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.  
**The location of this project was prescribed by the location of the pre-existing Jennette's Pier. The construction of new and/or replacement ocean fishing piers is prescribed by the availability of oceanfront land. This tract of land (5.12 acres of oceanfront property) is the largest undeveloped tract of land available on the Outer Banks, and therefore the most logical choice for the construction of a State-owned educational ocean fishing pier.**
- III. Explain why your hardship does not result from actions that you have taken.  
**The North Carolina Aquariums, on behalf of the State of North Carolina, are attempting to respond to an identified need for ocean fishing access and ocean beach access. The Legislative Waterfront Access Study Committee found that ocean fishing piers are rapidly disappearing, due to increasing economic pressures. In its report, the Commission recommended that the North Carolina Aquariums build and operate three ocean fishing piers as a pilot program (see attached copies of excerpts from the Committee's Final Report). The Aquariums concur with this finding and recommendation, and are moving to build the first of three planned educational ocean fishing piers. Without this Aquarium initiative, the citizens of the State will continue to lose access to ocean fishing and beach access. While the Aquariums are initiating this action, it is being undertaken on behalf of, and for the benefit of the citizens of North Carolina**
- IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.  
**The construction of the pier and pier house as planned are consistent with the proposed CAMA revised ocean pier rules that are currently in the process of rule making (i.e., the pier house would be built within the footprint of the pre-existing pier house of Jennette's Pier, and enlarged via a second floor). Should the submittal of the CAMA permit application for this project have been later, these revised rules would have allowed the pier and pier house as currently proposed to be permitted. The intent of most CAMA oceanfront regulations is to protect the ocean beach area for the use and enjoyment by the public, and to provide for the safety of the public from storm-damaged oceanfront structures. This project is a public project, designed to directly benefit the public, providing access to ocean fishing and to the ocean beach area. The project includes a bath house for use by the public when visiting and enjoying the public beach area. The project is also being designed to minimize damage to the pier and pier house from storm events.**

**It is the petitioner's belief that the public benefits of this project (ocean fishing access, ocean beach access, educational programming) make this project consistent with the spirit, purpose and intent of the CRC's rules.**

Please attach copies of the following:

Permit Application and Denial documents

Site Drawing with Survey and Topographical Information

Any letters filed with DCM or the LPO commenting on or objecting to your project

Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criterion, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree upon. Those facts will be the only facts that the Commission will consider in determining whether to grant your variance request.]

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: 8/21/08

Signature:



*This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.*



**CERTIFICATE OF SERVICE**

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

copy: Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 21<sup>st</sup> day of AUGUST, 2008.

  
\_\_\_\_\_  
Signature of Petitioner or Attorney



North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

August 14, 2008

**CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

NC Department of Environment and Natural Resources  
Aquarium Division  
Mr. David Griffin  
Mr. Chris Ivers  
3125 Poplarwood Court  
Suite 160  
Raleigh, NC 27604

Dear Sirs:

This letter is in response to your application for a Major Permit under the Coastal Area Management Act (CAMA), in which authorization was requested to construct an ocean pier, pier house and associated aquarium, bathhouse, utility/pump house, parking area and associated amenities in Dare County, North Carolina. Processing of the application, which was received as complete by the Division of Coastal Management's Elizabeth City office on July 11, 2008, is now complete. Based on the state's review, the Division of Coastal Management has made the following findings:

- 1) The new ocean pier will replace the original Jennette's pier and pier house.
- 2) The long-term average annual erosion rate at the project site is 2 feet per year, resulting in a small structure setback of 60 feet and a large structure setback of 120 feet, both measured from the first line of stable natural vegetation. A plat dated July 10, 2008 depicting the first line of stable natural vegetation and the resulting small and large structure setbacks was submitted with the original permit application.
- 3) The proposed bathhouse and pump/utility buildings proposed within the Ocean Erodible Area and High Hazard Flood Area AECs are considered to be small structures by the Division of Coastal Management and therefore are subject to the setback requirements set forth in NCAC T15A:07H.0306(a)(1). Both structures are proposed to be located waterward of the small structure setback. Additionally, a portion of the parking lot and pavilion will also be located waterward of the small structure setback.

400 Commerce Avenue, Morehead City, North Carolina 28557  
Phone: 252-808-2808 \ FAX: 252-247-3330 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

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- 4) The proposed parking areas and plaza area will cover approximately 114,000 square feet of the Ocean Erodible Area and High Hazard Flood Area AECs. The N.C. Division of Coastal Management has traditionally considered "parking areas" as a non-residential structure. The Division of Coastal Management has determined that the proposed parking area and connected plaza area is a large structures (>5,000 square feet) and therefore subject to the large structure setback requirements set forth in NCAC T15A:07H.0306(a)(4). The parking area and connecting plaza area is proposed to be located waterward of the large structure setback.
- 5) The proposed pier house will be located within the same footprint of the previously existing Jennette's pier house, however the proposed pier house will be 2-1/2 stories, a vertical increase of 1-1/2 stories from the previously existing 1-story Jennette's pier house.
- 6) The Division of Coastal Management has received comments from the Town of Nags Head indicating that the proposal has been deemed to currently be inconsistent with the Code of Ordinances of the Town of Nags Head.
- 7) Based upon the above referenced findings, the Division has determined that the proposed project is inconsistent with the following rules of the Coastal Resources Commission:
  - a) NCAC T15A:07H.0306(a)(1), which states, "If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable."
  - b) NCAC T15A:07H.0306(a)(4), which states in part that "Because large structures located immediately along the Atlantic Ocean present increased risk of loss of life and property, increased potential for eventual loss or damage to the public beach area and other important natural features along the oceanfront, increased potential for higher public costs for federal flood insurance, erosion control, storm protection, disaster relief and provision of public services such as water and sewer, and increased difficulty and expense of relocation in the event of future shoreline loss, a greater oceanfront setback is required for these structures than is the case with smaller structures. Therefore, in addition to meeting the criteria in this Rule for setback landward of the primary or frontal dune or both the primary and frontal dunes, for all multi-family residential structures (including motels, hotels, condominiums and moteliminiums) of more than 5,000 square feet total

floor area, and for any non-residential structure with a total area of more than 5,000 square feet, the erosion setback line shall be twice the erosion setback as established in Subparagraph (a)(1) of this Rule, provided that in no case shall this distance be less than 120 feet.

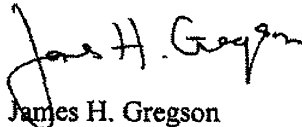
- c) NCAC T15A:07H.0309(e)(3), which states, "(e) Where application of the oceanfront setback requirements of Rule .0306(a) of this Section would preclude replacement of a pier house associated with an existing ocean pier, replacement of the pier house shall be permitted if each of the following conditions are met: (3) The pier house shall not be enlarged beyond its original dimensions as of January 1, 1996." The proposal is inconsistent with this rule due to the fact that the proposed pier house will expand beyond its original vertical dimension by increasing from 1 story to 2-1/2 stories.
- d) 15A NCAC 07H.0601 which states "No development shall be allowed in any AEC which would result in a contravention or violation of any rules, regulations, or laws of the State of North Carolina or of local government in which the development takes place."

Given the preceding findings, it is necessary that your request for issuance of a CAMA Major Permit under the Coastal Area Management Act be denied. This denial is made pursuant to N.C.G.S. 113A-120(a)(8) which requires denial for projects inconsistent with the state guidelines for Areas of Environmental Concern or local land use plans.

If you wish to appeal this denial, you are entitled to a hearing. The hearing will involve appearing before an Administrative Law Judge who listens to evidence and arguments of both parties and then makes a recommendation to the Coastal Resources Commission. Your request for a hearing must be in the form of a written petition, complying with the requirements of §150B of the General Statutes of North Carolina, and must be filed with the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, within twenty (20) days from the date of this letter. A copy of this petition should be filed with this office.

Members of my staff are available to assist you should you desire to modify your proposal in the future. If you have any questions concerning this matter, please contact Mr. Doug Huggett at (252) 808-2808, extension 212.

Sincerely,



James H. Gregson

NC Department of Environment and Natural Resources

Aquarium Division

August 14, 2008

Page 4

cc: Colonel Jefferson Ryscavage – U.S. Army Corps of Engineers, Wilmington, NC  
David Kennedy, Director – OCRM/NOAA, Silver Spring, MD  
Raleigh Bland, ACOE  
DCM - Morehead City  
DCM – Elizabeth City  
George Hemingway, BMS Architects, 514 Market Street, Wilmington, NC 28401

JUL 11 2008

NOV 27 2007

COASTAL MANAGEMENT  
Elizabeth City

COASTAL MANAGEMENT  
Elizabeth City

## CAMA Permit Narrative for the North Carolina Aquarium's Pier at Nags Head

The North Carolina Aquarium Pier at Nags Head built under the Aquarium Division of North Carolina's Department of Environment and Natural Resources will replace the seventy-year-old Jennette's pier and pier house, parking lot and septic field. The new 1000 foot long pier will be constructed out of concrete and have timber decking. A new 15,844 square foot pier house will be built in the same footprint as the old Jennette's pier house.

The facility will be a recreational and educational facility operated as an extension of the North Carolina Aquarium on Roanoke Island and serve as both a public fishing pier and regional beach access. The facility will offer a variety of educational programs and events that follow the mission statement of the aquariums. Which is to promote an awareness, understanding, appreciation, and conservation of the diverse natural and cultural resources associated with North Carolina's ocean, estuaries, rivers, streams, and other aquatic environments.

The Aquarium Pier will be a demonstration of North Carolina Aquarium's mission. Three wind turbines mounted on the pier will provide a significant source of renewable energy for the facility. The existing in ground septic system that supported Jennette's pier will be removed. A new grey water reuse facility will be built on the western parcel of the site. The facility will provide advanced treatment of all wastewater, thus significantly reducing the amount of water used from the Town of Nags Head municipal water system. The grey water will be used for urinals and toilets at both the Pier House and Bath House. A separate rainwater capture system will collect rainwater from the pier house roof storing it in a group of cisterns. Captured rainwater will be treated and used in the showers at the public beach access bathhouse. The existing parking lot will be removed and replaced with a pervious parking lot pavement having all storm water runoff stored on-site. LED lighting will be used in all possible locations to greatly reduce the energy load of the facility. A geothermal HVAC system will be incorporated, further reducing the energy draw and eliminating outdoor mechanical equipment. The project will be constructed in an effort to achieve as high a LEED rating as possible. LEED, leadership in energy and environmental design, is a third party certification and national accepted benchmark for the design and construction of high performance green buildings.

The pier itself will have a system of pre-cast concrete pilings. These pilings will be locked together with a cast-in-place concrete pile cap and pre-cast girder system. The pier decking will be timber and will be 25' above sea level and 5.5' higher than the old Jennette's pier at 19.5'. Three small open-air pavilions on the pier will offer protection from sun, wind and rain. These pavilions will also serve as outdoor classrooms for the aquarium's educational program. A salt-water intake system will be housed at the end of the pier, which will be a retractable 2" line. The natural salt water will be stored in two tanks at the parking lot. This natural salt water will be slightly treated onsite and then trucked to the Roanoke Island Aquarium. This system will allow the aquarium to use natural salt water as opposed to artificially produced salt water that it currently uses. Reducing the amount of treated municipal water the aquarium uses and significantly cutting the amount of money now spent on salt to produce the artificial salt water.

The pier house will be a concrete frame structure with wood walls and roof. The first floor will be a traditional pier house that sells tackle and concessions and also contain an educational

classroom. The second floor will house a multi-purpose room, catering kitchen and several staff offices. The multi-purpose room will double as an educational space and be available for private, public and community functions. Both floors will have covered porches that offer expansive views of the pier and Atlantic Ocean and protect the building from excessive solar gain.

**DIVISION OF COASTAL MANAGEMENT  
FIELD INVESTIGATION REPORT**

1. **APPLICANT'S NAME: NC DENR: Aquarium Division; The Aquarium Pier at Nags Head**
  
2. **LOCATION OF PROJECT SITE: 7223 South Virginia Dare Trail (NC 12), Nags Head, Dare County and adjacent to the Atlantic Ocean.**  
 Photo Index – 2006: N/A    2000: N/A    1998: 42-1052 (P-T, 6-7)  
 1995: 185-1924 (T-X, 6-7)    1989: 142-21 (N-Q, 8-9)    1984: 138-457 (E-H, 19-20)  
 State Plane Coordinates - X: 3007900    Y: 803400    Roanoke Island NE, NC  
 GPS: E062413A    LL
  
3. **INVESTIGATION TYPE: CAMA**
  
4. **INVESTIGATIVE PROCEDURE: Dates of Site Visit – 06/24/08; 07/02/08**  
 Was Applicant Present – No;    No
  
5. **PROCESSING PROCEDURE: Application Received Complete – 07/11/08**  
 Office - Elizabeth City
  
6. **SITE DESCRIPTION:**
  - (A) Local Land Use Plan – Town of Nags Head  
 Land Classification From LUP - Conservation
  - (B) AEC(s) Involved: Ocean Erodible Area, High Hazard Flood Area, Public Trust Area, and Estuarine Waters
  - (C) Water Dependent: Yes
  - (D) Intended Use: Public
  - (E) Wastewater Treatment: Existing – Septic drain field  
 Planned - Septic drain/spray field
  - (F) Type of Structures: Existing – 7 cottages, paved parking areas, outbuilding, sand fencing, and septic drain field. Trailer park and office building.  
 Planned - Pier, pier house, parking, paving, bath house
  - (G) Estimated Annual Rate of Erosion: 2 ft.  
 Source – DCM Long Term Average Annual Shoreline Change Study

7. **HABITAT DESCRIPTION:**

	COVERED	[AREA] FILLED	DISTURBED
(A) Public Trust Area, Estuarine Waters	43,430 sf: pier/ pier house		
(B) Ocean Erodible Area, High Hazard Flood Area	114,000 sf: parking and paving 1,800 sf: bath house 1,700 sf: outbuilding		
(C) Other			53,301 sf

- (D) Total Area Disturbed: 214,231 sf (4.918 acres)
- (E) Primary Nursery Area: No
- (F) Water Classification: SB    Open: Yes



**Field Investigation Report: The Aquarium Pier at Nags Head**  
**Page 2**

8. **PROJECT SUMMARY:** The applicant proposes to construct an ocean pier, pier house, bath house, utility/pump house, and parking area.

Project Setting

The development site consists of two tracts located at 7223 South Virginia Dare Trail (NC 12), Town of Nags Head, Dare County. The east tract has an area of 212,00 square feet (sf) and is adjacent to the Atlantic Ocean. The west tract is located across the street (South Virginia Dare Trail) from the east tract, has an area of 62,230 sf and is not located within an Area of Environmental Concern.

The east tract has 465 feet of shoreline that consists of a sand strand beach with a protective dune ridge parallel to the shoreline. The property has an elevation that varies from +9 feet to +14 feet above normal high water (NHW), with a prominent sand mound approximately +25 feet above NHW located in the northeastern area of the property. The property has sand/shell soils and is vegetated with American beach grass, bitter pancium, sea oats, and ornamental Russian olive. Existing development on the property consists of an abandoned cottage court with seven small cottages, a large parking area and service drive, a septic drain field that once serviced an ocean fishing pier house that recently was demolished and a small outbuilding used for weather observation. The adjacent riparian property located to the north is a local supermarket and cottage court and the adjacent riparian property to the south is a single-family, vacation-type dwelling. The property was once the site of Jennette's Pier and cottage court, which was built in 1939. The ocean fishing pier was 750 feet long. In 2003, Hurricane Isabel destroyed approximately 600 feet of the pier.

The west tract is flat, with an elevation of approximately +4 feet above NHW. It has sandy soils and is vegetated with red bay, Virginia creeper, willow and indigenous grasses. Existing development on this tract consists of a mobile home/camper trailer park with 14 trailers and an office building/residence.

The waters of the Atlantic Ocean in this area are classified as SB and are open to shellfish harvesting. The average annual erosion rate for this area is 2 feet with a 25-foot, 100-year storm recession factor.

Development Proposal

In order to provide public access to the Atlantic Ocean and provide educational opportunities for the public, the applicant proposes to construct an ocean pier, an ocean pier house with an aquarium, a public bath house, a utility outbuilding, and a public parking area for pier and beach access.

**Field Investigation Report: The Aquarium Pier at Nags Head**  
**Page 3**

The proposed pier will be 1,000 feet long and 25 feet wide with a 36-foot by 75-foot "T" head with decked corners. An enclosed 22-foot by 22-foot pump house will be located on the "T" head to provide shelter for water pumps used to move ocean water to holding tanks on shore. Two expanded platforms or pavilions are proposed along the pier to provide areas for roofed, open-sided, open-air classroom or shelter area. The first pavilion (closest to the pier house) will be 36 feet by 42 feet with decked corners and the second pavilion will be 36 feet by 52 feet with decked corners. Three wind turbines will be mounted along the pier fairway. The pier will be constructed out of concrete and have wood decking. The water depth at the proposed pier head is approximately -19 feet.

The pier house will be constructed in the same footprint as the old Jennette's pier house, which was approximately 80 feet by 90 feet with decks. The proposed new pier house will be 2-1/2 stories and will have 15,844 sf of enclosed/habitable area. The pier house will be accessed by two ramps. One ramp will be 25 feet wide and will be used as the main access ramp from the parking area and the other ramp will be 12 feet and will be used as a service ramp to access a proposed pump/utility outbuilding. The pier house will have decking, both open and covered around the entire structure. The location of the proposed pier house will be waterward the observed NHW line. The first floor elevation of the proposed pier house will be +23.0 feet.

The proposed public bath house will be 36 feet by 50 feet with a first floor elevation of +14.0 feet. It will be one story and provide public toilet facilities and changing areas with outdoor showers. The structure will have pervious paving for pedestrian use and for shower flooring. This structure will be located approximately 30 feet landward of the first line of stable natural vegetation (FLSNV).

The proposed utility outbuilding will be 34 feet by 50 feet with a first floor elevation of +13.5 feet. It will have two salt water storage tanks or cisterns and a dumpster enclosure constructed externally. This structure will be located approximately 65 feet landward of the FLSNV.

A 40-foot by 80-foot plaza and sidewalk of concrete paving will connect the three structures with the proposed parking area. The plaza will be located approximately 30 feet landward of the FLSNV.

The public parking area will have areas of approximately 250 feet by 300 feet and 195 feet by 200 feet and will be constructed out of pervious paving for the driveway areas and turf stone block paving in the parking areas. The parking area will provide parking space for 216 vehicles. The parking area will be located approximately 40 feet landward of the FLSNV.

Proposed development for the west tract is not specific other than it will be used as a spray field, and a "grey water" reuse building is proposed for the property. According to the application, 53,301 sf of the tract will be disturbed.

**Field Investigation Report: The Aquarium Pier at Nags Head**  
**Page 4**

Anticipated Impacts

The proposed pier and pier house will cover and shade approximately 43,430 sf of Public Trust Area (PTA) and Estuarine Waters (EW) Areas of Environment Concern (AECs) of the Atlantic Ocean. The proposed pier house is located waterward of mean high water (MHW), waterward of the FLSNV and waterward of the large structure setback for this area.

The proposed bath house and pump/utility outbuilding will cover 3,500 sf of Ocean Erodible Area (OEA) and High Hazard Flood Area (HHFA) AECs. Both structures are proposed to be located waterward of the small structure setback for the area.

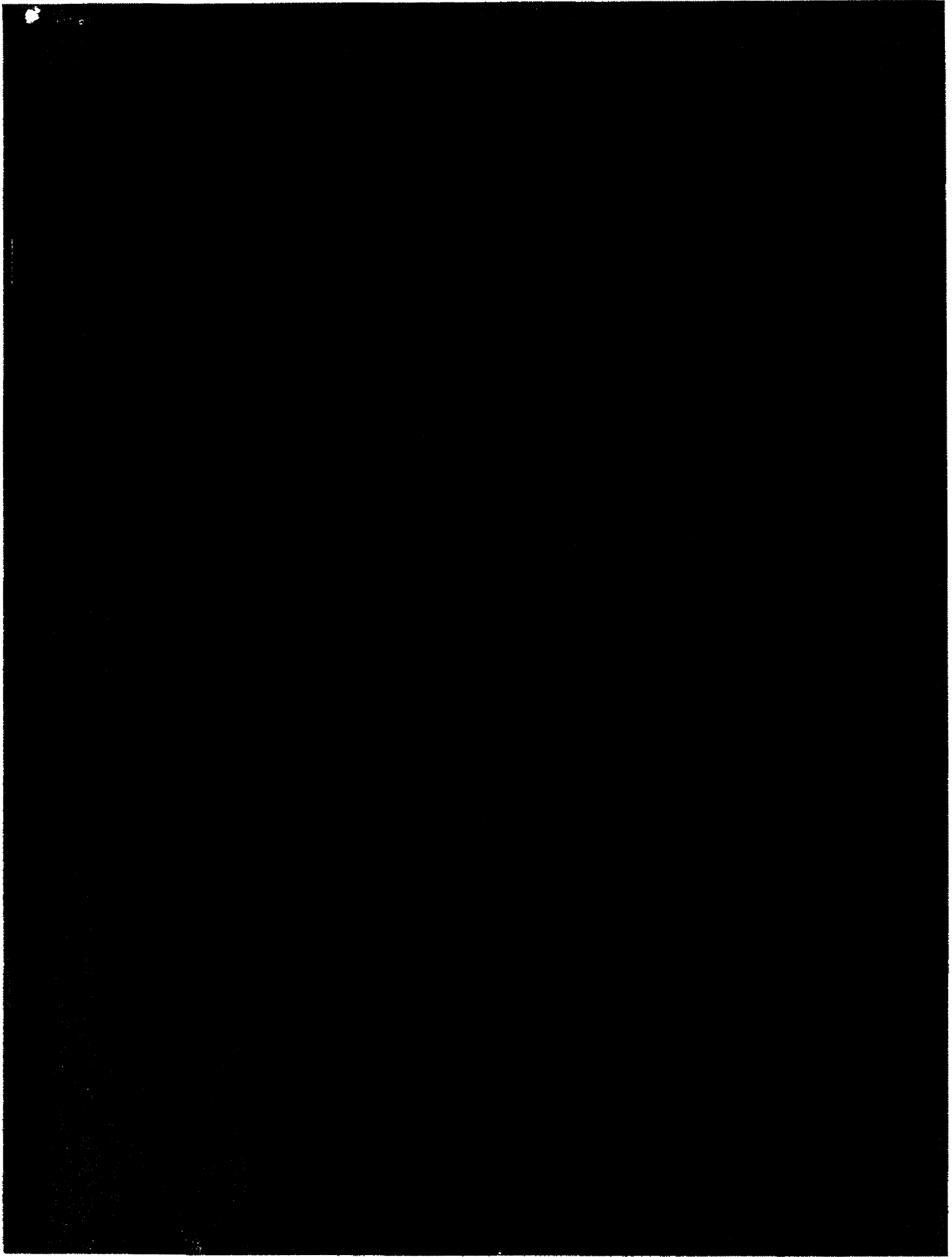
The proposed parking areas, plaza area and sidewalk will cover approximately 114,000 sf of OEA and HHFA AECs. Forty-four proposed parking spaces will be located waterward of the large structure setback.

The proposed development of the spray field and grey water reuse building will result in the disturbance of 53,301 sf of upland area.

Temporary water disturbance and turbidity will occur during construction.

The development proposal will provide increased ocean access and increased educational opportunities for the public.

Submitted by: Frank A. Jennings, III  
Date: 07/18/08



easements for recreational purposes or open space preservation (as encouraged by the Land and Water Conservation Commission), that is permissible under existing North Carolina legislation. But use of a PDR program to preserve a traditional waterfront use or activity rather than a natural resource (e.g., open land) is not specifically authorized by existing legislation. Therefore, it is advisable that the General Assembly provide explicit State authorization for a PDR program directed at traditional waterfront uses and activities, similar to the agricultural conservation easement program available for farmland preservation [N.C.G.S. sec.106-744]).

**The Committee recommends that the General Assembly consider enacting legislation to authorize Purchase of Development Rights (PDR) and Transfer of Development Rights (TDR) programs at the local government level, for use in local working waterfront and/or public access retention and enhancement programs.** While such legislation could provide an expanded set of tools to coastal governments for such waterfront-focused programs, it could also be of use and benefit — dependent on the legislative scope and language chosen — to communities statewide in their pursuit of land preservation and conservation goals.

## **Fishing Piers: A North Carolina Heritage**

Since the first privately owned, commercially operated, open-to-the-public fishing pier reportedly opened at Kure Beach in 1923, such recreational fishing piers have been a signature feature — not only of the State's coastal landscape but also in the lives of many coastal visitors. Called the “bleacher seats of the angling community,” these mostly wooden-legged structures provide public access, for a reasonable daily fee (typically less than \$10), to thousands of resident and non-resident anglers every year. Many North Carolina residents can likely recall how pier fishing nurtured their angling skills, and introduced them to the joy and wonder of ocean-based recreational activities and the coastal environment in general. Furthermore, the piers host youth fishing derbies, fishing classes for all ages, and opportunities for the visually or other impaired visitors to enjoy a rare experience.

During the last 20 years, natural and human forces have taken a toll on the array of fishing piers that stretch anywhere from 400 to 1,000 feet out into the ocean from the State's shore. From various sources, it has been roughly determined that the number of fishing piers has moved from a high number of 36 fishing piers in 1980 (claimed to represent a quarter of all fishing piers along the U.S. Atlantic and Gulf Coasts) to 25 in 2000, and to just 20 operating facilities at the present time.

The reasons?

Coastal storms (hurricanes and nor'easters) have battered the piers. Some owners were able and willing to rebuild. Others were not. Constant beach erosion, other damage from the elements, and rising operating costs all adversely impact those trying to run a viable business. Also, rising waterfront land values have put pressure on pier owners to sell, whether because of escalating property tax bills, or simply to take a profit after years of toil, albeit a labor of love to most.

But the main losers in the decline of the number of these piers in North Carolina are anglers of modest means, who have, for decades, gained convenient access to the ocean fishery resource via payment of a reasonable daily entry fee. The Committee believes in the

importance of retaining these true working and recreational waterfronts to provide an affordable recreational access option for thousands of North Carolina citizens and visiting tourists.

In addition, State agencies hold interest in making public investments to expand fishing pier opportunities to all. As just one example, North Carolina Aquariums managers wish to explore operating State-owned fishing piers, associated with the existing Aquariums at Fort Fisher, Pine Knoll Shores, and Roanoke Island, that not only would offer over-the-ocean perches for angling, but also public exhibits and programs that would extend the Aquariums' educational outreach efforts to thousands more. The "trick" with public entry into the fishing pier "business" is to ensure that the publicly subsidized competition does not undercut or further destabilize the economic viability of nearby existing privately owned and operated fishing pier enterprises. Public pier development efforts should not — intentionally or unintentionally — further diminish the number of private piers along the shore.

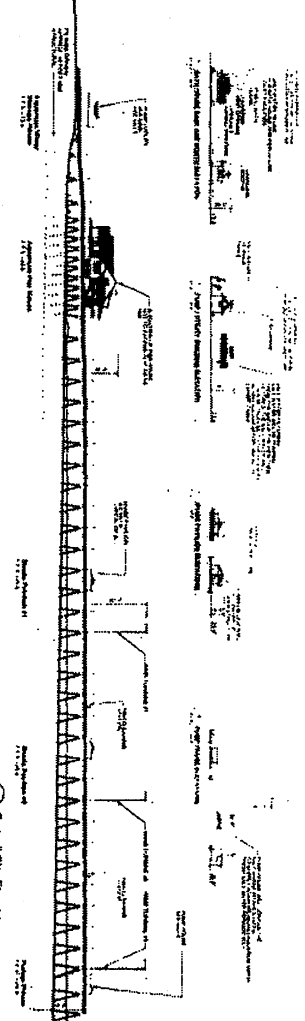
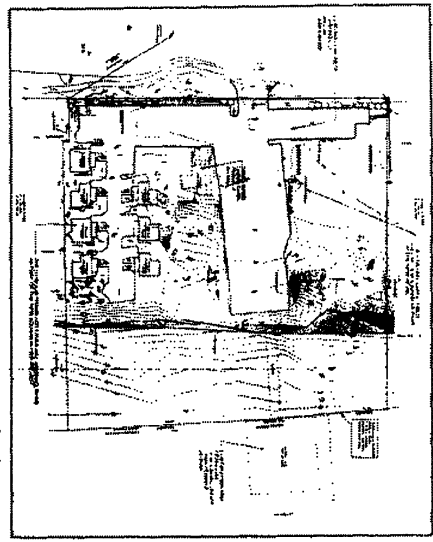
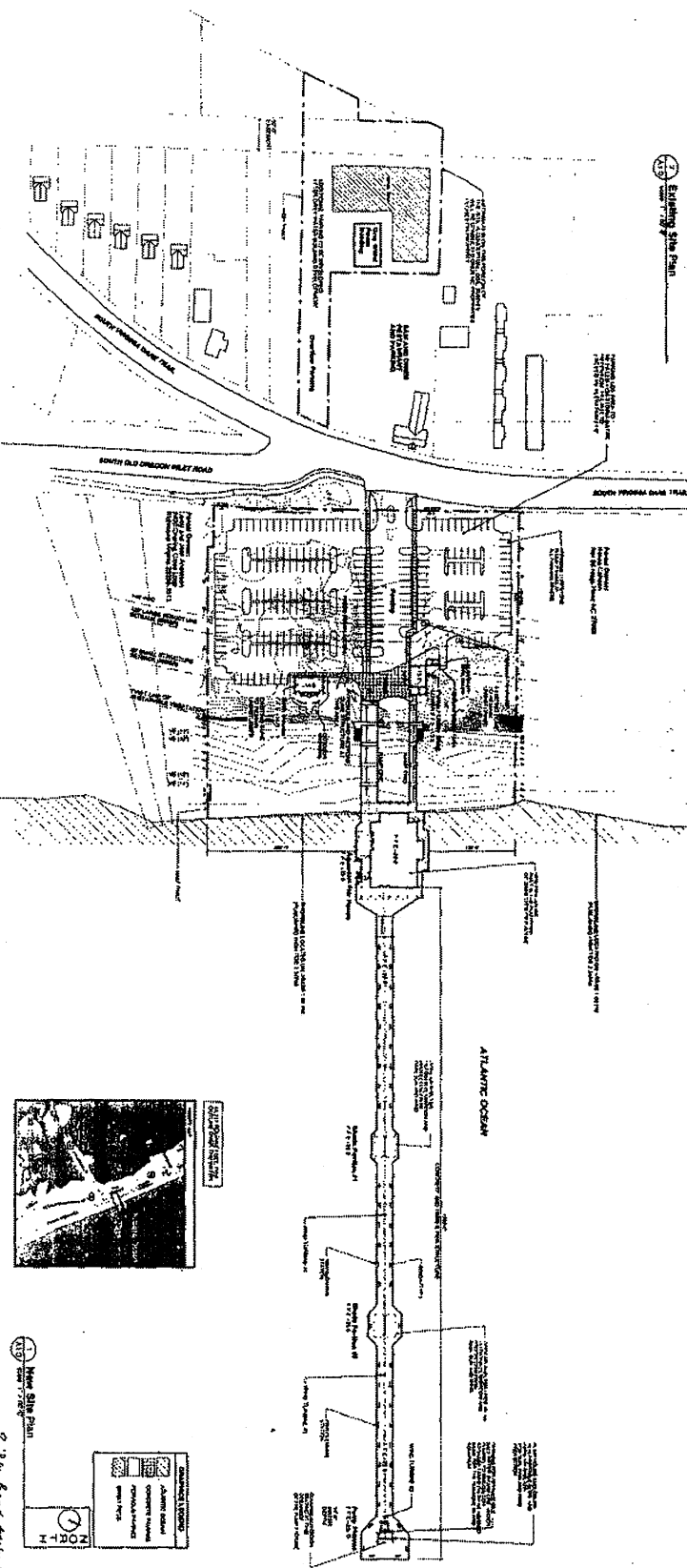
**The Committee recommends that private fishing piers providing public access be given present use value taxation classification as working waterfronts, with all attendant advantages.** (See Committee recommendation on present use value taxation cited earlier).

**The Committee recommends the State explore, with all due speed, sources of funding and financing mechanisms to be used in assisting owners of private fishing piers providing public access with storm damage repair, including the possibility of tapping the proposed working waterfront trust or set-aside fund to finance a low-interest loan program.** Such low-interest, State-underwritten loans, regardless of financial sourcing, should be allocated only and specifically to assist private pier owners in rebuilding from damages caused by single-storm events.

**The Committee recommends that the North Carolina Aquariums be authorized and funded to pilot the design, development, and operation of three (3) public fishing piers that not only would provide angling access, but also would offer public educational opportunities.** This program should be initiated on a pilot basis so as to ensure that its implementation does not unfairly compete with existing privately held and operated fishing piers. Authorization and funding of such a limited pilot development program should be provided with the understanding that formal public review be conducted, during the development and after the opening of such subsidized piers, to assess fully their impact on their private "sister" piers. The Committee believes that the above N.C. Aquariums pilot program should not preclude other State agencies, such as the N.C. Division of Marine Fisheries or the N.C. Clean Water Management Trust Fund from exploring creative ways and means to collaborate and cooperate with local governments, non-profits, and private fishing pier businesses in development of pier- or jetty-based fishing access opportunities.

## **Fees for Public Trust Submerged Lands Easements**

With few exceptions, all submerged lands lying under estuarine, coastal or other navigable waters ("coastal public trust waters") are State-owned public trust lands. Under State law, fee title may not be conveyed to such public trust submerged lands, but easements



LEGEND	
[Symbol]	ADJUSTED EXISTING
[Symbol]	CONSTRUCTION
[Symbol]	EXISTING
[Symbol]	PROPOSED

110 NEW SITE PLAN  
DATE: 11/17/82

Scale: As Shown

A10

Overall Site Plan

The Department of Environment and Natural Resources  
**The North Carolina Aquarium Pier at Nags Head**  
 7223 S. Virginia Dare Trail  
 Nags Head, North Carolina 27959

NOE FILE NO. 820700001



DATE: 11/17/82  
 DRAWN BY: [Name]  
 CHECKED BY: [Name]  
 APPROVED BY: [Name]




CRC-VR-08-51

State of North Carolina

Department of Justice  
PO Box 629  
Raleigh, North Carolina  
27602

ROY COOPER  
ATTORNEY GENERAL

TO: Coastal Resources Commission

FROM: Christine Anne Goebel   
Assistant Attorney General

DATE: September 12, 2008 (for the September 24-26, 2008 CRC Meeting)

RE: **Variance Request #08-51 by the Town of Ocean Isle Beach,  
by Debbie Smith, Mayor**

---

Petitioner, Town of Ocean Isle Beach, owns the right-of-way of Second Street and Shalotte Boulevard at their point of intersection, on the east end of the Town of Ocean Isle Beach. They currently have a sandbag structure on their property protecting these imminently threatened roads at this intersection. The Town seeks a variance from the 6 foot height limit of 15A NCAC 07H.1705(a)(10). They wish to increase the height of the existing sandbag structure "not to exceed two (2) feet above the adjacent street (Shalotte Blvd.) elevation."

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules  
Attachment B: Stipulated Facts  
Attachment C: Petitioner's and Staff's Responses to Criteria  
Attachment D: Petitioners' Variance Request Materials & other attachments

cc: Town of Ocean Isle Beach-attn: Mayor Debbie Smith, Petitioner  
Elva Jess, Town of Ocean Isle Beach's attorney  
Jim Gregson, DCM Director  
Ted Tyndall, DCM Asst. Director  
Steve Everhart, DCM District Manager Wilmington  
Angela Willis, DCM Dir. Asst.  
DCM Staff  
Jennie Wilhelm Hauser, Special Deputy Attorney General & CRC Counsel



ATTACHMENT A

RELEVANT STATUTES OR RULES

15A NCAC 7H .1700            **General Permit for Emergency Work Requiring a CAMA  
and/or Dredge and Fill Permit**

**.1701 Purpose**

This permit allows work necessary to protect property and/or prevent further damage to property caused by a sudden or unexpected natural event or structural failure which imminently endangers life or structure. For the purposes of this general permit, major storms such as hurricanes, northeasters or southwesters may be considered a sudden unexpected natural event although such storms may be predicted or publicized in advance.

**.1705 Specific Conditions**

(a) Temporary Erosion Control Structures in the Ocean Hazard AEC

(1) Permittable temporary erosion control structures shall be limited to sandbags placed above mean high water and parallel to the shore.

\*\*\*

(2) Temporary erosion control structures as defined in Subparagraph (1) of this Paragraph may be used only to protect imminently threatened roads and associated right of ways, buildings and associated septic systems. A structure will be considered to be imminently threatened if its foundation, septic system, or, right-of-way in the case of roads, is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is not obvious erosion scarp may also be found to be imminently threatened when site conditions, such as a flat beach profile or accelerated erosion, tend to increase the risk of imminent damage to the structure.

\*\*\*

(7) A temporary erosion control structure . . . may remain in place for up to five years or until May 2008, whichever is later, regardless of the size of the structure it is protecting if the community in which it is located is actively pursuing a beach nourishment project as of October 1, 2001.

\*\*\*

(10) Sandbags used to construct temporary erosion control structures shall be tan in color and three to five feet wide and seven to 15 feet long when measured flat. **Base width of the structure shall not exceed 20 feet, and the height shall not exceed six feet.**

**15A NCAC 7H .0300 Ocean Hazard Areas**

**.0308 Specific Use Standards for Ocean Hazard Areas**

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

\*\*\*

- (B) Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, are prohibited. Such structures include, but are not limited to: bulkheads; seawalls; revetments; jetties; groins and breakwaters.

\*\*\*

(2) Temporary Erosion Control Structures:

\*\*\*

- (B) Temporary erosion control structures as defined in Part (2)(A) of this Subparagraph may be used to protect only imminently threatened roads and associated right of ways, and buildings and associated septic systems. A structure will be considered imminently threatened if its foundation, septic system, or right-of-way in the case of roads, is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no obvious erosion scarp may also be found to be imminently threatened when site conditions, such as flat beach profile or accelerated erosion, tend to increase the risk of imminent damage to the structure.

**15A NCAC 7M .0200 Shoreline Erosion Policies**

**.0202 Policy Statements**

\*\*\*

- (e) Temporary measures to counteract erosion, such as the use of sandbags . . . should be allowed, but only to the extent necessary to protect property for a short period of time until the threatened structures can be relocated or until the effects of a short-term erosion event are reversed. In all cases, temporary stabilization measures must be compatible with public use and enjoyment of the beach.
- (f) Efforts to permanently stabilize the location of ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed except when the project meets one of the specific exceptions set out in 15A NCAC 7H .0308.

**STIPULATED FACTS**

**ATTACHMENT B**

1. Petitioner, Town of Ocean Isle Beach is a municipality organized and existing under the laws of the State of North Carolina.
2. Pursuant to N.C.G.S. 160A-296, the Town has the duty to keep the public streets in proper repair and the duty to keep the public streets open for travel and free from unnecessary obstructions.
3. N.C.G.S. 136-66.1 provides that the Town shall be responsible for the maintenance, construction and reconstruction of all streets within municipalities that are within its street system.
4. The Town of Ocean Isle Beach owns and maintains Shallotte Boulevard and part of Second Street: said streets are within the street system of the Town and lie within the municipal boundaries. Shallotte Boulevard runs perpendicular to the shoreline (north-south) and Second Street runs parallel to the shoreline (east-west). At the project site, Second Street is the east-west street closest to the shoreline.
5. Part of Second Street to the west of this site is a state-maintained road. The Department of Transportation has installed sandbags to the west of this project to protect portions of East Second Street.
6. Shallotte Boulevard and Second Street provide one means of egress and access to the eastern end of Ocean Isle Beach. This egress and access includes emergency service providers. The roadways that are in operation constitute a main thoroughfare in the Town and represent a portion of the hurricane evacuation route. At this time, Second Street is the only access to the east end of Ocean Isle Beach with a sixty foot (60') state approved right of way.
7. Temporary erosion control structures (sandbags) are the only method allowed by State law that will provide protection for the infrastructure.
8. The site at issue for this variance request is at the intersection of Shallotte Boulevard and East Second Street. This intersection is currently imminently threatened and there is an existing sandbag structure in place. The current erosion control structure was installed and permitted pursuant to CAMA rules and regulations.
9. The normal high water level currently exceeds fifty percent of the current bag height. There is overwash, inundation and increased erosion of the structure that was initially built to provide limited protection for the infrastructure.

10. The town has a nourishment project in effect that serves to reduce the impact of erosion within this area.
11. The Town's right-of-way is within the Ocean Hazard Area, Ocean Erodible Area, and High Hazard Flood Areas of Environmental Concern (AEC), and is not located in the Inlet Hazard AEC for Shalotte Inlet, to the east.
12. The long-term annual erosion rate for this stretch of shoreline is 4.5 feet per year.
13. The profile of the beach constantly changes within this area. Also, the beach elevation at this site is lower here than at the NC DOT sandbags adjacent and to the west, and so the Town's bags effectively sit in a hole or depression, and are overwashed during many high tides.
14. The site is a transition area at the Town's Federal nourishment project and is being maintained by public funds. The Corps of Engineers, by approving the project, confirmed the benefits to the general public to preserve and protect the beach strand from the effect of storms.
15. The park project within this area was funded by a grant from the Division of Coastal Management and the variance will provide stability and access for this project which is located at the northern end of Shallotte Boulevard at the Atlantic Intracoastal Waterway.
16. The Town has been very diligent in removing derelict sandbags and debris in this area.
17. The Town requested a CAMA general permit to increase the height of the sandbag structure currently in place through a letter dated August 20, 2008. The Town is not asking for an extension of the permit time. By this variance, the Town seeks to protect the infrastructure so long as a sandbag wall can be maintained.
18. The permit request was denied by the Division of Coastal Management, by and through its field representative, Debra Wilson, through a letter dated August 21, 2008. The denial letter is included in the Town's variance request materials and is incorporated.
19. The Town recently had a survey completed showing the spot elevations of the bags at certain points, as well as the elevations of the beach in front and behind the bags. This survey is attached, and incorporated by reference. A larger copy will be available at the meeting. The attached survey shows elevations taken on site before Hurricane Hanna.
20. Hurricane Hanna affected this site on September 5-6, 2008 where the large waves and surge overtopped the existing bags, and eroded parts of East Second Street and Shallotte Boulevard.

21. Site photographs taken both pre-Hanna and post-Hanna are included in a power point presentation to the CRC, and are incorporated.
22. The Coastal Resources Commission has jurisdiction over the parties and the subject matter.
23. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of the parties. All interested parties have participated in the petition process.

ATTACHMENT C

**Petitioner and Staff Positions**

- I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.**

**Petitioner's Position: Yes.**

Shallotte Boulevard and Second Street provide the main means of egress and access to the eastern end of Ocean Isle Beach. If the proposed project is not constructed, property owners have no means to access their homes and services (i.e. fire and rescue) would not be able to respond in the event of emergencies. Properties accessed by Second Street and Shallotte Boulevard have been improved with residential structures for a number of years preceding the current erosion control structure.

In accordance with current rules, as the project is presently configured, the normal high water level exceeds fifty percent of the current bag height, thereby causing overwash, inundation and increased erosion of the bags.

If the variance is not granted, erosion will increase, the roadway will be over washed and the surface of said roadways will be rendered impassible.

**Staff's Position: Yes.**

Staff agrees that strict application of the development rules regarding the size of the sandbag structure causes Petitioner unnecessary hardship. The erosion on the east end of Ocean Isle Beach is severe and is well-documented. Although the 6' by 20' sandbag dimensions are generally appropriate for their intended purpose of temporary protection of structures, at this location the sandbags have not prevented waves from overtopping the bags and eroding the area behind the bags on certain occasions. This is due, in large part, to the lower elevations, or "hole" on the beach in front of the structure, compared to the elevations to either side of the structure, including at the DOT sandbags. Thus, the hardship is that the sandbags at their usual permitted size are not sufficient to protect the imminently threatened road enough to keep it usable as a main route (but not the only route) to the east end of Ocean Isle Beach.

**II. Do such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property? Explain.**

**Petitioner's Position: Yes.**

Second Street and Shallotte Boulevard constitute a main thoroughfare in Ocean Isle Beach and represent a portion of our hurricane evacuation route. Shallotte Boulevard is the original means of access to Ocean Isle Beach and was the location for the initial ferry site. Properties with and along said streets have been improved with residences and preservation of the infrastructure shall maintain access to the homes of respective property owners. This variance is not being sought to allow for any additional improvements or structural changes to properties contiguous to the sandbag structure. The properties all either lie with and along the Atlantic Ocean or are within one hundred feet of the mean high tide.

**Staff's Position: Yes.**

Staff agrees that unnecessary hardship result from conditions which are peculiar to the Petitioner's property, being the lower elevations of the "hole" located in front of the sandbag structure compared to the elevations on either side, including those by the DOT sandbags protecting Second Street. This result in bags of insufficient relative elevation to protect the road from erosion since overtopping of the bags happens often.

**III. Do the hardships result from the actions taken by the Petitioner? Explain.**

**Petitioner's Position: No.**

The Division of Coastal Management enforces CAMA regulations. When the initial erosion control structure was installed, it was done pursuant to CAMA rules and regulations to protect the infrastructure that is again being compromised. The Town has done nothing that would accelerate the erosion that is impacting this area and has, in fact, participated in a fifty year Federal nourishment project seeking to protect the beach strand. In an effort to maintain the beach, the Town plants and fertilizes the length of the beach strand annually. We are stewards of the public beach.

**Staff's Position: No.**

Staff agrees that the hardships of erosion do not result from actions taken by the Petitioner.

**IV. Will the variance requested by the petitioner**

**(1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

**Petitioner's Position: Yes.**

The area in question is a transition area of the Town's Federal nourishment project and is being maintained by public funds. The Corps of Engineers by approving the nourishment project in this area, confirmed the benefits to the general public to preserve and protect the beach strand and this specific intersection.

The Division of Coastal Management provided a grant to the Town of Ocean Isle Beach to construct a part within a portion of Shallotte Boulevard in the amount of \$278,891.00; the total amount to construct the recreation area is \$371,855.00. Construction is currently underway. This development could be compromised by access issues if the intersection of Shallotte Boulevard and East Second Street continue to erode.

Because the profile of the beach is constantly changing within this area, one should be permitted to install a temporary erosion control structure that will protect to the height of the infrastructure. On any given day there may be a height differential on the beach while the infrastructure elevation remains constant.

The design of the proposed sandbag project will protect Town infrastructure and there are no alternative designs or variations from the CAMA rules that will accomplish the same task. CAMA rules allow for the protection of infrastructure by permitting temporary erosion control structures. Permitting a design to address the topographic condition of the roads adjacent to this project preserves substantial justice for property owners and secures the public safety with regard to access by property owners and emergency personnel.

The Town of Ocean Isle Beach has strived to be cooperative with CAMA and has worked to maintain compliance with its rules and regulations regarding temporary erosion control structures.



**Staff's Position: Yes.**

Staff contends that allowing Petitioners to enlarge their sandbag structures is consistent with the spirit, purpose, and intent of the CRC's rules. Adding sandbags in this area of lower elevation to bring them even with the adjacent bags and to provide more protection for the imminently threatened road is consistent with the Commission's rules. The increase in height brings this area into continuity with the DOT's sandbags protecting Second Street to the west. It is pertinent to note that Petitioners are not requesting an extended time period for their sandbag structures, only an increase in size for the time the existing bags are currently permitted. Therefore, the duration of the bags does not work to render the structures more "permanent."

Staff does not disagree that the variance will secure public safety and welfare. The public enjoys the right to use the ocean beach in front of these properties. Because of the erosion, there is only a limited beach available for public use. Thus, increasing the size of the sandbags is not going to have additional significant impacts on the public beach. Additionally, the enlarged sandbag structures are likely to improve the Petitioner's safety and welfare by helping to prevent the roads from being compromised. The variance will preserve substantial justice because it would be fair to allow sandbags to a more effective and uniform elevation compared to the road they are intended to protect.

Finally, staff note that the park referenced by Petitioner is located at the other end of Shallotte Boulevard, adjacent to the AIWW, and it is not located next to these sandbags. While this intersection is a main route to the east end of the island, it is not the only route.

CAMA VARIANCE REQUEST

DCM FILE NO. 08-51

RECEIVED

AUG 11 2008

N.C. ATTORNEY GENERAL

Petitioner supplies the following information:

Your Name Debbie S. Smith, Mayor  
Town of Ocean Isle Beach  
Address 3 West Third Street  
Ocean Isle Beach, NC 28469  
Telephone (910) 579-2166  
Fax and/or Email (910) 579-7070  
[justin@oibgov.com](mailto:justin@oibgov.com)

Name of Your Attorney (if applicable) Elva L. Jess  
Address P.O. Box 11028  
Southport, NC 28461  
Telephone (910) 457-9506  
Fax and/or Email (910) 457-6810  
[fjit@fjitlaw.net](mailto:fjit@fjitlaw.net)

Have you received a decision from the Division of Coastal Management (DCM) or a Local Permit Officer denying your application for a CAMA permit?

- no (You are not entitled to request a variance until your permit application has been denied.)
- yes (You may proceed with a request for a variance.)

What did you seek a permit to do?

Increase the height of a temporary erosion control structure to a height greater than six feet in an area already improved by a permitted sandbag structure.

What Coastal Resources Commission rule(s) prohibit this type of development?

15A NCAC 07H 0308 (a)(2)

Can you redesign your proposed development to comply with this rule? No  
(If your answer is no, explain why you cannot redesign to comply with the rule.)

A temporary erosion control structure (i.e. a sandbag wall) that is limited to a height of six feet will not provide adequate protection for infrastructure that is located to the north and exceeds the height of the erosion control structure by four feet.

Can you obtain a permit for a portion of what you wish to do? **No.**

If so, please state what the permit would allow.

We can obtain a permit for a temporary erosion control structure to the height of six feet; a structure of this size will not provide the necessary erosion control and may exacerbate the situation.

State with specificity what you are NOT allowed to do as a result of the denial of your permit application. It will be assumed that you can make full use of your property, except for the uses that are prohibited as a result of the denial of your permit application.

We are not allowed to increase the height of the current erosion control structure based upon current CAMA regulations. The current height does not provide sufficient protection of the infrastructure at its current elevation. The elevation of the beach strand fluctuates daily. The elevation of the infrastructure in question is constant.

#### RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

- I. Identify the hardship(s) you will experience if you are not granted a variance and explain why you contend that the application of this rule to your property constitutes an unnecessary hardship. [The North Carolina Court of Appeals has ruled that this factor depends upon the unique nature of the property rather than the personal situation of the landowner. It has also ruled that financial impact alone is not sufficient to establish unnecessary hardship, although it is a factor to be considered. The most important consideration is whether you can make reasonable use of your property if the variance is not granted. [*Williams v. NCDENR, DCM, and CRC*, 144 N.C. App. 479, 548 S.E.2d 793 (2001).]

Shallotte Boulevard and Second Street provide the main means of egress and access to the eastern end of Ocean Isle Beach. If the proposed project is not constructed, property owners have no means to access their homes and services (i.e. fire and rescue) would not be able to respond in the event of emergencies. Properties accessed by Second Street and Shallotte Boulevard have been improved with residential structures for a number of years preceding the current erosion control structure.

In accordance with current rules, as the project is presently configured, the normal high water level exceeds fifty percent of the current bag height, thereby causing overwash, inundation and increased erosion of the bags.

If the variance is not granted, erosion will increase, the roadway will be over washed and the surface of said roadways will be rendered impassible.

- II. Describe the conditions that are peculiar to your property (such as location, size, and topography), and cause your hardship.

Second Street and Shallotte Boulevard constitute a main thoroughfare in Ocean Isle Beach and represent a portion of our hurricane evacuation route. Shallotte Boulevard is the original means of access to Ocean Isle Beach and was the location for the initial ferry site. Properties with and along said streets have been improved with residences and preservation of the infrastructure shall maintain access to the homes of respective property owners. This variance is not being sought to allow for any additional improvements or structural changes to properties contiguous to the sandbag structure. The properties all either lie with and along the Atlantic Ocean or are within one hundred feet of the mean high tide.

- III. Explain why your hardship does not result from actions that you have taken.

The Division of Coastal Management enforces CAMA regulations. When the initial erosion control structure was installed, it was done pursuant to CAMA rules and regulations to protect the infrastructure that is again being compromised. The Town has done nothing that would accelerate the erosion that is impacting this area and has, in fact, participated in a fifty year Federal nourishment project seeking to protect the beach strand. In an effort to maintain the beach, the Town plants and fertilizes the length of the beach strand annually. We are stewards of the public beach.

- IV. Explain why the granting of the variance you seek will be consistent with the spirit, purpose, and intent of the CRC's rules, standards, or orders; preserve substantial justice; and secure public safety.

The area in question is a transition area of the Town's Federal nourishment project and is being maintained by public funds. The Corps of Engineers by approving the nourishment project in this area, confirmed the benefits to the general public to preserve and protect the beach strand and this specific intersection.

The Division of Coastal Management provided a grant to the Town of Ocean Isle Beach to construct a park within a portion of Shallotte Boulevard in the amount of \$278,891.00; the total amount to construct the recreation area is \$371,855.00. Construction is currently underway. This development could be compromised by access issues if the intersection of Shallotte Boulevard and East Second Street continue to erode.

Because the profile of the beach is constantly changing within this area, one should be permitted to install a temporary erosion control structure that will protect to the height of the infrastructure. On any given day there may be a height differential on the beach while the infrastructure elevation remains constant.

The design of the proposed sandbag project will protect Town infrastructure and there are no alternative designs or variations from the CAMA rules that will accomplish the same task. CAMA rules allow for the protection of infrastructure by permitting temporary erosion control structures. Permitting a design to address the topographic condition of the roads adjacent to this project preserves substantial justice for property owners and secures the public safety with regard to access by property owners and emergency personnel.

The Town of Ocean Isle Beach has strived to be cooperative with CAMA and has worked to maintain compliance with its rules and regulations regarding temporary erosion control structures.

Please attach copies of the following:

- Permit Application - Exhibit 1
- Permit Denial - Exhibit 2
- Site Drawing with Survey and Topographical Information (Exhibit 3)
- Site Drawing with proposed additional sandbags (Exhibit 4)

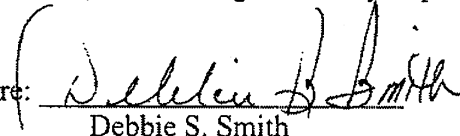
Provide a numbered list of all true facts that you are relying upon in your explanation as to why you meet the four criteria for a variance. Please list the variance criterion, ex. unnecessary hardship, and then list the relevant facts under each criterion. [The DCM attorney will also propose facts and will attempt to verify your proposed facts. Together you will arrive at a set of facts that both parties agree upon. Those facts will be the only facts that the Commission will consider in determining whether to grant your variance request.]

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

Pursuant to N.C.G.S. 113A-120.1 and 15A NCAC 7J .0700, the undersigned hereby requests a variance.

Date: *August 21, 2008*

Signature:



Debbie S. Smith  
Mayor

*This variance request must be filed with the Director, Division of Coastal Management, and the Attorney General's Office, Environmental Division, at the addresses shown on the attached Certificate of Service form.*

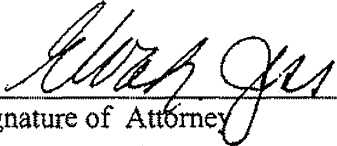
## CERTIFICATE OF SERVICE

I hereby certify that this Variance Request has been served on the State agencies named below by United States Mail or by personal delivery to the following:

Original served on: Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

copy: Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This the 21st day of August, 2008.

  
\_\_\_\_\_  
Signature of Attorney



# OCEAN ISLE BEACH

August 20, 2008

Debra Wilson, Field Representative  
Division of Coastal Management  
127 Cardinal Drive Ext.  
Wilmington, NC 28405

RE: CAMA Sandbag Application

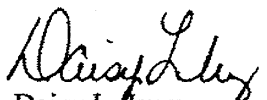
Dear Ms. Wilson:

The Town of Ocean Isle Beach would like to apply for a CAMA Sandbag Permit to add sandbags to our existing sandbag structure to a height not to exceed two (2) feet above the adjacent street (Shallotte Blvd.) elevation. The intersection of East Second Street and Shallotte Boulevard is a vital intersection providing access to the eastern portion of Ocean Isle Beach. The current height is not sufficient to provide protection to the adjacent street (Shallotte Blvd.). We also understand that a portion of our sandbag structure exceeds the maximum twenty (20) foot base width and we plan to remove the lower sandbags to bring our structure back into compliance.

I have attached a survey showing our current sandbag elevations, the street elevation and the area in which we would like to add additional sandbags.

Please contact me with any questions or comments at 910-579-3469.

Thank you,

  
Daisy L. Ivey  
Town Administrator

cc: Larry D. Sellers, Asst. Town Administrator  
Justin W. Whiteside, Planning Director

Enc.



EXHIBIT

2

North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

August 21, 2008

Hand Delivered

Daisy L. Ivey, Town Administrator  
Town of Ocean Isle Beach  
3 West Third Street  
Ocean Isle Beach, N.C. 28469

Dear Ms. Ivey:

The Division of Coastal Management has reviewed your proposal for the installation of additional sandbags at the intersection of East Second Street and Shallotte Blvd., in the Town of Ocean Isle Beach, N.C. Unfortunately, the Division of Coastal Management is not able to process your request for the installation of the additional sandbags under a CAMA General Permit due to specific site conditions (i.e. unable to meet the 6 foot height limitation requirement) as described in **15A NCAC 07H .0308 (a)(2)(F)** and **15A NCAC 07H .1705 (a)(7)(C)**.

Based upon these findings, the Division of Coastal Management is denying your request for a CAMA General Permit. However, you may petition for a variance from the Coastal Resource Commission (CRC) by means of the procedures described in **15A NCAC 07J .0700**. I have enclosed a copy of the subject ruling as well as the CAMA Variance Request Form (DCM Form 11).

If you have any questions regarding this decision, please feel free to call me at (910) 796-7215.

Sincerely,

Debra Wilson  
Field Representative

Cc: Ted Tyndall, DCM  
Steven Everhart, DCM  
Justin Whiteside, LPO

127 Cardinal Drive Extension, Wilmington, North Carolina 28405-3845  
Phone: 910-796-7215 \ Fax: 910-395-3964 \ Internet: <http://www.nccoastalmanagement.net>





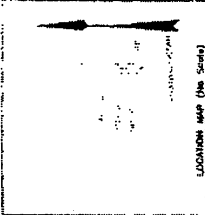
TOMPKINS  
LAND  
SURVEYING  
P.A.

214 AND 215E STATE ROAD ONE  
NORFOLK, VIRGINIA 23502



THE TOWN OF OCEAN ISLE BEACH  
OF  
SOUTH END OF CHARLOTTE BLVD.  
SANDBAG PROJECT

SHALLOTTE  
SCALE 1" = 20'  
NORTHARROW COUNTY, N.C.  
RECORD SUBJECT TO 2008

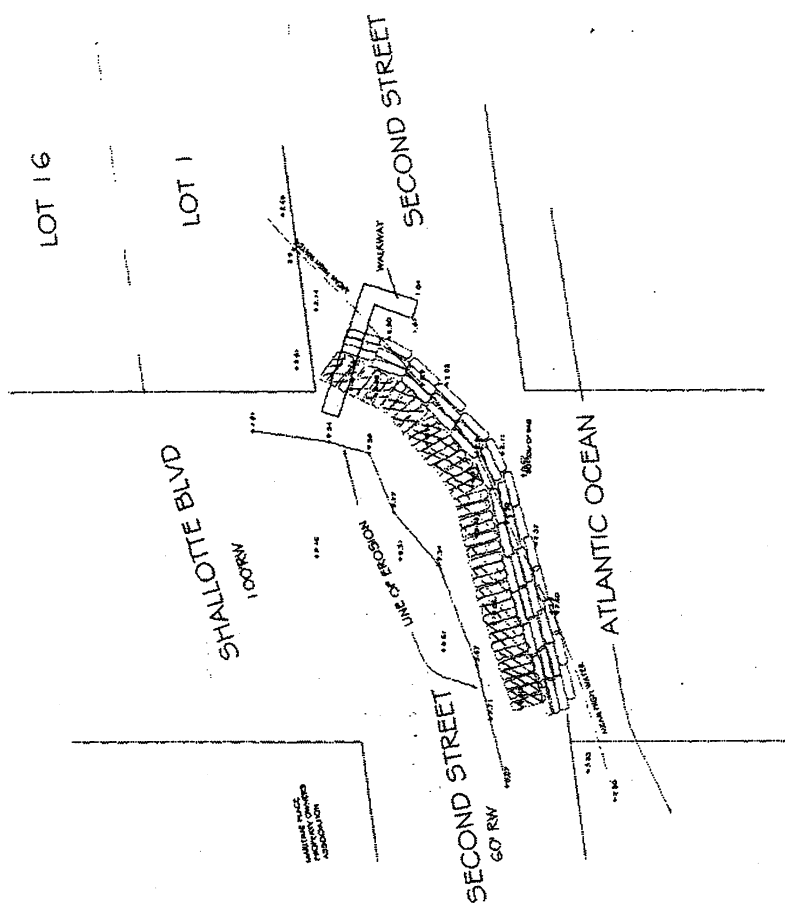


LOCATION MAP (See Sheet)

- 1. 2008
- 2. 2009
- 3. 2010
- 4. 2011
- 5. 2012
- 6. 2013
- 7. 2014
- 8. 2015
- 9. 2016
- 10. 2017
- 11. 2018
- 12. 2019
- 13. 2020
- 14. 2021
- 15. 2022
- 16. 2023
- 17. 2024
- 18. 2025
- 19. 2026
- 20. 2027
- 21. 2028
- 22. 2029
- 23. 2030



Proposed 100' wide Sandbags



CHARLOTTE COUNTY, N.C.  
AND DISTRICTS ARE MARKED ON THESE SHEETS



STATE OF NORTH CAROLINA  
COUNTY OF CHARLOTTE  
I,                     , Surveyor,  
do hereby certify that the foregoing is a true and correct copy  
of the original as shown to me by the person claiming to be the  
owner of the same, and that the same has been duly recorded in  
the public records of this county.

RECORDED IN BOOK 100, PAGE 100  
DATE 10/10/2024

*[Signature]*

DATE: 10/10/2024  
BY: *[Signature]*  
TITLE: Surveyor  
FIRM: TOMPKINS LAND SURVEYING P.A.  
ADDRESS: 214 AND 215E STATE ROAD ONE, NORFOLK, VA 23502  
PHONE: 757-647-1111  
FAX: 757-647-1112  
WEBSITE: WWW.TOMPKINSLS.COM

**NC COASTAL RESOURCES COMMISSION (CRC)**

**July 23-25, 2008**

**Holiday Inn Brownstone**

**Raleigh, NC**

**Present CRC Members**

Bob Emory, Chairman

James Leutze

Charles Elam

Bill Peele

Wayland Sermons

Melvin Shepard

Joan Weld

Bob Wilson

Lee Wynns

Renee Cahoon (absent 7/23/08)

David Webster (absent 7/23/08)

Jerry Old (absent 7/23/08)

**Present Coastal Resources Advisory Council Members (CRAC)**

Dara Royal, Chair

Penny Tysinger, Co-Chair

Bob Shupe

Tim Tabak

Randy Cahoon

Dave Weaver

Christine Mele

Bill Morrison

Lester Simpson

Carlton Davenport

Webb Fuller

William Gardner, Jr.

J. Michael Moore

Frank Rush

Phil Harris

David Stanley (for Don Yousey)

Harry Simmons

Rhett White

Bert Banks

Judy Hills

Kevin Richards (for Eddy Davis)

Spencer Rogers

Joe Lassiter

Joy Wayman

Maximillian Merrill

Lee Padrick

Anne Deaton

Al Hodge

Travis Marshall (and Deborah Anderson)

**Present Attorney General's Office Members**

Jennie Hauser

Allen Jernigan

Amanda Little

Jill Weiss

## 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.

Angela Willis called the roll. There were no reported conflicts. Based upon this roll call, Chairman Emory declared a Quorum.

## VARIANCE REQUEST

### Thompson (CRC-VR-08-43) Frisco, Excavation in SAV

Amanda Little of the Attorney General's Office represented Staff. Ms. Little stated the Petitioners are represented by David Dixon. Ms. Little stated the Petitioners applied for a CAMA Major Permit to perform maintenance dredging and excavate a new channel within the Pamlico Sound, adjacent to Sunset Village in the Town of Frisco, Dare County, NC. The proposed excavation is through extensive beds of SAV. The Petitioner seeks relief from strict application of the Commission's Public Trust Areas and Estuarine Waters Areas of Environmental Concern rule regarding the specific use standards 15A NCAC 07H .0208(b)(1).

Ms. Little reviewed the stipulated facts of this variance request. Staff and Petitioner agree on all four variance criteria which must be met in order to grant the variance. Ms. Little stated the proposed dredging requested will negatively impact 2,482 square feet of SAV, however to mitigate the impact the Petitioner has proposed to transplant the 2,482 square feet of SAV from the proposed channel alignment into sections of the existing channel and the existing channel will be abandoned. Neither the Division of Marine Fisheries nor the Wildlife Resources Commission objected to the project.

David Dixon, Attorney for Petitioner, stated the Petitioner requested this variance to see that the management objectives, specifically to protect SAV, are met. Mr. Dixon reviewed the stipulated facts that he contends supports the granting of this variance. Mr. Dixon reviewed the mitigation plan proposed by the Petitioner.

**Jim Leutze made a motion that mitigation be made a condition of the variance. Charles Elam seconded the motion. This motion was withdrawn.**

**Melvin Shepard made a motion to support Staff's position that strict application of the applicable development rules, standards, or orders issued by the Commission cause the Petitioner unnecessary hardships. Charles Elam seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Jim Leutze made a motion to support Staff's position that hardships result from conditions peculiar to the petitioner's property. Wayland Sermons seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Melvin Shepard made a motion to support Staff's position that the hardships do not result from actions taken by the Petitioner. Lee Wynns seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Wayland Sermons made a motion to support Staff's position that the variance would be consistent with the spirit, purpose and intent of the rules, standards or orders issued by the Commission; secure public safety and welfare; and preserve substantial justice.**

**Commissioner Sermons added that a condition be added which requires the Petitioner to comply with all mitigation plans submitted, including but not limited to the Division of Marine Fisheries letter dated August 8, 2007; the Wildlife Resources Commission letter dated October 16, 2006; and the Petitioner to the best of his ability would provide notification to the public of the abandonment and no further use of the old channel. Jim Leutze seconded the motion. The motion passed with seven votes (Leutze, Weld, Elam, Peele, Shepard, Wynns, Sermons) and one against (Wilson).**

This variance was granted.

Vodra (CRC-VR-08-44) Carteret County, Pier in excess of 400'

Amanda Little of the Attorney General's Office represented Staff. Ms. Little stated Jeff Gray represents the Petitioner. Ms. Little stated the Petitioner applied for a CAMA Major Permit to remove an existing pier and 12 slips and construct a new pier with platform, a jet ski lift and 9 sunfish racks that extend 572 feet into the Bogue Sound in Carteret County. The proposed development is longer than 400 feet and does not give access to deeper water at a rate of at least one foot each additional 100 foot increment of pier length over 400 feet. Petitioner seeks relief from strict application of the Commission's guidelines for Estuarine Waters Area of Environmental Concern and Public Trust Areas AEC in 15A NCAC 07H .0208(b)(6)(K).

Ms. Little reviewed the stipulated facts for this variance request. Staff and Petitioner agree on all four statutory criteria required to be satisfied in order to grant the variance.

Jeff Gray, Attorney for Petitioners, reviewed the stipulated facts which he contends support the granting of this variance. Mr. Gray stated he feels this variance meets all four statutory criteria.

**Charles Elam made a motion to support Staff's position that strict application of the applicable development rules, standards, or orders issued by the Commission cause the Petitioner unnecessary hardships. Jim Leutze seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Jim Leutze made a motion to support Staff's position that hardships result from conditions peculiar to the petitioner's property. Bob Wilson seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Wayland Sermons made a motion to support Staff's positions that hardships do not result from actions taken by the Petitioner. Lee Wynns seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

**Melvin Shepard made a motion to support Staff's position that the variance will be consistent with the spirit, purpose and intent of the rules, standards or orders issued by the Commission; will secure the public safety and welfare; and preserve substantial justice. Commissioner Shepard conditioned the permit to incorporate the language consistent with US Army Corps of Engineers recommendations. Wayland Sermons seconded the motion.**

**The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

This variance was granted.

### **CONTESTED CASES**

#### **Kenneth and Mary Anne Sutton v. DENR, DCM 07 EHR 1316**

Elizabeth Jill Weiss of the Attorney General's Office represented the Division of Coastal Management. DCM did not request oral argument. The Sutton's were not present. Ms. Weiss stated the ALJ ruled in favor of the Division. Ms. Weiss requested that the Commission affirm the ALJ's decision in this case.

**Wayland Sermons made a motion that the Coastal Resources Commission adopt the Administrative Law Judge's decision and issue a final agency decision affirming the respondent's decision to grant CAMA Minor Permit #07-133. Joan Weld seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Wynns, Sermons).**

At this time, Wayland Sermons gave the Vice Chair Nominating Committee Report. Wayland Sermons stated the Committee of Renee Cahoon, Melvin Shepard and Wayland Sermons met extensively and have brought the nomination of Joan Weld before the Commission for Vice Chairman of the Coastal Resources Commission.

**Jim Leutze made a motion to close the nominations, agree with the recommendation of the nominating committee, and elect the nominee by acclamation. Lee Wynns seconded the motion. The motion passed unanimously (Leutze, Wilson, Elam, Peele, Shepard, Wynns, Sermons) and one abstention (Weld).**

### **MINUTES**

**Melvin Shepard made a motion to approve the minutes of the May 2008 Coastal Resources Commission meeting. Wayland Sermons seconded the motion. The motion passed unanimously (Leutze, Webster, Sermons, Shepard, Wilson).**

### **EXECUTIVE SECRETARY'S REPORT**

Jim Gregson, DCM Director, gave the following report.

#### **Legislative Update**

Senate Bill 599 which, if ratified, would have authorized the CRC to permit a terminal groin pilot project at a North Carolina inlet, did not come up for a vote in the House before the Legislature adjourned last Friday.

The General Assembly directed the University of North Carolina to study the feasibility of building wind turbines in Pamlico and Albemarle sounds.

The legislature passed a bill to begin studying the possible financial effects of a major hurricane on North Carolina's Beach Plan, a state-created coastal insurance plan for those who can't get standard coverage. Insurance companies say a major hurricane could result in billions of dollars in charges to their industry that could be passed along to homeowners throughout the state because the Beach Plan is under-funded.

A compromise coastal stormwater rule was also passed. Senate Bill 1967 disapproves the rules adopted by the EMC on January 10, 2008 and supersedes the existing rules that became effective on September 1, 1995. Some key changes under the legislation are as follows:

- Under the new rules, nonresidential developments that will add more than 10,000 sq. ft of built upon area, or require a Sedimentation and Erosion Control Plan or a CAMA Major Development Permit and all residential development that requires a Sedimentation and Erosion Control Plan or a CAMA Major Permit will be required to manage stormwater runoff as specified in the ratified bill.
- Development within 575 feet of Outstanding Resource Waters shall be permitted if it has a built upon area of 12% or less under the low-density option. The development must contain a 50-foot-wide vegetative buffer for new development and a 30-foot-wide vegetated buffer for redevelopment activities. The buffer is measured from the MHW line of tidal waters and from the bank of non-tidal streams and rivers. Under the High density option development shall be permitted if it has a built upon area of between 12% and 25%, has no direct stormwater outlet pipes or channels to Class SA Waters and utilizes stormwater control systems that are any combination of infiltration systems, bioretention systems, cisterns, rain gardens or alternative low impact development systems that will treat the stormwater runoff from one and one-half inches of rainfall or the difference in the stormwater runoff from the predevelopment and post development conditions for a one-year, 24 hour storm event, whichever is greater. The same buffer conditions as in the low-density option apply.
- Development within one-half mile and draining to Class SA but not ORW Waters would have to meet the same requirements for ORW Waters with the exception of the 25% limit for the high density option. The new rules would also allow the use of wet detention ponds to control and treat the runoff near SA Waters if used in series with other best management practices. Stormwater controls and best management practices, with the exception of wet detention ponds may be located within the buffer area.
- In non-SA or ORW areas, development would be limited to 24% or less under the low-density option and greater than 24% for the high-density option. Under the high-density option control systems would be designed to store, control, and treat the runoff from all surfaces generated by one and one-half inches of rainfall. Same buffer requirements in ORW and SA areas would apply.
- Coastal Wetlands, as defined in CRC rules and located above MHW could not be included in the overall project area for the purposes of density calculation. Non-coastal wetlands could be used.
- Limited Residential Development with the 20 coastal counties that is located within one-half mile and draining to Class SA Waters, has a built upon area greater than 12% and would not otherwise require a Stormwater Management permit, i.e. less than one acre of disturbance or no CAMA Major Permit would be required to obtain a one time non-renewable stormwater permit if it will add more than 10,000 sq. ft. of built upon area.

The permit will require recorded deed restrictions or protective covenants requiring the installation of best management practices to control stormwater runoff.

- The rules contain six exclusions from the stormwater permitting requirements. (Certain DOT activities, prior permitted projects, redevelopment with no net increase in built upon area, already accepted applications, minor modifications to existing permits, municipalities with Phase 2 NPDES Permits.)
- The rules contain four activities that are exempt from the vegetative buffer requirements. (urban waterfronts, new urban waterfronts, CRC buffer exceptions, and development of upland marinas.)
- Rules will become effective on October 1, 2008.

### **Oceanfront Setback Public Hearings**

The CRC and DCM held a series of public hearings over the past few weeks for changes to 7H .0306 General Use Standards for Ocean Hazard Areas, which governs oceanfront setbacks and also gives the requirements for static line exceptions; and 15A NCAC 07J .1200 Procedures for Processing Static Line Exceptions. All of the public hearings began with a presentation and question and answer session, followed by a public comment period. Our final public hearing for these rules will be held July 24 at 5 p.m.

### **Evans Road Fire**

The Emily and Richardson Preyer Buckridge Coastal Reserve site is currently closed to the public due to its proximity to the Evans Road wildfire. Because the site is remote and has no public facilities, it does not usually have a large number of visitors during the summer months. The reserve will be reopened to visitors once the fire danger has passed.

We are also sending DCM staff, including Buckridge manager Woody Webster, and Accounts payable clerk Melissa Sebastian, and David Moye to serve on the DENR Buying Team, who are assisting the Division of Forest Resources with purchasing and acquisition needs.

### **Town of Holly Ridge Enforcement Plan**

On July 10, the Town of Holly Ridge submitted their letter of intent to adopt a local implementation and enforcement plan, which will allow the Town to administer the CAMA minor development permit program. The Town plans to hold a public hearing regarding the plan at the Sept. 9 meeting of the Town Council, and will present their proposed plan to the Commission for review at the September meeting.

### **Masonboro Island Purchase**

At the end of this month, we will close on a deal to acquire a 23-acre tract of Masonboro Island. It is the largest privately held parcel left on the island, and is located at the southern tip.

### **Staff News**

James Barry Guthrie will join the Morehead City office as a field representative on Aug. 1. James has been a NOAA Fisheries Specialist on Piver's Island for the past four years. Policy Manager Mike Lopazanski is moving from the Raleigh office to the Morehead City Office. DCM's attorney, Christy Goebel and husband Jeff welcomed their son Thomas Jeffrey on May 30. Wilmington Field Representative Jon Giles and wife Angela have a new baby girl, Eden

ementine, born June 20. Coastal Engineer Bonnie Bendell and her husband Jay welcomed twins Jake and Lily on June 20. Coastal Reserve Research Coordinator John Fear and his wife Holly welcomed twins Leigh and William on July 16.

### **CHAIRMAN'S COMMENTS**

Bob Emory introduced the most recent member to the Commission, Dr. David Webster. Dr. Webster fills the seat formerly occupied by Dr. Courtney Hackney. Chairman Emory read a card received from Dr. Joseph Gore in response to the flowers and card sent from the CRC to him following the May meeting. Chuck Bissette is absent from this meeting due to upcoming surgery.

Chairman Emory stated the CRAC meeting was interesting. There was a very good presentation on wind energy facilities. This is a timely topic. A wind energy facility could not currently be permitted based upon our rules. We have had ongoing discussions on shoreline stabilization. We have worked on rules that were not consistent with our sister-agency rules and the CHPP Steering Committee has discussed this. There is a subcommittee of the CHPP Steering Committee that will meet July 29 to start the shoreline stabilization discussion to see if we can make some progress. One of the CHPP goals is to create and encourage alternatives to vertical structures. At the last meeting there was a report of the BIMP subcommittee. This subcommittee made a series of recommendations to the Commission and there are several we have acted on. The discussion on innovative funding for beach nourishment is on the agenda for this meeting and is one of the things the BIMP subcommittee recommended.

Chairman Emory advised the Commission that if they have not had a chance to attend the Ethics Training, they need to do so as soon as they can. He further stated he had attended a remote training and it is very informative. As Commissioners, we are obligated to get this training and then repeat it every two years.

At this time Robin Smith stated the Governor's Drought Legislation also passed at the end of the Legislative Session. The centerpiece of this is the requirement that water systems (both local government and large investor-owned) have in place a water shortage response plan that involves tiered levels of response to drought or other water shortage. This also gives the Department some additional authority to ensure that these plans are being implemented. There are a number of pieces in this Bill that provide financial incentives for water systems to be more efficient in water use. There is an additional study of how water supply is done to see what the obstacles are to permitting new water supply sources. A few additional positions were received within the Division of Water Resources. Ms. Smith agreed with Chairman Emory that the wind energy issue is a very timely topic. The EMC has had an adhoc committee on renewable energy resources. They spent their May meeting looking at wind energy. In July, they looked at biomass (wood waste, poultry litter) and are working their way through the renewable energy sources and what the need may be for additional environmental standards.

### **CRAC Report**

***\*\*See attached for CRAC report.\*\****



CRC took the following actions:

**Melvin Shepard made a motion to certify the Edenton/Chowan County joint land use plan. Joan Weld seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

**Jerry Old made a motion to certify the Town of Atlantic Beach land use plan. Jim Leutze seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

**Jim Leutze made a motion to certify the Oak Island land use plan amendment. Jerry Old seconded the motion. The motion passed unanimously (Leutze, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

## **PRESENTATIONS**

### **Overview of Emily & Richardson Preyer Buckridge Coastal Reserve (CRC-08-26)**

**Woody Webster**

Woody Webster stated this is one of the ten coastal reserves in the state. This is the only inland site and this site straddles the Tyrrell and Hyde County line. This site has a long history of being timbered. Most of the historic timber is centered around the harvesting of Atlantic white cedar which is still a rare, high valued timber. In 1994, the Governor's coastal futures committee recommended a certain number of habitats be added to State acquisition priority. Discussions between the Division and the Nature Conservancy led us to find the Buckridge property. The initial purchase was bought with Clean Water Management Trust Fund money, US Fish and Wildlife Services funds and Natural Heritage Trust Fund grants in 1999. This purchase was in Tyrrell county and was about 18,000 acres. In 2000, it was dedicated as Emily and Richardson Preyer Buckridge Coastal Reserve. Roper Island in Hyde County was also added in late 2002. Currently we have 26,862 acres and have been committed to restoring it from the impacts of long-term timber harvest. There are about 39 miles of canals and 30 miles of unimproved roads on the site. This site protects 40 miles of estuarine shoreline. Almost all of the soil is organic, peat soils. This site connects to the larger conservation landscape in the Albemarle/Pamlico peninsula. It connects several different fish and wildlife refuges and state holdings. This site serves the larger goals of the coastal reserve by setting aside land for research, education, and compatible, traditional uses. This site also helps to maintain the outstanding resource waters of the Alligator River and habitat for various species. A few of the ongoing projects at the reserve include involvement with the Tyrrell County eco-tourism initiative that promotes sustainable economic development in sensitive areas, long-term restoration planning, invasive species control, and ongoing atmospheric deposition sampling. The challenges that face the site are the invasive species, the ongoing restoration funding, hunting, wildlife (bears tear up the equipment), and educating the public on appropriate levels of visitor use. A few partners the site works with are the Tyrrell County eco-tourism committee, Wildlife Resources Commission, US Fish and Wildlife Service, NC Division of Marine Fisheries, Partnership for the Sounds, and the Albemarle Pamlico Conservation and Communities Collaborative.

**Draft Amendments to 15A NCAC 07H .0304 & .0310 Inlet Hazard Areas  
(CRC 08-27)  
Jeff Warren**

Jeff Warren reviewed progress made on proposed draft rules for the inlet hazard areas. In September inlet hazard boundary revisions were reviewed with the Commission. This was focused on the 12 developed inlets of the State. The initial inlet hazard areas were drawn from a 1978 study. In 1988, the statistical effectiveness of those inlet hazard area boundaries expired. In the 1990's the science panel began discussing potential ways of drawing new boundaries. In 2004, a methodology was being developed. The new boundaries were presented in September 2007 and recommended to put adoption of these boundaries on hold because those boundaries were referenced in a report in CRC rule 07H .0304. We also wanted to look at the use standards within these boundaries. It was not prudent to approve the boundaries with the existing policies because there were conflicts. Staff requested time to look at the use standards within the boundaries found in CRC rule 07H .0310.

Staff has put proposed policy revisions in draft rule language, however, Staff is not recommending adoption. Staff would take the language out to stakeholders and then come back with a more firm set of rules that could be considered for public hearing. There are two rules to review.

7H .0310 (use standards within in the inlet hazard areas). In the current development standards there is no commercial or multi-family development greater than 5,000 square feet allowed inside the inlet hazard areas. There are some exceptions located in .0309. Single-family residences have no restriction on size in the inlet hazard area. There is a current development density limitation not to exceed one unit per 15,000 square feet. The oceanfront setback in the inlet hazard area is based on the erosion rate in the adjacent ocean erodible area and you currently cannot use what is referred to as "the single family exception" which was part of what was revised in .0309. Staff feels the size limitation is very effective. But to be consistent with how the CRC has headed in the proposed setback rules, the 5,000 square feet should not be tied to a certain use. All development within the inlet hazard area should be limited to 5,000 square feet. The big challenge with density restrictions is there is already a grandfather provision. Another grandfather provision would have to be provided. A lot of these inlet hazard areas are starting to grab areas that were not in an inlet hazard zone. Staff feels you can adequately address density by limiting size. Staff proposes the single-family exception be allowed. There are lots that were not in an inlet hazard area that currently can use the single-family exception and by putting them into the inlet hazard area, they lose an opportunity to use it. This exception is only for lots platted prior to June 1979.

Proposed development standards would not allow development greater than 5,000 square feet. Any structures or buildings associated with public beach access or public water access would be allowed. The oceanfront setback would be based on the calculated 1998 erosion rate. Oceanfront development, in addition to meeting the setback, has to be as far back on the lot as feasible and cannot be further oceanward than the landward most adjacent structure. There is an exception for linear infrastructure besides roads to allow for footprints greater than 5,000 square feet. Staff would recommend to allow the single-family exception as it has been revised in .0309. 7H .0309 would have to be modified removing the sentence which states you cannot use

the single-family exception in inlet hazard areas. Staff would recommend that swimming pools not be allowed inside the oceanfront setback in the inlet hazard area.

There is a small change in 7H .0304 that deals with the ocean erodible area. The current ocean erodible area is defined as 60-times the erosion rate plus the 100-year storm recession rate. If the maximum setback increases to 90, you wouldn't have to meet the setback. Staff suggests the ocean erodible area change to 90-times the erosion rate plus the 100-year storm recession rate.

After discussion, the Commission requested that the Science Panel look at erosion rates and the vegetation line in determining setbacks in the inlets. At the November meeting if the Science Panel has not concluded with this, they should report to the Commission how much longer it would take. Chairman Emory stated if the Science Panel and Staff cannot come to a consensus, a report can be given by Staff as well.

### **Draft Amendments to 15A NCAC 07H .0308(a)(2) Temporary Erosion Control Structures (CRC-08-28)**

**Jim Gregson**

Jim Gregson stated Staff is proposing to address three items to this rule. (1) Address an interpretive ruling (2) Take some items out of the Petition for Rulemaking and (3) Clean-up the sandbag rules based upon language that is no longer needed in the rule.

In March 2008, Staff came to the Commission and requested an interpretive ruling regarding the sighting of sandbag structures. The twenty-foot distance from the structure that is imminently threatened requirement was not working when the structure was imminently threatened due to accelerated erosion. Staff was concerned that we were allowing sandbags to go too far away from the structure because that is where the erosion escarpment was located. The Commission said that this was correct in allowing sandbags to be more than twenty feet from the structure in cases of accelerated erosion.

In May 2008, a Petition for Rulemaking was addressed and although the Petition was denied Staff felt there were some things in the Petition that had some merit and we have tried to incorporate some of these changes into the rules. One was an allowance for a sandbag structure to remain longer if it is in area that is actively seeking beach nourishment or in an inlet hazard area in a community seeking an inlet relocation project. The proposal from Staff is to allow sandbags to remain in place for eight years if the community is actively seeking an inlet relocation project. In areas where communities are actively seeking beach nourishment, the current rules state the sandbags can remain in place for up to five years or until May 2008 whichever is later. Staff proposes to delete the language which references May 2008, since this date has past, but keep the language referencing the five-year period for communities that are actively seeking beach nourishment. Staff is also proposing changes to when sandbags have to be removed. Currently, if you get a sandbag permit there is no requirement that the bags be removed until the end of their time period (either 2 or 5 years). The proposed rule language changes this and requires sandbags to be removed when the structure is no longer threatened, when the structure is removed or relocated, or upon completion of an inlet relocation or beach nourishment project. Based on the fact that inlets move back and forth, it is necessary to change the rule to allow structures to be protected more than one time in an inlet area.

Additional language was added, as directed by the Commission, to the criteria by which a Town would be considered pursuing a beach nourishment or inlet relocation project. An additional change was made in (G)(i) which now reads “has an active CAMA permit, where necessary, approving such project; or”. This makes it clear that it must be an active permit.

**Wayland Sermons made a motion to delete “large-scale” and send the amendments to 15A NCAC 07H .0308 to public hearing. Jim Leutze seconded the motion. The motion passed unanimously (Leutze, Cahoon, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

## **Overview of Bird Island Coastal Reserve**

**(CRC-08-30)**

**Hope Sutton**

Hope Sutton stated she oversees the stewardship aspect of the Coastal Reserve Program and is directly responsible for the five southern sites which include Bird Island, Bald Head Woods, Masonboro Island, Zeke’s Island, and Permuda Island. Bird Island is not actually an island, it is connected to Sunset Beach. The island was in private ownership from 1770 until the 1950’s. In the 50’s it was purchased by the Price Family and was intended to be a family resort. In the 1970’s progression was halted. In the 1990’s the family requested to resume construction, but the local community was concerned about the island staying in its natural state. The Bird Island Preservation Society was formed and they actively worked with the State to try to get this land into preservation. In the late 1990’s the CRC decided not to approve the permits for the Price family’s bridge and causeway, and the family sold the property. In 2002 the acquisition and dedication were completed. This property is about 1,200 acres, but only about 136 acres are uplands.

Ms. Sutton discussed the habitats of Bird Island. Bird Island has the typical community types of a barrier island represented to include upper beaches, a dune system, extensive maritime grassland, maritime shrub, extended salt shrub, and an extensive salt marsh. The animals that make use of the site include birds, loggerhead sea turtles, and diamondback terrapins. In addition to the recreation aspect of the reserve, there are also traditional uses such as fishing. As the southern most site, it is a front line for invasive species coming from the south.

As with all reserve sites, there are polices of use. At Bird Island the Bird Island Preservation Society has stewards that patrol the site on a daily basis. There is a reputation on Bird Island that naturalists are welcomed. This is a management problem. Other challenges involve visitor education and how to use the reserve appropriately. Current projects at Bird Island include cross-training with the Bird Island Preservation Society. The Audubon Society has started teaching them bird identification, signage is being updated, weekly walks open to the public have been implemented, bird nesting and turtle nesting areas are protected, and bird population surveys are ongoing. Future projects include putting a trail into the salt shrub area to expand on education; the tidal creek system should be more accessible to the public, a restoration project to pull the old bridge system out, and ongoing crab pot removal and oyster restoration.

## **Use of Geotextile Tubes as Substitute for Multiple Sandbags**

**Spencer Rogers**

Spencer Rogers stated this presentation was given to the planning committee a few meetings ago and while it is not a panacea for the sandbag problems it is a potential alternative. The top three sandbag problems heard the most are (1) the potential impact on the adjacent beach and neighboring shorelines (2) debris and litter problem and (3) staff's trouble in enforcing sandbags that they cannot see. The use of sandbags in North Carolina is the biggest market in the United States if not the World. Property owners would put in sandbags, if that was not helping they would build a bulkhead and if that did not work they would move the house. As bulkheads were restricted, more and more sandbag structures came into use. The primary concern is the impact on adjacent beaches. While most of the early structures were small it is possible to harden the shoreline with a sandbag structure just as if you use sheet piles or wood. Property owners used cheaper fabrics for sandbags which resulted in bag failures. This will result in continuing volumes of debris. After the sandbag regulations came into place in North Carolina, there has been an evolution in materials and fabrics. The geotextile containers have been made in much longer lengths and are using much better fabrics. The fabrics used in the geotubes are three times the strength of sandbag materials. There have been a couple of applications for the use of geotubes in North Carolina and all have been treated as variances through the CRC. The tubes come in lengths up to 300 feet and can be ordered in a wide variety of diameters. These are bigger single structures which must be put in with heavier equipment. There are a number of engineering techniques for both sandbags and geotubes. To compare the size of sandbags versus geotubes, a typical sandbag revetment would be six feet high and twenty feet wide while a geotube would be six feet tall but only 10.8 feet wide. This would narrow the width of the structure by almost half. This would cause less impact on the beaches in front of it and adjacent to it. There is about 2/3 less fabric involved in a single tube than there is in the typical sandbag structure which causes less debris. Since the technology and materials have evolved, the geotube structure would be less expensive than with a comparable level of sandbags.

**Jerry Old requested that the Attorney General's office look into this issue as it is unclear how these structures and the State law prohibiting erosion control structures other than sandbags would interact. Jennie Hauser stated the legal opinion should come from an attorney that supports the Division of Coastal Management.**

#### **Marine Fisheries Commission SAV Definition Update Anne Deaton**

Anne Deaton presented the update on the SAV definition since the last meeting. A draft definition was presented to the CRC in May. Following this meeting, a conference call was held with the DENR workgroup and during this conference call the concerns of the CRC were discussed. There was one small change made to the definition. The sediment criteria was removed from the definition because there is not enough information from North Carolina about what the sediment grain sizes are in North Carolina. Other than this change, the language is the same as was presented in May. In June the MFC met and were presented the proposed definition. The MFC approved sending the rule to public hearing. There will be three public hearings. The first is October 13 in Manteo, October 14 in New Bern, and October 15 in Wilmington at 7:00 p.m.

**Joan Weld made a motion that the CRC support the SAV definition. David Webster seconded the motion. After discussion, the motion was withdrawn.**

## **Pier Rules Update**

### **David Moye**

David Moye stated at the March meeting, the CRC requested changes be made to the proposed pier rules. There were two changes requested (1) platform square footage allotment and (2) width to height over wetlands allowed. In March these were changed to a set number of 8 square feet per linear foot of shoreline on the platform allowed and the gradient height to width option was changed to a single six-foot wide maximum width and three foot high off of the substrate of coastal wetland. This wording was approved for public hearing pending the satisfaction of the CRC on the SAV definition. The SAV definition has been sent for public hearing by the MFC. The use of the General Permit by the field representatives would go hand in hand with the flow charts. The flow charts have been updated to make them easier for the field rep to use as to what can and cannot be allowed by the General Permit. We are not trying to elevate the majority of the pier permits into Major Permits. Changes are proposed today to address the concerns of the CRC which reads as follows:

*Piers and docking facilities located over shellfish beds or submerged aquatic vegetation as defined by the Marine Fisheries Commission may be constructed without prior consultation from the Division of Marine Fisheries or the Wildlife Resources Commission, whichever is applicable, if the following two conditions are met. 1. Water depth at the docking facility location is equal to or greater than 2 feet of water at normal low water level or normal water level whichever is applicable. 2. The pier and docking facility is located to minimize the area of submerged aquatic vegetation or shellfish beds under the structure.*

**Melvin Shepard made a motion to accept the changes and send the dock and pier general permit rules 15A NCAC 07H .1200 to public hearing. Charles Elam seconded the motion. After the amended motion failed, this motion passed with nine votes (Leutze, Cahoon, Weld, Elam, Shepard, Old, Webster, Wynns, Sermons) and two against (Wilson, Peele).**

**Bob Wilson made a motion to amend the original motion changing the wording and intent to state the location of docks and piers will be located to minimize the adverse impact to SAV and any reference to the prohibition of the placement of a dock or pier because of the presence or suspected presence of submerged aquatic vegetation be deleted from the rule language. Bill Peele seconded the motion. This motion failed with five votes (Wilson, Elam, Peele, Old, Wynns) and six opposed (Leutze, Cahoon, Weld, Shepard, Webster, Sermons).**

## **Innovative Beach Nourishment Funding Strategies**

### **(CRC-08-34)**

#### **Peter Ravella**

Peter Ravella, President PARC LLC, stated this discussion would be focused on how to finance a beach project. He stated he would explain why this is a hard thing to do and why these projects fail on the financing side. Beach financing is tricky because of the efficacy of beach nourishment in general. Does it work? Does it make sense to put sand on the shoreline? Is it going to effectively respond to the problem? Limited public access is a problem in financial planning. If the public does not feel the beach is a place they can get to and enjoy, putting together a financing plan becomes more complex. Blended benefits for blended contributors – what benefits do healthy beaches produce and how does that affect the financial planning

process? State funding is the cornerstone of beach project financing. It is because beaches are public spaces and public assets. In North Carolina if there is a federal project, the State financing system is geared to those projects and will pay up to 75% of the non-federal share. What happens if there is not a federal project? In a non-federal project situation the State will participate on a level similar to if it was a federal project but at a lesser amount. The burden gets shifted to the local community. Beaches are the number one economic asset in these communities, but beaches are free. It is extremely difficult to find a way to fairly bring visitors into the picture for funding. In North Carolina there is an accommodation tax, sales tax revenues can be applied to beach restoration programs, and visitor user fees are difficult to get. Property owners living near the shore have greater property values because of the beach. These owners have a direct stake in the health, width and quality of the beach. Inland property owners are not as willing to invest great deals of money into beachfront communities because of the ideas of assumed risks and assumed benefits. Property owners on and near the beach are a special class and have a special responsibility when it comes to financial planning. They are an important part of the puzzle. To sum it up, a financial plan has to address the public and private nature of the beach. A financial plan should reflect the public and private character of the beach. Public investment is required because of the public character. State and local government must be represented in a financing plan. Private beach owners should be major contributors. Commercial enterprises along the shoreline (hotels, restaurants and attractions) have an odd role to play, but it is good to capture them in the financial plan.

If you can get a federal project it is fantastic. The federal commitment is a fifty-year plan and can pay up to 50 percent of the project costs. On the State side, there is an annual legislative exercise which means it is subject to political influence and is hard to plan for. At the local level, there are a couple of tools (1) the local government general revenue (2) accommodation tax (3) municipal services district and (4) sales taxes and user fees.

Examples were given of two recent Florida projects. One in Destin and one in Okaloosa Island. In the city of Destin there is very little state money. On Okaloosa Island there is a 50% state share. There are no federal monies in either project. The county guideline was to use the accommodation tax revenues and they wanted a beneficiary based principal. A one-cent addition was added to the accommodation tax and dedicated to the beach. A property owner assessment was done, this would require legislation in North Carolina but is a great tool. How do you get landowners to support funding? The landowners are not going to voluntarily do it. Having support from landowners is critical. A benefit based assessment strategy works well. You have to talk to landowners about the benefits they receive from wide and healthy beaches as well as the recreational benefits. The business class should also be included. If a business is beachfront, these businesses will pay a premium for a beach project since the beach drives people to their businesses.

What are the secrets to the success? It is only politics. When you put together a financing plan, the way decisions are made within communities on financing this through the political process (either elected officials or votes by the community). One thing to keep in mind is that people who support beach nourishment are never the ones who show up at the meetings, it is always the people who don't like what you are doing. It is very difficult to pass things when your supporters are quiet. Try to make an effort to encourage people that are comfortable with the idea to come to the meetings and let the elected officials know they support it. If you have more than a third of a community upset about the financing plan, it will probably fail. You have to

earn the respect of the community. You have to create a process that allows an elected official to vote yes for a tax increase. This is very difficult to do in local government politics. A financing plan that captures the dual nature of the public and private characteristics of the beach will succeed. If it fails to reconcile the community's understanding of these public and private attributes of the shoreline, it will not pass. You have to reflect the dual nature, capture the identifiable beneficiary groups, figure out how to account for them and have a sensible way of assessing it. You must pay very close attention to the boundaries if you use landowner assessments. There is always a split between beachfront owners and off-beach owners. Beachfront owners should always pay more than people who don't live on the beach. If you violate this principal, you will fail. Commercial properties must pay more than comparably situated residential properties. Hotels and condominiums are difficult to assess. There are reasonable ways to put together a funding plan, but there is no perfect plan. Do not over complicate the plan. Keep it simple.

**Governor's South Atlantic Alliance Update  
(CRC-08-36)  
Chris Russo, DENR**

Chris Russo gave an update on the Governor's South Atlantic Alliance. We all recognize that coastal and ocean resources are vital to economic, quality of life, security, and environmental health of our State. There is a need and an urgency to sustain these resources. Governor Easley also recognizes this and he recognized it in both the region and the State. He made a decision to support and champion a partnership. This partnership is State led and federally supported. It is composed of the Governors of the South Atlantic states (NC, SC, GA, and FL). The Alliance itself will focus on ocean and science management, specifically common priorities of importance to our State such as healthy eco-systems, clean coastal waters, working waterfronts, and disaster resilient communities. The Alliance is a true partnership based on a good working relationship, cooperation and common shared data and issues. Most importantly it is based upon the fact that the State's retain flexibility to implement programs related to their own unique programs including ecological, geographic, political and other circumstances we deem necessary for each of our states. It was recognized that regional initiatives and regional alliances and partnership have become more cost effective and more effective in outcome. In this Alliance we can expect benefits from establishing this Alliance in the area of program fund grants and technical assistance. The Alliance is practical and effective. It is a way to add value to the good work we are already doing. The best example of contributions from North Carolina as part of the Alliance in the area of coastal and ocean science is CHPP. The Alliance was endorsed by the Southeast Regional Partnership for Planning and Sustainability. This Partnership has existed for about two and a half years and consists of NC, SC, GA, FL and AL as well as the Department of Defense and other federal agencies. This Partnership allowed us to align the need for looking at the Southeast Region. Because we were able to align the leadership of the states we were able to come together over the past year to develop the construct for an Alliance for the Southeast. This was presented to Governor Easley and in discussion and conclusion Governor Easley felt that he would like to champion it. On June 24, 2008, he sent the letter to his fellow governors. Secretary Ross will be the representative in developing the concurrences with the Governors. Upon concurrence we will move forward with implementation. This is a large step-forward for North Carolina.



Jim Leutze thanked Chris Russo and Secretary Ross for their support of this project. This has not been easy to put together. My motivation was looking at CHPP and getting the various people who have an interest in environmental and coastal issues together and working on the same page. The coastal and environmental problems that we share with these states are very similar.

## **Sandbag Inventory and Prioritization Update (CRC-08-35)**

**Ted Tyndall and Ken Richardson**

Ted Tyndall stated this is an update from the previous meeting regarding efforts Staff has undertaken in the prioritization of sandbag removal. Over the past two months, DCM staff have conducted a detailed inventory of sandbag structures protecting oceanfront properties in North Carolina. Staff concentrated on the sandbag permits that were in communities that were actively seeking beach nourishment as of October 1, 2001. 15A NCAC 07H .0308(a)(2)(F) was passed in May 2000 and allowed for these property owners to keep their sandbags for five years from the date of installation or until May 1, 2008, whichever was later. This deadline affects approximately 150 of the 370 total sandbag structures that exist along our coast. The May 1 deadline has now passed and Staff believes that if notices for removal are sent to all the property owners with sandbags not meeting the literal interpretation of full compliance with the CRC's rules, a high number of variances would be filed at one time; a number that Staff anticipates would be too large for the Commission to hear within its mandated timeframes in which to hear variances. Therefore, with the Commission's guidance Staff began a phased approach for enforcing the deadline, beginning with a detailed inventory of all sandbag structures. It must be emphasized that sandbags that are covered with sand and stable, natural vegetation are allowed to remain in place until such time as they become uncovered. Inventory efforts began after May 1 and included documenting existing site conditions, taking multiple photographs from different views, and locating each structure with GPS. Site-specific notes were recorded and included documentation of the degree of encroachment that the bags have into public access to the dry sand beach, the nature of the development (public or private), the integrity of the sandbags (functional, derelict, or missing), how much of the sandbags are covered with sand and how much of that sand coverage includes stable and natural vegetation. The length of time that each sandbag structure has been in place was noted. These were the primary factors that were entered into a spreadsheet along with secondary variables that include whether or not the sandbags are affiliated with a shoreline that has received beach fill, is slated to receive beach fill, is in an existing inlet hazard area, or is in a proposed inlet hazard areas. A sandbag removal index (SRI) was developed to rank the non-compliance of sandbag structures on a relative scale. The quantitative model relies on those variables described earlier, appropriately weighted based on primary or secondary nature as input. The model provides a method with the ability to quantify subjectivity making it flexible and tolerant of imprecise data. Currently, Staff is continuing to work on the model and is developing a Google basemap that shows all sandbag locations with "popup" abilities that can show individual photographs, recorded site conditions, and the site specific SRI. The basemap will be capable of showing the location of sandbags in relation to other data layers such as inlet hazard area and static vegetation lines. Currently, Staff is still massaging the master data set to fill in the holes and to address discrepancies that popup with the model. Once the database and model are proofed, run and verified, the SRI will aid staff in determining which sandbags are not subject to removal (covered with sand and stable, natural vegetation) and which bags rank as a high priority for removal. Once that process is completed,

those property owners whose sandbags rank the highest will be among the first to be notified by mail that they have 30 days from the date of notification to remove their sandbags. If compliance is not forthcoming, the Division will then proceed with issuance of the formal Notice of Violation requesting removal. If the bags are not removed after that correspondence, injunctive relief will be sought through the courts to have the sandbags removed. For this presentation, Ken Richardson will demonstrate to the Commission the capabilities of the Google basemap that he created. This tool, along with the database and model creating the rankings, will aid Staff in the final decisions for which bags will need to be removed first. It must be pointed out that all bags subject to the May 1, 2008 deadline must be removed if they are not covered with sand and stable, natural vegetation. Staff's goal is to have all the data proofed, the model verified and run, and the rankings assigned by the end of August. The Google basemap will be accessible on the Division's website for use and perusal and the first letters requiring removal will be mailed out. The SRI will break it down into segments as to which bags will be receiving the letters. (At this time Ken Richardson demonstrated the map).

## **PUBLIC HEARINGS**

### **15A NCAC 07H .0306 General Use Standards for Ocean Hazard Areas**

Steve Levitas of Kilpatrick Stockton, representing Moore's Inlet Limited Partnership the owner of the Holiday Inn Sunspree in Wrightsville Beach, stated in December of last year my client submitted detailed comments on the previous version of this rule which we argued among other things that the revised setback requirement should not apply to communities with well-established beach renourishment programs. We worked with DCM staff on modifications to the proposed rule which would resolve our concerns. We are grateful to the CRC for providing the additional time to work through these issues and to the staff for their constructive approach to try to address these concerns. The rule as it is currently before you today goes a long way towards resolving these concerns and we think we are within striking distance of having a rule that we can support. The solution that has been developed by staff is to maintain existing setback requirements for large structures in communities with long-term, large-scale beach renourishment projects. We think this is a sound approach. The remaining issues we have primarily involve procedural requirements for qualifying for this relief from the more stringent setback requirements which are contained in this rule and 7J .1200.

Debbie Smith, representing Ocean Isle Beach, stated she wants to commend the Commission and the Staff on how diligently everyone has worked on these rules, especially the static line exemption. I am personally very proud of what has evolved and it is something that we can all live with. It is the right thing to do. I do have one minor issue with 7H .0306(8)(f) where it says any portion of a building may not extend oceanward any further than the adjacent structure. In many of our towns we have different and varying setbacks from our landward lot-line of our oceanfront lots. Some of us have minimum setbacks, but they can go further forward. At Ocean Isle we try to keep them as far from the ocean as possible, so there is a mandatory setback that you have to start from. I would like to see some revision in this rule that would require any new construction behind the static setback be mandated to start as far landward as possible. This would be a fair thing and keep these properties further landward and away from the ocean.

Tim Owens, Town Manager for the Town of Carolina Beach, stated he is here on behalf of the Town Council. I submitted a letter as well as a PowerPoint presentation. The Town Council in the Town of Carolina Beach is concerned about the effect the proposed regulations will have on existing, proposed and future development in the Town. The concern has increased after reading the beach fill section in the proposed rules. To better understand our concerns with the proposed regulations you have to understand the history of development in the Town or the Town's vision for the future. With the assistance of Federal and State governments, the Town of Carolina Beach has been fortunate enough to provide shoreline protection since 1965 with great success. Since that time, development within the Town has seen peaks and valleys with the latest large-scale surge of development slowing in 2005-2006. Overall the type of development in Carolina Beach is more compact and larger in scale than other North Carolina beach communities. A number of items contributed to this development pattern, but overall we believe it was a direct result of small lot sizes, early provisions of sewer service in the Town, and a healthy dune system that has provided decent protection to property owners over the years. Following the latest development surge, the Town realized that it needed to review its development policies, ordinances and better define a community position with regards to the Town's central business district. The Town hired a planning consultant to create a master development plan that was recently adopted by the Town Council. The newly adopted master plan contemplates a vision of a more urban environment to include several different amenities. The plan is a long-term vision and will take many years to accomplish and for the most part most of our citizens are very excited about the plan. The main concerns for us are that we have spent millions of dollars protecting the property along our coastline establishing a quality beach dune system for residents. Currently the regulations would make it difficult for Carolina Beach to fall within the current beachfill guidelines and we have been doing it since 1965. We have two more cycles of beach nourishment.

Steve Coggins of Rountree, Losee and Baldwin representing the Town of Carolina Beach stated he would like to thank the CRC on behalf of the municipalities within the CAMA counties for conducting regional hearings. There appears to be one urban center that is industrial, residential, historical, educational, tourism that is all centered on the oceanfront. The CRC has taken a hard look at urban waterfront rules. We have a vital urban center that simply does not fit with any of the pegs of the regulatory scheme. Perhaps it would be a healthy thing to take a look at an urban oceanfront rule as opposed to applying the one size fits all. We have technical concerns about whether the Town is even eligible to apply as a beach fill community. In the rule it states that if you already have a SVL, then you are not eligible to apply for beach fill status. I see this as a technical thing that we can change. We probably need significant clarification on whether a community like this urban center, that has, since 1965, a wonderful history of working with this agency and all related agencies, is assured.

Bill Bober, private homeowner on Emerald Isle, stated he owns properties which are both conforming and non-conforming. Some of my neighbors and I are both grateful to the Committee for finally addressing this rule change. We are also concerned about the vegetation setbacks. I don't know if the existing rule that is on the website is what will be voted on, but I think some of the other comments about the one-size fits all, just like the arbitrary static line that was put down ten years ago, should have not been a one-size fits all. I know it was an emergency line, but it was an economic disaster for many people who had planned on buying beach property for retirement purposes. Thank you for addressing this issue, but perhaps instead

of a one-size fits all, I would hope you would work more individually with the Towns with their individual requirements they need for homeowners or commercial or whatever it may be.

Lewis Woodson from Burlington, NC stated he owns a home in Oak Island. I am concerned about the vegetation line being moved. We bought our house about 15 years ago. When we bought it there were 12-15 houses in front of us on the ocean. Only 3 of those are left today. The static line is back where people cannot build in front of that, but now they want to move the static line back and put houses back where those houses have already washed away. I am opposed to that.

Steve Ambrose, homeowner in Emerald Isle, stated he wanted to thank the CRC, DCM and Dr. Jeff Warren and other parties involved in this process over the last several years. We appreciate you opening the floor today for public comment. My wife and I are owners of a beach home in the section of the beach affected by this new rule. We are extremely pleased with the new proposal which allows for the possibility for lots in this section of the beach to be re-built based on changes to the setback policy. This is a very positive approach which will allow some of the older structures to be brought up to current code, and therefore make homes safer for residents and their guests. Today I'm speaking to provide some positive feedback to the CRC and DCM regarding this entire process. As a concerned citizen, I have been involved for about the last three years. The rules have been comprehensively studied, proposed, and altered based on feedback from all interested parties. The various groups involved in drafting the rules have listened very carefully to all stakeholders, and have made numerous changes as a result of the meetings and public comments. It is refreshing to see this process work effectively and I am personally very pleased with the negotiated terms set forth in the final version of rule .0306. In particular I would like to extend my thanks and appreciation to Dr. Jeff Warren and his team on the CRC staff. He has been very accessible throughout this entire process. Over the last couple of years, Dr. Warren has taken the time to answer my numerous questions leading up to rule .0306. He has been willing to explain the process and logic behind the difficult task of balancing the interests of all involved stakeholders. I appreciate the fact that Dr. Warren is able to clarify and discuss some very complicated and detailed issues in layman's terms for citizens such as myself to understand. I look forward to the adoption of this rule, because it does allow for responsible and limited rebuilding along the effected areas of our wonderful state.

Charles Stuber, homeowner on Emerald Isle, stated he and his wife have owned property on Emerald Isle since 1970. We have seen a lot of things change since then. We bought our first property in 1970. At that time there were hardly any dunes in front of us. Through the use of sand fence and fertilizing the sea oats we have built up a very good primary dune in front of our property. We have five lots. With the renourishment we had five years ago, we have much better beach and much better dunes than we had 38 years ago. I think this is evidence that the beach is changing for the positive in our area. I applaud the CRC for considering the fact that the static line may need to be considered and have exemptions for it because right now all of our lots are non-conforming and if something happened to them we would have no value there. It will increase the tax value for Emerald Isle and it will encourage people to improve their property.

### **15A NCAC 07J .1200 Static Line Exception Procedures**

Steve Levitas, representing Moore's Inlet Limited Partnership, stated our interest in this rule arises from its relationship to the setback rules that were the subject of the prior hearing. In

order to obtain relief from the more stringent setback requirements in the .0306 rule for large structures within a local government's jurisdiction, the local government would have to satisfy the static line exception requirements in this proposed rule. We believe the purpose, spirit and intent of what the CRC and the DCM Staff are trying to do is sound. We agree there need to be well-defined procedures and there should be significant standards that have to be met in order to qualify for the static line exception and the setback exemption. We think this rule obtains some ambiguities and those provisions could be construed in a way that would undermine the purpose of this rule. I think it can be fixed relatively easily and I have had a chance to talk to Dr. Warren about this and I think he shares this view. I think there are some things that can be done in the general improvement of the language that will make the rule clearer and we are committed to work with the staff.

Frank Rush, Town Manager for the Town of Emerald Isle, stated the Town of Emerald Isle supports the static vegetation line exception and thanks the CRC and DCM Staff for a good public process. The significant stakeholder input is very much appreciated.

### **PUBLIC COMMENT AND INPUT**

Alexandra Boncek stated she is representing the Sandspur Motel and Cottage Court in Nags Head. My grandfather purchased the motel in 1971 and except for a few years, it has been in my family ever since. My mother took possession in 1992 and with your help and consideration; I will be able to take possession once I complete my education. Our family has spent hundreds of thousands of dollars over the past 25 years trying to save the beach and the motel. We have pushed dunes, installed miles of sand fence, planted vegetation and paid to have several hundred truckloads of sand brought in and put on the beach. In 1999, my mother applied for a permit to install sandbags on the beach just in front of our oceanfront cottage on the south side of the property. After that she was granted a permit to install sandbags directly under the cottage between the pilings. In the last few years, the bags on the beach became uncovered during several of the hurricanes that ravaged the beach. While uncovered, people drove over the bags and children played on them which tore holes rendering them useless. The shreds were unsightly so my mother started cutting the bags out and we now feel that the bags are completely gone in front of the cottage. However, we still have bags under the oceanfront house. They are totally covered and the entire house has sand fencing around it. In the middle of the house the bags are within a few feet of the underside of the house, so if we have to add sand we have to lay on our stomachs and bring in sand bucket by bucket. We have made every attempt to keep the bags covered but are unable to plant vegetation since no sunshine ever reaches the bags. We are a small cottage court configuration with two rows of cottages and efficiencies running from the ocean to the beach road that face each other. We see no way to remove the bags since they are so close under the house. With the pilings and supports, you have to get on your stomach to get to the center of the house. This house is our best moneymaker. Because it is only one story, all of our older clients want to rent this house since they do not have to climb steps once they get on the deck. This house provides about 25% of our income for the whole complex and rents double the weeks that the other two-story oceanfront house rents. We have been told that we are the low man on the totem pole when it comes to being ordered to remove the bags, however, that does not give us any comfort. We have made every effort to follow all the rules and instructions from your personnel. We feel that we should not be penalized when we are unable to complete the covered and vegetated rule through no fault of our own. We ask your consideration in granting an exemption for bags that are covered, are on private property, and in no way are unsightly or

impede a public access to the beach. This property should be allowed to be passed on to a third generation family member and should include the oceanfront cottage. We appreciate any consideration you could give us. We are not trying to get around the rules. My mother is a strict advocate for following the rules in life. However, following the rules in this instance could seriously affect our income and our ability to run the family business and make a profit. We are at your mercy and thank you for any assistance you can give us.

Charles Baldwin of Rountree, Losee & Baldwin stated he represents the Village of Bald Head Island. The Village is delighted that the marina is excluded from the current proposed inlet hazard area maps. As Staff indicated, this critical structure is the only point of ingress and egress from the island for people, supplies and vehicles. The marina area is also the location of the two bed and breakfasts on the island which are critical infrastructure facilities that can simply not be relocated anywhere else. Maps were shown that indicate the swimming pool, tennis courts, part of the clubhouse, pro shop and exercise room are not excluded. The facilities are not going to move more landward. They obviously need to stay there, as they do not pose a threat to anyone. I think there is a technical fix that we can do to address this issue. A policy staff implemented was to either include a property in its entirety or exclude the property in its entirety. If that same methodology were applied to the golf club property, then you would exclude the golf course, the pool, tennis courts and all. There is also a provision in the existing rule that reads, the Cape Fear Inlet Hazard Area shall not extend northeast of the Bald Head Island Marina Channel entrance. That provision excludes the marina from the inlet hazard area. That is good policy. It is proposed to be deleted in the new rule. This language should stay in the new rule.

### **ACTION ITEMS**

**Joan Weld made a motion that the CRC extend the time for deciding contested case 06 EHR 1185 Henry Cowell/Carolyn Dressler v. NC DENR/DCM/Earl and Mary Westphal for an additional sixty days so the Commission counsel and Staff can prepare and distribute the record to the Commission members and can provide parties with adequate time to file written exceptions and comments on the ALJ's decision. Jim Leutze seconded the motion. The motion passed unanimously (Leutze, Cahoon, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

**Joan Weld made a motion that the CRC extend the time for deciding contested case 07 EHR 0345 NC Coastal Federation v. DENR/Wind Over Waves LLC for an additional sixty days so the Commission, CRC Counsel and Staff can prepare and distribute the record to Commission members and provide parties with adequate time to file written exceptions and comments to the ALJ's decision. Melvin Shepard recused himself from this matter. Lee Wynns seconded the motion. The motion passed unanimously (Leutze, Cahoon, Wilson, Weld, Elam, Peele, Old, Webster, Wynns, Sermons).**

### **OLD/NEW BUSINESS**

Wayland Sermons requested the time for public hearings be changed. He requested public hearings not start at 5:00 p.m. for hearings that will receive a large amount of comments. He also requested that a meeting be held on Ocracoke Island at an upcoming meeting.

**Wayland Sermons made a motion that the Coastal Resources Commission meetings begin at 8:30 a.m. on Thursday and Friday mornings. Melvin Shepard seconded the motion. The motion passed unanimously (Leutze, Cahoon, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

Chairman Emory stated a significant amount of time will be allocated towards wind energy at the September meeting. Joan Weld has requested that a panel of people who each represent a different perspective on wind energy be present at the September meeting. Peter Ravella's presentation was a result of the on-going comprehensive approach to how we manage the beaches. What is the pleasure of the Commission to a next step? Jim Leutze stated this would be a good opportunity to use the CRAC as this has a lot to do with local funding. Dr. Leutze requested several Mayors and/or County Commissioners be involved in this discussion, as it requires local funding. Renee Cahoon stated the League of Municipalities and the NC Association of County Commissioners would be good sources to get involved. The CRAC will focus its next meeting on the local government perspective on wind energy and the local government interaction on innovative funding.

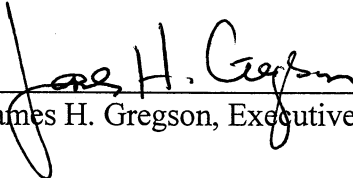
**Melvin Shepard made a motion that the CRC approve the sandbag removal program as outlined in the presentation on July 25, 2008, and the CRC finds this prioritization reasonable based upon the breadth of the issue and staff availability. Jim Leutze seconded the motion. The motion passed unanimously (Leutze, Cahoon, Wilson, Weld, Elam, Peele, Shepard, Old, Webster, Wynns, Sermons).**

Jim Leutze requested a progress report on the comprehensive beach and inlet management plan at each meeting.

Renee Cahoon requested the CRC look at the marina rules. As marinas are approved, there should be some element of public access included. The CRAC will follow up with this request.

With no further business, the CRC adjourned.

Respectfully submitted,

  
James H. Gregson, Executive Secretary

  
Angela Willis, Recording Secretary

# DRAFT

## NC Coastal Resources Advisory Council Holiday Inn Brownstone Raleigh, NC July 23, 2008 Meeting Summary

### Attendance

Dara Royal, Chair	Y	Christine Mele	Y
Penny Tysinger, Vice Chair	Y	Gary Mercer	
Eugene Ballance		Wayne Mobley	
Bert Banks (Morgan Jethro)	Y	J. Michael Moore	Y
Joe Beck		William Morrison	Y
Randy Cahoon	Y	Elwood Padrick (Charles Halsall)	Y
Carlton Davenport	Y	W. Burch Perry	
Eddy Davis (Kevin Richards)	Y	Spencer Rogers	Y
Anne Deaton	Y	Frank Rush	Y
Christine Mele		Robert Shupe	Y
Webb Fuller	Y	Harry Simmons	
William Gardner, Jr.	Y	Lester Simpson	Y
Renee Gledhill-Earley		Paul Spruill	
Gary Greene		Ray Sturza	
Phil Harris	Y	Tim Tabak	Y
Judy Hills	Y	Joy Wayman	Y
Al Hodge	Y	Beans Weatherly	
Maximilian Merrill	Y	David Weaver	Y
Joe Lassiter	Y	William Wescott	
Travis Marshall	Y	Traci White	
Lyman Mayo		Rhett White	Y
Gary McGee		Don Yousey (David Stanley)	Y

### Wednesday 21<sup>st</sup>

#### Call to Order

Dara Royal called the meeting to order at 1 pm and the Council approved the May 2008 minutes.

#### Chowan/Edenton Joint Land Use Plan

Charlan Owens, Elizabeth City District Planner gave a brief overview of the Edenton/Chowan Joint Land Use Plan. Owens characterized the area as 91% residential or agricultural with higher density development occurring in and around the Town. She noted several development projects including the Sandy Point mixed use development. Owens advised that none of the policies in the land use plan exceed state standards and that they are all being implemented through local ordinances.



## DRAFT

The Chowan County Board of Commissioners and Edenton Town Council adopted the land use plan at a joint meeting on June 23, 2008. The public had the opportunity to provide written comments to DCM up to fifteen (15) business days prior to the CRAC meeting and no comments were received. DCM Staff has determined that Chowan County and the Town of Edenton have met the substantive requirements outlined within the 2002 Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program. DCM staff recommended that the CRAC forward the Chowan County/Town of Edenton Joint Land Use Plan to the CRC for certification, and it was unanimously approved.

### **Town of Atlantic Beach Land Use Plan**

Maureen Meehan reviewed the Atlantic Beach Land Use Plan. She characterized the town as primarily single family but noted a large mixed-use redevelopment project at the Circle. Meehan advised that the Town is trying to maintain its image through the implementation of a "cottage" district, which limits development to single family residential use. There are several policies that exceed state standards pertaining to privately owned signs, floating homes and development of estuarine islands. The Atlantic Beach Town Council adopted the land use plan at a meeting on April 21, 2008. The public had the opportunity to provide written comments to DCM up to fifteen (15) business days prior to the CRAC meeting and no comments were received. DCM Staff has determined that the Town of Atlantic Beach has met the substantive requirements outlined within the 2002 Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program. DCM staff recommended that the CRAC forward the Town of Atlantic Land Use Plan to the CRC for certification, and it was unanimously approved.

### **Town of Oak Island Land Use Plan Amendment**

Mike Christenbury advised that the Town of Oak Island has a Consolidated Land Use Plan. Christenbury reminded the Council that with the merger of the Towns of Land Beach and Yaupon Beach resulted in a combined land use plan. While most inconsistencies have been addressed, the definition of marinas still differed and needed to be amended to make it consistent town-wide. In addition to adopting the CAMA definition of marinas, the Town has included policies regarding the siting of marinas, pumpout requirements, live-aboards, public access and participation in the State's Clean Marina Program. The Town of Oak Island held a duly advertised public hearing on June 10, 2008 and voted unanimously by resolution to adopt the amendment. The public had the opportunity to provide written comments to DCM up to fifteen (15) business days prior to the CRAC meeting and no comments were received. DCM Staff has determined that the Town of Oak Island has met the substantive requirements outlined within the 2002 Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program. DCM staff recommended that the CRAC forward the Town of Oak Island Land Use Plan Amendment to the CRC for certification, and that was approved with two votes against.

### **Offshore Wind Farming**

Bob Leker, Renewables Program Manager with the State Energy Office provided a detailed overview of the offshore wind farming issue in NC. Mr. Leker reviewed the water-based siting of wind facilities, discussed the wind resources available to NC and gave examples of inland projects and the technologies available of coastal wind development. Mr. Leker stated that due to the characterization of the available wind resource, the Pamlico and Albemarle Sounds hold the highest potential for wind energy development in NC. He advised that the top five coastal counties with the highest potential for wind energy are Dare, Hyde, Carteret, Tyrrell and Pamlico. Mr. Leker provided information on European wind farm activity and also cited several potential projects being developed in the US. Recent activities regarding wind energy development in NC have included: wind mapping and assessment, a demonstration site at Beech Mtn., state-wide public forums, development of a model wind ordinance, economic assessments, legal and permitting issues and development of a

## DRAFT

website (wind.appstate.edu). He concluded his presentation with a review of the potential impacts as well as the benefits of wind development in the State.

Doug Huggett reviewed the permitting issues associated with offshore wind farm development. Huggett noted that the P&SI Committee discussed this topic in 2005. The issue centers on 7H .0208(a)(1) regarding water dependent uses. The P&SI Committee was asked if wind turbines were water dependent and the Committee determined that they were not and therefore could not be permitted. In addition, 7H .0306 precludes development seaward of the first line of stable and natural vegetation which would precluded transmission lines being brought ashore. In 2005, the P&SI Committee decided that the rules should not be revised. Guy Stefanski advised the Council that the Ocean Policy Study Committee was addressing this issue at its next meeting in August. Given the changes in energy resources since 2005, the CRAC is recommending that it be directed by the CRC to study the permitting issues associated with offshore wind farm development.

### **New Business/Old Business**

The Council adjourned at 2:50 pm in order to join the CRC meeting at 3 pm.

### **Thursday 22<sup>nd</sup> & Friday 23<sup>rd</sup>**

Advisory Council met in session with CRC.

##



State of North Carolina

Department of Justice  
PO Box 629  
Raleigh, North Carolina  
27602

Reply to:  
Christine A. Goebel  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
Tel: 919-716-6600  
Fax: 919-716-6767  
cgoebel@ncdoj.gov

ROY COOPER  
ATTORNEY GENERAL

September 11, 2008

**By First Class Mail & email**

Mr. James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Re: *Cowell/Dressler v. DCM & Westphal*, 06 EHR 1185

Dear Mr. Gregson:

Please find enclosed the Respondent's Memorandum in Support of the ALJ's Decision. This Memorandum is respectfully submitted in accordance with communication from CRC Counsel Jennie Wilhelm Hauser, asking that parties file any exceptions to the ALJ's Decision by noon on September 11, 2008.

Although Respondent is filing a memorandum of support for the ALJ's Decision and is not filing exceptions, I would request time for oral argument to preserve the right to rebut any exceptions or arguments that Petitioner and/or Intervenor-Respondent may make before the CRC when they hear this case for a final agency decision at the September 24-26, 2008 meeting. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Christine Anne Goebel".

Christine Anne Goebel  
Assistant Attorney General

Enclosure  
cc(w/enc.): James L. Conner, II, Counsel for Petitioner  
Earl & Mary Jane Westphal, Pro-se Intervenor-Respondents  
Jennie Wilhelm Hauser, Special Deputy AG & Counsel for the CRC



**DCM Lawfully Issued CAMA General Permit No. 45215**

In this case, division staff properly granted Intervenor-Respondents' CAMA General Permit No. 45215 on May 10, 2006, which authorized the development of a 5' by 120' long pier, a 9' by 31' platform, and pilings for 2 boat slips on Intervenor-Respondent's property located at 309 Peninsula Drive in Oriental, North Carolina. The property is adjacent to Brite's Creek, part of the Neuse River Basin as designated by the EMC. The ultimate issue before the ALJ, and now before the Commission, is whether the issuance of CAMA General Permit No. 45215 was proper.

Judge Brooks AFFIRMED the Division of Coastal Management's decision to issue Intervenor-Respondent's CAMA general permit. Judge Brooks found that Petitioner failed to demonstrate by a preponderance of the evidence that Respondent erred in issuing the permit. (Decision, p.22; Record, p.2289) This decision was rendered after 9 days of the hearing in October and November 2007 and January 2008, where Judge Brooks was able to review the applicable law, testimony, and evidence presented by all three parties.

**Standard of Review**

This case arises under the revised Administrative Procedure Act ("APA"). When the General Assembly adopted substantial amendments to the APA in 2000, it gave express guidance to final agency decision-makers as to the standard of review in contested cases. In accordance with this revised standard of review, the Commission should adopt the Judge's Decision in its entirety. Specifically, the Commission is *required* to adopt each of the ALJ's findings of fact, "unless the finding is clearly contrary to the preponderance of the admissible evidence . . . ." N.C.G.S. § 150B-36(b). In considering the ALJ's findings, the Commission must "giv[e] due

regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses."

Id. If the Commission were to not adopt any of the ALJ's findings, it would be required to explain its reasons for disagreeing with the ALJ and identify specifically the evidence in the record upon which it relied to conclude that the ALJ was wrong. Id.

#### Summary of the Case

This case concerns the permitting of a simple, private pier for the Westphals on a lot adjacent to Brite's Creek in the Neuse River Basin that they planned to use for their retirement home in Oriental. Even before they sought their permit from DCM, their adjacent riparian neighbors, Petitioners Mr. Cowell and Ms. Dressler, offered their opinion about where the pier should be placed on the Westphal lot, being on the far side away from Petitioners' property, and coming off a small section of bulkhead. The Westphals decided against this alternative route proposed by Petitioners for several reasons including the long, indirect route from the home site and the fact that the walkway to the pier would go through a wooded strip of property which hugged the property line and passed close by their other neighbor's house, and would likely require tree removal. Instead, they proposed a location to DCM staff along the edge of the marsh near the center of their lot, and which hugged the tree-line along the "peninsula." They applied for and were granted their CAMA general permit, and constructed the 120-foot pier, platform, and 2-slip structure after permit issuance. Petitioners had submitted several objections to the proposed pier after they were given notice of the project, which were thoughtfully considered and reviewed by DCM staff before permit issuance, and were found not to be lawful reason for permit denial. Following the pier's construction, Petitioners filed their third party hearing request, and argued the pier was inconsistent with CAMA based on approximately 20 grounds.

Chairman Hackney found that the issue of whether impacts to coastal wetlands were minimized was not frivolous, and their petition was granted. In their Petition and Prehearing Statement, Petitioners raised many additional grounds for why the pier was inconsistent with DCM's rules.

At the hearing, the majority of Petitioners' case was testimony by James Spangler, a consultant hired by Petitioners to evaluate the pier project and testify about how it was inconsistent with the CAMA and the CRC's Rules. Over strong objections by Respondent concerning his actual experience working on CAMA permits and specifically those for private piers, Mr. Spangler was accepted by the ALJ as an expert witness. Mr. Spangler's initial testimony over three days concluded that it was his opinion that DCM staff issued CAMA General Permit No. 45215 improperly, as it was inconsistent with dozens of provisions of the CAMA and the CRC's rules. Mr. Spangler continued to hold this opinion during his testimony during rebuttal.

Respondent's case was primarily testimony by Assistant Director Ted Tyndall, DCM Field Representative Stephen Lane, and Al Hodge from DWQ. Their testimony addressed each of Mr. Spangler's assertions about the pier's purported inconsistencies with the CRC's rules, and corrected Mr. Spangler's incorrect understanding, incomplete reading, and misinformed interpretation of the CRC's rules. In addressing the issue of minimizing impacts to coastal wetlands identified by Chairman Hackney in granting the third party, Respondent's witnesses explained that a balancing of impacts to resources and of riparian rights for water dependant structures must occur in this case where the location of any pier at any location would affect some coastal wetlands and some of the DWQ's Neuse River 50' buffer. They concluded that the permitted pier location was superior to Petitioners' proposed location considering all impacts to

the resources. Finally, DCM agreed with Petitioners that portions of the pier were a few inches lower than the 36" requirement, and that this minor violation would be addressed with the Westphals following the conclusion of this case.

Finally, the Westphals case consisted of testimony from their other adjacent riparian neighbor, Mrs. Flanagan, their marine contractors from IBX who built their pier and many other piers in the area, and Mr. William Morrison, their environmental consultant. Mrs. Flanagan confirmed that while she waived her 15' riparian setback for the pier as permitted, she would not waive it for the Petitioner's proposed pier design. She also testified that she had concerns about Petitioner's proposed alternative design due to its proximity to her property. The testimony from the Westphals' other witnesses confirmed and supported the testimony of Respondent.

**Result by the ALJ**

After assessing the evidence and whether the Petitioner has overcome its burden regarding findings of fact, the Commission *must adopt* the ALJ's decision, including the ALJ's conclusions, unless the Commission demonstrates that the decision is clearly contrary to the preponderance of the admissible evidence in the record. N.C.G.S. § 150B-36(b3). If the Commission does not adopt the ALJ's decision as its final decision, the Commission shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the Commission. The Commission may consider only the official record . . . . Id.

The ALJ hears the evidence, observes witness demeanor, reviews the record, and then issues a written decision. In this case, Judge Brooks' decision to defer to DCM staff and its findings are well-supported. Every finding of fact is supported by the testimony of various



witnesses, and the documentary evidence, including site drawings, surveys, information from other resource agency staff and numerous photos. It is especially important to note that Judge Brooks concluded,

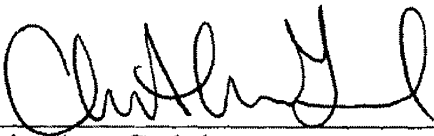
“[g]reater weight is given to the testimony of Respondent’s witnesses and Intervenor-Respondents’s witness, Mr. Morrison, whose extensive experience with and knowledge of CAMA general permits and applicable regulations was apparent. Lesser weight was given to the testimony of Petitioners’s witnesses, generally, whose experience and knowledge concerning applicable regulations was less, and to Mr. Spangler, specifically, whose credibility was weakened by his antagonistic posture in direct testimony as well in cross-examination upon recall.”

(Decision p. 21-22, Conclusion of Law #7)

Every conclusion of law is supported by the findings of fact, by the CAMA statute and by relevant case law where applicable. The decision reflects the presiding judge’s careful consideration of the record. Because the overwhelming preponderance of the admissible evidence in the record supports Judge Brooks’ Decision, the Commission should adopt that decision, in full, as its own.

Respectfully submitted this the 11th day of September, 2008.

ROY COOPER  
Attorney General

By:   
Christine Anne Goebel  
Assistant Attorney General  
N.C. Dept. of Justice  
9001 Mail Service Center  
Raleigh, N.C. 27699-9001  
(919) 716-6600 phone  
(919) 716-6767 fax  
cgoebel@ncdoj.gov

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the attached **Respondent's Memorandum in Support of the ALJ's Decision** was served on Counsel for Petitioner, the pro-se Intervenor-Respondents, the CRC's Executive Secretary, and the CRC's Counsel as follows:

By U.S. Mail:

James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

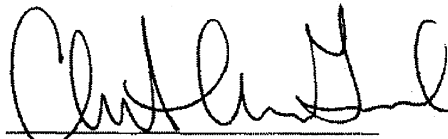
James L. Conner, II, Esq.  
Attorney for Petitioners  
311 E. Main Street  
Durham, NC 27701

Earl & Mary Jane Westphal  
Intervenor-Respondents  
PO Box 336  
Oriental, NC 28571

And by Hand Delivery to:

Jennie Wilhelm Hauser  
Special Deputy AG & CRC Counsel

This the 11 day of September, 2008.



Christine Anne Goebel  
Assistant Attorney General

**James L. Conner II**

Attorney & Mediator

September 10, 2008

**RECEIVED**  
SEP 11 2008

**Morehead City DCM**

Jim Gregson  
Division of Coastal Management  
400 Commerce Way  
Morehead City, NC 28557

Angela Willis  
Division of Coastal Management  
400 Commerce Way  
Morehead City, NC 28557

Bob Emory, Chair  
Coastal Resources Commission  
c/o Jim Gregson

Re: Cowell & Dressler v. NC DENR, DCM  
06 EHR 1185

Dear Mr. Gregson, Chairman Emory, and Ms. Willis:

Please find enclosed Petitioners' Written Argument, Written Exceptions, Proposed Decision, Transmittal of Proposed Decision, and Certificate of Service in the above matter.

**I also hereby request opportunity to present an oral argument to the Commission.**

Please let me know if you need anything further prior to the meeting, or if I have omitted anything you require.

With thanks and best regards, I am

Sincerely yours,

  
James L. Conner II

RECEIVED

SEP 11 2008

STATE OF NORTH CAROLINA  
COUNTY OF PAMLICO

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Morehead City DCM  
06 EHR 1185

Henry S. Cowell and )  
Carolyn E. Dressler, )  
Petitioners, )  
v. )  
NC DENR, Division of Coastal )  
Management, )  
Respondent, )  
and )  
Earl and Mary Jane Westphal, )  
Intervenor-Respondents, )

**WRITTEN ARGUMENT  
OF PETITIONERS**  
  
**to the  
COASTAL RESOURCES COMMISSION**

NOW COME your Petitioners, by and through counsel, and offer the following written arguments for your consideration.

**OVERVIEW**

This is a case about a standard event—the issuance of a general permit for construction of a residential pier—that took place under extraordinary circumstances.

The circumstances were unusual on at least three counts. First, a neighbor to the proposed development not only objected, but suggested a specific alternative location for the project. Second, this proposed alternative took the project out of the pristine stand of coastal wetlands that the project was proposed to traverse. Third, this was possible because the subject property had water frontage that was of two different characters: part was sheathed in coastal wetlands over one hundred feet deep, and part was bulkheaded with direct access to the open water.

Despite these unique factors, and a statutory and regulatory mandate not to permit development in coastal wetlands if alternatives exist, DCM chose to ignore the chance to protect the coastal wetlands and issued a permit for the pier system to cross 110 feet of formerly pristine coastal wetlands, resulting in unnecessary damage to the wetlands from which they have not recovered two and a half years later. This decision violated the law on several counts.

**FACTUAL SUMMARY**

The Proposed Decision contains extensive findings of fact, and they will not be repeated here. The following is a summary of the facts most important to an understanding of the case.

The project at issue is a pier with a fixed platform, totaling 151 feet in length. The pier begins on uplands, crosses 110 feet of coastal wetland, emerges above open water, and terminates in a two-level platform nine feet by thirty-one feet. The project was permitted by Stephen Lane of DCM on May 10, 2006. Construction started that day and was completed within a few days.

Petitioners, Mr. Hank Cowell and Dr. Carolyn Dressler, are neighbors to the east who share a previously pristine stand of coastal wetlands with the permittees. Mr. Cowell and Dr. Dressler were quite concerned when they heard that there were plans to extend a pier across these pristine wetlands, and registered their concerns promptly with DCM, both by letter and by telephone, months before the permit was issued. Importantly, they not only shared concerns, but described an alternative, easily available location for the project. This alternative location would avoid the wetlands completely (other than a thin band) by originating the pier at the existing bulkhead on the permittee's property. The alternative also had the advantage of requiring a much shorter pier, making it both simpler and less expensive.

Despite this prior notice of a more protective alternative, DCM permitted the pier in the original location, rather than the alternative. The construction of the pier destroyed a swath of the coastal wetlands six to eight feet wide and 110 feet long. After two growing seasons, only about ten per cent regrowth has occurred.

## ARGUMENT

### I. **DCM VIOLATED THE STATUTE (CAMA) WHEN IT ISSUED THIS PERMIT.**

The Coastal Area Management Act (CAMA) is the controlling substantive statute in this case, found at N.C. Gen. Stat. §113A-100 et seq. CAMA requires that "every person before undertaking any development in any area of environmental concern shall obtain . . . a permit pursuant to the provisions of this part." N.C. Gen. Stat. §113A-118 (a). The Act goes on to allow for 'general permits' in certain instances. N.C. Gen. Stat. §113A-118.1. Individual developments under general permits are exempted from the notice provisions of G.S. 113A-119. There are no other exceptions for general permits to the rules applicable to permitting. *Id.*

When a permit is applied for, CAMA requires that the responsible official "**shall deny** [the] application for a permit" if any of ten conditions exist. N.C. Gen. Stat. §113A-120(a)(emphasis added). If none of these conditions exist, a permit shall be granted. N.C. Gen. Stat. §113A-120(b).

The question here is whether any of the ten conditions existed that would require that the permit be denied. The answer is yes. The ninth condition reads as follows:

The responsible official or body **shall deny** an application for a permit upon finding:

\* \* \* \*

(9) In any case, that considering engineering requirements and all economic costs there is a **practicable alternative** that would accomplish the overall project purposes with less adverse impact on the public resources.

N.C. Gen. Stat. §113A-120(a)(9)(emphasis added).

So, if there was an alternative that (1) was practicable (considering engineering requirements and costs), (2) would accomplish the overall project purposes, and (3) would have less adverse impact on the public resources, DCM was **required** to deny the permit request.

The alternative suggested by Dr. Dressler and Mr. Cowell was practicable. It offered no special engineering requirements, and would have been less expensive than the alternative that was permitted, since it would have been much shorter. No one contends otherwise. There was absolutely no evidence or argument that there was any issue with engineering requirements in this case or that the alternative would not cost less than the as-built.

The alternative would have accomplished the overall project purposes—to have boat docks on the property.

Finally, the alternative would have had less adverse impact on the public resources. This is obvious. The testimony described the damage to the marsh caused by the as-built project. The alternative would have taken the project almost entirely out of the coastal wetland, crossing only about six feet of wetland vegetation—not even requiring a piling within the wetland—instead of 110 feet with eighteen pilings jetted into the wetlands.

There was testimony at trial that, because of the shape of the parcel of land, the alternative would require a longer walk through the riparian upland buffer to the pier than the as-built. Some witnesses opined that this extra walking across the buffer, by the two people in permittee's family plus any guests, would be an impact that would outweigh the impact to the coastal wetland. Common sense tells us that this is absurd. Even the permittee's own expert, Mr. Morrison, testified that it 'would take a lot of foot traffic' to cause any erosion and that any such effects were speculative. The Lower Neuse Riverkeeper was sufficiently concerned about the damage to this marsh that he drove to Raleigh to testify without compensation. He testified that, of course, the damage to the marsh was by far the bigger concern, and it was not a close call. This is further confirmed by the Buffer Rule itself, which has a detailed Table of Uses, but offers no restriction whatsoever on people walking in a buffer on their own land. *See* discussion of buffer rule, below.

There is no serious question that the alternative location would have been more protective of the environment, or in the words of the statute, would have had "less adverse impact on the public resources."

It also important to note that this is not a case where DCM might be excused for having not noticed that an alternative existed. This alternative was offered to DCM in November 2005, months prior to the permitting decision in May 2006. Record p 2537-39.

DCM violated the law, namely N.C. Gen. Stat. §113A-120(a), when it issued the subject permit in spite of the known existence of a practicable alternative with markedly less adverse impact.

**II. DCM VIOLATED THE CRC'S CAMA RULES WHEN IT ISSUED THIS PERMIT.**

This Commission has promulgated an extensive set of regulations to implement CAMA. 15A NCAC 07H. There are a number of Areas of Environmental Concern (AECs) described and regulated in those regulations. 15A NCAC 07H .0204 *et seq.* These AECs are designated pursuant to the mandate of the legislature in CAMA. N.C. Gen. Stat. §113A-113.

**A. DCM Violated the Coastal Shorelines AEC Use Standards In Issuing This Permit.**

There are four AECs defined within the 'estuarine and ocean system.' 15A NCAC 07H .0201. One of the four AECs is the 'Coastal Shorelines' AEC. 15A NCAC 07H .0209. The site of this project is in the Coastal Shorelines AEC. *See Findings of Fact.*

The Coastal Shorelines regulation contains Use Standards, which state *inter alia*:

In every instance, the particular location, use, and design characteristics shall comply with the general use and specific use standards for coastal shorelines, and where applicable, the general use and specific use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0209(d). The use standards go on to say:

Development **shall not** have a **significant adverse impact** on estuarine and ocean resources. **Significant adverse impacts shall include . . . development that would directly or indirectly . . . alter coastal wetlands .**

15A NCAC 07H .0209(d)(4)(emphasis added).

It is unquestionable that this pier and walkway "alter[ed] coastal wetlands." The regulation does not merely prohibit destruction of wetlands. It prohibits—using mandatory, not permissive language—**altering** coastal wetlands. "Alter" means to "make changes to something or somebody, or be changed or become different." *Encarta Dictionary* (2008). It is uncontested that these wetlands were changed by this project. *See Findings of Fact.*

It might be suggested that the regulatory prohibition on altering coastal wetlands must have some 'give' to allow piers and boat docks to be permitted for citizens who desire them, but who own property completely sheathed in coastal wetlands on the water side. Even though the regulation provides no such give, we might want to read some implied flexibility into the regulation for hardship cases. This case is not a hardship case. As is discussed extensively in the Findings of Fact and other sections of this brief, there was a clear alternative that would not have required any alteration of coastal wetlands.

DCM violated 15A NCAC 07H .0209(d) by permitting this project.

**B. DCM Violated the General Use Standards In Issuing This Permit.**

One of the four AECs is "Coastal Wetlands." 15A NCAC 07H .0205. The area impacted by this project is unquestionably coastal wetlands. *See Findings of Fact.*

The specific use standards for coastal wetlands state that:

Highest priority of use shall be allocated to the conservation of existing coastal wetlands. Second priority of coastal wetlands use shall be given to those types of development activities that require water access and cannot function elsewhere. . . . **In every instance**, the particular location, use, and design characteristics **shall be in accord with the general use standards for coastal wetlands**, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0205(d)(emphasis added). The General Use Standards of section .0208 do apply to coastal wetlands and to this project.

The General Use Standards are found at 15A NCAC 07H .0208(a) and provide in pertinent part as follows:

Before being granted a permit by the CRC or local permitting authority, there **shall** be a finding that the applicant has complied with the following standards:

\* \* \*

(B) Before receiving approval for location of a use or development within these AECs, the permit-letting authority **shall find that no suitable alternative site or location** outside of the AEC exists for the use or development and, further, that the applicant has **selected a combination of sites and design that will have a minimum adverse impact** upon the productivity and biologic integrity of **coastal marshland . . . .**

15A NCAC 07H .0208(a)(2)(emphasis added).

There was no finding in this permit process that that the applicant had complied with those standards, namely that the Westphals had selected a combination of sites and design that would have the minimum adverse impact on coastal marshland. There was likewise no finding that no suitable alternative site or location outside the AEC existed for this project.

In fact, no such finding could be made, since there was a perfectly suitable alternative site, as has been discussed thoroughly above and in the Proposed Decision.<sup>1</sup> This is really the

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<sup>1</sup> DCM argues that it made all findings that are required of it by simply issuing the permit. Its argument goes that otherwise it would be issuing permits without following the law, so those who review DCM's actions are bound to assume that DCM mentally made all the findings that are required under the law, even though there is no note, scribble, or any other writing to show that they made any such findings. This sort of 'trust us, we wouldn't do anything wrong' attitude is directly contrary to the intention of the APA that administrative decisions be reviewable. If OAH, the CRC, and the Superior Courts are to simply assume that the agency 'must have' made all findings



crux of the matter. Failure to make a finding is merely an administrative oversight if the finding could have been made, but was not. In this case, the intent of the regulation—to protect AECs from development if there is a viable alternative—was violated by permitting this development to plow right through 110 feet of pristine coastal wetlands, with a practicable alternative sitting unused a few meters away.

DCM violated the General Use Standards in permitting this project. The General Use Standards are part of the law. Therefore, DCM violated the law when it permitted this project.

### **III. THE NEUSE RIVER BUFFER RULE WAS ALSO VIOLATED WHEN DCM ISSUED THIS PERMIT.**

The Neuse River Basin Buffer Rule is found at 15A NCAC 02B .0233. The buffer rules are not administered by DCM, but by the Division of Water Quality (DWQ). For this reason, compliance with the buffer rule may or may not be a proper subject of this Commission's Decision. What is certainly true is that either the buffer rules apply or they do not apply. Neither party may have it both ways, arguing the buffer rules when it suits them, and denying their relevance when the buffer rules do not suit them. Petitioners will assume for purposes of this brief that, since the ALJ addressed buffer issues, the Final Agency Decision may do so also.

#### **A. There Was No Buffer Authorization and No Determination of No Practical Alternative—Both Required by Law.**

In order to determine whether a use or activity is allowed in the buffer, one looks at section 6 of the Buffer Rule—Table of Uses. Uses may be exempt from the buffer rules, allowable, allowable with mitigation, or prohibited. “Water dependent structures” are not exempt, but they are “allowable”. 15A NCAC 02B .0233(6). “Water dependent structures” is a term defined in 15A NCAC 02B .0202 (67). It is uncontroverted that the pier meets this definition.

An Allowable use “may proceed within the riparian buffer provided that there are no practical alternatives to the requested use pursuant to Item (8) of this Rule. These uses require written authorization from the Division [DWQ] . . . .” 15A NCAC 02B .0233(7)(b). When an applicant applies for and receives a CAMA General Permit to construct a pier that is within the Neuse or Tar-Pamlico River Basins, the applicant must also receive written buffer authorization from the DWQ.

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required by law, then review of the agency's decisions is meaningless. A ‘finding’ is defined to mean one of two things: “(1) a piece of information obtained from an investigation, especially scientific research or (2) a conclusion that is reached and recorded at the end of a judicial or other formal inquiry.” *Encarta Dictionary* (2008). These ‘assumed findings’ offered by the agency do not meet either definition. There was no investigation, and there was no recording of any conclusion. There must be some evidence that a finding has been made—ranging from a check mark on a list of required findings at minimum, to a full written report detailing the investigation that lead to the finding at maximum—in order to show that the decisionmaker was aware of his obligation to make each of the findings required by law and in fact made the findings.

Mr. Al Hodge, a Regional Supervisor for DWQ, conceded that a buffer authorization was required for this project, that no buffer authorization was issued, and that this was a violation of the law. *See* Finding of Fact 54.

The Rule also requires that there be a ‘determination of no practical alternatives’ in order to receive a buffer authorization, including a finding of fact that “the basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality.” 15A NCAC 02B .0233(8)(a)(i).

This section has very detailed requirements about what the applicant must submit in order to show that there is no practical alternative. The permittee in this case submitted nothing in any attempt to comply with 15A NCAC 02B .0233(8). Therefore, there was no finding of fact as required by the rule, and no determination of no practical alternatives. T pp 870-872.

Therefore, there were two violations of the Buffer Rule admitted to by the State’s witnesses: no buffer authorization was issued by DWQ and the permittee failed make the required submissions to show the lack of a practical alternative. The Buffer Rule is part of the law. Therefore, DCM violated the law when it permitted this project.

#### **B. The Buffer Rule Does Not Provide Justification for Ignoring the Alternative.**

The State attempted at trial to show that foot traffic in the buffer leading to the proposed alternative location for the pier was a sufficient reason to determine that the alternative location should not be permitted. This foot traffic would be from the permittee and his wife, along relatively level uplands, contained behind a bulkhead. Both common sense and the Record (as detailed in the Proposed Decision findings of fact) show that this farfetched concern is far overshadowed as a factual matter by the very real damage to the coastal wetlands caused by the as-built project. The alternative was the vastly preferable route for this project, considering all impacts to public resources.

As a matter of law, this argument also fails. There is no authority under the buffer rule for either DCM or DWQ to deny a permit based on the fact that a family will walk across its property that happens to be in the buffer. Neither is there authority for DCM or DWQ to regulate or restrict that family’s ability to walk on its property. *See* 15A NCAC 02B .0233, and in particular, the Table of Uses, 15A NCAC 02B .0233(6).

The absence of any regulation of family foot traffic in the buffer rule, despite the very careful (some would say intrusive) limitations on activities in the buffer, does two things. First, it shows that factually family foot traffic is not a real concern, and the negligible environmental consequences cannot outweigh the serious adverse impacts to the coastal wetlands in this case. Second, it shows that family foot traffic cannot legally be used as a basis for denying a permit, and therefore cannot be used as a basis for disqualifying the alternative route in this case.


### **CONCLUSION**

DCM violated several laws when it issued this permit. A practicable, economic alternative location existed for this pier/dock system. That alternative location would clearly

have been more protective of the coastal wetlands. CAMA itself required DCM to select that alternative, or deny the permit, as did the General use Standards in the regulations. In addition, coastal wetlands were altered unnecessarily and in violation of the Coastal Shoreline Use Standards. Finally, the Neuse River Basin Riparian Buffer Rule was violated in several respects, including the failure of the permittee to submit required information regarding alternatives and the failure of the agency to issue a buffer authorization.

This permit should be rescinded for having been issued in violation of the law, and the permittee should be required to remove the pier from the coastal wetlands. The permittee may choose to obtain a permit for the alternative location and rebuild. While this result may seem harsh, it must be remembered that the permittee chose to build his pier immediately upon issuance of the permit, and before a third party appeal could be filed (which would have stayed the permit), knowing that objections were being pursued. The permittee took on the risk that his permit would be invalidated based upon the objections when he rushed his project to completion.

Respectfully submitted, this the 10<sup>th</sup> day of September 2008.



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STATE OF NORTH CAROLINA

COUNTY OF PAMLICO

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 EHR 1185

Henry S. Cowell and )  
 Carolyn E. Dressler, )  
                   Petitioners, )  
                   ) )  
                   v. ) )  
                   ) )  
 NC DENR, Division of Coastal )  
 Management, )  
                   Respondent, )  
                   ) )  
                   and ) )  
                   ) )  
 Earl and Mary Jane Westphal, )  
                   Intervenor-Respondents, )

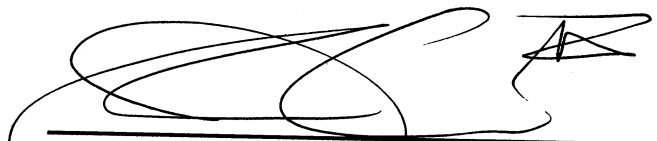
**TRANSMITTAL  
 OF PETITIONERS'  
 PROPOSED DECISION**

**to the  
 COASTAL RESOURCES COMMISSION**

TO THE HONORABLE MEMBERS OF THE COASTAL RESOURCES COMMISSION:

Enclosed or attached is our Proposed Decision. It has been my experience that these are usually very hard to read, with parts marked out, different type faces, and so forth. I have tried to make this a little better by using the following system: parts of the ALJ Decision to be deleted are both lined-through and gray, so they sink into the background; parts to be added are in bold; parts to be retained are in normal type; and finally, explanations are in italics. Though this is complicated, if you just read through it, reading only the normal and bold type, ignoring the gray and italics, you can see what the decision would be if adopted.

Respectfully submitted, this the 10<sup>th</sup> day of September 2008.




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SEP 11 2008

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 EHR 1185

COUNTY OF PAMLICO

Morehead City DCM

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Henry S. Cowell, III and Carolyn E. Dressler, )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 North Carolina Department of )  
 Environment and Natural )  
 Resources, Division of Coastal Management, )  
 )  
 Respondents, )  
 )  
 and )  
 )  
 Earl C. and Mary Jane Westphal, )  
 Intervenor-Respondents. )

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**PROPOSED  
FINAL AGENCY DECISION**

This contested case was heard on October 15-18, 2007 at the Craven County Courthouse in New Bern, North Carolina, and on November 26-27, 2007 and February 4-6, 2008 at the Lee House Hearing Room, Raleigh, North Carolina, before the Honorable Selina M. Brooks, Administrative Law Judge, on a petition for contested case hearing regarding the Division of Coastal Management's (DCM's) issuance of a general permit under the Coastal Area Management Act (CAMA) for development of a pier on Intervenor-Respondents's waterfront lot in Oriental, North Carolina in Pamlico County.

This Final Agency Decision is made by the Coastal Resources Commission.

**APPEARANCES**

For Petitioner: James L. Conner, II, Esq.  
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For Respondent: Christine A. Goebel, Esq.  
Assistant Attorney General  
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For Intervenor-Respondents:

Earl C. Westphal, Jr. and Mary Jane Westphal, Pro se  
PO Box 336  
Oriental, NC 28571

### APPLICABLE LAW

1. The relevant Statute in this case is N.C.G.S. § 113A, Article 7, “Coastal Area Management Act” (CAMA). Also applicable are the associated administrative rules for coastal management, found at 15A N.C.A.C. 07 *et seq.* These are the rules of the Coastal Resources Commission (CRC) for the administration of CAMA. (Stipulation 6)
2. Under CAMA, “development” in an area of environmental concern (“AEC”) requires a permit. N.C.G.S. § 113A-118. The proposed and permitted pier is “development” and is in an AEC, and requires a CAMA permit. (Stipulation 7)
3. ~~N.C.G.S. § 113A-120 states that DCM “shall issue” a CAMA permit unless there is a finding that the proposed development will significantly impact specified resources listed in that statute. A permit must be issued for the proposed development unless the development does not meet one of the bases for denial found at N.C.G.S. § 113A-120.~~

*This statement misstates the law. It is more properly part of the Conclusions of Law, and a more complete and accurate statement of the CAMA permitting law applicable to this case is included therein.*

4. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the CRC has designated AECs and has adopted use standards or state guidelines for development within these areas. 15A N.C.A.C. 07H.0100 *et seq.*
5. Petitioners bear the burden of proof on the issues under N.C.G.S. § 150B-23 *et seq.* See also *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998). In this case, Petitioners have the burden of demonstrating by a preponderance of the evidence that CAMA General Permit No. 45215 was improperly issued to the Intervenor-Respondents by the Respondent. Under N.C.G.S. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. *Britthaven, Inc. v. Dep’t of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 745 (1995).
6. ~~The agency’s conclusions of law should be upheld unless they are plainly erroneous or inconsistent with the regulations. *Simone v. N.C. School of the Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995).~~

*This statement misstates the law both by misstating the holding of the court and by omitting that the court determined in that case that the agency had violated its own regulations and affirmed*

*the judgment against the agency. The court did not say that an agency's conclusions of law should be upheld, it said that an "agency's interpretation of its own regulation should be accorded due deference unless it is plainly erroneous or inconsistent with the regulation." Simonel v. N.C. School of the Arts, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995). The court went on to reverse that agency's interpretation of its own regulation.*

7. N.C.G.S. § 150B-34(a) provides that "[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

### **PREHEARING MOTIONS**

1. On September 11, 2006, the Permittees, Earl and Mary Jane Westphal, through counsel, filed a Motion to Intervene as Intervenor-Respondents in this case. On September 28, 2006, the presiding Administrative Law Judge (Judge Mann was the assigned ALJ at that time) issued an Order granting the motion to intervene.
2. On October 5, 2006, Respondent filed a Motion for Partial Dismissal for lack of subject matter jurisdiction pursuant to N.C. R. Civ. P. 12(b)(1). On or about October 11, 2006, Intervenor-Respondents filed a similar Motion for Partial Dismissal for the same reasons. On or about October 13, 2006, Petitioners filed a Response to the Motions. The parties' arguments were heard at an October 17, 2006 hearing on this matter held at the Craven County Courthouse in New Bern, North Carolina. Upon considering the briefs and oral arguments of the parties, Judge Mann denied Respondents's and Intervenor-Respondents's Motions to Partially Dismiss for lack of subject matter jurisdiction. This ruling was memorialized in an Order issued January 30, 2007.
3. On June 29, 2007, Respondent filed a Motion in Limine to exclude the testimony about whether the pier as-built meets DCM's pier rules as enforcement actions not related to whether the decision to issue the permit was correct or not. On or about August 1, 2007, Petitioners filed a Response to the Motion. On August 27, 2007, the Undersigned filed a written Order denying Respondent's Motion. At the October 15, 2007 hearing on this matter, Respondent raised the issue again based on a new court ruling and the Undersigned heard oral arguments by the parties. Upon considering the briefs and oral arguments of the parties, the Undersigned denied Respondent's Motion in Limine.

### **ISSUE**

Whether CAMA General Permit No. 45215 was properly issued by the DCM to Intervenor-Respondents in light of the provisions of the CAMA and the administrative rules for coastal development promulgated by the Coastal Resources Commission (CRC).

## TESTIFYING WITNESSES

### For Petitioners:

Carolyn Elizabeth Dressler, Petitioner, testified on her own behalf, and is an adjacent riparian owner on the east side of the Intervenor-Respondents's lot. (T pp 58 *et seq.*)

James Anthony Spangler, President of Spangler Environmental Consultants, is a professional environmental consultant. Mr. Spangler was offered and accepted as an expert in "coastal and riparian environment and regulation of development in coastal and riparian areas" over the objection of Respondent. (T p 121)

Henry S. Cowell, III, Petitioner, testified on his own behalf, and is an adjacent riparian owner on the east side of the Intervenor-Respondents's lot. (T pp 595 *et seq.*)

Lawrence Carl Baldwin is the Lower Neuse Riverkeeper for the Neuse River Foundation, a non-profit organization that seeks to protect the Neuse River watershed. Mr. Baldwin was tendered and accepted as an expert in "general environmental conditions of the Lower Neuse watershed." (T p 636)

Adam Crawford Arrington, Professional Engineer (in the state of Alabama) and GPS consultant, was called to testify as a rebuttal witness by Petitioners. (T p 2038)

### For Respondent:

Alton Ray Hodge, a Regional Supervisor for the Division of Water Quality's (DWQ) Surface Water Section, has held this position since 2004. (T pp 801-04)

Stephen Douglas Lane, DCM Field Representative for Pamlico County at the time of this permit issuance. (T pp 955-70)

Michael Ted Tyndall, Assistant Director of the Division of Coastal Management in charge of Permits and Enforcement. (T pp 1365-78)

### For Intervenor-Respondents:

Thelma Flanagan is the adjacent riparian owner on the west side of the Intervenor-Respondents's lot and former owner of the Intervenor-Respondents's lot. (T pp 1502-03; 1515-16)

Peter Overgaard, President of IBX Contracting and a licensed marine contractor.



Leonard Alan Rollman is Vice President of IBX Contracting.

William Stephen Morrison, Co-founder of Land Management Group, was designated as an expert in “environmental consulting” over the objection of Petitioners. (T p 1775)

Earl C. Westphal, Jr., Intervenor-Respondent, testified on his own behalf. (T pp 1811 *et seq.*)

### **EXHIBITS RECEIVED INTO EVIDENCE**

Stipulated Exhibits included with the Prehearing Order signed and filed on October 15, 2007:

- A. CAMA General Permit No. 45215
- B. DCM's Permit File
- C. Order of the Chairman of the CRC granting the Petitioners's Third Party Petition
- D. Relevant portions of the CAMA (N.C.G.S. § 113A-100 *et seq.*)
- E. Relevant portions of the CRC's Administrative Rules for Coastal Development (15A N.C.A.C. 07 *et seq.*)

#### Petitioners's Exhibits:

1. CAMA General Permit No. 45215 (T p 219)
2. Respondent's supplemental responses to Petitioners's first discovery request (T p 59)
3. Resume of Spangler (T p 110)
4. AutoCAD enlarged drawing by Spangler and photographs identified as Numbers 1-17 from visit (T p 174)
5. Water Quality Certification No. 3494 (T p 477)
6. Army Corps of Engineers Regional General Permit, effective 3/26/05-12/31/10 (T p 391)
7. 15A NCAC 02B .0200 series (T p 440)
8. Adjacent Riparian Property Owner Statement, signed by Cowell and Dressler (T p 663)
10. Adjacent Riparian Property Owner Statement, blank (T p 614)
13. 11/16/05 Letter from Cowell and Dressler to Lane (T p 620)
14. Certified mail receipt, cash register receipt, and signed receipt card (T p 621)
15. Cowell's log of telephone conversations with Lane on 5/2/06 and 6/16/06 (T p 671)
17. Photograph identified as Part 1, Number 1 (T p 72)
17. Photographs identified as Numbers 2-30 and 37-48 (T p 725)
19. Pier statistics summary (T p 1929)
23. Pamlico County GIS map (T p 732)
29. Slab of live oak tree (T p 735)
33. Enlargement of map with measurements (T p 1926)

35. Estimate prepared by IBX for Cowell (T p 1741)
36. Hydrographic map of Brite's Creek (offer of proof only)
39. Five-page document consisting of map, chart, diagram, Google map, and key (T p 2074-78, for the limited purpose of showing where Ms. Dressler took her depth measurements but not for depth contours or shorelines)

Respondent's Exhibits:

1. Lane's calendar notes and phone log (T p 1081)
- 2A. Photograph (T p 1081)
- 2B. Photograph (T p 1090)
- 2C. Photograph (T p 1090)
- 2D. Photograph (T p 1090)
- 2E. Photograph (T p 1090)
- 2F. Photograph (T p 1090)
- 2G. Photograph (T p 1090)
- 2H. Photograph (T p 1090)
- 2I. Photograph (T p 1090)
- 2J. Photograph (T p 1090)
- 2K. Photograph (T p 1090)
- 2L. Photograph (T p 1156)
- 2M. Photograph (T p 1156)
- 2N. Photograph (T p 1156)
- 2O. Photograph (T p 1156)
- 2P. Photograph (T p 1156)
4. Aerial photograph of the site (T p 1082)
5. Third party hearing request, minus staff's recommendation (T p 1084)
6. Resume of Tyndall (T p 1376)

Intervenor-Respondents's Exhibits:

- 20-2 Affidavit of Rollman (T p 1829)
- 20-4 Letter from Flanagan (T p 1831)
- 21A-C Resume of Morrison (T p 1830)
- 22A-B 11/21/07 notes by Morrison (T p 1830)

**FINDINGS OF FACT**

*The Findings of Fact in the ALJ Decision were needlessly voluminous. Approximately 27 findings have been deleted to focus this decision on the actual issue in the case. Also, the Findings of Fact in the ALJ Decision were remarkably one-sided. Of the 124 findings, only nine*

*made any reference at all to the testimony of Petitioners' five witnesses, including two who were properly qualified as expert witnesses. An effort has been made to balance the findings.*

Based upon careful consideration of the applicable law, and evidence received during the contested case hearing, the entire record of this proceeding, and having weighed the credibility of the testimony of the witnesses, the Undersigned makes the following findings of fact:

### **The Parties**

1. Petitioners Henry S. Cowell and Carolyn E. Dressler own the property located at 1148 Orchard Creek Rd. in Oriental, Pamlico County, North Carolina. They have owned this property since July 2003. This property is adjacent to the lot where the pier was permitted. (Stipulated Fact 1) Mr. Cowell enjoys nature and the environment, boating, and the view of the marsh and wildlife from his property. He has been a member of Nature Conservancy and the Chesapeake Bay Foundation. (T pp 601-06) Ms. Dressler enjoys nature, gardening, fishing, environmental causes, birding, doing animal rescue, and enjoying the view and serenity of the marsh. She has been involved with the Audubon Society, the Chesapeake Bay Foundation and the Neuse River Foundation. (T pp 61-67)
2. The Respondent is the North Carolina Department of Environment and Natural Resources ("Agency" or "DENR"), Division of Coastal Management ("DCM"). (Stipulated Fact 3) The Respondent is the state agency authorized to issue permits and enforce regulations under the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.*
3. The Intervenor-Respondents/Permittees, Earl C. Westphal, Jr. and Mary Jane Westphal, own the property located at 309 Peninsula Dr., in Oriental, Pamlico County, North Carolina. Their lot is adjacent to Petitioners's lot. The Permittees have owned the lot since March 2005. (Stipulated Fact 2) Mr. Westphal purchased this property in order to build a house, retire, and use the property to boat, fish, cruise, and crab. He wanted a straight pier with a path straight from the future house-site to make it easier to haul things to and from the dock and boats ~~and for his elderly parents to access the dock and boats.~~ (T pp 1814-21)

*Mention of elderly parents is irrelevant and speculative, since there is no evidence that Mr. Westphal's parents have ever been to the property and it is unknown whether a house will ever be built on the lot and whether any such house will be built prior to the death of the elderly parents.*

- 3a. **The Westphal lot is vacant, and the Westphals at all relevant times to this case were residents of Maryland. See, e.g. Stip. Exh. A. Three and a half years after the Westphals' purchase of the property, the Westphals have not begun to build a home. These facts were uncontested.**

### **The Property**

4. Both lots (Petitioners's lot and Intervenor-Respondents's lot) are adjacent to Brite's Creek, part of the Neuse River Basin, and subject to the North Carolina Department of Environment

and Natural Resources, Division of Water Quality's (DWQ) Neuse River Basin Buffer Rules. (Stipulated Fact 4)

5. Portions of the site are within or adjacent to the Coastal Shorelines, Coastal Wetlands, Public Trust Area and Estuarine Waters, Areas of Environmental Concern (AEC), as defined by the administrative rules for coastal development by the Coastal Resources Commission (CRC). (Stipulated Fact 5)

6. The Westphal lot is less than an acre in size with a section of coastal wetlands ~~and a narrow wooded strip along the Westphal Flanagan property line on the west side. It also has a small amount of bulkhead that adjoins the Flanagan bulkhead~~ **and "it's got a little wooded strip kind of between - down the middle, you know, maybe towards the west a little bit. It's got a bulkhead at the end on the west side adjoining Ms. Flanagan's property on the west . . ."** (T pp 979-80)

*This finding does not accurately reflect the testimony, but restates it with added modifiers and other added words that slant the testimony in an adversarial way. The actual testimony about the Westphal lot is substituted. T p. 979-80. There is nothing there about the wooded strip being on the property line or about a 'small amount' of bulkhead.*

7. Based on personal observation at the site, the Undersigned notes that the Cowell-Dressler lot borders the Westphal lot on the east side ~~and that there is no wooded strip on the Cowell-Dressler Westphal property line.~~

*The deleted clause of this finding simply is not true, as is shown on aerial photos of the two lots. P. Exh. 9, Record p. 2265. In addition, it is irrelevant to any issue in this case.*

### **CAMA General Permits, Generally**

~~8. When a CAMA General Permit is being developed, there is interaction between DCM staff and other state and federal resource agencies, including DWQ. (T pp 814, 1423)~~

*This finding was misleading, especially when read in conjunction with the following paragraphs, because it uses the term "General Permit" to mean in some cases the overlying General Permit and in other cases the specific General Permit granted to a specific applicant, such as the Westphals. This finding of fact is true for the former meaning and false for the latter meaning. See 15A NCAC 07H.1201 et seq. contrasted with Stip. Exh. A, Record p. 2532.*

9. CAMA General Permits are a sub-set of the CAMA Major **and Minor** Permits. (T p 964)  
CAMA General Permits are developed for repetitive types of projects, such as piers.  
Applications for pier projects are common. (T p 964) If a project meets the bounds set by the general permit, the project can be permitted more quickly and inexpensively. (T p 965)

*This finding is slightly modified on the basis that the first sentence was not accurate, since General Permits may be issued for activities that require Major or Minor permits. 15A NCAC 07J.1101.*

10. CAMA General Permit applicants are not required to submit a survey for most projects but a sketch is accepted instead. The general permit process is intended to be quicker and less expensive than regular major permits. (T p 987, 1434)

~~11. Other resource agencies participate in the development of CAMA General Permits, and so the impacts of projects that fit into a general permit have already been considered and approved by these other agencies. (T pp 965-66)~~

*This finding fails on the same basis as finding 8. It is true for the overlying General Permit and false for the specific general permit issued to the Westphals. It also fails to take into account the review and findings required by DCM and DWQ even for general permits, as is laid out more specifically in the Conclusions of Law comments. Overall, it creates a false impression, and should be omitted.*

12. DCM is charged with finding a balance between minimizing impacts to resources and allowing reasonable development, specifically riparian development. (T p 1098) One of the ways DCM balances reasonable development and impacts to resources is to consider the concerns of other state resources agencies, such as DWQ, Marine Fisheries, Wildlife Resources, DOT Cultural Resources, and Archives and History, as well as federal agencies such as National Marine fisheries, Environmental Protection Agency, Army Corps of Engineers, and U.S. Fish and Wildlife Service. (T p 901-07, 1099, 1296, 1423)

13. DWQ has a general 401 water quality certification for the construction of piers, having found that such activities can have minimal impacts to water quality, if conditions are met. T p 845; **Pet. Exh 5 (the General Certification), Record pp 2633-2637. Paragraph 9 of the certification requires written concurrence from DWQ for a permit like the one issued in this case. None was issued, in violation of the Water Quality Certification. T pp 870-872.** ~~The federal government also has a general certification for 401 water quality impacts for pier projects permitted by DCM under a CAMA General Permit. (T p 846) Both DWQ and the Army Corps of Engineers do these general certifications instead of issuing the hundreds and thousands of pier permits individually, if the project can be permitted under the CAMA General Permit for piers, because such piers have a minimal impact on the resources. (T p 846) DWQ automatically issues the 401 general certification for projects which receive a CAMA General Permit for a pier. (T pp 847-49)~~

*This finding is modified in order to make clear that the general certifications assume DCM's compliance with CRC regulations to assure that impacts are minimized, and that the certifications themselves have numerous Conditions that must be met for projects to for the General Certification to apply, and specifically that the required written concurrence was not issued in this case.. This is all based on the uncontroverted testimony of State's witness Mr. Hodge. In addition, since there is no issue whether DCM complied with the federal general certification when it issued the permit, this section is irrelevant surplusage, and should be omitted.*

~~14. During the processing of a CAMA General Permit that involves the resource areas of other agencies, a DCM field representative may confer with someone from the respective agency~~

~~so that the issues of other agencies can be factored into the permit decision. (T pp 971, 1296-98)~~

*This finding is deleted on the basis that what "may" be done is not relevant, since there was no evidence any such conferring took place in this case. See T pp 971, 1296-98. In fact, the witness made no claim that any such conferring took p[lace, and said that while he might send a copy of a major permit to DWQ, "under a general permit, we would generally not have that formal communication process." T p. 1297.*

15. A CAMA General Permit does not have an individual application form but, instead, requires the submission of the adjacent riparian notice forms, and general information about the proposed project from the applicant. Once that information is obtained, DCM can write a CAMA General Permit on-site, **so long as all requirements of CAMA and the CAMA Rules are complied with.** (T pp 972-78) An adjacent riparian property owner is someone who owns property abutting another property owner's riparian area. (T p 973)

*This finding omits that, while a General Permit may be written on-site, this does not dispense with the requirements of the law and regulations governing the issuance of permits. See Conclusions of Law.*

16. The intent of DCM's notice requirements is to give the adjacent riparian owners notice about the proposed project and to provide the opportunity to express any objections to it. (T pp 988, 992-93) The substance of objections is more important to DCM when reviewing a general permit application, than the manner in which the objections are transmitted, e.g., telephone conversations, forms, or letters. (T p 988)

17. DCM has the authority to issue a permit even if adjacent riparian owners disagree with it. (T pp 1263, 1435-36)

~~18. DCM does not have the authority to consider proposed mitigation to offset impacts on the environment caused by private projects. DCM only has this authority for public projects pursuant to 15A NCAC 7M.0700 et seq. (T pp 1123, 1298-1300, 1440-42)~~

*The authority of DCM is a question of law, and should be addressed in the Conclusions of Law with citation to a law that supports the conclusion. In addition, this finding is irrelevant, since mitigation is not an issue in this case.*

19. DCM staff issue approximately 2,000 general permits per year. (T p 1373)

### **CAMA General Permit #45215, Application Process and Permit Issuance**

20. Mr. Lane was first contacted about the Westphals's proposed pier in 2005 by IBX, the agents for the Westphals. (T pp 981-82)

~~21. Mr. Lane was very familiar with the subject property and with Petitioners's lot, having been friends with the prior owner, and had visited that lot in the past. (T p 979)~~

*This finding inaccurately depicts Mr. Lane's testimony. He did not say he was "very familiar" with either property. He did state that he had been to the lot prior to Petitioner's ownership, which would have been more than five years ago (see Finding of Fact 1), and that he had been to the property more than two times. T p 979. This level of 'familiarity' adds nothing of meaning.*

22. As part of the permit process, notice of the proposed project is given to adjacent land owners. (Stipulated Fact 9; Stip Ex B)

23. IBX sent notice of the project to the adjacent riparian owners, Ms. Flanagan and Petitioners. (T p 79)

24. After receiving notice of the Westphals's proposed project, Ms. Flanagan replied on the "adjacent riparian owner statement" form dated October 29, 2005. She did not object to the project and agreed to waive the setback requirement for the project as shown on the "adjacent riparian owner statement" form. (Stipulated Fact 10; Stip Ex B; T pp 983-85)

**24a. The drawing on the Notice to Riparian Owner form was so out of scale that it showed the pier extending almost all the way across Brite's Creek (465 feet), and did not show the location of the pier relative to anything with any exactitude, especially from left to right. Testimony of S. Lane, T p 1244-45.**

*This finding is added for fairness and balance. It is the uncontroverted testimony of the State's witness.*

25. ~~A waiver of the 15-foot setback is specific to the project as proposed in the notice. (T pp 984-85) It is not a blanket waiver for any design or location changes. (T pp 1063, 1115-16, 1419, 1458, 1500)~~

*This finding is directly contradicted by the ALJ's finding of fact #37. In addition, this finding is misleading, as it suggests that a very specific project is proposed in the notice. In fact, only a crude sketch with no measurements indicating where the project would lie on the property was included in the notice. Pet. Exh. 8, Record p. 2662. In addition, the notice shows riparian lines that are parallel to the pier, which is not how the DCM's Lane testified the riparian lines run. See Findings of Fact 106 & 108; R. Exh. 4.*

26. After receiving notice of the Westphal proposed project, Petitioners submitted objections to the proposed development which were received by DCM. These objections were submitted in the form of Petitioners's response on the "adjacent riparian owner statement" form dated November 5, 2005, a letter to DCM's Stephen Lane dated November 6, 2005, and objections made by telephone by Mr. Cowell to Mr. Lane. The objections specifically proposed an alternative location for the proposed walkway and pier that Petitioners claimed would have less negative impact on the coastal marshes and the environment in general. (Stipulated Fact 11; T pp 79-84, 615-24, 671-75, 981-82, 989-93; Stip Ex B) ~~The proposed alternative was to locate the pier on the Flanagan side of the Westphal property. (T pp 478-81)~~

*This finding is modified on the basis that the last sentence omits that the proposed alternative moved the pier out of the coastal wetlands, and would have it connected to uplands at the*

*existing bulkhead, rather than crossing over 100 feet of coastal wetlands. See other Findings of Fact.*

**26a. The proposed alternative would have moved the pier out of the coastal wetlands, and substantially avoided the impacts to the coastal wetlands that are the subject of this case. Under the alternative, the permittee would have had the same size platform and docks as he proposed. Instead of extending the boardwalk to the platform for 110 feet through protected coastal wetlands, it would have extended a much shorter pier from an existing upland bulkhead, across open water to the platform. In addition, the alternative would not have required the placement of any pilings in the coastal wetlands. T pp 2099, 2100, 288-94, 425-26, 427.**

*This finding is added based on the preponderance of the evidence, which is essentially uncontroverted on these points.*

**26b. This much shorter pier would have been less expensive for the permittee. It would have posed no engineering problems, as it would have been a shorter and simpler structure. Record pp 2537-39; T p 608-611.**

*This finding is added based on the preponderance of the evidence, which is essentially uncontroverted on these points.*

27. Mr. Lane, after passing on the Petitioners' objections to IBX, did not hear from IBX or the Westphals between November 2005 and April or May 2006. (T p 1005) Mr. Lane assumed that the neighbors were discussing and working out the disagreements between them. (T p 1005)

28. After IBX had a signed contract with the Westphals, Mr. Overgaard contacted Mr. Lane and met him on the site on April 26, 2006. (T p 1006; R's Ex 1) Mr. Overgaard placed poles in the water before their meeting to show Mr. Lane the proposed location of the center, far left and far right pilings of the proposed pier. (T pp 1642-43) Mr. Lane, **by eyeballing the poles in relation to the properties, without any actual measurements**, determined that the location complied with the permit and was the correct distance from the Flanagan riparian line. (T pp 1198-1201)

*This finding omits that Mr. Lane's determination was strictly an "eyeballing" with no measurements involved. T pp 1198-1201.*

29. At the on-site meeting on April 26, 2006, Mr. Lane wrote up CAMA General Permit No. 45215, but did not issue it. (T p 1007)

30. DCM staff received the objections from Petitioners. Mr. Lane discussed the Petitioners' objection ~~several times~~ **once or possibly twice** by telephone before permit issuance. **Mr. Lane did not meet with Mr. Cowell on site to see the alternative proposed, and in fact made no attempt to meet with Mr. Cowell until after the permit had been issued. Mr. Cowell made several unreturned calls to Mr. Lane, trying to get a meeting and to bring attention to what he believed was a more environmentally protective alternative.**



(Stipulated Fact 12; T p 1213) **T p 80, 82, 83, 86, 87, 618, 625, 667, 671, 675, 676, 680, 681, 740.**

*The preponderance of the evidence is that Mr. Lane did not discuss the Petitioners' objections several times by telephone before issuance, but only once or at most twice. See citation inserted above. Likewise, Stipulated Fact 12 cited by the Decision does not mention more than one call. In addition, this finding omitted that Mr. Lane failed to meet with Petitioners or have them show him the proposed alternative, until after the permit was issued and the issue was moot. See Finding of Fact 39.*

**30a. Mr. Lane asked Peter Overgaard at IBX whether his clients, the Westphals, wanted to move the pier to the alternate location suggested by Mr. Cowell. Mr. Overgaard reported that they did not. T pp 1010, 1383.**

*See above.*

**31. Over the objections,** ~~After reviewing Petitioners's objections and discussing them with his supervisor.~~ Mr. Lane issued CAMA General Permit No. 45215 on May 10, 2006 on behalf of DCM. (Stipulated Fact 13)

*The finding did not accurately state the content of Stipulated Fact 13. The language is changed to accurately report that stipulated fact, which did not mention Mr. Lane reviewing objections or discussing them with his supervisor.*

**32. CAMA General Permit No. 45215 was issued pursuant to the general permit for piers. (T p 1099; Stip Ex A)** ~~Some of the limitations that this general permit requires and which limit the impacts of the pier on the resources, include height and width limitations for piers, and square-foot limitations for platforms. (T pp 1099-1101)~~

*This finding implied that this particular permit imposes these protections. In fact, it is the CAMA regulations, 15A NCAC 07H .1205, that impose the protections; there is only one protection particularized to this permit. That protection is a requirement that the pier be at least 36 inches off the substrate, and that requirement was violated. Pet. Exh. 1 (the permit), Record p. 2600; Finding of Fact 77; T pp 1091-92.*

**33. The pier was proposed and approved to cross approximately 110 feet of coastal wetland which is subject to the Respondent's jurisdiction and protection under CAMA. DCM indicated on the permit that this is also a primary nursery area, as defined in the Marine Fisheries regulations. (Stipulated Fact 14; Stip Ex A)**

**34. The drawing of the project on CAMA General Permit No. 45215 was not drawn to scale. (T pp 1014, 1197) Mr. Lane also noted that the field depiction of the coastal wetlands on the face of the permit was not intended to show uniform lushness of the wetlands. (T pp 1014, 1133)**

**35. Mr. Lane marked the box on the front of CAMA General Permit No. 45215 which directed the applicant to review the information printed on the back of a CAMA general permit form about the DWQ buffer rules. (T p 1016; Stip Ex A)**

36. Mr. Lane also filled in the line on the general permit form indicating that a building permit may be required from Pamlico County, the applicable jurisdiction for this property. (T p 1013)

*This finding is irrelevant to any issue in the case, and is omitted for the sake of brevity.*

37. The dimensions authorized by CAMA General Permit No. 45215 are the maximum dimensions for the pier project and a smaller pier with the same or lesser impacts could be built under this permit. (T p 1017)

38. On May 11, 2006, Mr. Lane visited the site to check for compliance by IBX with the permit and its conditions. (T p 1036; R's Ex. 1) Mr. Lane met with the contractors and confirmed that they were building the pier in the location and orientation that he had permitted in compliance with 15A NCAC 7H.1204(b). (T pp 1037-38, 1056-57) Mr. Lane indicated to IBX a point on the far shoreline that would show them the correct angle of the riparian line. (T p 1055) **Mr. Lane failed to notice that the pier was being constructed out of compliance with the height requirement of the permit. See other Findings of Fact.**

*This finding, in attempting to emphasize the diligence of Mr. Lane, omits that Mr. Lane failed to notice that the pier was being built out of compliance with the only particular requirement on the permit—the height requirement.*

39. While on-site on May 11, 2006, **after the permit had been issued and work commenced**, Mr. Lane attempted to reach Petitioners to make them aware of the permit issuance, but they were not home when he visited. (T p 1036)

*This finding, in attempting to emphasize the diligence of Mr. Lane, omits that Mr. Lane only tried to contact Mr. Cowell and Ms. Dressler on site after it was too late to matter. See other Findings of Fact.*

40. Mr. Lane took photos of the site and construction on May 11, 2006. (T p 1036; R's Ex. 2A)

41. Mr. Lane made another site visit to check permit compliance and take site-photos on June 7, 2006. (T p 1087; R's Ex 2B-2K) **Mr. Lane again failed to notice that the pier was being constructed out of compliance with the height requirement of the permit. See other Findings of Fact.**

*This finding, in attempting to emphasize the diligence of Mr. Lane, omits that Mr. Lane failed to notice that the pier was being built out of compliance with the only particular requirement on the permit—the height requirement.*

### **Third Party Appeal and Contested Case filing**

42. DCM District Manager Tere Barrett sent a letter on May 12, 2006 notifying Petitioners that a permit had been issued and that they had a right to challenge the permit issuance. (Stipulated Fact 15; Stip Ex B) This is standard DCM procedure where there have been objections to a project. (T pp 1061-62)

43. Mr. Tyndall was first involved in this case when he was copied on Ms. Barrett's letter to Petitioners. He spoke with Ms. Barrett and Mr. Lane about the case. (T p 1377)
44. Petitioners timely filed a third party hearing request, pursuant to N.C.Gen.Stat. § 113A-121.1(b) which was received by DCM staff on May 26, 2006. (Stipulated Fact 16)
45. Third Party Hearing Requests offer neighbors or other objecting parties an opportunity to have their objections heard by the Chairman of the CRC who decides if the third party can file a contested case. (T p 1086) The submission of a third party hearing request stays the permit. (T pp 1086-87)
46. When Petitioners filed their third party hearing request, the pier was already constructed. (T p 1087) **In fact, the pier was already constructed before Petitioners received the letter from Ms. Barrett notifying them of their right to file a Third Party Appeal. T p 795-96.** *This finding improperly implies possible lack of diligence on the part of Petitioners and omits that the pier was already constructed even before Petitioners received the letter notifying them of their right to challenge the permit.*
47. The Chairman of the CRC granted Petitioners's request to file a contested case hearing. This Order was signed on June 12, 2006. This contested case was initiated by a petition filed on June 27, 2006 in the Office of Administrative Hearings. (Stipulated Fact 17)
48. The Permittees, Earl C. Westphal, Jr. and Mary Jane Westphal, were granted the right to intervene on September 27, 2006. (Stipulated Fact 18)

### **The Inter-play between the CRC's Buffer Rules and the EMC's Buffer Rules**

49. The Environmental Management Commission (EMC) has established that **the waters of the Neuse and Tar-Pamlico River Basins are nutrient sensitive, and has developed several strategies to reduce the nutrient input into those basins, so that extra nutrients do not provide food for algae blooms.** (T pp 803, 823) The EMC promulgated riparian buffer rules which were implemented by the DWQ in 2000. (T pp 811, 820)  
*Clarification.*
50. The purpose of the riparian buffer rules is to **describe and protect a buffer to protect the waters (including wetlands) of the Neuse River Basin. T p 2080-81, 2111; Finding of Fact 49.** ~~minimize impacts to the buffer so that its function is maintained. (T pp 812-13)~~ Ground disturbance and tree cutting is limited so that vegetation can reduce sediment and stormwater runoff, and the root systems of the vegetation can remove nutrients from the waters. (T pp 821-22)  
*The first sentence misstates the purpose of the riparian buffer rules. 15A NCAC 02B .0233.*
51. The EMC's Neuse River Buffer Rules require a riparian buffer of 50 feet, measured landward of surface waters or the landward extent of Coastal Wetlands on the property. (T p

819) The 50-foot buffer is sub-divided into the first 30 feet (Zone 1) and the outer 20 feet (Zone 2). (T p 819) Within this buffer, activities are limited by rule **in great detail, including a Table of Uses.** ~~specifically as to impervious surfaces and ground disturbance.~~ (T p 819)

*The limitations on activities in the buffer are contained in the Rule, 15A NCAC 02B .0233, and include much more than impervious surfaces and ground disturbance.*

52. There is some overlapping jurisdiction between DCM and DWQ, and so there is an interlinked relationship between the two divisions. (T pp 809, 904) One of the areas of common jurisdiction between DCM and DWQ are the buffers in the Neuse and Tar-Pamlico River Basins. (T p 811) The CRC's rules allow the EMC's buffer rules to supercede the CAMA 30-foot buffer in these two river basins because the EMC's rules are more strict. (T pp 812, 910-11)

53. When an applicant applies for and receives a CAMA General Permit to construct a pier that is within the Neuse or Tar-Pamlico River Basins, the applicant must also receive buffer authorization from the DWQ. (T pp 815-16) **15A NCAC 02B .0233(7) &(8).**

*Add the regulatory cite.*

**The requirements for a buffer authorization are found at 15A NCAC 02B .0233(7) &(8). Those provisions require that there be a determination of no practical alternatives in order to receive a buffer authorization, including a finding of fact that "the basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality." 15A NCAC 02B .0233(8)(a)(i).**

~~This authorization would certify that the proposed pier location has minimized and avoided the riparian buffer to the greatest extent practicable. (T p 817)~~

*This finding misstated the Rule.*

54. Mr. Al Hodge, a Regional Supervisor for DWQ, conceded that a buffer authorization was required for this project, that no buffer authorization was issued, and that this was a violation of the law. T pp 815-16, 864, and 870. He also testified that at this time, DWQ is understaffed to issue buffer authorizations, but that he and his staff are working on fulfilling the mandate. (T pp 816, 864, 916)

*This finding omitted key, uncontroverted facts.*

~~55. DWQ relies on DCM staff to help educate the public about the need for buffer authorizations in the Neuse River basin, and have held joint training sessions to better train DCM staff about DWQ's rules. (T p 1395)~~

*This finding has no relevance to the issue in the case.*

~~56. Mr. Tyndall testified that personnel moves between positions with DCM, DWQ and the Army Corps of Engineers are common, so that there are strong working relationships and easy communication between the agencies and good understanding of all of the resource areas. (T p 1379) Mr. Tyndall testified that one main reason for hiring Mr. Lane was because of his past work with DWQ and the buffer rules. (T p 1398)~~

*This finding has no relevance to the issue in the case.*

57. Mr. Hodge testified that due to staffing issues, he did not issue a buffer authorization to the Westphals in this case. (T p 864)

*This finding is repetitive of finding 54 and is omitted for brevity.*

~~However, Mr. Hodge also testified that because of Mr. Lane's experience working for DWQ with the DWQ buffer rules and Mr. Lane's ability to apply the DWQ's criteria, the DWQ buffer criteria was considered in this case, albeit by Mr. Lane. (T p 888) Mr. Hodge also testified that having been on site since the pier was built, he would have issued a buffer authorization to the Westphals for the as-built pier if he had to make a decision today because the permitted route had the most minimal impact to the riparian buffer. (T p 913)~~

*This finding is omitted because the evidence cited is speculative. One witness should not, under the rules of evidence, be allowed to testify about another person's state of mind, especially when the witness was not present to observe the other person. N.C. Rules of Evidence, Rule 602.*

58. For the Westphal lot, the DWQ 50-foot buffer extends landward from the landward-most extent of the coastal wetlands. (T p 821)

59. Water-dependant structures, such as piers, are deemed "allowable" activities by the EMC under the Neuse River Buffer Rules. ~~to allow property usage and the reasonable use of a riparian owner's property. (T pp 827, 867, 909)~~ **There are a number of requirements for 'allowable' structures to be authorized, most notably the buffer authorization that did not occur here, which includes a finding of no practical alternative. See Finding of Fact 53.**

*While the first clause was true, it omitted key information. In addition, the rest of the finding contained repetitive language.*

60. **In preparation for this litigation**, Mr. Hodge made a site visit in late September or October 2007 to inspect the constructed pier and the proposed alternative location. (T pp 832-36) He confirmed that the Neuse River Buffer Rules apply to the site and require that the pier structure minimize impacts to the riparian buffer. (T pp 832-33)

*This finding omitted that Mr. Hodge made the visit in preparation for his testimony and not for any regulatory purpose. T pp 832-36.*

61. Construction of a pier always has some impact to the buffer. (T p 1804)

62. One of the easiest ways to minimize impacts to the buffer is for a pier structure and its access to proceed as close to perpendicular through the buffer as possible, not parallel to the buffer. (T pp 833, 914)

63. ~~The upland path or boardwalk access to the pier is part of a pier structure, which is also considered and allowed under the Neuse River Buffer Rules. (T pp 833-38, 881, 944-46)~~

*This finding is deleted on the bases that (1) it is irrelevant since no "upland path or boardwalk" was proposed or approved as part of this project, nor was one proposed as part of the*

*alternative location for the pier; (2) to the extent it is obviously true that one must walk to the beginning of one's pier in order to access it, this finding is still irrelevant since there is no permitting required for a walking path and no basis for jurisdiction to regulate or even consider a walking path under the buffer rule. 15A NCAC 02B .0233 (Table of Uses); T p 2083.*

~~64. It is not reasonable to build a pier and not provide access to it. (T p 1349)~~

*This finding is deleted on the basis that it has no relevance to the issue in this case. The permittees built the subject pier and neither DCM nor the permittee did anything to "provide access to it." They merely did as most do: built a pier that originated on uplands so that they could walk out on it without getting their feet wet. See Permit. This finding of fact has no meaning and is merely argumentative.*

**65. There was some concern expressed about possible erosive effects of walking across the buffer to get to the alternative pier location. T pp 932-34; 1799. However, the preponderance of the evidence shows that there was no significant danger of sedimentation or erosion occurring because of the foot traffic on the upland buffer from this family of two. T pp 1883,1884, 2088, 2062-63, 1779-80, 1797-98. Any such effects were speculative. Id. Ms. Dressler lives next door and follows a similar upland path through her yard (which is in the buffer) with her two dogs to her gardens and dock, and no erosion or denudation has occurred. T pp 2062-63. The three non-State experts all agreed on this, including the expert for the permittee. T pp 1779-98. A bare pathway across the buffer will have negative impacts on the vegetation in the buffer due to the repeated walking. (T pp 932-34) Enough foot traffic on a pathway would wear the ground down to the point where sedimentation and erosion issues may arise. (T p 1779)**

*The preponderance of the evidence shows that there was no significant danger of sedimentation or erosion occurring because of the foot traffic on the upland buffer from this family of two. T pp 1883,1884, 2088, 2062-63, 1779-80, 1797-98. This preponderance of evidence is also supported by common sense: there is no reason, from our own life experiences, to expect that occasional foot traffic by a family will cause denudation and erosion on level uplands.*

**66. Mr. Hodge could not tell from photographs whether the live oak tree cut down at the landward end of the pier was within the buffer or not. (T p 878-79) If the tree was in the buffer, Mr. Hodge felt that the cutting of the tree at the base of the existing pier is an allowable use under the Neuse River Buffer Rules because it accommodates the water-dependant pier structure. and access in a location that minimizes overall impacts to the buffer. (T pp 841-42, 876) However, this is in conflict with the buffer rules themselves, which state that Zone 1 (the first thirty feet) of the buffer "shall consist of a vegetated area that is undisturbed . . ." 15A NCAC 02B .0233(4)(a). Even if Mr. Hodges is correct, or if deference must be shown to his interpretation, there are requirements of the buffer rules that must be met for 'allowable uses' to be authorized under the buffer rules and therefore actually allowed. 15A NCAC 02B .0233. Approval from DWQ would be required to cut this tree, which approval was not obtained. T p 1169. The cut tree did not meet the definition of a "high value tree" as that term is used in the buffer rules at 15A NCAC 2B.0233(2)(f). (T p 901)**

*Corrections in statement of the law. Finding that cutting the live oak tree was an “allowable use” omits that there are requirements of the buffer rules that must be met for ‘allowable uses’ to be authorized under the buffer rules and therefore actually allowed. 15A NCAC 02B .0233. This finding also omits that approval from DWQ would be required to cut this tree, which approval was not obtained. T p 1169.*

67. The tree trimming on this site (or pruning) as shown in Petitioners’ Exhibit 17-2 and 17-28, was allowed under the Neuse River Buffer Rules in Mr. Hodge’s opinion. (T pp 824-25), so **long as the requirements of the buffer rules for allowed uses were otherwise met.** *This finding is modified on the basis that finding that cutting the trees was an “allowable use” omits that there are requirements of the buffer rules that must be met for ‘allowable uses’ to be authorized under the buffer rules and therefore actually allowed.*

68. **The permittee or his contractor could easily have avoided destroying the live oak tree by moving the pier location a very few inches, or notching the pier near its landward end to leave room for the tree. Record p. 2691, 2693.** *If IBX moved the pier to avoid the tree and kept the pier straight, it might have placed the pilings further into Ms. Flanagan’s riparian setback. (T pp 1654-55)*  
*The deleted finding was based upon speculative testimony. The evidence is clear that moving one end of the pier a very few inches, or even notching the six-foot-wide walkway to accommodate the tree would have prevented the cutting of this live oak. Record p. 2691, 2693.*

69. ~~DCM considered the provisions of the DWQ Neuse River Buffer Rules before issuing CAMA General Permit No. 45215. (T pp 1066, 1107)~~  
*This finding is deleted on the basis that DCM either did not consider the provisions of the buffer rules in any meaningful way or considered it acceptable to ignore the requirements of the buffer rules, given the failure to require a buffer authorization for this project. See other Findings of Fact.*

70. ~~The proposed pier project did not require a CAMA major permit because the project would not trigger the usual concerns of other agencies such as the Army Corps of Engineers or DWQ that would require further permitting by them. (T p 1778)~~  
*This finding is deleted on the basis that (1) it makes no sense (it appears that words were omitted) and (2) “triggering the usual concerns of other agencies” is not the standard for whether a CAMA major permit is required. 15A NCAC 07H .1202(b)(2).*

### **Pier and Platform Measurements**

71. The CAMA General Permit rules place length, width and height restrictions on pier structures. 15A NCAC 7H .1205(b)

72. CAMA General Permit rules limit the length of a pier to 100 feet or less. 15A NCAC 7H.1205(b). (T p 994; Stip Ex B) The purpose of this regulation is to avoid unreasonable interference with navigation. (T pp 994–95)

73. ~~The length of the Westphal pier is 41 feet, as measured from the waterward extent of the coastal wetlands. (T pp 995-96)~~ This pier, as proposed and built, does not exceed the established pier length in the area and is in compliance with the pier-length provision of 15A NCAC 7H.1205(b). (T p 996; 1459-60)

*This finding was inconsistent with the other findings of fact in this Decision, which refer to the entire structure across the marsh as a "pier". That entire structure is 151 feet long (including the platform, which is 31 feet). Stip. Exh. 1, Record p 2531; compare Findings 59-66, for example.*

74. CAMA General Permit rules limit the width of a pier to 6 feet. The width of the Westphal pier is six feet and in compliance with 15A NCAC 7H.0208(b)(6)(A). (T pp 1130-31, 1443).

75. The platform area of the Westphal pier is 9 feet by 31 feet in size and within the size limitations for platforms as set forth in 15A NCAC 7H .0208(b)(6)(C).

76. If a violation is found with a permitted structure after it has been built, DCM has the authority to issue a Notice of Violation and require the project be brought into compliance with the permit conditions. If the owners do not comply, further steps can be taken to ensure compliance. (T pp 967-69)

77. The Westphal pier is not in compliance with the permit condition that the decking boards be at least 3-feet above the marsh substrate. (T p 1091-92) ~~This is a minor violation. (T p 1094)~~  
**DCM conceded that it should have issued a Notice of Violation and required the pier to be raised to the correct height. T p 1430.**

*The evidence was that elevating the pier three feet above the substrate is critical to survival of the underlying coastal marsh, and DCM conceded that it should have issued a Notice of Violation and required the pier to be raised to the correct height. T p 1430. While it might be argued that this is minor in this instance because the coastal marsh in this case was destroyed by installation of the pier anyway, this argument hardly justifies additional violations.*

78. ~~Heavy equipment will be needed to correct the decking height violation.~~  
*This finding is deleted on the basis that the preponderance of the evidence established that there was no reason to suspect that heavy equipment would be needed in the marsh to fix the decking height, when the pier was constructed without the use of heavy equipment. T pp 301-303, 555-58, 591-92, 1937-1940, 2082-83, and 2087-88.*

DCM deferred issuing a Notice of Violation (NOV) for the height violation pending the outcome of this case in order to limit impacts to the marsh if the pier were ultimately required to be removed. (T pp 1096-98) Mr. Tyndall testified that in hindsight, DCM should have issued the NOV, but then extended the time to correct the violation until after the conclusion of this contested case. (T p 1430)



79. DCM does not regulate the height of the pier structure (including platforms, etc.) over open water so that no indication of the drop-down portion of the platform needed to be shown on CAMA General Permit No. 45215. (T p 1018)

*This finding was not relevant to the issue in the case and is deleted for brevity.*

### **Impacts to Coastal Wetlands**

80. Protection of coastal wetlands is one of the missions of the CAMA. DCM is required to balance those impacts with other concerns, such as riparian property rights and impacts to the DWQ buffer. (T p 1001) The CAMA and the Dredge and Fill law attempt to balance the protection of the coastal wetlands while still allowing traditional uses such as water-dependant development. The CRC's rules put restrictions on water-dependant development, such as piers, to limit the impacts. (T pp 1386-91) The general permit limitations of three-foot high, six-foot wide, and length restrictions help to reduce impacts as well. (T p 1392)

*Most of this 'finding' should be omitted and replaced with appropriate conclusions of law, which is done, with much more detail, in our Conclusions of Law.*

81. The requirements to minimize impacts to coastal wetlands do not result in a prohibition of piers. (T pp 1101, 1391)

*This finding is deleted on the basis that it has no relevance to the issue in this case (there has never been any allegation in this case that piers are prohibited or should be prohibited).*

82. Mr. Lane has issued between 800-1000 CAMA general permits during his tenure with DCM, with the vast majority of these being for piers. (T p 966) He testified that more than fifty percent of the piers he has permitted by general permits have piers which cross marshlands. (T p 1263)

*The second sentence of this finding is deleted on the basis that it is either irrelevant or misleading, since it fails to differentiate between (1) piers crossing a foot or two of coastal wetlands and those crossing over 100 feet of coastal wetlands (2) piers crossing other types of 'marshlands' versus those crossing the highly protected coastal wetlands and (3) piers crossing 'marshlands' for which there was no alternative versus situations analogous to this case where there was an alternative.*

83. The impacts to the coastal wetland from the construction of this pier were typical of pier installation in this area. (T pp 1001, 1172, 1282)

*This finding is deleted on the basis that it is irrelevant to the issue in this case. Either DCM issued the subject permit in compliance with law or it did not. If it did not, and it also permitted other piers in violation of the law, that is a matter for another case or the oversight of the Commission. This finding also ignores the crux of this case: that there was a clear, less destructive alternative available in this particular case, which is not always true.*

84. The preponderance of the evidence shows that the installation of this pier caused near total destruction of a swath of this coastal wetland six to eight feet wide and 110 feet long. E.g. T pp 370, 371, 265, 267, 269, 273, 285, 286, 314, 315, 518-19, 589, 638-40, 643, 644, 656, 665-66, 638-39, 2088, 686, 687, 688-89; Photos in Petitioners' Exhibits 4 and

**17, Record pp 2624-2632 and 2685-2712.** ~~The Westphal pier does have some impact to coastal wetlands that are minor and typical of piers.~~

*This finding was deleted and substituted on the basis that it was clearly contrary to the preponderance of the evidence. The preponderance of the evidence shows near total destruction of a swath of this coastal wetland six to eight feet wide and 110 feet long. E.g. Photos in Petitioners' Exhibits 4 and 17, Record pp 2624-2632 and 2685-2712; T pp 370, 371, 265, 267, 269, 273, 285, 286, 314, 315, 518-19, 589, 643, 644, 656, 665-66, 638-39, 2088, 686, 687, 688-89.*

85. Piers are permissible under the CRC's rules and include some shading. (T p 1001, 1137, 1468) Shade from a pier can negatively impact a coastal wetland. (T pp 1102-03)

~~86. The marsh along the as-built pier was naturally shaded due to the wooded area between the Westphal and Flanagan lots. The marsh was sparse on this side before the pier was built. (T p 1657)~~

*This finding is deleted on the basis that it is clearly contrary to the preponderance of the evidence in the Record. T p 64, 70, 685, 686, 687, 689, 1734; Pictures at Record p 2685, 2686, 2688, and 2690. Both the testimony of those best in a position to know, and photos from which one can draw one's own conclusions establish that the marsh was roughly equal in lushness and vigor in the area destroyed by this project as in the other areas of the wetlands. It is also deleted on the basis of being irrelevant: there is no provision of CAMA or the CAMA rules that address relative lushness of a coastal wetland as a reason for allowing its destruction.*

87. Concrete decking can often cause less shading compared to wooden decking boards placed closely together. The Westphal pier is made of concrete pieces with permanent slits which allow some sunlight to penetrate to the coastal wetlands below. (T p 1033) **Despite this, after two growing seasons, there has been only about ten per cent regrowth of the destroyed vegetation in the coastal wetland under and around this pier. T pp 586-87, 1152.**

*Uncontroverted testimony is added for balance.*

~~88. The permitted pier alignment helped reduce shading impacts because the pier was angled in relation to the sun to allow some sunlight to penetrate under the pier and help regrowth. (T pp 1787-88)~~

*This finding is deleted on the basis that it is misleading, seeming to suggest that the pier was intentionally aligned in this way. There is not one shred of evidence that that was done. In fact, there had only been about ten per cent regrowth of the destroyed marsh in the two years since the pier was built. T pp 586-87, 1152.*

89. The Neuse River Buffer Rules allow trees to be trimmed in order to build a pier or for access to a pier. (T pp 1170, 1233, 1403) ~~The live oak tree that was cut down was in the coastal wetland AEC and did not require permission for its removal. (T p 1282)~~

*This finding is modified on the basis that finding that cutting the trees was an "allowable use" omits that there are requirements of the buffer rules that must be met for 'allowable uses' to be authorized under the buffer rules and therefore actually allowed. This finding also omits that*

*approval from DWQ would be required to cut this tree, which approval was not obtained. T p 1169. In addition, as seen from other findings of fact, it was unclear whether the live oak tree was in the coastal wetland or in the buffer.*

90. The CRC's rules do not require a particular method of construction for the placement of pilings. Both driving in pilings and "blowing" or "jetting" pilings with a water hose are allowed. The possible impacts from both methods are similar and could be worse or better on any particular site, depending on other factors. (T pp 1157-60, 1466) A jet pump is a common tool used by marine contractors, and "jetting" pilings is a standard method of construction. (T p 1686)

~~91. There were some minimal impacts to the coastal wetlands from the construction of this pier, but there is evidence of new coastal wetlands growth, vegetation regrowth, the leveling of siltation, the presence of hundreds of crabs, and of animal, fish and birds using the marsh. (T pp 1136-37, 1151-52, 1791-96)~~

*This finding is deleted on the basis that it selectively picks out statements of natural resilience in the face of damage to and destruction of parts of the coastal wetlands, ignoring the bigger picture of destruction and impacts. Other findings of fact and objections to findings of fact, in particular number 84, address this issue. Therefore, this finding is repetitive and may be deleted without affecting the overall decision.*

92. Before issuing a general permit, the CRC must find that construction will not measurably increase siltation. 15A NCAC 7H.0208(a)(2)(E). ~~This finding is evidenced by the issuance of the permit. (T pp 1120-21, 1238-39, 1426)~~

*The second sentence of this finding of fact is deleted on the basis that the permit contains no such finding and no reference to any such finding. Likewise, the DCM file in this case contains no such finding or reference to such finding. Stip. Ex. A & B, Record p 2531 & 2532-2540.*

*Whether the mere issuance of a permit proves that all findings were made, even though they were not mentioned in the permit or in the agency file in any way, is a question of law, and has no place in the findings of fact.*

~~The CAMA general permit for piers anticipates some siltation from the installation of a pier, but that the siltation is typically minor and temporary in nature. (T p 1122)~~

*This finding is deleted on the basis that it is false. The CAMA general permit for piers has no such language, 15A NCAC 07H.1201 et seq., and the cited testimony makes no claim that such language exists in the general permit. T p 1122.*

**The development permitted by DCM in this case did cause measurable siltation. T p 1122-23, 267, 269, 286.** Since construction, the sediment in the disturbed area is **beginning to level out.** (T pp 1122-23)

*This finding is modified on the basis that it omits that it was uncontroverted that the development permitted by DCM in this case did cause measurable siltation. T p 1122-23, 267, 269, 286. It is also modified to more accurately reflect the cited testimony.*

~~93. The placement of the pier along the sparser, shaded marsh edge on the Flanagan side of the property reduced impacts to the marsh. (T p 1392)~~

*This finding is deleted on the basis that the preponderance of the evidence shows that the pier was not placed in a sparser section of marsh. See Finding of Fact 86.*

~~If the pier had been placed in the middle of the Westphal property, bisecting the marsh, then the impact on the coastal wetland would have been greater.~~

*This finding is deleted on the basis that it simply is not true. In fact, the pier is placed in roughly the center of the Westphal property. T p 1825. This is uncontroverted.*

~~94. The Westphal pier minimized any impacts to the coastal wetlands by the location of the pier, the use of concrete decking, and alignment with the sun in order to reduce shading.~~

*This finding is deleted on the basis that it is false and contrary to the great preponderance of the evidence. No witness testified that the as-built location of the pier minimized impacts to the coastal wetlands. The location of the pier was selected for the convenience of the Westphals. See Finding of Fact 3 and associated citations to the record. The issue in this case has been whether the convenience of the permittee and alleged buffer impacts outweigh the greater impact to the coastal wetlands, not whether this location minimized impacts on the coastal wetlands.*

~~95. The construction and installation of the Westphal pier had minor and temporary impacts on the coastal wetlands.~~

*This finding is deleted on the basis that, as evidenced by the absence of any citation to the record, there is absolutely no support for this finding. In fact, the impacts were drastic to the section of the wetlands in question, and after two years regrowth of wetlands vegetation is only ten per cent. See numerous other findings of fact.*

**95a. The construction of this pier system altered the coastal wetlands, most obviously by destruction of the wetland vegetation. The CAMA regulations mandate that “development shall not have a significant adverse impact on estuarine and ocean resources. Significant adverse impacts shall include . . . development that would directly or indirectly . . . alter coastal wetlands . . .” 15A NCAC 07H .0209(d)(4). Under this regulatory definition, ‘significant adverse impacts’ certainly occurred. T pp 518-19.**

*This finding is added because it reflects uncontroverted testimony, is important to the issue in the case, and was omitted by the ALJ.*

### **Proposed Alternative Route for the Pier**

96. When Mr. Westphal first purchased the lot, he spoke on-site with Mr. Cowell, who inquired what they intended to build on the lot. (T pp 1824, 608)

97. At that time, Mr. Cowell suggested and showed Mr. Westphal where he thought the Westphal pier should be built. (T pp 76-77, 608, 1824) He suggested that the pier begin at the existing bulkhead near the Flanagan property and extend waterward from there. (T pp 76-78) ~~Access to the pier would be by foot through the wooded strip along the Westphal-Flanagan property line.~~

*The third sentence of this finding is deleted on the basis that there is no citation to the record supporting this finding, and it is misleading. While it is uncontested that access would be by foot (as with the as-built pier), the critical attribute of the access route is that it is uplands instead of wetlands. In addition, 'along the Westphal-Flanagan property line' conjures pictures of one walking along that line, when in fact the evidence is that the most natural path is at least ten feet off that property line. See Finding of Fact 6.*

~~98. Mr. Westphal listened to Mr. Cowell's suggestion, but was surprised that he was suggesting how Mr. Westphal should use his own property. (T p 1824)~~

*This finding is deleted for lack of relevance to the issue in this case.*

~~99. Mr. Westphal testified that he thought the straight route down the center of his lot was the best place for the pier, in part because it was not too close to either neighbor's property and because of the smaller impact to the trees in the buffer. (T p 1825)~~

*This finding is deleted on the bases that: (1) it conflicts with Finding of Fact 3, which says permittee wanted the pier in its as-built location for convenience of access; (2) there was no evidence that permittee knew about or considered the buffer in deciding where to put the pier; and (3) in fact, on page 1825 of the transcript cited by the ALJ, there is no mention of "buffer" or of impact to trees. Permittee, instead, claims that he was thinking of his neighbors in locating the pier in the middle of his lot, not too close to either.*

100. Mr. Cowell testified that his alternative location could include upland improvements, but he did not believe them to be necessary and because he believes that his alternative did not require Ms. Flanagan to waive her 15-foot riparian setback. **Mr. Cowell's testimony was that no trees needed to be cut, but that a person might optionally want to do this, depending on personal preference. He summed up by saying: "Certainly you've got access without cutting anything. If you had to cut it, it would be less than what was cut across the marsh." T p 773.** ~~He conceded that this alternate route could result in the need to cut trees or clear brush. (T pp 769-73)~~

*This finding is modified to accurately reflect Mr. Cowell's testimony.*

101. In their initial objections, Petitioners suggested their alternative route for the pier, and this alternative was further described to Mr. Lane by Mr. Cowell, specifically in a telephone call. (T pp 1002, 1210, 1315) Mr. Lane testified that he had a good **general verbal** indication from Petitioners where their alternative location was proposed. (T p 1221) **At no point prior to permitting did Mr. Lane visit the site to have Mr. Cowell point out the location or route of the alternative. Finding of Fact 30.**

*This finding is modified to more fairly reflect the testimony that is cited. Mr. Lane's full testimony was as follows: "Although it had not been pointed out exactly, you know, to the exact foot where the proposed alternative would be, I believe we got a good indication of where the alternative was proposed." T p 1221. This must be understood in the light of Finding of Fact 30—Mr. Lane's only knowledge of the proposed alternative was from one or two telephone conversations.*

~~102. Mr. Lane did not take Mr. Cowell onto the Westphal property in order to be shown Petitioners's alternative location in detail, mainly because Mr. Lane felt he did not have the authority to take a third party onto someone else's lot. (T p 1210, 1316)~~

*This finding is deleted on the basis that this fails to indicate that this was merely Mr. Lane's testimony. There is nothing in the world to keep Mr. Lane from walking onto someone's property with someone else. The testimony is inherently incredible.*

103. Mr. Lane testified that it was very unusual for a neighbor to propose an alternative pier location. (T p 1002)

*This finding is modified on the basis that Mr. Lane's actual testimony did not use the intensifier "very" or any other intensifier. He said it was unusual and he did "not see a lot of it." T p 1002, lines 2-5.*

104. Mr. Lane testified that it was not his job to resolve a dispute between the Petitioners and the Westphals but, instead, to determine if the design proposed by the Westphals met the standards and requirements for a general permit. (T p 1313)

105. Although Mr. Lane did not think Petitioners's alternative route was feasible, he did tell IBX about the route in case it was something their client wanted to consider. (T pp 1002, 1009-10, 1162-63) Mr. Overgaard discussed the Petitioners's alternative with Mr. Lane, and then with Mr. Westphal. (T pp 1644-45) Mr. Lane spoke with Mr. Overgaard on May 4, 2006 who indicated that the Westphals did not wish to move the location of their pier. (T pp 1009-10, 1163; R's Ex 1)

**105a. Mr. Overgaard and his partner, Mr. Rollins, both revealed at trial that they had a mistaken understanding about the location and route of the proposed alternative. T p 1643-1645, 1676-77, 1704-07. This misunderstanding could easily have been avoided by a meeting between Mr. Cowell, Mr. Lane, and IBX on site to discuss the alternative.**

*This finding of fact is added to fairly reflect the testimony at trial. This testimony is uncontroverted, and was simply omitted by the ALJ.*

~~106. Mr. Lane noted that the alternative location proposed by Petitioners may very well require part of the pier to be within Ms. Flanagan's 15-foot setback or even within her actual riparian area. (T pp 1064-66)~~

*This finding is deleted on the basis that it is not accurate representation of Mr. Lane's testimony. He did not testify that part of the pier would be within the setback or riparian area, he testified that two tie poles—if they were moved in a certain way, and assuming a certain location of the riparian lines that was called seriously into question—would be in the riparian area, and that part of the platform would be in the setback area. T pp 1064-66.*

~~The closeness of the proposed alternative location to the Flanagan property line was part of his consideration. (T p 1318) The riparian area for the Flanagan lot projects east of the Westphal Flanagan property line over the water. (T p 1047) The riparian lines for the Westphal property are a bit skewed and do not simply extend from the property lines over the water. (T pp 1038, 1144)~~

*This finding is deleted on the basis that it omits a tremendous amount of information important to a fair picture of the issues treated in this paragraph. See, e.g., T pp 2099, 1896-1903, 1905-1911, 1912, 1923-24, 1925-26, 2030, 2033-2036, 2037, 2039-2050.*

107. ~~The waiver of the 15-foot setback by Ms. Flanagan was not a blanket waiver, and she would have to sign a new waiver for the alternative location proposed by Petitioners which would have the pier extending off the Westphal bulkhead very near the Westphal Flanagan property line. (T pp 1063, 1115, 1119, 1419)~~

*This finding is deleted on the bases that (1) this finding is irrelevant and (2) this finding conflicts with earlier findings that a smaller project with less impact could be built using the same waiver. Finding of Fact 37.*

108. Mr. Lane illustrated on Respondent's Exhibit 4 the approximate location of the channel of Brite's Creek and the resulting riparian line angle for the riparian line between the Westphal lot and the Flanagan lot. (T pp 1051-53) Mr. Lane also testified **"I can say I have navigated a little bit on the river there, but typically, in most cases, if you follow, you know, the center of the water body, that's where, in most cases, the channel will be, not always - not always the case, but that is what we see in lots of cases."** T p 1068. ~~that he was familiar with this water body, having navigated it himself in the past, as well as having examined aerial photographs. (T pp 1068-72)~~

*This finding is modified on the basis that it did not accurately state the testimony.*

The riparian line on the permit was not drawn to scale and was intended only to identify the distance from the pier to the Flanagan riparian line for the purpose of placement of the pilings. (T p 1053-55, 1197) **It also indicated riparian lines perpendicular to shore, in stark contrast to Mr. Lane's testimony at trial that the riparian lines are at a pronounced angle to shore. Record p 2531.**

*This finding is modified for completeness. The sentence added is uncontroverted.*

109. A riparian area is the open water that is waterward of the normal water level. A riparian line runs at a ninety-degree angle to the channel or deep water to the property corner at the normal water level. (T pp 973, 983, 1040-48) **The full rule regarding riparian lines is set out at 15A NCAC 7H .1205(o).**

*This finding is modified for completeness. The sentence added is uncontroverted.*

~~The determination of the location of the "channel" or "deep water" used to delineate riparian lines is somewhat subjective. (T p 1068-72, 1414-19, 1524-32)~~

*This finding is deleted on the basis that no witness said the location of the channel is 'subjective', nor does it make any sense to so find. Mr. Lane did say it took judgment. Both Mr. Lane and Mr. Tyndall testified a survey of the bottom of the creek would be the best way to determine the location of the channel.*

15A NCAC 7H .1205(o) provides the method to delineate riparian lines based on the location of the channel. (T pp 1037-38, 1144, 1300-08, 1404-14) The riparian setbacks are measured 15-feet from the riparian line, not the property line, and are only over water, not over land. (T pp 1047-48) A waiver of the 15-foot setback authorizes construction within the setback but not within the riparian area. (T p 1065)

**109a. Mr. Tyndall concluded that as to Mr. Lane's drawing of the purported channel in Brite's Creek: "For this particular property, that's pretty close, yes, for an approximation with this system, yeah." T p 1418. So, DCM was satisfied with an approximation, based on the location of the centerline of the creek. T p 1415, 1418. This finding of fact is added for clarity and balance.**

110. In Respondent's case-in-chief, testimony was elicited concerning the method for determining riparian lines and, specifically, for identifying the riparian area for the Flanagan property. The purpose of this testimony was to show that Petitioners's proposed alternative location was not feasible because it would place the Westphal pier within the Flanagan riparian area. (Argument of Counsel, T pp 1986-95)

111. In their rebuttal case, Petitioners's also offered testimony concerning the method for determining riparian lines that would show errors in DCM's calculations. (Argument of Counsel, T pp 1986-95) Mr. Spangler testified that the riparian line may be straight out from the property line or skewed. (T p 2099)

**111a. From the combined testimony, it is clear that DCM established riparian lines using the roughest approximations. Stephen Lane eyeballed the creek on site and told IBX where to put the platform and tie poles based on that. T pp 1037-38, 1056-57. Similarly, he drew free-hand an approximate channel line on an aerial photo at trial. It is also clear that DCM was wrong in some of its assumptions. T pp 1051-53. Stephen Lane thought there was an eight-foot deep channel in Brite's Creek, when in fact the deepest spots in the creek were less than four feet. T p 1204. For example, Mr. Baldwin, the Lower Neuse Riverkeeper, testified that Brite's Creek does not have a channel or deep water line, but rather is wide and flat-bottomed. (T p 1857) Stephen Lane admitted that he was unable to say what distance would lie between the perpendicular riparian lines in the permit and the angled ones he testified to at trial. T p 1203-04. Despite the roughness of its understanding of the creek, DCM personnel went on to testify as to some fairly precise things, such as that parts of the proposed alternative pier would be in the neighbor's riparian setback using the precise angle they free-handed onto the drawings. E.g. T p 1061-66.**

*This finding is added to summarize the preponderance of the evidence on this particular issue, based primarily on other findings of fact.*

**111b. Petitioners' witnesses used much more precise methods, involving actual measuring, to approximate the Brite Creek channel line and consequently the riparian lines. These methods involved simple measurements, well within the capability of laymen. For example, Mr. Cowell he made his own measurements concerning the water depth and bottom of Brite's Creek, and then he determined what he called the "controlling depth" in order to conclude that there is no channel or deep water in Brite's Creek within the meaning of the regulation. (T pp 1896-1913) Adam Arrington remotely assisted Ms. Dressler's use of a GPS device with which Petitioners located the points of some depth measurements in**



Brite's Creek, near the site of the Westphal pier, and then Mr. Arrington helped them to create a map of the depths. (T pp 2039-42) **The measurements and resulting testimony were sufficient to show the unreliability of the DCM approximations. See T pp 1896-1926; 2030-2050. However, the measurements were not a full hydrographic survey, and do not establish without doubt the location of the channel or the riparian lines.**

*This finding is modified to more fairly reflect the evidence.*

**111c. It is not necessary to conclusively determine in this decision the location of the riparian lines. This should be done in the field using the data gathered by the Petitioners and their witnesses, in order to establish the most accurate lines practicable.**

**111d. The need for a choice regarding riparian lines was mooted during Petitioner's rebuttal testimony when Mr. Spangler demonstrated that, even using the riparian lines drawn for litigation by DCM (different from the riparian lines on the permit), the alternative location for the pier could stay clear of Ms. Flanagan's riparian lines and even her fifteen foot setback. T p 299-300, 2097-2101, 1229-30. In particular, the platform and tie poles—the subject of the testimony regarding intrusion into Ms. Flanagan's setback—could stay right where they are for the as-built pier/dock system. T p 2099-2100. The only part of the system that would need to be moved is the walkway across the water, and it can be located 15 or more feet from Ms. Flanagan's riparian line (even as drawn by DCM for litigation), and therefore out of her setback. Id.**

*This finding is added to describe this key testimony, which was unrefuted, that was left out of the ALJ decision.*

**111e. Given that, the riparian setback issue is a red herring. Nothing about Ms. Flanagan's riparian setback prevents the alternative location from being practicable.**

~~Most of Petitioners's witnesses focused on the definition of the terms "channel" and "deep water" in the regulation concerning riparian lines. 15A NCAC 7H .1205(o)~~

~~*This finding is deleted on the basis that it is confusing as worded: Petitioners' witnesses focused on many other issues.*~~

~~Mr. Cowell testified that he interpreted the regulation language "deep water" to mean "deep water line."~~

~~*This finding is deleted on the basis that Mr. Cowell did not need to interpret the language. The Rule says "[t]he line of division of areas of riparian access shall be established by drawing a line along the channel or deep water . . ." 15A NCAC 7H .1205(o).*~~

~~Petitioners's witnesses did not demonstrate an expertise or knowledge concerning the determination of riparian lines nor provide evidence that contradicted the method as described by Respondent's witnesses.~~

~~*This finding is deleted on the basis that the determination of riparian lines is a straightforward exercise, described by the regulation, and requiring nothing more than determining the deep water line and then drawing a perpendicular line from that line to the property corner. Any person of normal intelligence can do this. Respondent's witness, Mr. Lane, drew his lines on an exhibit free hand, and the Respondent's witness, Mr. Tyndall, described a method that consists of*~~

*drawing the approximate center line of the creek. T p 1415. Petitioners' witnesses described a much more careful method, involving actual measurements of water depth to determine the deep water line, then the simple drawing of a perpendicular line. No expertise or knowledge beyond that clearly possessed by the witness is required.*

112. Petitioners's alternative location would impact some wetlands as seen along the bulkhead in Petitioners's Exhibit 4, photos 9-11. (T pp 1160-62) **In fact, the depth of the wetlands by the bulkhead is about six feet, T p 290; see Photos at Record pp 2628-29, just over five per cent of the amount impacted by the as-built pier. In addition, no pilings would need to be placed in this slender strand of wetlands for the alternative location.**

*This finding is modified on the basis that it omits any description of the one to two order of magnitude difference in the size of the area to be impacted as compared to the as-built pier.*

~~113. Mr. Lane testified that he believed the as-built pier location had less adverse impacts on the resources than the Petitioners' alternative. (T p 1322)~~

*This finding is deleted on the basis that it is not a true finding of fact, but merely a description of testimony. In addition, this same finding is repeated in finding of fact number 117 in more detail, making this finding superfluous.*

114. In Mr. Hodge's opinion, the alternative location for the pier would likely impact more woody vegetation and impact the resources than the permitted/existing location. (T p 838) **The total impact of the alternative location on the buffer would be more than the permitted location because the alternative is less perpendicular to the upland than the permitted location, and so would impact a much greater area of the buffer. (T pp 839-41) Also, in the existing location, most of the pier itself is not within the buffer because it is waterward of the Coastal Wetlands. The pier access proceeds through the buffer and is more perpendicular to the buffer. (T pp 841-43)**

*This finding is modified on the basis that it failed to make clear that it refers to comparative impacts in the buffer, not the coastal wetlands or other AECs. T pp 838-843. In addition, the buffer either is a DWQ issue that is not the subject of this case, or if it is a subject of this case, the buffer rules were violated, as specified in the other findings of fact.*

115. Mr. Morrison testified that Petitioners' alternative would have to include a wooded path for pier access which would wind about 100-feet through the Neuse Buffer area, ~~and the walking would get rid of vegetation to make it walkable with chairs, coolers and other materials to use on the pier or boats. (T pp 1779, 1782, 1786)~~ **Mr. Morrison further testified that it would take a lot of walking to have an impact, and that any such impact was speculative. T pp 1779, 1780, 1797, 1798.**

*This finding is modified on the basis that it makes no sense: "the walking would get rid of vegetation to make it walkable . . ."? In addition, the finding omits Mr. Morrison's admission that it would take a lot of walking to have an impact, and that any such impact was speculative. T pp 1779, 1780, 1797, 1798. As with the entire decision, this finding was argumentative and one sided.*

116. Mr. Lane agreed that if the Westphals were to propose a walkway to the Petitioners' proposed alternative, it would be development within the Coastal Shorelines AEC, requiring a CAMA permit. (T p 1267)

*This finding is deleted on the basis that it does not truthfully reflect the testimony. Mr. Lane did not say that a walkway would require a CAMA permit. He said that seventy five feet back from the waterline is an unspecified AEC, which would be true for both the as-built and the proposed alternative sites. T p 1267.*

~~Based on his experience, Petitioners' proposed alternative would likely require the removal of multiple trees or vegetation for any placement of a walkway, although none was proposed by Petitioners. (T pp 1113-15, 1226) In comparing the two pier locations, he felt the as-built location would result in the removal of less trees, being only the one, compared to the Petitioners's alternative. (T pp 1169-70)~~

*This finding is deleted on the basis that it is based upon speculation. The finding omits that the questions Mr. Lane was being asked postulated a six foot wide walkway, which was not proposed by the permittee nor by Petitioners. The finding also omits Mr. Lane's admissions that he made no determination at any time which trees would have to be removed, where the path to the pier would lie, or anything else that would form the reasonable basis of an opinion about the necessity for removal of trees. E.g. T pp 1220-27.*

117. Mr. Lane testified that he felt the as-built location reduced the overall impacts to resources, both coastal wetlands and DWQ's buffer, than the Petitioners' alternative route. This was due in part to the alternative running through a larger area of the DWQ buffer, the limited waiver by Ms. Flanagan, and the existing shading in the as-built location due to the tall trees along the upland near the Flanagan property that shaded the marsh. (T pp 1102-03)

*This is not a true finding of fact, but merely a description of testimony. It should be omitted, especially since it does not fairly reflect the preponderance of the evidence. However, it is left in to reflect this testimony.*

118. Ms. Flanagan has seen the as-built pier and is also familiar with the Petitioners's proposed alternative route. (T pp 1503-09)

*This finding is deleted on the basis that it is not truthful. Ms. Flanagan did not testify that she was familiar with the Petitioners' proposed alternative route. When asked the question whether she was familiar, she responded by asking "I understand that they would like to move it nearer to my property line, is that correct?" T pp 1503 lines 11-16.*

~~Ms. Flanagan testified that if the Westphals had proposed the pier route to follow the Petitioners' alternative route she would not have waived the 15-foot riparian setback. (T p 1509) Ms. Flanagan's concerns about the Petitioners' alternative route included the closeness to her own property and feeling cramped when the Westphals walked down the narrow wooded strip of their property to access the alternative pier. (T pp 1514-20) Ms. Flanagan also had concerns that if she were to erect a fence to mark the Westphal-Flanagan property line that the fence construction and the Westphals's access path foot traffic could cause erosion into the marshland. (T p 1521)~~

*This finding is deleted on the basis that it is based on testimony that improperly admitted. The testimony was both speculative and irrelevant, and the ALJ ruled incorrectly in allowing it over Petitioners' objections. DCM did not have any knowledge of what Ms. Flanagan thought of any*

*alternatives at the time it made its decision, and it is irrelevant what she might have been coached to say two years later. The issue is whether DCM properly issued the permit in May 2006.*

119. Mr. Tyndall testified that to him, the crux of this case comes down to whether the location of the permitted pier was the location which minimized impacts to the resources. **He supports his subordinate's issuance of the permit, and said "And so you're balancing the value of one versus balancing the other, and it's a very tough decision. And, in this case, the Westphals were pushing for an elevated boardwalk over the marsh, and that's what was issued." T p 1383.**

*This is not a true finding of fact, but merely a description of testimony. Additionally, this finding is modified on the basis that it does not truthfully state Mr. Tyndall's testimony. An examination of T p 1383 will show that Mr. Tyndall did not say anything about "strongly believed." The actual testimony is inserted.*

**119a. Impacts to the resources would be minimized by using the alternative location suggested by Petitioners for the pier system. The severe impacts to the coastal wetland from the as-built location, the simplicity of locating the pier in the alternate location, and the fact that the alternative location would vastly reduce or eliminate adverse impacts to the coastal wetlands are covered in previous findings of fact.**

*A summary paragraph to reflect the preponderance of the evidence, as laid out in other findings of fact.*

**119b. The difference in total adverse impacts to the protected resources between the as-built location and the alternative location is "black and white", an "obvious call"—the alternative location would be strongly preferred. This includes the impact to the buffer, as well as to the coastal wetlands and coastal shoreline. T pp 1883-84, 2082, 2088; 638-639. It is important to note that this testimony comes not only from Petitioners' well qualified expert, but also from Larry Baldwin, the Lower Neuse Riverkeeper, who was qualified as an expert, T pp 636-37, and was the only witness at the entire trial with no interest other than protecting the very resources CAMA is designed to protect. He was not defending a permit decision, he was not paid, he does not own land in the area.**

*This finding is added to correct an omission by the ALJ, and reflects the preponderance of the evidence on these points.*

#### ~~Improper delegation of DCM duties to IBX~~

~~120. There is no evidence that DCM delegated its decisionmaking authority to IBX or any other person or entity. (T pp 1162-64, 1685)~~

*This finding is deleted on the basis that there clearly is such evidence, as set out in the findings of fact of this Decision. See Finding of Fact 105. However, for fairness, and because the evidence is not overwhelming, no finding of fact to the contrary is substituted.*

#### Petitioners's reasons for bringing this case

121. Petitioners testified that their reason for contesting this permit is out of concern for the environment and not about the change in view from their property. (T pp 87-88, 618-25, 665-67, 736, 753, 774) Mr. Cowell testified that since construction of the pier, he has not seen any birds in the marsh. (T p 607) Ms. Dressler testified that since construction of the Westphal pier, none of the herons or egrets have visited the marsh, and that her view now includes the pier. (T pp 75-76) Ms. Dressler testified that she and Mr. Cowell brought this case because they are very environmentally concerned individuals and are concerned about the marsh. (T p 87-88)

~~122. In the third party hearing request, petitioners's list view as one of their concerns. (T pp 776-77; R's Ex 5) Mr. Cowell testified that he did not bring this case because of issues with his view and that his statements about view were made while he was "still very angry." (T pp 777-78) He confirmed that they were true at the time he wrote them and submitted them to the CRC. (T p 778)~~

*This finding is deleted on the basis that it is irrelevant to the issue in this case, and that it omits three key facts, were there any relevancy. First, there was no mention of view in Mr. Cowell's objection letter to Mr. Lane of November 6, 2005. Record pp 2537-39. Second, the Third Party Hearing Request was not before DCM when it made its decision to grant this permit, so it is irrelevant to the issue in this case. Third, Petitioners were required in their request for third party hearing to state a basis for their standing to bring a third party hearing request—something that differentiated Petitioners from everyone else who might be concerned about the environment. Since they are neighbors to this project, view is one such differentiating factor. The Commission will not have Petitioners castigated for filling out the forms as we require them.*

123. Testimony was elicited in Respondent's case-in-chief (T pp 1724-32, 1739-41) and in Petitioners's rebuttal case (T pp 2018-21) concerning Petitioners's personal commitment to and interest in environmental causes.

124. Upon consideration of the demeanor of the witnesses at the hearing and a review of the transcripts, the Undersigned is of the opinion that a misunderstanding occurred between IBX and Petitioners, and that Petitioners, in fact, have a longstanding interest in the environment and its preservation and conservation.

### CONCLUSIONS OF LAW

*The ALJ's Conclusions of Law failed to make any conclusions of law at all about how the law applies to this case. That is, the Decision failed to apply the law to the facts, instead leaping from a one-sided and inaccurate statement of facts to a decision. This is improper and shows the absence of a proper deliberative process in the decision making.*

*Proper Conclusions of Law have been added.*

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.Gen.Stat. § 113A-121.1 and N.C.Gen.Stat. § 150B-23.
2. All parties have been correctly designated and are properly before the Office of Administrative Hearings, and there is no question of misjoinder or nonjoinder of parties. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.
3. Petitioners have standing to bring this contested case related to environmental concerns resulting from the construction of the pier.
4. Petitioners have not demonstrated by a preponderance of the evidence that the permitted pier has substantially prejudiced their rights.
5. By issuing the permit, Respondent did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule. N.C.G.S. § 150B-23(a).
6. Respondents are required to act in order to correct the height violation of the as-built Westphal pier.
7. ~~Greater weight is given to the testimony of Respondent's witnesses and Intervenor-Respondent's witness, Mr. Morrison, whose extensive experience with and knowledge of CAMA general permits and applicable regulations was apparent. Lesser weight was given to the testimony of Petitioners's witnesses, generally, whose experience and knowledge concerning applicable regulations was less, and to Mr. Spangler, specifically, whose credibility was weakened by his antagonistic posture in direct testimony as well as in cross-examination upon recall.~~

*This finding is deleted on the basis that it is not a conclusion of law, but a finding of fact.*

*All of the following Conclusions of Law are added. They are not in bold type for ease of reading.*

The Coastal Area Management Act

8. The Coastal Area Management Act (CAMA) is the controlling substantive statute in this case, found at N.C. Gen. Stat. §113A-100 et seq.
9. CAMA requires that "every person before undertaking any development in any area of environmental concern shall obtain . . . a permit pursuant to the provisions of this part." N.C. Gen. Stat. §113A-118 (a).
10. The Act goes on to allow for 'general permits' in certain instances. N.C. Gen. Stat. §113A-118.1. Individual developments under general permits are not subject to the notice

provisions of G.S. 113A-119. There are no other exceptions for general permits to the rules applicable to permitting. *Id.*

11. CAMA requires that the responsible official “**shall** deny an application for a permit” if any of ten conditions exist. N.C. Gen. Stat. §113A-120(a)(emphasis added).

12. The ninth condition that requires that a permit be denied reads as follows:

In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.

N.C. Gen. Stat. §113A-120(a)(9)(emphasis added).

13. There was a practicable alternative to the location permitted for the pier in this case, and that alternative would have had significantly less adverse impact on the coastal wetlands, a public resource. The alternative was the one offered by Petitioners, and it was offered to DCM prior to the permitting decision.

14. The alternative offered no special engineering requirements, and would have been less expensive than the alternative that was permitted.

15. DCM violated the law, namely N.C. Gen. Stat. §113A-120(a), when it issued the subject permit in spite of the clear and known existence of a practicable alternative with less adverse impact.

#### CAMA Regulations

16. The CRC has promulgated an extensive set of regulations to implement CAMA. 15A NCAC 07H.

17. There are a number of Areas of Environmental Concern (AECs) described and regulated in those regulations. 15A NCAC 07H .0204 *et seq.* These AECs are designated pursuant to the mandate of the legislature in CAMA. N.C. Gen. Stat. §113A-113. There are four AECs defined within the ‘estuarine and ocean system.’ 15A NCAC 07H .0201.

18. One of the four AECs is “Coastal Wetlands.” 15A NCAC 07H .0205. The area impacted by this project is unquestionably coastal wetlands. *See Findings of Fact.*

a. The specific use standards for coastal wetlands state that:

Highest priority of use shall be allocated to the conservation of existing coastal wetlands. Second priority of coastal wetlands use shall be given to those types of development activities that require water access and cannot function elsewhere. . . . **In every instance**, the particular location, use, and design characteristics **shall be in accord with the general use**

**standards for coastal wetlands**, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0205(d)(emphasis added)

- b. The General Use Standards of section .0208 do apply to coastal wetlands and to this project.

19. Another of the four AECs is the ‘Coastal Shorelines’ AEC. 15A NCAC 07H .0209. The site of this pier and docks is in the Coastal Shorelines AEC. *See Findings of Fact.*

- a. The Coastal Shorelines regulation contains Use Standards, which state *inter alia*:

In every instance, the particular location, use, and design characteristics shall comply with the general use and specific use standards for coastal shorelines, and where applicable, the general use and specific use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0209(d).

- b. The use standards go on to say:

Development **shall not** have a **significant adverse impact** on estuarine and ocean resources. **Significant adverse impacts shall include . . .** development that would directly or indirectly . . . **alter coastal wetlands .**

..

15A NCAC 07H .0209(d)(4)(emphasis added).

- c. It is unquestionable that this pier and walkway “alter[ed] coastal wetlands.” The regulation does not merely prohibit destruction of wetlands. It prohibits—using mandatory, not permissive language—altering coastal wetlands. “Alter” means to “make changes to something or somebody, or be changed or become different.” *Encarta Dictionary* (2008). It is uncontested that these wetlands were changed by this project. *See Findings of Fact.*
- d. It might be suggested that the regulatory prohibition on altering coastal wetlands must have some ‘give’ to allow piers and boat docks to be permitted for citizens who desire them, but who own property completely sheathed in coastal wetlands on the water side. The regulation provides no such give. Even were we to read some implied flexibility into the regulation for hardship cases, this case is not a hardship case. As is discussed extensively in the Findings of Fact and in other conclusions of Law herein, there was a clear alternative that would not have required any alteration of coastal wetlands.
- e. DCM violated 15A NCAC 07H .0209(d) by permitting this project.



20. The regulations contain General Use Standards that apply to coastal wetlands and coastal shorelines, and therefore apply to this project. 15A NCAC 07H .0208(a).

a. The general use standards provide in pertinent part as follows:

Before being granted a permit by the CRC or local permitting authority, there **shall** be a finding that the applicant has complied with the following standards:

\* \* \* \*

(B) Before receiving approval for location of a use or development within these AECs, the permit-letting authority **shall find that no suitable alternative site or location** outside of the AEC exists for the use or development and, further, that the applicant has **selected a combination of sites and design that will have a minimum adverse impact** upon the productivity and biologic integrity of **coastal marshland . . . .**

15A NCAC 07H .0208(a)(2)(emphasis added).

- b. There was no finding in this permit process that that the applicant had complied with those standards, namely that the Westphals had selected a combination of sites and design that would have the minimum adverse impact on coastal marshland.
- c. There was likewise no finding that no suitable alternative site or location outside the AEC existed for this project. In fact, no such finding could be made, since there was a perfectly suitable alternative site, as has been discussed thoroughly elsewhere in this Decision.
- d. DCM argues that it made all findings that are required of it when it issued the permit. Its argument goes that otherwise it would be issuing permits without following the law, so those who review DCM's actions are bound to assume that DCM mentally made findings that it failed to make in any sort of writing. This sort of 'trust us, we wouldn't do anything wrong' attitude is directly contrary to the intention of the APA that administrative decisions be reviewable. If OAH, the CRC, and the Superior Courts are to simply assume that the agency 'must have' made all findings required by law, then review of the agency's decisions is meaningless. A 'finding' is defined to mean one of two things: "(1) a piece of information obtained from an investigation, especially scientific research or (2) a conclusion that is reached and recorded at the end of a judicial or other formal inquiry." *Encarta Dictionary* (2008). These 'assumed findings' offered by the

agency do not meet either definition. There was no investigation, and there was no recording of any conclusion. There must be some evidence that a finding has been made—ranging from a check mark on a list of required findings at minimum, to a full written report detailing the investigation that lead to the finding at maximum—in order to show that the decisionmaker was aware of his obligation to make each of the findings required by law and in fact made the findings.

- e. Again, in this particular case, we know that no such finding was made for three reasons. The base reason is that there is no writing of any sort to show any such finding. The second reason is that there was a clear, economic, and practicable alternative, so the required finding could not have been honestly made. Finally, and most conclusive, Stephen Lane testified as to his process of addressing the proposed alternative. It consisted primarily of asking the contractor whether the Westphals wanted to relocate the project to the alternative location. The contractor said ‘no’, and that was the end of it.
- f. DCM violated the General Use Standards in permitting this project. The General Use Standards are part of the law. Therefore, DCM violated the law when it permitted this project.

### **The Buffer Rule**

- 21. The Neuse River Basin Buffer Rule is found at 15A NCAC 02B .0233. The buffer rules are not administered by DCM, but by the Division of Water Quality (DWQ). For this reason, compliance with the buffer rule may or may not be a proper subject of this Decision. What is certainly true is that either the buffer rules apply or they do not apply. Neither party may have it both ways, arguing the buffer rules when it suits them, and denying their relevance when the buffer rules do not suit them. These conclusions of law will assume that the buffer rules are a proper subject of this case, since both parties put on evidence regarding same, and the ALJ accepted that evidence. These conclusions, however, are not necessary to this Decision, since we have already concluded that DCM violated CAMA and the CRC’s CAMA Rules in issuing this permit.
- 22. In order to determine whether a use or activity is allowed in the buffer, one looks at section 6—Table of Uses. Uses may be exempt from the buffer rules, allowed, allowed with mitigation, or prohibited. “Water dependent structures” are not exempt, but they are “allowable”. 15A NCAC 02B .0233(6).
- 23. “Water dependent structures” is a term defined in 15A NCAC 02B .0202 (67). It is uncontroverted that the pier meets this definition.

24. When an applicant applies for and receives a CAMA General Permit to construct a pier that is within the Neuse or Tar-Pamlico River Basins, the applicant must also receive written buffer authorization from the DWQ. 15A NCAC 02B .0233(7).
  - a. Mr. Al Hodge, a Regional Supervisor for DWQ, conceded that a buffer authorization was required for this project, that no buffer authorization was issued, and that this was a violation of the law. *See* Finding of Fact 54.
  - b. DCM violated the buffer rules when it issued this permit. The Buffer Rules are part of the law. Therefore, DCM violated the law when it permitted this project.
25. The requirements for a buffer authorization, which are found at 15A NCAC 02B .0233(7) & (8), require that there be a determination of no practical alternatives in order to receive a buffer authorization, including a finding of fact that “the basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality.” 15A NCAC 02B .0233(8)(a)(i). this section has very detailed requirements about what the applicant must submit in order to show that there is no practical alternative.
  - a. The permittee in this case submitted nothing in any attempt to comply with 15A NCAC 02B .0233(8). Therefore, there was no finding of fact that there was no practical alternative, and no determination of no practical alternatives. T pp 870-872.
  - b. This was a violation of the buffer rule. The Buffer Rules are part of the law. Therefore, DCM violated the law when it permitted this project.
26. Respondent attempted at trial to show that foot traffic in the buffer leading to the proposed alternative location for the pier was a sufficient reason to determine that the alternative location should not be permitted. The findings of fact deal show that this concern is far overshadowed as a factual matter by the damage to the coastal wetlands. As a matter of law, this argument also fails. There is no authority under the buffer rule for either DCM or DWQ to deny a permit based on the fact that a family will walk across its property that happens to be in the buffer. Neither is there authority for DCM or DWQ to regulate or restrict that family’s ability to walk on its property. *See* 15A NCAC 02B .0233, and in particular, the Table of Uses, 15A NCAC 02B .0233(6).

### Summary

27. Respondent violated CAMA, the CAMA Rules, and the Buffer Rule when it issued CAMA General Permit No. 45215.

Upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, and based upon the preponderance of the evidence, giving regard to the demonstrated knowledge and expertise of the

agency with respect to facts and inferences within the specialized knowledge of the agency pursuant to N.C.G.S. § 150B-34(a), and based on the preceding findings of fact and conclusion of law, the Coastal Resources Commission makes the following:

**DECISION**

Based on the foregoing findings of fact and conclusions of law, Petitioners have ~~not~~ demonstrated by a preponderance of the evidence that CAMA General Permit No. 45215 issued to Intervenor-Respondents on May 10, 2006 was improperly issued. ~~The preponderance of the evidence supports Respondent's issuance of CAMA General Permit No. 45215.~~ **CAMA General Permit No. 45215 is hereby rescinded. The pier shall be removed from the coastal wetlands, without the use of heavy equipment in the wetlands, just as it was installed.**

**ORDER**

It is hereby ordered that a copy of its final agency decision be served on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3), and on all parties or their counsel of record.

This the \_\_\_\_\_ day of September, 2008.

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Chairman  
Coastal Resources Commission

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STATE OF NORTH CAROLINA  
COUNTY OF PAMLICO

IN THE OFFICE OF MOREHEAD CITY DCM  
ADMINISTRATIVE HEARINGS  
06 EHR 1185

Henry S. Cowell, III and Carolyn E. Dressler, )  
)  
Petitioners, )  
)  
v. )  
)  
North Carolina Department of )  
Environment and Natural )  
Resources, Division of Coastal Management, )  
)  
Respondents, )  
and )  
)  
Earl C. and Mary Jane Westphal, )  
Intervenor-Respondents. )

**PETITIONERS' OBJECTIONS  
AND EXCEPTIONS TO  
THE ALJ DECISION**

NOW COME your Petitioners by and through their attorney, and pursuant to N.C. Gen. Stat. §150B-36, and file these exceptions to the decision entered by the ALJ. Those paragraphs accepted are indicated by "No Objection." Those paragraphs to which an exception is entered are indicated with an explanation for the objection in boldface type.

This contested case was heard on October 15-18, 2007 at the Craven County Courthouse in New Bern, North Carolina, and on November 26-27, 2007 and February 4-6, 2008 at the Lee House Hearing Room, Raleigh, North Carolina, before Selina M. Brooks, Administrative Law Judge.

**APPEARANCES**

For Petitioner: James L. Conner, II, Esq.  
311 E. Main Street  
Durham, NC 27701

For Respondent: Christine A. Goebel, Esq.  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

For Intervenor-Respondents: Earl C. Westphal, Jr. and Mary Jane Westphal, Pro se

PO Box 336  
Oriental, NC 28571

**APPLICABLE LAW**

1. The relevant Statute in this case is N.C.G.S. § 113A, Article 7, “Coastal Area Management Act” (CAMA). Also applicable are the associated administrative rules for coastal management, found at 15A N.C.A.C. 07 *et seq.* These are the rules of the Coastal Resources Commission (CRC) for the administration of CAMA. (Stipulation 6)

**No objection.**

1. Under CAMA, “development” in an area of environmental concern (“AEC”) requires a permit. N.C.G.S. § 113A-118. The proposed and permitted pier is “development” and is in an AEC, and requires a CAMA permit. (Stipulation 7)

**No objection.**

3. N.C.G.S. § 113A-120 states that DCM “shall issue” a CAMA permit unless there is a finding that the proposed development will significantly impact specified resources listed in that statute. A permit must be issued for the proposed development unless the development does not meet one of the bases for denial found at N.C.G.S. § 113A-120.

**Petitioners object and except to this statement on the basis that it misstates the law. See Proposed Conclusions of Law.**

4. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the CRC has designated AECs and has adopted use standards or state guidelines for development within these areas. 15A N.C.A.C. 07H.0100 *et seq.*

**No objection.**

5. Petitioners bear the burden of proof on the issues under N.C.G.S. § 150B-23 *et seq.* See also *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998). In this case, Petitioners have the burden of demonstrating by a preponderance of the evidence that CAMA General Permit No. 45215 was improperly issued to the Intervenor-Respondents by the Respondent. Under N.C.G.S. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. *Britthaven, Inc. v. Dep’t of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 745 (1995).

**No objection.**

6. The agency’s conclusions of law should be upheld unless they are plainly erroneous or inconsistent with the regulations. *Simonel v. N.C. School of the Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995).

**Petitioners object and except to this statement on the basis that it misstates the law both by misstating the holding of the court and by omitting that the court determined in that case that the agency had violated its own regulations and affirmed the judgment against the agency. The court did *not* say that an agency's *conclusions of law* should be *upheld*, it said that an "agency's interpretation of its *own regulation* should be accorded *due deference* unless it is plainly erroneous or inconsistent with the regulation." *Simonel v. N.C. School of the Arts*, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995). The court went on to reverse that agency's interpretation of its own regulation.**

7. N.C.G.S. § 150B-34(a) provides that "[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

**No objection.**

### **PREHEARING MOTIONS**

1. On September 11, 2006, the Permittees, Earl and Mary Jane Westphal, through counsel, filed a Motion to Intervene as Intervenor-Respondents in this case. On September 28, 2006, the presiding Administrative Law Judge (Judge Mann was the assigned ALJ at that time) issued an Order granting the motion to intervene.
2. On October 5, 2006, Respondent filed a Motion for Partial Dismissal for lack of subject matter jurisdiction pursuant to N.C. R. Civ. P. 12(b)(1). On or about October 11, 2006, Intervenor-Respondents filed a similar Motion for Partial Dismissal for the same reasons. On or about October 13, 2006, Petitioners filed a Response to the Motions. The parties' arguments were heard at an October 17, 2006 hearing on this matter held at the Craven County Courthouse in New Bern, North Carolina. Upon considering the briefs and oral arguments of the parties, Judge Mann denied Respondents's and Intervenor-Respondents's Motions to Partially Dismiss for lack of subject matter jurisdiction. This ruling was memorialized in an Order issued January 30, 2007.
3. On June 29, 2007, Respondent filed a Motion in Limine to exclude the testimony about whether the pier as-built meets DCM's pier rules as enforcement actions not related to whether the decision to issue the permit was correct or not. On or about August 1, 2007, Petitioners filed a Response to the Motion. On August 27, 2007, the Undersigned filed a written Order denying Respondent's Motion. At the October 15, 2007 hearing on this matter, Respondent raised the issue again based on a new court ruling and the Undersigned heard oral arguments by the parties. Upon considering the briefs and oral arguments of the parties, the Undersigned denied Respondent's Motion in Limine.

### **ISSUE**

Whether CAMA General Permit No. 45215 was properly issued by the DCM to Intervenor-Respondents in light of the provisions of the CAMA and the administrative rules for coastal development promulgated by the Coastal Resources Commission (CRC).

### **TESTIFYING WITNESSES**

#### **For Petitioners:**

Carolyn Elizabeth Dressler, Petitioner, testified on her own behalf, and is an adjacent riparian owner on the east side of the Intervenor-Respondents's lot. (T pp 58 *et seq.*)

James Anthony Spangler, President of Spangler Environmental Consultants, is a professional environmental consultant. Mr. Spangler was offered and accepted as an expert in "coastal and riparian environment and regulation of development in coastal and riparian areas" over the objection of Respondent. (T p 121)

Henry S. Cowell, III, Petitioner, testified on his own behalf, and is an adjacent riparian owner on the east side of the Intervenor-Respondents's lot. (T pp 595 *et seq.*)

Lawrence Carl Baldwin is the Lower Neuse Riverkeeper for the Neuse River Foundation, a non-profit organization that seeks to protect the Neuse River watershed. Mr. Baldwin was tendered and accepted as an expert in "general environmental conditions of the Lower Neuse watershed." (T p 636)

Adam Crawford Arrington, Professional Engineer (in the state of Alabama) and GPS consultant, was called to testify as a rebuttal witness by Petitioners. (T p 2038)

#### **For Respondent:**

Alton Ray Hodge, a Regional Supervisor for the Division of Water Quality's (DWQ) Surface Water Section, has held this position since 2004. (T pp 801-04)

Stephen Douglas Lane, DCM Field Representative for Pamlico County at the time of this permit issuance. (T pp 955-70)

Michael Ted Tyndall, Assistant Director of the Division of Coastal Management in charge of Permits and Enforcement. (T pp 1365-78)

#### **For Intervenor-Respondents:**



Thelma Flanagan is the adjacent riparian owner on the west side of the Intervenor-Respondents' lot and former owner of the Intervenor-Respondents' lot. (T pp 1502-03; 1515-16)

Peter Overgaard, President of IBX Contracting and a licensed marine contractor.

Leonard Alan Rollman is Vice President of IBX Contracting.

William Stephen Morrison, Co-founder of Land Management Group, was designated as an expert in "environmental consulting" over the objection of Petitioners. (T p 1775)

Earl C. Westphal, Jr., Intervenor-Respondent, testified on his own behalf. (T pp 1811 *et seq.*)

### **EXHIBITS RECEIVED INTO EVIDENCE**

Stipulated Exhibits included with the Prehearing Order signed and filed on October 15, 2007:

- A. CAMA General Permit No. 45215
- B. DCM's Permit File
- C. Order of the Chairman of the CRC granting the Petitioners's Third Party Petition
- D. Relevant portions of the CAMA (N.C.G.S. § 113A-100 *et seq.*)
- E. Relevant portions of the CRC's Administrative Rules for Coastal Development (15A N.C.A.C. 07 *et seq.*)

#### Petitioners' Exhibits:

1. CAMA General Permit No. 45215 (T p 219)
2. Respondent's supplemental responses to Petitioners' first discovery request (T p 59)
3. Resume of Spangler (T p 110)
4. AutoCAD enlarged drawing by Spangler and photographs identified as Numbers 1-17 from visit (T p 174)
5. Water Quality Certification No. 3494 (T p 477)
6. Army Corps of Engineers Regional General Permit, effective 3/26/05-12/31/10 (T p 391)
7. 15A NCAC 02B .0200 series (T p 440)
8. Adjacent Riparian Property Owner Statement, signed by Cowell and Dressler (T p 663)
10. Adjacent Riparian Property Owner Statement, blank (T p 614)
13. 11/16/05 Letter from Cowell and Dressler to Lane (T p 620)
14. Certified mail receipt, cash register receipt, and signed receipt card (T p 621)
15. Cowell's log of telephone conversations with Lane on 5/2/06 and 6/16/06 (T p 671)

17. Photograph identified as Part 1, Number 1 (T p 72)
17. Photographs identified as Numbers 2-30 and 37-48 (T p 725)
19. Pier statistics summary (T p 1929)
23. Pamlico County GIS map (T p 732)
29. Slab of live oak tree (T p 735)
33. Enlargement of map with measurements (T p 1926)
35. Estimate prepared by IBX for Cowell (T p 1741)
36. Hydrographic map of Brite's Creek (offer of proof only)
39. Five-page document consisting of map, chart, diagram, Google map, and key (T p 2074-78, for the limited purpose of showing where Ms. Dressler took her depth measurements but not for depth contours or shorelines)

Respondent's Exhibits:

1. Lane's calendar notes and phone log (T p 1081)
- 2A. Photograph (T p 1081)
- 2B. Photograph (T p 1090)
- 2C. Photograph (T p 1090)
- 2D. Photograph (T p 1090)
- 2E. Photograph (T p 1090)
- 2F. Photograph (T p 1090)
- 2G. Photograph (T p 1090)
- 2H. Photograph (T p 1090)
- 2I. Photograph (T p 1090)
- 2J. Photograph (T p 1090)
- 2K. Photograph (T p 1090)
- 2L. Photograph (T p 1156)
- 2M. Photograph (T p 1156)
- 2N. Photograph (T p 1156)
- 2O. Photograph (T p 1156)
- 2P. Photograph (T p 1156)
4. Aerial photograph of the site (T p 1082)
5. Third party hearing request, minus staff's recommendation (T p 1084)
6. Resume of Tyndall (T p 1376)

Intervenor-Respondents's Exhibits:

- 20-2 Affidavit of Rollman (T p 1829)
- 20-4 Letter from Flanagan (T p 1831)
- 21A-C Resume of Morrison (T p 1830)
- 22A-B 11/21/07 notes by Morrison (T p 1830)

## FINDINGS OF FACT

*The Findings of Fact in the ALJ Decision were needlessly voluminous. Approximately 27 findings have been deleted to focus this decision on the actual issue in the case. Also, the Findings of Fact in the ALJ Decision were remarkably one-sided. Of the 124 findings, only nine made any reference at all to the testimony of Petitioners' five witnesses, including two who were properly qualified as expert witnesses. An effort has been made to balance the findings.*

Based upon careful consideration of the applicable law, and evidence received during the contested case hearing, the entire record of this proceeding, and having weighed the credibility of the testimony of the witnesses, the Undersigned makes the following findings of fact:

### The Parties

1. Petitioners Henry S. Cowell and Carolyn E. Dressler own the property located at 1148 Orchard Creek Rd. in Oriental, Pamlico County, North Carolina. They have owned this property since July 2003. This property is adjacent to the lot where the pier was permitted. (Stipulated Fact 1) Mr. Cowell enjoys nature and the environment, boating, and the view of the marsh and wildlife from his property. He has been a member of Nature Conservancy and the Chesapeake Bay Foundation. (T pp 601-06) Ms. Dressler enjoys nature, gardening, fishing, environmental causes, birding, doing animal rescue, and enjoying the view and serenity of the marsh. She has been involved with the Audubon Society, the Chesapeake Bay Foundation and the Neuse River Foundation. (T pp 61-67)

#### **No Objection.**

2. The Respondent is the North Carolina Department of Environment and Natural Resources ("Agency" or "DENR"), Division of Coastal Management ("DCM"). (Stipulated Fact 3) The Respondent is the state agency authorized to issue permits and enforce regulations under the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.*

#### **No Objection.**

3. The Intervenor-Respondents/Permittees, Earl C. Westphal, Jr. and Mary Jane Westphal, own the property located at 309 Peninsula Dr., in Oriental, Pamlico County, North Carolina. Their lot is adjacent to Petitioners' lot. The Permittees have owned the lot since March 2005. (Stipulated Fact 2) Mr. Westphal purchased this property in order to build a house, retire, and use the property to boat, fish, cruise, and crab. He wanted a straight pier with a path straight from the future house-site to make it easier to haul things to and from the dock and boats, and for his elderly parents to access the dock and boats. (T pp 1814-21)

**Petitioners object and except to this finding. It fails to state that the Westphal lot is vacant, and that the Westphals at all relevant times to this case were residents of Maryland. See, e.g. Stip. Exh. A. Mention of elderly parents is irrelevant and speculative, since there is no evidence that Mr. Westphal's parents have ever been to the property and it is unknown whether a house will ever be built on the lot and whether any such house will be built prior**

to the death of the elderly parents. Three and a half years after the Westphals' purchase of the property, there has been no effort to build a home.

### The Property

4. Both lots (Petitioners's lot and Intervenor-Respondents's lot) are adjacent to Brite's Creek, part of the Neuse River Basin, and subject to the North Carolina Department of Environment and Natural Resources, Division of Water Quality's (DWQ) Neuse River Basin Buffer Rules. (Stipulated Fact 4)

**No objection.**

5. Portions of the site are within or adjacent to the Coastal Shorelines, Coastal Wetlands, Public Trust Area and Estuarine Waters, Areas of Environmental Concern (AEC), as defined by the administrative rules for coastal development by the Coastal Resources Commission (CRC). (Stipulated Fact 5)

**No Objection.**

6. The Westphal lot is less than an acre in size with a section of coastal wetlands

**No objection.**

and a narrow wooded strip along the Westphal-Flanagan property line on the west side. It also has a small amount of bulkhead that adjoins the Flanagan bulkhead. (T pp 979-80)

**Petitioners object and except to this finding on the basis that it does not accurately reflect the testimony, but restates it with added modifiers and other added words that slant the testimony in an adversarial way. The actual testimony about the Westphal lot is as follows: "it's got a little wooded strip kind of between - down the middle, you know, maybe towards the west a little bit. It's got a bulkhead at the end on the west side adjoining Ms. Flanagan's property on the west . . ." T p. 979-80. There is nothing there about the wooded strip being on the property line or about a 'small amount' of bulkhead.**

7. Based on personal observation at the site, the Undersigned notes that the Cowell-Dressler lot borders the Westphal lot on the east side

**No objection.**

and that there is no wooded strip on the Cowell-Dressler-Westphal property line.

**Petitioners object and except to this finding on the basis that it simply is not true, as is shown on aerial photos of the two lots. P. Exh. 9, Record p. 2265. In addition, it is irrelevant to any issue in this case.**

### CAMA General Permits, Generally

8. When a CAMA General Permit is being developed, there is interaction between DCM staff and other state and federal resource agencies, including DWQ. (T pp 814, 1423)

**Petitioners object and except to this finding on the basis that it is misleading, especially when read in conjunction with the following paragraphs, because it uses the term "General Permit" to mean in some cases the overlying General Permit and in other cases the specific**

**General Permit granted to a specific applicant, such as the Westphals. This finding of fact is true for the former meaning and false for the latter meaning. See 15A NCAC 07H .1201 et seq. contrasted with Stip. Exh. A, Record p. 2532.**

9. CAMA General Permits are a sub-set of the CAMA Major Permits. (T p 964) CAMA General Permits are developed for repetitive types of projects, such as piers. Applications for pier projects are common. (T p 964) If a project meets the bounds set by the general permit, the project can be permitted more quickly and inexpensively. (T p 965)

**Petitioners object and except to this finding on the basis that the first sentence is not accurate, since General Permits may be issued for activities that require Major or Minor permits. 15A NCAC 07J .1101.**

10. CAMA General Permit applicants are not required to submit a survey for most projects but a sketch is accepted instead. The general permit process is intended to be quicker and less expensive than regular major permits. (T p 987, 1434)

**No objection.**

11. Other resource agencies participate in the development of CAMA General Permits, and so the impacts of projects that fit into a general permit have already been considered and approved by these other agencies. (T pp 965-66)

**Petitioners object and except to this finding on the same basis as finding 8. The first sentence is true for the overlying General Permit and false for the specific general permit issued to the Westphals. Petitioners object and except to the second sentence on the grounds that it fails to take into account the review and findings required by DCM and DWQ even for general permits, as is laid out more specifically in the Conclusions of Law comments.**

12. DCM is charged with finding a balance between minimizing impacts to resources and allowing reasonable development, specifically riparian development. (T p 1098) One of the ways DCM balances reasonable development and impacts to resources is to consider the concerns of other state resources agencies, such as DWQ, Marine Fisheries, Wildlife Resources, DOT Cultural Resources, and Archives and History, as well as federal agencies such as National Marine fisheries, Environmental Protection Agency, Army Corps of Engineers, and U.S. Fish and Wildlife Service. (T p 901-07, 1099, 1296, 1423)

**No objection.**

13. DWQ has a general 401 water quality certification for the construction of piers, having found that such activities have minimal impacts to water quality. (T p 845) The federal government also has a general certification for 401 water quality impacts for pier projects permitted by DCM under a CAMA General Permit. (T p 846) Both DWQ and the Army Corps of Engineers do these general certifications instead of issuing the hundreds and thousands of pier permits individually, if the project can be permitted under the CAMA General Permit for piers, because such piers have a minimal impact on the resources. (T p

846) DWQ automatically issues the 401 general certification for projects which receive a CAMA General Permit for a pier. (T pp 847-49)

**Petitioners object and except to this finding on the basis that it omits that the general certifications assume DCM's compliance with CRC regulations to assure that impacts are minimized, and it omits that the certifications themselves have numerous Conditions that must be met for projects to for the General Certification to apply. Pet. Exh 5, 6 (the General Certifications themselves), Record pp 2633-2643.**

14. During the processing of a CAMA General Permit that involves the resource areas of other agencies, a DCM field representative may confer with someone from the respective agency so that the issues of other agencies can be factored into the permit decision. (T pp 971, 1296-98)

**Petitioners object and except to this finding on the basis that what "may" be done is not relevant, since there was no evidence any such conferring took place in this case. See T pp 971, 1296-98. IN fact, the witness made no claim that any such conferring took p[lace], and said that while he might send a copy of a major permit to DWQ, "under a general permit, we would generally not have that formal communication process." T p. 1297.**

15. A CAMA General Permit does not have an individual application form but, instead, requires the submission of the adjacent riparian notice forms, and general information about the proposed project from the applicant. Once that information is obtained, DCM can write a CAMA General Permit on-site. (T pp 972-78) An adjacent riparian property owner is someone who owns property abutting another property owner's riparian area. (T p 973)

**Petitioners object and except to this finding on the basis that it omits that, while a General Permit may be written on-site, this does not dispense with the requirements of the law and regulations governing the issuance of permits. See Conclusions of Law.**

16. The intent of DCM's notice requirements is to give the adjacent riparian owners notice about the proposed project and to provide the opportunity to express any objections to it. (T pp 988, 992-93) The substance of objections is more important to DCM when reviewing a general permit application, than the manner in which the objections are transmitted, e.g., telephone conversations, forms, or letters. (T p 988)

**No objection, other than relevance.**

17. DCM has the authority to issue a permit even if adjacent riparian owners disagree with it. (T pp 1263, 1435-36)

**No objection.**

18. DCM does not have the authority to consider proposed mitigation to offset impacts on the environment caused by private projects. DCM only has this authority for public projects pursuant to 15A NCAC 7M.0700 *et seq.* (T pp 1123, 1298-1300, 1440-42)

**Petitioners object and except to this finding on the basis that the authority of DCM is a question of law, and should be addressed in the Conclusions of Law with citation to a law**

**that supports the conclusion. In addition, this finding is irrelevant, since mitigation is not an issue in this case.**

19. DCM staff issue approximately 2,000 general permits per year. (T p 1373)  
**No objection.**

**CAMA General Permit #45215, Application Process and Permit Issuance**

20. Mr. Lane was first contacted about the Westphals's proposed pier in 2005 by IBX, the agents for the Westphals. (T pp 981-82)

**No objection.**

21. Mr. Lane was very familiar with the subject property and with Petitioners's lot, having been friends with the prior owner, and had visited that lot in the past. (T p 979)

**Petitioners object and except to this finding on the basis that it inaccurately depicts Mr. Lane's testimony. He did not say he was "very familiar" with either property. He did state that he had been to the lot prior to Petitioner's ownership, which would have been more than five years ago (see Finding of Fact 1), and that he had been to the property more than two times. T p 979.**

22. As part of the permit process, notice of the proposed project is given to adjacent land owners. (Stipulated Fact 9; Stip Ex B)

**No objection.**

23. IBX sent notice of the project to the adjacent riparian owners, Ms. Flanagan and Petitioners. (T p 79)

**No objection.**

24. After receiving notice of the Westphals's proposed project, Ms. Flanagan replied on the "adjacent riparian owner statement" form dated October 29, 2005. She did not object to the project and agreed to waive the setback requirement for the project as shown on the "adjacent riparian owner statement" form. (Stipulated Fact 10; Stip Ex B; T pp 983-85)

**No objection.**

**24a. The drawing on the Notice to Riparian Owner form was so out of scale that it showed the pier extending almost all the way across Brite's Creek (465 feet), and did not show the location of the pier relative to anything with any exactitude, especially from left to right. Testimony of S. Lane, T p 1244-45.**

*This finding is added for fairness and balance. It is the uncontroverted testimony of the State's witness.*

25. A waiver of the 15-foot setback is specific to the project as proposed in the notice. (T pp 984-85) It is not a blanket waiver for any design or location changes. (T pp 1063, 1115-16, 1419, 1458, 1500)

**Petitioners object and except to this finding on the basis that it is directly contradicted by the ALJ's finding of fact #37. In addition, this finding is misleading, as it suggests that a very specific project is proposed in the notice. In fact, only a crude sketch with no measurements indicating where the project would lie on the property was included in the notice. Pet. Exh. 8, Record p. 2662. In addition, the notice shows riparian lines that are parallel to the pier, which is not how the DCM's Lane testified the riparian lines run. See Findings of Fact 106 & 108; R. Exh. 4.**

26. After receiving notice of the Westphal proposed project, Petitioners submitted objections to the proposed development which were received by DCM. These objections were submitted in the form of Petitioners's response on the "adjacent riparian owner statement" form dated November 5, 2005, a letter to DCM's Stephen Lane dated November 6, 2005, and objections made by telephone by Mr. Cowell to Mr. Lane. The objections specifically proposed an alternative location for the proposed walkway and pier that Petitioners claimed would have less negative impact on the coastal marshes and the environment in general. (Stipulated Fact 11; T pp 79-84, 615-24, 671-75, 981-82, 989-93; Stip Ex B) The proposed alternative was to locate the pier on the Flanagan side of the Westphal property. (T pp 478-81)

**Petitioners object and except to this finding on the basis that the last sentence omits that the proposed alternative moved the pier out of the coastal wetlands, and would have it connected to uplands at the existing bulkhead, rather than crossing over 100 feet of coastal wetlands. See other Findings of Fact.**

**26a. The proposed alternative would have moved the pier out of the coastal wetlands, and substantially avoided the impacts to the coastal wetlands that are the subject of this case. Under the alternative, the permittee would have had the same size platform and docks as he proposed. Instead of extending the boardwalk to the platform for 110 feet through protected coastal wetlands, it would have extended a much shorter pier from an existing upland bulkhead, across open water to the platform. In addition, the alternative would not have required the placement of any pilings in the coastal wetlands. T pp 2099, 2100, 288-94, 425-26, 427.**

*Petitioners propose adding this finding based on the preponderance of the evidence, which is essentially uncontroverted on these points.*

**26b. This much shorter pier would have been less expensive for the permittee. It would have posed no engineering problems, as it would have been a shorter and simpler structure. Record pp 2537-39; T p 608-611.**

*Petitioners propose adding this finding based on the preponderance of the evidence, which is essentially uncontroverted on these points.*



27. Mr. Lane, after passing on the Petitioners' objections to IBX, did not hear from IBX or the Westphals between November 2005 and April or May 2006. (T p 1005) Mr. Lane assumed that the neighbors were discussing and working out the disagreements between them. (T p 1005)

**No objection.**

28. After IBX had a signed contract with the Westphals, Mr. Overgaard contacted Mr. Lane and met him on the site on April 26, 2006. (T p 1006; R's Ex 1) Mr. Overgaard placed poles in the water before their meeting to show Mr. Lane the proposed location of the center, far left and far right pilings of the proposed pier. (T pp 1642-43) Mr. Lane determined that the location complied with the permit and was the correct distance from the Flanagan riparian line. (T pp 1198-1201)

**Petitioners object and except to this finding on the basis that it omits that Mr. Lane's determination was strictly an "eyeballing" with no measurements involved. T pp 1198-1201.**

29. At the on-site meeting on April 26, 2006, Mr. Lane wrote up CAMA General Permit No. 45215, but did not issue it. (T p 1007)

**No objection.**

30. DCM staff received the objections from Petitioners. Mr. Lane discussed the Petitioners' objection several times by telephone before permit issuance. (Stipulated Fact 12; T p 1213)

**Petitioners object and except to this finding on the basis that the preponderance of the evidence is that Mr. Lane did not discuss the Petitioners' objections several times by telephone before issuance, but only once or at most twice. T p 80, 82, 83, 86, 87, 618, 625, 667, 671, 675, 676, 680, 681, 740. Likewise, Stipulated Fact 12 cited by the Decision does not mention more than one call. In addition, this finding omits that Mr. Lane failed to meet with Petitioners or have them show him the proposed alternative, until after the permit was issued and the issue was moot. See Finding of Fact 39.**

**30a. Mr. Lane asked Peter Overgaard at IBX whether his clients, the Westphals, wanted to move the pier to the alternate location suggested by Mr. Cowell. Mr. Overgaard reported that they did not. T pp 1010, 1383.**

*See above.*

31. After reviewing Petitioners' objections and discussing them with his supervisor, Mr. Lane issued CAMA General Permit No. 45215 on May 10, 2006 on behalf of DCM. (Stipulated Fact 13)

**Petitioners object and except to this finding on the basis that the finding did not accurately state the content of Stipulated Fact 13. The language should be changed to accurately report that stipulated fact, which did not mention Mr. Lane reviewing objections or discussing them with his supervisor.**

32. CAMA General Permit No. 45215 was issued pursuant to the general permit for piers. (T p 1099; Stip Ex A) Some of the limitations that this general permit requires and which limit the impacts of the pier on the resources, include height and width limitations for piers, and square-foot limitations for platforms. (T pp 1099-1101)

**Petitioners object and except to this finding on the basis that this finding implies that this particular permit imposes these protections. In fact, it is the CAMA regulations, 15A NCAC 07H .1205, that impose the protections; there is only one protection particularized to this permit. That protection is a requirement that the pier be at least 36 inches off the substrate, and that requirement was violated. Pet. Exh. 1 (the permit), Record p. 2600; Finding of Fact 77; T pp 1091-92.**

33. The pier was proposed and approved to cross approximately 110 feet of coastal wetland which is subject to the Respondent's jurisdiction and protection under CAMA. DCM indicated on the permit that this is also a primary nursery area, as defined in the Marine Fisheries regulations. (Stipulated Fact 14; Stip Ex A)

**No objection.**

34. The drawing of the project on CAMA General Permit No. 45215 was not drawn to scale. (T pp 1014, 1197) Mr. Lane also noted that the field depiction of the coastal wetlands on the face of the permit was not intended to show uniform lushness of the wetlands. (T pp 1014, 1133)

**No objection.**

35. Mr. Lane marked the box on the front of CAMA General Permit No. 45215 which directed the applicant to review the information printed on the back of a CAMA general permit form about the DWQ buffer rules. (T p 1016; Stip Ex A)

**No objection.**

36. Mr. Lane also filled in the line on the general permit form indicating that a building permit may be required from Pamlico County, the applicable jurisdiction for this property. (T p 1013)

**No objection, other than relevance.**

37. The dimensions authorized by CAMA General Permit No. 45215 are the maximum dimensions for the pier project and a smaller pier with the same or lesser impacts could be built under this permit. (T p 1017)

**No objection.**

38. On May 11, 2006, Mr. Lane visited the site to check for compliance by IBX with the permit and its conditions. (T p 1036; R's Ex. 1) Mr. Lane met with the contractors and confirmed that they were building the pier in the location and orientation that he had permitted in compliance with 15A NCAC 7H.1204(b). (T pp 1037-38, 1056-57) Mr. Lane indicated to IBX a point on the far shoreline that would show them the correct angle of the riparian line. (T p 1055)

**No objection, except that it omits that Mr. Lane failed to notice that the pier was being built out of compliance with the only particular requirement on the permit—the height requirement. See other Findings of Fact.**

39. While on-site on May 11, 2006, Mr. Lane attempted to reach Petitioners to make them aware of the permit issuance, but they were not home when he visited. (T p 1036)

**Petitioners object and except to this finding on the basis that it is not relevant, since the permit was already issued and construction had already started, and that the evidence shows he made no such visit and that Petitioner Dressler was home all day that day.**

40. Mr. Lane took photos of the site and construction on May 11, 2006. (T p 1036; R's Ex. 2A)  
**No objection.**

41. Mr. Lane made another site visit to check permit compliance and take site-photos on June 7, 2006. (T p 1087; R's Ex 2B-2K)

**No objection, except that it omits that Mr. Lane failed to notice that the pier was being built out of compliance with the only particular requirement on the permit—the height requirement. See other Findings of Fact.**

### **Third Party Appeal and Contested Case filing**

42. DCM District Manager Tere Barrett sent a letter on May 12, 2006 notifying Petitioners that a permit had been issued and that they had a right to challenge the permit issuance. (Stipulated Fact 15; Stip Ex B) This is standard DCM procedure where there have been objections to a project. (T pp 1061-62)

**No objection.**

43. Mr. Tyndall was first involved in this case when he was copied on Ms. Barrett's letter to Petitioners. He spoke with Ms. Barrett and Mr. Lane about the case. (T p 1377)

**No objection.**

44. Petitioners timely filed a third party hearing request, pursuant to N.C.Gen.Stat. § 113A-121.1(b) which was received by DCM staff on May 26, 2006. (Stipulated Fact 16)

**No objection.**

45. Third Party Hearing Requests offer neighbors or other objecting parties an opportunity to have their objections heard by the Chairman of the CRC who decides if the third party can file a contested case. (T p 1086) The submission of a third party hearing request stays the permit. (T pp 1086-87)

**No objection.**

46. When Petitioners filed their third party hearing request, the pier was already constructed. (T p 1087)

**Petitioners object and except to this finding on the following bases: (1) irrelevance (2) this finding improperly implies possible lack of diligence on the part of Petitioners and omits that the pier was already constructed even before Petitioners received the letter notifying them of their right to challenge the permit. T p 795-96.**

47. The Chairman of the CRC granted Petitioners's request to file a contested case hearing. This Order was signed on June 12, 2006. This contested case was initiated by a petition filed on June 27, 2006 in the Office of Administrative Hearings. (Stipulated Fact 17)

**No objection.**

48. The Permittees, Earl C. Westphal, Jr. and Mary Jane Westphal, were granted the right to intervene on September 27, 2006. (Stipulated Fact 18)

**No objection.**

### **The Inter-play between the CRC's Buffer Rules and the EMC's Buffer Rules**

49. The Environmental Management Commission (EMC) has established that the waters of the Neuse and Tar-Pamlico River Basins are nutrient sensitive, and has developed several strategies to reduce the nutrient input into those basins, so that extra nutrients do not provide food for algae blooms. (T pp 803, 823) The EMC promulgated riparian buffer rules which were implemented by the DWQ in 2000. (T pp 811, 820)

**No objection, except clarification.**

50. The purpose of the riparian buffer rules is to minimize impacts to the buffer so that its function is maintained. (T pp 812-13) Ground disturbance and tree cutting is limited so that vegetation can reduce sediment and stormwater runoff, and the root systems of the vegetation can remove nutrients from the waters. (T pp 821-22)

**Petitioners object and except to this finding on the basis that the first sentence misstates the purpose of the riparian buffer rules. 15A NCAC 02B .0233. The purpose of the buffer rules is to describe and protect a buffer to protect the waters (including wetlands) of the Neuse River Basin. T p 2080-81, 2111.**

51. The EMC's Neuse River Buffer Rules require a riparian buffer of 50 feet, measured landward of surface waters or the landward extent of Coastal Wetlands on the property. (T p 819) The 50-foot buffer is sub-divided into the first 30 feet (Zone 1) and the outer 20 feet (Zone 2). (T p 819) Within this buffer, activities are limited by rule, specifically as to impervious surfaces and ground disturbance. (T p 819)

**No objection, except as to incompleteness. The limitations on activities in the buffer are contained in the Rule, 15A NCAC 02B .0233, and include much more than impervious surfaces and ground disturbance.**

52. There is some overlapping jurisdiction between DCM and DWQ, and so there is an interlinked relationship between the two divisions. (T pp 809, 904) One of the areas of

common jurisdiction between DCM and DWQ are the buffers in the Neuse and Tar-Pamlico River Basins. (T p 811) The CRC's rules allow the EMC's buffer rules to supercede the CAMA 30-foot buffer in these two river basins because the EMC's rules are more strict. (T pp 812, 910-11)

**No objection.**

53. When an applicant applies for and receives a CAMA General Permit to construct a pier that is within the Neuse or Tar-Pamlico River Basins, the applicant must also receive buffer authorization from the DWQ. (T pp 815-16)

**No objection, except to add the regulatory cite, 15A NCAC 02B .0233(7) &(8).**

This authorization would certify that the proposed pier location has minimized and avoided the riparian buffer to the greatest extent practicable. (T p 817)

**Petitioners object and except to this finding on the basis that this finding misstates the requirements for a buffer authorization, which are found at 15A NCAC 02B .0233(7) &(8). Those provisions require that there be a determination of no practical alternatives in order to receive a buffer authorization, including a finding of fact that "the basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality." 15A NCAC 02B .0233(8)(a)(i).**

54. Mr. Hodge testified that at this time, DWQ is understaffed to issue buffer authorizations, but that he and his staff are working on fulfilling the mandate. (T pp 816, 864, 916)

**Petitioners object and except to this finding on the basis that it omits that Mr. Hodge conceded that a buffer authorization was required for this project, that no buffer authorization was issued, and that this was a violation of the law. T pp 815-16, 864, and 870.**

55. DWQ relies on DCM staff to help educate the public about the need for buffer authorizations in the Neuse River basin, and have held joint training sessions to better train DCM staff about DWQ's rules. (T p 1395)

**Petitioners object and except to this finding on the basis that this finding has no relevance to the issue in the case.**

56. Mr. Tyndall testified that personnel moves between positions with DCM, DWQ and the Army Corps of Engineers are common, so that there are strong working relationships and easy communication between the agencies and good understanding of all of the resource areas. (T p 1379) Mr. Tyndall testified that one main reason for hiring Mr. Lane was because of his past work with DWQ and the buffer rules. (T p 1398)

**Petitioners object and except to this finding on the basis that this finding has no relevance to the issue in the case.**

57. Mr. Hodge testified that due to staffing issues, he did not issue a buffer authorization to the Westphals in this case. (T p 864)

**Petitioners object and except to this finding on the basis that it omits that Mr. Hodge conceded that a buffer authorization was required by law for this project, that no buffer authorization was issued, and that this was a violation of the law. T pp 815-16, 864, 870-72, and 886-87.**

However, Mr. Hodge also testified that because of Mr. Lane's experience working for DWQ with the DWQ buffer rules and Mr. Lane's ability to apply the DWQ's criteria, the DWQ buffer criteria was considered in this case, albeit by Mr. Lane. (T p 888) Mr. Hodge also testified that having been on site since the pier was built, he would have issued a buffer authorization to the Westphals for the as-built pier if he had to make a decision today because the permitted route had the most minimal impact to the riparian buffer. (T p 913)

**Petitioners object and except to this finding on the basis that the evidence cited is speculative. One witness should not, under the rules of evidence, be allowed to testify about another person's state of mind, especially when the witness was not present to observe the other person. N.C. Rules of Evidence, Rule 602.**

58. For the Westphal lot, the DWQ 50-foot buffer extends landward from the landward-most extent of the coastal wetlands. (T p 821)

**No objection.**

59. Water-dependant structures, such as piers, are deemed "allowable" activities by the EMC under the Neuse River Buffer Rules to allow property usage and the reasonable use of a riparian owner's property. (T pp 827, 867, 909)

**Petitioners object and except to this finding on the basis that, while the first clause is true, it omits that there are a number of requirements for 'allowable' structures to be authorized, most notably the buffer authorization that did not occur here, which includes a finding of no practical alternative. See Finding of Fact 53. In addition, the rest of the finding contains repetitive language.**

60. Mr. Hodge made a site visit in late September or October 2007 to inspect the constructed pier and the proposed alternative location. (T pp 832-36) He confirmed that the Neuse River Buffer Rules apply to the site and require that the pier structure minimize impacts to the riparian buffer. (T pp 832-33)

**Petitioners object and except to this finding on the basis that this finding omits that Mr. Hodge made the visit in preparation for his testimony and not for any regulatory purpose. T pp 832-36.**

61. Construction of a pier always has some impact to the buffer. (T p 1804)

**No objection.**

62. One of the easiest ways to minimize impacts to the buffer is for a pier structure and its access to proceed as close to perpendicular through the buffer as possible, not parallel to the buffer. (T pp 833, 914)

**No objection, except relevance.**

63. The upland path or boardwalk access to the pier is part of a pier structure, which is also considered and allowed under the Neuse River Buffer Rules. (T pp 833-38, 881, 944-46)  
**Petitioners object and except to this finding on the bases that (1) it is irrelevant since no “upland path or boardwalk” was proposed or approved as part of this project, nor was one proposed as part of the alternative location for the pier; (2) to the extent it is obviously true that one must walk to the beginning of one’s pier in order to access it, this finding is still irrelevant since there is no permitting required for a walking path and no basis for jurisdiction to regulate or even consider a walking path under the buffer rule. 15A NCAC 02B .0233 (Table of Uses); T p 2083.**

64. It is not reasonable to build a pier and not provide access to it. (T p 1349)  
**Petitioners object and except to this finding on the basis that it has no relevance to the issue in this case. The permittees built the subject pier and neither DCM nor the permittee did anything to “provide access to it.” They merely did as most do: built a pier that originated on uplands so that they could walk out on it without getting their feet wet. See Permit. This finding of fact has no meaning and is merely argumentative.**

65. A bare pathway across the buffer will have negative impacts on the vegetation in the buffer due to the repeated walking. (T pp 932-34) Enough foot traffic on a pathway would wear the ground down to the point where sedimentation and erosion issues may arise. (T p 1779)  
**Petitioners object and except to this finding on the basis that the preponderance of the evidence shows that there was no significant danger of sedimentation or erosion occurring because of the foot traffic on the upland buffer from this family of two. T pp 1883,1884, 2088, 2062-63, 1779-80, 1797-98.**

66. Mr. Hodge could not tell from photographs whether the tree cut down at the landward end of the pier was within the buffer or not. (T p 878-79) If the tree was in the buffer, the cutting of the tree at the base of the existing pier is an allowable use under the Neuse River Buffer Rules because it accommodates the water-dependant pier structure and access in a location that minimizes overall impacts to the buffer. (T pp 841-42, 876) The cut tree did not meet the definition of a “high value tree” as that term is used in the buffer rules at 15A NCAC 2B.0233(2)(f). (T p 901)

**Petitioners object and except to this finding on the basis that finding that cutting the live oak tree was an “allowable use” omits that there are requirements of the buffer rules that must be met for ‘allowable uses’ to be authorized under the buffer rules and therefore actually allowed. 15A NCAC 02B .0233. This finding also omits that approval from DWQ would be required to cut this tree, which approval was not obtained. T p 1169.**

67. The tree trimming on this site (or pruning) as shown in Petitioners’ Exhibit 17-2 and 17-28, was allowed under the Neuse River Buffer Rules in Mr. Hodge’s opinion. (T pp 824-25)  
**Petitioners object and except to this finding on the basis that finding that cutting the trees was an “allowable use” omits that there are requirements of the buffer rules that must be**

met for 'allowable uses' to be authorized under the buffer rules and therefore actually allowed.

68. If IBX moved the pier to avoid the tree and kept the pier straight, it might have placed the pilings further into Ms. Flanagan's riparian setback. (T pp 1654-55)

**Petitioners object and except to this finding on the basis that it is based upon speculative testimony. The evidence is clear that moving one end of the pier a very few inches, or even notching the six-foot-wide walkway to accommodate the tree would have prevented the cutting of this live oak. Record p. 2691, 2693.**

69. DCM considered the provisions of the DWQ Neuse River Buffer Rules before issuing CAMA General Permit No. 45215. (T pp 1066, 1107)

**Petitioners object and except to this finding on the basis that DCM either did not consider the provisions of the buffer rules in any meaningful way or considered it acceptable to ignore the requirements of the buffer rules, given the failure to require a buffer authorization for this project. See other Findings of Fact.**

70. The proposed pier project did not require a CAMA major permit because the project would not trigger the usual concerns of other agencies such as the Army Corps of Engineers or DWQ that would require further permitting by them. (T p 1778)

**Petitioners object and except to this finding on the basis that (1) it makes no sense and (2) "triggering the usual concerns of other agencies" is not the standard for whether a CAMA major permit is required. 15A NCAC 07H .1202(b)(2).**

### **Pier and Platform Measurements**

71. The CAMA General Permit rules place length, width and height restrictions on pier structures. 15A NCAC 7H .1205(b)

**No objection.**

72. CAMA General Permit rules limit the length of a pier to 100 feet or less. 15A NCAC 7H.1205(b). (T p 994; Stip Ex B) The purpose of this regulation is to avoid unreasonable interference with navigation. (T pp 994-95)

**No objection.**

73. The length of the Westphal pier is 41 feet, as measured from the waterward extent of the coastal wetlands. (T pp 995-96) This pier, as proposed and built, does not exceed the established pier length in the area and is in compliance with the pier-length provision of 15A NCAC 7H.1205(b). (T p 996; 1459-60)

**Petitioners object and except to this finding on the basis that it is inconsistent with the other findings of fact in this Decision, which refer to the entire structure across the marsh as a "pier". That entire structure is 151 feet long (including the platform, which is 31 feet). Stip. Exh. 1, Record p 2531; compare Findings 59-66, for example.**



74. CAMA General Permit rules limit the width of a pier to 6 feet. The width of the Westphal pier is six feet and in compliance with 15A NCAC 7H.0208(b)(6)(A). (T pp 1130-31, 1443).  
**No objection, except relevance.**

75. The platform area of the Westphal pier is 9 feet by 31 feet in size and within the size limitations for platforms as set forth in 15A NCAC 7H .0208(b)(6)(C).  
**No objection, except relevance.**

76. If a violation is found with a permitted structure after it has been built, DCM has the authority to issue a Notice of Violation and require the project be brought into compliance with the permit conditions. If the owners do not comply, further steps can be taken to ensure compliance. (T pp 967-69)  
**No objection, except relevance.**

77. The Westphal pier is not in compliance with the permit condition that the decking boards be at least 3-feet above the marsh substrate. (T p 1091-92)  
**No objection.**

This is a minor violation. (T p 1094)

**Petitioners object and except to this finding on the basis that the evidence was that elevating the pier three feet above the substrate is critical to survival of the underlying coastal marsh, and DCM conceded that it should have issued a Notice of Violation and required the pier to be raised to the correct height. T p 1430. While it might be argued that this is minor in this instance because the coastal marsh in this case was destroyed by installation of the pier, this argument hardly justifies additional violations.**

78. Heavy equipment will be needed to correct the decking height violation.  
**Petitioners object and except to this finding on the basis that the preponderance of the evidence established that there was no reason to suspect that heavy equipment would be needed in the marsh to fix the decking height, when the pier was constructed without the use of heavy equipment. T pp 301-303, 555-58, 591-92, 1937-1940, 2082-83, and 2087-88.**

DCM deferred issuing a Notice of Violation (NOV) for the height violation pending the outcome of this case in order to limit impacts to the marsh if the pier were ultimately required to be removed. (T pp 1096-98) Mr. Tyndall testified that in hindsight, DCM should have issued the NOV, but then extended the time to correct the violation until after the conclusion of this contested case. (T p 1430)

**No objection.**

79. DCM does not regulate the height of the pier structure (including platforms, etc.) over open water so that no indication of the drop-down portion of the platform needed to be shown on CAMA General Permit No. 45215. (T p 1018)  
**No objection, except relevance.**

## Impacts to Coastal Wetlands

80. Protection of coastal wetlands is one of the missions of the CAMA. DCM is required to balance those impacts with other concerns, such as riparian property rights and impacts to the DWQ buffer. (T p 1001) The CAMA and the Dredge and Fill law attempt to balance the protection of the coastal wetlands while still allowing traditional uses such as water-dependant development. The CRC's rules put restrictions on water-dependant development, such as piers, to limit the impacts. (T pp 1386-91) The general permit limitations of three-foot high, six-foot wide, and length restrictions help to reduce impacts as well. (T p 1392)

**Petitioners agree with this finding, as far as it goes. Much more detail is provided in our proposed Conclusions of Law. This 'finding' should be omitted and replaced with appropriate conclusions of law.**

81. The requirements to minimize impacts to coastal wetlands do not result in a prohibition of piers. (T pp 1101, 1391)

**Petitioners object and except to this finding on the basis that it has no relevance to the issue in this case (there has never been any allegation in this case that piers are prohibited or should be prohibited).**

82. Mr. Lane has issued between 800-1000 CAMA general permits during his tenure with DCM, with the vast majority of these being for piers. (T p 966) He testified that more than fifty percent of the piers he has permitted by general permits have piers which cross marshlands. (T p 1263)

**Petitioners object and except to this finding on the basis that the second sentence is either irrelevant or misleading, since it fails to differentiate between (1) piers crossing a foot or two of coastal wetlands and those crossing over 100 feet of coastal wetlands (2) piers crossing other types of 'marshlands' versus those crossing the highly protected coastal wetlands and (3) piers crossing 'marshlands' for which there was no alternative versus situations analogous to this case where there was an alternative.**

83. The impacts to the coastal wetland from the construction of this pier were typical of pier installation in this area. (T pp 1001, 1172, 1282)

**Petitioners object and except to this finding on the basis that it is irrelevant to the issue in this case. Either DCM issued the subject permit in compliance with law or it did not. If it did not, and it also permitted other piers in violation of the law, that is a matter for another case or the oversight of the Commission. This finding also ignores the crux of this case: that there was a clear, less destructive alternative available in this particular case, which is not always true.**

84. The Westphal pier does have some impact to coastal wetlands that are minor and typical of piers.

**Petitioners object and except to this finding on the basis that it is clearly contrary to the preponderance of the evidence. The preponderance of the evidence shows near total**

**destruction of a swath of this coastal wetland six to eight feet wide and 110 feet long. E.g. T pp 370, 371, 265, 267, 269, 273, 285, 286, 314, 315, 518-19, 589, 643, 644, 656, 665-66, 638-39, 2088, 686, 687, 688-89; Photos in Petitioners' Exhibits 4 and 17, Record pp 2624-2632 and 2685-2712.**

85. Piers are permissible under the CRC's rules and include some shading. (T p 1001, 1137, 1468) Shade from a pier can negatively impact a coastal wetland. (T pp 1102-03)

**No objection.**

86. The marsh along the as-built pier was naturally shaded due to the wooded area between the Westphal and Flanagan lots. The marsh was sparse on this side before the pier was built. (T p 1657)

**Petitioners object and except to this finding on the basis that it is contrary to the preponderance of the believable evidence in the Record. T p 64, 70, 685, 686, 687, 689, 1734; Pictures at Record p 2685, 2686, 2688, and 2690. Both the testimony of those best in a position to know, and photos from which one can draw one's own conclusions establish that the marsh was roughly equal in lushness and vigor in the area destroyed by this project as in the other areas of the wetlands.**

87. Concrete decking can often cause less shading compared to wooden decking boards placed closely together. The Westphal pier is made of concrete pieces with permanent slits which allow some sunlight to penetrate to the coastal wetlands below. (T p 1033)

**Petitioners object and except to this finding on the basis that it omits that whatever might be true of the decking, there has only been ten per cent regrowth of the destroyed marsh grasses in two years.**

88. The permitted pier alignment helped reduce shading impacts because the pier was angled in relation to the sun to allow some sunlight to penetrate under the pier and help regrowth. (T pp 1787-88)

**Petitioners object and except to this finding on the basis that it is misleading, seeming to suggest that the pier was intentionally aligned in this way. There is not one shred of evidence that that was done. In fact, there had only been about ten per cent regrowth of the destroyed marsh in the two years since the pier was built. T pp 586-87, 1152.**

89. The Neuse River Buffer Rules allow trees to be trimmed in order to build a pier or for access to a pier. (T pp 1170, 1233, 1403) The live oak tree that was cut down was in the coastal wetland AEC and did not require permission for its removal. (T p 1282)

**Petitioners object and except to this finding on the basis that finding that cutting the live oak tree was an "allowable use" omits that there are requirements of the buffer rules that must be met for 'allowable uses' to be authorized under the buffer rules and therefore actually allowed. This finding also omits that approval from DWQ would be required to cut this tree, which approval was not obtained. T p 1169. In addition, as seen from other findings of fact, it was unclear whether the live oak tree was in the coastal wetland or in the buffer.**

90. The CRC's rules do not require a particular method of construction for the placement of pilings. Both driving in pilings and "blowing" or "jetting" pilings with a water hose are allowed. The possible impacts from both methods are similar and could be worse or better on any particular site, depending on other factors. (T pp 1157-60, 1466) A jet pump is a common tool used by marine contractors, and "jetting" pilings is a standard method of construction. (T p 1686)

**No objection, except relevance.**

91. There were some minimal impacts to the coastal wetlands from the construction of this pier, but there is evidence of new coastal wetlands growth, vegetation regrowth, the leveling of siltation, the presence of hundreds of crabs, and of animal, fish and birds using the marsh. (T pp 1136-37, 1151-52, 1791-96)

**Petitioners object and except to this finding on the basis that it selectively picks out statements of natural resilience in the face of damage to and destruction of parts of the coastal wetlands, ignoring the bigger picture of destruction and impacts. Other findings of fact and objections to findings of fact, in particular number 84, address this issue.**

92. Before issuing a general permit, the CRC must find that construction will not measurably increase siltation. 15A NCAC 7H.0208(a)(2)(E).

**No objection.**

This finding is evidenced by the issuance of the permit. (T pp 1120-21, 1238-39, 1426)

**Petitioners object and except to this finding on the basis that the permit contains no such finding and no reference to any such finding. Likewise, the DCM file in this case contains no such finding or reference to such finding. Stip. Exh. A & B, Record p 2531 & 2532-2540.**

The CAMA general permit for piers anticipates some siltation from the installation of a pier, but that the siltation is typically minor and temporary in nature. (T p 1122)

**Petitioners object and except to this finding on the basis that it is false. The CAMA general permit for piers has no such language, 15A NCAC 07H .1201 et seq., and the cited testimony makes no claim that such language exists in the general permit. T p 1122.**

Since construction, the sediment in the disturbed area is leveling out. (T pp 1122-23)

**Petitioners object and except to this finding on the basis that it omits that in fact the development permitted by DCM in this case did cause measurable siltation. T p 1122-23, 267, 269, 286.**

93. The placement of the pier along the sparser, shaded marsh edge on the Flanagan side of the property reduced impacts to the marsh. (T p 1392)

**Petitioners object and except to this finding on the basis that the preponderance of the evidence shows that the pier was not placed in a sparser section of marsh. See exception to Finding 86.**

If the pier had been placed in the middle of the Westphal property, bisecting the marsh, then the impact on the coastal wetland would have been greater.

**Petitioners object and except to this finding on the basis that it simply is not true. In fact, the pier is placed in roughly the center of the Westphal property. T p 1825.**

94. The Westphal pier minimized any impacts to the coastal wetlands by the location of the pier, the use of concrete decking, and alignment with the sun in order to reduce shading.

**Petitioners object and except to this finding on the basis that it is false and contrary to the great preponderance of the evidence. No witness testified that the as-built location of the pier minimized impacts to the coastal wetlands. The location of the pier was selected for the convenience of the Westphals. See Finding of Fact 3 and associated citations to the record. The issue in this case has been whether the convenience of the permittee and alleged buffer impacts outweigh the greater impact to the coastal wetlands, not whether this location minimized impacts.**

95. The construction and installation of the Westphal pier had minor and temporary impacts on the coastal wetlands.

**Petitioners object and except to this finding on the basis that, as evidenced by the absence of any citation to the record, there is absolutely no support for this finding. In fact, the impacts were drastic to the section of the wetlands in question, and after two years regrowth of wetlands vegetation is only ten per cent. See numerous other exceptions to these findings of fact.**

95a. The construction of this pier system altered the coastal wetlands, most obviously by destruction of the wetland vegetation. The CAMA regulations mandate that “development shall not have a significant adverse impact on estuarine and ocean resources. Significant adverse impacts shall include . . . development that would directly or indirectly . . . alter coastal wetlands . . .” 15A NCAC 07H .0209(d)(4). Under this regulatory definition, ‘significant adverse impacts’ certainly occurred. T pp 518-19.

*This finding is added because it reflects uncontroverted testimony, is important to the issue in the case, and was omitted by the ALJ.*

### **Proposed Alternative Route for the Pier**

96. When Mr. Westphal first purchased the lot, he spoke on-site with Mr. Cowell, who inquired what they intended to build on the lot. (T pp 1824, 608)

**No objection.**

97. At that time, Mr. Cowell suggested and showed Mr. Westphal where he thought the Westphal pier should be built. (T pp 76-77, 608, 1824) He suggested that the pier begin at the existing bulkhead near the Flanagan property and extend waterward from there. (T pp 76-78)

**No objection.**

Access to the pier would be by foot through the wooded strip along the Westphal-Flanagan property line.

**Petitioners object and except to this finding on the basis that there is no citation to the record supporting this finding, and it is misleading. While it is uncontested that access would be by foot (as with the as-built pier), the critical attribute of the access route is that it is uplands instead of wetlands. In addition, ‘along the Westphal-Flanagan property line’ conjures pictures of one walking along that line, when in fact the evidence is that the most natural path is at least ten feet off that property line. See Exception to Finding of Fact 6.**

98. Mr. Westphal listened to Mr. Cowell’s suggestion, but was surprised that he was suggesting how Mr. Westphal should use his own property. (T p 1824)

**Petitioners except based on the lack of relevance to any issue in the case.**

99. Mr. Westphal testified that he thought the straight route down the center of his lot was the best place for the pier, in part because it was not too close to either neighbor’s property

**No objection, but see Exception to Finding of Fact 6.**

and because of the smaller impact to the trees in the buffer. (T p 1825)

**Petitioners object and except to this finding on the basis that there was no evidence that permittee knew about or considered the buffer in deciding where to put the pier. In fact, on page 1825 of the transcript, there is no mention of “buffer” or of impact to trees. Permittee, instead, claims that he was thinking of his neighbors in locating the pier in the middle of his lot, not too close to either. But see Finding of Fact 6 for the true motivations of the permittee (his own convenience).**

100. Mr. Cowell testified that his alternative location could include upland improvements, but he did not believe them to be necessary and because he believes that his alternative did not require Ms. Flanagan to waive her 15-foot riparian setback.

**Petitioners object and except on the basis that this finding does not fairly reflect Mr. Cowell’s testimony.**

He conceded that this alternate route could result in the need to cut trees or clear brush. (T pp 769-73)

**Petitioners object and except to this finding on the basis that Mr. Cowell’s testimony was that no trees needed to be cut, but that a person might optionally want to do this, depending on personal preference. He summed up by saying: “Certainly you’ve got access without cutting anything. If you had to cut it, it would be less than what was cut across the marsh.” T p 773.**

101. In their initial objections, Petitioners’ suggested their alternative route for the pier, and this alternative was further described to Mr. Lane by Mr. Cowell, specifically in a telephone call. (T pp 1002, 1210, 1315)

**No objection.**

Mr. Lane testified that he had a good indication from Petitioners where their alternative location was proposed. (T p 1221)

**Petitioners object and except to this finding on the basis that Mr. Lane’s full testimony was as follows: “Although it had not been pointed out exactly, you know, to the exact foot where**

**the proposed alternative would be, I believe we got a good indication of where the alternative was proposed.” T p 1221. This must be understood in the light of Finding of Fact 30 and associated exceptions—Mr. Lane’s only knowledge of the proposed alternative was from one or two telephone conversations.**

102. Mr. Lane did not take Mr. Cowell onto the Westphal property in order to be shown Petitioners’s alternative location in detail, mainly because Mr. Lane felt he did not have the authority to take a third-party onto someone else’s lot. (T p 1210, 1316)

**Petitioners object and except to this finding on the basis that this fails to indicate that this was merely Mr. Lane’s testimony. There is nothing in the world to keep Mr. Lane from walking onto someone’s property with someone else. The testimony is inherently incredible.**

103. Mr. Lane testified that it was very unusual for a neighbor to propose an alternative pier location. (T p 1002)

**Petitioners object and except to this finding on the basis of relevancy and on the basis that Mr. Lane’s actual testimony did not use the intensifier “very” or any other intensifier. He said it was unusual and he did “not see a lot of it.” T p 1002, lines 2-5.**

104. Mr. Lane testified that it was not his job to resolve a dispute between the Petitioners and the Westphals but, instead, to determine if the design proposed by the Westphals met the standards and requirements for a general permit. (T p 1313)

**This is not a true finding of fact, but merely a description of testimony. Otherwise, no objection.**

105. Although Mr. Lane did not think Petitioners’s alternative route was feasible, he did tell IBX about the route in case it was something their client wanted to consider. (T pp 1002, 1009-10, 1162-63) Mr. Overgaard discussed the Petitioners’s alternative with Mr. Lane, and then with Mr. Westphal. (T pp 1644-45) Mr. Lane spoke with Mr. Overgaard on May 4, 2006 who indicated that the Westphals did not wish to move the location of their pier. (T pp 1009-10, 1163; R’s Ex 1)

**No objection as a generally accurate statement of Mr. Lane’s testimony.**

**105a. Mr. Overgaard and his partner, Mr. Rollins, both revealed at trial that they had a mistaken understanding about the location and route of the proposed alternative. T p 1643-1645, 1676-77, 1704-07. This misunderstanding could easily have been avoided by a meeting between Mr. Cowell, Mr. Lane, and IBX on site to discuss the alternative.**

*This finding of fact is added to fairly reflect the testimony at trial. This testimony is uncontroverted, and was simply omitted by the ALJ.*

106. Mr. Lane noted that the alternative location proposed by Petitioners may very well require part of the pier to be within Ms. Flanagan’s 15-foot setback or even within her actual riparian area. (T pp 1064-66)

**Petitioners object and except to this finding on the basis that it is not a truthful representation of Mr. Lane’s testimony. He did not testify that part of the pier would be**

**within the setback or riparian area, he testified that two tie poles—if they were moved in a certain way, and assuming a certain location of the riparian lines that was called seriously into question—would be in the riparian area, and that part of the platform would be in the setback area. T pp 1064-66. This loose use of the word “pier” continues to be problematic in this Decision. When helpful to its foregone conclusion, this Decision claims that the “pier” was only 41 feet long, because only the part over open water is considered a “pier”. Alternately, when a different definition of “pier” is helpful to the foregone conclusion, the decision seems to include the entire 110 feet of pier/walkway and the 31 foot platform in the definition of “pier.”**

The closeness of the proposed alternative location to the Flanagan property line was part of his consideration. (T p 1318) The riparian area for the Flanagan lot projects east of the Westphal-Flanagan property line over the water. (T p 1047) The riparian lines for the Westphal property are a bit skewed and do not simply extend from the property lines over the water. (T pp 1038, 1144)

**Petitioners object and except to this finding on the basis that it omits a tremendous amount of information important to a fair picture of the issues treated in this paragraph. See, e.g., T pp 2099, 1896-1903, 1905-1911, 1912, 1923-24, 1925-26, 2030, 2033-2036, 2037, 2039-2050.**

107. The waiver of the 15-foot setback by Ms. Flanagan was not a blanket waiver, and she would have to sign a new waiver for the alternative location proposed by Petitioners which would have the pier extending off the Westphal bulkhead very near the Westphal-Flanagan property line. (T pp 1063, 1115, 1119, 1419)

**Petitioners object and except to this finding on the bases that (1) this finding is irrelevant and (2) this finding conflicts with earlier findings that a smaller project with less impact could be built using the same waiver. Finding of Fact 37.**

108. Mr. Lane illustrated on Respondent’s Exhibit 4 the approximate location of the channel of Brite’s Creek and the resulting riparian line angle for the riparian line between the Westphal lot and the Flanagan lot. (T pp 1051-53) Mr. Lane also testified that he was familiar with this water body, having navigated it himself in the past, as well as having examined aerial photographs. (T pp 1068-72)

**Petitioners object and except to this finding on the basis that this does not accurately state the testimony. In fact, Mr. Lane said: “I can say I have navigated a little bit on the river there, but typically, in most cases, if you follow, you know, the center of the water body, that’s where, in most cases, the channel will be, not always - not always the case, but that is what we see in lots of cases.” T p 1068.**

The riparian line on the permit was not drawn to scale and was intended only to identify the distance from the pier to the Flanagan riparian line for the purpose of placement of the pilings. (T p 1053-55, 1197)

**Petitioners object and except to this finding on the basis that it omits that it was not merely not to scale, but also illustrated a riparian line at right angles to the shoreline, contrary to Mr. Lane’s testimony at trial about a markedly angled riparian line. Record p 2531.**



109. A riparian area is the open water that is waterward of the normal water level. A riparian line runs at a ninety-degree angle to the channel or deep water to the property corner at the normal water level. (T pp 973, 983, 1040-48)

**Petitioners have no strong objection, except that it is unnecessary to paraphrase the language of the rule, which appears at 15A NCAC 7H .1205(o).**

The determination of the location of the “channel” or “deep water” used to delineate riparian lines is somewhat subjective. (T p 1068-72, 1414-19, 1524-32)

**Petitioners object and except to this finding on the basis that no witness said the location of the channel is ‘subjective’, nor does it make any sense to so find. Mr. Lane did say it took judgment. Both Mr. Lane and Mr. Tyndall testified a survey of the bottom of the creek would be the best way to determine the location of the channel. And Mr. Tyndall concluded that as to Mr. Lane’s drawing of the purported channel in Brite’s Creek: “For this particular property, that’s pretty close, yes, for an approximation with this system, yeah.” T p 1418. So, DCM was satisfied with an approximation, based on little more than the location of the centerline of the creek. T p 1415, 1418.**

15A NCAC 7H .1205(o) provides the method to delineate riparian lines based on the location of the channel. (T pp 1037-38, 1144, 1300-08, 1404-14)

**No objection.**

The riparian setbacks are measured 15-feet from the riparian line, not the property line, and are only over water, not over land. (T pp 1047-48) A waiver of the 15-foot setback authorizes construction within the setback but not within the riparian area. (T p 1065)

**No objection.**

110. In Respondent’s case-in-chief, testimony was elicited concerning the method for determining riparian lines and, specifically, for identifying the riparian area for the Flanagan property. The purpose of this testimony was to show that Petitioners’s proposed alternative location was not feasible because it would place the Westphal pier within the Flanagan riparian area. (Argument of Counsel, T pp 1986-95)

**Petitioners object and except to this finding on the basis that argument of counsel may not properly be the basis for a finding of fact.**

111. In their rebuttal case, Petitioners’s also offered testimony concerning the method for determining riparian lines that would show errors in DCM’s calculations. (Argument of Counsel, T pp 1986-95)

**Petitioners object and except to this finding on the basis that argument of counsel may not properly be the basis for a finding of fact.**

Most of Petitioners's witnesses focused on the definition of the terms "channel" and "deep water" in the regulation concerning riparian lines. 15A NCAC 7H .1205(o)

**Petitioners object and except to this finding on the basis that it is confusing as worded: Petitioners' witnesses focused on many other issues. However, Petitioners agree that several witnesses did testify about this issue.**

Mr. Baldwin testified that Brite's Creek does not have a channel or deep water line, but rather is wide and flat-bottomed. (T p 1857)

**No objection, except that this should be made a true finding of fact by omitting the first three words.**

Mr. Cowell testified that he interpreted the regulation language "deep water" to mean "deep water line."

**Petitioners object and except to this finding on the basis that Mr. Cowell did not need to interpret the language. The Rule says "[t]he line of division of areas of riparian access shall be established by drawing a line along the channel or deep water . . ." 15A NCAC 7H .1205(o).**

He made his own measurements concerning the water depth and bottom of Brite's Creek, and then he determined what he called the "controlling depth" in order to conclude that there is no channel or deep water in Brite's Creek within the meaning of the regulation. (T pp 1896-1913) Adam Arrington remotely assisted Ms. Dressler's use of a GPS device with which Petitioners located the points of some depth measurements in Brite's Creek, near the site of the Westphal pier, and then Mr. Arrington helped them to create a map of the depths. (T pp 2039-42)

**Petitioners object and except to this finding on the basis that, though these sentences describe snippets of the indicated testimony, they fail to describe the full meaning of the testimony. See T pp 1896-1926; 2030-2050.**

Mr. Spangler testified that the riparian line may be straight out from the property line or skewed. (T p 2099)

**No objection.**

Petitioners's witnesses did not demonstrate an expertise or knowledge concerning the determination of riparian lines nor provide evidence that contradicted the method as described by Respondent's witnesses.

**Petitioners object and except to this finding on the basis that the determination of riparian lines is a straightforward exercise, described by the regulation, and requiring nothing more than determining the deep water line and then drawing a perpendicular line from that line to the property corner. Any person of normal intelligence can do this. Respondent's witness, Mr. Lane, drew his lines on an exhibit free hand, and the Respondent's witness, Mr. Tyndall, described a method that consists of drawing the approximate center line of the creek. T p 1415. Petitioners' witnesses described a much more careful method, involving actual measurements of water depth to determine the deep water line, then the**

**simple drawing of a perpendicular line. No expertise or knowledge beyond that clearly possessed by the witness is required.**

**111a. From the combined testimony, it is clear that DCM established riparian lines using the roughest approximations. Stephen Lane eyeballed the creek on site and told IBX where to put the platform and tie poles based on that. T pp 1037-38, 1056-57. Similarly, he drew free-hand an approximate channel line on an aerial photo at trial. It is also clear that DCM was wrong in some of its assumptions. T pp 1051-53. Stephen Lane thought there was an eight-foot deep channel in Brite's Creek, when in fact the deepest spots in the creek were less than four feet. T p 1204. For example, Mr. Baldwin, the Lower Neuse Riverkeeper, testified that Brite's Creek does not have a channel or deep water line, but rather is wide and flat-bottomed. (T p 1857) Stephen Lane admitted that he was unable to say what distance would lie between the perpendicular riparian lines in the permit and the angled ones he testified to at trial. T p 1203-04. Despite the roughness of its understanding of the creek, DCM personnel went on to testify as to some fairly precise things, such as that parts of the proposed alternative pier would be in the neighbor's riparian setback using the precise angle they free-handed onto the drawings. E.g. T p 1061-66.**

*This finding is added to summarize the preponderance of the evidence on this particular issue, based primarily on other findings of fact.*

**111b. Petitioners' witnesses used much more precise methods, involving actual measuring, to approximate the Brite Creek channel line and consequently the riparian lines. These methods involved simple measurements, well within the capability of laymen. For example, Mr. Cowell he made his own measurements concerning the water depth and bottom of Brite's Creek, and then he determined what he called the "controlling depth" in order to conclude that there is no channel or deep water in Brite's Creek within the meaning of the regulation. (T pp 1896-1913) Adam Arrington remotely assisted Ms. Dressler's use of a GPS device with which Petitioners located the points of some depth measurements in Brite's Creek, near the site of the Westphal pier, and then Mr. Arrington helped them to create a map of the depths. (T pp 2039-42) The measurements and resulting testimony were sufficient to show the unreliability of the DCM approximations. See T pp 1896-1926; 2030-2050. However, the measurements were not a full hydrographic survey, and do not establish without doubt the location of the channel or the riparian lines.**

*This finding is modified to more fairly reflect the evidence.*

**111c. It is not necessary to conclusively determine in this decision the location of the riparian lines. This should be done in the field using the data gathered by the Petitioners and their witnesses, in order to establish the most accurate lines practicable.**

**111d. The need for a choice regarding riparian lines was mooted during Petitioner's rebuttal testimony when Mr. Spangler demonstrated that, even using the riparian lines drawn for litigation by DCM (different from the riparian lines on the permit), the alternative location for the pier could stay clear of Ms. Flanagan's riparian lines and**

even her fifteen foot setback. T p 299-300, 2097-2101, 1229-30. In particular, the platform and tie poles—the subject of the testimony regarding intrusion into Ms. Flanagan’s setback—could stay right where they are for the as-built pier/dock system. T p 2099-2100. The only part of the system that would need to be moved is the walkway across the water, and it can be located 15 or more feet from Ms. Flanagan’s riparian line (even as drawn by DCM for litigation), and therefore out of her setback. Id.

*This finding is added to describe this key testimony, which was unrefuted, that was left out of the ALJ decision.*

**111e. Given that, the riparian setback issue is a red herring. Nothing about Ms. Flanagan’s riparian setback prevents the alternative location from being practicable.**  
Added to summarize.

112. Petitioners’ alternative location would impact some wetlands as seen along the bulkhead in Petitioners’ Exhibit 4, photos 9-11. (T pp 1160-62)

**Petitioners object and except to this finding on the basis that it omits any description of the one to two order of magnitude difference in the size of the area to be impacted as compared to the as-built pier. In fact, the width of the wetlands by the bulkhead was about six feet. T p 290; see Photos at Record pp 2628-29. In addition, this finding omits that no pilings would need to be placed in this slender strand of wetlands for the alternative location.**

113. Mr. Lane testified that he believed the as-built pier location had less adverse impacts on the resources than the Petitioners’ alternative. (T p 1322)

**This is not a true finding of fact, but merely a description of testimony.**

114. In Mr. Hodge’s opinion, the alternative location for the pier would likely impact more woody vegetation and impact the resources than the permitted/existing location. (T p 838)  
The total impact of the alternative location would be more than the permitted location because the alternative is less perpendicular to the upland than the permitted location, and so would impact a much greater area of the buffer. (T pp 839-41) Also, in the existing location, most of the pier itself is not within the buffer because it is waterward of the Coastal Wetlands. The pier access proceeds through the buffer and is more perpendicular to the buffer. (T pp 841-43)

**Petitioners object and except to this finding on the basis that it fails to make clear that it refers to comparative impacts in the buffer, not the coastal wetlands or other AECs. T pp 838-843. In addition, the buffer either is a DWQ issue that is not the subject of this case, or if it is a subject of this case, the buffer rules were violated, as specified in the other findings of fact.**

115. Mr. Morrison testified that Petitioners’ alternative would have to include a wooded path for pier access which would wind about 100-feet through the Neuse Buffer area, and the walking would get rid of vegetation to make it walkable with chairs, coolers and other materials to use on the pier or boats. (T pp 1779, 1782, 1786)

**Petitioners object and except to this finding on the basis that it makes no sense: “the walking would get rid of vegetation to make it walkable . . .”? In addition, the finding omits Mr. Morrison’s admission that it would take a lot of walking to have an impact, and that any such impact was speculative. T pp 1779, 1780, 1797, 1798. As with the entire decision, this finding is argumentative and one sided.**

116. Mr. Lane agreed that if the Westphals were to propose a walkway to the Petitioners’ proposed alternative, it would be development within the Coastal Shorelines AEC, requiring a CAMA permit. (T p 1267)

**Petitioners object and except to this finding on the basis that it does not truthfully reflect the testimony. Mr. Lane did not say that a walkway would require a CAMA permit. He said that seventy five feet back from the waterline is an unspecified AEC, which would be true for both the as-built and the proposed alternative sites.**

Based on his experience, Petitioners’s proposed alternative would likely require the removal of multiple trees or vegetation for any placement of a walkway, although none was proposed by Petitioners. (T pp 1113-15, 1226) In comparing the two pier locations, he felt the as-built location would result in the removal of less trees, being only the one, compared to the Petitioners’s alternative. (T pp 1169-70)

**Petitioners object and except to this finding on the basis that it is based upon speculation. The finding omits that the questions Mr. Lane was being asked postulated a six foot wide walkway, which was not proposed by the permittee nor by Petitioners. The finding also omits Mr. Lane’s admissions that he made no determination at any time which trees would have to be removed, where the path to the pier would lie, or anything else that would form the reasonable basis of an opinion about the necessity for removal of trees. E.g. T pp 1220-27.**

117. Mr. Lane testified that he felt the as-built location reduced the overall impacts to resources, both coastal wetlands and DWQ’s buffer, than the Petitioners’ alternative route. This was due in part to the alternative running through a larger area of the DWQ buffer, the limited waiver by Ms. Flanagan, and the existing shading in the as-built location due to the tall trees along the upland near the Flanagan property that shaded the marsh. (T pp 1102-03)

**Petitioners object and except to this finding on the basis that this is not a true finding of fact, but merely a description of testimony. It should be omitted, especially since it does not fairly reflect the preponderance of the evidence.**

118. Ms. Flanagan has seen the as-built pier and is also familiar with the Petitioners’s proposed alternative route. (T pp 1503-09)

**Petitioners object and except to this finding on the basis that it is not truthful. Ms. Flanagan did not testify that she was familiar with the Petitioners’ proposed alternative route. When asked the question whether she was familiar, she responded by asking “I understand that they would like to move it nearer to my property line, is that correct?” T pp 1503 lines 11-16.**

Ms. Flanagan testified that if the Westphals had proposed the pier route to follow the Petitioners' alternative route she would not have waived the 15-foot riparian setback. (T p 1509) Ms. Flanagan's concerns about the Petitioners' alternative route included the closeness to her own property and feeling cramped when the Westphals walked down the narrow wooded strip of their property to access the alternative pier. (T pp 1514-20) Ms. Flanagan also had concerns that if she were to erect a fence to mark the Westphal-Flanagan property line that the fence construction and the Westphals's access path foot traffic could cause erosion into the marshland. (T p 1521)

**Petitioners object and except to this finding on the basis that it is based on testimony that improperly admitted. The testimony was both speculative and irrelevant, and the ALJ ruled incorrectly in allowing it over Petitioners' objections. DCM did not have any knowledge of what Ms. Flanagan thought of any alternatives at the time it made its decision, and it is irrelevant what she might have been coached to say two years later. The issue is whether DCM properly issued the permit in May 2006.**

119. Mr. Tyndall testified that to him, the crux of this case comes down to whether the location of the permitted pier was the location which minimized impacts to the resources. He strongly believed that the permitted location struck the best balance between impacts to the marsh, impacts from cutting trees, and riparian rights. (T p 1383)

**This is not a true finding of fact, but merely a description of testimony. Additionally, Petitioners object and except to this finding on the basis that it does not truthfully state Mr. Tyndall's testimony. An examination of T p 1383 will show that Mr. Tyndall did not say anything about "strongly believed." Though he did say he agreed with his subordinate's issuance of the permit, he went on to say: "And so you're balancing the value of one versus balancing the other, and it's a very tough decision. And, in this case, the Westphals were pushing for an elevated boardwalk over the marsh, and that's what was issued." T p 1383.**

**119a. Impacts to the resources would be minimized by using the alternative location suggested by Petitioners for the pier system. The severe impacts to the coastal wetland from the as-built location, the simplicity of locating the pier in the alternate location, and the fact that the alternative location would vastly reduce or eliminate adverse impacts to the coastal wetlands are covered in previous findings of fact.**

*A summary paragraph to reflect the preponderance of the evidence, as laid out in other findings of fact.*

**119b. The difference in total adverse impacts to the protected resources between the as-built location and the alternative location is "black and white", an "obvious call"—the alternative location would be strongly preferred. This includes the impact to the buffer, as well as to the coastal wetlands and coastal shoreline. T pp 1883-84, 2082, 2088; 638-639. It is important to note that this testimony comes not only from Petitioners' well qualified expert, but also from Larry Baldwin, the Lower Neuse Riverkeeper, who was qualified as an expert, T pp 636-37, and was the only witness at the entire trial with no**

**interest other than protecting the very resources CAMA is designed to protect. He was not defending a permit decision, he was not paid, he does not own land in the area.** *This finding is added to correct an omission by the ALJ, and reflects the preponderance of the evidence on these points.*

**Improper delegation of DCM duties to IBX**

120. There is no evidence that DCM delegated its decisionmaking authority to IBX or any other person or entity. (T pp 1162-64, 1685)

**Petitioners object and except to this finding on the basis that there clearly is such evidence, as set out in the findings of fact of this Decision. See Finding of Fact 105.**

**Petitioners's reasons for bringing this case**

121. Petitioners testified that their reason for contesting this permit is out of concern for the environment and not about the change in view from their property. (T pp 87-88, 618-25, 665-67, 736, 753, 774) Mr. Cowell testified that since construction of the pier, he has not seen any birds in the marsh. (T p 607) Ms. Dressler testified that since construction of the Westphal pier, none of the herons or egrets have visited the marsh, and that her view now includes the pier. (T pp 75-76) Ms. Dressler testified that she and Mr. Cowell brought this case because they are very environmentally concerned individuals and are concerned about the marsh. (T p 87-88)

**No objection, except relevancy.**

122. In the third party hearing request, petitioners's list view as one of their concerns. (T pp 776-77; R's Ex 5) Mr. Cowell testified that he did not bring this case because of issues with his view and that his statements about view were made while he was "still very angry." (T pp 777-78) He confirmed that they were true at the time he wrote them and submitted them to the CRC. (T p 778)

**Petitioners object and except to this finding on the basis that it is totally irrelevant, and that it omits two key facts, were there any relevancy. First, there was no mention of view in Mr. Cowell's objection letter to Mr. Lane of November 6, 2005. Record pp 2537-39. Second, the Third Party Hearing Request ws not before DCM when it made its decision to grant this permit, so it is irrelevant to the issue in this case. Third, Petitioners were required in their request for third party hearing to state a basis for their standing to bring a third party hearing request—something that differentiated Petitioners from everyone else who might be concerned about the environment. Since they are neighbors to this project, view is one such differentiating factor. Finally, the reasons Petitioners brought this case is totally irrelevant to the issue in the case—whether DCM followed the law in issuing this permit.**

123. Testimony was elicited in Respondent's case-in-chief (T pp 1724-32, 1739-41) and in Petitioners's rebuttal case (T pp 2018-21) concerning Petitioners's personal commitment to and interest in environmental causes.

**No objection.**

124. Upon consideration of the demeanor of the witnesses at the hearing and a review of the transcripts, the Undersigned is of the opinion that a misunderstanding occurred between IBX and Petitioners, and that Petitioners, in fact, have a longstanding interest in the environment and its preservation and conservation.

**No objection.**

### **CONCLUSIONS OF LAW**

**Petitioners object and except to these Conclusions of Law generally on the basis that they fail to make any conclusions of law at all about this case. That is, the Decision fails to apply the law to the facts, instead leaping from a one-sided and inaccurate statement of facts to a decision. This is improper and shows the absence of a proper deliberative process in the decision making.**

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.Gen.Stat. § 113A-121.1 and N.C.Gen.Stat. § 150B-23.
2. All parties have been correctly designated and are properly before the Office of Administrative Hearings, and there is no question of misjoinder or nonjoinder of parties. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.
3. Petitioners have standing to bring this contested case related to environmental concerns resulting from the construction of the pier.
4. Petitioners have not demonstrated by a preponderance of the evidence that the permitted pier has substantially prejudiced their rights.
5. By issuing the permit, Respondent did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule. N.C.G.S. § 150B-23(a).
6. Respondents are required to act in order to correct the height violation of the as-built Westphal pier.
7. Greater weight is given to the testimony of Respondent's witnesses and Intervenor-Respondents's witness, Mr. Morrison, whose extensive experience with and knowledge of CAMA general permits and applicable regulations was apparent. Lesser weight was given to



the testimony of Petitioners's witnesses, generally, whose experience and knowledge concerning applicable regulations was less, and to Mr. Spangler, specifically, whose credibility was weakened by his antagonistic posture in direct testimony as well as in cross-examination upon recall.

**Petitioners object and except to this conclusion on the basis that it is not a conclusion of law, but a finding of fact.**

**Petitioners offer the following additional Conclusions of Law, which would be the only conclusions of law specifically addressing the law as it applies to this case. Because they are extensive, they are not in bold:**

The Coastal Area Management Act

8. The Coastal Area Management Act (CAMA) is the controlling substantive statute in this case, found at N.C. Gen. Stat. §113A-100 et seq.
9. CAMA requires that "every person before undertaking any development in any area of environmental concern shall obtain . . . a permit pursuant to the provisions of this part." N.C. Gen. Stat. §113A-118 (a).
10. The Act goes on to allow for 'general permits' in certain instances. N.C. Gen. Stat. §113A-118.1. Individual developments under general permits are not subject to the notice provisions of G.S. 113A-119. There are no other exceptions for general permits to the rules applicable to permitting. *Id.*
11. CAMA requires that the responsible official "**shall** deny an application for a permit" if any of ten conditions exist. N.C. Gen. Stat. §113A-120(a)(emphasis added).
12. The ninth condition that requires that a permit be denied reads as follows:  
  
In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.  
  
N.C. Gen. Stat. §113A-120(a)(9)(emphasis added).
13. There was a practicable alternative to the location permitted for the pier in this case, and that alternative would have had significantly less adverse impact on the coastal wetlands, a public resource. The alternative was the one offered by Petitioners, and it was offered to DCM prior to the permitting decision.
14. The alternative offered no special engineering requirements, and would have been less expensive than the alternative that was permitted.

15. DCM violated the law, namely N.C. Gen. Stat. §113A-120(a), when it issued the subject permit in spite of the clear and known existence of a practicable alternative with less adverse impact.

#### CAMA Regulations

16. The CRC has promulgated an extensive set of regulations to implement CAMA. 15A NCAC 07H.
17. There are a number of Areas of Environmental Concern (AECs) described and regulated in those regulations. 15A NCAC 07H .0204 *et seq.* These AECs are designated pursuant to the mandate of the legislature in CAMA. N.C. Gen. Stat. §113A-113. There are four AECs defined within the ‘estuarine and ocean system.’ 15A NCAC 07H .0201.
18. One of the four AECs is “Coastal Wetlands.” 15A NCAC 07H .0205. The area impacted by this project is unquestionably coastal wetlands. *See Findings of Fact.*
  - a. The specific use standards for coastal wetlands state that:

Highest priority of use shall be allocated to the conservation of existing coastal wetlands. Second priority of coastal wetlands use shall be given to those types of development activities that require water access and cannot function elsewhere. . . . **In every instance**, the particular location, use, and design characteristics **shall be in accord with the general use standards for coastal wetlands**, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0205(d)(emphasis added)
  - b. The General Use Standards of section .0208 do apply to coastal wetlands and to this project.
19. Another of the four AECs is the ‘Coastal Shorelines’ AEC. 15A NCAC 07H .0209. The site of this pier and docks is in the Coastal Shorelines AEC. *See Findings of Fact.*
  - a. The Coastal Shorelines regulation contains Use Standards, which state *inter alia*:

In every instance, the particular location, use, and design characteristics shall comply with the general use and specific use standards for coastal shorelines, and where applicable, the general use and specific use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0209(d).
  - b. The use standards go on to say:

Development **shall not** have a **significant adverse impact** on estuarine and ocean resources. **Significant adverse impacts shall include . . . development that would directly or indirectly . . . alter coastal wetlands . . .**

15A NCAC 07H .0209(d)(4)(emphasis added).

- c. It is unquestionable that this pier and walkway “alter[ed] coastal wetlands.” The regulation does not merely prohibit destruction of wetlands. It prohibits—using mandatory, not permissive language—altering coastal wetlands. “Alter” means to “make changes to something or somebody, or be changed or become different.” *Encarta Dictionary* (2008). It is uncontested that these wetlands were changed by this project. *See Findings of Fact*.
  - d. It might be suggested that the regulatory prohibition on altering coastal wetlands must have some ‘give’ to allow piers and boat docks to be permitted for citizens who desire them, but who own property completely sheathed in coastal wetlands on the water side. The regulation provides no such give. Even were we to read some implied flexibility into the regulation for hardship cases, this case is not a hardship case. As is discussed extensively in the Findings of Fact and in other conclusions of Law herein, there was a clear alternative that would not have required any alteration of coastal wetlands.
  - e. DCM violated 15A NCAC 07H .0209(d) by permitting this project.
20. The regulations contain General Use Standards that apply to coastal wetlands and coastal shorelines, and therefore apply to this project. 15A NCAC 07H .0208(a).
- a. The general use standards provide in pertinent part as follows:
    - Before being granted a permit by the CRC or local permitting authority, there **shall** be a finding that the applicant has complied with the following standards:
      - \* \* \* \*
    - (B) Before receiving approval for location of a use or development within these AECs, the permit-letting authority **shall find that no suitable alternative site or location** outside of the AEC exists for the use or development and, further, that the applicant has **selected a combination of sites and design that will**

**have a minimum adverse impact** upon the productivity and biologic integrity of **coastal marshland** . . . .

15A NCAC 07H .0208(a)(2)(emphasis added).

- b. There was no finding in this permit process that that the applicant had complied with those standards, namely that the Westphals had selected a combination of sites and design that would have the minimum adverse impact on coastal marshland.
- c. There was likewise no finding that no suitable alternative site or location outside the AEC existed for this project. In fact, no such finding could be made, since there was a perfectly suitable alternative site, as has been discussed thoroughly elsewhere in this Decision.
- d. DCM argues that it made all findings that are required of it when it issued the permit. Its argument goes that otherwise it would be issuing permits without following the law, so those who review DCM's actions are bound to assume that DCM mentally made findings that it failed to make in any sort of writing. This sort of 'trust us, we wouldn't do anything wrong' attitude is directly contrary to the intention of the APA that administrative decisions be reviewable. If OAH, the CRC, and the Superior Courts are to simply assume that the agency 'must have' made all findings required by law, then review of the agency's decisions is meaningless. A 'finding' is defined to mean one of two things: "(1) a piece of information obtained from an investigation, especially scientific research or (2) a conclusion that is reached and recorded at the end of a judicial or other formal inquiry." *Encarta Dictionary* (2008). These 'assumed findings' offered by the agency do not meet either definition. There was no investigation, and there was no recording of any conclusion. There must be some evidence that a finding has been made—ranging from a check mark on a list of required findings at minimum, to a full written report detailing the investigation that lead to the finding at maximum—in order to show that the decisionmaker was aware of his obligation to make each of the findings required by law and in fact made the findings.
- e. Again, in this particular case, we know that no such finding was made for three reasons. The base reason is that there is no writing of any sort to show any such finding. The second reason is that there was a clear, economic, and practicable alternative, so the required finding could not have been honestly made. Finally, and most conclusive, Stephen Lane testified as to his process of addressing the proposed alternative. It consisted primarily of asking the contractor whether the

Westphals wanted to relocate the project to the alternative location. The contractor said ‘no’, and that was the end of it.

- f. DCM violated the General Use Standards in permitting this project. The General Use Standards are part of the law. Therefore, DCM violated the law when it permitted this project.

### **The Buffer Rule**

21. The Neuse River Basin Buffer Rule is found at 15A NCAC 02B .0233. The buffer rules are not administered by DCM, but by the Division of Water Quality (DWQ). For this reason, compliance with the buffer rule may or may not be a proper subject of this Decision. What is certainly true is that either the buffer rules apply or they do not apply. Neither party may have it both ways, arguing the buffer rules when it suits them, and denying their relevance when the buffer rules do not suit them. These conclusions of law will assume that the buffer rules are a proper subject of this case, since both parties put on evidence regarding same, and the ALJ accepted that evidence. These conclusions, however, are not necessary to this Decision, since we have already concluded that DCM violated CAMA and the CRC’s CAMA Rules in issuing this permit.
22. In order to determine whether a use or activity is allowed in the buffer, one looks at section 6—Table of Uses. Uses may be exempt from the buffer rules, allowed, allowed with mitigation, or prohibited. “Water dependent structures” are not exempt, but they are “allowable”. 15A NCAC 02B .0233(6).
23. “Water dependent structures” is a term defined in 15A NCAC 02B .0202 (67). It is uncontroverted that the pier meets this definition.
24. When an applicant applies for and receives a CAMA General Permit to construct a pier that is within the Neuse or Tar-Pamlico River Basins, the applicant must also receive written buffer authorization from the DWQ. 15A NCAC 02B .0233(7).
  - a. Mr. Al Hodge, a Regional Supervisor for DWQ, conceded that a buffer authorization was required for this project, that no buffer authorization was issued, and that this was a violation of the law. *See* Finding of Fact 54.
  - b. DCM violated the buffer rules when it issued this permit. The Buffer Rules are part of the law. Therefore, DCM violated the law when it permitted this project.
25. The requirements for a buffer authorization, which are found at 15A NCAC 02B .0233(7) & (8), require that there be a determination of no practical alternatives in order to receive a buffer authorization, including a finding of fact that “the basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality.”

15A NCAC 02B .0233(8)(a)(i). this section has very detailed requirements about what the applicant must submit in order to show that there is no practical alternative.

- a. The permittee in this case submitted nothing in any attempt to comply with 15A NCAC 02B .0233(8). Therefore, there was no finding of fact that there was no practical alternative, and no determination of no practical alternatives. T pp 870-872.
  - b. This was a violation of the buffer rule. The Buffer Rules are part of the law. Therefore, DCM violated the law when it permitted this project.
26. Respondent attempted at trial to show that foot traffic in the buffer leading to the proposed alternative location for the pier was a sufficient reason to determine that the alternative location should not be permitted. The findings of fact deal show that this concern is far overshadowed as a factual matter by the damage to the coastal wetlands. As a matter of law, this argument also fails. There is no authority under the buffer rule for either DCM or DWQ to deny a permit based on the fact that a family will walk across its property that happens to be in the buffer. Neither is there authority for DCM or DWQ to regulate or restrict that family's ability to walk on its property. *See* 15A NCAC 02B .0233, and in particular, the Table of Uses, 15A NCAC 02B .0233(6).

### **Summary**

27. Respondent violated CAMA, the CAMA Rules, and the Buffer Rule when it issued CAMA General Permit No. 45215.

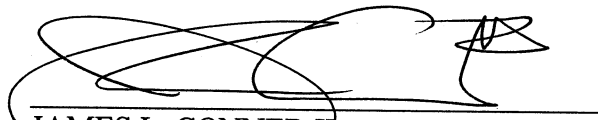
Upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, and based upon the preponderance of the evidence, giving regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency pursuant to N.C.G.S. § 150B-34(a), and based on the preceding findings of fact and conclusion of law howsoever named, the Undersigned makes the following:

### **DECISION**

**For all the reasons stated in the exceptions to the Findings of Fact and in the provided Conclusions of Law, Petitioners object and except to this decision, which is not supported by the evidence or the law.**

Based on the foregoing findings of fact and conclusions of law, Petitioners have not demonstrated by a preponderance of the evidence that CAMA General Permit No. 45215 issued to Intervenor-Respondents on May 10, 2006 was improperly issued. The preponderance of the evidence supports Respondent's issuance of CAMA General Permit No. 45215.

These objections submitted this the 10th day of September, 2008.

A handwritten signature in black ink, appearing to read "JAMES L. CONNER II", is written over a horizontal line. The signature is somewhat stylized and loops back to the left.

JAMES L. CONNER II  
Attorney for Petitioners  
311 E. Main Street  
Durham, NC 27701  
919-749-9943  
State Bar No. 12365  
jimconner@earthlink.net

STATE OF NORTH CAROLINA  
COUNTY OF PAMLICO

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 EHR 1185

Henry S Cowell III and  
Carolyn E Dressler

PETITIONER,

v.

Division of Coastal Management

RESPONDENT,

Earl C. and Mary Jane Westphal,

RESPONDENT-INTERVENORS

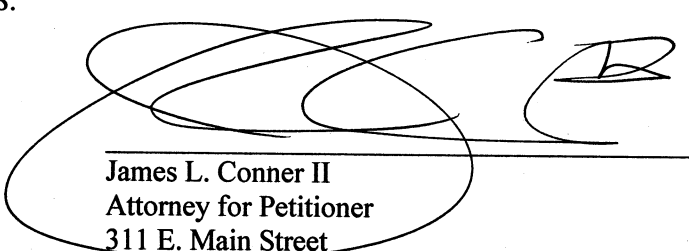
CERTIFICATE  
OF SERVICE

I certify that **Petitioners' Objections and Exceptions to ALJ Decision, Proposed Agency Decision, Written Arguments, and Transmittal of Proposed Decision** have been served on the Respondent and Respondent-Intervenors this day by depositing a copy of it in the United States Postal Service with sufficient postage affixed, addressed to:

Christine A. Goebel  
Department of Justice  
Attorney General's Office  
Environmental Division  
[cgoebel@ncdoj.gov](mailto:cgoebel@ncdoj.gov)

Earl and Mary Jane Westphal  
[MJWestphal@co.pg.md.us](mailto:MJWestphal@co.pg.md.us)  
[ewestphal@comcast.net](mailto:ewestphal@comcast.net)

This the 11<sup>th</sup> day of September 2008.



James L. Conner II  
Attorney for Petitioner  
311 E. Main Street  
Durham, NC 27701



STATE OF NORTH CAROLINA  
COUNTY OF PAMLICO

BEFORE THE  
COASTAL RESOURCES COMMISSION  
06 EHR 1185

Henry S Cowell III and  
Carolyn E Dressler

PETITIONERS,

V.

Division of Coastal Management

RESPONDENT

Earl C. and Mary Jane Westphal

RESPONDENT-INTERVENORS

Request to present at  
Commission Hearing

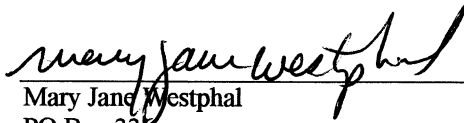
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SEP 10 2008

Worehead City DCM

This is to serve as a formal request by Respondent-Intervenor to present oral argument in the above case at the scheduled hearing on September 25, 2008 or as subsequently scheduled.

This 9 day of September 2008.



Mary Jane Westphal  
PO Box 338  
Oriental, NC 28571



Earl C Westphal, Jr.



## State of North Carolina

Department of Justice  
PO Box 629  
Raleigh, North Carolina  
27602

Reply to:  
Christine A. Goebel  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
Tel: 919-716-6600  
Fax: 919-716-6767  
cgoebel@ncdoj.gov

ROY COOPER  
ATTORNEY GENERAL

September 11, 2008

**By First Class Mail & email**

Mr. James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Re: *NC Coastal Federation v. DCM & Wind Over Waves, LLC*, 07 EHR 0345

Dear Mr. Gregson:

Please find enclosed the Respondent's Memorandum in Support of the ALJ's Decision. This Memorandum is respectfully submitted in accordance with communication from CRC Counsel Jennie Wilhelm Hauser, asking that parties file any exceptions to the ALJ's Decision by noon on September 11, 2008.

Although Respondent is filing a memorandum of support for the ALJ's Decision and is not filing exceptions, I would request time for oral argument to preserve the right to rebut any exceptions or arguments that Petitioner and/or Intervenor-Respondent may make before the CRC when they hear this case for a final agency decision at the September 24-26, 2008 meeting. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Christine Anne Goebel".

Christine Anne Goebel  
Assistant Attorney General

Enclosure

cc(w/enc.): John Suttles, S.E.L.C., Counsel for Petitioner  
Amy P. Wang, Ward and Smith, P.A., Counsel for Intervenor-Respondent  
Jennie Wilhelm Hauser, Special Deputy AG & Counsel for the CRC

STATE OF NORTH CAROLINA  
COUNTY OF DARE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
07 EHR 0345

---

NC COASTAL FEDERATION, )  
Petitioner, )  
vs. )  
N.C. DEPARTMENT OF ENVIRONMENT )  
AND NATURAL RESOURCES, )  
DIVISION OF COASTAL )  
MANAGEMENT, )  
Respondent, )  
and )  
WIND OVER WAVES, LLC )  
Intervenor-Respondent. )

**RESPONDENT'S MEMORANDUM  
IN SUPPORT OF ALJ'S DECISION**

---

This memorandum is respectfully submitted to the Coastal Resources Commission by Respondent in support of the Decision issued by the Honorable Administrative Law Judge ("ALJ") Melissa Owens Lassiter in the above-captioned case on April 7, 2008 and Amended (to add the offer of proof to the record) April 15, 2008.

**Relief Requested: CRC Should Uphold the ALJ's Decision**

Respondent files no exceptions to the Decision, and respectfully urges the Commission to adopt the ALJ's Decision in full as the Final Agency Decision. Because the ALJ upheld the agency's action granting Intervenor-Respondent's CAMA permit in this case, and essentially adopted the Respondent's and Intervenor-Respondent's joint proposed decision, this memorandum is submitted to emphasize the correctness of the ALJ's decision and to remind the Commission of the standard of review when reviewing a decision by an ALJ.

**DCM Lawfully Issued CAMA Major Permit No. 192-06**

In this case, division staff properly granted Intervenor-Respondent's CAMA Major Permit No. 192-06 on November 26, 2006, which authorized the development of subdivision infrastructure, including a loop-road and utilities, on a 38.25-acre site adjacent to Pamlico Sound in Salvo, Dare County, North Carolina. The issue before the ALJ, and now before the Commission, is whether the issuance of CAMA Major Permit No. 192-06 was proper. The hearing focused on the resolution of three primary issues<sup>1</sup> being (1) whether the July 2006 delineation of the coastal wetlands by DCM staff was proper; (2) whether there were practicable alternatives per N.C.G.S. § 113A-120(a)(9), and (3) whether the development would contribute to cumulative effects inconsistent with the rules per N.C.G.S. § 113A-120(a)(10).

Judge Lassiter AFFIRMED the Division of Coastal Management's decision to issue Intervenor-Respondent's CAMA major permit. Judge Lassiter found that Petitioner failed to demonstrate by a preponderance of the evidence that Respondent erred in issuing the permit. (Decision, pp. 18-19; Record, pp. 1215-1216) This decision was rendered after five days of the hearing in August and September 2007, where Judge Lassiter was able to review the applicable law, testimony, and evidence presented by all three parties.

---

<sup>1</sup>Initially, Petitioner tried to also challenge the DWQ stormwater permit through the CAMA permit challenge process. On Respondent's motion, the ALJ severed the DWQ issue, and it was tried in a separate case against DWQ. (Record p. 1558) Also, Petitioner's challenge that the permit was inconsistent with the Dare County CAMA LUP was dismissed by the ALJ on (date) during the hearing. (Transcript p. 862)

### **Standard of Review**

This case arises under the revised Administrative Procedure Act ("APA"). When the General Assembly adopted substantial amendments to the APA in 2000, it gave express guidance to final agency decision-makers as to the standard of review in contested cases. In accordance with this revised standard of review, the Commission should adopt the Judge's Decision in its entirety. Specifically, the Commission is *required* to adopt each of the ALJ's findings of fact, "unless the finding is clearly contrary to the preponderance of the admissible evidence . . . ." N.C.G.S. § 150B-36(b). In considering the ALJ's findings, the Commission must "giv[e] due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses." Id. If the Commission were to not adopt any of the ALJ's findings, it would be required to explain its reasons for disagreeing with the ALJ and identify specifically the evidence in the record upon which it relied to conclude that the ALJ was wrong. Id.

### **Summary of the Petitioner's argument and Respondent's and Intervenor-Respondent's rebuttal**

DCM has read, and adopts the summary of the issues presented by the Intervenor-Respondent Wind Over Waves, LLC ("WOW") in the exceptions they have filed, with the exception of WOW's exception to the ALJ's ruling, challenging NCCF's standing to bring this case. DCM did not join in WOW's Motion to Dismiss based on standing, and does not take exception to the ALJ's order denying WOW's Motion. Otherwise, their summary fairly depicts the Respondent and Intervenor-Respondent's view of this case.

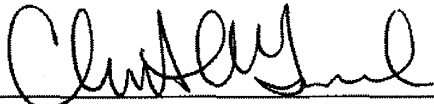
**Correct Result by the ALJ**

After assessing the evidence and whether the Petitioner has overcome its burden regarding findings of fact, the Commission *must adopt* the ALJ's decision, including the ALJ's conclusions, unless the Commission demonstrates that the decision is clearly contrary to the preponderance of the admissible evidence in the record. N.C.G.S. § 150B-36(b3). If the Commission does not adopt the ALJ's decision as its final decision, the Commission shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the Commission. The Commission may consider only the official record . . . . Id.

The ALJ hears the evidence, observes witness demeanor, reviews the record, and then issues a written decision. In this case, the ALJ's decision to defer to DCM staff's and its findings are well-supported. Every finding of fact is supported by the testimony of various witnesses and the documentary evidence, including site drawings, surveys, review comments by other resource agency staff and numerous photos. Every conclusion of law is supported by the findings of fact, by the CAMA statute and by relevant case law where applicable. The entire decision reflects the presiding judge's careful consideration of the record. Because the overwhelming preponderance of the admissible evidence in the record supports the ALJ's Decision, the Commission should adopt that decision as its own.

Respectfully submitted this the 11th day of September, 2008.

ROY COOPER  
Attorney General

By: 

Christine Anne Goebel  
Assistant Attorney General  
N.C. Dept. of Justice  
9001 Mail Service Center  
Raleigh, N.C. 27699-9001  
(919) 716-6600 phone  
(919) 716-6767 fax  
cgoebel@ncdoj.gov

## CERTIFICATE OF SERVICE

This is to certify that a copy of the attached **Respondent's Memorandum in Support of the ALJ's Decision** was served on Counsel for Petitioner, DCM's Director/CRC's Executive Secretary, Counsel for Intervenor-Respondent, and CRC's Counsel as follows:

By U.S. Mail to:

James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

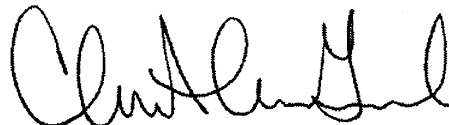
John Suttles & Michele Nowlin, Counsel for Petitioners  
Southern Environmental Law Center  
200 West Franklin Street, Suite 330  
Chapel Hill, NC 27516

Frank H. Sheffield, Jr. & Amy P. Wang, Counsel for Intervenor-Respondent  
Ward & Smith, P.A.  
PO Box 867  
New Bern, NC 28563-0867

And by Hand Delivery to:

Jennie Wilhelm Hauser  
Special Deputy AG & CRC Counsel

This the 11 day of September, 2008.



Christine Anne Goebel  
Assistant Attorney General



# SOUTHERN ENVIRONMENTAL LAW CENTER

200 WEST FRANKLIN STREET, SUITE 330  
CHAPEL HILL, NC 27516-2559

Charlottesville, VA  
Chapel Hill, NC  
Atlanta, GA  
Asheville, NC  
Sewanee, TN

Telephone 919-967-1450  
Facsimile 919-929-9421  
selcnc@selcnc.org

September 6, 2008

**VIA FEDERAL EXPRESS**

Jim Gregson  
Executive Secretary, Coastal Resources Commission  
Division of Coastal Management  
400 Commerce Way  
Morehead City, NC 28557



**Morehead City DCM**

Re: NC Coastal Federation v. DENR, DCM and Wind Over Waves (07-EHR-345)

Dear Mr. Gregson:

Enclosed please find the following documents, which we hereby submit for consideration by the Coastal Resources Commission:

- Petitioner's Exceptions to Administrative Law Judge's Recommended Decision in Case No. 07 EHR 345, and
- Petitioner's Memorandum of Fact and Law in Support of Written Exceptions to the Administrative Law Judge's Recommended Decision in Case No. 07 EHR 0345.

We respectfully ask that the Commission consider the enclosed Exceptions and Memorandum and grant the request contained therein. As noted in the motion that precedes Petitioner's formal written exceptions, we also request that the Commission hear oral argument in this matter at its meeting September 24-26, 2008.

We have also enclosed a copy of both the Exceptions and the Memorandum, and ask that you stamp the copies "filed" and return them to us in the enclosed self-addressed, stamped envelope. Thank you for your assistance.

Very truly yours,

A handwritten signature in cursive script that reads "Lou Ann Phelps".

Lou Ann Phelps  
Administrative Legal Assistant  
N.C. State Bar Certified Paralegal

Enclosures

cc (w/encl): Christine Goebel (via electronic and U.S. mail)  
Amy P. Wang and Frank H. Sheffield, Jr. (via electronic and U.S. mail)  
Angela Willis (via electronic mail)

BEFORE THE  
NORTH CAROLINA COASTAL RESOURCES COMMISSION

RECEIVED  
SEP 08 2008

NORTH CAROLINA COASTAL )  
FEDERATION, )  
 )  
Petitioner )  
 )  
v. )  
 )  
NC DEPARTMENT OF ENVIRONMENT )  
AND NATURAL RESOURCES, DIVISION )  
OF COASTAL MANAGEMENT, )  
 )  
Respondent, )  
 )  
and )  
 )  
WIND OVER WAVES, LLC, )  
 )  
Respondent-Intervenor. )

Morehead City DCM

**PETITIONER'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S  
RECOMMENDED DECISION  
IN CASE NO. 07 EHR 0345**

Pursuant to N.C. Gen. Stat. § 150B-36, the North Carolina Coastal Federation (“Petitioner”) respectfully files the following written exceptions to the Administrative Law Judge’s Recommended Decision in the above-captioned matter, in accordance with the North Carolina Coastal Resources Commission (“Commission”) counsel’s letter to the parties dated July 31, 2008. For reasons that are more fully demonstrated in the following exceptions and Petitioner’s supporting memorandum, Petitioner respectfully requests that the Commission exercise its authority pursuant to N.C. Gen. Stat. § 150B-36(b) to reject, modify, or amend the Administrative Law Judge’s (“ALJ”) findings of fact and conclusions of law and to **vacate and remand** the Wind Over Waves, LLC (“Wind Over Waves”) CAMA permit (192-06) to the Division of Coastal Management (“DCM”) with instructions to assure that any reissued permit contain a demonstration and provisions adequate to insure the protection of coastal lands and

waters from adverse impacts associated with Phase III of the Wind Over Waves subdivision, including impacts to the coastal wetlands on site, degraded water quality for the adjacent SA waters, and other impacts from the cumulative impacts of development.

To assist the Commission in its consideration of the following exceptions, Petitioner's have reproduced in its entirety the ALJ's Recommended Decision as amended, noting those portions of the ALJ's Recommended Decision to which Petitioner's object because they are not supported by a preponderance of the evidence in the record, as well as those additional facts that Petitioner submits should be included in the Commission's Final Decision because they are substantial, supported by a preponderance of evidence in the record, and are vital to a fair determination of the central issues in the case. In its exceptions, Petitioner has identified those portions of the ALJ's Recommended Decision to which it objects by "striking through" language that is not supported by a preponderance of evidence in the record or which is not in accordance with applicable North Carolina law. For each finding of fact or conclusion of law to which Petitioner objects, Petitioner has provided a factual or legal basis for its objection, along with appropriate citations to the Hearing Transcript, the Record, or to the applicable statute or regulation, pursuant to N.C. Gen. Stat. § 150B-36(b1).

Additionally, in its exceptions Petitioner has identified each requested finding of fact or conclusion of law that is not contained in the ALJ's Recommended Decision by adding and "underlining" the requested additional text. For each requested finding of fact or conclusion of law that is not contained in the ALJ's Recommended Decision, Petitioner has provided a factual or legal basis for the requested finding or conclusion, along with appropriate citations to the Hearing Transcript, the Record, or to the applicable statute or regulation, pursuant to N.C. Gen. Stat. § 150B-36(b2).

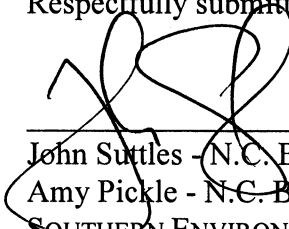
Petitioner does not object to any portion of the ALJ's Recommended Decision appearing in the following exceptions that is not "stricken through." Further, Petitioner does not seek to add to the ALJ's Recommended Decision any findings of fact or conclusions of law other than as represented in the underlined portions of these exceptions.

Based on a review of the official record as defined by N.C. Gen. Stat. § 150B-37(a), Petitioner's objections and additions to the ALJ's Recommended Decision are supported by a preponderance of the admissible testimony and evidence in the record and applicable and controlling laws and adjudications governing development in highly vulnerable coastal areas such as the site on which Phase III of the Wind Over Waves subdivision would be located. Accordingly, Petitioner's respectfully request that the Commission exercise its discretion to modify and amend the ALJ's findings of fact and conclusions of law and to reject the ALJ's Recommended Decision because it is clearly contrary to the preponderance of admissible evidence in the record. N.C. Gen. Stat. § 150B-36(b3). In addition, Coastal Federation desires and requests the opportunity to present oral argument to the CRC in accordance with the CRC counsel's letter dated July 31, 2008.

***[SIGNATURE FOLLOWS]***

This the 6th day of September, 2008.

Respectfully submitted,



---

John Suttles - N.C. Bar No. 34393  
Amy Pickle - N.C. Bar No. 29390  
SOUTHERN ENVIRONMENTAL LAW CENTER  
200 West Franklin Street, Suite 330  
Chapel Hill, NC 27516  
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STATE OF NORTH CAROLINA  
COUNTY OF DARE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
FILE NO.: 07-EHR-0345

NORTH CAROLINA COASTAL )  
FEDERATION, )  
 )  
Petitioner )  
 )  
v. )  
 )  
NC DEPARTMENT OF ENVIRONMENT )  
AND NATURAL RESOURCES, DIVISION )  
OF COASTAL MANAGEMENT, )  
 )  
Respondent, )  
 )  
and )  
 )  
WIND OVER WAVES, LLC, )  
 )  
Respondent-Intervenor. )

DECISION

On August, 29-31 2007 and on September 24-25, 2007, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On January 25, 2008, the undersigned ruled that Respondent properly issued CAMA Major Development Permit No. 192-06 to Respondent-Intervenor for the Wind Over Waves - Phase III residential development in Salvo, Dare County, North Carolina. On February 29, 2008, Respondent and Respondent-Intervenor filed their Proposed Decision with the Office of Administrative Hearings.

**APPEARANCES**

**For Petitioner:**

Michelle B. Nowlin  
John T. Suttles, Jr.  
Southern Environmental  
Law Center  
200 West Franklin Street  
Suite 330  
Chapel Hill, NC 27516

**For Respondent:**

Christine A. Goebel  
NC Dept of Justice  
Assistant Attorney General  
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**For Respondent-Intervenor**

Frank H. Sheffield, Jr.  
Amy P. Wang  
Ward and Smith, P.A.  
1001 College Court  
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New Bern, NC 28563

## ISSUES

1. Whether Respondent properly issued the subject CAMA Permit, in accordance with N.C. Gen. Stat. §§ 113A-118 and 113A-120, 15A N.C.A.C. 7H .0205 and 15A N.C.A.C. 7J .0209 to allow development of a closed loop road for a residential subdivision in an Area of Environmental Concern?

2. Whether Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or the rules of the Coastal Resources Commission in issuing the subject CAMA Permit to Respondent-Intervenor?

3. **EXCEPTION (Additional Issues Inserted)** Whether DCM erred in issuing the CAMA permit in violation of N.C. Gen. Stat. § 113A-120(a)(8), which prohibits the issuance of a permit for a development that is inconsistent with State guidelines?

**BASIS FOR EXCEPTION:** The statement of issues is misleading because it does not state the statutory requirement that development be consistent with all State guidelines, as alleged in the Petitioner's Petition for a Contested Case Hearing at p. 2 and Prehearing Statement at pp. 2-3.

4. **EXCEPTION (Additional Issues Inserted)** Whether DCM erred by issuing a CAMA permit that allows non-water-dependent activities in coastal wetlands, in violation of 15A N.C.A.C. 7H.0601, 7H.0205(d) and 7H.0208(a)(1)?

**BASIS FOR EXCEPTION:** The statement of issues is misleading because it does not state the statutory requirement that development be consistent with all State guidelines, as alleged in the Petitioner's Petition for a Contested Case Hearing at p. 2 and Prehearing Statement at pp. 2-3.

5. **EXCEPTION (Additional Issues Inserted)** Whether Respondent erred in issuing a permit without **evaluating** the cumulative effects of similar projects within the area, as required by N.C. Gen. Stat. § 113A-120(a)(10)?

**BASIS FOR EXCEPTION:** The statement of issues is misleading because it does not state the statutory requirement that development be consistent with all State guidelines, as alleged in the Petitioner's Petition for a Contested Case at p. 3 and Prehearing Statement at pp. 2-3.

**STATUTES AND RULES AT ISSUE**

N.C. Gen. Stat. § 113A-100, *et seq.*  
15A N.C.A.C. Chapter 7, Coastal Management

**EXCEPTION (Additional Rules Inserted) 15A N.C.A.C Chapter 2**

**BASIS FOR EXCEPTION:** The additional rules were provided in Petitioner's Bench Books and contain regulations and definitions that are important to the proper resolution of this case.

**WITNESSES**

For Petitioner: Theodore James Sampson, Ann Privett,  
Michael James Halminski, Jan DeBlieu,  
Charlan Owens, John Fussell, Robin Gerald

For Respondent: David Woodard Moye, John Cece,  
Terence Moore, Michael Ted Tyndall

For Respondent-Intervenor: Joseph Silas Lassiter, Brian Rubino,  
Johnnie Robbins

**EXHIBITS RECEIVED INTO EVIDENCE**

Stipulated Exhibits: 1-4, included with Prehearing Order

For Petitioner: 3-4, 4(A), 4(A)(1), 4(A)(2), 6, 12, 18, 20, 23, 25-31

For Respondent: 6-7, 9-12, 14-15

For Respondent Intervenor: 1-6

**FINDINGS OF FACT**

Based upon careful consideration of the evidence presented at the hearing, the pleadings, and entire record of this case, the undersigned hereby finds as follows:

**Background**

1. The property at the center of this dispute is Respondent-Intervenor Wind Over Waves, LLC's ("WOW") Phase III Project located in Salvo, Dare County, North Carolina ("Phase III"). Phase III is composed of approximately 38.25 acres, subdivided into 57 lots. (Stip. Facts 1-3)



2. Phase III is the third phase of the Wind Over Waves residential subdivision development. Phases I and II were permitted separately, and most of the lots in those phases have been developed with homes on them. Phase III currently is "undeveloped" according to the definition of "development" under CAMA. (Stip. Facts 2, 6)

3. Phase III borders Pamlico Sound and Midgett Cove along the western side. The meandering Coastal Wetlands shoreline is over 1,600 linear feet. (Stip. Fact 4)

4. The waters of Pamlico Sound at this location are classified "SA" by the Environmental Management Commission ("EMC"), and are open to the harvesting of shellfish. (Stip. Fact 5)

5. Portions of the development proposed for Phase III are within Areas of Environmental Concern ("AEC"), and are subject to regulation under the Coastal Area Management Act ("CAMA"). N.C. Gen. Stat. § 113A-100 *et seq.* Portions of Phase III are within or adjacent to the Coastal Shorelines, Coastal Wetlands, Public Trust Area and Estuarine Waters AECs. (Stip. Fact 7)

6. Petitioner is a non-profit, tax-exempt organization dedicated to the promotion of better stewardship of coastal resources.

7. Respondent is a State agency established pursuant to N.C. Gen. Stat. § 113A-104, and vested with the statutory authority to enforce the State's environmental laws, including laws enacted to protect coastal lands and waters of the State. (Stip. Fact 10)

8. **EXCEPTION (Language deleted; additional language inserted)** WOW is a limited liability company that proposes to develop Phase III ~~the third phase of its Wind Over Waves residential subdivision on approximately 38 acres in Salvo, Dare County, North Carolina. This subdivision is located on the west side of N.C. Highway 12, adjacent to the Pamlico Sound.~~ Mr. Johnnie Robbins and Mr. Billy Roughton are the member-managers of WOW. (Stip. Fact 11)

**BASIS FOR EXCEPTION:** Finding of Fact 8 contains redundant statements of fact, repeating facts listed in Finding of Fact 1-3.

9. **EXCEPTION (Additional Facts Inserted)** On October 17, 2006 David Moye completed his field report for Phase III. As a part of the CAMA major express permitting process, David Moye sent information packets about WOW to other resource agencies for comment. The Division of Water Quality had already issued Stormwater Permit No. SW7050909 to WOW on September 26, 2005. On October 23, 2006, Quible and Associates, P.A., a civil engineering and

surveying firm in Kitty Hawk, North Carolina, submitted an application for a CAMA major development permit (the "Application") to Respondent as engineers and agents for WOW. (Stip. Fact 15, Stip. Ex. 2 p.1)

**BASIS FOR EXCEPTION:** Finding of Fact 9 omits uncontradicted evidence in the record that documents the issuance of a stormwater permit from the Division of Water Quality and the timeline associated with the express permit and associated permits from other state agencies. This information is important because the Environmental Management Commission has vacated and remanded the stormwater permit and state law imposes an independent duty on DCM to determine whether a project will degrade coastal resources.

10. **EXCEPTION (Language deleted; additional facts inserted)** DCM received objections in connection with this project from three persons, including Petitioner and a letter from Mary Helen Goodloe-Murphy, President of the Rodanthe-Waves-Salvo Civic Association. On November 27 26, 2006, Respondent issued a CAMA Major Development Permit No. 192-06 (the "CAMA Permit") to WOW, pursuant to N.C. Gen. Stat. § 113A-120 and 15A N.C.A.C. 7J .0200 *et seq.*, authorizing the development of a loop road and utilities (the "Proposed Road") for access to Phase III. (Stip. Ex. 1)

**BASIS FOR EXCEPTION:** Finding of Fact 10 contains a typographical error and omits evidence in the record that documents the concerns about the project that were expressed to DCM.

11. Petitioner filed a Third Party Hearing Request with the Chairman of the Coastal Resources Commission ("CRC") pursuant to N.C. Gen. Stat. § 113A-121.1(b). On December 29, 2006, the CRC Chairman granted Petitioner's Request (Stip. Facts 24-25).

12. On January 17, 2007, Petitioner filed a Petition for Contested Case Hearing challenging the CAMA Permit and Stormwater Permit SW7050909 issued by the North Carolina Department of Environment and Natural Resources ("DENR") Division of Water Quality ("DWQ") (the "Stormwater Permit") on September 26, 2005. Subsequently, the undersigned granted Respondent's and DWQ's Joint Motion to Sever, severing Petitioner's appeal on the CAMA Permit from its appeal of the Stormwater Permit. (Stip. Fact 26)

13. On April 11, 2007, the undersigned granted WOW's Motions to Intervene as Respondent-Intervenor in both actions. (Stip. Fact 26)

14. **EXCEPTION (Additional language inserted)** On December 12, 2007, the undersigned entered a Decision upholding DWQ's issuance of the Stormwater Permit. The

Environmental Management Commission vacated the stormwater permit in its final agency decision dated July 11, 2008.

**BASIS FOR EXCEPTION:** Finding of Fact 14 is misleading because it does not contain information related to the final agency decision. N.C. Gen. Stat. § 150B-34(a), directs the Administrative Law Judge to return a recommended decision and factual findings to the agency—in this case the Environmental Management Commission (“EMC”)—which renders the final agency decision, pursuant to N.C. Gen. Stat. § 150B-36. In such cases, the EMC exercises its adjudicatory function to issue a final agency decision. Final Decisions of the EMC are binding legal decisions of which the CRC should take notice. In this case, the CRC should take notice and give effect to the EMC’s Final Decision vacating and remanding the WOW stormwater permit issued by DWQ and relied on by DCM in issuing the CAMA permit at issue in this case.

**Witnesses**

15. **EXCEPTION (Additional Facts Inserted)** Petitioner's witness Theodore James Sampson ("Sampson") is an environmental consultant, and a former District Manager in Respondent's Elizabeth City District Office. At hearing, the undersigned qualified him as an expert in the CAMA permitting process and the delineation of coastal wetlands. Sampson was the supervisor for Respondent's field representatives, including John Cece, in the Elizabeth City District Office. As the supervisor, Sampson reviewed and conducted coastal wetlands delineations based on the presence of wetland species and occasional flooding. In his capacity as supervisor for the Respondent’s field representatives, Sampson visited the Phase III site three times to consult with John Cece about the presence of coastal wetlands and the extent of flooding on the site. (T. pp. 192-199). During his site visits, Sampson anticipated a coastal wetland delineation upland of the line delineated after his retirement. (T. pp 222, 223-224, 246-247). Sampson did not process any CAMA Major Permit applications during his tenure with Respondent. He retired from his position as District Manager before WOW submitted its ~~WOW's~~ Application to Respondent. (T. pp. 122, 139, 160, 176, 180-89.)

**BASIS FOR EXCEPTION:** Finding of Fact 14 contains a typographical error, omits undisputed facts that are centrally relevant in this case and further, downplays and mischaracterizes the nature and extent of Mr. Sampson’s experience in delineating coastal wetlands and his experience with Phase III.

16. **EXCEPTION (Additional Facts Added)** Petitioner's witness Ann Privett ("Privett") is has been a resident of Salvo on Hatteras Island since 1976. Privett currently lives in a neighborhood across N.C. Highway 12 from and to the east of Phase III. (T. pp. 306-07.) Privett has

observed wind driven tides approximately five or six times a year that flood her current neighborhood (T. pp. 312-313).

**BASIS FOR EXCEPTION:** Finding of Fact 16 does not accurately reflect evidence in the record regarding the nature of Ms. Privett's observations of the regular flooding in the area. This information is important to the case because it demonstrates that flooding in the areas adjacent to the Phase III site occurs on a regular basis.

17. **EXCEPTION (Additional Facts Added)** Petitioner's witness Michael James Halminski ("Halminski") is a resident of Salvo on Hatteras Island, and is self-employed as a freelance photographer. Much of his professional photography work involves documenting nature in Pamlico Sound in the vicinity of the Phase III; he has experience in photographing coastal wetlands generally and the wetland areas on the Phase III site specifically. (T. p. 326 -328). Halminski is a 20-year member of Petitioner. Halminski lives approximately one-quarter mile north of the Wind Over Waves subdivision, slightly farther north of Phase III. He farms oysters as a hobby in the Pamlico Sound that adjoins his property. (T. pp. 324-25, 332, 338.). Halminski no longer collects oysters for human consumption in Pamlico Sound in the vicinity of Phase III due to concerns about pollution. (T 332-333). Halminski has visited Phase III to explore the natural areas (T. p. 329). Mr. Halminski has observed regular flooding of his upland property, which is similar in topography to Phase III (T. p 336).

**BASIS FOR EXCEPTION:** Finding of Fact 17 does not accurately reflect evidence in the record regarding the nature of Mr. Halminski's profession as a photographer; how Mr. Halminski has changed his oyster-collection and harvesting activities due to concerns about pollution from development; or the regular flooding that occurs adjacent to Phase III. This information is important because Respondent and Intervenor have challenged Petitioner's standing and because it supports the general observation that the area in which Phase III is located is subject to regular flooding.

18. **EXCEPTION (Language deleted; additional facts added)** Petitioner's witness Robin Gerald ("Gerald") is a resident of Salvo on Hatteras Island. Gerald was unable to attend the hearing, but all parties stipulated to using the transcript of his September 14, 2007 July 23, 2007 deposition, in place of his live testimony. Mr. Gerald is a member of the Coastal Federation and has lived on Hatteras for approximately 35 years; for the past 17 years, Gerald has lived lives approximately one and one-quarter miles south of the Wind Over Waves subdivision and Phase III. (Petr's Exh. 28, Gerald Depo, pp. 7, 17). Historically, Mr. Gerald has visited the Phase III site by kayak, canoe, and on foot to hunt waterfowl, fish, and collect crabs and oysters. (Petr's Exh. 28,

Gerald Depo, pp.11-13, 15, 18). Mr. Gerald is has concerns about increased flooding of Highway 12 due in part to the WOW development. (Petr's Exh. 28, Gerald Depo, pp. 29-30). He has observed extensive flooding on the Phase III site (Petr's Exh. 28, Gerald Depo., pp 21-25). He has been self-employed in various capacities in Dare County. (T. pp. 56-8.)

**BASIS FOR EXCEPTION:** Finding of Fact 18 does not accurately reflect evidence in the record regarding the nature of Mr. Gerald's longstanding interest in and use of the Phase III site and the waters adjacent to it. This information is important because Respondent and Intervenor have challenged Petitioner's standing and because it supports the general observation that the area in which Phase III is located is subject to regular flooding.

19. **EXCEPTION (Language added)** Petitioner's witness Jan DeBlieu ("DeBlieu") is an employee of Petitioner, and is the Cape Hatteras Coastkeeper. Phase III lies within her area of responsibility as a Coastkeeper. (T. pp. 347-48.) Ms. DeBlieu testified that Petitioner has over 8,000 members, 32 of which reside on Hatteras or Ocracoke Islands, including board members. (T. p. 353). Petitioner conducts regular activities in the area of the Phase III site, including public education, stormwater testing, and land conservation for the purpose of preserving marshland and working waterfronts for commercial fishermen. (T. p. 355-356). Ms. DeBlieu has conducted extensive research into wind on the Outer Banks for her award-winning book titled "Wind." (T pp. 349-350). As part of this book, she researched the wind driven tides on the Outer Banks. (T. P. 385, 386-387, 389). Ms. DeBlieu visited Phase III for the purpose of having a professional photograph taken by Mr. Ray Matthews. (T. pp. 361, 370) At that visit, Mr. Cece also attended and walked Phase III with them. (T. p 361). Ms. DeBlieu also submitted comments on the CAMA permit for Phase III expressing concerns about the quantity and quality of the coastal wetlands on site. (T. pp. 373-374)

**BASIS FOR EXCEPTION:** Finding of Fact 19 does not accurately reflect evidence in the record regarding the interests of Petitioner's members in the area of the Phase III site or their concerns about development in the area. This information is important because Respondent and Intervenor have challengd Petitioner's standing. Furthermore, finding of Fact 18 fails to reflect Ms. DeBlieu's experience and observations of Phase III and the quality of coastal wetland species on the site.

20. Petitioner's witness Charlan Owens ("Owens") is Respondent's District Planner in the Elizabeth City District Office. Owens is responsible for land use plan reviews in the Elizabeth City District. Owens reviewed the Application for consistency with the Dare County Land Use Plan. (T. pp. 444-46, 452; Stip. Ex. 2 p 45.)

21. **EXCEPTION (Language deleted; additional facts inserted)** Petitioner's witness John Fussell ("Fussell") is a self-employed consultant on botany and bird issues who lives in Morehead City, North Carolina. He has conducted studies on wetland and plant issues in the past for the United States Army Corps of Engineers and others. Fussell's consulting work does not include delineating wetlands. Fussell observed a variety and an abundance of Coastal Wetlands vegetation on the Phase III site and the effects on the vegetation from the frequent mowing. He was qualified as an expert in botany and the understanding of plants and their associated habitat needs. (T. pp. 528-30, 540-42, 557, 570.)

**BASIS FOR EXCEPTION:** Finding of Fact 21 does not accurately reflect evidence in the record regarding Mr. Fussell's observations and expert testimony. This information is important because Mr. Fussell is the only witness to be qualified in botany and plant habitat needs to testify on the impacts of mowing on coastal wetland species.

22. Respondent's witness David Woodard Moye ("Moye") is employed by Respondent as its CAMA Express Permit Coordinator for the northeast area of the State, including Dare County. (T. p. 679.) Moye is responsible for assisting applicants through the major permit express review program. (T. pp. 682-83.) Moye conducts scoping and preapplication meetings; processes permit applications; conducts on-site field investigations; writes field investigation reports; processes and coordinates inter-agency comments; and drafts CAMA permits for review by the Major Permits Coordinator and Respondent's Assistant Director prior to issuance. (T. pp. 682-83.) Moye was involved in drafting and issuing the CAMA Permit at issue in this case.

23. Respondent's witness John Cece ("Cece") is employed by Respondent as a field representative in its Elizabeth City District Office. (T. pp. 742-44.) Cece assists the public with CAMA permit issues, and conducts site evaluations of property subject to Respondent's jurisdiction in the seven-county Elizabeth City District. (T. pp. 742-44.) Cece was involved with the delineation of coastal wetlands for the proposed development at Phase III. (R's Ex. 10-11, 15.)

24. Respondent's witness Terence Moore ("Moore") is the District Manager in Respondent's Washington District Office who supervises Respondent's district staff, and is responsible for issuing general, minor and major CAMA permits through the rules and regulations established by CAMA and the State's Dredge and Fill laws. (T. pp. 867-68.) Moore was involved with the delineation of coastal wetlands for the proposed development at Phase III. Moore was qualified as an expert in the field of coastal wetlands delineations. (T. pp. 886-86.)

25. Respondent's witness Michael Ted Tyndall ("Tyndall") is Respondent's Assistant Director based at headquarters in Morehead City. (T. p. 948.) Tyndall is in charge of Respondent's District Offices, including the Elizabeth City District Office. Tyndall is responsible for ensuring compliance with CAMA and the State's Dredge and Fill laws for the 20 coastal counties. Tyndall also drafts new rules and regulations for coastal development as a staff person for the Coastal Resources Commission ("CRC"). (T. pp. 948-49.) Tyndall was involved with the delineation of coastal wetlands for the proposed development at Phase III. Tyndall was qualified as an expert in the fields of the CAMA permitting process and coastal wetlands delineations. (T. p. 946; R's Ex. 12.)

26. WOW's witness Joseph Silas Lassiter ("Lassiter") is a Board-Certified Environmental Professional and President of Quible and Associates, P.A. ("Quible"). Lassiter also serves as a marine science and technology advisor on the Coastal Resources Advisory Council of the CRC. Lassiter worked for WOW as an environmental consultant on the original Wind Over Waves subdivision project, and assisted with the environmental permitting processes, particularly concerning the identification and location of wetlands on the Phase III site. Lassiter was qualified as an expert in the field of coastal wetlands delineations.

27. WOW's witness Brian Rubino ("Rubino") is a geologist with Quible who worked with Lassiter as an environmental consultant on the original Wind Over Waves subdivision project. He assisted with the environmental permitting processes, particularly concerning the identification and location of wetlands on the Phase III site.

28. WOW's witness Johnnie Robbins ("Robbins") is a long-time resident of Dare County, and a retired high school principal from Manteo, North Carolina. Robbins is involved in real estate development in Dare County, and is a member-manager of, and co-investor, in WOW.

### **CAMA Permitting Process**

29. **EXCEPTION (Additional Facts Inserted)** North Carolina's coastal lands and waters, particularly the estuaries, are among the State's most valuable resources. As the coastal areas have been subject to increasing developmental pressures, a comprehensive plan is necessary to protect, preserve, and manage the coastal area of North Carolina. CAMA is a comprehensive plan for the protection, preservation, orderly development and management of the coastal areas of North Carolina. N.C. Gen. Stat. § 113A-102(a). The goals of CAMA include protecting the natural

resources of the coast, insuring that development is consistent with land and water quality ecology, and preserving the history, culture, and science of the coast. N.C. Gen. Stat. § 113-102(b).

**BASIS FOR EXCEPTION:** Finding of fact 29 omits applicable statutory requirements that govern DCM's responsibilities in this case.

30. Respondent acts for the CRC by coordinating the analysis and permitting of certain development activities with other State and Federal agencies, whose expertise lies in other areas of environmental and public health protection. 15A N.C.A.C. 7M .0801. Respondent issues CAMA permits under authority delegated by the CRC. 15A N.C.A.C. 7J .0209.

31. **EXCEPTION (Additional facts inserted)** A CAMA permit is required for any development activity within an AEC that has been designated by the CRC. N.C. Gen. Stat. §§ 113A-113, 118. (T. p. 174.) North Carolina law requires permits to be denied if the development is inconsistent with State guidelines or local land-use plans. N.C. Gen. Stat. § 113A-120(a)(8).

**BASIS FOR EXCEPTION:** Finding of Fact 31 omits applicable statutory requirements that govern DCM's responsibilities in this case.

32. A CAMA major development permit is required for any development that requires permission from another Federal or State agency. N.C. Gen. Stat. § 113A-118. It is undisputed that in this case a Major CAMA Permit was required for the Proposed Road.

33. Respondent administers an express permitting program for the processing of certain applications for CAMA major development permits. N.C. Gen. Stat. § 143B-279.13. By paying a higher application fee, applicant's permits are processed by Respondent through an expedited review process, whereby the bulk of the information and work is coordinated and completed with staff assistance before the applicant submits its permit application. Through this expedited review process, Respondent issues permits within 30 days of application. (T. pp. 689-90.)

34. Respondent offered sufficient, competent evidence to demonstrate that this level of review is the same as in the standard permit review process. Petitioner offered no contradictory evidence, nor did Petitioner offer evidence to demonstrate that the express permitting level of review is inferior to the standard level of review.

35. Applications for CAMA major development permits submitted to Respondent's Washington Regional Office for the express program are processed by Moye. As a matter of practice, Moye requests that applications be complete upon submittal, since the review period for the



express program is shorter than the standard process for CAMA major development permits. (T. p. 686.)

36. Moyer reviews the application for accuracy and completeness, conducts an on-site investigation, and prepares a Field Investigation Report describing the proposed development site and the anticipated environmental impacts. Moyer then sends a letter to the applicant confirming the application is complete, and provides an expected decision date. (T. pp. 690-91.)

37. Respondent publishes notice of the proposed development in a newspaper local to the proposed development and posts notification on the property. (T. p. 693.)

38. The CAMA permit application form requests a range of information related to the proposed development, including the specifics of the proposed activity, the AEC in which it is located, information concerning the surrounding geographic area outside of the AEC, land uses and wildlife habitat. Respondent analyzes direct impacts and reviews conditions upstream and downstream of the property, specifically for in-water development that has taken place, such as piers, docks, marinas. (T. pp. 697-98.)

39. Respondent circulates applications for CAMA major development permits to 15 State and Federal agencies having expertise in the areas identified in N.C. Gen. Stat. § 113A-120 for an independent analysis of the CAMA permit application based on their respective authorities. (T. pp. 700-702.) Those agencies include: Department of Administration, State Property Office; Department of Cultural Resources, Division of Archives and History; Department of Commerce, Division of Community Assistance; Department of Transportation, Division of Highways; Department of Environment and Natural Resources Divisions of Land Quality, Land Resources, Marine Fisheries and DWQ; Wildlife Resources Commission; Army Corps of Engineers (the "Corps"); Environmental Protection Agency; National Marine Fisheries Service; and, Fish and Wildlife Service. 15A N.C.A.C. 7J .0207. (Stip. Ex. 2 p. 38.)

40. **EXCEPTION (Additional facts inserted)** CAMA requires that a permit be denied for any proposed development that "would contribute to cumulative effects that would be inconsistent with the guidelines set forth" therein. Cumulative impacts are those impacts that arise from a number of projects, including those impacts from projects similar to the requested permit in nearby areas that are available for development. N.C. Gen. Stat. § 113A-120(a)(10). Respondent

uses the analyses compiled through the inter-agency review to determine potential cumulative impacts on coastal resources.

**BASIS FOR EXCEPTION:** Finding of Fact 40 omits applicable statutory requirements that govern DCM's responsibilities in this case.

41. **EXCEPTION (Additional facts inserted)** Respondent issues a CAMA permit for proposed development based on its analysis of the potential impacts on the particular AEC in which the development is proposed, and the analysis of any cumulative impacts from the collective comments and recommendations resulting from the inter-agency review. 15A N.C.A.C. 7J .0209. A CAMA permit cannot be issued for a project requiring a stormwater permit from the Division of Water quality unless the stormwater permit is issued. (T. p. 703-704, 724, 980).

**BASIS FOR EXCEPTION:** Finding of Fact 41 omits facts relevant to the proper issuance or denial of an express CAMA permit.

42. On October 17, 2006, WOW submitted its Application to Respondent for express review. The Application was for the Proposed Road. The Application was not for development on each individual lot since such development will be governed by additional permit processes under the jurisdiction of other DENR agencies and Dare County. (T. pp. 687, 720-21.)

43. According to the Application, the Proposed Road would disturb approximately 6.5 acres of upland area outside of CAMA AECs. Approximately one-third of an acre of the Proposed Road would lie within the 75-foot Coastal Shoreline AEC, triggering the need for a CAMA Major Permit. (Stip. Ex. 2 p. 8; Stip. Ex. 3A.)

44. **EXCEPTION (Additional facts inserted)** At the time WOW submitted the Application, it had received its low-density Stormwater Permit from DWQ and approval of its sedimentation and erosion control plan. (T. p. 687; Stip. Ex. 2 pp. 19-23.) The CAMA permit could not have been issued unless the stormwater permit had been issued prior. (T. p. 703-704, 724, 980).

**BASIS FOR EXCEPTION:** Finding of Fact 44 omits relevant testimony as to the proper issuance of the CAMA permit.

45. Moye visited the Phase III Site on more than one occasion. (T. pp. 745-72; R's Ex. 10-11, 15.) On October 17, 2006, Moye conducted a site visit, during which he took photographs, and walked the property. Moye drafted a Field Investigation Report that he attached to the Application before he submitted such to the 15 review agencies. (T. pp. 693-94.) The Field

Investigation Report contained impacts anticipated by Moye, such as the total square footage of impacts of the Proposed Road on the entire site, including the preparation area, lay down area, and all disturbed areas associated with installing the Proposed Road. (T. p. 698.)

46. Respondent published notice of the Application for the Proposed Road in the *Coastland Times* newspaper. (T. pp. 692-93, 715; Stip. Ex. 2 pp. 33-34.)

47. Moye reviewed aerial photographs and talked with the Field Representative, Cece. Cece provided information to Moye, regarding the wetlands delineation that was submitted with the Application. (T. p. 699.) Moye relied on the delineation line set by Tyndall, Cece, and Moore on July 27 and 28, 2006, because of their collective experience, and because he was confident they would make an accurate call on the location of coastal wetlands. (T. p. 738.)

48. Owens reviewed the Application in light of the Dare County Land Use Plan, its policy statements, land use planning maps, the Field Investigation Report, and aerial photographs. (T. p. 492; P's Ex. 25.) On November 9, 2006, Owens issued a Land Use Plan Consistency Report, concluding the Application was consistent with the Dare County Land Use Plan. (T. pp. 452, 459, 494; Stip. Ex. 2 p. 45.)

49. Moye reviewed the determination by Owens that the Application was consistent with the Dare County Land Use Plan. (T. pp. 711, 735.)

50. Moye reviewed public comments received as a result of the notice and publication. The only negative comment was from DeBlieu, who objected to the number of lots, and expressed concerns regarding stormwater impacts, the delineation of coastal wetlands, and impacts from Phases I and II of the subdivision. (T. pp. 372-75, 716-17; Stip. Ex. pp. 60-7.)

51. **EXCEPTION (Language deleted; additional facts inserted)** Moye determined that DeBlieu's comments did not provide a basis for denial of the Application, because her concerns were related to stormwater impacts, an improper coastal wetland delineation, and cumulative impacts from the previous adjacent development. (T.p. 717) ~~geared mainly towards stormwater which fell within the jurisdiction of DWQ and for which DWQ had issued the Stormwater Permit. (T. p. 717; Stip. Ex. 2 pp. 60-7.) Tyndall agreed with Moye's determination on this issue. (T. p. 988.)~~

**BASIS FOR EXCEPTION:** Finding of Fact 51 is factually incomplete and misleading because it mischaracterizes Ms. DeBlieu's concerns with the Phase III coastal wetlands delineation, stormwater impacts, and impacts from cumulative development in the area.

52. DeBlieu also raised concerns about mowing on Phase III, and whether that affected the coastal wetlands delineation submitted in the Application. (T. pp. 373-74, 717; Stip. Ex. 2 pp.60-7, 988.) Moye did not observe any damage to the root system of the coastal vegetation or any scraping or disturbance of the ground surface at Phase III during his site visits. (T. p. 739.) Moye determined that extensive and multiple mowing events would be required to have any effect on the composition of the wetland species. (T. pp. 726-27.) At hearing, Moore opined that the mowing on the Phase III site was not enough to affect his ability to delineate the coastal wetlands line. (T. pp. 892-93.)

53. CAMA and its implementing rules and regulations, as interpreted by Respondent's staff at this time, do not prohibit mowing of coastal marsh. (T. p. 726-27, 870-71.)

54. Moye sent the Application to the applicable State and federal agencies for the inter-agency review. None of the agencies issued objections. (T. p. 715.) The Wildlife Resources Commission commented that the Corps 404 wetland delineation, dated January 2002, that WOW had submitted with the Application, "may not reflect current site conditions of the dynamic system." (T. pp. 705-06; Stip. Ex. 2 pp. 50-1.)

55. In response to the concern raised by the Wildlife Resources Commission, Moye imposed a condition on the CAMA Permit mandating a deed restriction on each lot in the Phase III project. That restriction required each property lot owner obtain a revised coastal wetland delineation by Respondent on his/her lot, at least 60 days before construction began on that lot. (T. pp. 707, 983-85; Stip. Ex. 1.)

56. **EXCEPTION (Additional facts inserted)** Based on the lack of objection from the agencies and Respondent's staff, Moye determined that the Proposed Road and any related cumulative effects would not have any adverse effects on the surrounding resources. (T. pp. 713, 989-92.) Respondent offered no evidence to demonstrate that DCM staff complied with the statutory obligations to conduct a cumulative impacts analysis. In reviewing for cumulative effects, Respondent failed to address impacts that are attributable to the number of development projects in the area, including the Phase I, Phase II, or the future Phase IV developments that are similar to Phase III and adjacent to the Phase III site.

**BASIS FOR EXCEPTION:** Finding of Fact 56 omits DCM's statutory obligation and evidence that demonstrates DCM's failure to address cumulative impacts fully.

57. CAMA authorizes Respondent to require "practicable alternatives" to proposed development only after considering engineering requirements and all economic costs. N.C. Gen. Stat. § 113A-120(a)(9). (T. pp. 992-93.)

58. Moye discussed alternative locations for the Proposed Road with Lassiter and Rubino. After several design iterations, Lassiter and Rubino determined that, given the location of the Coastal Shoreline AEC and fire safety code restrictions, the location of the Proposed Road submitted in the final Application was the only economically feasible design. Therefore, Respondent accepted the design for the Proposed Road.

59. A preponderance of the evidence at the hearing demonstrated that there were no alternative practicable locations for the Proposed Road that in any would reduce the impacts to any AEC.

60. On November 26, 2006, Respondent issued the CAMA Permit with conditions to WOW. (Stip. Ex. 1.)

61. **EXCEPTION (Language deleted; additional facts inserted)** A preponderance of the evidence at the hearing showed that Respondent failed to follow all the normal and customary permitting processes required by CAMA and its implementing rules and regulations by failing to conduct a proper cumulative impacts analysis in issuing that permit.

**BASIS FOR EXCEPTION:** Finding of Fact 61 is not supported by a preponderance of the evidence in the record and ignores DCM's statutory obligations to conduct a cumulative impacts analysis that addresses the impacts to important coastal resources from similar developments in the area. N.C. Gen. Stat §113A-120(10).

### **Coastal Wetlands Delineation**

62. **EXCEPTION (Additional language inserted)** CAMA defines coastal wetlands as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), but not including hurricane or tropical storm tides, and that contains some, but not necessarily all, of the 10 marsh plant species listed in 15A N.C.A.C. 7H .0205. (T. p. 167.) CAMA establishes no other criteria to define coastal wetlands or marshes that are protected under CAMA.

**BASIS FOR EXCEPTION:** Finding of Fact 62 fails to fully characterize the legal requirements for delineating a coastal wetland, which is essential to the resolution of this case.

63. **EXCEPTION (Additional language inserted)** DCM does not have any guidelines or regulations to aid in determining occasional or frequent flooding. (T. pp. 169-170, 264-265, 722-723, 775, 779, 824-825, 962). According to DCM staff, regular ~~Regular~~ flooding generally is associated with lunar tides. Occasional flooding generally is associated with wind blown tides, which may occur on a seasonal basis or even once a year. (T. pp. 264-66, 961-62). This area of the Outer Banks is most influenced by occasional wind-blown tides. (T. pp. 308, 335, 387, 392, 724, 879).

**BASIS FOR EXCEPTION:** Finding of Fact 63 omits undisputed facts that are centrally relevant in this case.

64. Coastal wetlands are an AEC within Respondent's jurisdiction. 15A N.C.A.C. 7H .0205.

65. CAMA's first priority for coastal wetlands is to conserve existing wetlands, and then to allow for water-dependent structures. 15A N.C.A.C. 7H .0205(d).

66. **EXCEPTION (Additional language inserted; language deleted)** The method typically used by DCM staff to delineate coastal wetlands includes looking for the existence ~~and relative abundance~~ of the coastal wetlands species, ~~the relative abundance of non-coastal wetlands species,~~ and also for evidence of occasional or regular flooding, such as field indicators. (T pp. 167-72, 267, 773-75, 876-86, 957-62.).

**BASIS FOR EXCEPTION:** Finding of Fact 66 contains an incomplete and inaccurate statement of applicable and controlling statutory and regulatory provisions. It also mischaracterizes the statutory and regulatory requirements for delineating a coastal wetland, which does not depend on the abundance of coastal wetland species, but instead only requires the presence of coastal wetland species.

67. The Phase III site is relatively low and flat with sandy soils typical of the barrier islands. It is bordered to the north by Phases I and II of Wind Over Waves subdivision, to the west by Pamlico Sound, to the south by a tidal creek known as Britt (also known as "Brick") Creek, and to the east by N.C. Highway 12. The elevation of the subdivision as a whole varies, beginning higher at Phase I and dipping gradually down to the lowest elevation in front of Phase III. There is a bowl-shaped area or slight depression near the center of the Phase III site. (T. pp. 1129-31.).

68. It is undisputed that the Phase III site is characterized by the presence of some of the marsh plant species listed in 15A N.C.A.C. 7H .0205, including Cord Grass (*spartina alterniflora*) and Black Needlerush (*juncus roemerianus*).

69. **EXCEPTION (Additional Facts Inserted)** Cece, Privett, Halminski, Gerald, and DeBlieu have observed flooding on Hatteras Island, specifically over N.C. Highway 12 in front of the Wind Over Waves subdivision, and over portions of Phase III, which they believe is regular flooding.

**BASIS FOR EXCEPTION:** Finding of Fact 69 is misleading because it fails to identify all witnesses who observed flooding in the area and on the Phase III site. The presence of occasional flooding is an essential component of the resolution of this case.

70. **EXCEPTION (Language deleted; additional language inserted)** The preponderance of the evidence at the hearing showed that flooding over N.C. Highway 12 occurs due to the general grade of that portion of Hatteras Island, heavy rains, clogged roadside swales, and wind-driven tides from Pamlico Sound. ~~the lack of stormwater management controls in neighborhoods adjacent to the Wind Over Waves subdivision, including the properties at which Privett, Halminski and Gerald reside.~~

**BASIS FOR EXCEPTION:** Finding of Fact 70 is not supported by a preponderance of the evidence in the record and ignores testimony of DCM staff, including Cece and Sampson, that indicates occasional flooding on the WOW development.

71. **EXCEPTION (Language deleted; additional language inserted)** The preponderance of the evidence at the hearing demonstrated that the observations of Cece, Sampson, Privett, Halminski, Gerald and DeBlieu were ~~not~~ sufficient to establish that there is regular or occasional flooding ~~over the entire Phase III site~~ upland of the coastal wetland delineation line on Phase III.

**BASIS FOR EXCEPTION:** Finding of Fact 71 is not supported by a preponderance of the evidence in the record because the Respondent's witnesses failed to visit the site during conditions that could be reasonably expected to produce flooding from wind-driven tides. Cece, Privett, Halminski, Gerald, and DeBlieu all either were present on the site at times that could reasonably be expected to produce flooding and observed flooding on the site or live in the area and could observe regular, seasonal flooding on the site and in adjacent areas.

72. **EXCEPTION (Language deleted; additional language inserted)** Cece visited the Phase III site on several occasions to observe wrack lines, coastal and non-coastal wetlands plant species, and opportunities for flooding. Cece first visited the Phase III site on January 18, 2006. WOW's Rubino had requested Cece visit the site. Rubino accompanied Cece on this Phase III site visit. (T. pp. 748-49.) Conditions were wet with the wind blowing from the southwest at 20 knots or greater. (T. p. 749.) ~~Cece and Rubino focused on the south-west portion of the Phase III site, and observed some standing water along the coastline following Pamlico Sound, and the southern portion of the property transected by Britt Creek, as well as Black Needlerush.~~ (T. pp. 750-55, 783.) Cece could not make an initial classification of coastal wetlands at that time because the water was too deep to allow Cece to identify the presence of coastal wetlands species. (T. p. 750). Cece was also concerned that a significant portion of the site could be coastal wetlands and observed flooded areas on Lots 32-34 and 15-18. (T. p. 751).

**BASIS FOR EXCEPTION:** Finding of Fact 72 omits undisputed evidence in the record regarding Cece's observation of flooding on the Phase III site and, further, downplays and mischaracterizes the extent of flooding that was observed.

73. **EXCEPTION (Language deleted; additional language inserted)** On January 26, 2006, Cece visited the Phase III site. He walked the site to get a sense of the whole property generally. (T. p. 753.) On February 2, 2006, Cece and Sampson visited to the Phase III site. (T. pp. 197, 754.) They walked the Phase III site for general familiarity. (T. pp. 753-54.) Cece and Sampson were joined later that day by Tyndall to gain general familiarity of the property subject to the Application. (T. pp. 754, 965.) On February 5, 2006, Cece visited the property again, and observed evidence of flooding along the ~~southern portion~~ western edge of the Phase III site, including Lots 17-19, 11-13 and possibly 4 and 5. (T. pp. 755-56, 813-815, 827-828.)

**BASIS FOR EXCEPTION:** Finding of Fact 73 omits undisputed facts is not supported by a preponderance of the evidence and fails to fully characterize the extent of the flooding observed by Cece during his visits to the Phase III site.

74. Cece and Sampson requested the presence, input, and experience of Tyndall to determine the location of the coastal wetlands line. (T. pp. 966, 1022.)



75. In early March 2006, Cece visited the property and was accompanied by DeBlieu. (T. pp. 360-67, 760-61.) During this visit, Cece and DeBlieu observed a sizeable stand of Black Needlerush (*juncus roemerianus*) towards the center of Phase III. (T. p. 762.)

76. **EXCEPTION (Additional language inserted)** On May 25, 2006, Cece and Tyndall visited the site to continue to gain general familiarity of the site. During this visit, they concentrated on where the potential coastal wetland lines may be delineated, the species of vegetation present, and any evidence of flooding on the Phase III site that would be indicative of coastal wetlands. (T. pp. 764-65, 965.)

**BASIS FOR EXCEPTION:** Finding of Fact 76 mischaracterizes the purpose of Cece's and Sampson's visit by omitting undisputed facts.

77. Cece's final visits to the Phase III site were on July 27 and 28, 2006. During this visit, Cece accompanied Tyndall to perform the task of staking and marking the coastal wetlands line. (T. pp. 767, 965, 970.) Tyndall requested the assistance and experience of Moore to confirm his opinion on the location of the coastal wetlands line. (T. pp. 876, 887, 970-71.) Cece helped to hang or implant and label CAMA flags used by Respondent for marking such delineations. (T. pp. 767-68.) During the July 27th visit, Cece was asked for his opinion and previous observations of flooding. (T. pp. 768-69, 974, 1050-51.) Tyndall, Moore, and Cece performed most of the delineation on July 27<sup>th</sup>. On July 28, 2006, Cece completed the delineation in accordance with Tyndall's guidance. (T. pp. 772-73, 889-91, 971-76.)

78. Tyndall has nearly 20 years experience in coastal wetland delineations, and was qualified as an expert in the area of coastal wetlands delineations and the CAMA permitting process. (T. p. 946.) He has trained many current and former field staff for Respondent in coastal wetlands delineations. (T. pp. 738, 951-54.)

79. Moore has nearly 20 years experience in coastal wetlands delineations, and was qualified as an expert in delineation of coastal wetlands and the CAMA permitting process. (T. pp. 886-87.) Moore has testified as an expert in these fields in other contested cases. (T. p. 886.) He has trained many current and former field staff for Respondent in coastal wetlands delineations. (T. pp. 722, 738, 869-70, 873-74, 952, 971.)

80. **EXCEPTION (Language deleted; additional language inserted)** A preponderance of the evidence at the hearing demonstrated that Tyndall and Moore ~~are two of the most experienced~~

coastal wetlands delineators in the State of North Carolina. failed to visit Phase III during conditions expected to produce wind-driven tides on the site and utilized an additional criteria for determining flooding that is not in accordance with North Carolina law.

**BASIS FOR EXCEPTION:** Finding of Fact 80 is not supported by a preponderance of the evidence in the record and omits undisputed facts that are centrally relevant to this case. Respondent failed to produce evidence of Tyndall's or Moore's experience relative to other wetland delineators in the State of North Carolina. In addition, Finding of Fact 79 fails to fully explain the circumstances pursuant to which Tyndall and Moore observed Phase III, which is central to this case. The Respondent offered no contradictory evidence to demonstrate that either Tyndall or Moore were on site during weather conditions reasonably expected to produce a wind-driven tide nor did Respondent offer evidence to demonstrate that a conduit is a legal requirement for delineating wetlands.

81. **EXCEPTION (Language deleted)** ~~A preponderance of the evidence at the hearing demonstrated that it is not uncommon to see Black Needlerush (*juncus roemerianus*) in a bowl-shaped area or slight depression that retains moisture (as in the central portion of Phase III) without such an area qualifying as coastal wetlands, or having a direct conduit to the sound.~~

**BASIS FOR EXCEPTION:** Finding of Fact 81 is factually misleading and unsupported by law. First, Finding of Fact 81 ignores evidence in the record that contradicts the extent of flooding on Phase III (including the central portion). The presence of coastal wetland species throughout Phase III is undisputed. Second, the only statutory and regulatory requirements for determining coastal wetlands are the existence of coastal wetland species and regular or occasional flooding. A conduit is not required nor is it part of the legal determination of coastal wetlands.

82. **EXCEPTION (Language deleted; additional language inserted)** A preponderance of the evidence at the hearing showed that the mowing that had taken place on the Phase III site approximately every three months did not violate CAMA rules and regulations, but did ~~and did not~~ damage the root system of the vegetation or disturb the ground, such that it affected the composition of species or delineation of coastal wetlands on the Site.

**BASIS FOR EXCEPTION:** Finding of Fact 82 is not supported by a preponderance of the evidence and ignores testimony from Cece and Mr. Fussell, the only expert botanist qualified in the identification and habitat needs of marshland plants. Mr. Fussell testified that mowing can suppress the growth of native vegetation and create conditions that allow other species to move in. (T. pp. 569, 590-592). Mr. Cece testified that he was surprised by the change in species composition on the

site that could be attributed to the regular and severe mowing. (T. p. 811). Mr. Lassiter testified that mowing occurred every three months during the growing season starting in 2001. (T. p. 1105).

83. **EXCEPTION (Language deleted)** A preponderance of the evidence at the hearing showed that some portions of the Phase III site are subject to regular or occasional flooding. ~~Specifically, these areas include the shoreline bordering Pamlico Sound on the western side, and the area near the tidal creek and peninsula on the southern side.~~

**BASIS FOR EXCEPTION:** Finding of Fact 83 is not fully supported by a preponderance of the evidence in the record and ignores evidence in the record that flooding occurs on Phase III and is not confined to the southwestern area adjacent to Britt Creek.

84. **EXCEPTION (Language deleted; additional language inserted)** A preponderance of the evidence at the hearing, ~~including expert observations of the location of wrack lines, vegetation patterns, and the lack of floodwater conduits connecting Pamlico Sound to the center portion of the Phase III site,~~ demonstrated that there is not regular or occasional flooding ~~in the center of the Phase III site~~ landward of the coastal wetland delineation.

**BASIS FOR EXCEPTION:** Finding of Fact 84 is not fully supported by a preponderance of the evidence ignores evidence from Cece, the only DCM staff to be onsite during conditions reasonably expected to produce wind-driven tides that flood Phase III.

85. **EXCEPTION (Additional language inserted)** Based on their specific knowledge and expertise, Tyndall, Moore, and Cece delineated and marked the coastal wetlands line they determined to be correct in July 2006. (T. pp. 770, 927, 1052.) A preponderance of the evidence in the record demonstrates that the day Tyndall, Moore, and Cece delineated the coastal wetlands for Phase III was not during conditions that could reasonably be expected to produce wind-driven tides that would flood Phase III. Furthermore, Tyndall and Moore were relying on the presence or absence of a conduit to determine the extent of flooding.

**BASIS FOR EXCEPTION:** Finding of Fact 85 is misleading and omits the applicable statutory requirements that govern DCM's responsibilities in this case. Tyndall and Moore did not visit Phase III during conditions reasonably expected to produce wind-driven tides that would flood Phase III. Rather, Tyndall asked Cece to monitor the site and to visit the site when such tides could be expected. Furthermore, a conduit is not part of the regulatory definition of coastal wetland. By relying on the presence or absence of a conduit, Moore injected a criterion that is outside the regulatory definition and is not required to delineate a coastal wetland.

86. **EXCEPTION (Language deleted; additional language inserted)** A preponderance of the evidence at the hearing, including the weight of expert testimony, showed occasional flooding was sufficient to constitute coastal wetlands ~~waterward of and up to~~ landward from the coastal wetlands line delineated by Tyndall, Moore, and Cece, ~~but not landward of such line.~~

**BASIS FOR EXCEPTION:** Finding of Fact 86 is not fully supported by a preponderance of the evidence ignores evidence from Cece, the only DCM staff to be onsite during conditions reasonably expected to produce wind-driven tides that flood Phase III.

### CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.Gen.Stat. § 150B-23 (2006). (See Stipulation in Prehearing Order.)

2. All parties have been designated correctly and are properly before the Office of Administrative Hearings. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter. (See Stipulation in Prehearing Order.)

3. N.C. Gen. Stat. § 150B-2(6) defines a "person aggrieved" as:

Any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

Applying that definition, Petitioner is a "person aggrieved" by Respondent's November 27, 2006 issuance of the subject CAMA Permit.

4. Petitioner bears the burden of proof on the issues. Britthaven v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E. 2d 455, 461, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). To meet this burden, Petitioner must show by a preponderance of the evidence that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that the design and location of the Proposed Road was appropriate, and that the CAMA Permit did not require additional conditions. (See Stipulation in Prehearing Order.)

5. **EXCEPTION (Conclusion of Law deleted)** Pursuant to ~~N.C. Gen. Stat. § 113A-104, Respondent is vested with the statutory authority to enforce the State's environmental laws, including laws enacted to protect coastal lands and waters of the State.~~

**BASIS FOR EXCEPTION:** Conclusion of Law 5 is cumulative and redundant because it simply restates Finding of Fact 7, which is based on facts stipulated by all parties.

6. **EXCEPTION (Conclusion of Law deleted)** ~~CAMA is a comprehensive plan for the protection, preservation, orderly development and management of the coastal areas of North Carolina. N.C. Gen. Stat. § 113A-102(a).~~

**BASIS FOR EXCEPTION:** Conclusion of Law 6 is cumulative, redundant and omits applicable statutory requirements. Conclusion of Law 6 simply restates Finding of Fact 29. We hereby incorporate our exceptions to Finding of Fact 29 into the exception for Conclusion of Law 6.

7. **EXCEPTION (Conclusion of Law deleted)** ~~Respondent acts for the CRC by coordinating the analysis and permitting of certain development activities with other State and Federal agencies, whose expertise lies in other areas of environmental and public health protection. 15A N.C.A.C. 7M .0801. Respondent issues CAMA permits under authority delegated by the CRC. 15A N.C.A.C. 7J .0209.~~

**BASIS FOR EXCEPTION:** Conclusion of Law 7 is cumulative and redundant because it simply restates Finding of Fact 30.

8. **EXCEPTION (Conclusion of Law deleted)** ~~A CAMA permit is required for any development activity within an AEC that has been designated by the CRC. N.C. Gen. Stat. §§ 113A-113, 118. (T. p. 174.)~~

**BASIS FOR EXCEPTION:** Conclusion of Law 8 is cumulative, redundant and omits applicable statutory requirements. Conclusion of Law 8 simply restates Finding of Fact 31. We hereby incorporate our exceptions to Finding of Fact 31 into the exception for Conclusion of Law 6

9. **EXCEPTION (Language deleted; additional language inserted)** ~~A CAMA major development permit is required for any development that requires permission from another Federal or State agency. N.C. Gen. Stat. § 113A-118. It is undisputed that in this case, a Major CAMA Permit was required for the Proposed Road. Respondent failed to properly considered cumulative impacts before issuing the CAMA Permit.~~

**BASIS FOR EXCEPTION:** Conclusion of Law 9 is cumulative, redundant, and not supported by a preponderance of the evidence. First, Conclusion of Law 9 simply restates Finding of Fact 32. Second, the undisputed evidence at the hearing of the case showed that no DCM staff investigated the cumulative impact of adding Phase III to existing development impacts or the impacts on coastal resources from potential future development in the area similar to Phase III, such as Phase IV of WOW.

10. **EXCEPTION (Conclusion of Law deleted)** Respondent administers an express permitting program for the processing of certain applications for CAMA major development permits. N.C. Gen. Stat. § 143B-279.13.

**BASIS FOR EXCEPTION:** Conclusion of Law 10 is cumulative and redundant because it simply restates Finding of Fact 33.

11. **EXCEPTION (Conclusion of Law deleted)** Respondent offered sufficient, competent evidence to demonstrate that this level of review is the same as in the standard permit review process. Petitioner offered no contradictory evidence, nor did Petitioner offer evidence to demonstrate that the express permitting level of review is inferior to the standard level of review.

**BASIS FOR EXCEPTION:** Conclusion of Law 11 is cumulative and redundant because it simply restates Finding of Fact 34.

12. **EXCEPTION (Conclusion of Law deleted)** A preponderance of the evidence at the hearing showed that Respondent followed all the normal and customary permitting processes required by CAMA and its implementing rules and regulations in issuing that permit.

**BASIS FOR EXCEPTION:** Conclusion of Law 12 is cumulative, redundant, and is not supported by a preponderance of the evidence. First, Conclusion of Law 12 simply restates Finding of Fact 61. Second, Finding of Fact 61, and therefore Conclusion of Law 12, ignores DCM's statutory mandate to conduct a cumulative impacts analysis that addresses the impacts to important coastal resources from similar developments in the area. N.C. Gen. Stat. § 113A-120(10).

13. The preponderance of the evidence at hearing proved that the subject CAMA Permit is consistent with the Dare County Land Use Plan. During the hearing, the undersigned granted Respondent-Intervenor's Motion to Dismiss Petitioner's case on the issue of consistency with the Dare County Land Use Plan. (T. p. 862.)

14. **EXCEPTION (Conclusion of Law deleted)** Respondent properly considered practicable alternatives before issuing the CAMA Permit. A preponderance of the evidence at the hearing demonstrated that there were no alternative practicable locations for the Proposed Road that in any would reduce the impacts to any AEC.

**BASIS FOR EXCEPTION:** Conclusion of Law 14 is cumulative and redundant because it simply restates Finding of Fact 59.

15. **EXCEPTION (Language inserted)** To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. As such, Findings of Fact Nos. 7, 29-34, 59, 61, 82 - 86 and all associated exceptions are hereby incorporated by reference.

**BASIS FOR EXCEPTION:** Conclusion of Law 15 omitted reference to Findings of Fact 7, 29-34, 59, and 61 and any incorporation by reference of the exceptions to Finding of Fact Nos. 82-86.

16. **EXCEPTION (Language deleted, additional language inserted)** Petitioner has demonstrated ~~failed to demonstrate~~ by a preponderance of the evidence that Respondent's decision to issue the CAMA Permit was improper.

**BASIS FOR EXCEPTION:** Conclusion of Law 16 is not supported by a preponderance of the evidence and ignores DCM's statutory obligations. DCM staff added and relied on an improper criteria to define and identify coastal wetlands—a conduit for flooding. This legal error is particularly important in a case like this, which is low and flat and experiences flooding from wind-driven tides. Furthermore, DCM failed to conduct an adequate cumulative impacts analysis because the impacts from previous developments, such as Phase I and II, and known future developments, such as Phase IV, in the area were ignored. Thus, the wetland delineation was not proper, CAMA procedure was not followed, and the CAMA permit was improperly issued.

17. **EXCEPTION (Language deleted; additional language inserted)** Based upon a preponderance of the evidence at the hearing, and giving due regard to the demonstrated knowledge and expertise of Respondent with respect to facts and inferences within its specialized knowledge of the agency, Respondent's analysis was insufficient ~~sufficient~~, and its decision to issue the CAMA Permit was improper ~~proper~~. N.C. Gen. Stat. § 150B-34. Therefore, Respondent ~~did not~~ exceeded its statutory authority or jurisdiction, ~~did not~~ acted erroneously, ~~did not~~ acted arbitrarily or capriciously, and failed to act ~~acted~~ as required by law and rule by issuing the subject CAMA Permit to WOW.

**BASIS FOR EXCEPTION:** Conclusion of Law 17 is not supported by a preponderance of the evidence.

### DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

1. WOW's Motion to Dismiss is **DENIED**.
2. Petitioner's Motion for Summary Judgment on Liability is **DENIED**.
3. Respondent's issuance of the subject CAMA Permit to WOW is VACATED  
UPHELD.

### NOTICE

The Coastal Resources Commission, the agency making the final decision in this contested case, is required to give each party an opportunity to file exceptions to this Recommended Decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

In making its final decision, the Coastal Resources Commission shall comply with the requirements of N.C. Gen. Stat. § 150B-36 with regard to each finding of fact. The Coastal Resources Commission is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings. The Coastal Resources Commission shall serve the Office of Administrative Hearings at 6714 Mail Service Center, Raleigh, NC 27699-6417.

This the 7<sup>th</sup> day of April, 2008.

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Melissa Owens Lassiter  
Administrative Law Judge



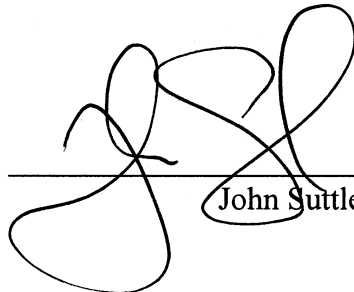
**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioner's Exceptions to Administrative Law Judge's Recommended Decision in Case No. 07 EHR 0345 has been served on all parties by electronic mail and by United States mail, first-class postage prepaid, addressed as follows:

Christine Goebel  
NC Department of Justice  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

Amy P. Wang  
Frank H. Sheffield, Jr.  
Ward and Smith, P.A.  
1001 College Court  
P.O. Box 867  
New Bern, NC 28563-0867

This the 6th day of September, 2008.



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John Suttles

BEFORE THE  
NORTH CAROLINA COASTAL RESOURCES COMMISSION

NORTH CAROLINA COASTAL )  
FEDERATION, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
NC DEPARTMENT OF ENVIRONMENT )  
AND NATURAL RESOURCES, DIVISION )  
OF COASTAL MANAGEMENT, )  
 )  
Respondent, )  
 )  
and )  
 )  
WIND OVER WAVES, LLC, )  
 )  
Respondent Intervenor. )

**RECEIVED**  
SEP 08 2008

**Morehead City DCM**  
**PETITIONER'S MEMORANDUM**  
**OF FACT AND LAW IN SUPPORT OF**  
**WRITTEN EXCEPTIONS TO THE**  
**ADMINISTRATIVE LAW JUDGE'S**  
**RECOMMENDED DECISION**  
**IN CASE NO. 07 EHR 0345**

Pursuant to N.C. Gen. Stat. § 150B-36, Petitioner the North Carolina Coastal Federation (“Coastal Federation”) respectfully submits this Memorandum of Fact and Law in Support of Written Exceptions to the Administrative Law Judge’s Recommended Decision in the above-captioned matter. For reasons that are more fully demonstrated below and in Coastal Federation’s Exceptions, Coastal Federation respectfully requests that the Coastal Resources Commission (“CRC”) exercise its authority pursuant to N.C. Gen. Stat. § 150B-36(b) to reject, modify, or amend certain of the Administrative Law Judge’s (“ALJ”) findings of fact and conclusions of law and to render a Final Decision that the North Carolina Division of Coastal Management (“DCM”) violated State law by: (1) relying on a stormwater permit issued by the Division of Water Quality that the Environmental Management Commission has vacated because it fails to protect water quality; (2) issuing to Wind Over Waves, LLC (“Wind Over Waves”) a

CAMA Major Permit for a 57-lot residential development under conditions that will allow the destruction of coastal wetlands in violation of State statute and regulations; and (3) failing to conduct an independent review of the adverse affects on the coastal resources on and adjacent to the Wind Over Waves development.

**I. SUMMARY OF MEMORANDUM**

Coastal Federation filed this contested case pursuant to N.C. Gen. Stat. §§ 150B-23 and 113A-121.1 to challenge a CAMA Major Development Permit issued to Wind Over Waves, LLC (“Wind Over Waves”) for the development of Phase III of the Wind Over Waves subdivision in Salvo, North Carolina. The CAMA permit would authorize a 57-lot development covering approximately 38 acres adjacent to Pamlico Sound and a tidal creek known as Britt Creek. Coastal Federation simultaneously challenged the Division of Water Quality’s (“DWQ”) issuance of a stormwater permit for Phase III of the Wind Over Waves subdivision. Although Coastal Federation’s claims against both DCM and DWQ were joined in a single Contested Case, the claims against DWQ and DCM were severed and the two cases proceeded separately. After the recommended decision was filed in this case, the Environmental Management Commission (“EMC”) issued its final agency decision vacating the stormwater permit for Phase III of the Wind Over Waves subdivision. Although DCM has an independent legal duty to ensure coastal development does not adversely impact water quality, DCM relies on DWQ to flag water quality concerns and to deny stormwater permit for development that cannot address adverse impacts to water quality. Without a valid stormwater permit, the CAMA permit issued for Phase III of the Wind Over Waves subdivision fails to ensure protection of water quality standards and the protection of the shellfishing waters adjacent to the Phase III site.

Furthermore, DCM committed several errors in issuing the CAMA permit. DCM failed to designate all areas on the site that constitute coastal wetlands and DCM failed to conduct a cumulative impacts analysis as required by N.C. Gen. Stat. § 113A-120 (10). Although large portions of the site meet the exclusive regulatory criteria established by the Coastal Resources Commission (“CRC”) for classification as coastal wetlands and protection from development, a preponderance of the evidence shows that DCM failed to designate these areas as coastal wetlands based on a combination of one legal and two factual errors.

First, DCM committed legal error and violated the plain language of 15A N.C. Admin. Code 07H .0205(a) by unlawfully imposing a requirement for identifying areas “subject to . . . occasional flooding by tides, including wind tides” that the CRC expressly excluded from the definition of “coastal wetlands”—the presence of a direct watercourse connection, or “conduit,” for the flood waters to reach wetland areas. Second, DCM committed two factual errors by excluding wetland areas from its wetland delineation based on: (1) a misinterpretation of the significance of the presence of non-coastal wetland indicator plant species that tolerate and even favor flooded and saline conditions in areas where indicator plant species are also present; and (2) dramatic changes in the natural distribution and concentration of coastal wetland plant indicator species after repeated mowing of the property.

The Phase III property is characterized by expansive coastal wetlands. Many of the plant species listed in the CAMA regulations are present on the site, extending to the dense line of pines located on the eastern part of the property. Other species found exclusively in wetlands and marshes also are present; many of these species also are salt tolerant. The site is occasionally flooded by wind-driven tides from Pamlico Sound, a regular phenomenon in the winter months when strong winds from the southwest blow for days at a time. Despite direct

observations of flooding in areas dominated by coastal wetland indicator species, DCM excluded large areas as coastal wetlands based on an unlawful interpretation of the regulations, a lack of botanical knowledge of wetland plants, and consideration of factors not authorized by law. As a result, the delineation conducted for the Phase III was arbitrary and capricious and in violation of CAMA and its implementing regulations.

Finally, DCM did not conduct a review of the cumulative impacts from the proposed development on the four Areas of Environmental Concern (“AECs”) present on the site. DCM’s omissions violate express mandates set forth in CAMA. For these reasons, the CAMA permit issued to Wind Over Waves must be voided.

## **II. NATURE OF PROCEEDING AND STANDARD OF REVIEW**

This matter comes before the CRC as an ALJ’s Recommended Decision and concerns an appeal of a CAMA major permit issued by DCM to Wind Over Waves in violation of state laws governing protection of coastal wetlands and coastal water quality from the adverse impacts of development. CAMA recognizes the sensitive nature of coastal wetlands and coastal waters. N.C. Gen. Stat § 113A-102. The CAMA regulations emphasize the interconnectedness of coastal lands and waters and explain that the “unique productivity” of estuaries and ocean is “supported by detritus (decayed plant material) and nutrients that are exported from coastal marshlands.” 15A N.C. Admin. Code 7H. 0205(b).

During the proceedings and the hearing in this case, the parties presented two competing legal positions. DCM and Wind Over Waves maintained that the CAMA permit met all applicable legal requirements because DCM properly delineated the coastal wetlands on the property and followed the appropriate CAMA procedure to determine the cumulative impacts from the Phase III site and to identify water quality concerns. Coastal Federation, on the other

hand, contended that the CAMA permit is unlawful because the coastal wetland delineation was deficient both legally and factually and the CAMA permit issuance process was not followed because the cumulative impacts analysis was inadequate.

After the presentation of the evidence, the ALJ found that DCM had properly issued the CAMA permit to Wind Over Waves. But the ALJ's decision is based on incorrect legal determinations and facts that are not supported by a preponderance of the evidence in the record. Accordingly, based on the revised findings of facts and conclusions of law appearing in Coastal Federation's Exceptions and as more fully supported by this memorandum of fact and law, the ALJ's Recommended Decision should be modified and amended, and a Final Decision should be rendered holding that the Wind Over Waves CAMA permit violates CAMA provisions for the protection of coastal wetlands and CAMA procedure to address cumulative impacts from development and should be **vacated**.

According to CAMA regulations, DCM must prohibit development that violates water and air quality standards. 15A N.C. Admin. Code 7H. 0208(a)(2)(C). Despite having an independent legal duty to protect coastal waters, DCM relies on DWQ's analysis to fulfill this obligation and determine whether a development violates water quality. Because the EMC has expressly stated that the Wind Over Waves stormwater permit will not protect water quality and has vacated it, DCM can no longer rely on that permit to meet its duty. *N.C. Coastal Fed'n v. N.C. Dep't of Env't and Natural Res., Div. of Water Quality*, 07 EHR 0077 (Environmental Management Commission July 11, 2008) (final agency decision) (Attachment 1). As explained more fully by this memorandum of fact and law, the CRC should render a Final Agency Decision that the Wind Over Waves CAMA permit should be **vacated**.

According to N.C. Gen. Stat. § 150B-36(b), the CRC “shall adopt each finding of fact contained in the administrative law judge’s decision unless the finding is clearly contrary to the preponderance of the admissible evidence.” Although the CRC should give deference to the ALJ’s findings of fact to the extent they depend on the ALJ’s opportunity “to evaluate the credibility of witnesses,” *id.*, the CRC should not accept any factual findings that are not supported by a preponderance of the evidence in the record. If the CRC chooses not to adopt any of the ALJ’s findings, the CRC must provide its “reason for not adopting the findings of fact” and “[t]he evidence in the record relied upon by the agency in not adopting the finding of fact.” N.C. Gen. Stat § 150B-36(b1)(1)-(2). If the CRC makes any additional findings of fact, it must “set for separately and in detail the evidence in the record relied upon.” N. C. Gen. Stat. § 150B-36(b2). Any such evidence must be “supported by a preponderance of the admissible evidence in the record.” *Id.* As explained more fully below, the ALJ’s findings in this matter are not supported by a preponderance of evidence in the record. In fact, the opposite is true: a preponderance of evidence in the record and the subsequent EMC decision compel a ruling that the CAMA permit is unlawful and should be vacated.

Furthermore, nothing in the Administrative Procedure Act constrains the CRC to accept or defer to the ALJ’s interpretations of law. Indeed, as between the two, the CRC is at least as capable of construing regulations that it promulgated as an ALJ who took no part in the rule development process. In this case, the applicable CAMA regulations prohibit any development that adversely affects water quality standards, adversely affects coastal wetlands, or is processed without a cumulative impacts analysis. Thus, the CRC should render a final agency decision vacating the Wind Over Waves CAMA permit as unlawful.

**III. STATEMENT OF THE FACTS AND LAW SUPPORTING COASTAL FEDERATION'S EXCEPTIONS**

**A. DCM Is Relying on an Invalid Stormwater Permit to Meet Its Statutory Obligation to Protect Water Quality.**

The Coastal Area Management Act prohibits DCM from issuing a CAMA permit for any development “that would directly or indirectly impair water quality standards.” 15A N.C. Admin. Code 2H. 0209(d)(4). The waters of Pamlico Sound adjacent to Phase III of the Wind Over Waves subdivision are classified as waters used for shellfish for market purposes (“SA”). 15A N.C. Admin. Code 2B. 0221. Water quality standards applicable to SA waters require those waters to meet specified sanitary and bacteriological standards to protect and maintain shellfish culture; and “any source of water pollution which precludes any of these uses . . . on either a short-term or long-term basis shall be considered to be violating a water quality standard.” 15A N.C. Admin. Code 2B .0221(2). These State guidelines require the development activities authorized by CAMA permits to maintain water quality conditions that support the shellfishing uses, prohibit discharges of pollutants to the waters, and require that a bacteriological standard to support shellfish use be maintained.

DCM has an independent duty to insure that a CAMA permit will not allow development to violate water quality standards. The CAMA regulations specify that DCM and the CRC will take a “lead role” in coordinating the activities of state and local agencies to “ensure optimal water quality.” 15A N.C. Admin. Code 7M. 0801. DCM asserts that it fulfills this duty by relying on other state agencies to provide comments on development that requires a CAMA permit. In this case, DCM relied on a stormwater permit issued by DWQ to meet its duty to insure Phase III of the Wind Over Waves subdivision would not violate water quality standards.



David Moye testified that DCM could not issue a CAMA permit unless DWQ had already issued a stormwater permit. (T. p. 703, 724) And Ted Tyndall confirmed that the stormwater permit had to be issued first. (T. p. 980)

DCM can no longer rely on the stormwater permit to fulfill its legal obligation to assure that the development will not “directly or indirectly impair water quality standards.” 15A N.C. Admin. Code 2H.0209(d)(4). After extensive briefing and a full hearing on the merits, the EMC issued a final agency decision vacating the stormwater permit issued to Wind Over Waves. *N.C. Coastal Fed’n v. N.C. Dep’t of Env’t and Natural Res., Div. of Water Quality*, 07 EHR 0077 (Envtl. Mgmt. Comm’n July 11, 2008) (final agency decision) (Attachment 1). In its final agency decision dated July 11, 2008, the EMC states DWQ erred in issuing the stormwater permit because “stormwater transport from the proposed development would likely result in noncompliance with water quality standards in adjacent shellfish waters classified SA.” *Id.* at 2. Therefore, it is now clear that the CAMA permit issued by DCM would authorize a development “that would directly or indirectly impair water quality standards” in violation of 15A N.C. Admin. Code 2H.0209(d)(4). In order to give full legal effect to the EMC’s final agency decision vacating the Wind Over Waves stormwater permit—and to avoid undermining the EMC’s final agency decision—the CRC should now vacate the CAMA permit, because it depends on the existence of a valid stormwater permit that will protect water quality standards and existing uses. 15A N.C. Admin. Code 7M.0801; *see* Moye, T. p. 703, 724; Tyndall, T. p. 980.

**B. The Wetlands Delineation Conducted by DCM Is Arbitrary and Capricious and Violates 15A N.C. Admin. Code 7H. 0205(a).**

The CRC has promulgated regulations establishing the exclusive criteria for identifying coastal wetlands. CAMA regulations define coastal wetlands as “any salt marsh or other marsh

subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides.” 15A N.C. Admin. Code 7H. 0205(a). In addition to occasional flooding, the property in question must “contain some, but not necessarily all” of certain enumerated marsh plant species. *Id.* These are the only criteria the CRC has established for identifying coastal wetlands, and DCM is not free to impose additional requirements.

1. The Site of the Proposed Phase III Development Contains the Requisite Coastal Wetland Species.

It is undisputed that coastal wetland indicator plant species are abundant on the site up to the dense tree line on the eastern edge of the property. These species include *Juncus roemerianus* (“black needle rush”), *salicornia spp.* (“glasswort”), *distichlis spicata* (“salt grass”), *Scirpus spp.* (“bulrush”), *Typha spp.* (“cat-tail”), and *Spartina patens* (“salt meadow grass”).

These species are found landward of DCM’s coastal wetlands line, particularly throughout Lots 1-18, and in the “meadow” through the central part of the property in Lots 20-34. There are also lush stands of *Juncus* in the southern part of the property, in Lots 32-34. (Sampson, T. pp. 201-204, 242, 244, 271; DeBlieu, T. p. 363, 365, 368, 381, 405, 415, 426, 429; Fussell, T. pp. 579-581, 587; Cece, T. pp.751, 783-785, 806, 811; Tyndall, T. pp. 988, 1033, 1040, 1042). As counsel for Respondent and Respondent-Intervenor conceded, these species are well-represented throughout the site, and the main dispute concerns the occurrence of occasional flooding in these areas.

2. Areas Containing Coastal Wetland Species Also Experience Occasional Flooding.

To meet the definition of a coastal wetland, in addition to having some of the indicator plant species present, a site must experience regular or occasional flooding from lunar or wind-

driven tides, exempting only flooding caused by winds associated with hurricanes and tropical storms. 15A N.C. Admin. Code 2H. 0205(a). This area of the Outer Banks is most influenced by occasional, or wind-driven, tides. DCM has not adopted guidance interpreting the term “occasional flooding,” but DCM’s witnesses unanimously agreed that flooding restricted to a certain season would constitute “occasional flooding.”<sup>1</sup> Mr. Moore, offered as DCM’s leading expert on coastal wetland delineation, testified that flooding that occurs seasonally, even just once a year, may be considered “occasional” pursuant to CAMA.

The best evidence of the extent of flooding from wind-driven tides—direct personal observation—unequivocally shows that substantial areas meeting the regulatory definition of coastal wetlands exist landward of DCM’s delineation. During two site visits in the winter of 2006 John Cece observed flooding on the site upland of the current delineation. His first visit was conducted at the request of Brian Rubino on January 18, 2006. The day before, the wind conditions had been calm, but the morning of their visit a strong wind blew out the southwest. Mr. Rubino wanted Mr. Cece’s opinion about the presence of coastal wetlands on an isthmus leading to Lot 19, an area that was covered with water so deep that despite his hip waders, Mr. Cece could not walk through it. While walking to and from Lot 19, Mr. Cece observed water spilling over the bank of the tidal creek, flooding the upland portions of Lots 17 and 18 and the southern bend of the loop road through the development in the vicinity of Lot 34. Mr. Cece also observed stands of *Juncus roemerianus* in the flooded areas, specifically on Lots 32-34 and Lots 15-18; during later visits he observed the same conditions on Lots 11-13 (and possibly also Lots 4 and 5).

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<sup>1</sup> Notably, however, DCM’s own witnesses disagreed as to whether flooding that occurs “one time only” could qualify as “occasional flooding.” Mr. Moore, the Washington District Manager testified that a single flood event could qualify, while Mr. Tyndall, DCM’s assistant director, disputed that position. This significant disagreement on one of the only two criteria for identifying coastal wetlands by two of DCM’s most senior officials leads to a substantial likelihood of different delineation decisions involving sites with the same conditions. DCM must consistently interpret CAMA regulations or its decisions are, by definition, arbitrary and capricious.

Mr. Cece reported his findings to his supervisor, Ted Sampson. Mr. Sampson arranged a site visit with Ted Tyndall. Mr. Sampson called Mr. Tyndall not because of uncertainty about delineating coastal wetlands, but because he understood the potential magnitude of the impact the delineation would have on the developer's plans for the property. Mr. Tyndall confirmed that this was correct procedure.

On February 2, 2006, Messrs. Tyndall, Sampson and Cece met and walked through the property, focusing on the areas where Mr. Cece had observed flooding. Messrs. Tyndall and Sampson concurred with Cece's assessment that the requisite species and flooding from the Sound and tidal creek qualified the area as coastal wetlands. Messrs. Tyndall and Sampson directed Mr. Cece to monitor the site closely and visit the property the next time strong southwest winds were blowing.

Mr. Cece again visited the site on February 5. He walked through the site and observed flooding in the same areas where he had observed flooding on January 18. Mr. Cece reported these findings to Messrs. Sampson and Tyndall via electronic mail. The areas where he observed flooding are indicated by dotted red lines on Petitioner's Exhibit 31. They are identical to the areas Mr. Tyndall reported observing standing water during his visit to the site on February 2, 2006 as indicated by red and blue Xs on Petitioner's Exhibit 29. These same areas were documented to contain coastal wetland indicator species, according to Mr. Cece's February 6, 2006 e-mail and testimony.

In addition to the DCM employees' direct observations of flooding, Robin Gerald testified that the Phase III property floods several times each winter. Mr. Gerald has lived on Hatteras Island for more than 30 years and used to hunt ducks and trap on the site of the Wind Over Waves development. (Gerald Deposition pp. 16-26) According to Mr. Gerald, flooding

occasionally extended up to the tree line on the eastern edge of the property, throughout the areas in which coastal wetland indicator species were documented. Mr. Gerald testified that he has observed – and canoed through – water on the site while hunting waterfowl in the winter, and that this flooding was caused by winds from the southwest blowing water onto the property from Pamlico Sound.<sup>2</sup> (Gerald Dep. pp. 16-26, 64-5, 68-9; Petitioner’s Exh. 27) Mr. Gerald testified that the conditions under which he observed flooding on the site were common place during the winter months and that the types of winds that caused the flooding were not associated with any hurricanes or tropical storms.

Mr. Halminski, a long-time resident of Hatteras Island who used to work as a waterfowl hunting guide and accompanied Mr. Gerald on several trips to the Wind Over Waves property prior to its development, and another long-time local resident, Ann Privett, corroborated Mr. Gerald’s testimony regarding flooding from southwest winds during the winter. There is no question that the flooding from wind-driven tides described these long-time local residents who are most familiar with the conditions in the area resulted from winds and storms that do not fit the exception for a tide generated by a “hurricane” or “tropical storm.” Indeed, as Mr. Sampson noted, hurricanes and tropical storms do not occur in this area during the winter months.

Wind Over Waves never rebutted Mr. Gerald’s testimony about the flooding he witnessed, and only obliquely questioned the plausibility of Mr. Gerald’s testimony that he was able to canoe over portions of the property in the winter months. Ironically, Wind Over Waves cited the fact that thick pockets of *Juncus* grass would have made it difficult to canoe on the site. But Mr. Gerald’s testimony shows exactly why his observations ring true. As Mr. Gerald

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<sup>2</sup> Wind Over Waves’ suggestion that Mr. Gerald’s main complaints about the Phase III development are self-serving, and that his visits to the property were improper, are specious and are intended to distract from the impact of his testimony. Prior to the intense development of Hatteras Island, it was common for many other residents to hunt on the property. Gerald Deposition p. 18, ll. 17-19. As numerous witnesses testified, the property was not posted against trespassing until March 2006. *Id.*, pp. 47-9.

testified, his canoe only draws 5 or 6 inches of water loaded when loaded and thus he was able to canoe through shallow water. This is consistent with the testimony Mr. Cece's testimony that he walked through water at least 8 inches deep on the site. Mr. Gerald testified that sometimes the water would be up to 18 inches deep, making it quite easy to paddle his canoe around the site. (*Id.*, p. 19, ll. 24-25; p. 20, ll. 1-12; p. 22, ll. 18-20; p. 69, ll. 10-21.) He also testified that sometimes he had to drag his canoe through shallower areas. (*Id.*, p. 22, ll. 20-23) As for the pockets of *Juncus*, Mr. Gerald explained that he paddled *around*, not over, the pockets of *Juncus*, *Spartina patens*, and eastern red cedar scattered throughout the interior of the site. (*Id.*, p. 64, ll. 14-17; p. 69, ll. 16-19) There is nothing implausible about his testimony and Wind Over Waves offered nothing to rebut it.

3. DCM's Coastal Wetland Delineation is Arbitrary and Capricious, Erroneous, and Based on Legal and Factual Errors.

DCM had direct evidence of wetland indicator species and occasional flooding from normal wind events, the only two regulatory criteria for identifying coastal wetlands, throughout much of the property. Mr. Cece, Mr. Sampson and Mr. Tyndall were so certain of the extent of coastal wetlands on the property and of the impact this would have on the owner's plans for development that they wrote a letter to the project consultant, Joe Lassiter with Quible & Associates, to inform him of this conflict on February 16, 2006. (Pet.'s Exh. 23, p. 1) Mr. Sampson testified that he conferred with Mr. Tyndall before writing this letter and that Mr. Tyndall shared his opinion. Mr. Tyndall corroborated this account in his own testimony.

Mr. Sampson's observations are vital because, unlike Mr. Moore, he was on the site before it was extensively mowed and while flood waters were present. Mr. Sampson testified based on those observations that he would have delineated coastal wetlands extending eastward and northward of the loop road through the property, drawing a line representing the

approximate extent of the coastal wetlands through Lots 20-34. (Stip. Exh. 4(A)(1) (overlay depicting Mr. Sampson's observations); Hearing Trans. Vol. II, pp. 246-7.) This is consistent with the area where Mr. Gerald observed flooding many times during the three decades he hunted ducks on the property. Mr. Sampson's opinion is based on his *direct observations* of the presence of coastal wetland indicator plant species and flood waters during his site visits, Mr. Cece's observations of the site under windy conditions, and the lack of significant elevation changes that could have impeded flooding from tides on the western half of the property. (Pet.'s Exh. 30).

Mr. Sampson's testimony is compelling based on his direct experience and because, as the District Manager of the Elizabeth City office, he would have been responsible for approving the coastal wetlands delineation if he had not retired prior to the completion of the CAMA permit process for Phase III of the Wind Over Waves development. Mr. Sampson was trained in wetlands delineation by Mr. Moore. Mr. Tyndall confirmed he was so confident in Mr. Sampson's abilities that had he not retired, he would have been the person entrusted and vested with the regulatory responsibility for the delineation, and neither Mr. Tyndall nor Mr. Moore would have assisted with the process.

Conversely, Mr. Moore testified that he *did not* conduct the wetlands delineation, nor was he provided the type of information he would normally use to make a delineation. His time on site was limited to the low-lying western edge of the property, where he advised Mr. Tyndall and Mr. Cece of the techniques he would use to conduct a delineation given the circumstances present that day. Mr. Moore was on site for less than three hours on a hot still day, after the vegetation had been closely cropped to a height of less than 6 inches. He testified he would have needed at least a full day on the property to conduct a proper delineation. Mr. Moore also

testified about the process he uses – and instructs other field staff to use – in delineating coastal wetlands, none of which he performed here. He did not review aerial photographs or the site plan, consult DCM data to learn about the property’s history, review Mr. Cece’s notes, or review the permit application or any other permits issued by other agencies for the development of the site. He also testified that prior to the contested case hearing, he had not heard any information about the previous site visits and observations of other DCM employees, including Mr. Cece’s observations of the dramatic change in species composition and the lush pockets of *Juncus* that had virtually disappeared since the property had been mowed. Mr. Moore testified that it would have been helpful for him to know about these changes when he was on site advising Mr. Tyndall about the delineation. The bottom line is this: while Mr. Moore provided advice and assistance based on a one-time visit for a few hours on a day that would not produce flooding from a wind-driven tide, he did not perform a coastal wetland delineation during his brief site visit on July 25, 2006.

i. DCM Violated CAMA Regulations by Requiring a “Discrete Conduit” for Floodwaters to Reach Wetland Areas.

Although areas upland of DCM’s delineation met the only two criteria for identifying coastal wetlands, DCM failed to include them in its delineation based on a clear legal error. Mr. Tyndall testified that he did not extend the coastal wetland line into the vicinity of Lot 34 – disregarding his own observations of actual flooding in a stand of *Juncus* – because he could not identify a discrete “conduit” for the water from the tidal creek. He gave the same justification for not extending the line farther inland on the Sound-side lots.

This constitutes legal error. In defining coastal wetlands, CAMA regulations do not require a conduit for the conveyance of floodwaters. To the contrary, the regulations state that a conduit is *not* required: coastal wetlands are defined as any marsh “subject to regular or



occasional flooding by tides, including wind tides (*whether or not the tide waters reach the marshland through natural or artificial watercourses*) ...” 15A N.C. Admin. Code 2H .0205(a) (emphasis added). The CRC specifically considered whether to require a discrete conduit to convey flood waters and specifically rejected it as a criterion. If wind-driven tide waters reach an area where coastal wetland species are found, whether by inundating a low-profile site or through a discrete watercourse connection, the area is a coastal wetland by definition. And DCM cannot require an additional criterion prohibited by the CRC.

The reason for the CRC’s carefully worded definition is clear in this case. The Wind Over Waves site has a low profile with very subtle topographical changes. It is bounded to the west by Pamlico Sound and to the south by Britt Creek. With strong, consistent southwesterly winds, the waters of the Pamlico Sound and Britt Creek shoal up on the shores of the site and inundate the low-lying areas. Based on the site’s topography, it does not require discrete channels to convey tide waters, because the site is so low and flat.

The undisputed weather data proves that wind tides from Pamlico Sound and Britt Creek were the only plausible sources of the standing water observed by Messrs. Cece, Sampson, and Tyndall. There had been little – if any – rain prior to the time when the flooding was observed, but there were strong winds blowing from the southwest. (Pet.’s Exh. 18) Moreover, Mr. Cece directly observed floodwater spilling over the banks of the tidal creek and pushing up from the Sound. Thus, the only possible sources of the floodwaters observed on the property were wind-driven tides from the tidal creek and the Sound. CAMA regulations are clear that the only criteria for identifying coastal wetlands are the presence of enumerated plant species and occasional flooding caused by wind tides, regardless of the means by which the water reaches the area. 15A N.C. Admin. Code 2H. 0205(a). These conditions were present upland of the

delineation, and DCM committed legal error by excluding these wetland areas from its delineation based on a third criterion expressly prohibited by the CRC.

ii. DCM's Disregard of Mowing was Arbitrary and Capricious.

While the parties dispute various aspects of this contested case, there is one key factor on which both Coastal Federation's and DCM's experts agree: mowing alters species composition and the natural succession of plants, and can impede the proper identification of coastal wetlands. Mr. Fussell, the only expert botanist qualified in the identification and habitat needs of marshland plants, testified that mowing can suppress the growth of native vegetation and create conditions that allow other species to move in. Mr. Fussell and Mr. Moore agreed that there is a veritable seed bank in the soils; winds and wildlife distribute seeds from other areas. Under natural conditions, those seeds could not compete with wetland plants in areas subject to inundation, particularly inundation by saline waters.

But mowing alters the natural conditions. When mowing is conducted during the growing season when the site is dry and the period for seasonal flooding has passed, other plant species "pioneer"—that is they germinate and take root and, for a time, can appear to dominate. (Hearing Transcript Vol. III, p. 591, ll. 1-7; p. 592, ll. 1-11) If a wetlands delineation is conducted before the seasonal floods have resumed, the altered composition of species can skew the delineation.

This is precisely what happened here. Mr. Tyndall testified that when conducting a delineation of coastal wetlands, he often relies on the plants to tell him about the site's history of flooding. According to his testimony, some species, such as *Juncus*, will strongly indicate frequent or occasional flooding, especially when the *Juncus* dominates an area. According to Mr. Tyndall and Mr. Fussell, *Juncus* thrives under flooded conditions, out-competing other

plants. However, according to Mr. Moore and Mr. Fussell, *Juncus* is also the species most sensitive to mowing. *Juncus* is slow to regenerate and can be suppressed by repeated mowing. Mr. Moore testified that if cut below 6 inches, *Juncus* would be overtaken by other species and might not regenerate at all.

The regular mowing of the Phase III property altered the species composition and did in fact suppress the regeneration of several lush stands of *Juncus*, interfering with the delineation. During the course of Mr. Cece's initial review of the site, the property was mowed severely to a height of 3-4 inches. (Resp.'s Exh. 11, p. 3 (entry for March 15, 2006); R-I's Exhs. 2, 4; Hearing Trans. Vol. III, pp. 590) Mr. Lassiter, whom Wind Over Waves employed as a consultant, testified that beginning in about 2001, the property was mowed regularly, approximately every three months during the growing season.

Mr. Cece, Mr. Sampson, and Ms. DeBlieu all testified that prior to the mowing in March, 2006, there were lush, tall stands of *Juncus roemarianus* on the Phase III property, including in the south-central portion in the vicinity of Lots 32-35. (Resp.'s Exh. 11 (entries for January 18, 2006 and February 5, 2006). Ms. DeBlieu took a photograph of one such *Juncus* stand, which stretches back to the line of wax myrtle bushes and trees. (Pet.'s Exh. 4.) Mr. Cece testified that this photograph accurately depicts the lush, pure stand of *Juncus* that was approximately three-feet high. Mr. Cece also observed flooding in this area from the tidal creek and Pamlico Sound during his visit on January 18, 2006 and again during his visit on February 5, 2006, establishing the two requisite conditions for identification of coastal wetlands.

However, Mr. Cece testified that when he went back to the property in May to begin the process of delineating the coastal wetlands, he was surprised by the drastic change in species composition in the former *Juncus* meadow and on the Lots that front the Sound. According to

his observations, these formerly lush stands of *Juncus* were sparsely vegetated, with a mix of species present, including “herbaceous” non-coastal wetland indicator species. Recent photographs of the site support this description. (Resp.’s Exh. 6) Mr. Cece further testified that this change in species composition affected his judgment about where to place the final line delineating the extent of coastal wetlands on the Phase III property. The regular and severe mowing dramatically altered the species composition of the coastal wetlands and contributed to a flawed delineation. DCM’s disregard of the impacts of the mowing was arbitrary and capricious.

iii. DCM Erroneously Excluded Areas as Coastal Wetlands Due to the Presence of Other Plant Species.

Despite the extensive presence of plant species specified in the CAMA regulations, DCM excluded many of these areas from consideration as coastal wetlands. DCM staff stated they looked to the dominance of coastal wetland indicator species, and that when other, non-indicator species began to appear, they determined the tidal waters must not be reaching that area. However, this assessment was based on an inaccurate understanding of the ecological range and needs of the other observed species.

For example, Mr. Cece stated that coastal red cedar (*Juniperus virginiana*, var. *silicola*) cannot tolerate salt, and that because there are clumps of these cedars between the proposed road and the Sound, he excluded these areas from consideration as coastal wetlands and instead classified them as “uplands,” even though the areas contained coastal wetland indicator species and he observed flooding there. He also testified that he eliminated the area along the tidal creek, south of the bend in the road where he observed flooding, as coastal wetlands precisely because of the presence of the red cedars.

The scientific basis for this decision is erroneous. John Fussell is a botanist and was the only witness qualified as an expert in marshland plants. He stated unequivocally that coastal red

cedar *does* tolerate a fair amount of salt. In fact, the North Carolina Natural Heritage Program recognizes “coastal red cedar forest” as a natural plant community in tidally-influenced areas of the coast. (Hearing Trans. Vol. III p. 586) During his site inspection, Mr. Fussell also identified in his transects other species that live in coastal wetlands, even though they are not listed among the indicator species in the CAMA regulations. In other words, while the plants cannot be used to satisfy one of the two criteria for identifying a coastal wetland, they cannot be used to eliminate an area from consideration either. But DCM cited the presence of this “leafy” vegetation as a reason to exclude broad areas on the Phase III site from classification as coastal wetlands. In addition to coastal red cedar, these species include saltmarsh *fimbristylis*, seashore mallow, mullet bush, flat-topped goldenrod, arrow-leaf morning glory, *Iva furtesensis*, and annual sea pink. Each of these species tolerates salt and flooding and is commonly found in brackish coastal marshes. (*Id.*, pp. 581-83, 597-99, 611-12, 650-51) Several of them are considered “obligate” species, i.e., they are found *exclusively* in wetlands. In fact, ***none of the species contraindicate the presence of coastal wetlands.*** DCM’s reliance on these plants as a basis for excluding large areas from protection as coastal wetlands was erroneous, arbitrary and capricious, and not authorized by law.

iv. The Observed Flooding Was Caused by Wind Conditions that Do Not Meet the Definition of a “Hurricane” or “Tropical Storm.”

Wind Over Waves also argued that because the wind speed on January 18, 2006, was measured at 39 mph at one point during the morning, the flooding should be excluded from consideration for purposes of delineating the coastal wetlands on the Phase III site. This argument is specious and without legal or scientific support. It is also without support from DCM personnel who testified in this case.

The CAMA regulations exclude from consideration flooding that is caused by two specific types of weather events: “hurricane or tropical storm tides.” 15A N.C. Admin. Code 7H .0205(a). They do not exclude flooding caused by winds of a particular speed, direction or duration, or by winds associated with other storms typical of the coastal region, such as thunderstorms or nor’easters. Had the CRC intended to more broadly exclude flooding from other weather events, or certain wind speeds, it certainly could have done so.

Tropical storms are not defined by wind speed alone. Maximum sustained winds of 39 mph or above is one attribute the National Oceanic and Atmospheric Administration (“NOAA”) uses to define a tropical storm. Other required attributes include water temperature in excess of 80° F, bands of thunderstorms, and origins in warm tropical waters. None of these conditions was present during the winter of 2006, when Mr. Cece, Mr. Sampson and Mr. Tyndall visited the Phase III site. The winds that caused the flooding on January 18, 2006 were not associated with hurricanes or tropical storms, but with strong southwesterly winds typical of the winter months on Hatteras Island.

The CRC’s intent to limit the exclusion to flooding caused by tropical storms and hurricanes is clear and well-grounded in sound scientific principles. Mr. Sampson, a decorated career U.S. Coast Guard officer, testified that tropical storms travel long distances over the open ocean, gathering before them a wall of water referred to as a storm surge. When they hit land, the force and velocity of these storms can force water inland over substantial distances with great destructive force. (Hearing Trans., Vol. I, p. 219, 287-91) This is very different than localized thunderstorms and nor’easters. Although such storms may record high wind speeds, they do not produce storm surges like tropical storms and hurricanes. Wind Over Waves’ interpretation of “tropical storm” is inconsistent with the science and the plain meaning of the regulations.

**C. DCM Did Not Analyze Cumulative Impacts as Required by Law.**

CAMA requires DCM to deny an application for a permit if “the proposed development would contribute to cumulative effects that would be inconsistent with [State] guidelines.” N.C. Gen. Stat. §§ 113A-120(a)(10), (a)(8). The statute defines cumulative impacts as “impacts that are attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity.” *Id.* § 113A-120(a)(10). The state guidelines to which the statute refers include the guidelines that direct DCM to protect traditional uses of the public trust area AECs, including shellfish waters, and to prohibit development that would contribute to a violation of water quality standards. DCM failed to execute this responsibility and conduct the requisite review of cumulative impacts as required by statute.

It is undisputed that DCM failed to review cumulative impacts. Mr. Moye, the DCM employee responsible processing Wind Over Waves’ permit application, admitted that neither he nor anyone else with DCM had reviewed the cumulative impacts of the proposed development. Not only did he ignore the cumulative impacts of other nearby development on the estuarine waters and public trust resources CAMA directs DCM to protect, but he also ignored the cumulative impacts of the overall development of the Wind Over Waves property itself.

Mr. Moye limited his review to the direct impacts of the road through the estuarine shoreline AEC. He testified that he did not review the impacts associated with the development of the individual lots because the CAMA permit covered only that portion of the road that would be constructed within the 75-foot estuarine shoreline AEC. This narrow interpretation of the responsibilities CAMA imposes on his review defies logic and is contrary to law. The road is a required element for the development of the property—without the road, the lots cannot be

accessed and thus cannot be built upon, and there is no purpose for the road except to access the lots. CAMA requires DCM to review the “total project,” including impacts beyond the AEC 15A N.C. Admin. Code 7J. 0203(c); *Id.* 7H. 0202; testimony of Ted Tyndall.

Additionally, Mr. Moyer did not review the impacts of existing Phases I and II, or future Phase IV. (In fact, at no point did anyone from DCM even consult the permit file for Phases I and II.) Mr. Moyer did not review Mr. Cece’s field notes or talk with him about the site or the delineation, even though written comments from the public raised questions about the accuracy of the delineation. He did not test or require testing of the water quality. He did not assess the impacts from stormwater, even though the Dare County Department of Health had notified Wind Over Waves that the roadside swales through Phases I and II had deteriorated and needed to be maintained. (Stipulated Exh. 2, p. 027) No one from DCM followed up to certify that Wind Over Waves had corrected the problem with the roadside swales, even though the agency was notified of this problem. Mr. Moyer did not assess impacts to the shellfish waters adjacent to the site, either from stormwater impacts, impacts from the 57 septic tanks that would be located in the property’s sandy and highly permeable soils, or runoff from the road itself.

Mr. Moyer also failed to assess the dangers and concerns of increased flooding, despite the receipt of written comments from three members of the community – Ms. DeBlieu, Ms. Goodloe-Murphy, and Mr. Halminski – who raised this concern. Mr. Johnny Robbins, a principal of the Wind Over Waves development, confirmed that flooding, especially in the area of the tidal creek which is the lowest spot of the Tri-Villages area and serves as an alluvial drain, was a problem. Yet Mr. Moyer ignored flooding as a concern, failing to even mention it in the field report he circulated to other agencies for review.



Contrary to suggestions by DCM, the review of the CAMA permit application is the only time when a review of cumulative impacts can, or will, be done. There will be no review when the individual residences are constructed, because no CAMA permit will be required unless additional development occurs within an AEC. DCM's failure to review cumulative impacts associated with Phase III violates the express terms of the statute requiring "total project review." As such, DCM's issuance of the Permit was arbitrary and capricious and not authorized by law, and the CRC should render a Final Agency Decision that the Wind Over Waves CAMA permit should be **vacated**.

### **III. ORAL ARGUMENT**

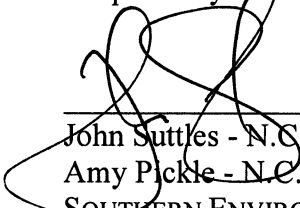
Coastal Federation desires and request the opportunity to present oral argument to the CRC in accordance with the CRC counsel's letter dated July 31, 2008.

### **IV. CONCLUSION**

For the foregoing reasons and for the additional reasons cited in Coastal Federation's Exception to the ALJ's Recommended Decision, Coastal Federation respectfully urges the CRC to exercise its authority pursuant to N.C. Gen. Stat. § 150B-36(b) to reject, modify, or amend certain of the ALJ's findings of fact and conclusions of law and to render a Final Decision that the Wind Over Waves CAMA major permit violates North Carolina law by authorizing improper impacts to coastal wetlands and without following proper procedure. Accordingly, the Wind Over Waves CAMA major permit should be **VACATED**.

This the 6th day of September, 2008.

Respectfully submitted,



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John Suttles - N.C. Bar No. 34393  
Amy Pickle - N.C. Bar No. 29390  
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*Counsel for Petitioner*

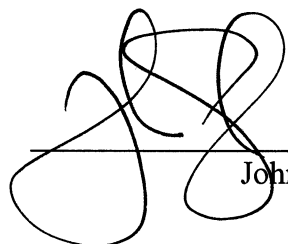
**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petitioner's Memorandum of Fact and Law in Support of Written Exceptions to the Administrative Law Judge's Recommended Decision in Case No. 07 EHR 0345 has been served on all parties by electronic mail and by United States mail, first-class postage prepaid, addressed as follows:

Christine Goebel  
NC Department of Justice  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001

Amy P. Wang  
Frank H. Sheffield, Jr.  
Ward and Smith, P.A.  
1001 College Court  
P.O. Box 867  
New Bern, NC 28563-0867

This the 6th day of September, 2008.

  
\_\_\_\_\_  
John Suttles

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September 11, 2008

VIA E-MAIL  
ORIGINAL VIA U.S. MAIL

Mr. James H. Gregson  
Executive Secretary to the CRC  
DENR Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

RE: *North Carolina Coastal Federation*  
*v. North Carolina Department of Environment and Natural Resources, Division of*  
*Coastal Management and Wind Over Waves, LLC*  
OAH File 07-EHR-0345  
Our File 061473-00001

Dear Mr. Gregson:

I am writing on behalf of our client, Respondent-Intervenor, Wind Over Waves, LLC. Please find enclosed Respondent-Intervenor's Statement in Support of, and Exception to, the Decision Issued by Administrative Law Judge Lassiter. This Statement is respectfully submitted in accordance with the July 31, 2008 letter from Coastal Resources Commission ("CRC") Counsel, Jennie Wilhelm Hauser, asking that any written arguments or exceptions be submitted by noon on September 11, 2008.

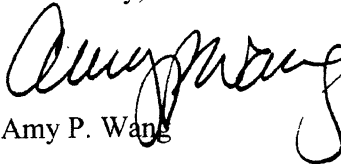
In addition to the submitted Statement, we formally request the opportunity to present oral argument, and reserve the right to rebut any arguments presented by Petitioner North Carolina Coastal Federation, before the CRC when it hears this contested case for final agency decision at the meeting scheduled for September 24-26, 2008, in Sunset Beach, North Carolina.

Thank you for your attention to this request.

WARD AND SMITH, P.A.

Mr. James H. Gregson  
September 11, 2008  
Page 2

Yours truly,

  
Amy P. Wang

APW:kts  
NBMAIN\791708\1  
Enclosure

cc: Wind Over Waves, LLC  
Ms. Angela Willis (via e-mail)  
Amy Pickle, Esq.  
John Suttles, Esq.  
Christy Goebel, Esq.  
Frank H. Sheffield, Jr., Esq.



Wind Over Waves for Phase III of its residential subdivision development. Petitioner must show that DCM exceeded its authority or jurisdiction under CAMA; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or, failed to act as required by law or the rules of the CRC in issuing the CAMA Permit. N.C. Gen. Stat. § 150B-23. Petitioner's arguments can be distilled down to two primary points: 1) DCM's delineation of coastal wetlands was not accurate; and, 2) DCM did not follow proper procedures in processing Wind Over Wave's Application for the CAMA Permit. Petitioner has failed to meet its burden to support either argument.

A. **DCM Properly Delineated the Coastal Wetlands Line.**

On October 17, 2006, Wind Over Waves submitted to DCM its application for a CAMA Major Permit (the "Application") for plans to construct a looped road and utilities (the "Proposed Road") for Phase III of a low-density residential subdivision on its 38.25 acre tract adjacent to Pamlico Sound on NC Highway 12 in Salvo, Dare County, North Carolina (the "Property"). A portion of the Proposed Road lies within a CAMA defined Area of Environmental Concern ("AEC"), and thus falls within the jurisdiction of DCM. N.C. Gen. Stat. § 113A-115; 15A NCAC 7H .0200, *et seq.* Construction of the Proposed Road will disturb approximately 6.5 acres of upland area outside of CAMA AECs; approximately one-third of an acre of the Proposed Road will lie within the 75-foot Coastal Shoreline AEC. See 15A NCAC 7H .0209. The Application was not for development on each individual lot because such development will be governed by additional permit processes under the jurisdiction of DCM, other DENR agencies, and Dare County.

Petitioner challenges the accuracy of the delineation of coastal wetlands on the Property that was conducted by DCM staff with collectively more than 50 years of wetlands identification and delineation experience among them. The CRC's regulations define coastal wetlands as coastal marsh which contains (i) at least one of ten listed plant species are present; and, (ii) the marsh containing such species is subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), not including hurricane or tropical storm tides ("Coastal Wetlands"). 15A NCAC 7H .0205. Petitioner's real dispute lies not in the presence of wetlands plant species

on the Property, which is not contested, but whether sufficient flooding events occur on the Property to qualify the upland area as Coastal Wetlands.

DCM knew this delineation would be watched closely by both Wind Over Waves and Petitioner; therefore, DCM field representative John Cece ("Cece") and then DCM Regional Supervisor Ted Sampson ("Sampson") requested the presence, input and experience of seasoned DCM officials: Ted Tyndall, DCM Assistant Director ("Tyndall"), and Terry Moore, DCM's Regional Supervisor for the Washington Regional Office ("Moore"). Tyndall and Moore are two of the most experienced coastal wetlands experts in the State of North Carolina, and as such were accepted by the ALJ as experts in the field of Coastal Wetlands delineations. Individually and collectively, Cece, Sampson, Tyndall and Moore made various visits to the Property, walking transects for hours. They observed Coastal Wetlands species, analyzed conduits to various areas of the Property, looked for rack lines, and observed an abundance of non-Coastal Wetlands and leafy plant species in order to determine whether sufficient evidence of regular or occasional flooding into the center of the Property existed. After several months, Tyndall and Cece, with Moore's assistance, used their specific knowledge and expertise to delineate and mark the Coastal Wetlands line they determined to be correct. Wind Over Waves' project consultant Joe Lassiter ("Lassiter"), a long-time member of the Coastal Resources Advisory Council and also accepted by the ALJ as an expert in the field of Coastal Wetlands delineations, confirmed his agreement with the line. Cece, who spent the most time on the Property in various weather conditions, testified more than once that he agreed with the Coastal Wetlands Line that was delineated.

In staking the line, DCM found Coastal Wetlands species on the Property. However, although certain species are present on the Property outside the delineated line, Petitioner could not produce sufficient evidence of regular or occasional flooding on the central portion of the Property. Petitioner tendered no expert in Coastal Wetlands delineation; rather, it offered lay opinions from witnesses who are untrained and undereducated in the field of Coastal Wetlands delineation. First, Sampson acknowledged that he was not an expert in delineating coastal wetlands. He left DCM before the completion of pre-application field inspections on the Property, and he did not participate in the decision to issue the CAMA Permit. Second, John



Fussell, a botanist, visited the site only on one occasion, after which he attempted to link his observations about plant species on the Property with his general personal knowledge of the Outer Banks to assert that sufficient Coastal Wetlands species exist in the central portion of the Property to justify extending the delineation into the uplands. Fussell failed to demonstrate that the Coastal Wetlands line delineated by experienced DCM officials violated CAMA rules.

Third, the testimony of Robin Gerald, who claimed to have canoed across the central portion of the Property on numerous occasions while hunting waterfowl, was controverted directly by Lassiter who has an intimate knowledge of the vegetation density on the Property. Fourth, Ann Privett, who lives across N.C. Highway 12 and has never been on the Property during foul weather, had no information regarding the presence of Coastal Wetlands on the Property. Privett only discussed heavy rains and flooding in her neighborhood, Hatteras Colony, a 20-year-old oceanfront subdivision across the Wind Over Waves development that has no stormwater management controls of its own.

Fifth, Mike Halminski, a local photographer who complained of flooding on his property up-grade of the Wind Over Waves subdivision, could neither clearly identify flooding on the Property nor isolate the Wind Over Waves subdivision as the cause of flooding on his property that is located near several clogged and ineffective North Carolina Department of Transportation drainage ditches along N.C. Highway 12. Last, Cape Hatteras Coastkeeper Jan DeBlieu testified regarding her intimate knowledge of the wind on the Outer Banks and a patch of *juncus romerianus* on the Property. However, such knowledge of the wind and familiarity with plant species does not make her an expert in Coastal Wetlands delineation. Ultimately, Petitioner's evidence amounts merely to a different and less-knowledgeable opinion than that of DCM.

DCM staff in general should be given deference with respect to the facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34. Further, the testimony of agency representatives such as Moore and Tyndall, who have demonstrated their expert knowledge and experience many times and were recognized by this Court as experts in the field of Coastal Wetlands delineation, should be given even greater weight concerning their delineation of the Coastal Wetlands line on the Property. The ALJ, after

considering such evidence and giving appropriate regard to the knowledge and expertise of DCM, determined that Petitioner had not met its burden of demonstrating that the CAMA Permit issued to Wind Over Waves is in violation of any state law or regulation. The CRC should adopt the ALJ's Decision in this regard, and likewise should uphold the CAMA Permit.

**B. DCM Evaluated The Cumulative Impacts Of The Project And Considered Practicable Alternatives When Processing Wind Over Waves' CAMA Permit Application.**

Petitioner did not show by a preponderance of the evidence that DCM failed to evaluate the cumulative impacts of the Proposed Road. The CAMA balances environmental protection with economic development by providing a permitting process in which DCM reviews requests for permission to conduct specific coastal development activities. As David Moye, DCM CAMA Express Permits Coordinator, and Tyndall both testified, DCM recognizes the value of the waters of the coastal counties and its role in protecting such resources; therefore, DCM coordinates the analysis and permitting of certain development activities with other State and Federal agencies that have expertise in other areas of environmental and public health protection. 15A NCAC 7M .0801.

DCM's CAMA Major Permit application form requests a range of information related to the proposed development activity as well as the surrounding geographic area, including land uses and wildlife habitat. DCM focuses its analysis on the impact of the proposed development on the particular AEC in which the development activity is proposed. Following CRC guidelines, DCM circulates the application package to 15 State and Federal agencies having expertise in the areas identified in N.C. Gen. Stat. § 113A-120 for an independent analysis of the CAMA permit application. 15A NCAC 7J .0207. The comments and recommendations of these agencies provide DCM with an assessment of the areas or resources which the proposed development may impact. DCM issues a CAMA Major Permit for proposed development based on the collective review, comments and recommendations of all 15 agencies. 15A NCAC 7J .0208.

Although CAMA requires that a permit be denied for any proposed development that "would contribute to cumulative effects that would be inconsistent with the

guidelines set forth" therein, there is no separate and distinct requirement that DCM conduct a solely independent cumulative impacts analysis; neither has the CRC promulgated such a rule or guidance. N.C. Gen. Stat. § 113A-120(a)(10). Rather, DCM properly uses the expert analyses conducted by other agencies. If DCM receives adverse comments or concerns from other agencies, then it determines that the proposed development impacts other coastal resources. Absent adverse determinations from other agencies protecting their specific interests, DCM can reasonably conclude that there are no cumulative impacts that are inconsistent with CAMA guidelines or in violation of N.C. Gen. Stat. § 113A-120(a)(10). As explained by Tyndall, this integrated process necessarily evaluates the total project and considers the cumulative impacts of proposed development.

Such a process was followed for the CAMA Permit. DCM reviewed Wind Over Waves' application, considering adjacent development upstream and downstream from the site, and analyzing the impact of the Proposed Road on the coastal shoreline AEC. DCM then circulated the application to the agencies identified in N.C. Gen. Stat. § 113A-120 for an independent analysis of the Proposed Road based on their respective authorities. 15A NCAC 7J .0207. In this case, DCM received no objections from any of the reviewing agencies. The one detailed response and comment DCM did receive from the Wildlife Resources Commission prompted the imposition of a condition on the CAMA Permit. In recognition of the "dynamic nature of this area, the low elevations at the site, and the phased construction methodology," DCM required Wind Over Waves to place additional deed restrictions on each lot stating that revised Coastal Wetlands delineations shall be made by DCM on each lot at least 60 days prior to the initiation of construction on the individual lot. This type of restriction is not a standard CAMA permit condition and was imposed only after DCM assessed the interagency reviews of the potential cumulative impacts of the Proposed Road. N.C. Gen. Stat. § 113A-120(a)(10).

Petitioner has not demonstrated that there would be any cumulative impacts caused by the Proposed Road that are inconsistent with the guidelines set forth in subdivisions 1 through 9 of N.C. Gen. Stat. § 113A-120. If there were cumulative impacts that significantly affected an AEC as Petitioner protests, then more reviewing agencies would have commented or objected to Wind Over Waves' permit application, and DCM would have been

required to address those concerns.

In addition, Petitioner did not show by a preponderance of the evidence that DCM did not consider practicable alternatives to the location of the Proposed Road in the AEC. CAMA authorizes DCM to require "practicable alternatives" to proposed development only after considering engineering requirements and all economic costs. N.C. Gen. Stat. § 113A-120(a)(9). Several witnesses, including Moye, Lassiter, and Brian Rubino, a consultant for Wind Over Waves with Quible & Associates, testified to the conversations they had concerning the location of the Proposed Road as part of the vetting process for applications going through the CAMA express permit program. After several design iterations, Lassiter and Rubino determined that, given the location of the Coastal Shoreline AEC and Dare County fire safety code restrictions for the width and angle of the loop, the location of the Proposed Road submitted in the final Application was the only feasible design. DCM accepted that design as the best practicable alternative. Petitioner has not demonstrated that there is any practicable alternative for the Proposed Road that would reduce the impacts to any AEC. Ironically, if the Proposed Road had been moved out of the AEC, as Petitioner proposes, there would have been no CAMA major permit required and no review of the coastal impacts of the Project.

Petitioner has failed to show by a preponderance of the evidence that DCM violated CAMA by failing to consider the cumulative effects of, and practicable alternatives to, the location of the Proposed Road in the AEC when it issued the CAMA Permit. Petitioner attempts to question the judgment of DCM staff as to whether the procedures followed for processing CAMA Permits are sufficient, but that is not a proper concern for a permit challenge and should instead be addressed with the CRC through the rule-making provisions of the Administrative Procedure Act ("APA"). N.C. Gen. Stat. § 150B-18, *et seq.* Since Petitioner has failed to meet its burden, the CRC should adopt the Decision of the ALJ upholding DCM's issuance of the CAMA Permit as its Final Agency Decision.

**C. The CRC Is Not Bound By The Environmental Management Commission's Final Agency Decision to Vacate Wind Over Waves' Stormwater Permit.**

On September 8, 2005, Wind Over Waves submitted to DENR's Division of Water Quality ("DWQ"), a complete application for a Stormwater Management Permit for

Low Density Development for the construction of the Proposed Road, utilities, and other infrastructure for development of Phase III. DWQ reviewed the plans and specifications and determined the proposal would comply with the stormwater regulations set forth in 15A NCAC 2H .1005. On September 26, 2005, DWQ issued Stormwater Management Permit No. SW705909 (the "Stormwater Permit") to Wind Over Waves.

On January 17, 2007, 16 months after DWQ issued the Stormwater Permit, Petitioner filed its Petition for Contested Case Hearing seeking an Order invalidating both the CAMA Permit issued by DCM and the Stormwater Permit issued by DWQ. On February 9, 2007, DCM and DWQ filed a Joint Motion to Sever the case due to the separate regulatory schemes protecting different resources of the State and the two separate commissions with jurisdiction over each of the challenged permits, neither of which could make a final decision over both permits. (R. pp. 1542-49). On February 28, 2007, the Court granted the Joint Motion to Sever. (R. pp. 1558-61).

On July 30-31 and August 1, 2007, the ALJ heard the contested case addressing the Stormwater Permit. On August 29-31 and September 24-25, 2007, the same ALJ heard the contested case addressing the CAMA Permit. On December 13, 2007, the ALJ issued a decision upholding DWQ's issuance of the Stormwater Permit. On April 7, 2008, the ALJ issued her Decision to uphold the CAMA Permit. On June 27, 2008, the Office of Administrative hearings produced the official record in this case pursuant to N.C. Gen. Stat. § 150B-37.

In the meantime, on May 8, 2008, the Environmental Management Commission (the "EMC") did not adopt the ALJ's decision to uphold the Stormwater Permit by a vote of 8-6. As a result, on July 10, 2008, the EMC issued its Final Agency Decision vacating the Stormwater Permit (the "Final Agency Decision").

Wind Over Waves has filed a Petition for Judicial Review challenging the EMC's Final Agency Decision and requesting the Superior Court of Dare County to adopt the decision of the ALJ. The bases of Wind Over Waves' challenge are: (1) certain of the EMC's Findings of Fact were not supported by a preponderance of admissible evidence, as required by N.C. Gen. Stat. §§ 150B-36 (b1) and (b2); and, (2) the EMC did not demonstrate that the ALJ's

decision was clearly contrary to the preponderance of admissible evidence in the record, as required by N.C. Gen. Stat. § 150B-36(b3). The Superior Court of Dare County will neither consider nor make a determination with regard to the EMC's Final Agency Decision prior to the CRC's consideration of the ALJ's Decision to uphold the CAMA Permit.

In making its final agency decision, the CRC may consider **only the official record** prepared pursuant to N.C. Gen. Stat. § 150B-37. N.C. Gen. Stat. § 150B-36(b3). The APA is very specific about what the CRC must do when making its final agency decision:

[A] final decision in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency and each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall follow the procedures set forth in subsections (b1) and (b2) of this section.

(b1) For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the following:

(1) The reasons for not adopting the findings of fact.

(2) The evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge's decision.

Any finding of fact not specifically rejected as required by this subsection shall be deemed accepted for purposes of judicial review of the final decision pursuant to Article 4 of this Chapter.

(b2) For each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact. Any new finding of fact made by the agency shall be

supported by a preponderance of the admissible evidence in the record. The agency shall not make any new finding of fact that is inconsistent with a finding of fact contained in the administrative law judge's decision unless the finding of fact in the administrative law judge's decision is not adopted as required by subsection (b1) of this section.

(b3) Except as provided in G.S. 150B-34(c), the agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision.

N.C. Gen. Stat. § 150B-36 (emphasis added). The only decision under consideration by the CRC is the ALJ's Decision to uphold the CAMA Permit. The EMC's Final Agency Decision was not issued until well after the ALJ heard the CAMA Permit contested case, over a month after she issued her Decision, and clearly is not part of the record in the underlying case. The CRC is neither bound by nor may it consider the EMC's Final Agency Decision.

## II. EXCEPTION AND PROPOSED ALTERNATIVE

Wind Over Waves respectfully excepts to the ALJ's Conclusion of Law No. 3 that Petitioner is an "aggrieved party." Wind Over Waves proposes the following revised Conclusion of Law, with alternative language indicated in **bold**:

**Under the definition of 'person aggrieved' in N.C. Gen. Stat. § 150B-2(6), Petitioner has failed to sufficiently allege that it is a "person aggrieved" by Respondent's November 26, 2006 issuance of the subject CAMA Permit.**

First, November 27, 2006 is a typographical error. DCM issued the CAMA Permit on November 26, as found in Finding of Fact 10 and as supported by Stip. Ex. 1.

Second, for purposes of preserving its right to raise the issue of standing on any

appeal, Wind Over Waves respectfully disagrees with the ALJ's conclusion of law that Petitioner met the procedural requirements for standing. Wind Over Waves disputes that Petitioner qualifies as an "aggrieved party" under the APA. A North Carolina court cannot exercise subject matter jurisdiction to hear a claim if a party does not have standing to bring the claim.

Petitioner must qualify as an "aggrieved party" under the APA in order to have standing to raise an issue about an agency action. County of Wake v. Dep't of Environ. & Nat. Resources, 155 N.C. App. 225, 573 S.E.2d 572, review denied 357 N.C. 62, 579 S.E.2d 386 (2002). The APA requires that in order to be considered "aggrieved," a party's person or property must be substantially and adversely affected by an agency decision. N.C. Gen. Stat. §§ 150B-2(6) and 23. Although "aggrieved" has no technical meaning, the North Carolina Court of Appeals has looked to whether a petitioner has in its petition "alleged such a personal stake in the outcome of a controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions" such as standing. Orange County v. N.C. Dep't of Transp., 46 N.C. App. 350, 361, 265 S.E.2d 898, 899 (1980)(citations omitted)(emphasis added).

Petitioner did not plead in its Petition that any of its members have been, or imminently will be, injured by the Proposed Road authorized by the CAMA Permit. The Petition and Petitioner's Prehearing Statement all contain lengthy background information on Petitioner's organizational history; its interest in the stewardship of coastal resources generally; its active, sophisticated involvement in environmental regulatory matters; and, its mission to protect and maintain both the State's coastal wetlands and shellfishing waters. However, Petitioner fails to allege in its Petition that any one of its members suffers a concrete injury or substantial adverse effect from development on the Property as a result of the CAMA Permit. Failure to allege a claim properly in the pleadings is fatal to an administrative appeal. Lee v. N.C. Dep't of Transportation, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (aff'd per curiam, 360 N.C. 585, 634 S.E.2d 887 (2006)). This deficiency cannot be cured during the discovery phase of a case by providing evidence of alleged injury to Petitioner's members. At that point, it is too late. Therefore, the ALJ had no jurisdiction to consider Petitioner's claims.

Further, Petitioner cannot achieve standing through its reliance on Holly Ridge to



prove "aggrieved party" status. Holly Ridge Assoc. v. N.C. Dep't of Environ. & Nat. Resources, 176 N.C. App. 594, 627 S.E.2d 326, rev'd and remanded 361 N.C. 531, 648 S.E.2d 830 (2007). First, Holly Ridge involved Petitioner's intervention in a contested case involving the DENR Division of Land Resources' imposition of a civil penalty for violations of erosion and sedimentation control requirements near a body of water in Onslow County. Petitioner was not found to be a "person aggrieved;" rather, it was allowed to intervene after the close of discovery by the administrative law judge pursuant to N.C. R. Civ. P. 24 and 26 NCAC 3 .0117. Id. Under 26 NCAC 3 .0117, an interested person may intervene at the discretion of the administrative law judge upon a showing that he or she may be "directly affected by the outcome." Standing to assert "person aggrieved" status, however, requires an injury and not just an interest. The court stated that Petitioner "need not meet the standard of a 'person aggrieved' in order to intervene." Id. at 603, 627 S.E.2d at 333.

Second, the North Carolina Supreme Court has since reversed and remanded the Court of Appeals' decision in Holly Ridge. The Court found that while Petitioner's allegations of injury could have been an appropriate basis to participate in the proceeding as amicus curiae, "the injuries alleged are not the kind of direct interest required for intervention as of right here. To satisfy the requirements for intervention as of right, [Petitioner] must have a 'direct and immediate interest relating to the property or transaction' that is the subject of the contested case." Id. at 538, 648 S.E.2d at 836 (internal citations omitted). Whereas previously, North Carolina courts declared that only a general interest in the subject matter of the case was required for environmental groups to participate as full parties, the Court now has ruled that a group such as Petitioner must demonstrate a "direct and immediate interest" in the matter.

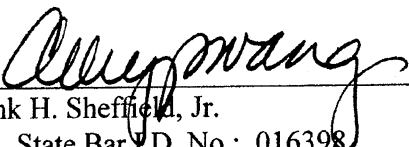
The rationale of the Holly Ridge decision applies equally in the instant case. A preponderance of the evidence in the record shows that there will be no actual harm to any of Petitioner's witnesses because there is no physical or hydrological connection between construction of the Proposed Road and any of their properties. Further, none of Petitioner's member-witnesses were named separately as petitioners and, in fact, were not even contacted about serving as witnesses until well after the Petition for Contested Case Hearing was filed and Wind Over Waves raised the issue of standing. Indeed, the only interest demonstrated by

Petitioner and its local members is a generalized organizational interest in protecting the coastal environment and, more specifically, the flooding conditions along N.C. Highway 12, neither of which is sufficient to bestow standing to Petitioner under Holly Ridge. Petitioner has not met its burden of demonstrating that it has standing to bring this appeal.

**CONCLUSION**

The CRC should adopt Wind Over Waves' Exception and Proposed Alternative to the ALJ's Conclusion of Law No. 3 and dismiss Petitioner's appeal for lack of standing due to a failure to properly plead the case. In the alternative, the CRC should adopt the Decision of the ALJ upholding DCM's issuance of the CAMA Permit as its Final Agency Decision.

Respectfully submitted this the 11th day of September, 2008.

  
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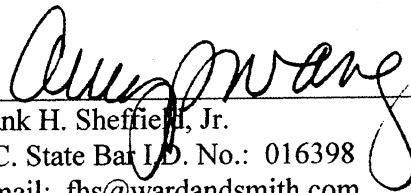
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing  
RESPONDENT-INTERVENOR'S STATEMENT IN SUPPORT OF DECISION ISSUED BY  
ADMINISTRATIVE LAW JUDGE via e-mail and United States mail to the following persons at  
the following addresses which are the last addresses known to me:

Mr. John Suttles  
Ms. Amy Pickle  
Southern Environmental Law Center  
200 West Franklin Street, Suite 330  
Chapel Hill, NC 27516  
E-mail: apickle@selcnc.org  
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This the 11th day of September, 2008.



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North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

## MEMORANDUM

CRC-08-37

**To:** The Coastal Resources Commission and Coastal Resources Advisory Council  
**From:** Charlan Owens, AICP, DCM Elizabeth City District Planner  
**Date:** September 12, 2008  
**Subject:** Map and Text Amendment to the Currituck County 2006 Core Land Use Plan (LUP)–  
(September CRC Meeting)

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Currituck County requests a Land Use Plan (LUP) amendment to reconfigure the designation of 120 acres on the Future Land Use Plan Map (FLUPM) and to revise a table that indicates acreage totals for each designation compared with projected land needs, consistent with the FLUPM change.

The Board of Commissioners adopted the amendment by a 3-2 vote at their August 18<sup>th</sup> meeting. Objections concerning the impacts of proposed future site development were voiced at the public hearing and two (2) written objection emails were submitted to DCM.

### OVERVIEW

Currituck County desires to convert approximately 40 acres of the Future Land Use Plan Map (FLUPM) to “Full Service Areas” from “Conservation Areas” and approximately 80 acres to “Conservation Areas” from “Limited Service Areas”; and to revise acreage totals shown in Table 11.1 of the LUP to be consistent with map changes. (See Attachment B, Pages 3 and Page 4)

The map amendment area is located on mainland Currituck County, west of US 158 at the terminus of West Side Lane (SR 1112), adjacent to the Kilmarlic subdivision, near Harbinger. The area is located along the Albemarle Sound and contains Areas of Environmental Concern (AECs), which are subject to CAMA permitting requirements. The entire amendment area is located within the 100-year floodplain (Zone AE).

The request to add acreage to “Full Service Areas” was initiated by an applicant interested in developing the property. Preliminary development plans include an upland marina as well as residential and non-residential uses. The 40-acre amendment area includes approximately 23 acres of uplands, 2 acres of wetlands, and 14 acres of canals and a lake. An LUP amendment is the first step in the process to ensure development plans are consistent with the LUP. Local zoning, State permits, and local development approvals are separate issues that have not yet been decided. During future zoning and project approvals, the County intends to obtain public access to the proposed marina that will include: boat slips available to the general public, public boat launching to the Albemarle Sound, and 10 to 11 public access parking/trailer spaces.

The County's "Conservation Areas" designation policy is meant to provide for the long-term management and protection of significant, limited, or irreplaceable areas. While much of the land included in this designation is environmentally sensitive, areas that would be considered developable are envisioned for agriculture and agriculture related uses and extremely low density residential (1 unit per 3 acres or less). This designation will not support the residential densities and non-residential uses contemplated.

The County's "Full Service Areas" designation is preferred for community centers. Designation areas include parts of the County where a broad range of infrastructure and service investments have been provided or will be made available by the public and/or private sector. Residential density is contemplated to be 2 units per acre, but could be increased to 3-4 units an acre through local overlay zoning. Nonresidential uses may include clusters of businesses serving the immediate area and, where appropriate, a more extensive market territory. This designation will support the development plan contemplated on the 40 acre portion of the amendment.

The request to convert 80 acres to "Conservation Areas" from "Limited Service" was initiated by County Planning staff in order to offset the proposed expansion of "Full Service Areas". The current "Limited Service Areas" designation policy prefers primarily residential development at low densities of 1 unit per acre, which may be increased up to 1.5 units per acre through local overlay zoning. Neighborhood commercial uses are considered appropriate in these areas along with businesses designed to serve the tourist industry, such as small gift shops and agri-tourism related uses. The 80-acre amendment area consists of undeveloped open space that is part of the adjacent Kilmarlic subdivision and that already has deeded easements for Ducks Unlimited. A change to "Conservation Areas" is consistent with existing conditions and use of the area.

The text amendment to Table 11.1 Comparison of Land Allocated to Future Land Use and Projected Land Needs, 2025 shows the revised acreage allocated to "Full Service Areas", "Limited Service Areas" and "Conservation Areas" that would result from the map amendment and the revised amount of acreage available for development within each designation. As submitted, the table indicates that the map revisions will not result in acreage allocated for development exceeding the projected land needs consistent with the 7B rules.

**ATTACHMENTS:** The following provides an overview and summation of the attachments provided, including DCM staff's analysis in Attachment A; a copy of Currituck County's Planning Department staff report in Attachment B; and a copy of the written objection in Attachment C.

**Attachment A** contains a detailed Land Use Plan Analysis prepare by DCM staff. During creation of the LUP, the FLUPM is prepared with consideration given to natural constraints and land suitability for development. When development patterns depicted on the FLUPM are not consistent with the natural systems or the land suitability analysis, a description of the steps that the local government shall take to mitigate impacts is required. The DCM staff review indicates that the proposed "Full Service Areas" designation is not consistent with the analysis and cites

existing policies and implementation actions that would mitigate the impacts. Within this attachment, DCM staff also reviews the County's Staff Report (Attachment B) and written objection (Attachment C).

**Attachment B** contains the Currituck County Report prepared by County Planning Department staff. The report includes: a Resolution of Approval, a Case Analysis prepared by County Planning Staff, the proposed map and text changes, minutes highlighting local Planning Board and Board of Commission discussion, and the applicant/developer's amendment application. These materials provide the background and analysis that went into the Board of Commissioner's decision of approval.

**Attachment C** contains the submitted written objections. The objections are specific to the change of 40 acres to "Full Service Areas" from "Conservation Areas" and consist of two (2) emails submitted by Gary and Brenda Kleman, an initial email submitted on August 21<sup>st</sup>, and a second email dated September 2<sup>nd</sup>. The second email relates the objections to the criteria for CRC certification as required in 15A NCAC 07B.0802. DCM staff believes that the objections are addressed through existing local policies and/or are more directly related to site development than the LUP amendment.

**DCM STAFF RECOMMENDATION:** DCM staff has determined that Currituck County has met the substantive requirements outlined in the 2002 Land Use Plan Guidelines and that there are no conflicts evident within either state or federal law or the State's Coastal Management Program.

DCM staff recommends that the CRAC forward the Currituck County Land Use Plan amendment to the CRC for certification approval.

*If you have any questions please do not hesitate to contact me (Charlan Owens) at 252-264-3901.*

## ATTACHMENT A LAND USE PLAN ANALYSIS

### ENVIRONMENTAL CONSTRAINTS AND LAND SUITABILITY

Map 11.1 Future Land Use Plan Map (FLUPM) depicts the application of policies for growth and development and the desired future patterns of land use and land development with consideration given to natural system constraints and infrastructure policies. If the FLUPM shows development patterns or land uses that are not consistent with the natural systems analysis or the land suitability analysis, then the plan shall include a description of the steps that the local government shall take to mitigate the impacts [15A NCAC 07B.0702 (d) (4) (E)].

The natural systems analysis of the LUP is indicated on Map 3.6 Environmental Composite, which shows the extent and overlap of natural features based on the local government's determination of the capabilities and limitations of these features for development practices as indicated in the following three (3) categories:

- Class I – land containing only minimal hazards and limitations that may be addressed by commonly accepted land planning and development practices;
- Class II – land containing development hazards and limitations that may be addressed by methods such as restrictions on the types of land uses; special site planning; or the provision of public services; and
- Class III – land containing serious hazards for development or lands where the impact of development may cause serious damage to the functions of natural systems

Within the proposed 40-acre “Full Service Areas”, uplands, the lake, and adjacent canal are within Class I and Class II areas, while wetland areas and adjacent canal are located within Class III area.

Within the proposed 80-acre “Conservation Areas”, the open space is located primarily within Class III area.

The land suitability analysis of the LUP is provided on Map 6.1 Land Suitability Analysis, which indicates the supply of land suited for development based on natural system constraints, compatibility with existing land uses and development patterns, the existing land use and development criteria of local, state and federal agencies, and the availability and capacity of water, sewer, stormwater management facilities, and transportation systems as suggested in the following four (4) categories:

- Least Suitable for Development
- Low Suitability for Development
- Medium Suitability for Development
- High Suitability for Development

Within the proposed 40-acre “Full Service Areas”, uplands to the northeast are within Medium Suitability for Development; remaining uplands, the lake, and adjacent canal are within Low Suitability for Development; while wetland areas and adjacent canal are located within Least Suitable for Development.

Within the proposed 80-acre “Conservation Areas”, the open space is located primarily within Least Suitable for Development.

## MITIGATION STRATEGIES

As indicated in the review of natural constraints and land suitability, the proposed 40-acre “Full Service Areas” is located adjacent to and within lands that contain development hazards with low suitability for development. Therefore, the LUP must include a description of the steps that the local government shall take to mitigate impacts when development patterns are not consistent with the natural systems analysis or the land suitability analysis.

LUP policy and implementation statements qualify as mitigation for impacts. Those that would be associated with a “Full Service Areas” development pattern located within constrained areas adjacent to the Estuarine Shoreline include the following, organized by State Management Topic:

### *Public Access*

*POLICY PA5: PUBLIC AND PRIVATE MARINAS offering access to area waters should be encouraged when developed in accordance with the CAMA specific use standards for marinas (i.e. docks for more than 10 vessels). Marinas shall not be approved, however, that are incompatible with nearby land uses or whose designs fail to meet the environmental quality and development standards of the County’s Unified Development Ordinance.*

*POLICY PA6: MARINAS IN UPLAND LOCATIONS generally shall be preferred over marinas in open water, thereby better preserving the visual appearance of the shoreline as well as avoiding the “consumption” of available public trust surface waters.*

*Action PA-5: Open water marinas often “consume” large areas of public trust surface waters and can interfere with the rights of navigation for small sailing vessels and other water users. Amend the Currituck County Unified Development Ordinance to provide incentives for constructing non-wetland, upland marinas as opposed to open water marinas.*

*POLICY PA7: Currituck County marina owners shall be encouraged to participate in BEST PRACTICE OPERATING PROGRAMS, such as the “Clean Marina” program sponsored by the NC Division of Coastal Management and the NC Marine Trades Services organization. The County encourages marina operators to apply for grants that may be available to help pay for pump-out facilities or other environmental improvements.*



POLICY PA8: DEVELOPMENT STANDARDS FOR BOAT RAMPS AND/OR PARKING AREAS associated with public access sites shall address, at a minimum, requirements for stormwater runoff, water quality protections, aesthetic concerns and adequate water depth at low tide.

*Action PA-6: The County shall continue to require major residential subdivisions that abut public trust waters to provide public access to those waters. Access for the general public is preferred.*

### **Land Use Compatibility**

POLICY ES1: New development shall be permitted to locate only in areas with SUITABLE SOIL and where ADEQUATE INFRASTRUCTURE is available. For existing development located on poor soils, and where sewage treatment upgrades are necessary, engineering solutions may be supported, provided that environmental concerns are fully addressed.

POLICY ES2: NON-COASTAL WETLANDS, including FRESHWATER SWAMPS, AND INLAND, NON-TIDAL WETLANDS, shall be conserved for the important role they play in absorbing floodwaters, filtering pollutants from stormwater runoff, recharging the ground water table, and providing critical habitat for many plant and animal species. Currituck County supports the efforts of the U.S. Army Corps of Engineers in protecting such wetlands through the Section 4042 permit program of the Clean Water Act, as well as Section 4013 water quality certifications by the State of North Carolina.

POLICY ES3: COASTAL WETLANDS shall be conserved for the valuable functions they perform in protecting water quality and in providing critical habitat for the propagation and survival of important plant and animal species. CAMA use standards and policies for coastal wetlands shall be supported. Uses approved for location in a coastal wetland must be water dependent (i.e. utility easements, bridges, docks and piers) and be developed so as to minimize adverse impacts.

POLICY ES4: In approving new developments, Currituck County shall support the retention or creation of a vegetated buffer area along ESTUARINE SHORELINES as a simple, effective and low-cost means of preventing pollutants from entering estuarine waters. Exceptions to this requirement may include developments involving pre-existing man-made features such as hardened shorelines, ditches, and canals. Farming and forestry operations that abide by appropriate "best management practices" are also exempt. The County also supports CAMA use standards for all COASTAL SHORELINES, whether estuarine or otherwise.

POLICY ES5: *Uses allowed in ESTUARINE WATERS must be water dependent (public access, docks, piers, erosion control, and other CAMA-approved uses) and must not interfere with the proper function, cleanliness, salinity, and circulation of the resource. FLOATING HOMES shall not be approved for placement in the estuarine waters of Currituck County. (Also see the Public Access section of this plan for policies concerning new MARINAS.)*

POLICY ES8: *Areas of the County identified for significant future growth shall avoid NATURAL HERITAGE AREAS (e.g. Great Marsh on Knotts Island, Currituck Banks/Swan Island Natural Area, Currituck Banks Corolla Natural Area, Pine Island/Currituck Club Natural Area, Northwest River Marsh Game Land, and many other marsh areas on the mainland.)*

POLICY HNI: *Currituck County shall encourage development to occur at densities appropriate for the location. LOCATION AND DENSITY FACTORS shall include whether the development is within an environmentally suitable area, the type and capacity of sewage treatment available to the site, the adequacy of transportation facilities providing access to the site, and the proximity of the site to existing and planned urban services. For example, projects falling within the Full Services areas of the Future Land Use Map would be permitted a higher density because of the availability of infrastructure as well as similarity to the existing development pattern. Such projects could be developed at a density of two (2) or more dwelling units per acre. Projects within areas designated as Limited Service would be permitted a density of one (1) to one and one half (1.5) units per acre depending upon the surrounding development pattern and availability of resources. Projects within areas designated as Rural or Conservation by the Future Land Use Plan would be permitted a much lower density of 1 dwelling unit per 3 acres because of the lack of infrastructure in the area, the existing low density development pattern, and presence of environmentally sensitive natural areas.*

### **Infrastructure Carrying Capacity**

POLICY WS3: *Currituck County endorses UTILITIES EXTENSION POLICIES that focus water and sewer services (1) within existing developed areas and in nearby targeted growth areas identified as Full Service and Limited Service areas, (2) where development densities would make the provision of all public services more efficient, (3) where the land is particularly well suited for development and (4) away from environmentally sensitive areas, such as areas with extensive wetlands or the northern beaches of the Outer Banks.*

*Action WS-4: Prohibit any new wastewater treatment plant from locating in any Area of Environmental Concern (AEC) as designated by CAMA.*

POLICY WS8: *CENTRAL AND PACKAGE TREATMENT PLANTS shall be designed using best available technology to eliminate or reduce odors. In addition, such plants shall be properly located so as not to adversely impact nearby land uses.*

POLICY PR6: *All new residential development shall provide for ADEQUATE OPEN SPACE AND RECREATION IMPROVEMENTS including, as may be appropriate, funding in proportion to the demand created by the development. The amount of open space and improvements may be determined according to the number of dwelling units in the development and/or by a percentage of the total acreage in the development. Fees in lieu of land dedication shall be based on the inflation adjusted assessed value of the development or subdivision for property tax purposes.*

POLICY PP2: *Currituck County shall continue to implement a policy of ADEQUATE PUBLIC FACILITIES, sufficient to support associated growth and development. Such facilities may include but not be limited to water supply, school capacity, park and open space needs, fire fighting capability, and law enforcement.*

### **Natural Hazard Areas**

POLICY NHI: *The County recognizes the risks to life and property that exist within SPECIAL FLOOD HAZARD AREAS (i.e. areas having a 1% chance of flooding in any year) that may be inundated during major storm events. The County will continue taking measures to mitigate these risks and will avoid taking any action in these areas that materially increases risks to life and property.*

POLICY NH2: *The County shall require development and redevelopment within SPECIAL FLOOD HAZARD AREAS to meet the standards of the National Flood Insurance Program and the County's Flood Damage Prevention Ordinance. Particular attention shall be given to development in VE (i.e. velocity wave) zones concerning standards for breakaway walls, no land disturbing activities, and no permanent enclosures below the base flood level.*

*Action NH-3: Continue to monitor and implement appropriate sections of the April 2004 Currituck County Hazard Mitigation Plan.*

POLICY NH8: *Currituck County encourages owners of PROPERTIES ALONG ESTUARINE SHORELINES to employ the least hardened approach to shoreline stabilization (i.e. marsh grass favored over riprap favored over bulkheading, etc.), provided that reasonable access is available to install the technology available.*

## *Water Quality*

*POLICY WQ3: Currituck County supports policies, plans and actions that help protect the water quality of the county's estuarine system by preventing SOIL EROSION AND SEDIMENTATION, and by controlling the quantity and quality of STORMWATER RUNOFF entering the estuary.*

*Action WQ-3: Continue to implement the recently adopted amendment to the Currituck County Unified Development Ordinance requiring an engineer's certification that new development will not cause flooding on adjacent properties.*

*Action WQ-7: Amend the UDO to provide incentives for buffers and setbacks for development adjacent to public trust waters.*

*Action WQ-8: Consider amending the UDO to incorporate "Low Impact Development" (LID) concepts for all new development in the County. LID concepts focus especially on minimizing impervious surface areas, preserving natural vegetative ground covers, absorbing stormwater runoff into the ground rather than collecting and piping it elsewhere, and ultimately cutting down on stormwater runoff into the estuary.*

*POLICY WQ4: RUNOFF AND DRAINAGE from development, forestry and agricultural activities shall be of a quality and quantity as near to natural conditions as possible. Postdevelopment runoff shall not exceed pre-development volumes.*

*POLICY WQ5: Development that preserves the NATURAL FEATURES OF THE SITE, including existing topography and significant existing vegetation, shall be encouraged. COASTAL AND NON-COASTAL WETLANDS shall not be considered part of a lot's acreage for the purpose of determining minimum lot size or development density. Open space developments shall be encouraged to REDUCE IMPERVIOUS SURFACE AREAS associated with new development and redevelopment.*

*POLICY WQ6: Currituck County supports the retention or preservation of VEGETATED BUFFERS along the edge of drainage ways, streams and other components of the estuarine system as an effective, low cost means of protecting water quality.*

The proposed "Conservation Areas" designation is consistent with the natural constraints and land suitability analysis, therefore an identification of mitigation strategies for this portion of the amendment is not required.

## PROJECTED FUTURE LAND NEEDS

Table 11.1 Comparison of Land Allocated to Future Land Use and Projected Land Needs, 2025 indicates the acreage allocated to each designation on the FLUPM and the total acreage available for development as compared to the projected land need for development to the year 2025. As indicated in 15A NCAC 07B.0702 (d), last paragraph, the amount of land allocated to various uses may not exceed projected land needs.

The table indicates a projected land need of 37,183 acres. The existing acreage for development is 37,094 acres. The proposed acreage for development resulting from the map amendment to “Full Service Areas”, “Limited Service Areas” and “Conservation Areas” designations is 37,073 acres. The amendment meets the requirements of the Rule.

## REVIEW OF COUNTY REPORT

**Attachment B** contains the Currituck County Report prepared by County Planning Department staff. The report includes: a Resolution of Approval, a Case Analysis prepared by County Planning Staff, minutes highlighting local Planning Board and Board of Commission discussion, and the applicant/developer’s amendment application. These materials provide the background and analysis that went into the Board of Commissioner’s decision of approval. Verbal objections were expressed at the Board of Commissioner’s public hearing and are included in the minutes.

Much of the review and discussion relates to development plans. The County report indicates three (3) policies that are considered to be unsupportive of the map amendment request:

- Policy ES2 concerning the conservation of non-coastal wetlands [and support of the U.S. Army Corps of Engineers in protecting such wetlands through the Section 4042 permit program of the Clean Water Act, as well as Section 4013 water quality certifications by the State of North Carolina];
- Policy WQ 5 encouraging the preservation of existing topography and significant vegetation, and indicating that Coastal and Non-Coastal wetlands shall not be considered as part of a lot’s acreage for determining minimum lot size or development density; and
- Policy TR11 indicating that access to higher intensity development shall generally not be permitted through an area of lower intensity development.

DCM staff considers Policy ES2 and Policy WQ 5 to be directly related to future site development rather than the map amendment. Policy TR11 is stated as “generally” rather than mandatory. Buffering or other effective design features may be employed as part of a site development to address the intensity difference concerns mentioned in TR11.

## REVIEW OF WRITTEN OBJECTION

**Attachment C** contains the submitted written objection. The objection is specific to the change of 40 acres to “Full Service Areas” from “Conservation Areas” and consists of two (2) emails submitted by Gary and Brenda Kleman, an initial email submitted on August 21<sup>st</sup>, and a second email dated September 2<sup>nd</sup>. The second email relates the objection to the criteria for CRC certification as required in 15A NCAC 07B.0802.

The objection indicates that the proposed LUP amendment is not consistent with criteria concerning the following Management Topics:

- Land Use Compatibility,
- Infrastructure Carrying Capacity; and
- Water Quality

**Land Use Compatibility.** The management goal of this topic is to ensure that development and use of resources or preservation of land minimizes direct and secondary environmental impacts, avoids risks to public health, safety, and welfare, and is consistent with the capability of the land based on considerations of interactions of natural and manmade features. The planning objective is to adopt and apply local development policies and balance protection of natural resources and fragile areas with economic development, with policies providing direction to assist local decision making and consistency for zoning, divisions of land, and public and private projects. LUP requirements include establishing density and intensity criteria for each designation on the FLUPM consistent with the land suitability analysis and the establishment of local mitigation criteria and concepts, which may include cluster subdivision design, enacting local buffers, impervious surface limits, and innovative stormwater management alternatives.

The objection notes surrounding development as “Limited Service” with wetlands and adjacent Significant Heritage Areas, and that condominium development will do harm to fragile wetlands. DCM staff believes that existing LUP policies providing guidance for appropriate density (POLICY HN1), providing for the conservation and preservation of wetlands (POLICY ES2 and POLICY ES3), and calling for significant future growth to avoid natural heritage areas (POLICY ES8) are sufficient to address this Management Topic relative to the proposed amendment.

**Infrastructure Carrying Capacity.** The management goal of this topic is to ensure public systems are appropriately sized, located and managed so the quality and productivity of AECs and other fragile areas are protected or restored. The planning objective is to establish level of service policies and criteria for infrastructure consistent with the projection of future land needs. LUP requirements include the establishment of service boundaries for existing and future infrastructure and the correlation of FLUPM designations with existing and planned infrastructure such as wastewater, water infrastructure, and transportation.

The objection indicates the lack of adequate fire, ambulance, and transportation services in the area. DCM staff believes that existing LUP policies addressing continued implementation of adequate public facilities sufficient to support growth and development (POLICY PP2) address this Management Topic relative to the proposed amendment.

Traffic impacts are more directly related to development plans. The map amendment area is located off of a publicly maintained road that connects to US Highway 158. The lower Currituck area experiences heavy traffic flow along this highway during the tourist season. Currituck County policy indicates that Highway 158/168 shall receive special attention concerning the proper development of land and properties adjoining and/or accessing this critical arterial (POLICY TR6) and indicates that local streets shall be designed and built to allow for convenient circulation within and between neighborhoods with care taken to encourage local street "connectivity" without creating opportunities for cut-through traffic from outside the connected areas (POLICY TR8). Additionally, the County also supports a new Mid-County Bridge between the mainland and Corolla that will reduce tourist traffic impacts in the lower Currituck area. The bridge is currently in the design and funding phase and is targeted to open in 2013.

**Water Quality.** The management goal of this topic is to maintain, protect, and where possible enhance water quality in all coastal wetlands, rivers, streams and estuaries. The planning objective is to have policies for coastal waters within the planning jurisdiction to help ensure that water quality is maintained if not impaired and improved if impaired. LUP requirements include the inclusion of policies that help prevent or control nonpoint source discharges (sewage and stormwater) such as but not limited to the following: impervious surface limits, vegetated riparian buffers, natural areas, natural area buffers, and wetland protection.

The objection indicates a compromise of the Albemarle Sound due to dredging and runoff resulting from the development in addition to the brine that will be discharged from the County's Reverse Osmosis (R. O.) Water Treatment Plant that is currently under construction. DCM staff believes that existing policies including the conservation of wetlands for filtering pollutants (POLICY ES2), the use of estuarine shoreline buffers to prevent pollutants from entering estuarine waters ( POLICY ES4), the prevention of soil erosion and sedimentation and control of stormwater runoff (POLICY WQ3), and requirements that runoff from development be of a quality and quantity as near to natural conditions as possible and that post-development runoff shall not exceed pre-development volumes (POLICY WQ4) are sufficient to address this Management Topic relative to the proposed amendment.

The dredging of estuarine and public trust waters and siting of an R. O. discharge are activities that require the review and approval of State environmental agencies and are not part of a map amendment request. Dredging will be subject to CAMA permit review as part of a site development application. The County's R. O. plant has been approved and permitted by State agencies and is currently under construction. The brine waste of the R.O. plant will be discharged into the Albemarle Sound from a pipe located 1,800 feet offshore of Newbern's Landing Road, approximately 3 miles north of the map amendment site.





## Currituck County

Department of Planning  
Post Office Box 70  
Currituck, North Carolina 27929  
252-232-6029  
FAX 252-232-3026

### MEMORANDUM

**To:** Charlan Owens, AICP  
DCM Elizabeth City District Planner

**From:** Ben E. Woody, AICP  
Planning Director

**Cc:** Dan Scanlon  
County Manager

**Date:** August 21, 2008

**Re:** PB 08-22 Currituck Marina Land Use Plan Amendment

RECEIVED  
NC DENP

AUG 25 2008

COASTAL MANAGEMENT  
Elizabeth City

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The Currituck County Board of Commissioners is requesting an amendment to the Currituck County Land Use Plan to designate approximately 40 acres of the Future Land Use map from Conservation area to Full Service area and approximately 80 acres from Limited Service area to Conservation area.

The request for 40 acres of Full Service area was initiated at the request of Michael Perry of MSA Engineering and represents a portion of a larger 119 acre parcel. The request for 80 acres of Conservation area was initiated by county planning staff.

This request was approved by the Board of Commissioners at their August 18 meeting, and recommended by the Planning Board at their July 8 meeting.

As required by the Coastal Area Management Act (CAMA), the Board of Commissioners is submitting a local resolution of adoption which includes findings that demonstrate this amendment is consistent with the policy objectives of the Plan.

Please find the following information also included with this request:

- map amendment to the Future Land Use Map
- text amendment to Section 11 of the Land Use Plan
- case analysis of amendment request (including policy and management topics analyses, recommendations, and additional map exhibits)
- narrative of the request, application, and property survey as submitted by the applicant
- meeting minutes of the Planning Board and Board of Commissioners

Should you have any questions, do not hesitate to contact me at 232-6029.



**RESOLUTION OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS  
AUTHORIZING AN AMENDMENT TO THE CAMA LAND USE PLAN**

**WHEREAS**, the County desires to amend its 2006 CAMA Land Use Plan, specifically the Future Land Use Map, to designate approximately 40 acres as "Full Service Area" from "Conservation Area", and

**WHEREAS**, the County also desires to amend its 2006 CAMA Land Use Plan to designate approximately 80 acres of the Future Land Use Map as "Conservation Area" from "Limited Service Area", and

**WHEREAS**, on July 8, 2008, the Planning Board unanimously recommended adoption of the draft amendment to the CAMA Land Use Plan; and

**WHEREAS**, the County conducted a duly advertised public hearing on the draft amendment to the CAMA Land Use Plan at the Regular Meeting of the Board of Commissioners on Monday, August 18, 2008; and

**WHEREAS**, the amendment to the Future Land Use Map has been evaluated for its consistency with other existing policies and no internal inconsistencies exist; and

**WHEREAS**, the amendment is consistent with the currently approved North Carolina Coastal Management Program and the rules of the Coastal Resources Commission; and


**WHEREAS**, the amendment is consistent with the six management topics outlined in the County's Land Use Plan; and


**WHEREAS**, the amendment does not violate any state or federal laws,

**NOW, THEREFORE, BE IT RESOLVED THAT** the Board of Commissioners of Currituck County, North Carolina, has adopted the draft CAMA Land Use Plan amendment; and

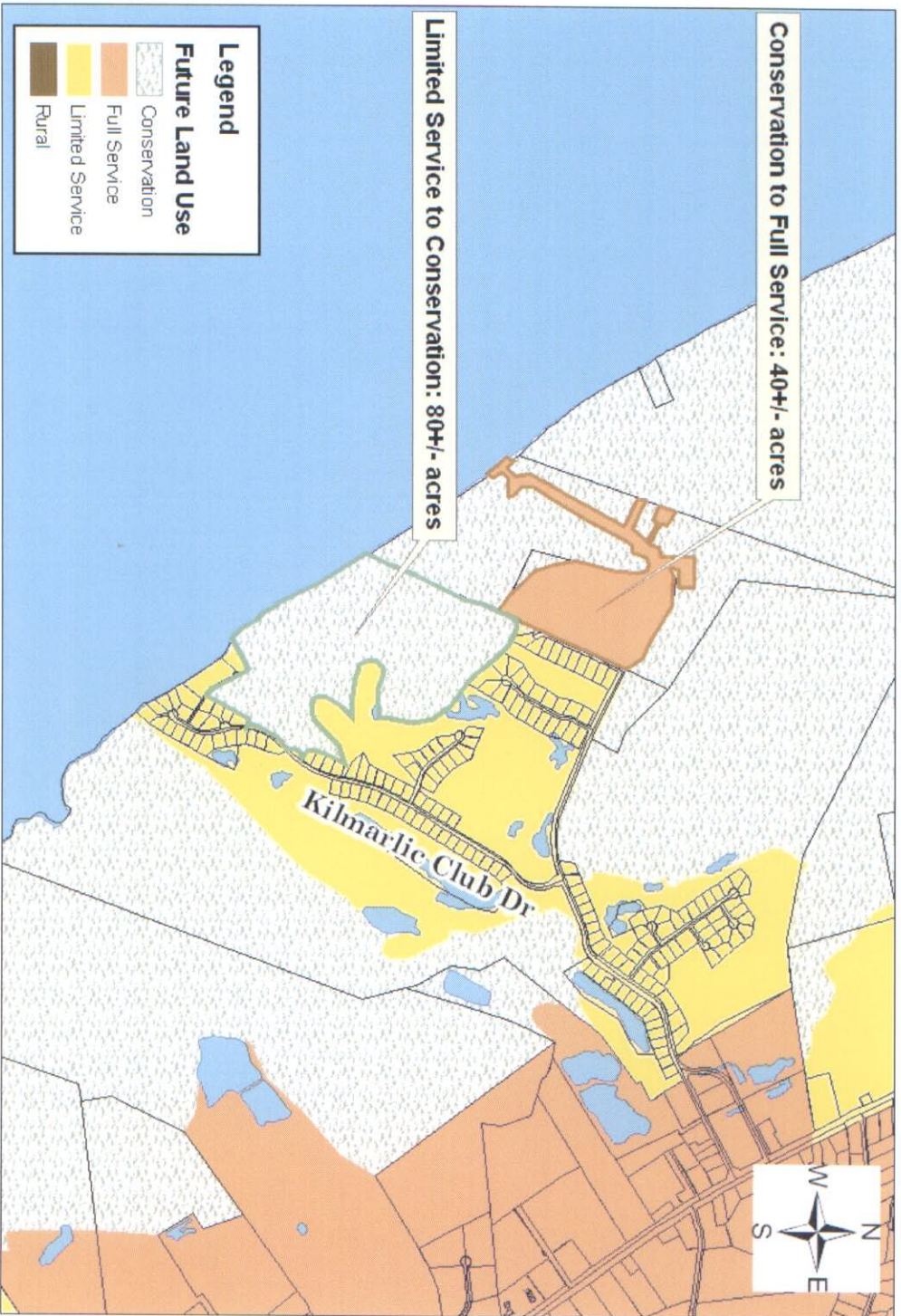
**BE IT FURTHER RESOLVED** that the County Manger of Currituck County is hereby authorized to submit the adopted CAMA Land Use Plan amendment to the State for certification as described above.

Adopted this 18 day of August 2008.

  
Board of Commissioners' Chairman  
Attest:

  
Clerk to Board.

**MAP OF THE AMENDMENT AREA**



**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**

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Feet  
Currituck County Planning Department





## LAND USE PLAN TEXT AMENDMENT

Section 11: Land Classification System, Table 11.1 is amended by adding the following underlined language and deleting the strikethrough language:

**Table 11.1 Comparison of Land Allocated to Future Land Use and Projected Land Needs, 2025**

<b>Land Use Class</b>	<b>Total Acres Allocated to Each Land Class (a)</b>	<b>% of Each Land Class in Development (b)</b>	<b>Total Acreage Available for Development as Projected (a) x (b)</b>	<b>Total Acreage Projected for Development</b>
Full Service Areas	<del>17,613</del> <u>17,653</u>	80%	<del>14,090</del> <u>14,122</u>	
Limited Service Areas	<del>26,706</del> <u>26,626</u>	65%	<del>17,359</del> <u>17,306</u>	
Rural Areas	40,218	10%	4,021	
Conservation Areas	<del>81,183</del> <u>81,223</u>	2%	<del>1,623</del> <u>1,624</u>	
Totals	165,720	--	<del>37,094</del> <u>37,073</u>	37,183

**CASE ANALYSIS FOR THE  
COASTAL RESOURCES COMMISSION  
MEETING DATE: September 25 - 26, 2008  
Currituck County Land Use Plan Amendment  
PB 08-22 Currituck Marina**

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**TYPE OF REQUEST:** To amend the Currituck County Land Use Plan to designate approximately 40 acres of the Future Land Use map from Conservation area to Full Service area and approximately 80 acres from Limited Service area to Conservation area.

**LOCATION:** Located near the terminus of West Side Lane, adjacent to Kilmarlic Subdivision.

**CURRENT ZONING:** Agricultural (A)

**SURROUNDING PROPERTY:**

	<b>Land Use</b>	<b>LUP Classification</b>
<b>NORTH:</b>	Undeveloped	Conservation
<b>SOUTH:</b>	Albemarle Sound	N/A
<b>EAST:</b>	Kilmarlic Subdivision	Limited Service
<b>WEST:</b>	Undeveloped	Conservation

**LAND USE PLAN  
ANALYSIS:**

**CLASSIFICATIONS**

**Conservation Area** – The purpose of the Conservation class is to provide for the long-term management and protection of significant, limited, or irreplaceable areas. Proper management is needed to conserve the natural, cultural, recreational, scenic or biologically productive values of these areas. The Conservation class should be applied to areas that should not be developed at all (preserved), or if developed, done so in a very limited manner characterized by careful planning and cautious attention to the conservation of environmental features. Infrastructure and services, public or private, should not be provided in these areas as a catalyst that could stimulate development.

Due to the low-lying nature of much of Currituck County, and the prevalence of wetlands in the County, the Conservation class is the most extensive of the four land classes. Oftentimes, the scattered, widespread nature of such areas (e.g. 404 wetlands) precludes their mapping except at a very generalized level of detail. In such instances, the standards of the Conservation class shall be applied in accordance with the site specific information

made available during special studies and/or the land development process.

**Full Service Area** – Areas designated as Full Service are those parts of the county where a broad range of infrastructure and service investments have been provided or will be made available by the public and/or private sectors. Infrastructure investments may include, for example, community level or centralized water, parks, schools, fire and rescue facilities. Central wastewater treatment and disposal whether public or community is considered reasonable in the Full Service Areas.

**Point Harbor Sub-Area** – The policy emphasis is to allow portions of the Point Harbor area to continue to evolve as a full service community, but with better attention to the planning needed to protect residential areas and the natural features that make the area so attractive. Vegetative buffers should be required/maintained along shorelines to preserve public access and open space at the waters edge and to protect water quality in the sound.

## **SUPPORTIVE POLICIES**

**POLICY PA1:** Public access to the sound and ocean waters of Currituck County is essential to the quality of life of residents and visitors, as well as the economy of the area. The County supports the establishment of ADDITIONAL PUBLIC AND PRIVATE ACCESS opportunities to the waters of Currituck County.

**POLICY PA2:** The County supports MANY FORMS OF “ACCESS” to the water, including scenic outlooks and boardwalks, boat ramps, marinas and docks, fishing piers, canoe and kayak launches, and other means of access. Whenever possible, such facilities shall be designed to accommodate the needs of handicapped individuals.

**POLICY PA5:** PUBLIC AND PRIVATE MARINAS offering access to area waters should be encouraged when developed in accordance with the CAMA specific use standards for marinas (i.e. docks for more than 10 vessels). Marinas shall not be approved, however, that are incompatible with nearby land uses or whose designs fail to meet the environmental quality and development standards of the County’s Unified Development Ordinance.

**POLICY PA6:** MARINAS IN UPLAND LOCATIONS generally shall be preferred over marinas in open water, thereby preserving the visual appearance of the shoreline as well as avoiding the “consumption” of available public trust surface waters.



**POLICY PP2:** Currituck County shall continue to implement a policy of ADEQUATE PUBLIC FACILITIES, sufficient to support associated growth and development. Such facilities may include but not be limited to water supply, school capacity, park and open space needs, fire fighting capability, and law enforcement.

**POLICY WQ6:** Currituck County supports the retention or preservation of VEGETATED BUFFERS along the edge of drainage ways, streams and other components of the estuarine system as an effective, low cost means of protecting water quality.

**POLICY ML3:** The interests of Mainland Area residents in having ACCESS TO THE AREA'S OCEAN AND ESTUARINE WATERS shall be fostered through County actions to increase the number of additional public access sites at a rate commensurate with the population growth of the Currituck County. Included in the actions taken to increase public access shall be a consideration given to transportation needs, including boat docks and ferry services.

### **UNSUPPORTIVE POLICIES**

**POLICY ES2:** NON-COASTAL WETLANDS, including FRESHWATER SWAMPS, AND INLAND, NON-TIDAL WETLANDS, shall be conserved for the important role they play in absorbing floodwaters, filtering pollutants from stormwater runoff, recharging the ground water table, and providing critical habitat for many plant and animal species.

**POLICY WQ5:** Development that preserves the NATURAL FEATURES OF THE SITE, including existing topography and significant existing vegetation, shall be encouraged. COASTAL AND NON-COASTAL WETLANDS shall not be considered part of a lot's acreage for the purpose of determining minimum lot size or development density.

**POLICY TR11:** ACCESS TO HIGHER INTENSITY DEVELOPMENT shall generally not be permitted through an area of lower intensity development. For example, access to a multi-family development, a major park facility or other large traffic generator shall not be permitted through a local street serving a single-family residential neighborhood.

### **MANAGEMENT TOPICS**

*Staff responses are in italics and follow each management topic.*

**Public Access** – To provide suitable public access opportunities to the County's public trust waters and shorelines so as to allow for a wide range of activities.

*The 40 acre site proposed for Full Service area would provide the County's first direct public access to the Albemarle Sound.*

**Land Use Compatibility** – To properly develop in accordance with the suitability of the land, infrastructure availability and the compatibility of surrounding uses.

*The upland area of the 40 acre site proposed for Full Service area is classified as low suitability for development. There is county water and emergency medical services readily available to the site, as well as vehicular access from a State maintained road. The surrounding land uses include the Kilmarlic subdivision and golf course, a regional health and racquet club, and approximately 25 acres of land zoned for multifamily uses (4 du/acre).*

**Infrastructure Carrying Capacity** – To avoid taking or approving actions related to infrastructure and the provision of services that could induce intensive development in environmentally fragile areas.

*Infrastructure capacity such as improved roads and public water are directly accessible to the 40 acre site proposed for Full Service area.*

**Natural and Man-Made Hazards** – To exercise caution, foresight, and common sense in dealing with the risks of coastal development.

*With environmental oversight from the State and local tools such as conditional zoning and floodplain management, the county is in a position to ensure development proposals are responsive to coastal development concerns.*

**Water Quality** – To preserve and improve water quality in the coastal waters of Currituck County; To preserve critical natural areas as the source of biological diversity and productivity on the County's ocean and estuarine environments.

*The intent of this request is primarily limited to the upland areas of the 40 acre site proposed for Full Service. The overall intensity of the project is of concern and will need to be designed in a manner to minimize potential impacts on water quality. The use of central wastewater, Low Impact Development (LID) stormwater techniques, and vegetative buffers are critical to the proposal's consistency with Land Use Plan management topics.*

**Local Concerns** – To protect and conserve the area's natural beauty and coastal resources as the County's greatest asset for economic development and a high quality of life.



*The request attempts to minimize the impact of the developable area while promoting a high quality project that provides public access and other economic benefits to the county.*

**CAMA LAND  
SUITABILITY:**

According to the land suitability analysis included in the Land Use Plan, the majority of the 40 acre site proposed for Full Service designation is classified as low suitability for development (see Land Suitability Map - Pg. 13).

**PUBLIC SERVICES  
AND UTILITIES:**

The amendment area is located within the Jarvisburg Elementary School District. The Lower Currituck Volunteer Fire Department (Kilmarlic Station) provides fire protection for this area. EMS coverage is provided from the Grandy Volunteer Fire Department Station. Public water is available to this site from the Kilmarlic Subdivision.

**TRANSPORTATION:**

The 40 acre site proposed for Full Service area is accessible by vehicle from West Side Lane and presumably by boat from the Intracoastal Waterway.

**FLOOD ZONE:**

The 40 acre site proposed for Full Service area is located in Flood Zone AE(7).

**WETLANDS:**

Approximately 95+/- acres of wetlands are located on the larger 119 acre parcel (including the existing lake and canal). The remaining 23+/- acres primarily consists of uplands and is included in the 40 acre site proposed for Full Service designation (see Property Survey - Pg. 26).

**SOILS:**

The Currituck County Soils map indicates the majority of the 40 acre site proposed for Full Service designation contains primarily suitable soils (see Soil Suitability Map - Pg. 14).

**RECOMMENDATION:**

After hearing evidence presented at the public hearing and based on recommendations from the Planning Board and Planning Staff, the Board of Commissioners recommended approval of the request due to its consistency with existing Land Use Plan policies and management topics. Further, the Board of Commissioners included the following recommendations as part of their approval:

- In order to maintain balance in Land Use Plan classifications, adjacent wetlands currently designated as Limited Service should be incorporated into this amendment request and designated as Conservation. Considering the intensity of



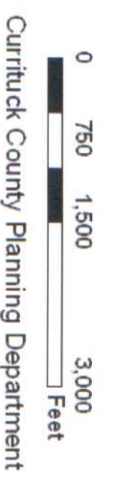
development allowed by the proposed Full Service designation, staff would recommend a 2/1 ratio for exchanging Conservation areas (i.e., for every 1 acre of Full Service created, 2 acres of Conservation is created).

- Future development proposals for the subject property must maintain public access, public boat launching, and parking facilities to the Albemarle Sound (Policies PA1, PA2, PA5, ML3).
- Any future marina proposal shall participate and become a Certified Clean Marina in the North Carolina Clean Marina program (Policy PA7).
- This site is adjacent to the Albemarle Sound. In addition, the wetlands on this site are designated as a Significant Natural Heritage Area by the North Carolina Natural Heritage Program for their presence of rare and important ecological features. In an effort to protect these areas and preserve water quality, priority should be given to the retention and preservation of wetland areas. It is recommended that no development, land disturbing, or logging activities occur in areas designated by the 2006 Land Use Plan as Conservation. (Policies ES2, WQ 5, WQ 6, ML1)
- Future development proposals for the subject property must demonstrate that water quality is not adversely impacted. The use of Low Impact Development (LID) techniques and wetland preservation should be given high priority. In addition when developing near the shoreline, precedence should be given to “soft” stabilization approaches including but not limited to preservation of existing vegetation, creation of natural, living shorelines for areas needing stabilization, and establishment of vegetative buffers (Policies ES4, WQ3, WQ6, and Point Harbor Sub-Area description).

AERIAL PHOTOGRAPH

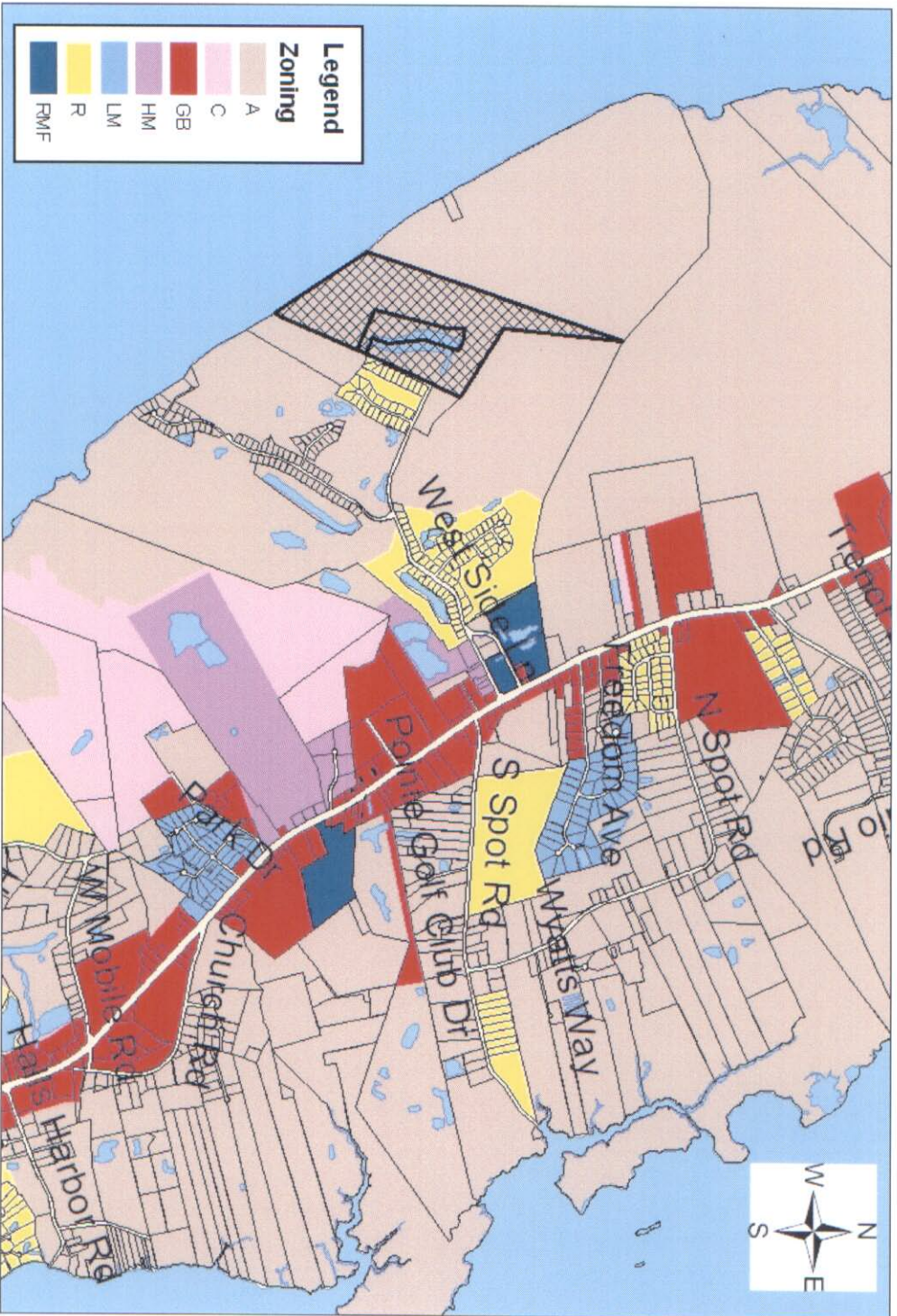


**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**





**ZONING MAP**

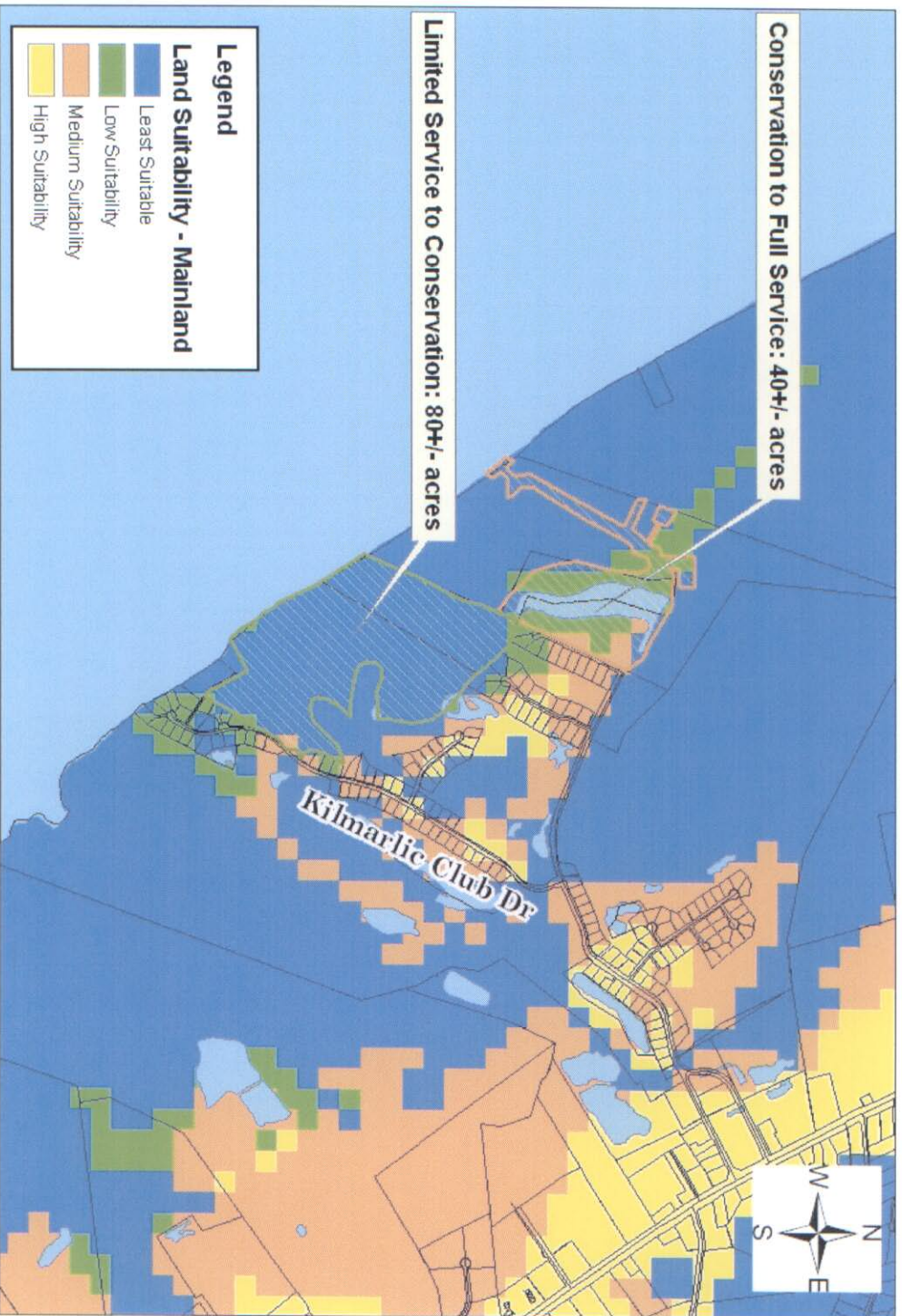


**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**

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Currituck County Planning Department



LAND SUITABILITY



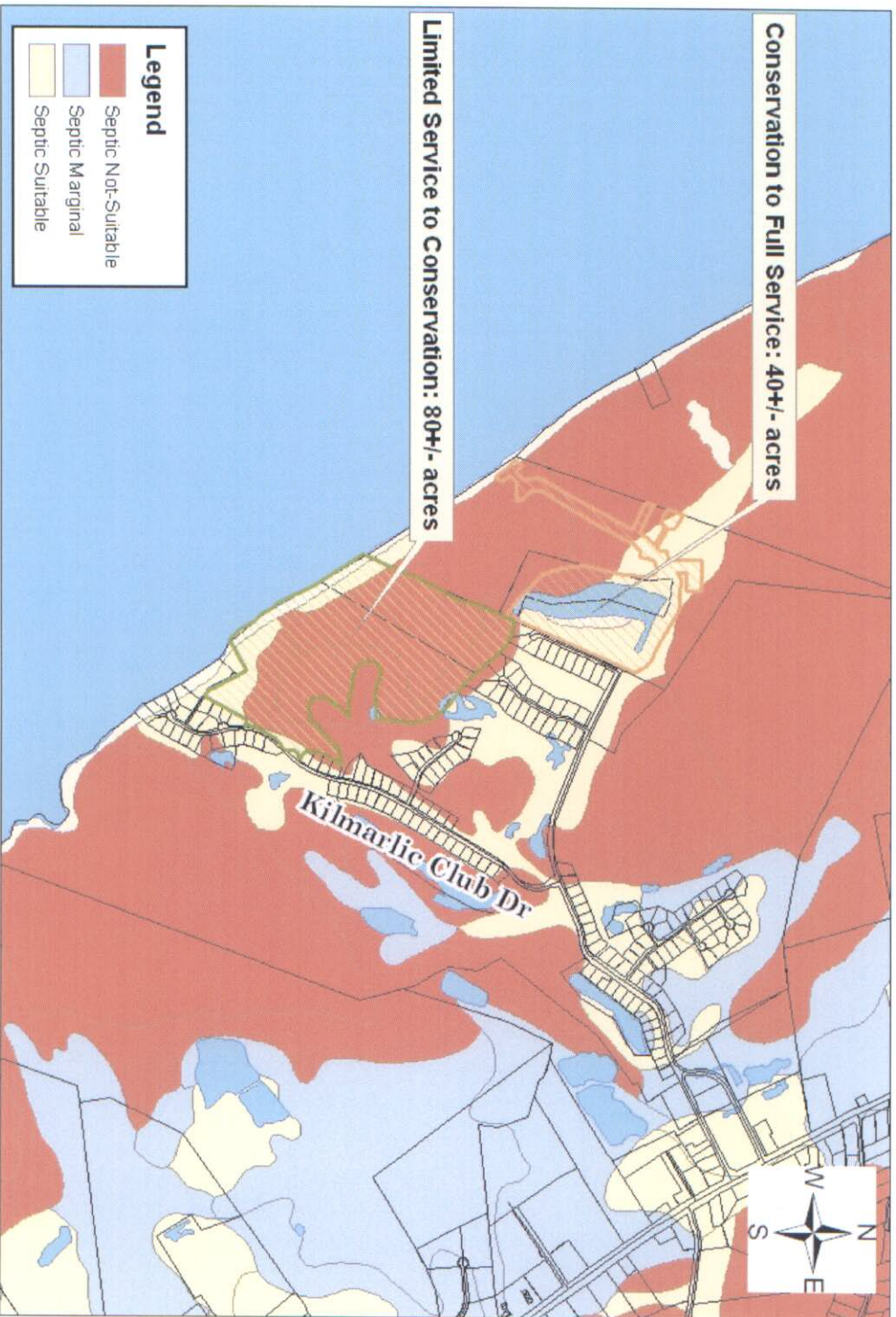
**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**

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Currituck County Planning Department





SOIL SUITABILITY



**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**

Currituck County Planning Department



WATER DEPTH



**PB 08-22 CURRITUCK MARINA  
Land Use Plan Amendment**

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Feet  
Currituck County Planning Department





**NCDENR SIGNIFICANT NATURAL HERITAGE AREAS**



**PB 08-22 Currituck Marina**  
**Significant Natural Heritage Areas**





## **PLANNING BOARD DISCUSSION – June 10, 2008 Meeting**

Mr. West stated that this is not part of the Kilmarlic property but access would need to go through a portion of the Kilmarlic property.

Mr. West asked how can wetlands in the Kilmarlic Club be designated to an conservation area if they are already designated to another subdivision.

Mr. Webb stated the county has sole authority to amend the plan if, the state certifies the change, and determine the outlook of the Future Land Use Plan.

Mr. West asked if public access would be available to the marina.

Mr. Webb stated the West Side Lane is a public road and the applicants have indicated there would be public marina access.

Mr. Morrison stated they think this is a great project for the citizens of Currituck having direct access to the Albemarle Sound. They have been in contact with the Kilmarlic golf course and they are working with them because this project will help their project.

Mr. Midgette asked Mr. Morrison if they are in agreement with staff recommendations.

Mr. Morrison stated yes.

Ms. Turner asked Mr. Morrison if he was okay with public access to sound and boat launch.

Mr. Morrison stated yes.

Mr. Bell asked who is responsible for checking the water quality?

Mr. Webb stated that a CAMA permit is reviewed by 12 different state agencies and a thorough review is done.

Mr. Kovacs asked if the Board of Commissioners are the only ones that can make changes to the Land Use Plan since they approve it.

Mr. Webb stated this is an amendment to a county planning document and staff would want a recommendation from the Planning Board.

Mr. West asked how does the next item on the agenda, which is a Currituck County request to amend the Land Use Plan, impact this request which is also a request to amend the Land Use Plan.

Mr. Webb stated that the applicants are asking the Planning Board to consider immediate action on this request tonight. What will be reported next is a report on the process the county is looking for a much wider area.

Mr. Woody stated that this request is totally separate from the County's request.

Mr. Midgette asked with this being an amendment to the Land Use Plan will this have an affect on any other conversation areas in the county.



Mr. Webb stated no.

Mr. Keel stated that since another Town Meeting is scheduled on June 17, 2008 for the citizens in the Crawford Township to offer comments on the proposed amendment and learn more about the County's Land Use Plan, wouldn't it be better to do the two amendments at the same time.

Mr. Woody stated he would encourage the board to consider this entirely separate from what the county is requesting.

Ms. Turner asked if the only reason they want to get the amendment is so they can obtain the CAMA permit.

Mr. Webb stated that this was the county's view. Mr. Webb stated that whatever action the county takes, The Division of Coastal Management will make a recommendation from the county's action afterwards or before it goes to Coastal Resources Commission (CRC).

Mr. West asked Mr. Morrison where they are with the project, i.e. permits, etc.

Mr. Morrison stated they have been working on this project for approximately three years which included all the engineering and surveying.

Mr. West stated that if this was put off for another month since the county is going through this Town Meeting process looking at the LUP and this could or could not have an impact on it.

Mr. Morrison stated he attended and participated at the Town Meeting on June 5, 2008 and thought it was fantastic to understand the LUP which is totally different and separate from what they are requesting. Mr. Morrison is asking the board to make a recommendation on their request and look at it as an individual project.

Mr. Webb stated that the LUP map is not the only component of the Land Use Plan, this is why we look at the polices.

Mr. West stated this will add 40 acres of full service to the LUP.

Mr. Woody stated it will add 40 acres of full service and 40 acres of conservation to the LUP.

Mr. Webb stated that there were no potential marina sites on the map when the LUP Committee met in 2006.

Mr. West stated that there is no opposition to the marina but with the Town Meetings still taking place he feels they should wait until they have taken place before the board makes a recommendation. Mr. West stated that it is not the marina that is requiring an amendment to the LUP, but the density of the property surrounding the marina to full service.

Mr. Midgette asked why the county has conservation areas.

Mr. West stated that the definition in the case analysis states "the purpose of the Conservation class is to provide for the long-term management and protection of significant, limited, or irreplaceable areas".

Mr. Midgette stated that the board has approved projects with conservation areas and now they would be going back on what has been done in the past. Mr. Midgette stated he has no problem

with the marina but feels if they were to make a recommendation then other citizens within the county could do the same thing.

Mr. Morrison stated that the county would be gaining an extra 40 acres of conservation area.

Ms. Turner asked if this request is allowed to change, is it a way to ensure that the county doesn't lose conservation land?

Mr. Webb stated that what the board is looking at is the Future LUP and the other would be mitigation.

Ms. Turner stated if the board moves forward she would like to see keeping the same amount of conservation area.

Mr. Kovacs asked for clarification on the 2/1 ratio for exchanging Conservation area (i.e., for every 1 acre of Full Service created, 2 acres of Conservation is created.)

Mr. Webb stated the plan would change to add 40 acres of land to the conservation class.

Mr. West asked if the full service would be county wide for every 1 acre.

Mr. Webb stated it would be just for this property.

Mr. Wright stated he served on the LUP committee and one of the things they were concerned with was accessibility of the Albemarle Sound, which is one of great water resources of North Carolina and the nation. Currituck does not have any public access from Point Harbor to Coinjock to get to the Albemarle Sound. Mr. Wright feels that this proposal would give the public access to the Albemarle Sound. Mr. Wright stated he also has concerns. When Kilmarlic was done it was titled a great conservation, open space subdivision. Much of the open space in Kilmarlic was put under conservation easement to Ducks Unlimited. Mr. Wright asked if the land are already on a permanent easement for Ducks Unlimited. Mr. Wright is also concerned with the amount of density in an important wetlands area. He feels a lot of people will get confused with the whole process until the Town Meetings are done and the general question about unlimited vs. full services. Mr. Wright recommends the board table this request.

Mr. Morrison states he agrees with what Mr. Wright stated. Mr. Morrison did state this should be viewed separately from the Currituck County's LUP amendment. He is asking that the planning board make a recommendation on this request tonight so it can move to the June's Board of Commissioners meeting.

Ms. Turner stated that the marina is a positive project but she is concerned with the density and with one Town Meeting just taking place to discuss the LUP and another 2 weeks away, she feels it would be good to table this item.

#### **ACTION**

Mr. Keel motioned to table the request to amend the Currituck County Land Use Plan to designate approximately 40 acres of the Future Land Use map from Conservation Area to Full Service Area. Mr. West seconded the motion. Motion passed unanimously.



## PLANNING BOARD DISCUSSION – July 8, 2008 Meeting

Mr. Webb stated that the conservation area for Kilmarlic, Phase I does have a deeded easement for Ducks Unlimited and changing this to a conservation in the Land Use Plan would not have much affect on the plan. The other question Mr. Webb addressed was how the county's Land Use Plan (LUP) process is going to affect this request and Mr. Webb stated that it would have no affect.

Mr. Myers asked if the board had any questions.

Mr. Kovacs asked if this goes from limited service to a full service district, what is the difference in the number of units.

Mr. Webb stated approximately 55 units.

Mr. Kovacs asked if this request has to go before CAMA and that CAMA would not approve the request because the density is too high.

Mr. Webb stated that the county does not know because no reports have been seen regarding limited service vs. full service district.

Mr. Kovacs asked what is the number of conservation acreage the county would gain if this request was approved.

Mr. Myers stated 40 acres.

Mr. Kovacs stated if it was limited service it would be approximately 60 units less.

Mr. Myers stated the housing would be mixed use with duplexes/condo's and town homes.

Mr. Morrison stated the price range will be approximately \$299,000 for a 1,800 sq. ft. unit.

Mr. Kovacs stated that if it were to stay at limited service vs. full service would the price for a unit would change.

Mr. Myers stated that there are some conditions that you have with limited service that you don't have with full service, i.e. wastewater permitting and this is why it needs to be a full service district.

Mr. Kovacs asked if it were limited service that you couldn't get approval for wastewater treatment system.

Mr. Webb stated that the county's LUP would allow for this system in limited service.

Mr. West stated this was tabled from last month's meeting because of the process that the county is going through and the county has not gotten any further on the LUP. Mr. West stated he understands why they are asking for a full service district but he is concern with what precedent this will set for future developments in the area.

Mr. Morrison stated that the reason they are asking for the full service is so they can get the CAMA permit. Mr. Morrison stated this project will be beautiful for Currituck County and they are

also looking at units that will sell. This project will have public access to the sound. They are asking for the density to be 1.9 per unit.

Mr. Keel asked what the square footage will be per unit.

Mr. Morrison stated approximately 1,800 sq. ft.

Mr. West asked what size the parking space would be for the public access to the pier and launch area.

Mr. Myers stated 10-11 spaces which will be your average parking space and it will accommodate a trailer.

Mr. Morrison stated that you could store your boat at the boat house for a fee, which will include once a day your boat be taken out of storage and put in the water. Boat slips will be available to the general public.

Mr. Kovacs asked if another canal will be cut for this project.

Mr. Morrison stated that in 1986 a permit was granted to keep this canal open which was a drainage canal for the property which goes all the way to the river.

Mr. West asked if it will need to be dredged.

Mr. Morrison stated yes.

**ACTION**

Mr. Keel motion to recommend approval with staff recommendations to amend the Currituck County Land Use Plan to designate approximately 40 acres of the Future Land Use map from Conservation Area to Full Service Area. Mr. West seconded the motion. Motion passed unanimously.

## **BOARD OF COMMISSIONERS DISCUSSION – August 18, 2008 Meeting**

*\* Meeting minutes were not completely transcribed at the time of DCM submission*

Ben Woody, Planning Director, reviewed the request.

Chairman Nelms opened the public hearing.

Tim Morrison and Fred Myers, Developer, reviewed their request.

Linda Pasqua, Harbinger, expressed concerns with the additional traffic this request would bring.

Ellen Eddie, opposed the request.

June Rapper, opposes the request and wanted to know if the Board was going to provide the additional fire and EMS. She requested her comments be sent to CAMA.

Judy from Harbinger, expressed concerns with traffic and no EMS or Fire.

Gwenn Cruickshanks, opposes this change to the LUP and the lack of EMS and Fire protection and increase in traffic. She requested her remarks be sent to CAMA.

There being no further comments, Chairman Nelms closed the public hearing.

### **ACTION**

Commissioner Bowden moved to approve with findings of fact. Chairman Nelms seconded the motion. Motion carried with Commissioner Gregory and Etheridge voting no.



## AMENDMENT NARRATIVE (FULL SERVICE AREA)



**Narrative  
Currituck Marina  
Powell's Point, NC  
MSA Project No. 07177**

The baseline purpose of the CAMA is to protect valuable natural heritage assets. These are uniquely valuable, coastal ecosystems. They are complex with regard to habitats and the biota that rely on these areas for survival. This project, Currituck Marina, honors that important commitment, through avoidance, minimization and conservation. It seeks to maintain the assets that make this as such a beautiful area, by developing areas that are upland, while capturing any runoff that could adversely affect the receiving waters.

By using cluster development and smaller footprints, the amount of impervious surface is kept to a minimum. Adjacent properties include single family development and a golf course, which will not be affected by this amendment. In fact, the golf course would be considered an amenity for this project and our project, potential income source for the golf course.

As a Community that targets "Active Adults" and is basically self contained. There would be minimal impact on County resources. There would be no affect on the local school system. While there would be a need to have public utilities, these would be consistent with existing demand. What makes this project truly unique and of public benefit is the opportunity to offer safe harbor to local and transient boaters. It is the intent of the developers to allow the general boating public to use the inland harbor in the event of foul weather. This is an unparalleled opportunity for the intracoastal boater. This change of use for the project and an identified public need truly justifies its approval and its land space to be reclassified.

Reviewing the County's Land Use Plan, indicates that is a conforming use. While there is a development aspect of the proposed project, the conservation component is a significantly larger area. The use of upland areas, translates into the honoring of the AECs to the maximum extent practicable. Additionally, it appears as if this area is designated to be acceptable as a "Full Service Area", under the Guidelines.

This project and project location offer a unique opportunity for public benefit. It is a positive mix of upland and coastal habitat. This applicant is committed to conserving the ecological benefits, while creating a safe harbor for the boating public.

**AMENDMENT APPLICATION (FULL SERVICE AREA)**

Land Use Plan Amendment Chapter 11 Section (s) 3 as follows:

Full service area district  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Property Information (if amending a LUP map)**

Street Address: 291 West Side Lane

Parcel ID Number(s): 0112000003c0000

Deed Reference:                      Book 398    Page 694

Township: Powells Point

**Description of Property (if amending a LUP map)**

Size (in acres): ±123.1 Ac

Size of Area for Amendment ±40 Ac Upland

Street Frontage (feet): 60 ft

Current Zoning District: N/A

Current Land Use of Property: Residential

Surrounding Land Use:            North Fortune Bay Golf Club  
    South Albemarle Sound  
    East Kilmarlic Golf Community  
    West Property of Robert E. Wells &  
    Ronald K. Bennett ("Joyce Christiansen TRACT")

Current Future Land Use map designation: Conservation Area District

Proposed Future Land Use map designation: Full Service Area District

**Pre-application Conference Information**



Date of pre-application conference: April 10, 2008

Applicant/ representative in attendance: Mike Perry, Fred Myers

Planning Department staff in attendance: David Webb

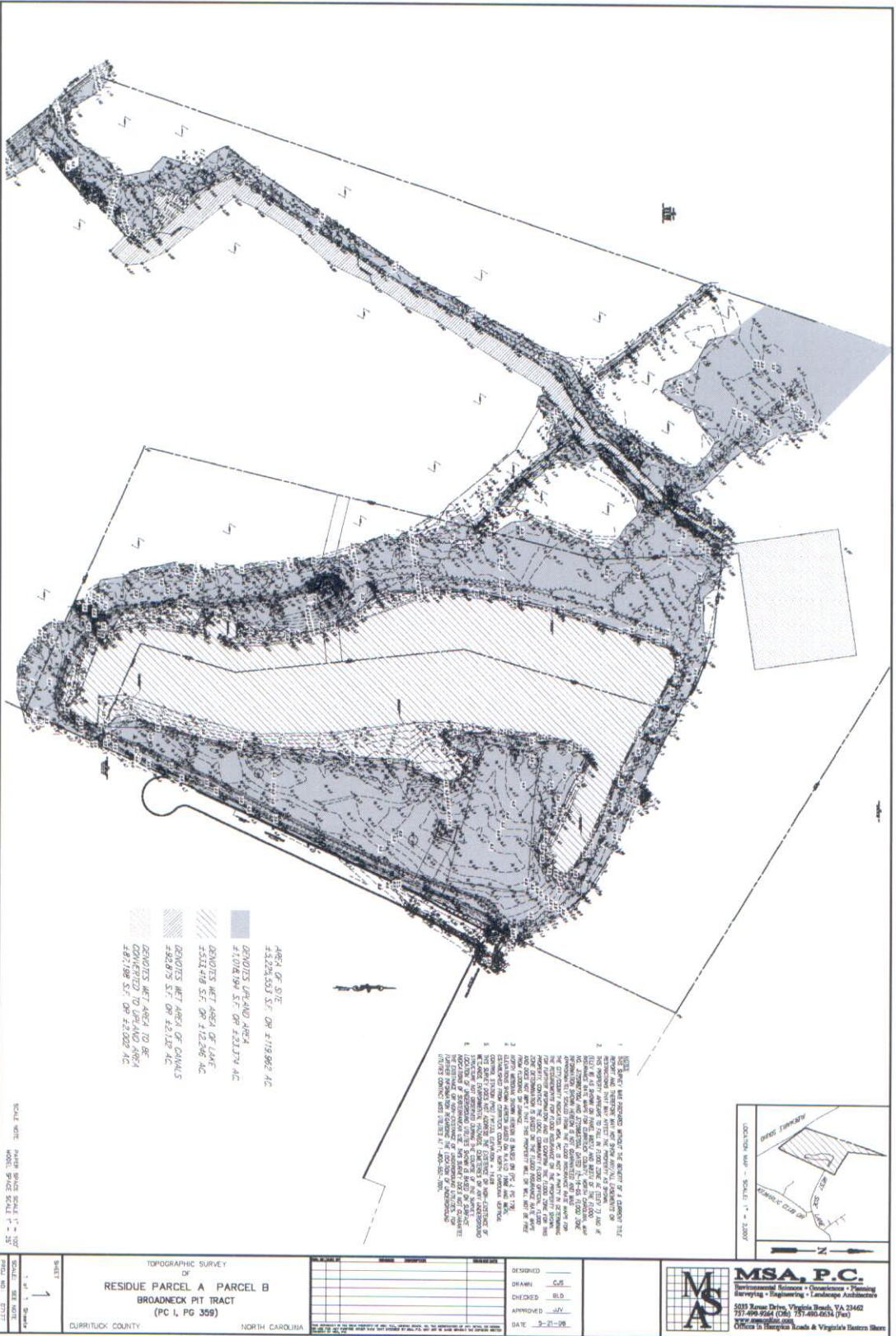
### **Justification**

Please provide sufficient information to explain and justify how the Land Use Plan Amendment request satisfies the following questions. Attach additional sheets if necessary.

1. Will the proposed amendment support uses that are suitable in view of the use and development of adjacent and nearby properties? **Yes.**
2. Will the proposed amendment adversely affect the existing use or usability of adjacent or nearby properties? **No.**
3. Would the proposed amendment support uses that could result in an excessive or burdensome use of existing public facilities such as streets, schools, transportation facilities, or utilities? **No.**
4. How does the proposed amendment conform to the recommendations of the Future Land Use Plan, and any other applicable long range plans? **The Kilmarlic Golf Club property is located to the east of the proposed Currituck Marina project. The land use of Kilmarlic Golf Club was amended from a conservation district to a full-service area district and thus, the Kilmarlic community accommodates single-family homes. This area has illustrated growth on its long range plan. By amending the Land Use Plan for Currituck Marina, this will leave a ±68.51% conservation area district, and a ±19.48% full-service area district within the boundaries of the subject property. (See Section II, Attachment B)**
5. Are there any existing or changing conditions affecting the use or development of the property which justifies either approval or disapproval of the request? **No.**
6. Is there a public need for additional land space to be classified to this request? **Yes, Upland Marina: used for the public as a hurricane evacuation marina.**
7. How does this request relate to the land suitability analysis found in the Land Use Plan? Are there factors that have changed since the suitability analysis was completed? **This area is medium suitability to low suitability with wetlands. (See Section II, Attachment C)**



# PROPERTY SURVEY (FULL SERVICE AREA)



**Subject:** Changing of Currituck's Land use Plan

**From:** "Brenda Kleman" [REDACTED]

**Date:** Tue, 2 Sep 2008 16:36:19 -0400

**To:** <charlan.owens@ncmail.net>

September 2, 2008

To Whom it May Concern,

We are writing to object to a request by the developers of Currituck Marina and the Currituck Board of Commissioners (in a 3-2 vote) to change 40 acres of Currituck County's Land Use Plan from Conservation to Full Service based on the following criteria:

15A NCAC 07B.0702 (d)(3)(B)- Land Use Compatibility- The surrounding land and development is Limited Service and wetlands. It is also adjacent to a designated Significant Heritage Area. We believe a request to change the LUP just to allow additional condominiums will do harm to the fragile wetlands.

15A NCAC 07B.0702 (d)(3)(C)- Infrastructure Carrying Capacity- Lower Currituck, south of Grandy, does not have a usable fire station; nor does it have an ambulance, EMS or any other government support buildings. The proposed development will also feed onto the most heavily traveled section of U.S. Highway 158 due to tourist traffic, and does not have any established feeder roads for residents, nor plans to construct any.

15A NCAC 07B.0702 (d)(3)(E)- Water Quality- Has the potential to severely compromise the already shallow Albemarle Sound because of the need to dredge, and the proposed development is just south of where the county will start dumping its briny discharge from a Reverse Osmosis Plant next year. It is difficult to believe that the dredging, briny discharge and runoff from such a large development will not have a negative impact on the area's ecosystem and water.

Thank you for giving us the opportunity to express our concerns.

Sincerely,

Gary and Brenda Kleman

203 Waterside Drive  
Harbinger, NC 27941  
[REDACTED]

:

**Subject:** Fw: Currituck's request to change 40 acres from Conservation to Full Service

**From:** "Brenda Kleman" [REDACTED]

**Date:** Thu, 21 Aug 2008 16:10:06 -0400

**To:** <charlan.owens@ncmail.net>

Dear Ms. Owens

We are residents of Harbinger who are very concerned with a request made by the developer's of Currituck Marina, and a split decision approval made by the Board of Commissioners, to change 40-acres of Lower Currituck's Land Use Plan from Conservation to Full Service. The property is located in the Kilmarlic Club.

According to the developers' plans, they want to build over 220 condominiums, a "public marina", a boatel and shops on property designated Limited Service and Conservation. A point that seems to have been missed by most Currituck officials is that the developers can build the marina, boatel, shops and 180 condominiums without changing an additional 40-acres from Conservation to Full Service.

There are very few remaining areas in Lower Currituck, especially along the Albemarle Sound that are designated wetlands. This particular property is also adjacent to an identified Significant Heritage Area.

We are concerned that the large development will do harm to the fragile wetlands. We also have concerns that the proposed packaged wastewater systems and run-off could eventually harm the Albemarle.

It was determined that the developers' will need to dredge at least 800 to 1,000 feet due to the Albemarle's shallow waters, and that the site is located just south of where the county's new Reverse Osmosis Plant will start dumping its briny discharge next year.

It is our belief that the Commissioners (in a 3-2 vote) approved the project because of the developers' highlighting the need for a "public marina". However, it should be noted that according to their plans, only 10 public parking spaces will be available. If this gets built the Kilmarlic Subdivision alone, will have over 400 to 500 homes.

In addition, the developers' stated that they will substitute 80 acres of upland Limited Service land for the 40 acres of Conservation. According to CAMA's own criteria; the 40-acres is deemed unsuitable for development.

We also feel that CAMA should not approve the Land Use Plan change because of all the policies that it is in conflict with, including a lack of public services. The proposed property & our residents have a condemned fire station, and the closest ambulance and EMS station is 14 miles away.

Highway 158 from Jarvisburg south to the Wright Memorial Bridge suffers from the most congested tourist traffic in the county. We do not have feeder roads that can be used to get us where we need to go, and all this additional traffic from another large multi-family subdivision will only add a greater stress to the area and its residents..

There is a public pier and boat access 2 miles from this site and no residents can get onto the highway to use it on weekends.

The developers' told the Commissioners at their Aug. 18 meeting, that if CAMA approves the Land Use Plan change, they will ask for a rezoning of the Conservation area to Full Service prior to getting Army Corp. of Engineers and other environmental permits for the marina. Our fear is that if they are denied the marina, it will be just another 220+ condominium project and our wetlands will be gone forever. There is already a great deal of vacant land zoned for housing subdivisions in Lower Currituck.

For all these reasons, which we believe are important, we ask that CRC not allow the LUP change from Conservation to Full Service.

Thank you for your time.

Sincerely,  
Mr. & Mrs. Gary Kleman

203 Waterside Drive  
Harbinger, NC 27941  
[REDACTED]



North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

## MEMORANDUM

CRC-08-38

**To:** The Coastal Resources Commission & Coastal Resources Advisory Council  
**From:** Michael Christenbury, Wilmington District Planner  
**Date:** September 15, 2008  
**Subject:** Carolina Beach Land Use Plan Amendment (September 2008 CRC Mtg.)

The Town of Carolina Beach is requesting CRC Certification of an amendment to the Town of Carolina Beach Land Use Plan's Policy #30, to permit appurtenances of up to 10 feet above the height limits for Hotels.

**Recommendation:** That the CRAC recommend to the CRC the denial of the Town of Carolina Beach amendment request based on the determination that the Town has failed to meet the public notice requirements of G.S. 113A-110(e) and (f) as well as '15A NCAC 07B.0801(a)', not less than 30 days prior to the CRAC meeting; and,

That the Town be directed to re-notice and re-consider adoption of the proposed amendment to include the required disclosure of .0802(b)(3), that the public has the opportunity to provide written comment following the local adoption of the Land Use Plan amendment no less than 15 business days prior to next scheduled CRAC/CRC meeting.

**Overview:** The Town of Carolina Beach is located on Pleasure Island in southern New Hanover County, located to the north of Kure Beach and to the south of the City of Wilmington.

The Town of Carolina Beach 2007 Land Use Plan was certified by the CRC on November 30, 2007. On August 22, 2008, the Town of Carolina Beach amended the 2007 Carolina Beach Land Use Plan to include the following to policy statement # 30 (subsection # 4 added in italics, bold and underlined) that would only be applicable to areas designated Commercial 2, on the Town's Future Land Use & Classification Map for Hotels:

Policy # 30: Building Height shall be defined as that distance measured from the highest appurtenance on the structure to:

1. The front street line.
2. The nearest front street line where there is not an adjacent right-of-way.
3. An average of each front street line on through lots.
4. **Hotels - appurtenances ten (10) feet or less in height shall be exempted from the height measurement.**

127 Cardinal Drive Ext., Wilmington, North Carolina 28405  
Phone: 910-796-7426 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

The Carolina Beach Town Council adopted the amendment by a 3 – 1 vote at their August 22, 2008 meeting. At the hearing, three (3) individuals spoke in opposition to this amendment, and one (1) written objection was submitted to DCM. Attachment A provides the letter submitted by the Attorney for Carolina Beach PACE, W. Dan Bell.

The written objection submitted stated that the public notice published in the July 23, 2008 edition of the *Island Gazette* did not meet requirements per '15A NCAC 07B.0801(a) Public Hearing and Local Adoption Requirements'. Specifically, the public notice omitted the disclosure of the public opportunity to provide written comment following local adoption of the plan as noted per 07B.0802(b)(3). It was further noted that the notice in Attachment 1 was the only public notice that was published not less than 30 days prior to the public hearing as required in 07B.0801. Attachment 1, provides a copy of the notice.

DCM staff agrees that the notice is deficient and communicated the same to the Town with the recommendation that the request be withdrawn and resubmitted following re-notice and decision as required. It was noted that if that approach was pursued, it was possible for the Town to meet the deadlines to meet the November CRC meeting in Morehead City.

The Town has chosen to both move forward with this request before the CRAC and at the same time re-notice a hearing that would make it possible to return at the November CRAC/CRC meeting.

**BASIS FOR DETERMINATION:** State rules must be used in conjunction with each other. The CAMA Act per G.S.113A-110 (e) requires a notice of a local public hearing not less than 30 days before the local hearing:

**§ 113A-110. Land-use plans.**

- (e) Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption (whether the county or the Commission or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations. Notice of the hearing shall be given not less than 30 days before the date of the hearing and shall state the date, time, and place of the hearing; the subject of the hearing; the action which is proposed; and that copies of the proposed plan or amendment are available for public inspection at a designated office in the county courthouse during designated hours. Any such notice shall be published at least once in a newspaper of general circulation in the county.

Further the CRC has adopted 15A NCAC 07B.0801 (a), PUBLIC HEARING AND LOCAL ADOPTION REQUIREMENTS, that states:

- (a) Public Hearing Requirements. The local government shall provide documentation to DCM that it has followed the process required in G.S. 113A-110; and such notice shall include per .0802(b)(3), the disclosure of the public opportunity to provide written comment following local adoption of the Land Use Plan.

(See Attachment B for a complete copy of section .0800.)

As cited .0801(a) cross-references the sub-section below regarding the public disclosure requirements: (See Attachment B for a complete copy of section .0800.)

**15A NCAC 07B.0802(b)(3) PRESENTATION TO COASTAL RESOURCES  
COMMISSION FOR CERTIFICATION.**

- (3) The public shall have an opportunity to submit written objections, comments, or statements of support prior to action by the committee designated by the CRC. Written objections shall be received by DCM no less than 15 business days prior to the next scheduled CAMA Land Use Plan review meeting and shall be limited to the criteria for CRC certification as defined in Subparagraph (c)(3) of this Rule. Written objections shall identify the specific plan elements that are opposed. A copy of any objections shall be sent by the DCM to the local government submitting the CAMA Land Use Plan.

The above section in .0802 was adopted to specifically address the CAMA Act requirement found in G.S. 113A-110 as follows:

- (f) No land-use plan shall become finally effective until it has been approved by the Commission. The county or other unit adopting the plan shall transmit it, when adopted, to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the plan, and shall review and consider each county land-use plan in light of such objections and comments, the State guidelines, the requirements of this Article, and any generally applicable standards of review adopted by rule of the Commission. Within 45 days after receipt of a county land-use plan the Commission shall either approve the plan or notify the county of the specific changes which must be made in order for it to be approved. Following such changes, the plan may be resubmitted in the same manner as the original plan.

Amendments to CAMA Land Use Plan are provided for in 07B .0900. Attachment C provides a copy of Section .0900. No mention of local hearing requirements are provided in .0900, the rules rely on .0801(a) for local hearing requirements.

**DISCUSSION:**

Objection Letter: The objection letter submitted by Attorney, Dan Bell was hand delivered to Mr. Christenbury late Thursday, September 4, 2008 which was only fourteen (14) business days prior to the CRAC meeting. Though technically shy a day it is still provided in Attachment A. The single substantive objection, in DCM staff's view is the July 22<sup>nd</sup> public notice not being consistent with the state's rules.

Town's Response to Issue: The correspondence in Attachment D, by Mr. Ferguson (Planning Director) and Steve Goggins, (Town Attorney) email is provided in Attachment F, each making arguments that the Town relied on section .0900 pertaining to amendments (see Attachment C) and that the disclosure requirement was both not specifically required or applicable. Their correspondence implies that 7B .0900 is separate and distinct from .0800 or the cited 113A-110(e). The Town believes it has

exceeded the state's public notice requirements including having provided the public with disclosure statements, though not in the first, but in numerous subsequent notices.

DCM recognizes that the Town of Carolina Beach did advertise five (5) additional times (which was not required) in order to notify the public of the scheduled hearing, and in fact these subsequent notices did include language consistent with state rules, to include the disclosure of the public opportunity to provide written comment following the local adoption (See Attachment 2#).

None of these additional notices were published in time to meet the specific requirements of *not less than 30 days* prior to the public hearing consistent with G.S. 113A-110(e) and 07B .0801(a)

DCM staff does not accept the argument that 7B.0900 can be viewed and used as a stand-alone section for amendments to local Land Use Plan's. Other 7B sections, most notably ' .0700 CAMA Land Use Planning Requirements' and ' .0800 CAMA Land Use Plan Review and Certification', must be used and considered in concert when determining whether the local plan or amendment has met the state's rules, whether content, processing or public notice.

**SUMMATION:** As noted earlier in the memo DCM staff recommended to the Town that the request be withdrawn and resubmitted following re-notice and decision as required.

The Town has chosen to both move forward with this request before the CRAC and at the same time re-notice a hearing that would make it possible to return at the next November CRAC/CRC meeting in Morehead City.

## **ATTACHMENTS**

A: Objection Letter by Dan Bell hand delivered on September 4, 2008

1: Town of Carolina Beach July 23, 2008 PH notice

2: Other PH Notices

3: Town of Carolina Beach Resolution 08-926

B: 15A NCAC 07B .0800 CAMA Land Use Plan Review and CRC Certification

C: 15A NCAC 07B .0900 CAMA Land Use Plan Amendments

D: Town of Carolina Beach's Comments

E: Town's Power Point Presentation

F: TCB Attorney Steve Coggin's email

**Bell Law Office PC  
W. Dan Bell  
Mailing Address: PO Box 136  
206 K Avenue, Ste. 205  
Kure Beach NC 28449  
910/458-4370 Fax 910/458-4309  
email [lawbell@juno.com](mailto:lawbell@juno.com)**

RECEIVED  
DCM WILMINGTON, NC

SEP 04 2008

September 4, 2008

HAND DELIVERED

Michael Christenbury  
NC Division of Coastal Management  
127 Cardinal Drive Ext.  
Wilmington NC 28505

RE: Proposed Amendment to Carolina Beach Land Use Plan

Dear Mr. Christenbury:

Pursuant to 15A NCAC 07B .0802(b)(3) and on behalf of my client Carolina Beach PACE I am submitting objections to the proposed amendment to Policy #30. These objections apply specifically to the entire amendment which adds the following provision:

Policy #30 ....

\*

\*

\*

4. hotels – appurtenances ten (10) feet or less in height shall be exempted from the height measurement.

## HISTORY

The Carolina Beach Land Use Plan (“LUP”) was approved by the Town on October 23, 2007, and by the Coastal Resource Commission (“CRC”) on November 30, 2007. A hotel developer known as The Hilton requested that the LUP be amended to allow for appurtenances which extend above the 115’ height limit. Carolina Beach Town Council (“Council”) set a public hearing on the proposed amendment for August 22, 2008. The published notice which appeared on July 23, 2007, is attached hereto as Exhibit A. The Town’s altered notice which was published on July 30 and August 6, 13, and 20 is attached as Exhibit B. These notices are verified in an August 5 memo from Ed Parvin, senior planner, to the Mayor, Council and the Planning and Zoning Commission (“P&Z”) which is attached as Exhibit c.

At this public hearing the Coouncil approved by a 3 to 1 vote a Resolution approving the amendment which is attached as Exhibit d. This Resolution was sent to CRC which placed the amendment on its agenda for its September 24-26 meeting.

**ATTACHMENT A**



## **GROUNDNS FOR OBJECTIONS**

### **1. The July 23 published notice of the August 22 hearing was not consistent with the Rules of the CRC.**

First, in order to legally notify the public of the required public hearing on the proposed amendment, 15A NCAC 07B.0801(a) requires the local government to adhere to G. S. 113A-110(e) by, not less than 30 days before the hearing, placing a notice in a newspaper of general circulation in the county. Exhibit A is the only notice which met that time deadline.

This statute requires the notice to state, among other things, “the subject of the hearing.” This was not done. Paragraph 1 of that notice reads: “Amending the 2007 CAMA Land Use Plan to consider modifying the limitations to building height in the Commercial 2 Land Use Classification Area”

This paragraph plainly states that this LUP amendment would result in consideration of modifications to the building height. It says “consider”. It doesn’t say “change.” It doesn’t say if the height will be increased or decreased. It doesn’t say that the increased height will be for appurtenances. These factors are essential parts of the actual proposed amendment. They were omitted from the only timely notice. Therefore, the notice is invalid and inconsistent with the Rules of the CRC.

Second, 15A NCAC 07B.0801(a) requires a valid notice to include the provisions of .0802(b)(3) relating to the right to provide written objections. This Rule provides, among other things, that objections “...are limited to the criteria for CRC certification as defined in Subparagraph (c)(3) of this Rule” and that the “written objections shall identify the specific plan elements that are opposed.”

Neither of these provisions was included in Exhibit A or in any of the subsequent notices. This made the notices incomplete, ineffective, misleading and inconsistent with CRC Rules. A citizen following the instructions of the notice would have filed an invalid objection. Surely, the CRC did not include these very specific provisions in its Rule only to have them ignored. Surely, the CRC does not want to concede that they have no meaning. Surely, it is no burden on a local government to include these provisions in its notice.

In summary, the required the Town’s notice for the August 22 hearing was inconsistent with the Rules of the CRC and the amendment must not be certified.

### **2. The resolution was adopted in violation of State law.**

The notice for the August 22 meeting stated that the public hearing was the only business to be conducted. The public had no notice that Council intended to vote on a Resolution. There is no provision in G.S. 160A-81 for voting at a public hearing.

If the vote on the Resolution was taken after the public hearing was officially closed, then the vote at an illegal special meeting of Council. G.S. 160A.71 requires special meetings to be properly and publicly noticed and it limits the business conducted at the special meeting to agenda items.

If the vote on the resolution at the August 22 meeting was taken before the public hearing was closed, it was an action on a non-agenda item. It would be contrary to the

spirit of the law to sanction an action at a public hearing which could not be taken at a Council meeting.

The vote on the resolution violated state law, invalidating the resolution and making certification of the amendment improper.

**3. The Resolution does not contain findings which demonstrate that policy statements and the Future Land Use Plan Map have been evaluated as is required by 15A NCAC 07B.0802(c)(3)(E).**

The Resolution contains not a single finding. The Resolution only parrots the language of the Rule. If this is what the Rule intended, this is all the Rule would have required.

Webster defines "finding" as "the result of an investigation". For example, the Town could have included language stating the results of an investigation to determine if the increased height conflicted with the future characteristics of Commercial 2 found on Page 95 of the LUP. There are many other possible examples.

The fact is that the Resolution completely disregards this Rule. Therefore, the certification must be denied.

**4. The passage of the Resolution ratified a procedure which was rife with internal inconsistencies.**

Part 1, Section 1.5 of the LUP is entitled "Public Involvement." This section requires public involvement at every stage of the process. This simply did not occur. The notice of the public hearing on the amendment actually gives notice that the Council will approve it and that it will be sent to CRC. Not only is this arrogant, it also completely disregards the LUP requirement of public participation.

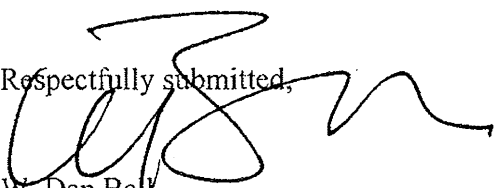
In fact this amendment was not intended for public debate. In fact, it was a special amendment to serve the needs of a private developer.

This mocks the LUP which was designed by the public and intended to be revised by the public. If sanctioned by the CRC, my clients are gravely concerned that this will set a precedent, and that the LUP will no longer be a document of the people, but will become a document for special interests.

## CONCLUSION

For all of the above reason, I respectfully respect that you deny certification to this proposed amendment.

Respectfully submitted,



W. Dan Bell

Attorney for Carolina Beach PACE  
Bell Law Office PC  
PO Box 136  
205 K Avenue, Ste 205  
Kure Beach NC 28449  
State Bar 26946

ATTACHMENT #1

JULY 23, 2007 advertisement

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*NOTICE OF PUBLIC HEARING TO AMEND THE TOWN OF CAROLINA BEACH 2007 COASTAL AREA MANAGEMENT ACT (CAMA) LAND USE PLAN*

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The Town of Carolina Beach will hold a public hearing on August 22, 2008 at 6:00p.m. or soon thereafter in the Town Administration Building at 1121 North Lake Park Blvd. in Carolina Beach. The Town Council will consider the following:

1. Amending the 2007 CAMA Land Use Plan to consider modifying the limitations to building height in the Commercial 2 Land Use Classification Area; and/or
2. Amending the Zoning Ordinance, Section 3.9.1 to limit the maximum height of commercial buildings to 115 feet excluding appurtenances in the central business district (CBD) zoning district.

A copy of the amendment can be viewed at Town Hall and/or at the New Hanover County Courthouse during normal work hours.

Questions and/or comments on the 2007 CAMA Land Use Plan amendment can be directed to Gary Ferguson, Director of Planning & Development at (910) 458-2986 or Ed Parvin, Senior Planner at (910) 458-2526.

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Ex A

ATTACHMENT #2

July 30, 2008; August 06, 2008; August 13, 2008; and August 20, 2008

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*NOTICE OF PUBLIC HEARING TO AMEND THE TOWN OF CAROLINA BEACH 2007 COASTAL AREA MANAGEMENT ACT (CAMA) LAND USE PLAN*

---

The Town of Carolina Beach will hold a public hearing on August 22, 2008 at 6:00p.m. or soon thereafter in the Town Administration Building at 1121 North Lake Park Blvd. in Carolina Beach. The Town Council will consider the following:

**Land Use Plan Amendment** – Consider amending the 2007 CAMA Land Use Plan to modify the limitations to building height in the Commercial 2 Land Use Classification Area by specifically amending Policy #30 to add Item #4 as shown below.

Policy #30: Building Height shall be defined as that distance measured from the highest appurtenance on the structure to:

- i. The front street line.
- ii. The nearest front street line where there is not an adjacent right-of-way.
- iii. An average of each front street line on through lots.
- iv. Hotels – appurtenances ten (10) feet or less in height shall be exempted from the height measurement.

A copy of the amendment can be viewed at Town Hall (1121 N. Lake Park Blvd, Carolina Beach, NC 28428) and/or at the New Hanover County Courthouse (Office of the Wilmington/Cape Fear Coast Convention and Visitors Bureau, 24 N. 3<sup>rd</sup> Street, Room 201, Wilmington, NC 28401) during normal work hours.

The Town of Carolina Beach invites your comments to this important Land Use Plan Amendment. **Again, the Town will consider this issue on August 22, 2008 at 6:00p.m. at the Town Administration Building.**

Once adopted, the amendment will be submitted to the Coastal Resources Commission (CRC) for Certification. Written objections, comments or statements of support shall be submitted to the NC Division of Coastal Management District Planner, Michael Christenbury, 127 Cardinal Drive Ext., Wilmington, NC 28405. Written comments must be received no less than 15 business days prior to the September 24<sup>th</sup>-26<sup>th</sup> CRC meeting at which time the amendment is scheduled to be considered for Certification. Copies of the amendment are available for review and may be checked out for a 24-hour period at the Carolina Beach Town Hall during normal business hours. The public is encouraged to review the amendment.

For questions or additional information on this Land Use Plan amendment, please contact Gary Ferguson, Director of Planning & Development at 1121 N. Lake Park Blvd, Carolina Beach, NC 28428, by phone at 910-458-2986, or by email at [gary.ferguson@carolinabeach.org](mailto:gary.ferguson@carolinabeach.org).

Ex B



**RESOLUTION IN SUPPORT OF THE AMENDMENT OF THE 2007 TOWN OF CAROLINA BEACH CAMA LAND USE PLAN**

**WHEREAS**, the Town of Carolina Beach has met the intent and requirements as set forth in the North Carolina General Statutes and the North Carolina Administrative Code, and

**WHEREAS**, the Town Council certifies that the Town has followed the process as required in GS 113A-110 and notices as referred to in 15A NCAC 07B.0802 (b)(3), and

**WHEREAS**, the Town Council hereby finds that the amended policy statement has been evaluated with other existing policies and the Future Land Use Plan Map, and it has been determined that no internal inconsistencies exist,

**NOW, THEREFORE BE IT RESOLVED, THAT** the Town Council of the Town of Carolina Beach hereby adopts this amendment as reviewed for public hearing on August 22, 2008 and hereby requests that the amendment and it's supporting documentation be sent forward to the Coastal Resources Commission for their review at the September 24-26, 2008 Commission meeting.

POLICY 30 AMENDED TO ADD ITEM #4 AS SHOWN BELOW:

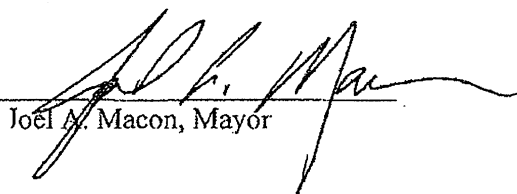
Policy #30: Building Height shall be defined as that distance measured from the highest appurtenance on the structure to:

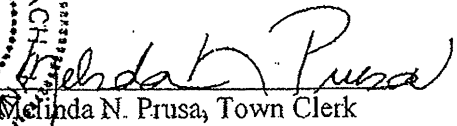
1. The front street line.
2. The nearest front street line where there is not an adjacent right-of-way.
3. An average of each front street line on through lots.
4. Hotels – appurtenances ten (10) feet or less in height shall be exempted from the height measurement.

Approved by a vote of 3 in favor and 1 opposed on this 22<sup>nd</sup> day of August, 2008.



Signed by:

  
Joel A. Macon, Mayor

  
Melinda N. Prusa, Town Clerk

Ex C

## SECTION .0800 – CAMA LAND USE PLAN REVIEW AND CRC CERTIFICATION

### 15A NCAC 07B .0801 PUBLIC HEARING AND LOCAL ADOPTION REQUIREMENTS

- (a) Public Hearing Requirements. The local government shall provide documentation to DCM that it has followed the process required in G.S. 113A-110; and such notice shall include per .0802(b)(3), the disclosure of the public opportunity to provide written comment following local adoption of the Land Use Plan.
- (b) Final Plan Content. The final decision on local policies and all contents of the CAMA Land Use Plan consistent with the CAMA land use planning rules shall be made by the elected body of each participating local government.
- (c) Transmittal to the CRC. The local government shall provide the Executive Secretary of the CRC with as many copies of the locally adopted land use plan as the Executive Secretary requests, and a certified statement of the local government adoption action no earlier than 45 days and no later than 30 days prior to the next CRC meeting. If the local government fails to submit the requested copies of the locally adopted land use plan and certified statement to the Executive Secretary within the specified timeframe, the local government may resubmit documents within the specified timeframe for consideration at the following CRC meeting.

*History Note: Authority G.S. 113A-107(a); 113A-110; 113A-124;  
Eff. August 1, 2002.  
Amended Eff. January 1, 2007; February 1, 2006*

### 15A NCAC 07B .0802 PRESENTATION TO COASTAL RESOURCES COMMISSION FOR CERTIFICATION

- (a) Re-Certification: If the CRC adopts new CAMA Land Use Plan rules, plans shall be updated within six years of the effective date of the new rules. If a scoping process is held, a summary shall be provided to the CRC along with the request for re-certification of the existing CAMA Land Use Plan.
- (b) Committee Designated by CRC to Review Local Land Use Plans:
- (1) The appropriate DCM District Planner shall submit a written report to the committee designated by the CRC as to the type of plan being presented, highlight any unique characteristics of the plan, identify any land use conflicts with adjacent planning jurisdictions or other state/federal agencies, identify any inaccuracy or inconsistency of items in the plan, and recommend certification, conditional certification, or non-certification.
  - (2) The local government shall submit its draft Land Use Plan to the committee designated by the CRC.
  - (3) The public shall have an opportunity to submit written objections, comments, or statements of support prior to action by the committee designated by the CRC. Written objections shall be received by DCM no less than 15 business days prior to the next scheduled CAMA Land Use Plan review meeting and shall be limited to the criteria for CRC certification as defined in Subparagraph (c)(3) of this Rule. Written objections shall identify the specific plan elements that are opposed. A copy of any objections shall be sent by the DCM to the local government submitting the CAMA Land Use Plan.
  - (4) The local government may withdraw the submitted CAMA Land Use Plan from CRC consideration at any time before review.
- (c) CRC Certification:
- (1) The CRC shall certify the CAMA Land Use Plan following the procedures and conditions specified in this Rule.
  - (2) Provided the locally adopted land use plan has been received by the Executive Secretary no earlier than 45 days and no later than 30 days prior to the next CRC meeting, the CRC shall certify, conditionally certify or not certify the plan at that meeting or mutually agreed upon date. If the CRC fails to take action as specified above the plan shall be certified.
  - (3) The CRC shall certify plans which:
    - (A) are consistent with the current federally approved North Carolina Coastal Management Program;
    - (B) are consistent with the Rules of the CRC;
    - (C) do not violate state or federal law;
    - (D) contain policies that address each Management Topic. If a local government cannot meet any CAMA Land Use Plan requirement contained within Paragraphs (d) and (e) of 15A NCAC 07B .0702 the plan shall include a description of the analysis that was undertaken, explain the reason(s) the requirement could not be met, and the local government's alternative

plan of action to address the CAMA Land Use Plan requirements. If such description(s) are not included in the plan, it shall not be certified; and

- (E) contain a local resolution of adoption that includes findings which demonstrate that policy statements and the Future Land Use Plan Map (FLUP) have been evaluated, and determine that no internal inconsistencies exist.

(d) Non- Certification: If the plan is not certified the CRC shall within 30 days inform the local government as to how the plan might be changed so certification can be granted. Until the plan is certified, the pre-existing certified CAMA Land Use Plan shall remain in effect.

(e) Conditional Certification: If the plan is conditionally certified, the CRC shall within 30 days provide the local government with condition(s) that shall be met for certification. Until the condition(s) is met on a conditionally certified plan, the pre-existing certified CAMA Land Use Plan shall remain in effect. When the local government complies with all conditions for a conditionally certified plan, as determined by the Executive Secretary of the CRC, plan certification is automatic with no further action needed by the CRC.

*History Note: Authority G.S. 113A-107(a); 113A-110; 113-111; 113A-124;  
Eff. August 1, 2002.  
Amended Eff. April 1, 2008; September 1, 2008.*



SECTION .0900 – CAMA LAND USE PLAN AMENDMENTS

15A NCAC 07B .0901 CAMA LAND USE PLAN AMENDMENTS

(a) Normal Amendment Process:

- (1) The CAMA Land Use Plan may be amended and only the amended portions submitted for CRC. If the local government amends half or more of the policies of the CAMA Land Use Plan, a new locally adopted plan shall be submitted to the CRC.
- (2) The local government proposing an amendment to its CAMA Land Use Plan shall provide to the Executive Secretary of the CRC or her/his designee written notice of the public hearing, a copy of the proposed amendment (including text and maps as applicable), and the reasons for the amendment no less than 30 days prior to the public hearing. After the public hearing, the local government shall provide the Executive Secretary or her/his designee with a copy of the locally adopted amendment no earlier than 45 days and no later than 30 days prior to the next CRC meeting for CRC certification. If the local government fails to submit the requested documents as specified above to the Executive Secretary within the specified timeframe, the local government shall be able to resubmit the documents within the specified timeframe for consideration at the following CRC meeting.
- (3) For joint plans, originally adopted by each participating jurisdiction, each government shall retain its sole and independent authority to make amendments to the plan as it affects their jurisdiction.
- (4) CRC review and action on CAMA Land Use Plan amendments shall be in the same manner as provided in 15A NCAC 07B .0802 (b), (c), (d) and (e), except amendments to Land Use Plans which were certified prior to August 1, 2002 are exempt from subsection .0802(c)(3)(D)
- (5) The local resolution of adoption shall include findings which demonstrate that amendments to policy statements or to the Future Land Use Plan Map (FLUP) have been evaluated for their consistency with other existing policies.

(b) Delegation of CRC Certification of Amendments to the Executive Secretary:

- (1) A local government that desires to have the Executive Secretary instead of the CRC certify a CAMA Land Use Plan amendment shall first meet the requirements in Subparagraphs (a)(1) through (3) of this Rule and the following criteria defined in Parts (b)(1)(A) through (D) of this Rule. The local government may then request the Executive Secretary to certify the amendment. The Executive Secretary shall make a determination that all criteria have been met, and mail notification to the local government and CRC members, no later than two weeks after receipt of the request for certification. The CRC's delegation to the Executive Secretary of the authority to certify proposed amendments is limited to amendments that meet the following criteria:
  - (A) Minor changes in policy statements or objectives for the purpose of clarification of intent; or
  - (B) Modification of any map that does not impose new land use categories in areas least suitable for development as shown on the Land Suitability Map; or
  - (C) New data compilations and associated statistical adjustments that do not suggest policy revisions; or
  - (D) More detailed identification of existing land uses or additional maps of existing or natural conditions that do not affect any policies in the CAMA Land Use Plan.
- (2) If the Executive Secretary certifies the amendment, the amendment shall become final upon certification of the Executive Secretary, and is not subject to further CRC review described in 15A NCAC 07B .0802 (Presentation to CRC for Certification).
- (3) If the Executive Secretary denies certification of the amendment, the local government shall submit its amendment for review by the CRC in accordance with the regular plan certification process in 15A NCAC 07B .0802 (Presentation to CRC for Certification).

(c) Any amendments to the text or maps of the CAMA Land Use Plan shall be incorporated in context in all available copies of the plan and shall be dated to indicate the dates of local adoption and CRC certification. The amended CAMA Land Use Plan shall be maintained as required by G.S. 113A-110(g).

(d) Within 90 days after certification of a CAMA Land Use Plan amendment, the local government shall provide one copy of the amendment to each jurisdiction with which it shares a common border, and to the regional planning entity.

(e) A local government that receives Sustainable Community funding from the Department pursuant to 15A NCAC 07L shall formulate and submit to the CRC for certification a CAMA Land Use Plan Addendum during its first year as a Sustainable Community, and if new planning rules have been adopted by the CRC, shall update the CAMA Land Use Plan within six years of adoption of these new planning rules.

*History Note: Authority G.S. 113A-107(a); 113A-110; 113A-124;  
Eff. August 1, 2002.  
Amended Eff. February 1, 2006.*

Joel Macon  
*Mayor*

Alan Gilbert  
*Councilman*

Jerry Johnson  
*Councilman*



Dan Wilcox  
*Mayor Pro Tem*

Pat Efird  
*Councilwoman*

Timothy Owens  
*Town Manager*

TOWN OF CAROLINA BEACH  
1121 N. Lake Park Boulevard  
Carolina Beach, North Carolina 28428  
910 458 2526  
FAX 910 458 2997

September 12, 2008

Mr. John Thayer  
N.C. Division of Coastal Management  
400 Commerce Ave .  
Morehead City, NC 28557

Dear Mr. Thayer,

As you are aware the Town of Carolina Beach has serious objections to the Division of Coastal Management (DCM) Staff position that our noticing requirements for amending our 2007 CAMA Land Use Plan (LUP) failed to meet the provisions of 15A NCAC 07B .0901. In support of our position please find our Town attorneys opinion that was emailed to you on September 8, 2008 and also a brief power point presentation that we wish to make available to the CRAC members at your next meeting in Sunset Beach on September 25-26 2008.

In summary our issues can be confined to the following points relative to your position that we have failed to meet the noticing requirements for LUP amendments.

1. Town Staff relied on the noticing provisions as outlined in Section .0900 and entitled "CAMA Land Use Plan Amendments". More specifically Section 07B .0901 (a)(4) gives the reader of this rule clear direction concerning exactly what DCM wishes such notice to include. Item (a)(4) clearly states "CRC review and action on CAMA Land Use Plan amendments shall be in the same manner as provided in 15A NCAC07B .0802 (b), (c), (d) and (e), except amendments to Land Use Plans which were certified prior to August 1, 2002 are exempt from subsection .0802(c)(3)(D).
2. It is my understanding that DCM staff agrees that the Town of Carolina Beach has met the requirements of 15A NCAC 0B .0802 (b), (c), (d) and (e). This provision is entitled "Presentation to Coastal Resources Commission for Certification".
3. What DCM Staff is objecting to is that the Town has failed to meet, in its first of eight (8) notices of our LUP amendment, the provisions found in Section .0800 which is entitled CAMA Land Use Plan Review and CRC Certification. More specifically, DCM Staff is saying the

**ATTACHMENT D**

provision found in 15A NCAC 07B.0801 (a) were not provide in our first notice advertising a public hearing in that we have failed to adhere to the final part of this provision which states, “; and such notice shall include per .0802 (b)(3), the disclosure of the public opportunity to provide written comment following local adoption of the Land Use Plan”.

4. Clearly the provisions of .0800 are designed in part, to address the noticing requirements of new Land Use Plans and not newly adopted and certified LUP's that are now undergoing an amendment. This seems clear because of the direction the authors of this rule provided in Section .0901 to local governments when it says in item number (4), “amendments shall be in the same manner as provided in 15A NCAC 07B .0802 (b), (c), (d) and (e)”. Nowhere in this amendment language is there any reference for the reader to be made aware that they must also follow the requirements of 07B .0801(a). In other words, the noticing requirements gives the reader very exact and specific direction for Land Use Plan amendments but fails to tell the reader that they must also follow disclosure provisions located in another part of the 7B rules. Why does DCM not provide guidance that local governments must also follow 07B .0801 (a) when they give explicit reference and direction to many other items in this rule for noticing?? In our opinion, this is an oversight on DCM's part by not including the correct reference to the required provisions yet we must live with the consequence of a delayed action by the CRC.

Although it should be noted that the Town has far exceeded the minimum advertising requirements for this proposed amendment which was locally adopted through a public hearing process at which only three (3) individuals spoke in opposition, DCM appears adamant in delaying this certification due to an omission of a reference to this newly crafted rule. The reference of course, should clearly direct the reader to 7B.0801 and it clearly does not.

Lastly, and from a rational planning point of view concerning the disclosure statement that must be included in the notice of the initial LUP amendment, why does DCM require such a statement prior to local government acting on such an amendment? Said amendment may or may not be adopted locally yet DCM is mandating that such an advertisement include language directing those who may object to send objection letters to the regional DCM planner. Are you not putting the cart before the horse? In closing, Carolina Beach only wishes that the CRAC and CRC read the literal wording and the direction given to the reader in these provisions and consider certifying this proposed Land Use Plan amendment.

Gary Ferguson, AICP  
Planning Director

# Carolina Beach Land Use Plan Amendment

Coastal Resources Commission  
September 24-26, 2008

## Advertising and Notification Process

# Advertisement Requirements

## **SECTION .0900 – CAMA LAND USE PLAN AMENDMENTS**

15A NCAC 07B .0901 (a)(2) The local government proposing an amendment to its CAMA Land Use Plan shall provide to the Executive Secretary of the CRC or her/his designee

- (1) written notice of the public hearing,**
- (2) a copy of the proposed amendment (including text and maps as applicable), and the**
- (3) reasons for the amendment no less than 30 days prior to the public hearing.**

July 23, 2008 original advertisement meets the guidelines for a CAMA LAND USE PLAN AMENDMENT as described in SECTION .0900

HEARING REQUIREMENTS FROM 15A NCAC 07B. 0901 CAMA LAND USE PLAN AMENDMENTS:

**"(1) written notice of the public hearing, (2) a copy of the proposed amendment (including text and maps as applicable), and the (3) reasons for the amendment no less than 30 days prior to the public hearing."**

Language included in the July 23 ad:

- (1)** The Town of Carolina Beach will hold a public hearing on August 22, 2008 at 6:00p.m. or soon thereafter in the Town Administration Building at 1121 North Lake Park Blvd. in Carolina Beach. The Town Council will consider the following: Amending the 2007 CAMA Land Use Plan to **(3)** consider modifying the limitations to building height in the Commercial 2 Land Use Classification Area;
- (2)** A copy of the amendment can be viewed at Town Hall and/or at the New Hanover County Courthouse during normal work hours.

*\*note: Along with advertising and notices posted, this amendment was provided to Mike Christenbury 30 days prior to our public hearing as required by 15A NCAC 07B .0901.*

# CROSS REFERENCES FROM 0900 CAMA LAND USE PLAN AMENDMENTS

15A NCAC 07B .0802 (b), (c), (d) and (e).

0802 (b), (c), (d), and (e) explains the CRC certification process for presentation and approval of land use plans and amendments. No additional local government requirements are addressed in these sections, although 0802 (b) was addressed in the following notices and advertisements:

Notices posted on July 23, 2008: Town Hall, New Hanover County Courthouse, Carolina Beach Parks and Recreation Center, Carolina Beach Library, and the Carolina Beach Senior Center

6 Island Gazette advertisements

- July 30, 2008
- August 27, 2008
- August 06, 2008
- September 3, 2008
- August 13, 2008
- September 10, 2008

1 Star News advertisement

- July 26, 2008

OUR NOTICE GAVE THE PUBLIC 38 DAYS TO SEND COMMENTS TO DCM

## Advertising for the August 22, 2008 meeting

- 8 total advertisements were completed for the Land Use Plan Amendments
- Notices posted on July 23, 2008 in 5 locations
  - (1) Town Hall, (2) New Hanover County Courthouse, (3) Carolina Beach Parks and Recreation Center, (4) Carolina Beach Library, and (5) the Carolina Beach Senior Center

## SECTION .0800 CAMA LAND USE PLAN REVIEW AND CRC CERTIFICATION

- This section lays out the adoption requirements for a CAMA Land Use Plan.
- Amendments are not addressed in this section
- There are no cross references from .0900 CAMA LAND USE PLAN AMENDMENTS to 0801 PUBLIC HEARING AND LOCAL ADOPTION REQUIREMENTS

## REVIEW OF THE LUP AMENDMENT

## Current Policy #30

- Building height shall be defined as that distance measured from the highest appurtenance on the structure to:

- The front street line

- The nearest front street line where there is not an adjacent right-of-way

- An average of each front street line on through lots

## Current Policy #32

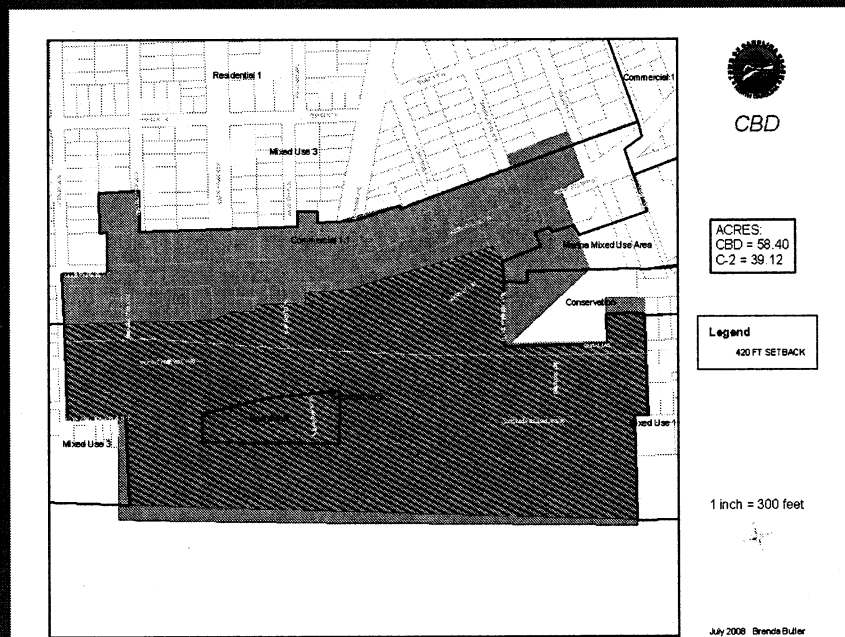
“The Town policy on height for the Commercial 2 area shall require no commercial structures to exceed 115 feet. Any structure with residential units shall not exceed a maximum height of 40 feet unless the one-to-one rule is applied not to exceed 60 feet. The Town will undertake a master planning effort with ample public participation in the Commercial 2 area and other areas that tie into the Commercial 2 and Boardwalk Area.”



## Purpose of the LUP Amendment

- To accommodate 10 additional feet of building height for hotels in the C-2 Future Land Use Classification Map by raising the maximum building height from 115 feet including appurtenances to 115 feet excluding appurtenances.

## C-2 Land Use Plan Classification Area



## Proposed Policy #30

Building Height shall be defined as that distance measured from the highest appurtenance on the structure to:

The front street line.

The nearest front street line where there is not an adjacent right-of-way.

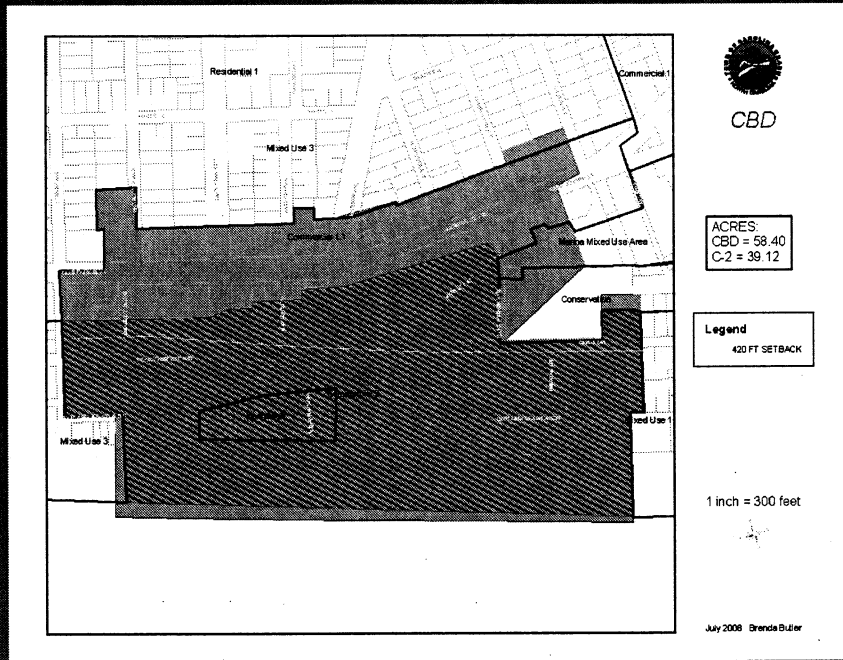
An average of each front street line on through lots.

Hotels – appurtenances ten (10) feet or less in height shall be exempted from the height measurement.

## Policy Changes Will Accomplish the Following:

1. Maintain heated space or occupancy area to a maximum of 115 feet.
2. Restrict the applicability of this allowance to only hotels in the C-2 designation
3. Restrict the height of appurtenances to a maximum of only 10 feet above the permitted maximum building height of 115 feet.

# CAMA Ocean Hazard A.E.C.

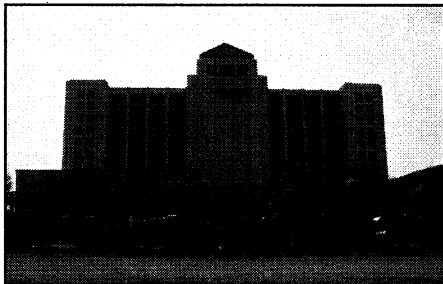


## CBD Zoning Use Regulations

for commercial uses and services, and entertainment, “maximum building height shall be solely based on conditional use permit review” – Section 3.9-1 Zoning Ordinance

## Height of Existing High Rise Structures

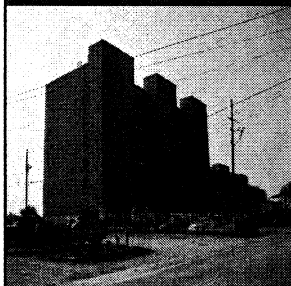
- Courtyard Marriott 136 feet
- Pelican Watch 120 feet
- Harbor Oaks 120 feet plus appurtenances
- Atlantic Towers 110 feet
- Golden Sands 75 feet



Courtyard Marriott: 136 feet



Pelican Watch: 120 feet



Golden Sands: 75 feet



Harbor Oaks: 120+



Atlantic Towers: 110 feet



## LUP Amendment Pros

- The Master Development Plan supports this amendment with suggested heights +/- 130 feet.
- Currently, there is no building cap outside AECs, therefore, zoning outside AECs would support this.
- The Hilton's requests will add economic viability to our CBD.

## LUP Amendment Cons

- It is a change against the final decisions made during the planning process that went into the 2007 Land Use Plan adoption.
- This is another incremental increase in the building height cap without addressing the issue as a whole.

## No Recommendation by P&Z Required

- GS 113A – 110. Land-use plans
  - e) Prior to adoption or subsequent amendment of any land-use plan,  
(whether the county or the Commission or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations.

Subject: TIME OF ESSENCE!--Proposed Amendment Adding Item 4 to Policy # 30 of the Town of Carolina Beach CAMA Land Use Plan

From: "Steve Coggins" <scoggins@rblawfirm.com>

Date: Mon, 8 Sep 2008 21:57:52 -0400

To: <John.Thayer@ncmail.net>

CC: <Steve.Underwood@ncmail.net>, <Jim.Gregson@ncmail.net>, "Gulick, James" <JGULICK@ncdoj.gov>, <Mike.Christenbury@ncmail.net>, "Tim Owens" <tim.owens@carolinabeach.org>, "Gary Ferguson" <gary.ferguson@carolinabeach.org>, "Ed Parvin" <ed.parvin@carolinabeach.org>, <alan.gilbert@carolinabeach.org>, <dan.wilcox@carolinabeach.org>, <jerry.johnson@carolinabeach.org>, <joel.macon@carolinabeach.org>, <pat.efird@carolinabeach.org>

**Monday, September 08, 2008**

**TIME OF THE ESSENCE**

**Mr. John Thayer**  
**Manager of Planning /Public Access**  
**Division of Coastal Management**  
**N.C. Department of Environment & Natural Resources**  
**400 Commerce Avenue**  
**Morehead City, NC 28557**  
**John.Thayer@ncmail.net**

**Re: Invalid Objections to Prior Notice of 8/22/08 Resolution of Town of Carolina Beach (TCB) Council Resolution No. 08-926 to Amend TCB's CAMA Land Use Plan, Policy # 30.4 to Allow Exemption of 10 feet From Height Requirement for Hotel Appurtenances;**

**Dear Mr. Thayer:**

**I serve as Town Attorney for the Town of Carolina Beach. On 8/22/08, TCB Council passed a resolution to amend its CAMA Land Use Plan to allow appurtenant structures atop hotels in the Commercial 2 Land Use Plan Classification Area to deviate up to 10 feet from the applicable height requirement. That proposed amendment is pending before the CRC for adoption on September 26, 2008 during its regularly scheduled meeting. The proposed amendment has been noticed so that the public may submit comments and objections to the CRC/DCM before the 9/26/08 meeting.**

**I understand that DCM has received a letter dated 9/4/08 to Mike Christenbury objecting that TCB did not give adequate notice of TCB's adoption of the Resolution in favor of the amendment in that the notice(s) allegedly did not (a) give notice of the subject of the hearing; or (b) give notice of the action which is proposed. The objection consequently requests the CRC not to certify the Amendment.**

**TCB strongly disagrees with this objection. *TCB urges DCM and the CRC to notify TCB before the close of business tomorrow, 9/9/08 of its position on the notice issue.***

**Accordingly, I write you in your capacity as Manager of Planning /Public Access, for I understand that you serve as a primary actor and advisor in the course of DCM application and interpretation of statutory and regulatory requirements for CAMA Land Use Plan Amendment procedures.**

**TCB points out in the strongest possible terms that, it has not only complied with statutory and regulatory requirements for CAMA Land Use Plan Amendment procedures, but it has gone beyond what is required. In support, TCB offers the attachments to this email, and the following**

ATTACHMENT F

**summary:**

## **I. CAMA STATUTE COMPLIANCE**

**The applicable CAMA statute provides:**

### **N.C.G.S. § 113A-110. Land-use plans.**

(e) Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption (whether the county or the Commission or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations. Notice of the hearing shall be given not less than 30 days before the date of the hearing and shall state the date, time, and place of the hearing; *the subject of the hearing; the action which is proposed*; and that copies of the proposed plan or amendment are available for public inspection at a designated office in the county courthouse during designated hours. Any such notice shall be published at least once in a newspaper of general circulation in the county. *(italics added)*

**Note that N.C.G.S. § 113A-110(e) of CAMA does not provide what precisely must be the content of the notice regarding the “subject of the hearing” or the “action which is proposed”.**

**In order to comply with the CAMA statutory notice requirement, TCB issued a published July 23, 2007 notice indicating that the Town Council on 8/22/08 would have before it the matter of “amending the 2007 CAMA Land Use Plan to consider the limitations to building height in Commercial 2 Land Use Classification Area”. This was published in the *Island Gazette* on 7/23/08 and the *Star News* on 7/26/08. TCB provided the same to Mike Christenbury of DCM on 7/23/07. Copies of proposed amendment were posted for public viewing at the (1) TCB Town Hall; (2) New Hanover Courthouse; (3) Wilmington/Cape Fear Coast Convention and Visitors Bureau; (4) Katie B. Hines Senior Center; (5) Carolina Beach Library; (6) Carolina Beach Parks and Recreation Center.**

**On 8/22/08, the TCB Council passed Resolution 08-926 Amending Policy #30 of the CAMA Land Use Plan (dealing with how one defines the distance to be measured for Building Height) by adding a Item 4 to Policy # 30 by stating: “Hotels—appurtenances ten (10) feet or less in height shall be exempted from the height requirement.”**

**Discussing and adding Item 4 to Policy 30 of TCB’s CAMA Land Use Plan were actions that precisely fall within description of the “subject of the hearing” and “proposed action” in the 7/23/07 notices as required by G.S. 113A-110. The notices stated the Council was to meet for the purposes of “amending the 2007 CAMA Land Use Plan to consider the limitations to building height in Commercial 2 Land Use Classification Area”. Discussing and adopting the exemption of hotel appurtenances from Building Height limits deals with “limitations on building height in Commercial 2 Land Use Classification Area”. Thus, the notice of the discussion and action falls within the scope of the CAMA G.S. 113A-110(e) statutory 30 day prior notice requirement of both (a) the subject of the hearing and (b) the action proposed. TCB discussed the subject of “Exempting hotel appurtenances by 10 feet or less from determining Building Height” and acted on that language. Further, the precise wording of the proposed action was available for viewing at the above locations.**

**However, the Town did not stop there. Further notices were published on July 30, August 6,**



August 13, and August 20 in which the precise wording of the proposed amendment were stated. Not only that, these notices provided information set forth in 15A NCAC 07B .0802(b)(3), *although the information is not required to be given (let alone by any form of notice) by the particular regulation.*

## II. CAMA REGULATORY COMPLIANCE

### a. Section .0800 requirements

By the express language of Section 0800, its provisions apply to adoption of LUP's. Nothing in Section .0800 refers to procedures for LUP Amendments.

### b. Section .0900 requirements;

Section .0900 applies to LUP Amendments. CAMA Land Use Plan Amendment procedures are found exclusively in Section .0900. Section .0901(a) (4) merely provides for "CRC review and action" (note the lack of reference to notice) on amendments as per Section .0802(b), (c), (d), and (e). *Note that none of those provisions in Section .0802 provide anything about what a local government must provide as notice, if any, to the general public regarding CRC meetings to certify LUP Amendments. Still, TCB provided abundant notice of the subject and proposed action of the proposed amendments to be certified by the CRC.*

### c. Section .0802(b)

As an example that Section .0802 does not deal with notice, note that subsection (3) merely states:

"The public shall have an opportunity to submit written objections, comments, or statements of support prior to action by the committee designated by the CRC. Written objections shall be received by DCM no less than 15 business days prior to the next scheduled CAMA Land Use Plan review meeting and shall be limited to the criteria for CRC certification as defined in Subparagraph (c)(3) of this Rule. Written objections shall identify the specific plan elements that are opposed. A copy of any objections shall be sent by the DCM to the local government submitting the CAMA Land Use Plan."

No language in .0802(b)(3) provides an express obligation, means, precise mechanics or content requirements for notices to the public of requests to the CRC to certify LUP Amendments.

Assume, however, for the sake of argument, a local government is to provide prior notice of the matters described in Section.0802(b)(3). Take note that TCB again,

again, again, and again provided the public prior notice *the precise wording of the amendment* when it published in the *Island Gazette* on July 30, August 6, August 13, and August 20 the following:

- Policy #30: Building Height shall be defined as that distance measured from the highest appurtenance on the structure to:
- i. The front street line.
  - ii. The nearest front street line where there is not an adjacent right-of-way.
  - iii. An average of each front street line on through lots.
  - iv. Hotels – appurtenances ten (10) feet or less in height shall be exempted from the height measurement.

**Not only that, in those same notices, TCB again, again, again, and again, notified the public of “an opportunity to submit written objections, comments, or statements of support” [see Section .0802(b)(3) above] to the CRC by including the following language in the *Island Gazette*:**

A copy of the amendment can be viewed at Town Hall (1121 N. Lake Park Blvd, Carolina Beach, NC 28428) and/or at the New Hanover County Courthouse (Office of the Wilmington/Cape Fear Coast Convention and Visitors Bureau, 24 N. 3<sup>rd</sup> Street, Room 201, Wilmington, NC 28401) during normal work hours.

The Town of Carolina Beach invites your comments to this important Land Use Plan Amendment. Again, the Town will consider this issue on August 22, 2008 at 6:00p.m. at the Town Administration Building.

Once adopted, the amendment will be submitted to the Coastal Resources Commission (CRC) for Certification. Written objections, comments or statements of support shall be submitted to the NC Division of Coastal Management District Planner, Michael Christenbury, 127 Cardinal Drive Ext., Wilmington, NC 28405. Written comments must be received no less than 15 business days prior to the September 24<sup>th</sup>-26<sup>th</sup> CRC meeting at which time the amendment is scheduled to be considered for Certification. Copies of the amendment are available for review and may be checked out for a 24-hour period at the Carolina Beach Town Hall during normal business hours. The public is encouraged to review the amendment.

For questions or additional information on this Land Use Plan amendment, please contact Gary Ferguson, Director of Planning & Development at 1121 N. Lake Park Blvd, Carolina Beach, NC 28428, by phone at 910-458-2986, or by email at [gary.ferguson@carolinabeach.org](mailto:gary.ferguson@carolinabeach.org).

These repeated notices amply advised the public of:

- i. An opportunity to provide the CRC
- ii. written objections, comments or statements to support
- iii. no less than 15 business days prior to the September 24-26 CRC meeting.

Further, these notices provided that, should the public have any questions about the content of any such comments, they could call the TCB Director of Planning and Development (at the noted phone #, email address, and physical address).

d. Section .0801(a) requirement

This section by its terms applies only to notice of Public Hearing Requirements for adopting LUP's. There is no reference to procedures for LUP amendments. The provision merely requires that the local government:

- (1) comply with G.S. 113A-110 (which it has amply done, as shown in Part I above); and
- (2) Disclose to the public the “opportunity to provide written comment following local adoption of the Land Use Plan”. Assuming for the sake of argument this provision applies to LUP Amendments, TCB has nonetheless abundantly done so because it:
  - a. disclosed to the public
  - b. its opportunity to submit written comment by way of

- i. the *Island Gazette* notices of July 30, August 6, August 13, and August 20
- ii. which notices informed the public that it could:
  - 1. submit:
    - a. written objections, comments or statements to support to DCM
    - b. no less than 15 business days prior to the September 24-26 CRC meeting; and
  - 2. ask any questions about the content of any such comments by calling the TCB Director of Planning and Development at the listed phone #, email, and address.

TCB accordingly respectfully requests immediate response of the position of DCM/CRC on this matter by the close of business on 9/9/08 that TCB has fulfilled its obligations under CAMA and applicable regulations.

*Steve Coggins*  
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 cell and voice mail: (910) 524-9515

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<p>NOTICES &amp; MEMOS REGARDING AMENDMENT TO TCB CAMA LUP POLICY #30.4 ON 8-22-08 BY TCB COUNCIL.pdf</p>	<p>NOTICES &amp; REGARDIN AMENDME Content-Description: TCB CAMA POLICY #30 8-22-08 BY COUNCIL.p Content-Type: application/c Content-Encoding: base64</p>
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North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

**James H. Gregson, Director**

William G. Ross Jr., Secretary

**CRC-08-39**

September 10, 2008

**MEMO TO:** Coastal Resources Commission

**FROM:** Doug Huggett  
DCM Major Permits Coordinator

**SUBJECT:** CAMA Major Permit and Dredge & Fill Review Process

The Major Permit review process that is currently utilized by the Division of Coastal Management is based on a blueprint mandated by the Coastal Area Management Act (CAMA) and the State Dredge and Fill Law. For example, the Dredge and Fill Law, CAMA, and the Rules of the Coastal Resources Commission (CRC) all require that permit applications for Major Development permits be distributed to State agencies having expertise and/or jurisdiction with regards to coastal resources. The CRC's rules also require that comments, concerns, and/or recommendations from these agencies must be taken into consideration by the Division prior to making a final major permit decision. Furthermore, there are numerous places in the CRC's rules where certain findings by these "expert agencies" must be made before a permit can be granted. For example, according to 15A NCAC 07H .0208(a)(2)(C), no CAMA permit can be issued that would violate state water quality standards. The authority to determine compliance with state water quality stands lies solely with the N.C. Division of Water Quality (DWQ). Therefore, coordination with DWQ is not simply a matter of courtesy; it is a required core component of the CAMA Major Permit review process.

As is the case with coordination of permit applications, the process for making a final decision to either issue or deny a CAMA Major Permit is also set out in CAMA, the Dredge and Fill Law, and the CRC's rules. For example, CAMA states that a permit shall be denied if one of 10 specific findings is made, and the Dredge and Fill law states that a permit may be denied if one of 5 specific findings is made. If such negative findings cannot be made, the permit must be issued.

My presentation will give more details on the permit review process as mandated by the Coastal Area Management Act and the State Dredge and Fill Law. Additional examples of areas requiring agency coordination will be provided, and the final permit decision process will be more fully explained.

400 Commerce Avenue, Morehead City, North Carolina 28557  
Phone: 252-808-2808 \ FAX: 252-247-3330 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

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CHPP Team Meeting  
August 4, 2008  
Washington Regional Office

**Present:** Pete Caldwell (DWQ), Patti Fowler (DEH), Jim Gregson (DCM), Rebecca Ellin (DCM/NERR), Steve Underwood (DCM), Maria Dunn (WRC), Scott Chappell (DMF), Anne Deaton (DMF), Brian Boutin (DMF), Jimmy Johnson (OCCA)

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**Introductions:**

The meeting began at 10:00am. Introductions were made by those present. The CHPP Team welcomed Pete Caldwell, from DWQ and Brian Boutin, from DMF to the team.

**CHPP Annual Report:**

Jimmy asked that each member of the CHPP Team supply to him by September 2, their division's respective efforts regarding implementation of the CHPP. The accomplishments should be tied to a specific goal and a specific recommendation within that goal. He asked the team to also include future initiatives and priorities. The Annual Report is due by the end of September. The draft annual report should be completed in time for the November commission meetings.

**CHPP 5 Year Annual Review:**

Anne initiated a discussion regarding the legislatively mandated 5 year review of the CHPP. She began with a brief overview of how the document was originally written. Included in her presentation was the role of the CHPP Team and the CHPP Steering Committee. She asked the team what their opinion was as to the best way to handle the review and subsequent document.

What is the best way to organize the CHPP review?

- Addendum/Supplement vs. rewriting the plan?
- What new issues should be included?
- Does anything in the CHPP need to be removed?
- Are there inaccuracies that need to be corrected?
- What to do about continuing research needs?

Anne provided the team with a handout of ideas and issues. She suggested that the review include a couple of indicators for each of the 6 habitats. These could be provided by to the team by Dean Carpenter with the Albemarle Pamlico National Estuary Program. They have been working on these indicators for several years now. Steve Underwood felt that there needed to be a habitat status report for each of the habitats. The indicators and any threats could be included in that discussion. A discussion of the APNEP indicators followed.

Steve suggested that we need to be sure to include the accomplishments of the past 5 years in whatever format we choose. Steve stated that the CHPP had been a huge success and has had tremendous implications with regards to State Government and the way coastal habitats are now

CHPP Team Meeting  
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Washington Regional Office

viewed. It is the closest thing to ecosystem management there is. He also said we need to be sure to incorporate climate change in the review. It will affect each of the 6 identified habitats in the CHPP. The group also discussed adding an accomplishments chapter at the beginning of the CHPP, possibly deleting or condensing the introduction.

Rebecca Ellin noted that whatever is done, the first thing is that there needs to be a review of the current document. The review should be undertaken with three questions in mind. What needs to be updated? What needs to be changed and what needs to be added? Anne said that Brian and Scott had already begun that process.

Patti Fowler noted that the CHPP really brought DEH, and Shellfish Sanitation specifically "into the fold." Because of the CHPP, they have been able to add new staff positions. This has enabled them to do things that have needed to be done for years.

Pete Caldwell asked if there were any legislative constraints that the group was under. Basically it is just that the document must be reviewed every 5 years. What that entails is one reason for this discussion.

Anne suggested that some of the emerging issues that need to be included are: endocrine disrupting compounds, energy, climate change, inner banks development and land use changes and emerging industries. She then provided a draft calendar and time-line for the next 16 months. Again there were questions asked regarding how often the team needed to meet and how to keep the respective commissions apprised of the progress.

Regarding the review, the team decided they need to discuss how to handle review of the drafts with the CHPP Steering Committee before a CHPP team review schedule can be determined. Team reviews should be timed to precede the Steering Committee meetings, allowing adequate review time. They also agreed it would probably be good to have a Tri-commission meeting when the update is complete to maintain the visibility of the CHPP.

**Strategic Habitat Areas:**

Anne provided the team with an update on the progress of the Strategic Habitat Area work. She noted that a group of local technical experts had identified those areas in the Albemarle Sound area they felt should be considered for SHA designation. A map of the areas was provided with the SHA's delineated.

Steve Underwood was concerned that too much area would be designated a SHA. He felt this would compromise the effectiveness of any designation with regulatory ramifications. SHA's are supposed to be the best of the best and this much area doesn't match that definition. He asked why designate them at all?

Maria Dunn said she hoped the SHA's in this area of the state would have oversight regarding water quality, water flows and water temperature, and dredging restrictions. There needs to be serious consultation with resource agencies regarding these issues. She also suggested that it

CHPP Team Meeting  
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would be good if the SHA's were recognized in local Land Use Plans. That would be up to DCM. She also asked the question that if so designated, what the SHA designation means.

The meeting adjourned at 11:45am.

HAFF

**CHPP Steering Committee Meeting**  
**August 8, 2008**  
**Washington, NC**

Meeting Attendees: Jess Hawkins (MFC), Pete Peterson (EMC), Tom Ellis (EMC), Wayland Sermons (CRC), Bob Emory (CRC), Scott Chappell (DMF), Anne Deaton (DMF), Brian Boutin (DMF), Patti Fowler (Shellfish Sanitation), Jim Gregson (DCM), Steve Underwood (DCM), Rebecca Ellin (DCM-NERR), Al Hodge (DWQ), Pete Caldwell (DWQ), Bradley Bennett (DWQ), Jimmy Johnson (DENR), Bill Swartley (DFR), Maria Dunn (WRC), Kristina Fischer (DSWC), Kristin Miguez (EEP) [Robin Smith (DENR), Steve Wall (DENR) via conference call]

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Call to Order and Introductions:

Pete Peterson called the meeting to order at 1:10pm. Introductions of all attendees took place. Pete noted that Robin Smith and Steve Wall were joining us by way of a conference call from Raleigh. It was noted that Wayland Sermons has been named by Chairman Bob Emory to be the new permanent Steering Committee member from the CRC.

A motion to accept the minutes as presented was made by Jess Hawkins and a second was provided by Bob Emory. The motion passed without dissent.

Jess wanted to publicly thank DENR and DWQ for providing information regarding the Coastal Stormwater Rules which stemmed from discussions during the last Steering Committee meeting.

Legislative Update: Robin Smith and Steve Wall

- Stormwater Rules – DENR is pleased with the stormwater compromises. Robin estimated that about 95% of the final language was in the original EMC rules.
- Drought – Legislation now gives the Governor and DENR the authority to mandate measures on municipal water systems when faced with declared drought conditions.
- Wind Energy – The legislation authorizes Environmental Review Commission to conduct a study of the need for a permitting program for turbines associated with the generation of electricity. The legislation also allows the ERC to study the consolidation of the State's regulatory commissions and to look at the possibility of a stormwater program without permits.

Tom Ellis asked how the wind energy legislation would overlap with work being done by the Environmental Management Commission on the same issue. Steve answered by saying there was the potential for some duplication of effort if the two commissions were not careful. Steve also noted that the EMC was not constrained to look only at wind energy. Robin noted that any conflicts which might arise between the efforts of the two commissions could be dealt with by the ERC through legislation.

- Budget – The Clean Water Management Trust Fund was funded at \$100 million. There was also \$50 million included in the budget for land conservation projects.



Marine Fisheries Commission's SAV Definition: Anne Deaton

Anne provided information on the status of the MFC's revised Submerged Aquatic Vegetation definition. The definition had been revised by a DENR workgroup at the request of the Coastal Resources Commission. Anne reported the MFC approved the revised definition for SAV at the commission's June meeting and voted to send the definition to public hearings, which will be held in October.

The new definition expands the list of vegetation included as SAV, to include more of the low salinity grasses. It also allows for existing and documented areas where SAV has been present within the past ten growing seasons. Anne reported that the CRC had moved forward with their Dock and Pier Rules, by sending them to public hearing. Several CRC members had objected to moving these rules forward based on the MFC's original SAV definition, thus necessitating the workgroup.

Bob Emory and Wayland Sermons expressed their views on behalf of the CRC as to why the CRC had delayed their rules based on the MFC's definition. The concern expressed by several CRC members was based on the 10 year time frame for presence of SAV and the inclusion of potential SAV habitat and the criteria used to determine potential habitat. The two CRC commissioners reminded the CHPP Steering Committee that the CRC was charged with balancing issues between the environment and the rights of property owners. Jess Hawkins noted that the public doesn't own the submerged lands or waters, only the adjacent upland property. He also noted that habitat designations have consequences for fishermen too, but they are sometimes needed to sustain the resources. A minority of CRC members still feel this definition will result in bad policy decisions.

It was noted by members of both the staffs of the DMF and DCM that the definition and the accompanying Policy Guidelines is not a radical departure from the way permits have been commented on and issued in the past.

There was some discussion as to why the CRC doesn't have mitigation allowances written into their rules. One reason given was that there was no form of structured response to private projects, whereas, public projects have a very structured response process. Jess Hawkins noted that the Chesapeake Bay had experienced good success with mitigation, especially in the areas of growing and transplanting SAV. Bob stated that the CRC relies on the DMF to make any mitigation recommendations when they comment on permits. Al Hodge stated that any potential mitigation needs to be discussed at the beginning of the permit process in order to avoid negative comments and responses from the resource agencies.

Robin noted that things are moving forward on a good path. She assured the committee that the State will still issue General Permits to provide owners with riparian access even if there is SAV presence. She noted the threshold to be used by the commenting agencies is >50% coverage. While the public has the right to access the water, there can be conditions or limitations on that access.

In conclusion, Bob noted that at times resource agencies will be at odds over some of these issues. That is one of the primary purposes behind the Coastal Habitat Protection Plan, to provide a venue

where these differences can be worked out in a timely manner. That is what took place with this issue.

### Shoreline Stabilization Workgroup: Bob Emory

Bob gave the CHPP Steering Committee a brief report regarding the July 29<sup>th</sup> meeting of the Shoreline Stabilization Workgroup (summary notes attached). Bob reminded the CSC that one of the goals of the CHPP is to “promote alternatives to vertical stabilization.” Approximately 1%, about 850 miles, of the estuarine shoreline is currently stabilized by some means. The CRC is currently looking at their regulations to try and remove some of the disincentives to alternative means of stabilizing the shoreline. The workgroup came up with three issues which need to be examined next. They are:

1. Convene an interagency group to create an outline of current analysis to match stabilization methods with shoreline types. This should be very practical and usable for the General Permit process. Steve Underwood will be the lead on this and the estimated time to complete this outline is approximately 6 months.
2. Look at the General Permit for marsh sills. Obtain a direct order from CHPP to ask the staffs of each agency involved to look at the General Permit for marsh sills and see if any of the conditions can be removed.
3. Each Commission should request an education component for alternatives to bulkheads. Discuss this at the CHPP meeting. The main audience would be marine contractors and hold workshops.

Following Bob’s report, discussion followed centered on the three issues identified by the workgroup. Al Hodge reminded the CSC that in order for DWQ to grant a 401 Certification, the applicant must prove there is a need for the stabilization and that every effort must be made to “avoid and minimize” disturbances in the buffer areas. He does not feel that is being done now. Also, development is moving upstream where there often is not an erosion problem, but status quo is to put in a bulkhead for aesthetic reasons, and during the process damage the buffer zone.

With regards to the permit for sills, Maria Dunn mentioned that a meeting was held in 2005 with resource agencies for the purpose of looking at all the conditions. She believed that three conditions were removed at that meeting and now there are 28 conditions that must be met in order to construct a marsh sill. Jim Gregson also noted that the length of time needed to get a permit for sill was too lengthy and made that option prohibitive. There needs to be better coordination between agencies, State and Federal.

Anne Deaton noted that a lot of the concerns regarding sills can be found in some specific locations and habitat. There could be some shoreline situations where a marsh sill would be great, and others where it could cause damage to other existing habitat resources. She suggested removing problematic sitings from the General Permit. Robin agreed with Jim and Anne and she suggested that the CSC look at that suggested approach. Anne also noted that the permits were reviewed for immediate impact and not looked at for long-term benefits.

Rebecca Ellin handed out the NERR's Estuarine Shoreline Education Plan. This plan outlines a variety of opportunities and education techniques.

The CSC decided to wait on asking Doug Huggett to convene another meeting with the resource agencies regarding the conditions placed on permits for a marsh sill. Robin asked the question of what the CSC would be comfortable with especially with regards to the General Permit. The answers to that question will hopefully come from the work of Steve Underwood's group.

#### City of Wilmington: Bradley Bennett

Bradley provided an update on the progress that has been made in the Wilmington area regarding the infrastructure issues surrounding the sewer system. He noted that all of the Special Order of Consent requirements had been met. The moratorium was lifted in March of this year. The expansion of the sewage treatment plant on the north side of Wilmington is underway. That project should be completed in 2010. The capacity of the plant will expand from 10 million gpd to 16 million gpd. The CSC was pleased to hear Bradley's update.

#### Coastal Stormwater Rules: Bradley Bennett

Bradley began his presentation by noting that the Stormwater Education/Outreach position has been filled. Bridget Munger is the new stormwater outreach person for DWQ. She will be responsible for building relationships with communities and help to educate responsible parties with regards to the new stormwater regulations.

Bradley then moved on to an update of the new coastal stormwater legislation. He reviewed the history of the stormwater rules and the work the EMC did over the past several years regarding this issue. He then went over the implications of the legislative review and SB 1967 and HB 2138. These bills were approved in July and will go into effect on October 1 of this year (To see a comparison between the EMC rules and the compromise legislation go to: <http://h2o.enr.state.nc.us/su/documents/CoastalStormwater-ComparisonChart.pdf>.) Bradley provided several other websites to visit for more information. They are:

1. [h2o.enr.state.nc.us/su/coastal.html](http://h2o.enr.state.nc.us/su/coastal.html)
2. [ncstormwater.org](http://ncstormwater.org)
3. [h2o.enr.state.nc.us/su/stormwater.html](http://h2o.enr.state.nc.us/su/stormwater.html)

Following Bradley's presentation there was considerable discussion. Tom Ellis asked the question if we are really better off with regards to water quality under the new legislative rules versus the EMC's. Robin reiterated that most of what the EMC had proposed is in the new legislation and that we definitely are better off than prior to the EMC's rules.

Tom asked about SB 845 and the ability of the EMC to look at coastal development in the near future. Robin said the legislation would cause some delays in being able to react, but that the chances of the EMC doing anything before 2010 were pretty slim. Robin again stated that she believes the stormwater legislation, "largely reflects the policy decision of the EMC."

Jimmy reported the CHPP Team met prior to the Steering Committee. The purpose of the CHPP Team meeting was to discuss the CHPP Annual Report and to begin to put together a time table and a method for the 5-year CHPP review and update. Several questions were asked of the Steering Committee regarding the CHPP update.

1. How often does the CSC want to review the updated documents?
2. How often does the CSC want to meet to review the documents?
3. How will the updates be reported back to the respective commissions and how frequent do they want to receive the reports?
4. Is an addendum, or amendment, to the CHPP preferable to a full rewrite of the plan itself?
5. What recommendations would the CSC have for new inclusions in the CHPP?

Anne handed out a possible timeline that would allow the CHPP to be updated by December of 2009.

Jimmy asked that each division report back to him by Labor Day their CHPP accomplishments for 2007/2008 and their priorities for 2008/2009 to be included in the Annual Report.

An email will be sent to the CSC members regarding dates for the next meeting, which should be held in October. Issues for the next meeting should include more shoreline discussions, pharmaceuticals and an update on the SHA efforts.

The meeting adjourned around 4:30pm.

**Shoreline Stabilization Subcommittee Meeting  
DCM – Morehead City  
July 29, 2008**

In attendance: Bob Emory, Jimmy Johnson, Jess Hawkins, Jim Gregson, Ted Tyndall, Al Hodge, Pete Peterson, Guy Stefanski, Spencer Rogers, Steve Underwood, Katherine McGlade.

Why are we talking about bulkheads?

This is a charge from CHPP. It can be found in Goal 3, Recommendation 3.4.

Pete Peterson stated that bulkheads inhibit upslope and can eliminate salt marsh and fisheries habitat. Waves get to the bulkheads and cause erosion from the backside. Vertical Structures rank last and there are difficulties upriver with bulkheads in areas that should be buffers.

Bob Emory stated DCM has gotten more strict on permitting bulkheads.

Jim Gregson stated that the four district offices of DCM were handling the General Permits for bulkheads differently. A policy memo was drafted and sent to ensure consistency with the 7H Specific Use Standards for Bulkheads. Ted Tyndall stated that by Jim's policy memo, DCM has moved bulkheads above normal high water and justification must be shown to go below MHW. The CRC is trying to be cautious of any movement below MHW. This will get bulkheads out of the public trust waters. The idea is to get them as far back as you can get it. Yet, there is a need for some to extend out into public trust waters. Riprap has come along and rules have been sent to public hearing for alternatives.

Pete Peterson voiced his concern that the Federal agencies are not involved in CHPP.

Al Hodge discussed the conflict with DCM and DWQ rules. He stated a 401 certification is required for any activity associated with a US Army Corps of Engineers permit for water dependant activity and DWQ views bulkheads as water dependant. The 401 mandates can be simplified into two issues (1) No Practical Alternative and (2) Avoid and Minimize. With the present CAMA permitting process, DWQ is not meeting the mandate.

Ted Tyndall gave rough estimates on miles of shoreline and miles of bulkheads. He stated the miles of shoreline have been reported between 5,500 and 11,000 miles depending on the source. Between 1984 and 2000, there has been approximately 850 miles of shoreline stabilization permitted or roughly ten percent of the shoreline. However, he cautioned that a substantial amount of this number was re-issuance of previous permits.

Guy Stefanski is involved with an Estuarine Workgroup that is currently in the process of gathering digital delineation of estuarine shoreline. The internal draft is done. The Estuarine Shoreline Working Group will meet on August 7<sup>th</sup>. At this meeting, they will finalize the methodology to begin implementation. It will identify and quantify the percentage of each kind of shoreline type.

The education component was discussed. Ted Tyndall stated that a meeting was held with coastal contractors. Pete Peterson stated that contractors would build what they sell. Steve Underwood stated

that DCM's Coastal Reserves is working on getting the word out to contractors about alternatives to bulkheads.

Bob Emory stated the CRC has been tweaking rules with regards to alternative structure permits to make them more attractive. The efforts have moved bulkheads up shore, but this created problems with DWQ. The CRC has been making the specifications for alternative structures more attractive and making them easier to get. The fee for bulkheads has also been increased.

Al Hodge stated there are existing issues with General Permits and Major Permits for bulkheads that conflict with buffer rules. We need to work out a couple of details that will avoid and minimize. DWQ is struggling with the impact as it pertains to construction of bulkheads (tie backs, clearing). People are choosing this method to clear their land for the visual aspect of the lot. More invasive to the buffer. It enhances property value for a panoramic view. One option is for CAMA field staff to give the applicant the information (to not clear) and the applicant could obtain a CAMA permit. If the project is invasive, the applicant has signed that they will contact DWQ for certification.

Pete Peterson stated the next steps need to be imaginative. This is not just regulatory, we may need some legislation.

Bob Emory stated we need education and outreach to landowners.

Jess Hawkins stated that as a group, the CHPP is a mechanism for pulling structures back. The public knows bulkheading has increased. The State should encourage natural techniques other than a vertical bulkhead to protect their property. It may not be popular as a government employee, but if we wait for the public we would never get anything accomplished as Commissioners. The focus should be on policy changes and education of a living shoreline alternative. It is not just the CRC's job to educate. It should also be the EMC, DMF, and CHPP selling this idea to all constituents.

Bob Emory stated the DCM Reserves staff could be used to acquaint contractors to new methods.

Spencer Rogers advised that it is important to understand that the issue is broader than bulkheads. Marsh sills, which are low breakwaters, should be used more often. This method should be promoted. They will not work without marsh, but are a functional erosion control. The property owners need to grow a marsh which is an unavoidable benefit to sills. He asked if this committee was willing to make a policy statement to promote sills?

Bob Emory stated the CRC has not attempted to limit the ability to permit a bulkhead. In two or three more years we may be in a better position to limit bulkheads. It is a good idea to identify where the marsh is or can be created.

Ted Tyndall had concerns as to whether sills could fit into GP requirements.

Al Hodge stated people will do what they want with their property. It is our responsibility to protect the resource. We need an evaluation process to help people determine if they have a need for shoreline stabilization. The least invasive methodology for saving the shoreline should be used. There is a cumulative effect on the resource. We should come up with an analysis methodology.

Jim Gregson stated the CRC's rules already require alternative structures "where possible" be used instead of bulkheads. The definition of "where possible" is the problem.

Steve Underwood cautioned the group not to embrace one shoreline stabilization type. Promote the concept, not the type. I will have the Reserves look at the types of shoreline and determine what works best. Keep this as a General Permit and avoid the major permit process.

Bob Emory asked Steve to outline the analysis and come to the CHPP meeting with a timeline of how long this process would take.

Next Steps:

1. Ask an interagency group to create an outline of analysis to match stabilization method with shoreline type. This should be very practical and usable for General Permit process.
2. Look at the General Permit for marsh sills. Obtain a direct order from CHPP to ask staff of each agency to look at the General Permit for marsh sills.
3. Each Commission should request an education component for alternatives to bulkheads. Discuss this at the CHPP meeting. The main audience would be marine contractors and hold workshops.



North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

**James H. Gregson, Director**

William G. Ross Jr., Secretary

September 12, 2008

**MEMORANDUM**

***CRC-08-40***

**TO:** Coastal Resources Commission

**FROM:** Scott Geis  
Ocean and Coastal Policy Analyst

**SUBJECT:** Update on Ocean Policy Study Committee Activities

Within the last ten years, many of the issues facing North Carolina's coastal ocean have changed, and new issues have come to the forefront. For example, there is a greater interest in offshore sand resources as beach nourishment has become more critical. There is a greater focus on Critical Habitat Protection areas. There is a new and evolving interest in offshore wind energy generation and large-scale offshore aquaculture production. Recently, there has been renewed interest in lifting the moratorium on oil and gas exploration in the ocean waters off North Carolina's coast. These changing needs signal a crucial time for North Carolina to review its ocean policy structure and to devise policy options that ensure we are prepared to meet the challenges of tomorrow. The underlying theme common among each of these changing needs is the idea of developing comprehensive ocean policies to manage the beaches and waters of NC.

Three projects have recently been undertaken by DCM representing the state's foray into comprehensive ocean and coastal management. These initiatives, although focusing on unique resource issues, can be applied together to further implement a comprehensive approach to ocean and coastal resource management. These projects are the Beach and Inlet Management Plan (BIMP), DCM's Estuarine Shoreline Mapping Project (ESMP), and the development of a new updated Ocean Policy Report.

Since February 2008, the focus of the Ocean Policy Steering Committee (OPSC) has been to identify emerging environmental, legal and policy issues associated with the use and development of ocean resources in North Carolina's coastal ocean waters and in adjacent federal waters. Issues have been targeted because of the significant impact they may have on North Carolina's coastal communities, waters and fisheries. The OPSC is comprised of various federal state and local government representatives as well as academics from several of the state's major universities. Committee members have been engaged in an assessment of current rules and policies of the NC Coastal Management Program for their effectiveness in protecting North Carolina's coastal resources. Specifically, the OPSC hopes to ensure that:



1. NC will be prepared as the ocean and coastal setting continues to experience technological, social and economic changes; and
2. NC policies assure consistency of federal actions when new technologies are employed in federal waters that are beyond NC's jurisdictional limit.

The OPSC initiative stems from a 1994 management study on NC's Ocean Stewardship Area, which worked to identify deficiencies in NC's ocean management regime. The end goal of the OPSC is to develop specific, actionable policy recommendations for NC. Emerging issues which have been discussed by the OPSC include; sand allocation, beach nourishment and inlet management; siting of offshore renewable energy facilities; offshore or deep ocean outfalls; ocean zoning; and open ocean aquaculture. To date the OPSC has generated draft recommendations on each of these issues and is in the process of preparing these recommendations for three public meetings, which will be used to generate community and stakeholder input and support. A finalized report of and final OPSC recommendations will be presented CRC at the February 2009 meeting.



North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

**James H. Gregson, Director**

William G. Ross Jr., Secretary

September 11, 2008

**MEMORANDUM**

**CRC-08-41**

**TO:** Coastal Resources Commission

**FROM:** Steve Underwood, Assistant Director for Policy and Planning

**SUBJECT:** Beach and Inlet Management Plan Update

**Background**

The North Carolina Divisions of Coastal Management (DCM) and Water Resources are partnering to develop the state's first comprehensive Beach and Inlet Management Plan (BIMP). The BIMP is the State's attempt at developing a systematic management strategy for its 326 miles of oceanfront barrier islands and 19 active tidal inlet complexes. Creation of the BIMP was a recommendation of the Coastal Habitat Protection Plan that was adopted in 2004, as well as a directive of the General Assembly's 2000 Appropriations Bill (HB 1840). The General Assembly appropriated \$750,000 to the Division of Water Resources for the initial phase of the BIMP development. In September 2007, DENR hired the engineering firm of Moffatt & Nichol to assist the State with the following tasks over an 18-month period: 1) data identification and acquisition of existing datasets, 2) definition of beach and inlet management regions, 3) scheduling and facilitation of stakeholder meetings, 4) development of draft beach and inlet management strategies and 5) preparation of a final report.

Two groups have been established to guide the initial BIMP development: a BIMP Advisory Committee and a DENR technical work group. The Advisory Committee is composed of representatives from federal and state agencies, local governments, academic institutions, and non-profit organizations. The technical work group is comprised of DENR agency representatives

In addition to the state's efforts, DCM has been working to integrate the USACE regional sediment management (RSM) philosophy into the BIMP. By definition, RSM is a "system based approach" that seeks to solve sediment-related problems by designing solutions that fit within the context of a regional strategy. RSM is a Corps-wide approach

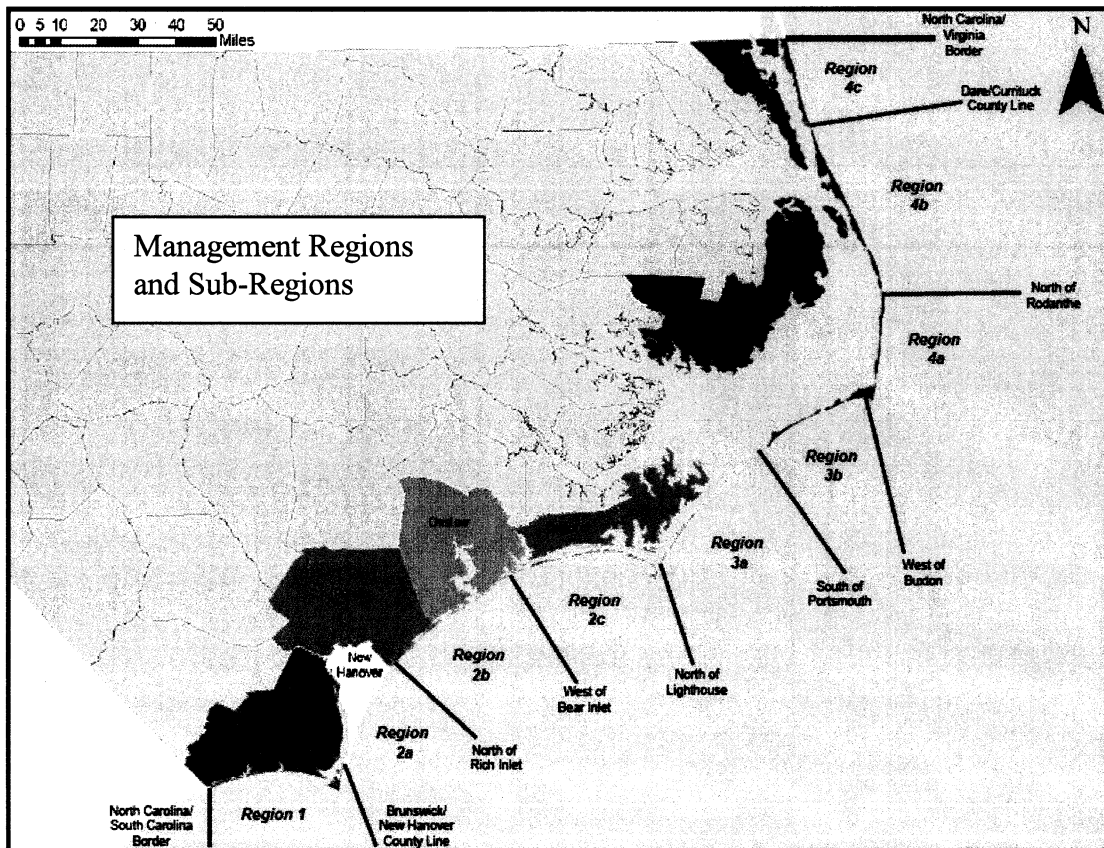
that is being implemented through coordinated activities using several corps authorities. The State and USACE recognize the importance of a cooperative relationship for successful implementation of the NC BIMP and RSM.

**BIMP Update:**

DCM and DWR met with the USACE on Monday September 8, to provide an update on the BIMP. The USACE also provided updates on coastal processes work along Brunswick County and the Bogue Banks area.

The two groups (BIMP Advisory Committee and a DENR technical work group) met on Thursday, September 11<sup>th</sup> in Raleigh, to review progress and provide suggestions. Moffitt & Nichol, and the USACE gave presentations on the BIMP and RSM projects. Specifically, M&N reviewed the draft regions and subregions along the coast (Figure 1). These regions were defined by the following criteria:

- 1) Geologic Framework and Cape Features
- 2) Developed/Undeveloped Reaches
- 3) Erosion/Accretion Patterns/Rates
- 4) Potential Sediment Transport
- 5) Potential Sand Sources
- 6) Dredging Considerations
- 7) Socio-Political Regions



These regions would form the basis for various management strategies along the coast. A more detailed review of each of these boundaries will be discussed, and an update on the schedule for the upcoming stakeholder meetings with local governments will be provided.



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

September 11, 2008

**MEMORANDUM**

**CRC 08-42**

**TO:** Coastal Resources Commission

**FROM:** Jeffrey Warren, PhD  
Coastal Hazards Specialist

**SUBJECT:** Public Comments for Proposed Changes to  
15A NCAC 07H.0306 and 07J.1200

**INTRODUCTION**

As per GS 150B, following fiscal review of the rule by the Division of Coastal Management (DCM) and subsequent approval of said review by the Department of Environment and Natural Resources (DENR) and the State Budget Office (SBO), the proposed rule changes to 15A NCAC 07H.0306 (General Use Standards for Ocean Hazard Areas) and 15A NCAC Subchapter 07J (specifically, the addition of static line exception procedures in Section .1200) were published in the North Carolina State Register (vol. 22, #24) on June 16, 2008. The 60-day public comment period started on the publication date and extended through August 15, 2008. A brief history of each rule change proposal follows. In addition, this memo has two appendices:

**Appendix A** – Transcripts summarizing comments made at each of the six public hearings for both 15A NCAC 07H.0306 and 07J.1200

**Appendix B** – Written comments received by the Division of Coastal Management via mail and email during the official comment period ending August 15, 2008

**TIMELINE FOR PROPOSED RULE DEVELOPMENT**

**15A NCAC 07H.0306**

The draft rule language for 07H.0306 published in the State Register included revisions recommended by the DCM staff and the Coastal Resources Commission (CRC) based

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on comments received during the first public comment period spanning November 1 through December 31, 2007. These amended rules were approved for public comment by the CRC on January 17, 2008. Following the January CRC meeting at which the rules were approved, DCM continued to receive input from stakeholders through March 2008. Based on this input, DCM recommended additional revisions to the draft rule language. The language published in the Register was approved for public comment by the CRC on March 27, 2008.

### **15A NCAC 07J.1200**

The draft rule language for 07J.1200 published in the State Register had been approved for public comment by the CRC on September 27, 2007. Because this proposed rule required a citation in the rule language of 07H.0306 (and vice versa), amendments to 07H.0306 that provided a reference to 07J.1200 were required. However, because 07H.0306 had already been submitted to the DENR, SBO, and Office of Administrative Hearings for public comment based on the CRC's actions at their July 2008 meeting, no action could be taken until after the November-December 2007 comment period for 07H.0306. At the March CRC meeting, DCM staff recommended minor revisions to the 07J.1200 draft rule language. This language, published in the Register on July 16, was approved for public comment by the CRC on March 27, 2008. At this point, both proposed rule changes to 07J.1200 and 07H.0306 are able to move forward in lock step.

## **WHO PROVIDED PUBLIC COMMENTS?**

### ***Verbal Comments***

At the request of the CRC Chairman Bob Emory, six public hearings were conducted for each of the two rules (hearings were back-to-back) during the sixty-day comment period. Five of these hearings were regional and occurred at 6:00 pm in each of the following locations: Surf City (July 7), Carolina Beach (July 8), Supply (July 14), Beaufort (July 15), and Kill Devil Hills (July 16). Prior to each of these regional hearing, DCM staff allotted an hour (5:00 to 6:00 pm) to conduct an informal overview of the proposed rule changes followed by an open question and answer period. The sixth and final public hearing occurred in front of the CRC at its meeting in Raleigh meeting at 5:00 pm on July 24, 2008.

A total of 18 individuals provided verbal comments during the six public hearings – 18 for 07H.0306 and four for 07J.1200. Of these people, two provided comments at two separate hearings (one commented twice on 07H.0306 and the other commented on 07H.0306 at one hearing and 07J.1200 at the other) and two people commented on both rules at the same hearing. Of the group of 18 distinct speakers, nine people were property owners or represented individual property or business owners in coastal communities (Oak Island x 2, Carolina Beach x 2, Wrightsville Beach, Emerald Isle x 3), seven people represented communities (Carolina Beach x 2, Bald Head Island, Oak Island, Emerald Isle, Atlantic Beach, and Kill Devil Hills), and one person represented two separate professional organizations (Outer Banks Association of Realtors and

Outer Banks Homebuilders Association). A summary of the comments made at all six public hearings is included as an attachment to this memo (Appendix A).

***Written Comments***

Sixteen written comments were received during the 60-day period spanning June 16 through September 15. Six were submitted by property owners (Oak Island x 3, Carolina Beach, Wrightsville Beach, and one generally defined as the Outer Banks), one from an engineer consultant (Wilmington), six officially representing five separate communities (Oak Island, Carolina Beach x 2, Figure Eight Island, Kill Devil Hills, and Southern Shores), one developer (Currituck County) and one NC Representative referencing the comments from the aforementioned Currituck County developer. These comments are included in their entirety as an attachment to this memo (Appendix B).

**SUMMARY**

Stakeholder comments, both written and verbal, received during the official 60-day period for proposed rule changes to 15A NCAC 07H.0306 and 07J.1200 are attached to this memo. On Friday, September 26, I will provide a synopsis of the major themes in these comments to the CRC. Until then, the comments are provided here in their entirety for review and consideration.

# **APPENDIX A**

Transcripts summarizing comments made at each of the six public hearings for both 15A NCAC 07H.0306 and 07J.1200



**Regional Public Hearing  
Surf City, NC  
Surf City Community Center  
July 7, 2008  
6:00 pm**

Introduction by Commissioner Charles Elam at 6:00 p.m. After a brief description of the proposed rule changes to 15A NCAC 07H.0306, the first public hearing was opened at 6:02 p.m.

**David Ward**, resident of Topsail Island, expressed concern about the limitation of cantilevering to zero feet. Mr. Ward agreed with the excessive risk related to extreme cantilevering but saw no reason of limiting cantilevering to two or four feet. As an architect, he felt it enhanced the design of certain structures and that no problems would be solved by eliminating limited cantilevering. Mr. Ward also felt that it was silly that a roof overhang could not encroach over setback line.

**Rosemarie Gabriel** addressed the issue about the seriousness of the ordinance change that could impact thousands of people. While noting that the information was run in the local papers, Ms. Gabriel asked why the homeowners impacted by these ordinances were not given a letter describing how they may or may not be impacted by these proposed changes.

With no further public comments, the hearing was closed at 6:10 p.m.

After a brief introduction on the proposed rule changes to 15A NCAC 07J.1200, the second public hearing was opened at 6:11 p.m. There was a question from the audience about “procedures” and DCM staff explained that the procedures were those by how a local government would petition the CRC for a static line exception.

With no public comments, the hearing was closed at 6:12 pm.

Commissioner Elam announced the final public hearing for these two rules would be in Raleigh on July 24<sup>th</sup> at 5:00 pm at the Holiday Inn Brownstowne in Raleigh.

**Regional Public Hearing  
Carolina Beach, NC  
Carolina Beach Town Hall  
July 8, 2008  
6:00 pm**

Introduction by Commissioner Joan Weld at 6:07 p.m. After a brief description of the proposed rule changes to 15A NCAC 07H.0306, the first public hearing was opened at 6:08 p.m.

**Alan Gilbert**, resident of Carolina Beach and business owner in Carolina Beach and member of Carolina Beach Town Council, has been reading many opinions from coastal interest groups. He noted that he had not seen copies of impact statements of the proposed rules. CAMA rules state to protect life and property, and Mr. Gilbert wondered if a general findings sheet or fact sheet could be released regarding proposed rule changes. How do these proposed rules impact the citizens at large, both positive and negative? Mr. Gilbert has seen numerous organizations that look at economic development. Is this going to reduce citizens' insurance? How are these rules going to influence them? From a council member's perspective, these are the types of data that would be helpful to him. When policy is projected on people, he looks for those types of findings. Maybe something in laymen terms would be appropriate and help the public understand how they might be affected by any proposed rule changes.

**Ann Bowman**, business owner at the beach, addressed the issue that she felt structure size had nothing to do with the impact of the ocean nor does use of the lot. Ms. Bowman is a property manager for 11 properties on the ocean. At the beach, maximum lot size and depth is 125 feet all the way up to the north end of Carolina Beach. Three buildings exceed 20,000 square feet. Ms. Bowman was quite appalled that there was nothing in the proposed rules where those buildings could not rebuild in the face of a huge national disaster. Bowman reference the Riggings and Shell Island who were offered money to move buildings but refused and felt that everyone was being penalized on the oceanfront for these few examples. She proposed a rule that a setback would be as previously established unless 1) sandbags had ever been installed in front of the existing building or 2) any new construction to be built on a currently undeveloped or vacant lot shall comply with the new setbacks. She wanted to see some type of exception for properties that have had no history of a problem from where they currently sit, noting that there is a completely different set of issues from the north end of Carolina Beach to the southern end of the island at Kure Beach / Ft. Fisher boundary.

**Steve Coggins**, attorney for Carolina Beach and Bald Head Island, wanted to extend a welcome as Carolina Beach's Town counsel and thanked the CRC and DCM staff for conducting the regional public hearings. Coggins couldn't think of a more important effort than coming to the communities to discuss proposed policies. As counsel, he is going to be asked very hard questions about compliance. Commissioner Weld stated that questions could be posed but the questions would not be answered during the public hearing. The hearing was for comment on the public record, but the question(s)

could be posed for the record. Coggins stated that his primary concern was 07H.0305 that was defining the static vegetation line, which was then reference by rule 07H.0306. Coggins recited the portion of 07H.0305 about static vegetation lines not being established where static lines were already in place, including those in place prior to the effective date of the rule. Any community that currently has a static line, such as Kure, Carolina and Wrightsville Beach (Coggins also reference WB's building line), is going to be advised by Coggins that the community is stopped from the get go and the CRC shall be stopped from considering the static line exception. He felt that this was an inadvertent oversight. He mentioned that the static line was adopted two years ago. Coggins' second comment was a concern that there is no credit, because of the way the rule is given, based on unique natures of the different communities pursuing nourishment, specifically cited dense urban environments such as Carolina Beach and Kure Beach. Many miles of the NC coast currently are non-buildable altogether because they are under Federal and State protection. It appears to him that these communities that have had large, dense development that has survived numerous storms. Coggins noted that the CRC was addressing urban waterfront rules along the estuarine shoreline and that such a concept should be considered for the oceanfront. Coggins felt there would be no desire for people in the State for these large, urban areas to retreat but, rather, continue to thrive in place. Certainly, sea level is rising and global communities are taking proactive steps to mitigate SLR. However, unlike the urban waterfront rules, these setback rules do not take into account the need to take into account dense, urban developments that currently exist. The devil is indeed in the details. The preface of 0306 as proposed states that "Furthermore, there is no assurance for future funding of beach compatible sediment for beach fill and project maintenance." That is a finding of fact. However, the rule seems to encourage a community to pursue a static vegetation line and provide evidence of plans for a beach fill project designed for a period of at least 30 years. It doesn't state that any part of the 30 years is retroactive but rather the rule is considering 30 years forward. However, this statement falls on the heels that there is no assurance for beach compatible beach fill. It would be appropriate for an applicant to feel there is no way a viable 30-year project design could be developed. Further, documentation from the USACE must be provided that there is compatible sand available for the beach fill project for the next 30 years. There is an Ocean Policy Steering Committee and a Beach and Inlet Management Plan that is addressing these big issues. Should there be ocean zoning? Should sand be regulated. At the highest levels of thinkers about NC coastal policy are bedeviled by these issues, so how is Coggins going to be able to advice his clients that there will be sediment for thirty years. One can infer that the community is set up to fail. Further, the proposed rule references full funding for the project design but there is no assurance of future funding. There is no assurance of anything. If Federal funding could continue, the USACE might design a project for longer than 30 years, it does not provide finding for more than 20 years. Coggins referenced discussion prior to the hearing between the mayor of Kure Beach and the Manager of Bald Head Island about the challenges of meeting the requirements demonstrating beach fill design, appropriate sand volume and monies to pay for the project. Numerous financial avenues to pay for these projects are being examined (as opposed to having the cash on hand up front), but the rule states that the funding must be identified to full fund the project for over thirty years. Coggins

did not know of any municipality that could have any assurance of any finding for more than 30 years. If that is the sort of thing required for this rule, it needs to be spelled out and made clear. In the absence of that, we have no clue to where we are. For Carolina Beach (CB), he is unsure if the Town of CB even has the right to make an application in the first place. Second, in his view, the facts provide a presumption on the application that there is no future guarantee for a bank of sand and money that will in fact provide assurances for sand for the particular project. No rules are in place at this time and are being considered by other agencies as well as the CRC. What about new rules such as mining rules, ocean floor zoning, sand management regions? What if these rules make certain sand resources off limits to towns such as Carolina Beach where they couldn't provide assurances of compatible sediment to construct the project. There is also some question about whether staggered setbacks apply in the event the beach fill project is approved. It appears to him that these rules even when there is a static vegetation line. Coggins has heard that there are those that believe that if a beach fill project is approved that the graduated setback do not apply. He feels that they do indeed apply. Even if all the criteria of a static line exception are met in the application, it states that the CRC "may" allow development under the following conditions. In the absence of the word "shall", regardless of the criteria being met, it is within the discretion of the CRC to decide one way or the other. If a Town expends extraordinary resources to submit an application as set forth in 07J.1200, then that is concerning. Coggins stated he was confused that, even upon approval, that the static exception could not be passed until the passage of five years beyond the initial project associated with the original static vegetation line. He is not sure if that is the intent of the proposed rule language. Coggins stated this confused him and was unsure when he could receive a static vegetation line. One must ask, what is the impact of intervening events that may take place between beach nourishment and the five years. Is there a difference between an avulsive event such as a hurricane versus encroachment by long-term shoreline erosion. Coggins also noted that defining size of structure on the built-upon area and that parking above ground was not included. He felt that it needed to be clearer that surface parking was not included in the proposed increased setback proposal. There are grandfathering provisions in 0306(a)(3) for development landward of any primary dune. He felt all platted lots were pre-June 1, 1979. It was bedeviling that lot configurations were changed by storms or federally or multiple-funded projects that these lots were no longer as shown on the particular plat. Does this mean the lot needs to be owned by the person seeking the designation on whether they meet the setback. Or, should that owner say, my lot is 120 feet deep on the plat but because over the course of events (rise of MHW or the placement of sand from public funds so that raised lands no longer belong to the lot owner), is that person eligible to still take advantage of the grandfather provision. This is a similar bedeviling that exists later in the rule that references provision in 07H.0309, which specifically grants exceptions for development landward of vegetation lines only. The liberal language of 0309(a), it can be argued, is not reconcilable with the language in 07H.0306 that references it. Coggins certainly recognizes the abuses that have occurred with cantilevering. Two to three-foot cantilevers may be arguable safer in the event of a storm surge compared to a cosmetically attached deck when exposed of a storm surge, so Coggins did not understand how a cosmetic deck could be treated differently in other rules. The reason

for the setback, as he understands it, is to provide protection from extraordinary storm forces and wind, so he doesn't understand the risk from limited cantilevering of 2-3 feet. Coggins reference the alternative minimum tax as an analogy to buildings greater than 5000 square feet can be setback based on whichever is more landward – the static line or the vegetation line. There are many reasons for redevelopment besides storm damage. What about renovation and green construction? Nonetheless, it seems that the rule states that the landward-most line (veg line or static line) is used to measure the setback. Commission Weld asked Coggins if he was close to finishing. He stated he was wrapping up and then made no further comments.

Weld asked if there was anyone that had not signed up but wanted to speak. With no further public comments, the hearing was closed at 6:40 pm.

After a brief introduction on the proposed rule changes to 15A NCAC 07J.1200, the second public hearing was opened at 6:52 p.m.

Calvin Peck, Town Manager of the Village of Bald Head Island (BHI) and resident of Carolina Beach, spoke on behalf of BHI. Peck appreciated the CRC's efforts to make exceptions to the static vegetation line rule in light of long-term beach fill projects. Peck's primary concern was with definition. 07J.1201(a) states that a petitioner can submit a request for a static line exception after five years has passed after initial construction. He felt that this was reasonable and illustrated that the project was in place and stable. The problem comes in with part (2) when the rule started to define what a large-scale, long-term project. He noted that 30 years from the request had to be met which would be five years after the initial project. Therefore, the maximum amount of time here is actually a 35-year time span. 25 years seems reasonable since it is in line with USACE projects. Other beach fill projects in NC such as BHI and other Brunswick County towns that share sand from the Wilmington shipping channel and it is a 20-year USACE project. The project will be re-evaluated at that time based on available sand and maintenance of channel. Therefore, after a waiting period of five years outlined in the rule, there are only 15 years remaining in the project and the rules states that a minimum of 30 years is necessary to qualify for the static line exception. Peck stated that the rule was asking the petitioner to renew a beach fill project, or at least have those plans in place (including sufficient beach quality sand necessary to do the project) – that is a significant engineering event. Some municipalities, New Hanover County being an exception to the rule, that do not have long-term projects in place. What is funding for the project? Money in the bank? Assessments on a project-by-project basis (maintenance projects). What about a municipal taxing district. Is that sufficient to prove funding for a long-term project even though such things can be overturned with a change of political leadership. Is it still considered long term? What about occupancy taxes on rooms? Carrying it to an extreme, all it takes is the General Assembly doing away with the occupancy tax (or a municipality or county not collecting it for one or more years). What happens then? If you're looking for an excuse or reason to not grant a static line exception, you can interpret the rule as the community/application not having money "in the bank." Again, Peck thanked the CRC

for considering a policy such as this because it has been needed for a long time. However, the 30-year date from the date of petition forward was simply too much.

Weld asked if additional people wanted to speak. With none, the hearing was closed at 6:58 pm.

**Regional Public Hearing  
Supply, NC  
Brunswick County Board of Realtors  
July 14, 2008  
6:00 pm**

Introduction by Dr. Steve Everhart (hearing officer), DCM Wilmington Regional Manager, at 6:01 p.m.

After a brief introduction on the proposed rule changes to 15A NCAC 07H.0306, the first public hearing was opened at 6:03 p.m. Dr. Everhart reminded the attendees that the written comments could continue to be submitted through August 15<sup>th</sup>.

**Dara Royal**, Council Member from the Town of Oak Island, submitted written comments prior to her oral comments. Ms. Royal commented on behalf of the Town and commended the CRC on recognizing the benefits of large-scale beach fill projects that have a commitment for maintenance of said projects in order to provide storm and erosion protection. Royal appreciated the CRC's willingness to work with local government stakeholders during the rulemaking process. Ms. Royal felt that it was imperative for the adoption process of the draft rules to move forward expeditiously and that the Town's comments would not jeopardize that goal. Generally speaking, the Town strongly supports that static exception established in the proposed rule amendments. One concern, however, was the "landward-most adjacent structure" limitation that proposed an arbitrary line in front of which development could not occur. Ms. Royal felt that several key points warranted special attention by the CRC in order to ensure fairness and avoid unintended consequences. The "landward-most" position is arbitrary and, although the Town recognizes and acknowledges that a building line should be established in order to setback development the maximum feasible landward distance on a lot, the proposed rule would have two negative impacts: 1) it will permit placement of the total floor area of infill development in some cases to be farther oceanward than otherwise necessary, and 2) it will discourage re-development to current building codes by reducing the allowable floor area more than would otherwise be permitted. As an alternative, the local government requesting a static line exception could work with the Division of Coastal Management to formulate a building line that represents the maximum feasible distance landward that allowable development could be set back on a lot taking into consideration local development ordinances and lot configurations. The construction line could be approved by the CRC as part of the static line exception request. The Town respectfully requests that the building line procedure described here be incorporated into the proposed rules in order to eliminate the inconsistency inherent with using landward-most adjacent provision.

With no other comments, the public hearing was closed at 6:07 p.m.

After a brief introduction on the proposed rule changes to 15A NCAC 07J.1200, the second public hearing was opened at 6:09 p.m. With no comments from the public, the hearing was closed at 6:10 p.m.

**Regional Public Hearing  
Beaufort, NC (Pivers Island)  
NOAA / NC DCM Coastal Reserve auditorium  
July 15, 2008  
6:00 pm**

Introduction by Commissioner Wayland Sermons (hearing officer) at 6:01 p.m.  
Commissioner Chuck Bissette also present.

After a brief introduction on the proposed rule changes to 15A NCAC 07H.0306, the first public hearing was opened at 6:03 p.m.

**Trace Cooper**, Mayor of Atlantic Beach, spoke on behalf of the Town. The request from the Town was to provide an exemption from the proposed increased setbacks for public beach access. The Town has a fairly well established dune line and has several ADA compatible ramps over the frontal dune line that allows beach access. Variances are time consuming and expensive for towns to do, so carving out a provision to get people to the beach would avoid the variance process. Mayor Cooper commented he likely would have additional comments that would be submitted to DCM staff in writing.

Commissioner Sermons reminded the attendees that the CRC will be receiving written public comments through August 15<sup>th</sup>.

**Frank Rush**, Emerald Isle Town Manager, spoke on behalf of the Town and stated that the Town supports the static line exception in the proposed rule language. Mr. Rush also thanked DCM staff and the CRC for the hard work that went into the development of the proposed rule language, in particular the level of public involvement and public input, which has been very much appreciated. This has been an excellent process and the Town supports the rule.

With no further public comments, the hearing was closed at 6:05 p.m.

After a brief introduction on the proposed rule changes to 15A NCAC 07J.1200, the second public hearing was opened at 6:06 p.m. With no comments from the public, the hearing was closed at 6:07 p.m.



**Regional Public Hearing  
Kill Devil Hills  
Town of Kill Devil Hills meeting room  
July 16, 2008  
6:00 pm**

Introduction by Commissioner Renee Cahoon at 6:00 p.m. After a brief description of the proposed rule changes to 15A NCAC 07H.0306, the first public hearing was opened at 6:02 p.m.

**Paul Buske**, member of Kill Devil Hills (KDH) Board of Commissioners, resident of KDH, and a local builder, spoke on behalf of the Town of KDH. Mr Buske references the resolution that the Town passed the night before opposing the proposed rule changes and stated that he would briefly make a few comments regarding the Town's position. The Town feels that there would be a negative effect of increasing the erosion rate setback for larger projects using the proposed sliding scale. The Town is concerned that there will be an adverse economic impact to the larger setback requirements will make projects unbuildable. Three projects currently under construction in KDH were identified in a packet given to Commissioner Cahoon, projects that will be impacted by the proposed rules. One project is single-family and would be minimally impacted because it is on a 5,000 foot deep lot and the other two larger, multi-family projects would face significant impact. Major changes would have to be made to all three of these projects as far as decreasing occupancy, parking and placement on the lot. Additional projects being looked at by the Town also would not be able to be built as proposed under the requirement proposed by the CRC. Mr. Buske stated that it is different when the ocean takes your property away and makes the lot unbuildable versus these rules taking property away by making it unbuildable. Nobody wants to spend \$2 million on a lot to build only a three-bedroom house. Many proposed projects would not work economically under the proposed rules. The ninety-year setback in the proposed rule changes takes into account that a building is designed to last ninety years. Mr. Buske was unaware of any structure that is designed to last ninety years and commented that the Town routinely sees structures that are around 30 years old being torn down for re-development. The new building code makes new structures last longer with newer materials and deeper pilings and 50-year events are used for snow loads and wind loads as compared to the proposed rules based on 60- and 90-year events. Mr. Buske stated that there was a lack of scientific evidence that current rules are not working. KDH has a small strip of land here and these rules will greatly impact the Town and adjacent communities in Dare County. All the towns are going to suffer. Mr. Buske requested that the CRC take the time to look at and review these rules and adopt something that works.

**Willo Kelly**, Government Affairs Director for Outer Banks Homebuilders Association and the Outer Banks Association of Realtors spoke on behalf of both groups, who will be submitting written comments to these proposed rule changes regarding setbacks. However, the static line exception rule change has also been discussed. There is support for beach nourishment in Dare County and rule changes that would allow

development to occur in areas where it currently is not allowed is something that the groups see as a benefit.

With no further public comments, the hearing was closed at 6:08 p.m.

After a brief introduction on the proposed rule changes to 15A NCAC 07J.1200, the second public hearing was opened at 6:09 p.m.

**Willo Kelly** referenced her comments from the previous hearing for the record and noted they will be presented in writing.

With no further comments from the public, the hearing was closed at 6:10 p.m. Commissioner Cahoon stated that the CRC would be receiving comments through August 15<sup>th</sup>.

**Final Public Hearing**  
*(in front of full CRC)*  
**Raleigh, NC**  
**Brownstone Hotel**  
**July 24, 2008**  
**6:00 pm**

***15A NCAC 07H .0306 General Use Standards for Ocean Hazard Areas***

**Steve Levitas** of Kilpatrick Stockton, representing Moore's Inlet Limited Partnership the owner of the Holiday Inn Sunspree in Wrightsville Beach. In December of last year my client submitted detailed comments on the previous version of this rule which we argued among other things that the revised setback requirement should not apply to communities with well-established beach renourishment programs. We worked with DCM staff on modifications to the proposed rule which would resolve our concerns. We are grateful to the CRC for providing the additional time to work through these issues and to the staff for their constructive approach to try to address these concerns. The rule as it is currently before you today goes a long way towards resolving these concerns and we think we are within striking distance of having a rule that we can support. The solution that has been developed by staff is to maintain existing setback requirements for large structures in communities with long-term, large-scale beach renourishment projects. We think this is a sound approach. The remaining issues we have primarily involve procedural requirements for qualifying for this relief from the more stringent setback requirements which are contained in this rule and 7J .1200.

**Debbie Smith**, representing Ocean Isle Beach, stated she wants to commend the Commission and the Staff on how diligently everyone has worked on these rules, especially the static line exemption. I am personally very proud of what has evolved and it is something that we can all live with. It is the right thing to do. I do have one minor issue with 7H .0306(8)(f) where it says any portion of a building may not extend oceanward any further oceanward than the adjacent structure. In many of our towns we have different and varying setbacks from our landward lot-line of our oceanfront lots. Some of us have minimum setbacks, but they can go further forward. At Ocean Isle we try to keep them as far from the ocean as possible, so there is a mandatory setback that you have to start from. I would like to see some revision in this rule that would require any new construction behind the static setback be mandated to start as far landward as possible. This would be a fair thing and keep these properties further landward and away from the ocean.

**Tim Owens**, Town Manager for the Town of Carolina Beach, stated he is here on behalf of the Town Council. I submitted a letter as well as a PowerPoint presentation. The Town Council in the Town of Carolina Beach is concerned about the effect the proposed regulations will have on existing, proposed and future development in the Town. The concern has increased after reading the beach fill section in the proposed rules. To better understand our concerns with the proposed regulations you have to understand the history of development in the Town or the Town's vision for the future. With the

assistance of Federal and State governments, the Town of Carolina Beach has been fortunate enough to provide shoreline protection since 1965 with great success. Since that time, development within the Town has seen peaks and valleys with the latest large-scale surge of development slowing in 2005-2006. Overall the type of development in Carolina Beach is more compact and larger in scale than other North Carolina beach communities. A number of items contributed to this development pattern, but overall we believe it was a direct result of small lot sizes, early provisions of sewer service in the Town, and a healthy dune system that has provided decent protection to property owners over the years. Following the latest development surge, the Town realized that it needed to review its development policies, ordinances and better define a community position with regards to the Town's central business district. The Town hired a planning consultant to create a master development plan that was recently adopted by the Town Council. The newly adopted master plan contemplates a vision of a more urban environment to include several different amenities. The plan is a long-term vision and will take many years to accomplish and for the most part most of our citizens are very excited about the plan. The main concerns for us are that we have spent millions of dollars protecting the property along our coastline establishing a quality beach dune system for residents. Currently the regulations would make it difficult for Carolina Beach to fall within the current beachfill guidelines and we have been doing it since 1965. We have two more cycles of beach nourishment.

**Steve Coggins** of Rountree, Losee and Baldwin representing the Town of Carolina Beach stated he would like to thank the CRC on behalf of the municipalities within the CAMA counties for conducting regional hearings. There appears to be one urban center that is industrial, residential, historical, educational, tourism that is all centered on the oceanfront. The CRC has taken a hard look at urban waterfront rules. We have a vital urban center that simply does not fit with any of the pegs of the regulatory scheme. Perhaps it would be a healthy thing to take a look at an urban oceanfront rule as opposed to applying the one size fits all. We have technical concerns about whether the Town is even eligible to apply as a beach fill community. In the rule it states that if you already have a SVL, then you are not eligible to apply for beach fill status. I see this as a technical thing that we can change. We probably need significant clarification on whether a community like this urban center, that has since 1965 a wonderful history of working with this agency and all related agencies, is assured.

**Bill Bober**, private homeowner on Emerald Isle, stated he owns properties which are both conforming and non-conforming. Some of my neighbors and I are both grateful to the Committee for finally addressing this rule change. We are also concerned about the vegetation setbacks. I don't know if the existing rule that is on the website is what will be voted on, but I think some of the other comments about the one-size fits all, just like the arbitrary static line that was put down ten years ago, should have not been a one-size fits all. I know it was an emergency line, but it was an economic disaster for many people who had planned on buying beach property for retirement purposes. Thank you for addressing this issued, but perhaps instead of a one-size fits all, I would hope you work more individually with the Towns with their individual requirements they need for homeowners or commercial or whatever it may be.

**Lewis Woodson** from Burlington, NC stated he owns a home in Oak Island. I am concerned about the vegetation line being moved. We bought our house about 15 years ago. When we bought it there were 12-15 houses in front of us on the ocean. Only 3 of those are left today. The static line is back where people cannot build in front of that, but now they want to move the static line back and put houses back where those houses have already washed away. I am opposed to that.

**Steve Ambrose**, homeowner in Emerald Isle, stated he wanted to thank the CRC, DCM and Dr. Jeff Warren and other parties involved in this process over the last several years. We appreciate you opening the floor today for public comment. My wife and I are owners of a beach home in the section of the beach affected by this new rule. We are extremely pleased with the new proposal which allows for the possibility for lots in this section of the beach to be re-built based on changes to the setback policy. This is a very positive approach which will allow some of the older structures to be brought up to current code, and therefore make homes safer for residents and their guests. Today I'm speaking to provide some positive feedback to the CRC and DCM regarding this entire process. As a concerned citizen, I have been involved for about the last three years. The rules have been comprehensively studied, proposed, and altered based on feedback from all interested parties. The various groups involved in drafting the rules have listened very carefully to all stakeholders, and have made numerous changes as a result of the meetings and public comments. It is refreshing to see this process work effectively and I am personally very pleased with the negotiated terms set forth in the final version of rule .0306. In particular I would like to extend my thanks and appreciation to Dr. Jeff Warren and his team on the CRC staff. He has been very accessible throughout this entire process. Over the last couple of years, Dr. Warren has taken the time to answer my numerous questions leading up to rule .0306. He has been willing to explain the process and logic behind the difficult task of balancing the interests of all involved stakeholders. I appreciate the fact that Dr. Warren is able to clarify and discuss some very complicated and detailed issues in layman's terms for citizens such as myself to understand. I look forward to the adoption of this rule, because it does allow for responsible and limited rebuilding along the effected areas of our wonderful state.

**Charles Stuber**, homeowner on Emerald Isle, stated he and his wife have owned property on Emerald Isle since 1970. We have seen a lot of things change since then. We bought our first property in 1970. At that time there were hardly any dunes in front of us. Through the use of sand fence and fertilizing the sea oats we have built up a very good primary dune in front of our property. We have five lots. With the renourishment we had five years ago, we have much better beach and much better dunes than we had 38 years ago. I think this is evidence that the beach is changing for the positive in our area. I applaud the CRC for considering the fact that the static line may need to be considered and have exemptions for it because right now all of our lots are non-conforming and if something happened to them we would have no value there. It will increase the tax value for Emerald Isle and it will encourage people to improve their property.

### ***15A NCAC 07J .1200 Static Line Exception Procedures***

**Steve Levitas**, representing Moore's Inlet Limited Partnership, stated our interest in this rule arises from its relationship to the setback rules that were the subject of the prior hearing. In order to obtain relief from the more stringent setback requirements in the .0306 rule for large structures within a local government's jurisdiction, the local government would have to satisfy the static line exception requirements in this proposed rule. We believe the purpose, spirit and intent of what the CRC and the DCM Staff are trying to do is sound. We agree there needs to be well-defined procedures and there should be significant standards that have to be met in order to qualify for the static line exception and the setback exemption. We think this rule obtains some ambiguities and those provisions could be construed in a way that would undermine the purpose of this rule. I think it can be fixed relatively easily and I have had a chance to talk to Dr. Warren about this and I think he shares this view. I think there are some things that can be done in the general improvement of the language that will make the rule clearer and we are committed to work with the staff.

**Frank Rush**, Town Manager for the Town of Emerald Isle, stated the Town of Emerald Isle supports the static vegetation line exception and thanks the CRC and DCM Staff for a good public process. The significant stakeholder input is very much appreciated.

# **APPENDIX B**

Written comments received by the Division of Coastal Management via mail and email during the official comment period ending August 15, 2008

Subject: proposed oceanfront setback rules  
Date: Tue, 8 Jul 2008 11:53:40 -0400  
From: Tommy Tucker <tommytucker@charter.net>  
Reply-To: Tommy Tucker <tommytucker@charter.net>  
Organization: Tucker Bros. Realty Co.  
To: <jim.gregson@ncmail.net>

TO: Mr. Jim Gregson

Dear Mr. Gregson:

This email is in support of eliminating state imposed oceanfront setback lines, standing or proposed, in the towns of Carolina Beach and Kure Beach. Both towns have full beach renourishment programs, with federal, state and local funding.

Carolina Beach renourishment has been in place since 1964, Kure Beach since 1997. Both have proven to be most successful in fulfilling their missions.

I see no need or good reason for state imposed oceanfront setbacks for property built behind our berms.

By the way, I was 13 when the initial Car. Bch. berm was built, skim-boarding in the runoff, so I do speak from actual knowledge, having lived in Carolina Beach my entire life, serving 4 years as a lifeguard while earning a degree in political science from North Carolina University, aka UNC-Chapel Hill.

I have been a real estate broker in Carolina Beach over 35 years, and my father, Glenn M. Tucker, likewise from 1937 until his death in 1993. He also served on the original NC Water and Air Resources Board for 13 years, under Governors Dan K. Moore and Terry Sanford.

Hopefully, the above will help to lend some credibility to this email.

Sincerely,

Thomas O. Tucker, REALTOR® GRI®

NC BROKER NO. 25674 SINCE 1973

Tucker Bros. Realty Co.  
Thomas O. Tucker and James Hiram Tucker



REALTORS® since 1973  
201 Harper Avenue  
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(910) 520-4944 cellular James Hiram Tucker

[www.TuckerBrosRealty.com](http://www.TuckerBrosRealty.com)

Subject: Oak Island ocean setback rules  
Date: Thu, 10 Jul 2008 13:39:41 -0400  
From: Bill Ferriss <billferriss@ctc.net>  
To: <jim.gregson@ncmail.net>

Jim,

I appreciate all the hard work your staff has done on the CAMA rules to protect the NC Coast. However I do have a few comments about the setback rules that apply to Oak Island.

The 1998 vegetation Line on Oak Island was established after the NC coast had three hurricanes that contributed to the beach front erosion but more importantly, CAMA allowed the beaches to be Bulldozed to renourished the front dune. The number of cubic yards of sand bulldozed up was never reported and therefore never considered as one of the causes for our beach front to erode. Bull dozing made the ocean tide come in closer to the frontal dune and eliminated any chance of new vegetation. The new sand and shells also had salt that deferred any growth.

The 1998 vegetation line was also determined by the growth of sea oats. This was not correct according to your legal staff on my last hearing. All native vegetation should have been considered to establish the vegetation line.

The last renourishment program on Oak Island simply replaced the sand that was bull dozed up in the 1990's. Therefore the vegetation line should be determined based on the present vegetation line or July 2008 when vegetation has had a chance to grow. Sea Oats are not mature until the month of July. I have proof that a qualified CAMA worker marked the same corner of a lots vegetation line over five feet closer to the ocean in June that they did in April. It was not the fault of the worker, it is the fact that the vegetation line will change due to summer growth.

The size limit on all buildings was established because tall buildings created a shadow on the beach sand that cooled the sand and affected the sea turtle eggs. Well, Oak Island is a north & South beach and therefore the shadows would not be on the beach. This restriction should be determine by local government.

The definition of frontal dune should be changed because the definition indicates any dune that has a 1% chance to be covered with water can not be classified as a frontal dune. Oak Island does not have a frontal dune because Hurricane Hazel in 1954 caused all of Oak Island to be under water for less than eight hours. The 1% rule or one time in 100 years was an eight

hour disaster that reclassified all frontal dunes on Oak Island forever. I do not think it is fair for a hurricane to be the cause of rule. It should be caused by the tide change and erosion by the change of tides.

Respectfully submitted

William P. Ferriss, SRA  
1417 12th Fairway Drive  
Concord, NC 28027  
704-782-5253

Subject: beach development rules  
Date: Mon, 14 Jul 2008 07:34:54 -0700  
From: Chuck Harmon <chuck@york.org>  
To: <jim.gregson@ncmail.net>

Dear Mr. Gregson,

I am a property owner on Oak Island in Brunswick County, NC. Despite the possible economic advantages to me and my neighbors on the island, I am writing to ask that you and the Division of Coastal Management, please do NOT change the setback requirements and allow building closer to the water's edge on Oak Island.

The beach renourishment projects and the desire of property owners along the waterfront to develop their lots have created a false optimism that is both environmentally and economically dangerous. As I am sure you are aware, there are several compelling reasons to have even more stringent restrictions (not more relaxed) regarding such development.

1. Beach renourishment is expensive and often not successful in the long term; nature will move the sand regardless of human effort, and we are not mightier than the ocean.
2. The oceanfront ecosystem is fragile and construction threatens the very beauty that makes Oak Island economically vital, beauty which you and your agency are charged to protect.
3. Regardless of the political and scientific arguments about climate change, there is little debate that ocean levels are rising, and it seems foolish and short sighted to dramatically increase the human footprint in the most vulnerable waterfront areas.
4. We have an obligation to protect our coast and the motivation of those who wish to build is based on short-term profit, not long term conservation. Other coastal states (Oregon, California, Georgia) have already established programs to limit coastal development and protect this vital public asset.

I urge you to reject the arguments of developers and politicians who would benefit economically at the expense of all of the people of North Carolina. Please protect the coastline for our children and grandchildren to enjoy.

//Chuck Harmon//

//2908 E. Beach Drive/////

//Oak Island////, NC//

Subject: Proposed Setback Rules for Salt Sounds & River Fronts vs Oceanfront  
Date: Tue, 15 Jul 2008 23:32:59 -0400  
From: Allyn Norton <[anortonjr@ec.rr.com](mailto:anortonjr@ec.rr.com)>  
To: <[jim.gregson@ncmail.net](mailto:jim.gregson@ncmail.net)>

Jim,

As part of public comment, I have the following inputs & questions:

1. My reading of the proposed rules do not help me separate beachfront from waterfront in salt sounds and rivers. Material has been silent.
2. If salt waterfronts on sounds and rivers are included, then rock revetment and other seawalls suggest a zero erosion rate and therefore no square footage rules for setback.
3. Where the rules may not apply as in item # 2, the setback has been 50 feet for residential construction without CAMA limits on square footage. DWQ may have proposed different rules for stormwater rule reasons but status on these is also unclear.

Simple response is requested on following:

- A. Can you clarify where the proposed rules apply. Oceanfront only or also sounds and salt rivers.
  - A1. When does soundfront become oceanfront as relates to the rules ?  
Example: Harkers Island sand beach waterfront in the Maritime Museum Area. OR any exposed waterfront behind the barrier islands ( not oceanfront )
- B. Can you differentiate DCM vs DWQ rules / porposed rules on setback and why they are being separately treated ( as they appear to be but not sure )
- C. Can you calrify the proposed rules where waterfront is hardened as with rock revetment and other seawalls ( not oceanfront. Fort Fisher would be a special case ocean front revetment exception and not what I mean. )
- D. Can you clarify when DCM CAMA rules will apply to setback and square footage verses when NCDENR DWQ rules apply.  
In simplistic terms, what will each setback rule be for non ocean front construction.

Note: I am asking because I am reading as much of the literature

as I can see published on Internet and I am unable to determine intent as related to the above differentiations.

You are welcome to share with others or the general audience as to the above differentiations.

Thanks, Would help me. Hopely would be a clarification for many others.

Allyn ( Al ) Norton, PENC  
Norton Engineering & Planning  
2235 South Live Oak Pkwy  
Wilmington, NC, 28403-6112  
910-762-3757  
Cell 252-943-5360 ( Belhaven )

Subject: Comment On Proposed Oceanfront Setback Rules Changes  
Date: Wed, 16 Jul 2008 11:19:46 -0400  
From: Richard L Bunce <[rbunce@ec.rr.com](mailto:rbunce@ec.rr.com)>  
To: <[jim.gregson@ncmail.net](mailto:jim.gregson@ncmail.net)>

Mr. Gregson;

This email includes my comments for the N.C. Department of Environment and Natural Resources? Division of Coastal Management and Coastal Resources Commission recent public hearings on the proposed Oceanfront Setback Rules changes. I have previously submitted comments to Mr. Tancred Miller in November of 2007.

As a resident of Oak Island, NC I would like to comment on a part of the proposed static line rule changes that would require Towns to commit to future beach nourishment projects. I believe there are many uncertainties with beach nourishment projects that would make a long term commitment by a Town such as ours unwise. One issue is with Federal and State funding uncertainty. Beach nourishment projects in past years are largely funded by governments other than local Towns. Recently that same level of funding appears to be in doubt. A small Town such as ours committed to pay significant cost for nourishment would be in serious financial trouble.

Another issue is the effect of climate change and sea level rise. Should predictions of significant sea level rise in the next 50 years such as those developed by the Intergovernmental Panel on Climate Change (IPCC), prove to be correct, then the value of beach nourishment is brought into serious doubt. Several government agencies have issued reports over the last several decades casting doubts on the effectiveness of beach nourishment in an environment of sea level rise. The U. S. Fish and Wildlife Service has specifically commented on the proposed Brunswick County Beaches Nourishment Project that concluded that beach nourishment was not effective in the face of rising sea level. I hope the DCM and CRC will consider these uncertainties over beach nourishment and provide an official statement documenting their position on Climate Change and projected sea level rise and effectiveness of beach nourishment in this environment.

Richard L Bunce  
125 NE 26th St.  
Oak Island, NC 28465  
910-201-4679  
[rbunce@ec.rr.com](mailto:rbunce@ec.rr.com)

**Subject:** [Fwd: Ocen front setbacks]  
**From:** Jim Gregson <Jim.Gregson@ncmail.net>  
**Date:** Fri, 25 Jul 2008 19:36:56 -0400  
**To:** Angela Willis <Angela.Willis@ncmail.net>

----- Original Message -----

**Subject:** Ocen front setbacks  
**Date:** Fri, 25 Jul 2008 17:42:37 -0400  
**From:** Carol Hayhoe <[chayhoe@embarqmail.com](mailto:chayhoe@embarqmail.com)>  
**To:** <[jim.gregson@ncmail.net](mailto:jim.gregson@ncmail.net)>

\*As Realtors in the Outer Banks and homeowners that loves the beach - We commend those trying to increase the setbacks. We have many areas here where the beach is gone because of the greed of building too close to the ocean. Let's protect our beaches - without them our livelihoods will all be gone. The nicer the beaches, the more folks will want to come to live and visit in NC! Save our beaches!\*

\*\* \*Thank you \*

**\*Carol and Mike Hayhoe\***

\*252-202-0192\*

\*[carol@OBXfuturehome.com](mailto:carol@OBXfuturehome.com)

<<mailto:carol@OBXfuturehome.com>>\*

Jim Gregson <[Jim.Gregson@ncmail.net](mailto:Jim.Gregson@ncmail.net)>

Director

NC Division of Coastal Management



Town of Oak Island comments submitted for CRC/DCM Public Hearing July 14, 2008

These comments, which are submitted on behalf of the Town of Oak Island, respond to the proposed amendments to 15A N.C.A.C. 7H.0306 approved for public hearing by the Coastal Resources Commission on March 27, 2008.

We commend the Coastal Resources Commission's recognition of the benefits of large-scale beach nourishment projects that have a commitment to maintenance in providing storm and erosion protection for oceanfront development. And we appreciate your willingness to work with local government stakeholders during the rulemaking process. We would like for the adoption process to proceed expeditiously and believe these comments will not compromise that goal.

Generally speaking, **the Town strongly supports the "static line exception" established in the proposed amendments.** However, several key points related to the landward most adjacent structure limitation in .0306 (a)(8)(F) warrant the special attention of the CRC and should be considered prior to adopting the proposed rules to ensure fairness and avoid unintended consequences.

The landward most adjacent structure limitation is arbitrary and as such will result in considerable inequities in terms of the size and location of a structure on a lot. The Town recognizes and acknowledges that a building line should be established in order to set back allowable development the maximum feasible distance landward on a lot.

However, the landward most adjacent structure limitation will have at least two negative impacts:

- It will permit the placement of the allowable total floor area of infill development oceanward farther than would otherwise be necessary.
- It will discourage redevelopment to current building codes by reducing the allowable total floor area more than would otherwise be permitted.

As an alternative, a local government requesting a static line exception could work with the Division of Coastal Management to formulate a building line that represents the maximum feasible distance landward that allowable development could be set back on a lot taking into consideration local development ordinances and lot configurations. That building line could be approved by the Coastal Resources Commission as part of the static line exception request.

We respectfully request that you incorporate the procedure outlined above for establishing a building line for a static line exception to eliminate the inconsistencies inherent in the use of the landward most adjacent structure limitation.

Thank you for your consideration.

Joel Macon  
Mayor

Alan Gilbert  
Councilman

Jerry Johnson  
Councilman



Dan Wilcox  
Mayor Pro Tem

Pat Efird  
Councilwoman

Timothy Owens  
Town Manager

## TOWN OF CAROLINA BEACH

1121 N. Lake Park Boulevard  
Carolina Beach, North Carolina 28428  
910 458 2978  
FAX 910 458 2997

July 22, 2008

Mr. Jim Gregson, Director  
North Carolina Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28577

Dear Mr. Gregson,

The Carolina Beach Town Council has read and discussed the proposed rule changes to 15A NCAC 07H .0306 General Use Standards for Ocean Hazard Areas. At our regularly scheduled Town Council meeting held on July 7, 2008, the Town Council approved sending a letter to the Coastal Resources Commission expressing our opinion and concerns of the newly proposed regulations.

Before getting into details regarding the proposed rule changes, it is imperative that we inform you more about development patterns and the future possibilities of development in the Town. The Town of Carolina Beach first began nourishing the beach in 1965. Since that time, the Town has seen a lot of development. Overall, the type of development in Carolina Beach is more compact and larger in scale when compared to other North Carolina Beach communities. A number of items attributed to this development pattern but overall we believe that it was primarily as a direct result of smaller lot sizes, early provision of sewer service in the Town, and a healthy dune system that has provided decent protection to property owners over the years.

Carolina Beach has seen its share of peaks and valleys with regard to development in Town with the last large scale development boom ending in early 2006. Since that time, Carolina Beach has had some time to re-evaluate development patterns in the Town and has recently adopted a master development plan which primarily focuses on the redevelopment of the Town's Central Business District. The newly adopted master plan contemplates a vision of a more urban environment to include: 1) Quality, larger scale

commercial and mixed use development, 2) Improved streetscapes, 3) Improved and additional public open space, 4) Parking deck facilities, 5) An expanded marina, 6) An improved Carolina Beach Lake, 6) A publicly owned pier facility, and 7) Improved multi-modal and multi-purpose interconnectivity between the Central Business District and other parts of our Town. The plan is a long term vision and will take many years to accomplish. Despite the anticipated timeline, residents of our community appear excited about the possible transformation from a summertime resort town to a true year round destination point. This vision will take a lot of perseverance to achieve and we are concerned that some of the rule changes could make our long term vision more difficult to implement.

On first review, the proposed rule changes may not appear to affect the Town's future plans significantly if the Town meets the definition and criteria of a beach fill community. However, the regulations as written do provide some concerns. The Town's specific concerns primarily lie within NCAC 07H .0306 General Use Standards for Ocean Hazard Areas (8) which provides development allowances for beach fill communities and the ambiguity that lies within this section. In short, our primary concerns are:

1. Carolina Beach, New Hanover County and the Federal government have spent millions of dollars protecting property along our coastline and establishing a quality beach and dune system for residents and visitors to enjoy. This beach fill and shoreline protection program has been on-going since 1965. Currently, the Town will receive 2 more re-nourishment cycles prior to our Federal funding cycle ending in 2015. The Town believes that it meets the definition of a beach fill community and therefore can develop using the existing 60 foot and 120 foot setback lines. While the Town is actively seeking Federal reauthorization, there is no assurance that this will happen. This uncertainty in the reauthorization process could lend itself to the possibilities of the CRC not classifying us as a beach fill community and further hampers the Town's effort to revitalize its Central Business District per the vision set forth in the Town's master development plan.
2. In the event that the Town is not considered a beach fill community, a large number of existing condo complexes, hotels, high-rise condo projects and large scale projects approved by the Town but yet constructed may be in jeopardy of not receiving a CAMA permit or in jeopardy of not being able to rebuild following major damage resulting from a weather related event.
3. The Town should qualify as a beach fill community and be exempt from any increase in setback regulations due to our long history and success (since 1965) with beach nourishment.
4. The Town of Carolina Beach has had as much experience with beach fill and is in as close a position as any Town or County in North Carolina to being considered a beach fill community. However, and as written, we believe that it

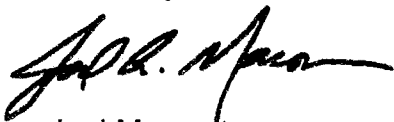
will be difficult for any Town or County in North Carolina to be deemed a beach fill community at any point in the future.

5. In the event that the setback rules are adopted, the rule changes should not become effective as of the adoption date. The CRC should allow public entities ample time to submit a request to the CRC to be considered as a beach fill community.

In summary, the Town is very concerned about the affect that the proposed regulations could have on our vision to improve our community along with the prospect that the changes could limit the future plans of our property owners. We are proud of our Town and have been fortunate to have been one of only a handful of North Carolina Beach communities that have seen success in protecting our shoreline. In addition to being concerned about the affects of these regulations on our Town, the Town is very concerned about the future impacts that these regulations may have on our fellow beach communities that do not have beach fill project or may never have beach fill projects. Tourism and economic development along the coast is essential to our community and provides broader benefits to the State of North Carolina and the United States as a whole.

In closing, we believe that the current oceanfront regulations have served the Town of Carolina Beach well and the Town is not in favor of any changes to oceanfront development regulations that would further restrict development and hamper the Town's goal of improving its community as set forth in the Town's master development plan. Finally, the Town does support the North Carolina Division of Coastal Management's initiative to limit cantilevering over setback lines (Town does not support an outright prohibition of cantilevering), as well, as giving property owners the ability to use an established FLSNV as its reference point for development when less restrictive than a static building line. Thank you for giving us the opportunity to express our viewpoints and concerns. Attached to this letter are tonight's presentation and some specific language concerns as submitted from our Town Attorney Steve Coggins. We hope that you will listen to our concerns and use them in your decision making process. If you have any questions about the Town or our concerns, please feel free to contact me at (910) 458-2999.

Sincerely,

A handwritten signature in black ink, appearing to read "Joel Macon". The signature is fluid and cursive, with a long horizontal stroke at the end.

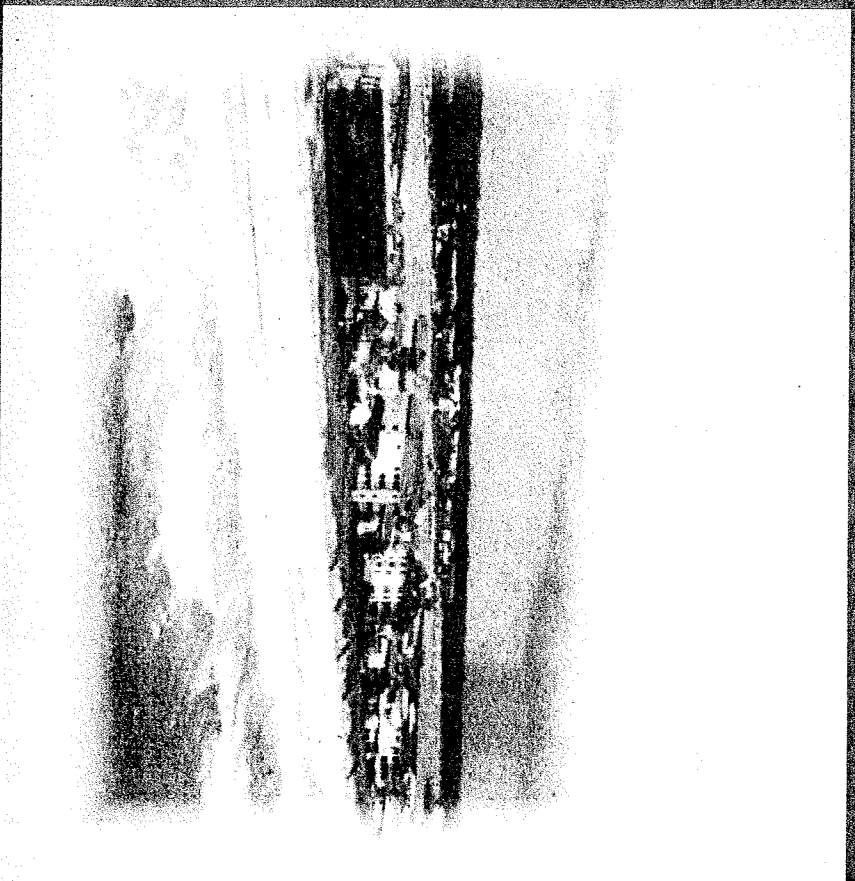
Joel Macon  
Mayor

Town of Carolina Beach  
Ocean Front Setback Proposal

Coastal Resources Commission  
July 24, 2008

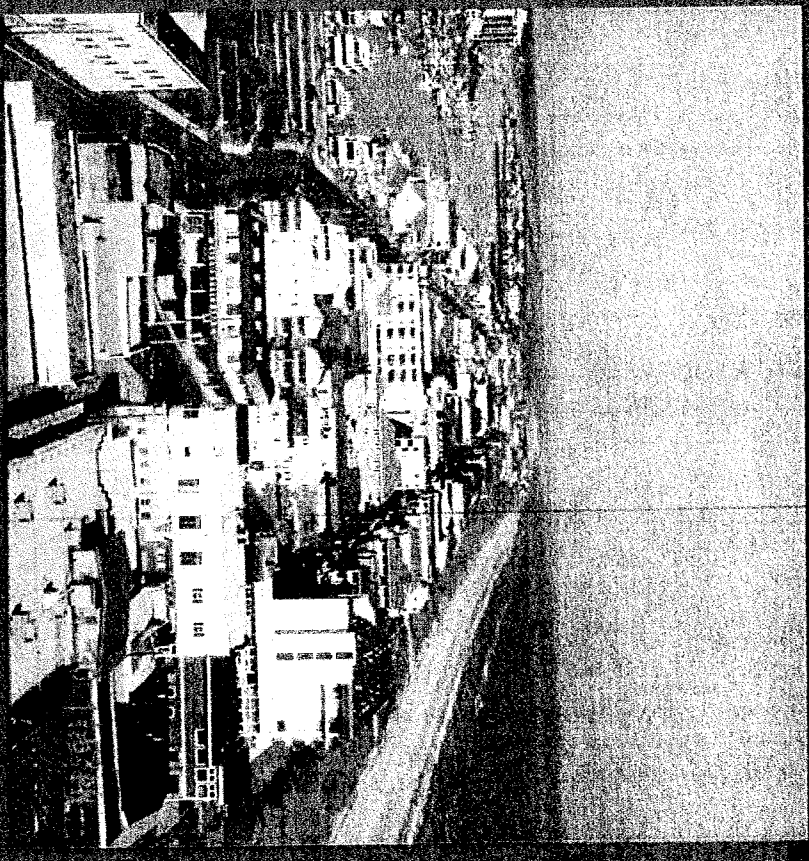
**Generally speaking, the Town Council of the Town of Carolina Beach is concerned about the affect that the proposed regulations will have on existing, proposed, and future development in the Town.**

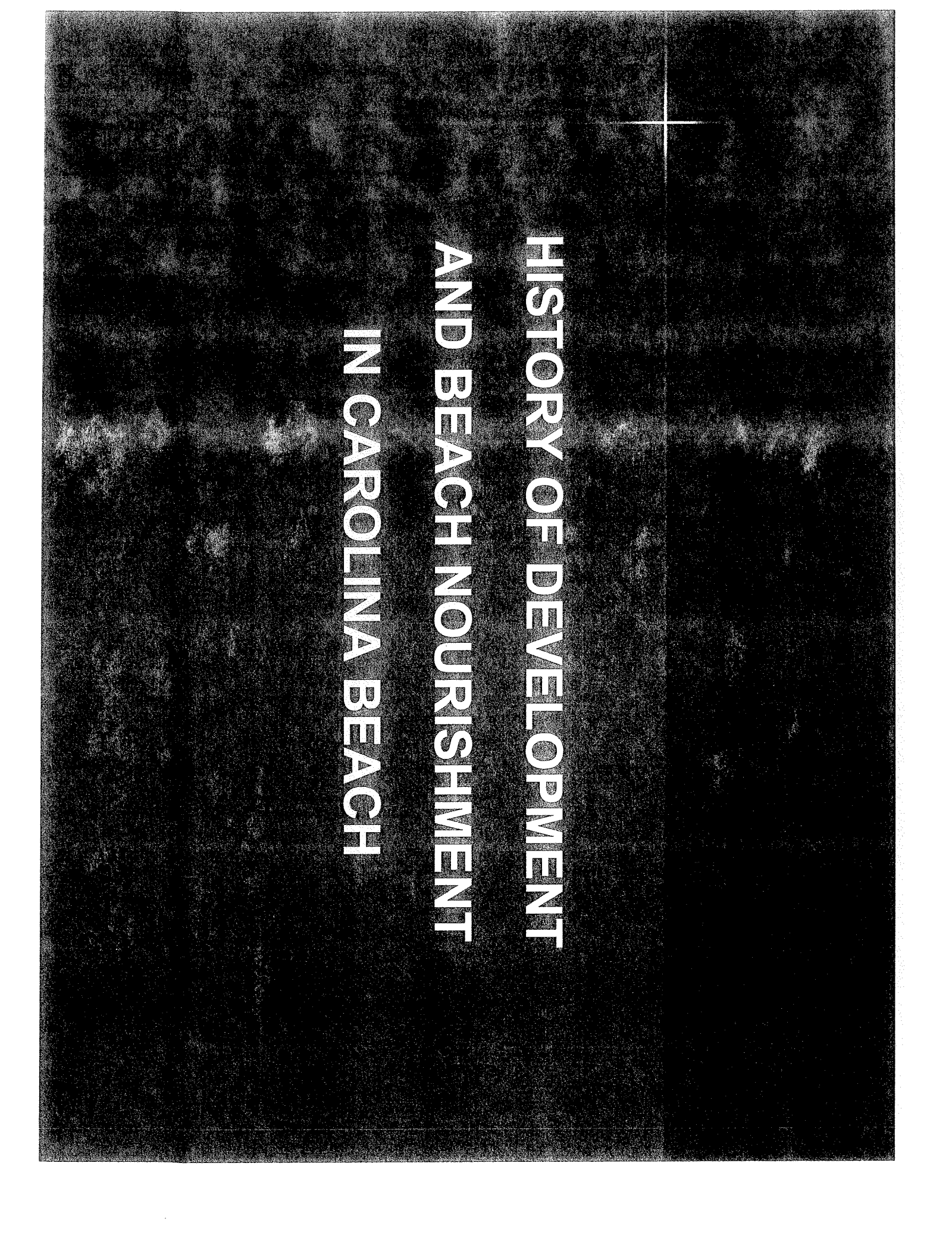
**This concern is increased after reading and interpreting the beach fill section of the proposed rules.**





**To better understand our concerns with the proposed regulations, you have to understand the history of development in the Town and what the Town's vision is for the future.**



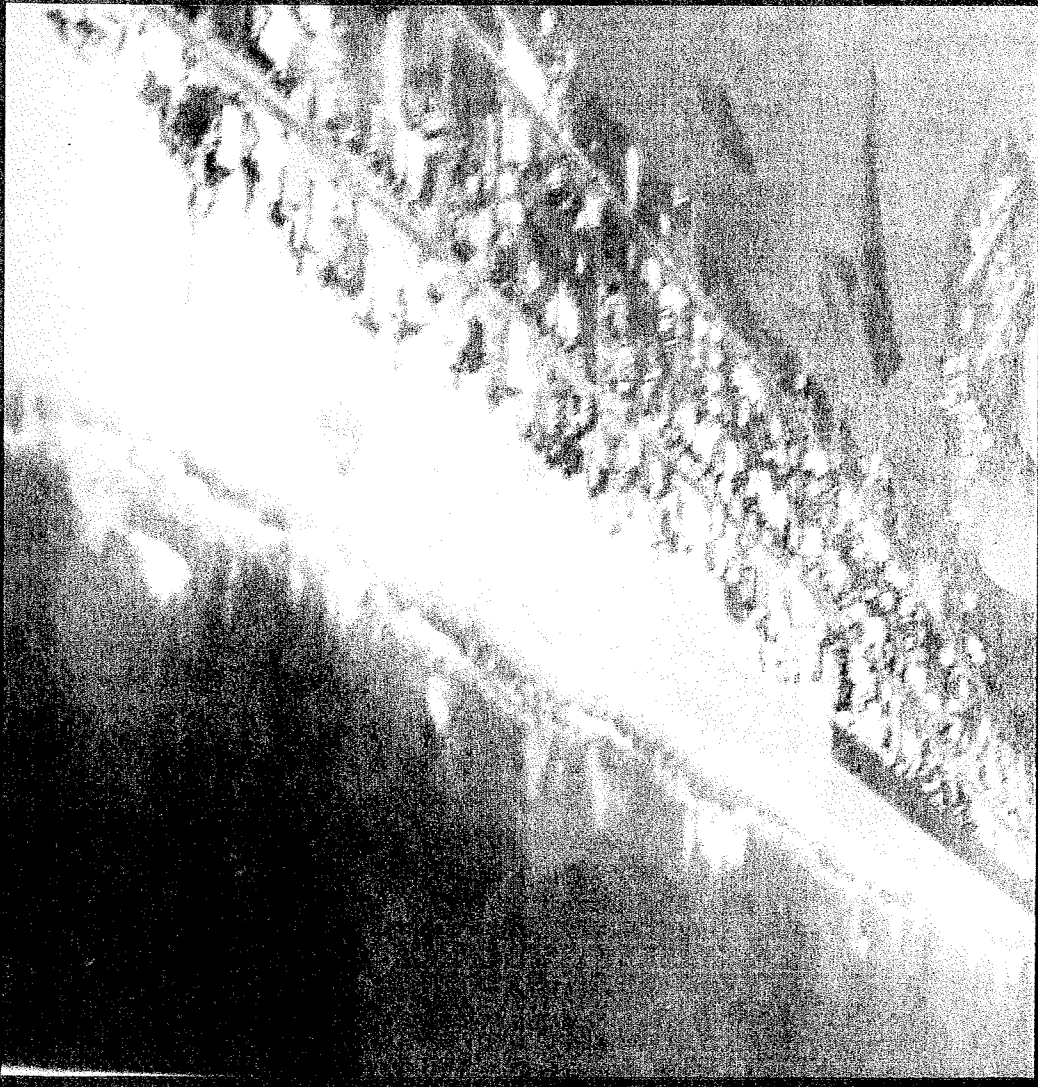


**HISTORY OF DEVELOPMENT  
AND BEACH NOURISHMENT  
IN CAROLINA BEACH**



**With the assistance of the Federal and State Government, the Town of Carolina Beach has been fortunate enough to provide shoreline protection since 1965 with great success.**

**Since that time, development within the Town has seen peaks and valleys with the latest large scale surge of development slowing in 2005/06.**



**Overall, the type of development in Carolina Beach is more compact and larger in scale when compared to other North Carolina Beach communities.**

**A number of items attributed to this development pattern but overall we believe that it was primarily as a direct result of smaller lot sizes, early provision of sewer service in the Town, and a healthy dune system that has provided decent protection to property owners over the years.**

**THE FUTURE OF DEVELOPMENT IN THE TOWN IS  
CONTEMPLATED IN THE TOWN'S MASTER  
DEVELOPMENT PLAN**

**Following the latest development surge, the Town realized that it needed to review its development policies, ordinances and better define a community vision with regard to the Town's Central Business District.**

**The Town hired a planning consultant to create a Master Development Plan that was recently adopted by the Town Council.**



**The newly adopted master plan contemplates a vision of a more urban environment to include:**

- 1) Quality, larger scale commercial and mixed use development**
- 2) Improved streetscapes**
- 3) Improved and additional public open space**

- 4) Parking deck facilities**
- 5) An expanded marina**
- 6) An improved Carolina Beach Lake**
- 7) A publicly owned pier facility**
- 8) Improved multi-modal and multi-purpose interconnectivity between the Central Business District and other parts of our Town**

**The plan is a long term vision and will take many years to accomplish.**

**Despite the anticipated timeline, residents of our community appear excited about the possible transformation from a summertime resort town to a true year round destination point.**

# CAROLINA BEACH

## MASTER DEVELOPMENT PLAN



**DESIGN PLANNING**  
peter | smith & company, inc.

10001 S. UNIVERSITY BLVD., SUITE 100, CHARLOTTE, NC 28216  
704.375.1234



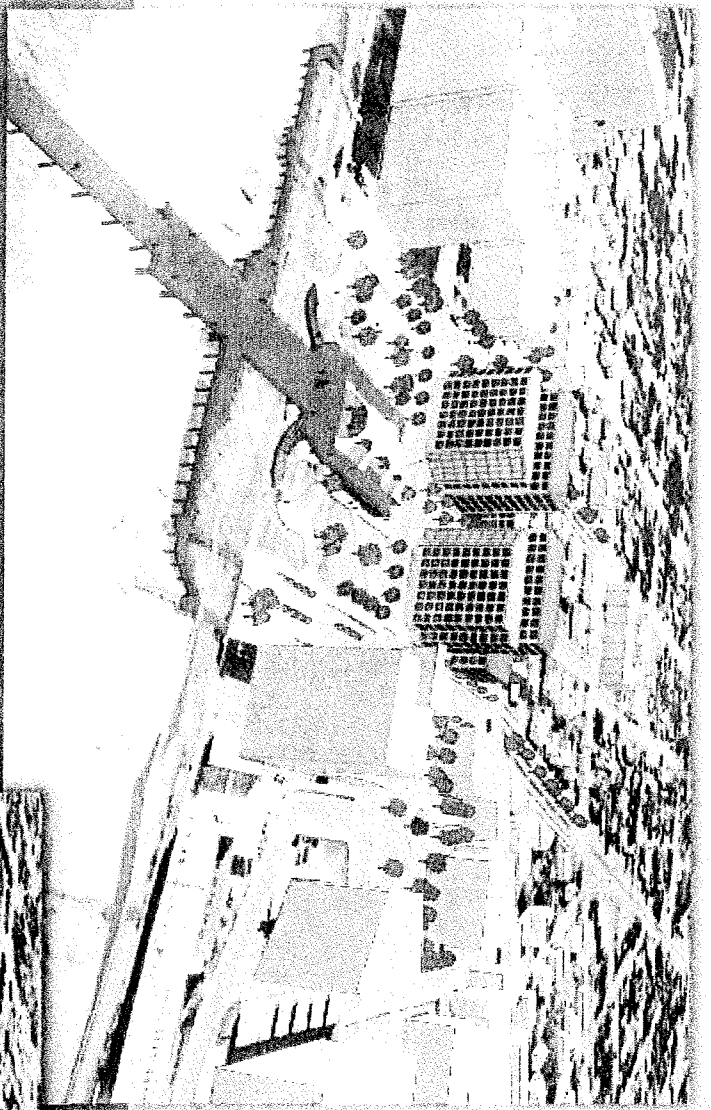
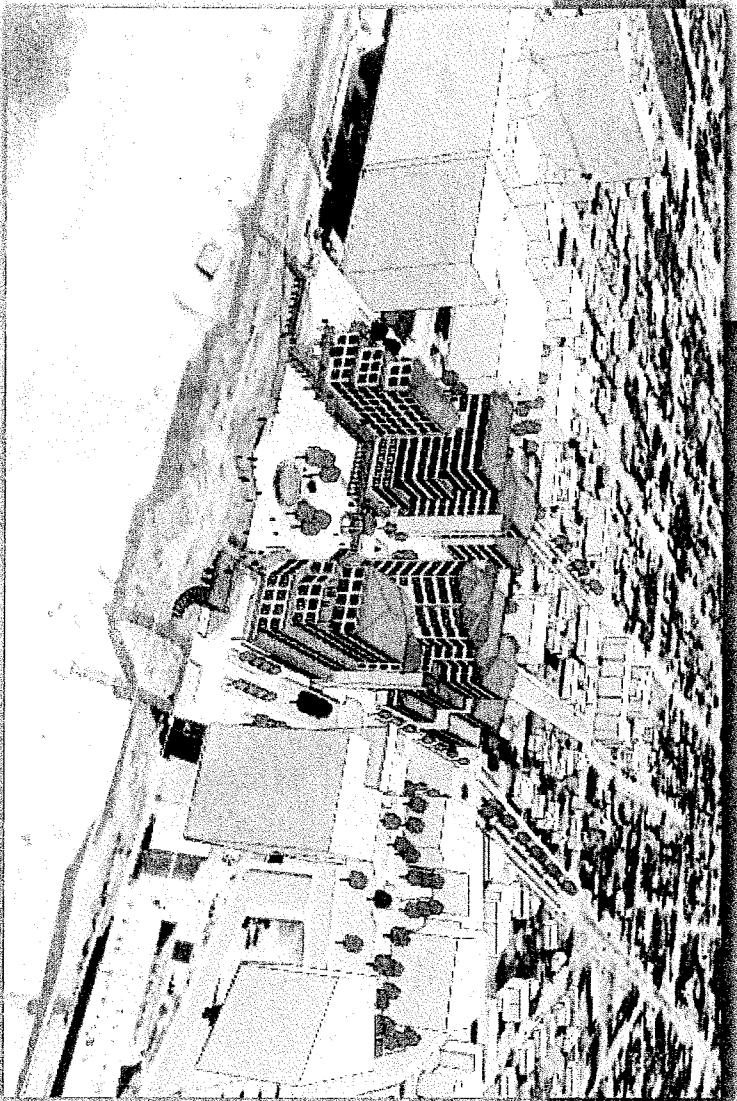


PHOTO-SIMULATION;  
PIER PARK CONCEPT ALTERNATIVE

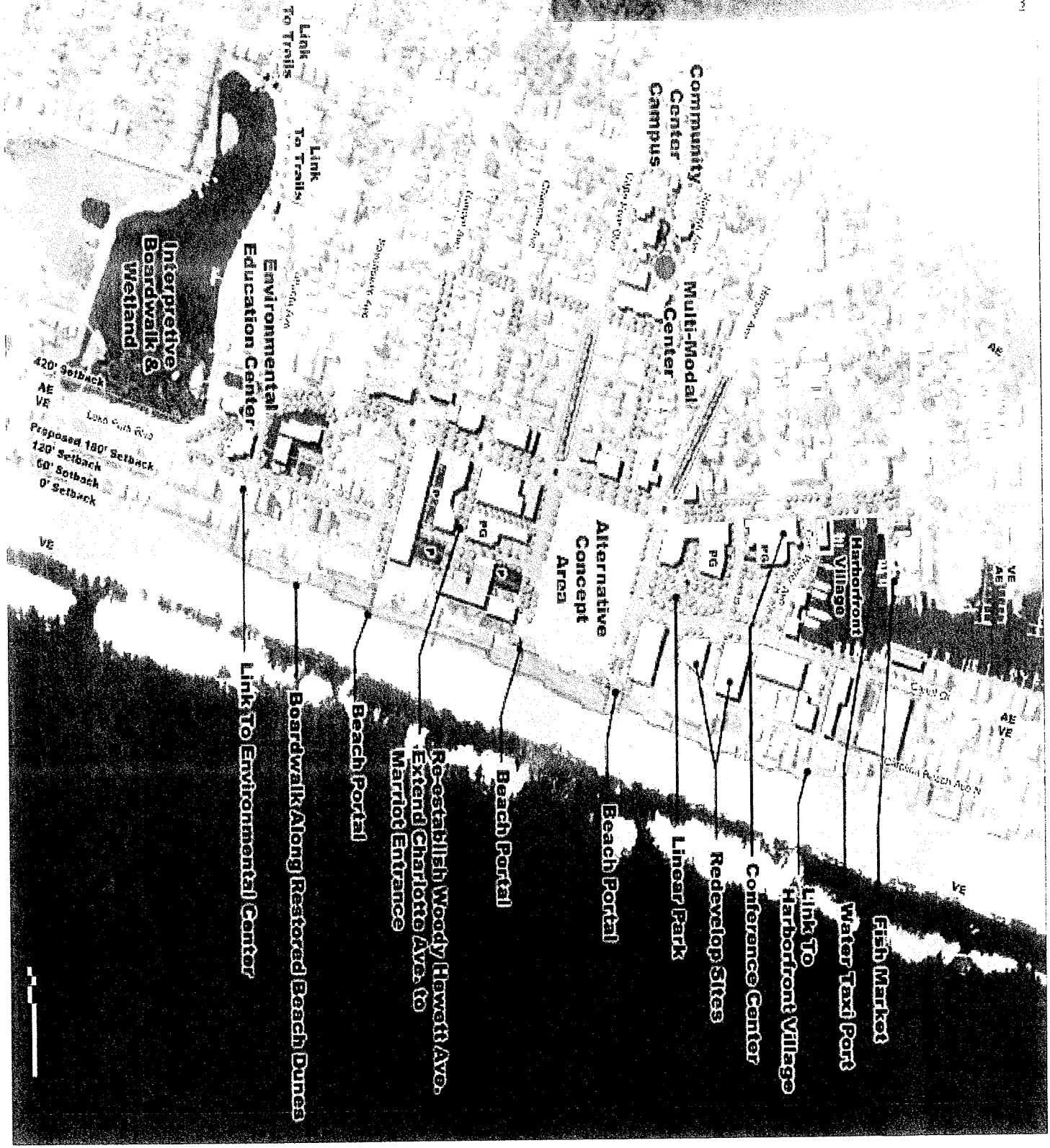
PHOTO-SIMULATION;  
TOWN SQUARE CONCEPT ALTERNATIVE





**LEGEND**

- Approved Development
- Potential Development
- Existing Buildings to Retain
- Proposed Streets
- Proposed Walkways
- Boardwalk / Pier
- Interpretive Plaza
- Proposed Parking
- Potential Parking Change
- Other Setbacks (0', 50', 100', 400')
- FEMA Flood Zones
- CMC Proposed Coastal Setback Level (100')



# KEY GUIDELINES

- Buildings should be designed to express a clearly defined base, mid-section and crown. The base of the building should extend no higher than the top of the 3<sup>rd</sup> floor and should be articulated with an architectural service feature.
- Buildings should step back in profile from the base as they rise in height to create and "wedding cake" effect. Buildings should step down toward the ocean.
- Tall buildings should be oriented perpendicular to the beach to maximize "windows" to the ocean and convey a mass that is more narrow than wide.
- Buildings should have an articulated vertical profile with subtle features projecting overhangs, hips and dormers should be encouraged.
- Buildings should be located at the street edge to create a well defined "urban wall" - some of enclosure and strong relationship to the public realm.
- All buildings with street frontages should have an entrance. Building entrances should be highlighted and clearly defined with enhanced architectural treatment.
- The facade of all street frontages should be equal avoid blank walls fronting the public realm.
- Buildings should express a dominant horizontal line.

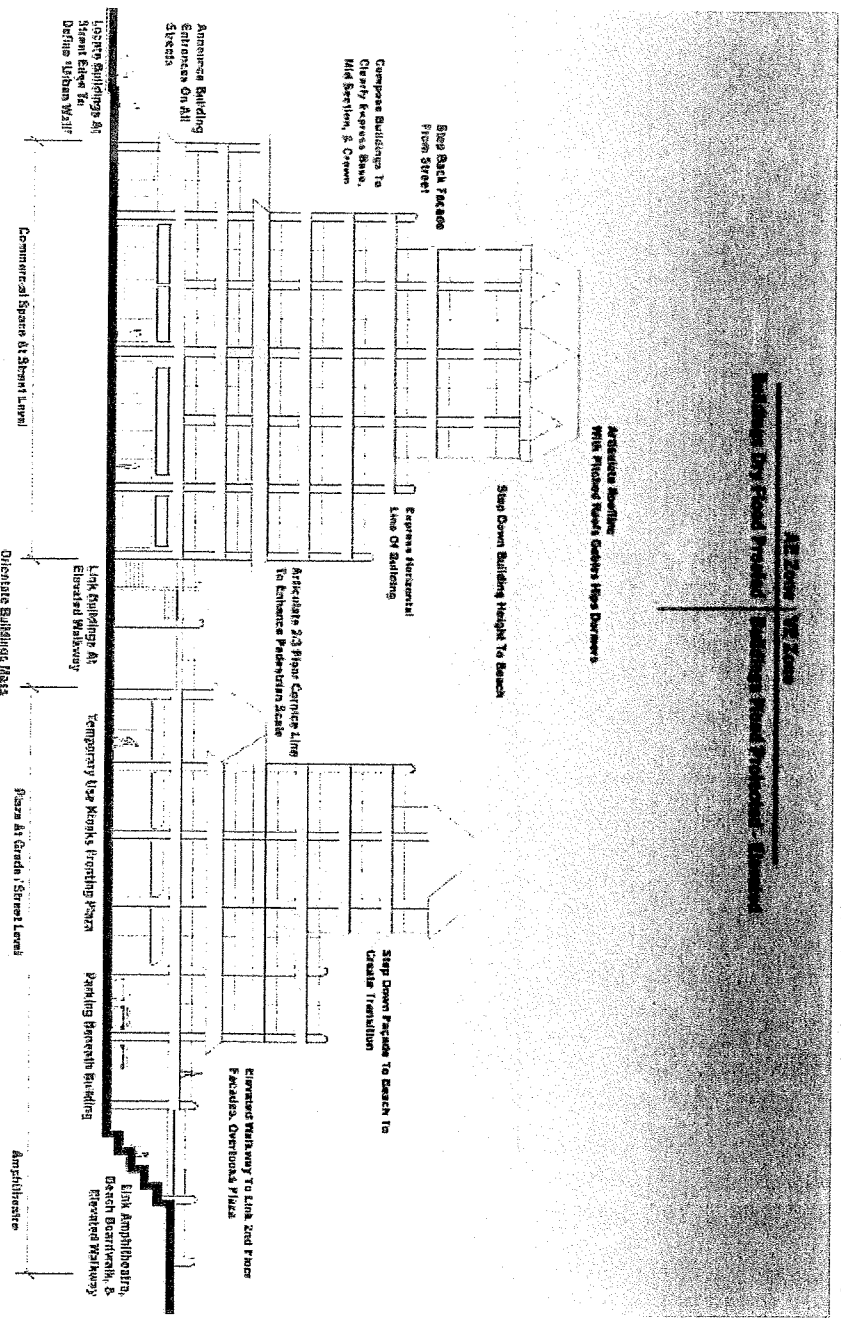


Figure 02 Building Along Ocean Curative Diagram



## **SPECIFIC CONCERNS OF THE PROPOSED RULES**

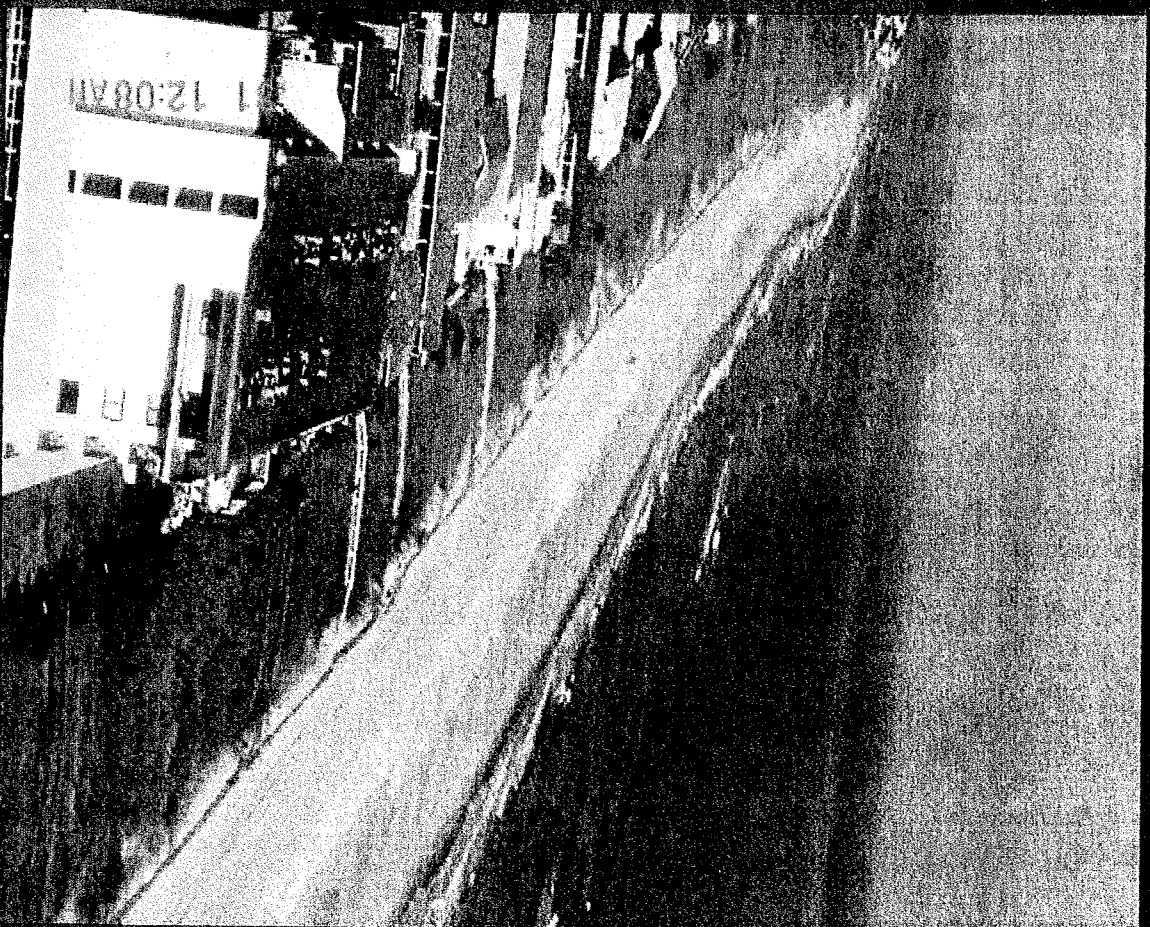
**The Town's specific concerns primarily lie within NCAC 07H.0306 General Use Standards for Ocean Hazard Areas (8) which provides development allowances for beach fill communities and the ambiguity that lies within this section.**



**In short, our primary concerns are:**

**Carolina Beach, New Hanover County and the Federal government have spent millions of dollars protecting property along our coastline and establishing a quality beach and dune system for residents and visitors to enjoy.**

**This beach fill and shoreline protection program has been on-going since 1965. Currently, the Town will receive 2 more re-nourishment cycles prior to our Federal funding cycle ending in 2015.**



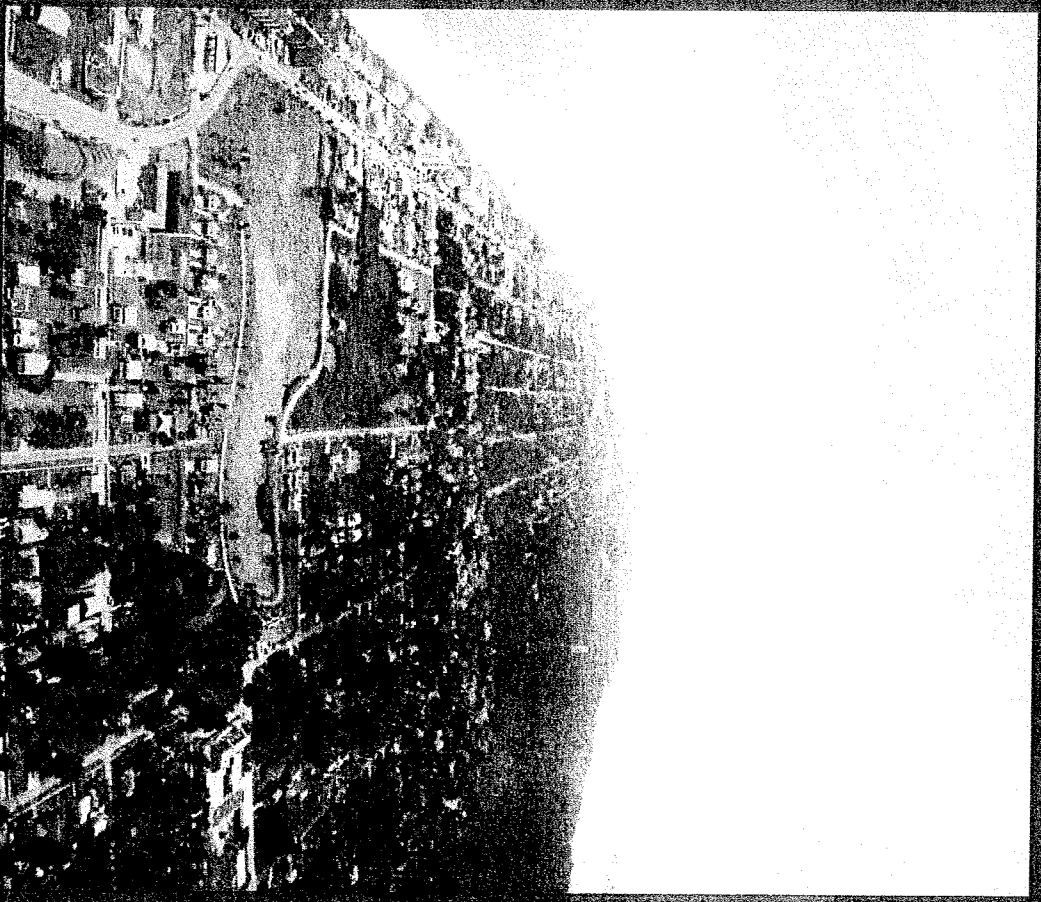
The Town believes that it meets the definition of a beach fill community and therefore can develop using the existing 60 foot and 120 foot setback lines. While the Town is actively seeking Federal reauthorization, there is no assurance that this will happen.

This uncertainty in the reauthorization process could lend itself to the possibilities of the CRC not classifying us as a beach fill community and further hampers the Town's effort to revitalize its Central Business District per the vision set forth in the Town's Master Development Plan.





**In the event that the Town is not considered a beach fill community, a large number of existing condo complexes, hotels, high-rise condo projects and large scale projects approved by the Town but not yet constructed may be in jeopardy of not receiving a CAMA permit or in jeopardy of not being able to rebuild following major damage resulting from a weather related event.**



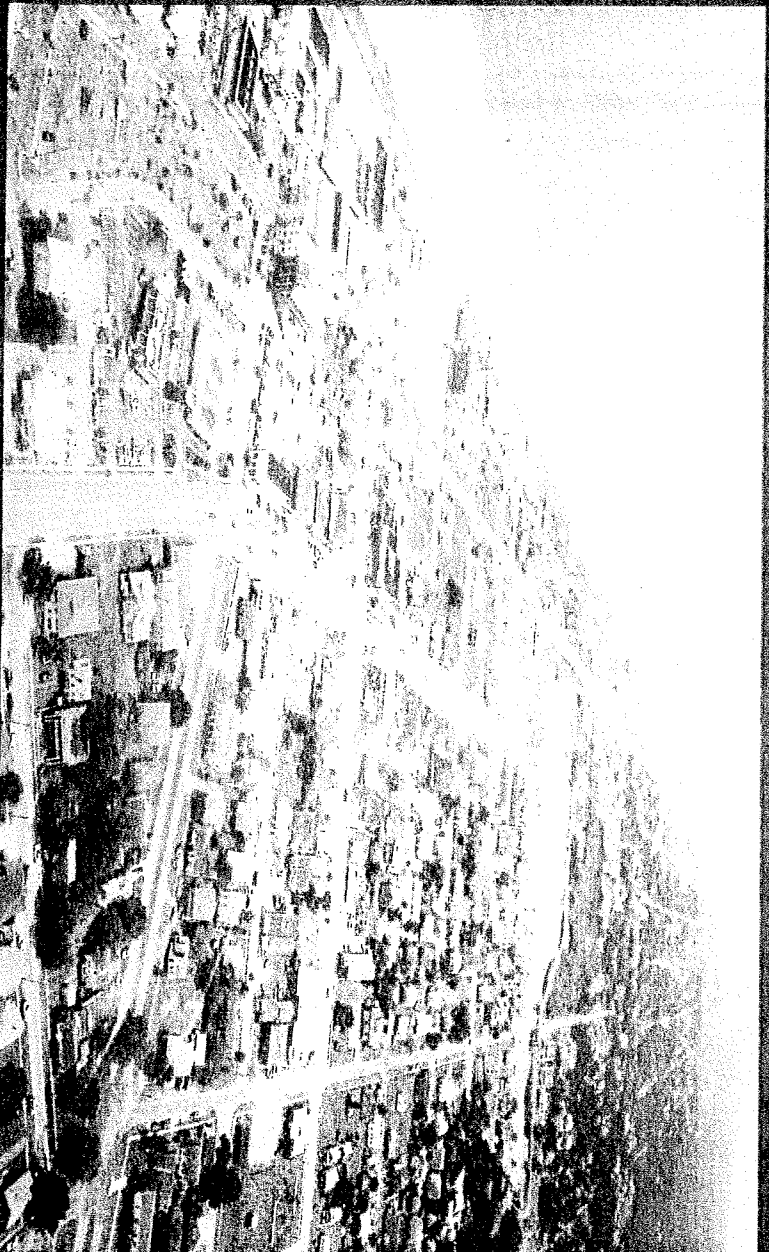
**The Town should qualify as a beach fill community and be exempt from any increase in setback regulations due to our long history and success (since 1965) with beach nourishment.**

**The Town of Carolina Beach has had as much experience with beach fill and is in as close a position as any Town or County in North Carolina to being considered a beach fill community. However, and as written, we believe that it will be difficult for any Town or County in North Carolina to be deemed a beach fill community at any point in the future.**





**In the event that the setback rules are adopted, the rule changes should not become effective as of the adoption date. The CRC should allow public entities ample time to submit a request to the CRC to be considered as a beach fill community.**



# IN CLOSING

**The Town Council of the Town of Carolina Beach are of the opinion that the current oceanfront regulations have served the Town of Carolina Beach well.**

**The Town is not in favor of any changes to oceanfront development regulations that would further restrict development and hamper the Town's goal of improving its community as set forth in the Town's master development plan.**

**The Town does support the North Carolina Division of Coastal Management's initiative to limit cantilevering over setback lines (Town does not support an outright prohibition of cantilevering), as well, as giving property owners the ability to use an established FLSNV as its reference point for development when less restrictive than a static building line.**

# Community Information

- Population around 5800
  - The most urbanized beach community on NC Coast
- 6.3 miles of developable beachfront
- Established the first oceanfront building line in 1963
- First beach fill community on NC coast (1965)
- Of the 40 or so structures on NC coast over 6 stories, Carolina Beach has 5
  - This is 12.5% of that total



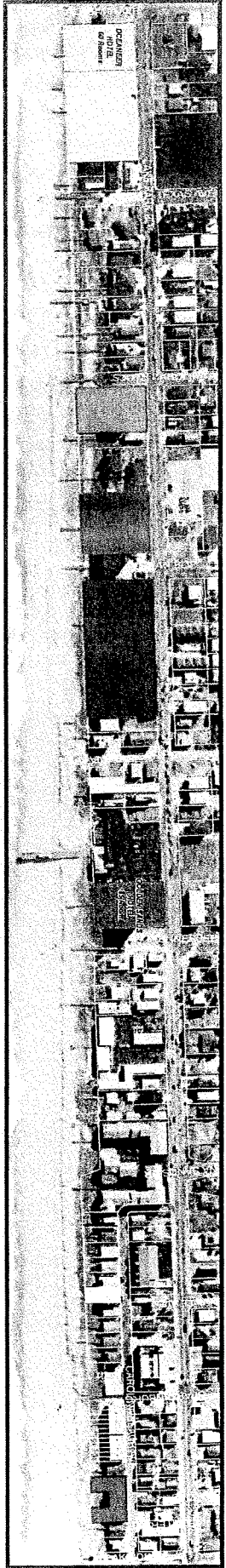
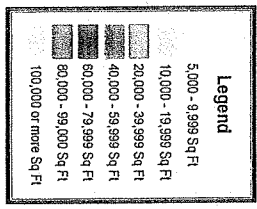


1 inch = 320 feet



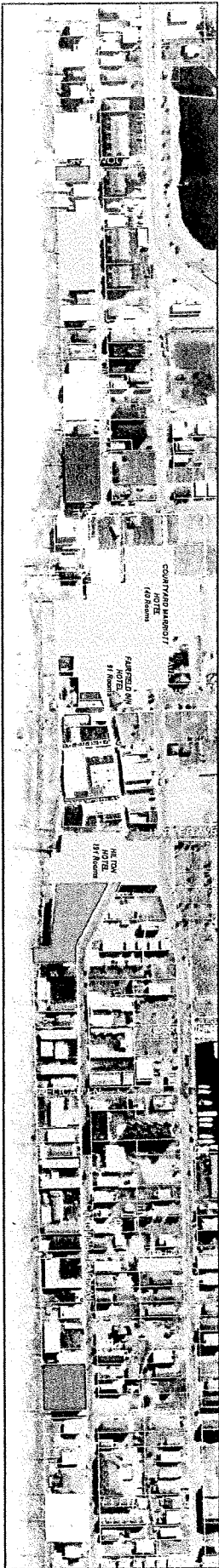
TOTAL BLDGS: 73  
 NON CONFORMING BLDGS: 9  
 Hotels - 2 (Total Rooms: 145)  
 Condos - 7  
 TOTAL DWELLING UNITS: 345

CRC  
 SOUTH SIDE  
 LAKE DR TO ALABAMA AVE



TOTAL BLDGS: 63  
 NON CONFORMING BLDGS: 18  
 Hotels - 3 (Total Rooms: 422)  
 Condos - 15  
 TOTAL DWELLING UNITS: 229

CRC  
 CENTRAL  
 LAKE DR TO SEAGULL LN



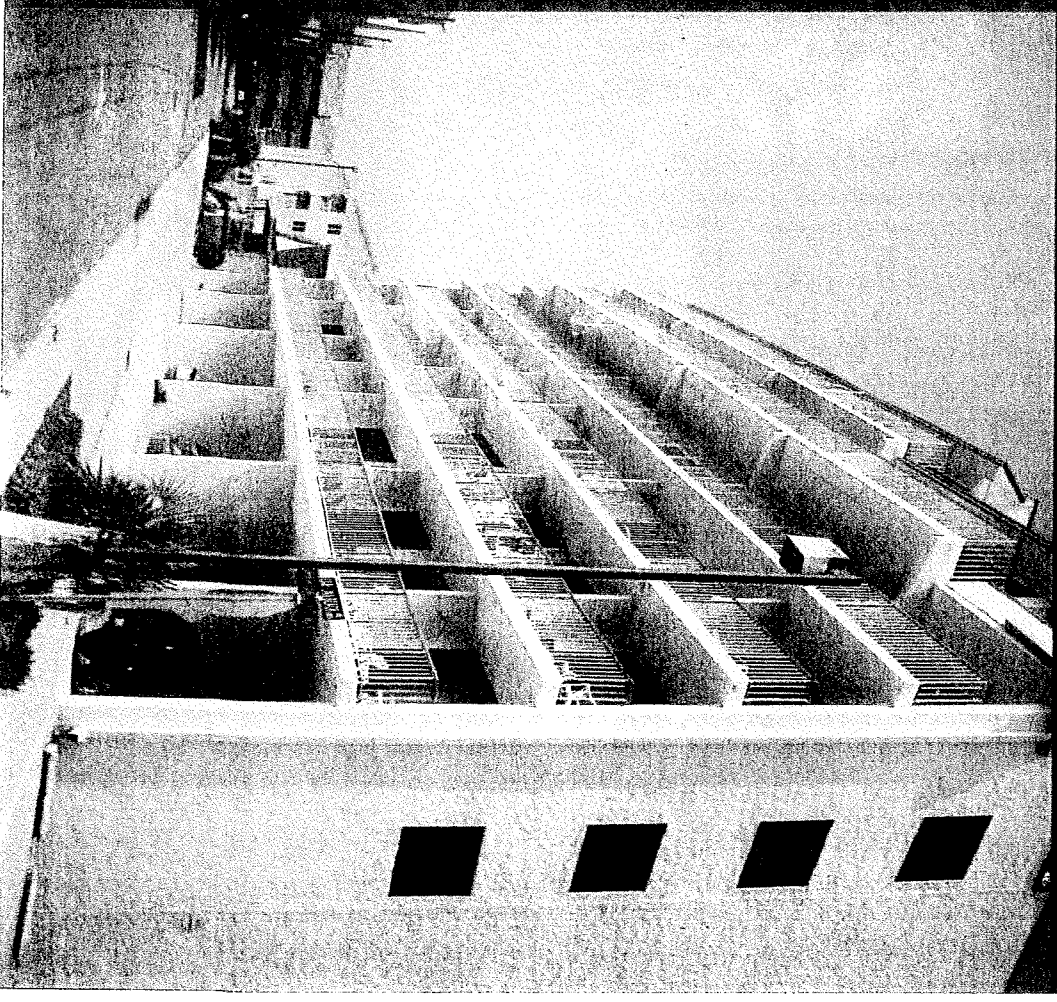
TOTAL BLDGS: 120  
 NON CONFORMING BLDGS: 31  
 Hotels - 0  
 Condos - 31  
 TOTAL DWELLING UNITS: 248

CRC  
 NORTH END  
 SEAGULL LN TO SALT MARSH LN



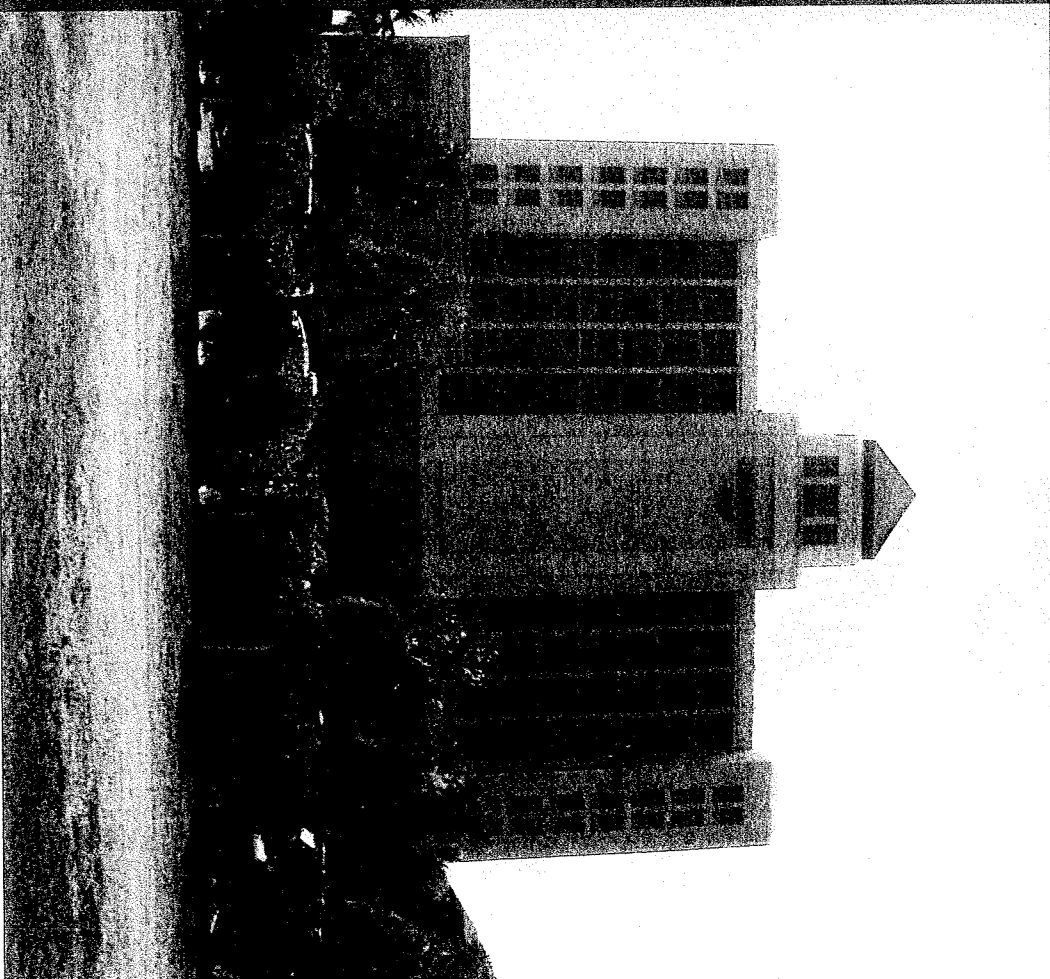
# Examples in CB

- **Paradise Towers**
- Residential
  - Multi-Family
- Potential Non-Conformity



# Examples in CB

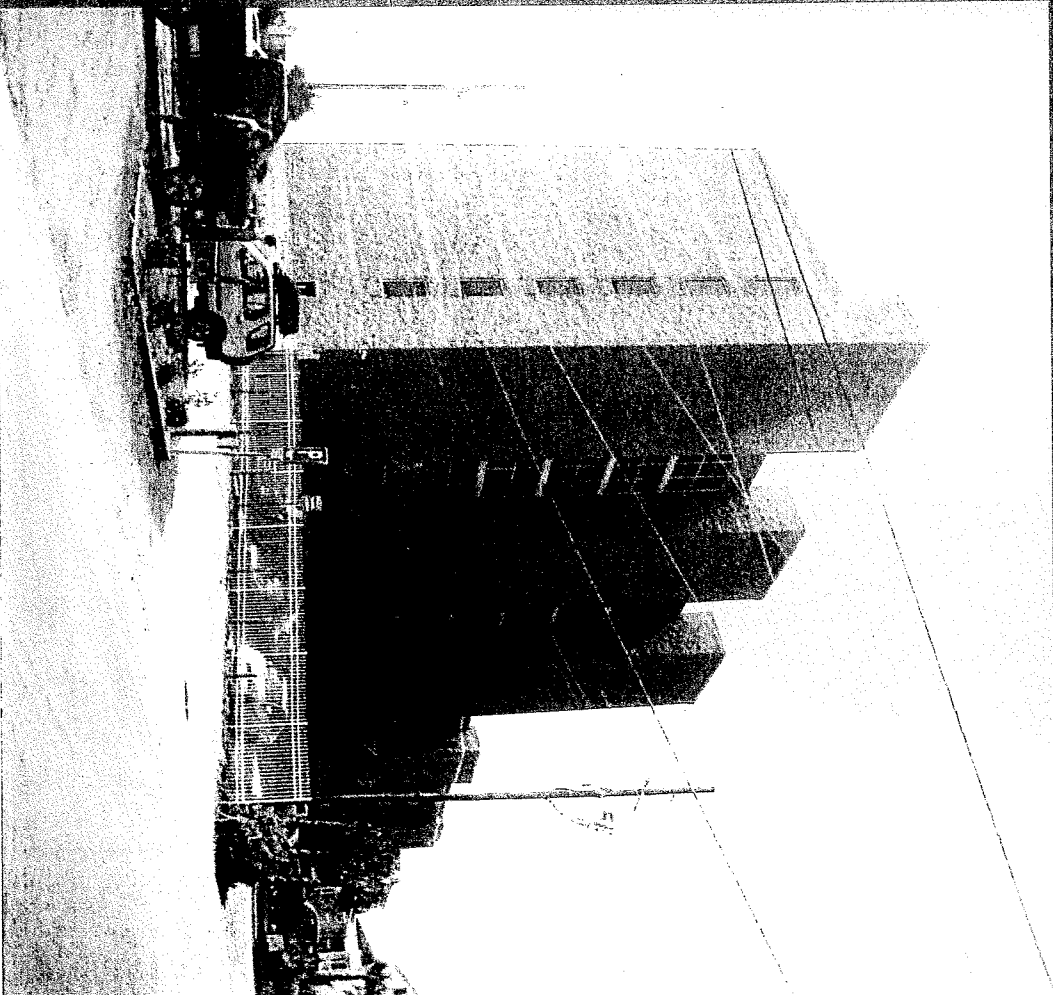
- Courtyard  
Marriott
- Commercial
  - Hotel
- Potential Non-Conformity





# Examples in CB

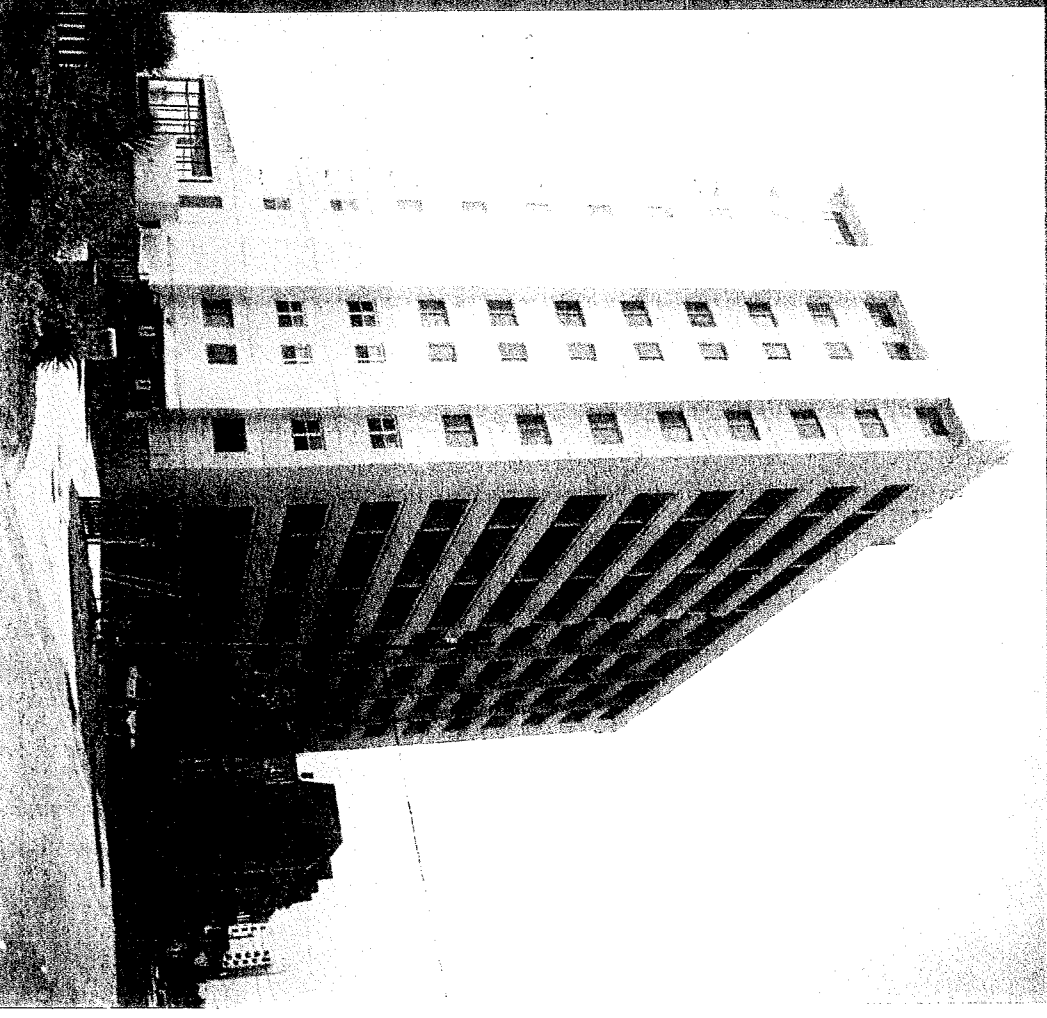
- Golden Sands
- Commercial
  - Hotel
- Potential Non-Conformity





# Examples in CB

- Pelican Watch
- Residential
  - Multi-Family
- Potential Non-Conformity



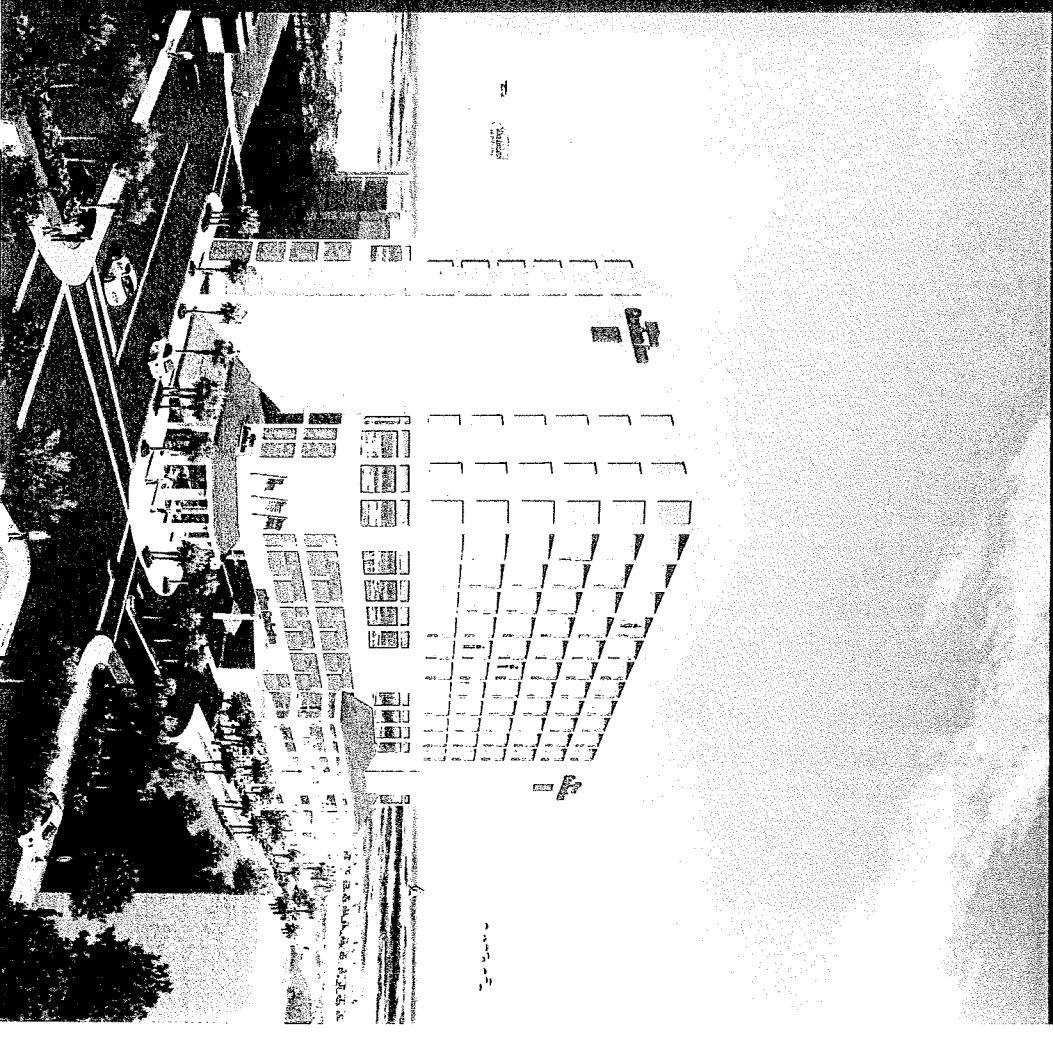
# Examples in CB

- **Atlantic Towers**
- Residential
  - Multi-Family
- Potential Non-Conformity



# Future Non-conformities

- Hilton Garden Inn
  - 140,000 sq ft
  - 191 rooms
- Fairfield Inn
  - 78,000 sq ft
  - 90 rooms



# Summary

- There are **5,829** residential units in Carolina Beach
  - **822** of these will be non-conforming units without the proposed exception.
  - This is **14** percent of the total residential units in *all* of Carolina Beach.
  - These numbers are *conservative* and do not include many older structures.

**Subject:** [Fwd: COMMENTS OF TOWN OF CAROLINA BEACH ON 15A NCAC 7H. 0306 ON SETBACK/BEACH FILL / SVL PROPOSED RULE AMENDMENTS]

**From:** Jim Gregson <Jim.Gregson@ncmail.net>

**Date:** Sun, 17 Aug 2008 06:56:10 -0400

**To:** Angela Willis <Angela.Willis@ncmail.net>

----- Original Message -----

**Subject:** COMMENTS OF TOWN OF CAROLINA BEACH ON 15A NCAC 7H. 0306 ON SETBACK/BEACH FILL / SVL PROPOSED RULE AMENDMENTS

**Date:** Fri, 15 Aug 2008 18:14:25 -0400

**From:** Steve Coggins <scoggins@rlblawfirm.com>

**To:** <Jim.Gregson@ncmail.net>

**CC:** Jeff Warren <Jeff.Warren@ncmail.net>, <Steve.Everhart@ncmail.net>, Tim Owens <tim.owens@carolinabeach.org>, <alan.gilbert@carolinabeach.org>, <dan.wilcox@carolinabeach.org>, <jerry.johnson@carolinabeach.org>, <joel.macon@carolinabeach.org>, <pat.efird@carolinabeach.org>

\*RE: COMMENTS OF TOWN OF CAROLINA BEACH ON 15A NCAC 7H. 0306 ON SETBACK/ BEACH FILL / SVL PROPOSED RULE AMENDMENTS\*

\*  
Attached are the Comments of Town Of Carolina Beach on 15A NCAC 7H. 0306 On Setback/ Beach Fill / SVL Proposed Rules.

\*  
\*Thank you for your attention. \*

\*/Steve Coggins/\*

**\*Stephen D. Coggins\***

**\*Rountree, Losee & Baldwin\***

\*Box\*\* 1409\*\*\*

\*Wilmington\*\* NC 28402-1409\*\*\*

\*scoggins@rlblawfirm.com <<mailto:scoggins@rlblawfirm.com>>\*

\*www.rlblawfirm.com <<http://www.rlblawfirm.com>> \*

\*(910)763-3404; fax (910) 763-0080\*

\*cell and voice mail: (910) 524-9515\*

\* \*

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Jim Gregson <[Jim.Gregson@ncmail.net](mailto:Jim.Gregson@ncmail.net)>

Director

8-15-08 TCB COMMENTS TO PROPOSED .0306 SET BACK-BEACH FILL-SVL RULES.pdf

Content-Type: application/octet-stream  
Content-Encoding: base64



TO: North Carolina Coastal Resources Commission (CRC) & Division of Coastal Management (DCM) of North Carolina Department of Environment & Natural Resources (DENR)

FR: Council of the Town of Carolina Beach (TCB) C/O Stephen D. Coggins of Rountree, Losee, & Baldwin, LLP, TCB Attorney

RE: 8-15-08 TCB COMMENTS ON CAMA PROPOSED AMENDMENTS TO 15A NCAC 7H .0306 REGARDING SET BACKS / BEACH FILL / SVL's

**TCB REQUESTS THE CRC TO:**

- (1) **MODIFY THE PROPOSED RULES TO FIT TCB'S NEEDS; OR**
- (2) **EITHER GRANT TCB EXEMPTION FROM THE PROPOSED RULES (OR DEFER THEIR ADOPTION) UNTIL:**
  - A. **DEVELOPMENT OF SPECIALIZED "URBAN OCEANFRONT" RULES TAILORED TO TCB, AND**
  - B. **REVISION OF BOTH:**
    1. **RELATED RULES AND**
    2. **OTHER PROPOSED RULES THAT AFFECT APPLICATION OF THE PROPOSED RULES**

**SO THAT THEY ARE CONSIDERED AS A WHOLE AND AND DRAWN SO THAT THEY OPERATE AS AN "INTEGRATED" REGULATORY SCHEME WITHOUT CONFLICTS AND AMBIGUITIES**

**INTRODUCTION**

**The Latest Iteration (As Of 7-8-08) of Proposed Rule Amendments**

- **Do Not Take Into Account:**
  - **Highly Unique Historical And Future Character (Unlike Any Other On Our Coast) As A True Urban Center With Industrial, Commercial, Tourist, Historical, Educational, And Residential Structures, Uses And Activities**
  - ***All Of Which Are Oceanfront***
- **Would Prevent TCB From Taking Advantage of the "Beach Fill" and New "SVL" Designation Rules;**

- **Do Not Give Credit To TCB For Its Many Decades of Working Closely With All Appropriate Agencies In Developing the Quality, Financing, and Long Term Design of Beach Renourishment Projects;**
- **Would Render Nonconforming A Substantial Number of Structures Along The Urban Mixed Use Oceanfront, Resulting In Immediate Adverse Impact on TCB;**
- **Would Undermine TCB's Ambitious "Master Plan" Developed In Context of Its New CAMA Land Use Plan, Which Was Developed In Close Consultation With DCM Staff And Recently Certified By The CRC;**

### **TCB'S RECOMMENDATION TO CRC AND DCM:**

1. Defer consideration of the Set Back and IHA proposed rule changes until development of needed "Urban Oceanfront" Rules that are considered in tandem with all proposed rules;
2. In the alternative, exempt true urban "working/commercial/residential/tourist" oceanfront center areas from any adopted set back rules, pending adoption of new Urban Oceanfront Rules;
3. Provide technical amendments to 7H. 0305 to make clear TCB is eligible to apply for SVL status;
4. Assure TCB can readily demonstrate and qualify for SVL status;
5. Delete the 2,500 square foot limit on floor area of buildings allowed within an area that is granted a static line exception so that there would be no limit on size, provided the structure could meet the setbacks provided by other rules.
6. Allow cantilevered portions of buildings and roof overhangs to extend a few feet into the ocean setback to allow for customary construction without opening the door to extreme cantilevers.

### **BACKGROUND**

A review of the proposed rule changes, the minutes of the May 28, 2008 public meeting, other comments submitted to the CRC, and TCB's Master Plan reveal that the proposed new CRC set back rules in 7H .0306 (as well as others that will be soon under consideration) do not adequately take into account TCB's geologic, historical coastal management and "central urban/tourist" assets that are unique to NC Coast. Consequently, the present and future proposed rule changes risk rendering: (1) future development under the TCB Master Plan parameters as neither legally nor financially feasible; and (2) existing unique TCB development assets as "non-conforming" that cannot be feasibly replaced, regardless of the reasons for the redevelopment. In short, the proposed amendments (and impending further proposals) cannot be reconciled with TCB's Master Plan. The end result could be the end of the future of TCB's planned development, the loss of its heritage, and its unique place as a valuable asset to all the State.

#### **I. *PROPOSED SET BACK RULES CONCERNS***



A. UNDER .0305(6), A NEW SVL CANNOT BE GRANTED UNDER .0306. [*“A static vegetation line shall not be established where a static vegetation line is already in place, including those established by the Division of Coastal Management prior to the effective date of this Rule.”*].

This is the most alarming provision to TCB. Language in .0305(6) provides that if there is already a SVL, a new, different SVL cannot be granted in the future under .0306---even if the old SVL was adopted before the SVL definition in .0305. Further, the regulations in .0305 and the proposed changes to .0306 do not state clearly whether a community with a pre-amendment SVL can benefit from a significant oceanward build up of a natural vegetation line in consequence of the decades of renourishment activity.

B. NO CREDIT FOR PREVIOUS YEARS OF DEMONSTRATING HIGH QUALITY DESIGN AND LONG RANGE FINANCING AND MAINTENANCE.

Under the proposed rules, in order to obtain SVL status, a community must demonstrate a 30 year plan that establishes quality beach fill, long term financing, and available sand resources. Unlike other NC coastal communities, TCB (as well as Wrightsville Beach and Kure Beach) has done so already for decades. However, the draft rules give TCB no credit for this past performance. TCB believes that to qualify for SVL status, its decades of performance already should be computed into the 30 year period.

C. AUTOMATIC APPLICATION OF PROPOSED SETBACKS TO LONG ESTABLISHED “SVL COMMUNITIES”

TCB already benefits from a “Static Vegetation Line” (with a few exceptions) along the entire TCB ocean front. This SVL was negotiated decades ago. Erosion rates based on 2 feet a year apply to these set backs.

Meanwhile, the new set back rules set forth in .0306 upon adoption will *immediately apply to TCB’s existing SVL*. That is because the set backs apply to the existing “ocean hazard setback for development”, regardless of whether the “existing ocean hazard setback” is TCB’s decades-existing SVL, or a “vegetation line”, or a “measurement line”. [Proposed .0306 (a)(1) & (2)]. The proposed graduated set back rules will go into effect whether or not TCB applies for and receives a new SVL based on proof of a long term commitment to beach fill that may result in significant natural vegetation oceanward of the SVL. This result will be unique to the few communities on our coast that already have SVL’s that were acquired long before Rule .0306 ever existed.

TCB believes this is an oversight in drafting. TCB has the impression that immediate application of the graduated set backs to the few “pre-existing SVL communities” on the NC oceanfront was not contemplated by DCM Staff drafting the proposed rules.

#### D. OTHER PROBLEMATIC PROVISIONS THAT CONCERN TCB

1. An ambiguity exists because the provision limiting the size of development to 2500 square feet in .0306(a)(8)(D) may render non-conforming, not only those 2500+ square feet buildings landward of the actual vegetation set back (if it applies at all to TCB), but also those *landward of the SVL as well*.

If DCM/CRC's position is that TCB cannot petition for a SVL line under .0306 in order to take advantage of its benefits (because TCB already has a pre-amendment static line), then the set back rules should be further amended to provide TCB's is not subject to the beach fill project petition requirements, the 2500 square foot building limit, or even the graduated set back rules.

2. SVL Status Is Discretionary. Note that under .0306(a) (8), The CRC is not compelled under any circumstances to grant a SVL petition. The CRC *may* allow SVL development---there is no requirement that SVL status be granted even if TCB demonstrates it has met all the criteria.

3. TCB recommends that the criteria for obtaining SVL status be stated in broader language. The rules should not be so specific that they could be construed as requiring guarantees of long term available financing and sand resources. Ever shifting economic and political forces make it impossible for any beach community to give 30 year guarantees of long-term financing, available beach fill quality, and maintenance commitments.

#### D. "GRADUATED SET BACKS" BASED ON SIZE OF ANY TYPE OF STRUCTURE [PROPOSED .0306 (A)(2)]

##### 1. Importance of Structure Size, Not Use

A building less than 5000 square feet in size is subject to the old rules [i.e., a 60 foot set back (30 x 2 feet annual erosion rate) and no change would apply to them. They would not be rendered conforming.<sup>1</sup>

However, TCB has many buildings significantly larger than 5000 square feet that are decades old, or have been recently developed, or are "in the works" in accord with the Master Plan. These structures would be subject to more stringent set backs regardless of whether they are for public use. Examples are the proposed State Aquarium Pier and Learning Center, required sufficient vertical parking, or a Marina Public Boat access

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<sup>1</sup> That is, unless TCB applies for and receives a new SVL status under the new proposed large scale, long term beach fill rules set forth in .0306(a)(8) (C) & (D). In that case, a new building is subject to the vegetation line (not the SVL), but it is limited to 2500 square feet in size.

facility. Also affected are commercial uses, such as industries, hotels restaurants, retail shops or the like. As the size increases, the set backs increase from 120 to 180 feet, assuming the erosion rate remains at 2 feet. A combination of the graduated set backs with any change in the erosion rate, risks undermining the core of the Master Plan and forcing TCB to abandon its revered Boardwalk history and dreams of improvement. <sup>2</sup>

## 2. Defining the Size of a Structure

Covered porches are not figured into determining square footage. However:

- all heated or air conditioned space;
- parking above ground level (regardless of the type of surface); and
- all above ground covered areas that are not load bearing,

*are* computed into the square footage. These factors would preclude the structures essential to the TCB Master Plan. The factors are inconsistent with the Town's historic "urban oceanfront" character and long-existing structures.

### E. MINIMUM SET BACKS

No building 5000 square feet or greater can be less than 120 feet from the vegetation line or SVL, whichever is more landward. .0306 (a)(2)(K). If the "vegetation line" happens to be more landward than TCB's historic long term SVL status, then TCB would be unfairly penalized for being a successful partner with the Federal, NC and other governmental agencies in maintaining the beach critical to TCB's urban oceanfront status. Again, TCB should be given credit for its historic SVL designation and long term beach renourishment and not penalized by the "whichever is more landward" phrase. In the case of TCB, the phrase should either be deleted or changed to read "whichever is more oceanward".

### F. CANTILEVERING

Cantilevered space and even roof overhangs cannot intrude into the set back. .0306 (a) (2). TCB believes a small amount of cantilevering should be allowed. Total elimination of any cantilevering, no matter how modest and no matter the circumstances is an overreaction to isolated abuses.

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<sup>2</sup> Even if TCB achieves a new SVL under the long term, large scale rules, no building 5000 square feet or greater can be less than 120 from the vegetation line or SVL, *whichever is more landward*. .0306 (a)(2)(K).

## II. INTERRELATIONSHIP OF PROPOSED CHANGES WITH CURRENT RULES

### A. "NO DEVELOPMENT LANDWARD OF PRIMARY DUNE FOR PRE-JUNE 1, 1979 EXISTING LOTS REFERENCED IN .0306(A) (3)."

This provision allows for some "grandfathered" development where there is no primary dune, but only if the development is on lots existing as of June 1, 1979. Most, if not all, TCB ocean front lots existed prior to 6-1-79 and are not blessed with a "primary dune" landward of a "frontal dune". At the same time, the combination of multiple avulsive storms, together with large-scale publicly financed beach projects may have resulted in those lots no longer existing as platted. Rather, many lots may now be much smaller, since the title to the former oceanward part of the lot's land mass would now belong to the State. This reference in .0306(a) (3) and how it interrelates with static vegetation lines should be clarified to avoid unfairly penalizing the individual pre-6/1/79 platted lot owners.

### B. EXCEPTION FOR 7H .0309(A)<sup>3</sup> DEVELOPMENT REFERENCED IN .0306 (A) (2) [INTRODUCTORY PARAGRAPH] & (8)(G)

Eight exceptions in the set back rules are supposedly reserved by .0306 (a) (2) [introductory paragraph] & (8)(G)'s reference to 7H .0309(a). However, 7H .0309(a) specifically grants exceptions only for development landward of "vegetation lines". No reference is made to SVL's. Accordingly, the two provisions should be made clearly consistent so that SVL property may benefit from the eight exceptions in .0306 (a) (2) & (8) (G), and .0309(a).

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#### <sup>3</sup> 15A NCAC 07H .0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS

(a) The following types of development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campsites;
- (2) parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding a footprint of 500 square feet;
- (4) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single-story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;
- (7) temporary amusement stands;
- (8) sand fences; and
- (9) swimming pools.

***In all cases, this development shall be permitted only if it is landward of the vegetation line;*** involves no alteration or removal of primary or frontal dunes which would compromise the integrity of the dune as a protective landform or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

C. THE EXCEPTION FOR 7H .0309(B)<sup>4</sup> DEVELOPMENT REFERENCED IN .0306 (A)(8)(H) IS UNFAIRLY NOT AVAILABLE TO TCB.

Pre-6/1/79 platted lots are allowed to be developed where no SVL is involved. However, the proposed language in .0306 (a)(8)(H) amendment makes clear this exception is NOT available to large project SVL designated areas. Given the combination of (a) the rigorous conditions to obtaining SVL status, and (b) TCB's long term successful history as a SVL community, TCB questions whether there is a rational reason for denying TCB's pre-6/1/79 platted lots the benefit of .0306 (a)(8)(H) that is available to other coastal communities.

D. VARIANCE PROCEDURES

Proponents of the amendments may argue that in individual hard cases, the CRC always has the flexibility to grant a variance. A close reading, however, of the variance criteria, show that a such a possibility is extremely remote. The hardship must arise from the peculiarities of the lot (and not by any actions of the petitioner) and the variance must be consistent with the letter and spirit of CAMA rules. The former is a virtual factual impossibility. The latter depends on the subjective attitudes of the CRC at any given time. Accordingly, TCB suggests the existing variance procedures do not provide sufficient flexibility for "hard cases".

**III. EFFECT OF POTENTIAL AMENDMENTS TO OTHER IMPORTANT RULES**

A. EROSION RATES – 7H. .0304

Should the erosion rates be altered, the overall effect of the .0306 set backs will be dramatically altered. Communities such as TCB in the midst of substantial short and long term development planning need assurances of stability.

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<sup>4</sup> (b) Where application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures shall be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.

(A) All pilings shall have a tip penetration that extends to at least four feet below mean sea level;

(B) The footprint of the structure shall be no more than 1,000 square feet or 10 percent of the lot size, whichever is greater.

(C) Driveways and parking areas shall be constructed of clay, packed sand or gravel except in those cases where the development does not abut the ocean and is located landward of a paved public street or highway currently in use. In those cases concrete, asphalt or turfstone may also be used.

(5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system shall be submitted as part of the CAMA permit application.

B. INLET HAZARD AREAS 7H .0310

Should the Set Back Proposed Amendments to .0306 be adopted for Ocean Hazard Areas (OHA's), they will become automatically the set backs for the Inlet Hazard Areas (IHA's) north Freeman Park [.0304(3)].

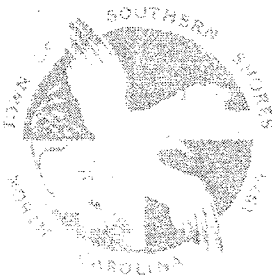
Further, current .0310(a)(1) provides that .0309 exceptions allowing development otherwise prohibited by .0306 do not apply to IHA's. Given the concerns raised by TCB regarding the dramatic expansion of IHA geographic boundaries to include significant areas within the town limits, all proposed amendments in .0306 should not be implemented until IHA polygons and rules are defined, and both rules then adjusted to assure compatibility.

**CONCLUSION**

**TCB REQUESTS THE CRC TO:**

- (1) MODIFY THE PROPOSED RULES TO FIT TCB'S NEEDS; OR**
- (2) EITHER GRANT TCB EXEMPTION FROM THE PROPOSED RULES (OR DEFER THEIR ADOPTION) UNTIL:**
  - A. DEVELOPMENT OF SPECIALIZED "URBAN OCEANFRONT" RULES TAILORED TO TCB, AND**
  - B. REVISION OF BOTH:**
    - 1. RELATED RULES AND**
    - 2. OTHER PROPOSED RULES THAT AFFECT APPLICATION OF THE PROPOSED RULES**

**SO THAT THEY ARE CONSIDERED AS A WHOLE AND AND DRAWN SO THAT THEY OPERATE AS AN "INTEGRATED" REGULATORY SCHEME WITHOUT CONFLICTS AND AMBIGUITIES**



# Town of Southern Shores

5375 N. Virginia Dare Trail, Southern Shores, NC 27949

Phone 252-261-2394 / Fax 252-255-0876

info@southernshores-nc.gov

www.southernshores-nc.gov

Resolution 2008-08-02

Resolution in Opposition to the  
Proposed CAMA Oceanfront Setback Regulations  
15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas

WHEREAS, the Town of Southern Shores is a coastal community in Dare County, one of the twenty coastal counties in the State of North Carolina; and

WHEREAS, the Coastal Resources Commission (CRC) was created by the North Carolina General Assembly in 1974 when the Coastal Area Management Act (CAMA) was adopted; and

WHEREAS, the purposes of the CRC include establishing policies for the North Carolina Coastal Management Program, adopting and implementing rules for CAMA which balance economic growth and development in areas of environmental concern and adopting rules and policies for coastal development within those areas; and

WHEREAS, the CRC is presently considering rule changes to CAMA Oceanfront Setback Regulations 15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas; and

WHEREAS, as proposed these rule changes will have the effect of increasing oceanfront setbacks on a sliding scale based on building size and annual erosion rates that will require increased setback requirements for larger single-family dwellings and multi-family projects currently allowed in Southern Shores and thus render such projects unbuildable; and

WHEREAS, application of the proposed rule requirements would have a tremendously negative impact on the Town's ad valorem property tax base by causing such structures to be non-compliant with CAMA rules and regulations; and

WHEREAS, the proposed new rules limit options for redevelopment and may reduce the size and value of new structures; and

WHEREAS, construction methods and standards in place today are more stringent and result in stronger, more resistant structures that are better able to endure and withstand oceanfront conditions; and

WHEREAS, there is a lack of scientific evidence to show effectiveness of increased setbacks based on a structure's floor area, as proposed in these rule changes; and

WHEREAS, wind and snow load requirements are based on 30-50 year events while flood plain management requirements are based on 100 year events and therefore the proposed setbacks constitute regulating to a higher standard than other codes;

NOW, THEREFORE, BE IT RESOLVED that the Southern Shores Town Council hereby opposes the proposed CAMA Oceanfront Setback Regulations 15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas and requests the CRC not approve the rule changes as proposed; and


BE IT FURTHER RESOLVED that the Southern Shores Town Council requests the CRC discontinue further consideration of the subject rule revisions.


This the 5<sup>th</sup> day of August 2008.

SEAL

SEAL

ATTEST

  
Carrie Gordin, Town Clerk

  
Don Smith, Mayor

Fwd: Resolution]

Lowana Barrett <Lowana.Barrett@ncmail.net>

Thu, 07 Aug 2008 15:50:29 -0400

to: angela.willis@ncmail.net

----- Original Message -----

Subject: Resolution

Date: Thu, 7 Aug 2008 15:54:25 -0500

From: Merrie <[msmith@southernshores-nc.gov](mailto:msmith@southernshores-nc.gov)>

To: <[dcmfrontdesk@ncmail.net](mailto:dcmfrontdesk@ncmail.net)>

Please pass this attachment to the members of the Coastal Resources Commission Member and the Coastal Resources Advisory Council.

//Merrie Smith//

//Executive Assistant//

//Town of Southern Shores//

//5375 N. Virginia Dare Trail//

//Southern Shores, NC 27949//

//252-261-2394//

Lowana Barrett <[lowana.barrett@ncmail.net](mailto:lowana.barrett@ncmail.net)>

<b>Res.2008-08-02 Opposition to CAMA Setback.pdf</b>	<b>Content-Type:</b> application/pdf <b>Content-Encoding:</b> base64
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## TOWN OF KILL DEVIL HILLS

*Land Where Flight Began*

Resolution in Opposition to the  
Proposed CAMA Oceanfront Setback Regulations  
15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas

Kill Devil Hills, North Carolina  
July 14, 2008

WHEREAS, the Town of Kill Devil Hills is a coastal community in Dare County, one of the twenty coastal counties in the State of North Carolina; and

WHEREAS, the Coastal Resources Commission (CRC) was created by the North Carolina General Assembly in 1974 when the Coastal Area Management Act (CAMA) was adopted; and

WHEREAS, the purposes of the CRC include establishing policies for the North Carolina Coastal Management Program, adopting and implementing rules for CAMA which balance economic growth and development in areas of environmental concern and adopting rules and polices for coastal development within those areas; and

WHEREAS, the CRC is presently considering rule changes to CAMA Oceanfront Setback Regulations 15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas; and

WHEREAS, as proposed these rule changes will have the effect of increasing oceanfront setbacks on a sliding scale based on building size and annual erosion rates that will require increased setback requirements for larger single-family dwellings and multi-family projects currently under construction in Kill Devil Hills and thus render such projects unbuildable; and

WHEREAS, application of the proposed rule requirements would have a tremendously negative impact on the Town's ad valorem property tax base by causing such structures to be non-compliant with CAMA rules and regulations; and

WHEREAS, the proposed new rules limit options for redevelopment and may reduce the size and value of new structures; and

WHEREAS, construction methods and standards in place today are more stringent and result in stronger, more resistant structures that are better able to endure and withstand oceanfront conditions; and

WHEREAS, there is a lack of scientific evidence to show effectiveness of increased setbacks based on a structure's floor area, as proposed in these rule changes; and

WHEREAS, wind and snow load requirements are based on 30-50 year events while flood plain management requirements are based on 100 year events and therefore the proposed setbacks constitute regulating to a higher standard than other codes;

NOW, THEREFORE, BE IT RESOLVED that the Kill Devil Hills Board of Commissioners hereby opposes the proposed CAMA Oceanfront Setback Regulations 15A NCAC 07H. 0306 General Use Standards for Ocean Hazard Areas and requests the CRC not approve the rule changes as proposed; and

BE IT FURTHER RESOLVED that the Kill Devil Hills Board of Commissioners requests the CRC discontinue further consideration of the subject rule revisions.

This the 14<sup>th</sup> day of July, 2008.



Raymond P. Sturza, II  
Mayor  
Town of Kill Devil Hills

ATTEST:

Mary E. Quidley, Town Clerk

RECEIVED

AUG 20 2008

Morehead City DCM



North Carolina (
House of Representatives
State Legislative Office Building
300 N Salisbury Street Room 635
Raleigh, North Carolina 27603-5925

Post-it Fax Note 7671
Date 8/19/08 # of pages 6
To: Jim Gregson From: Elizabeth Biser
Co./Dept. DCM Co. Leg. Affairs/DENR
Phone # 252-808-2808 Phone # 919-715-4189
Fax # 252-247-3330 Fax # 919-715-3060

REPRESENTATIVE BILL OWENS
1ST DISTRICT: CAMDEN, CURRITUCK, PASQUOTANK, TYRRELL
TELEPHONE: (919) 733-0010
(919) 834-1814 FAX
EMAIL: billo@ncleg.net
HOME ADDRESS: PO BOX 537
ELIZABETH CITY, NC 27907

August 19, 2008

- COMMITTEES:
RULES, CALENDAR AND OPERATIONS
OF THE HOUSE, CHAIR
WAYS AND MEANS, VICE CHAIR
APPROPRIATIONS
APPROPRIATIONS SUBCOMMITTEE
ON GENERAL GOVERNMENT
COMMERCE, SMALL BUSINESS AND
ENTREPRENEURSHIP
ENVIRONMENT AND NATURAL
RESOURCES
FINANCE
LOCAL GOVERNMENT I

Mr. James H. Gregson
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Dear Mr. Gregson:

I received a copy of the August 12, 2008 letter to you from Mr. R. Braxton Hill, III with Coastland Corporation regarding revisions to oceanfront setback rules. I support Mr. Hill's request for an extension of the commitment date from August 15 to November 15 to make a proper assessment. I suggest a meeting with your staff and the Coastland Corporation folks would be in order. It appears they have valid concerns.

Thank you for your cooperation in the matter.

Sincerely,

Bill Owens (handwritten signature)

Bill Owens
Representative

BO:lj

Cc: R. Braxton Hill, III



COASTLAND CORPORATION

P.O. Box 1717, Virginia Beach, VA 23451

Tel. (757)422-9111 • Fax (757)422-9113

coastland@inetmail.att.net

August 12, 2008

Certified Mail No. 7007 0710 0001 3904 5967

Return Receipt Requested

James H. Gregson  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

RECEIVED  
AUG 14 2008

Morehead City DCM

Re: Proposed DCM Setback Rules

Dear Mr. Gregson:

This letter concerns the proposed 15A NCAC 07H.0306 revisions to oceanfront setback rules.

Coastland Corporation has owned substantial oceanfront property in Currituck County since 1971. The PUD plan was approved in 1973 regulating density, height and other matters. Coastland agreed to conform development to the "Currituck Plan" which was a voluntary prototype plan to encourage environmentally sound design and community wide utility systems to reduce impact on the environment.

Coastland was the only developer to follow the "Currituck Plan" and did so on a voluntary basis and at increased cost to the development projects. Coastland's benefit was its thought that it would have a better, high quality product to offer (which indeed was true).

On June 28, 1973 James E. Harrington, Secretary, NC Department of Natural and Economic Resources, joined James E. Johnson, Jr., President of Coastland Corporation, at a news conference where development plans were announced for 3 miles of oceanfront on North Carolina's Currituck Outer Banks.

Secretary Harrington praised the overall Ocean Sands development plan as "a model for future coastal development that includes respect for the natural surroundings. The primary dunes on the ocean are to be left intact and all construction will begin well behind this line. The natural topography will be preserved and there will be none of the flattening of dunes that has caused irreparable damage to the coast. Central water and sewage systems will be provided to limit the impact of humans on the environment. All utilities will be underground. To my knowledge, this is the first ocean community of its type on the North Carolina coast. It is certainly the ocean community of the future from both an ecological and an aesthetic point of view". See the enclosed press release.

Now, some thirty years later these proposed DCM setback rules severely jeopardize the remaining undeveloped oceanfront property still owned by Coastland.

Coastland had adopted a "slow growth" sales and development so as not to burden the county with unmanageable growth from a service standpoint.

Now, Coastland's property rights and values may be in effect "taken" by these new rules which basically re-configure and limit, some thirty years later, how the property may be used.

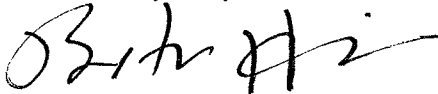
The Coastland beachfront and the Currituck County beachfront are very stable and erosion has not been an issue as attested by the Currituck County Manager.

Coastland requests that for the above reasons its property (and that titled in its subsidiary affiliates) be grandfathered from the proposed rules or that the new rules not be adopted.

Otherwise, Coastland should be and expects to be compensated for any loss in value or taking of its property value by virtue of these proposed rules.

In any event, we only became aware of these proposed new rules very recently in a newspaper article, and had very limited time to evaluate this. We request our extension of the commitment date from August 15 to November 15 to make a proper assessment.

Yours very truly,



R. Braxton Hill, III

Enclosure

cc: Jeff Warren,  
State of North Carolina Environment & Natural Resources  
1638 Mail Service Center  
Raleigh, NC 27699

Marc Basnight  
NC Senate  
16 West Jones Street, Room 2007  
Raleigh, NC 27601-2808

William Owens  
NC House of Representatives  
16 West Jones Street, Room 1309  
Raleigh, NC 27601-1096

Dan Scanlon  
County Manager, Currituck County  
PO Box 39  
Currituck, NC 27929

Eric Weatherly  
County Engineer, Currituck County  
PO Box 38  
Currituck, NC 27929

Joseph Callaway, Esq.  
Battle, Winslow, Scott & Wiley, P.A.  
3737 Glenwood Avenue, Suite 100  
Raleigh, NC 27612

CURRITUCK, N. C., June 28 - James E. Harrington, Secretary, N. C. Department of Natural and Economic Resources, joined James E. Johnson, Jr., President of Coastland Corporation, at a news conference today where development plans were announced for 3 miles of oceanfront on North Carolina's Currituck Outer Banks.

Secretary Harrington praised the overall Ocean Sands development plan as "a model for future coastal development that includes respect for the natural surroundings. The primary dunes on the ocean are to be left intact and all construction will begin well behind this line. The natural topography will be preserved and there will be none of the flattening of dunes that has caused irreparable damage to the coast. Central water and sewage systems will be provided to limit the impact of humans on the environment. All utilities will be underground. To my knowledge, this is the first ocean community of its type on the North Carolina coast. It is certainly the ocean community of the future from both an ecological and an aesthetic point of view."

Johnson, who as President of Coastland, owner-developer of Ocean Sands, oversaw the planning, said, "this is a prime example of how co-operation between industry, State, and County officials has produced a subdivision of outstanding environmental quality while it remains economically viable from the developer's standpoint. As a native North Carolinian, I am proud that Ocean Sands, as the first subdivision to conform to the new "Currituck Plan", has set the tone for future developments in the area."

The Ocean Sands Master Plan is based on the concept of clustering buildings and surrounding them with open space. About 800 single-family lots and 2,800 condominium units are included in the Plan. Access to Ocean Sands will be over a private road to be constructed by Coastland. Privacy will be assured through 24-hour security at the entrance. Sewer and water will be provided by Currituck County through an agreement with Coastland.

The total area is divided into separate cluster communities which will be called "Colonies". There is but one entrance into each colony from the Ocean Sands main private access road. This will provide privacy and maximum utilization of the open space. Open space blocks within each colony have been set aside for park and playground. All materials used will be natural and will blend with the environment. An association comprised of the property owners will maintain the open-space and access areas. A property owner's manual describes all of the environmental considerations of the area and will lend property

owners assistance in designing and building their homes and landscaping. An architectural review process assures harmony of the buildings with the environment and other structures.

Secretary Harrington concluded his remarks by saying that "the Outer Banks of North Carolina offers the ultimate in climate, oceanfront, and history for vacationers. They can swim in clean, uncluttered beaches of the Atlantic Ocean and protected sounds; enjoy the best deep-sea, surf, and pier fishing on the coast; enjoy the best bass fishing in the world in Currituck Sound; and enjoy numerous sports activities that include tennis and two of the most unusual championship golf courses in North Carolina (which is Golf State, U.S.A.)." "It is fortunate," Harrington said, "that people may choose a living environment such as Ocean Sands within the Outer Banks area."

Master Plan Design and environmental planning for Ocean Sands was conducted by Design Workshop, Inc. of Raleigh, N.C.

The Ocean Sands office is located in Kill Devil Hills, N.C. East Coast Executive Offices for Coastland Corporation are located in Virginia Beach, Virginia.

For more information, write or call:



[Fwd: Comments on Oceanfront Setback Rules]  
**Subject:** [Fwd: Comments on Oceanfront Setback Rules]

**From:** Jim Gregson <Jim.Gregson@ncmail.net>

**Date:** Sun, 17 Aug 2008 06:57:52 -0400

**To:** Angela Willis <Angela.Willis@ncmail.net>

----- Original Message -----

**Subject:** Comments on Oceanfront Setback Rules

**Date:** Fri, 15 Aug 2008 16:36:16 -0400

**From:** Willo Kelly <[willokelly@gmail.com](mailto:willokelly@gmail.com)>

**To:** [jim.gregson@ncmail.net](mailto:jim.gregson@ncmail.net)

Dear Mr. Gregson,

The Outer Banks Home Builders Association and the Outer Banks Association of Realtors would like to submit the following comments in opposition to draft rule language 15A NCAC 07H.0306 General Use Standards For Ocean Hazard Areas:

\* The proposed changes to oceanfront setbacks would cause many

residential and non-residential oceanfront structures in Dare

County and Currituck County to become non-compliant thus devaluing

the property and the opportunity for future investment in our

area. Potential buyers of non-conforming/non-compliant properties,

due to rule or regulation changes, have recently been denied

financing because the structure is non-compliant. There is great

concern that many of the larger oceanfront homes financed with an

adjustable rate mortgage will lose the opportunity to be financed

at all if deemed non-compliant, thus causing an increase

in foreclosures. \* The proposed rule changes

limit options for redevelopment and  
may negatively impact the size and value of new  
structures.

\* The majority of Outer Banks oceanfront property  
is already  
platted as smaller residential lots. The proposed  
changes  
negatively impact the opportunity for the  
combination of lots and  
the development of multi-family housing.

\* Construction methods, building code standards,  
stormwater  
regulations and other standards currently in  
place have resulted  
in structures that are stronger, more  
weather-resistant and better  
able to withstand oceanfront conditions.

Thank you for this opportunity to comment.

Kindest regards,

Willo Kelly

Government Affairs Director

Outer Banks Home Builders Association

Outer Banks Association of Realtors

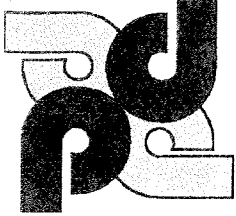
[willokelly@gmail.com](mailto:willokelly@gmail.com) <<mailto:willokelly@gmail.com>>

(252) 202-7927

Jim Gregson <[Jim.Gregson@ncmail.net](mailto:Jim.Gregson@ncmail.net)>

Director

NC Division of Coastal Management



August 14, 2008

Mr. Jim Gregson  
Director, Division of Coastal Management  
400 Commerce Avenue  
Morehead City, North Carolina 28557

RECEIVED  
AUG 15 2008

Morehead City DCM

RE: Proposed Changes to 15A NCAC 07H .0306 (Ocean Hazard Setbacks)  
and 15A NCAC 07H .1200 *et seq* (Static Line Exception)

Dear Mr. Gregson:

I am writing on behalf of Moore's Inlet Limited Partnership (MILP), the owner of the Holiday Inn SunSpree (SunSpree) located at 1706 N. Lumina Avenue in Wrightsville Beach (Property), regarding the Coastal Resources Commission's (CRC) proposed changes to its rules in 15A NCAC 07H .0306 regarding ocean hazard setbacks (Ocean Hazard Setbacks) and 15A NCAC 07H .1200 *et seq* regarding procedures for establishing the static line exception (Static Line Exception). On December 31, 2007, MILP submitted comments on the prior proposed rule change for the Ocean Hazard Setbacks. This letter provides comment on the revisions to these rules as well as on the recently proposed Static Line Exception.

We appreciate the CRC's recognition that the revised setback requirements should not apply to communities with well-established beach renourishment projects as long as the requisite commitment to beach renourishment can be established. However, MILP believes that the proposed rules contain a number of ambiguities and inconsistencies in that could affect how this policy is implemented. MILP therefore requests that the following revisions be made to the proposed rules:

1. **15A NCAC 07J .0306(a)(2)(K), Line 7:** The reference to 15A NCAC 07H .0306(a)(8) is both confusing and redundant. The purpose of this subsection is to define those communities that are eligible for an alternative setback standard for large structures. That is accomplished by the cross-reference to 15A NCAC 07J .1200. The additional reference to 15A NCAC 07H .0306(a)(8) adds nothing and confuses the issue because the latter rule includes development standards that are not applicable to the proposed alternative setback standard, such as a limitation of 2,500 square feet on building size (which directly conflicts with the applicability of this rule only to structures greater than 5,000 square feet). Accordingly, we request the proposed rule be revised to read as follows: "Notwithstanding any

other setback requirement of 15A NCAC 07H .0306(a)(2), a building or other structure greater than 5,000 square feet in a community meeting the criteria set forth in 15A NCAC 07H .0306(a)(8) as well as the requirements in 15A NCAC 07J .1200 shall require a minimum setback factor . . .”

2. **15A NCAC 07J .0306(a)(2)(K), Line 16:** We understand that DCM and the Commission do not intend to preclude the use of a measurement line in appropriate circumstances in communities eligible for the alternative setback standard established by this rule. To make this clear, MILP proposed that this rule be rewritten to read: “the setback shall be measured landward from either the static vegetation line, vegetation line, or measurement line, whichever is further landward.”
3. **15A NCAC 07J .0306(a)(8) and 15A NCAC 07J .1200.** We believe it is somewhat confusing to require a local government with a long-term, large-scale beach renourishment project that wishes to avail itself of the alternative setback requirement to apply for a “static line exception.” It may make more sense to establish in 15A NCAC 07J .1200 a procedure for demonstrating that a long-term, large-scale beach renourishment project is in place, which would make a petitioner eligible for both the static line exception and the alternative setback requirement for large structures. We understand that DCM agrees that this would be a useful change to the structure of the rules.
4. **15A NCAC 07J .1201(d):** The prefatory sentences of this subsection contain several ambiguities. First, after having defined who may apply for a static line exception in 15A NCAC 07J .1201(a)(any local government subject to a static vegetation line), this subsection introduces the new concept that the petitioner must be the party “responsible” for the management and maintenance of the long-term, large-scale beach fill project. The ambiguity arises from the fact that it is unclear what the word “responsible” means where, as in Wrightsville Beach, the project is managed by the U.S. Army Corps of Engineers pursuant to a contract with the Town. Moreover, this additional language seems unnecessary in the overall context of this rule, which clearly establishes that in order to qualify for the exception a petitioner has to demonstrate that a long-term, large-scale beach fill project is being implemented. Accordingly, we request that the first sentence of this subsection be revised to end with the word “petitioner.”

Second, this subsection introduces the concept of “long-term,” which does not appear in prior subsections of this rule. We suggest that the rule consistently use the phrase “long-term, large-scale beach fill project” and that the definition of that phrase should be moved to subsection (a) of this rule.

Finally, and most importantly, if the definition of a “long-term” project is to remain 30 years from the date of the exception request, it should be understood that not every local government will have 30 years left on its current beach fill

contract at the time of application. We do not read the rule to impose such a requirement. The revisions we request below are intended in part to clarify that what is required with respect to the design life of the project is (1) a conceptual maintenance plan, (2) an identified source of fill material, and (3) an identified funding source.

5. **15A NCAC 07J .1201(d)(2):** This subsection requires a petitioner for a static line exception to provide “plans and related materials” for “planned maintenance needed to achieve a design life providing no less than 30 years of shore protection.” It is obviously not possible to provide detailed design documents for the maintenance of a beach fill project for 30 years, as the maintenance needs of the project may change over time; we cannot imagine that it is the Commission’s intent to impose such a requirement. We therefore request that the foregoing clause be rewritten to read: “a conceptual plan for ~~planned~~ maintenance needed to achieve a design life providing no less than 30 years of shore protection.”
6. **15A NCAC 07J .1201(d)(3):** The sources of beach-compatible sediment may change over the life of a 30-year project. Accordingly, we request that the word “anticipated” be inserted in the first line of this subsection before the word “location.”
7. **15A NCAC 07J .1201(d)(4):** We do not understand what is meant by the phrase “funding bases” and request that it be changed to “funding sources.” It should be clear that what is required is one or more identified revenue streams to fund the project over its design life, not 30 years of cash on hand at the time of the application.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact me at (828) 253-5552 if you have any questions regarding our comments.

Sincerely yours,



Mack B. Pearsall  
President of PVC, Inc.  
General Partner of Moore’s Inlet  
Limited Partnership

cc: Hon. Steven Whalen, Mayor, Wrightsville Beach  
Robert Simpson, Wrightsville Beach Town Manager  
Jeff Warren, DCM  
Steve Levitas, Kilpatrick Stockton, Raleigh, NC  
Carolyn Bachl, Kilpatrick Stockton, Raleigh, NC  
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RECEIVED

July 18, 2008 JUL 21 2008

Mr. Jim Gregson, Director  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

Morehead City DCM

Re: **Comments on Rule Making**  
**15A NCAC 7H.0306**  
**15A NCAC 7J.1200**

Dear Mr. Gregson:

I represent the Figure "8" Beach Homeowners' Association. The Board of Directors of the Association has asked me to submit the following comments on behalf of the Association.

**GENERAL COMMENT.**

The Association commends the Division of Coastal Management and the Coastal Resources Commission for proposing changes in the rules related to the creation of a static line for setback purposes in conjunction with a large-scale beach fill project. The current rules which impose a permanent prohibition on building on certain lots is extremely unfair because the static line prevents development in some places that are less hazardous than areas where the line does not apply. The current static line rule is particularly unfair in situations where a large scale project is undertaken after a storm event where the natural vegetation line is abnormally far landward and where a large scale project will restore a beach and a vegetation line that can be expected to perform just as a natural beach within a few years.

The static line concept is unreasonable and unjustified in some situations as the rule itself indicates. The language in 7H.0306(a)(8) states that a beach subject to a large-scale fill project "can be expected to erode at least as fast as, if not faster than, the pre-project beach". In those situations where the beach erodes only "as fast as...the pre-project beach", a static line should not be imposed. The rule should be amended to have an automatic release from the static line in such situations rather than forcing a community to seek an exemption using standards that are not reasonable when applied to a beach that is not eroding as fast as a pre-project beach.

**SPECIFIC COMMENTS.**

**7H.0306(a)(2).** The measurement point for ocean hazard setbacks should be from the measurement line to the foundation pilings for ease of permitting and enforcement. A customary allowance for roof overhangs and a small portion of the building that may extend beyond the foundation pilings should be allowed. A roof overhang does not create additional living space and does not offend any of the reasons for the setback rule. A specific limit on roof overhangs can be set based on customary construction practices.

**7H.0306(a)(2)(A)-(H).** There should be no increased setback for single family residential structures regardless of size. If the goal of the rule is to allow structures to be moved, even large structures can be effectively moved. It should be up to the owners to determine what amount of investment they wish to make in their property that may be in a hazardous location. If local regulations allow large single family structures, the CRC rules should not impose more stringent setbacks for single family structures.

**7H.0306(a)(8)(D).** There is no rational basis for limiting the total floor area of a building to 2,500 square feet. It should be up to the property owner and local regulations to determine appropriately sized structures. If a house is located in an area with a static line exception, it will likely be less affected by erosion than many areas where setbacks are not subject to the static line rules.

**7J.1203(c) and 1205(d).** There appears to be a typographical error in the statutory reference. I believe the reference to G.S. 150B-23 should be to G.S. 150B-43.

**7J.1204(a).** In the second sentence the word "three" should be deleted as there is now only one condition in .0306(a)(8)(A).

**7J.1204(b).** The first sentence should be rewritten to reflect the fact that only one standard is set forth in .0306(a)(8)(A).

**7J.1204(b)(3).** The reference to .0306(a)(8)(A) should be deleted and changed to 7J.1201(d)(4).

**7J.1204(c).** In the second sentence the reference to .0306(a)(8)(A) should be changed to .0306(a)(8) or to .0306(a)(8)(A)-(H).

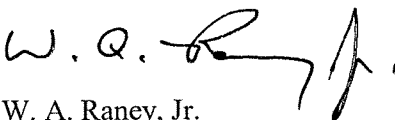
**7J.1205(a).** The last clause should be changed to read: "That the standard set forth in 15A NCAC 7H.0306(a)(8)(A) is not being met."

**7J.1205(c) and (d).** Change "revoked" to "suspended" to enable the affected community to gain approval for a continuation of the static line exception. If necessary, a sentence could be added to read "During the period of any suspension, all permit applications will be considered as if no static line exception exists."

Please consider these comments in connection with the rule making process. If you or any members of your staff or any members of the CRC would like to have a further explanation concerning these comments, please feel free to contact me.

Sincerely,

WESSELL & RANEY, L.L.P.



W. A. Raney, Jr.

WAR:jn

WAR\Corp\R02-120-C104

cc: David Kellam via e-mail

Board of Directors via e-mail



North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

September 11, 2008

**MEMORANDUM**

**CRC 08-43**

**TO:** Coastal Resources Commission

**FROM:** Jeffrey Warren, PhD  
Coastal Hazards Specialist

**SUBJECT:** Final Rule Language Recommendations  
15A NCAC 07H.0306 and 07J.1200

Upon review of the stakeholder input received during the public comment period between June 16 and August 15, 2008 (see memo CRC 08-42 for the complete verbal and written comments), minor revisions have been made to the draft rule language for both 15A NCAC 07H.0306 and 07J.1200. Both rules are attached to this memo. Please note the following explanations regarding text edits (or lack thereof):

Rule language that remains unchanged from current rule is black.

Rule language that has been added to the current rule is underlined and red.

~~Rule language that has been deleted from the current rule is struck through and red.~~

Rule language that has been added to the proposed language published in the Register on July 16, 2008 is black and highlighted in yellow.

~~Rule language that has been deleted from the proposed language published in the Register on July 16, 2008 is underlined, struck through, and red.~~

**STAFF RECOMMENDATION**

The changes made to the rule language are not substantive and would not require additional public comment periods. DCM staff recommends that both rules be adopted by the CRC as revised. If adopted, the likely effective date will be December 1, 2008.

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**15A21 NCAC 07H .0306 GENERAL USE STANDARDS FOR OCEAN HAZARD AREAS**

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.

- ~~(1) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.~~
- (1) The ocean hazard setback for development shall be measured in a landward direction from the vegetation line, the static vegetation line or the measurement line, whichever is applicable. The setback distance shall be determined by both the size of development and the shoreline erosion rate as defined in 15A NCAC 07H.0304. Development size shall be defined by total floor area for structures and buildings or total area of footprint for development other than structures and buildings. The calculation of total floor area shall be based on the following criteria:
- (A) The total square footage of heated or air-conditioned living space; and
  - (B) The total square footage of parking elevated above ground level; and
  - (C) 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; and
  - (D) Roof-covered porches and walkways shall not be included in the total floor area unless they are enclosed with material other than screen mesh or are being converted into an enclosed space with material other than screen mesh.
- (2) With the exception of those types of development defined in 15A NCAC 07H.0309, no development, including any portion of a building or structure, shall extend seaward of the ocean hazard setback distance. This shall include roof overhangs and elevated portions that are cantilevered, knee braced, or otherwise extended beyond the support of pilings or footings. The ocean hazard setback shall be established based on the following criteria:
- (A) A building or other structure less than 5,000 square feet shall require a minimum setback factor of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
  - (B) A building or other structure greater than or equal to 5,000 square feet but less than 10,000 square feet shall require a minimum setback factor of 120 feet or 60 times the shoreline erosion rate, whichever is greater;
  - (C) A building or other structure greater than or equal to 10,000 square feet but less than 20,000 square feet shall require a minimum setback factor of 130 feet or 65 times the shoreline erosion rate, whichever is greater;
  - (D) A building or other structure greater than or equal to 20,000 square feet but less than 40,000 square feet shall require a minimum setback factor of 140 feet or 70 times the shoreline erosion rate, whichever is greater;
  - (E) A building or other structure greater than or equal to 40,000 square feet but less than 60,000 square feet shall require a minimum setback factor of 150 feet or 75 times the shoreline erosion rate, whichever is greater;
  - (F) A building or other structure greater than or equal to 60,000 square feet but less than 80,000 square feet shall require a minimum setback factor of 160 feet or 80 times the shoreline erosion rate, whichever is greater;
  - (G) A building or other structure greater than or equal to 80,000 square feet but less than 100,000 square feet shall require a minimum setback factor of 170 feet or 85 times the shoreline erosion rate, whichever is greater;

15A NCAC 07H.0306 published in Register on July 16, 2008 and subsequently modified by DCM staff

- (H) A building or other structure greater than or equal to 100,000 square feet shall require a minimum setback factor of 180 feet or 90 times the shoreline erosion rate, whichever is greater;
- (I) Infrastructure that is linear in nature such as roads, bridges, pedestrian access such as boardwalks and sidewalks, and utilities providing for the transmission of electricity, water, telephone, cable television, data, storm water and sewer shall require a minimum setback factor of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
- (J) Parking lots greater than or equal to 5,000 square feet shall require a setback factor of 120 feet or 60 times the shoreline erosion rate, whichever is greater;
- (K) Notwithstanding any other setback requirement of 15A NCAC 07H.0306(a)(2), a building or other structure greater than or equal to 5,000 square feet in a community with a static line exception as defined in 15A NCAC 07J.1200 meeting the criteria set forth in 15A NCAC 07H.0306(a)(8) as well as the requirements in 15A NCAC 07J.1200 shall require a minimum setback factor of 120 feet or 60 times the shoreline erosion rate in place at the time of permit issuance, whichever is greater. The setback shall be measured landward from either the static vegetation line, or the vegetation line or the measurement line, whichever is farther landward.
- (23) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the ~~long term erosion setback line~~ ocean hazard setback, whichever is farthest from the ~~first line of stable natural~~ vegetation line, static vegetation line or measurement line, ~~where whichever is~~ applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located ~~seaward-oceanward~~ of the primary dune. In such cases, the development ~~may~~ shall be located landward of the ~~long term erosion ocean hazard setback line and~~ but shall not be located on or ~~oceanward in front of~~ a frontal dune. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.
- (34) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal dune or landward of the ~~long term erosion ocean hazard setback line~~, whichever is farthest from the ~~first line of stable natural~~ vegetation line, static vegetation line or measurement line, ~~where whichever is~~ applicable.
- ~~(4) — Because large structures located immediately along the Atlantic Ocean present increased risk of loss of life and property, increased potential for eventual loss or damage to the public beach area and other important natural features along the oceanfront, increased potential for higher public costs for federal flood insurance, erosion control, storm protection, disaster relief and provision of public services such as water and sewer, and increased difficulty and expense of relocation in the event of future shoreline loss, a greater oceanfront setback is required for these structures than is the case with smaller structures. Therefore, in addition to meeting the criteria in this Rule for setback landward of the primary or frontal dune or both the primary and frontal dunes, for all multi-family residential structures (including motels, hotels, condominiums and moteliminiums) of more than 5,000 square feet total floor area, and for any non-residential structure with a total area of more than 5,000 square feet, the erosion setback line shall be twice the erosion setback as established in Subparagraph (a)(1) of this Rule, provided that in no case shall this distance be less than 120 feet. In areas where the rate is more than 3.5 feet per year, this setback line shall be set at a distance of 30 times the long term annual erosion rate plus 105 feet.~~

*15A NCAC 07H.0306 published in Register on July 16, 2008 and subsequently modified by DCM staff*

- (5) If neither a primary nor frontal dune exist in the AEC on or landward of the lot on which development is proposed, the structure shall be landward of the ocean hazard setback.
- ~~(56)~~ Structural additions or increases in the footprint or total floor area of a building or structure represent expansions to the total floor area~~principal structure~~ and ~~both~~ shall meet the setback requirements established in ~~Paragraph (a) of this Rule and 15A NCAC 07H.0309(a)Rule .0309(a) of this Section~~. ~~The enclosure of existing roof covered porches shall be exempt from this requirement if the footprint is not expanded, modifications to existing foundations are not required and the existing porch is located landward of the vegetation line or measurement line applicable.~~ New development landward of the applicable setback may be cosmetically, but shall not be structurally, attached to an existing structure that does not conform with current setback requirements.
- ~~(67)~~ Established common-law and statutory public rights of access to and use of public trust lands and waters in ocean hazard areas shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.
- (8) Beach fill as defined in this Section represents a temporary response to coastal erosion, and compatible beach fill as defined in 15A NCAC 07H.0312 can be expected to erode at least as fast as, if not faster than, the pre-project beach. Furthermore, there is no assurance of future funding or beach-compatible sediment for continued beach fill projects and project maintenance. Therefore, development setbacks measured from an established vegetation line in areas that have received beach fill may, over time, be located so as to be closer to the shoreline and more vulnerable to natural hazards along the oceanfront. Therefore, development setbacks in areas that have received large-scale beach fill as defined in 15A NCAC 07H.0305 shall be measured landward from the static vegetation line as defined in this Section. If development landward of the large-scale beach fill project does not meet the setback requirements from the static vegetation line, but can or has the potential to meet the setback requirements from the vegetation line set forth in Part (1) of this Rule, a local government or community may petition the Coastal Resources Commission for a "static line exception" to allow development of property that lies both within the jurisdictional boundary of the petitioner as well as the boundaries of the large-scale beach fill project. The procedures for a static line exception request are defined in 15A NCAC 07J.1200. If the request is approved, the Coastal Resources Commission may allow development under the following conditions:
- (A) The local government or community provides evidence of a long-term commitment to beach fill including:
- (i) plans for design, construction, and maintenance of a beach fill project designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work and designed for a period of at least 30 years from the date of the static line exception request; and
  - (ii) documentation by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work of the location, of compatible sand as defined in 15A NCAC 07H.0312 necessary to construct and maintain the beach fill project over its design life; and
  - (iii) identification of the financial resources or funding sources**bases** necessary to fully fund the beach fill project over its design life; and
- (B) A minimum of five (5) years has passed since the onset of the initial large-scale beach fill construction associated with the static vegetation line as defined in 15A NCAC 07H.0305; and
- (C) Development shall meet all setback requirements from the vegetation line defined in this Rule; and
- (D) Total floor area of a building shall be no greater than 2,500 square feet; and

*15A NCAC 07H.0306 published in Register on July 16, 2008 and subsequently modified by DCM staff*

- (E) Development setbacks shall be calculated from the shoreline erosion rate in place at the time of permit issuance; and
- (F) No portion of a building or structure, including roof overhangs and elevated portions that are cantilevered, knee braced or otherwise extended beyond the support of pilings or footings, may extend oceanward of the landward-most adjacent building or structure and shall be as far landward on the lot to the maximum extent feasible. When the configuration of a lot precludes the placement of a building or structure in line with the landward-most adjacent building or structure, an average line of construction shall be determined by the Division of Coastal Management on a case-by-case basis in order to determine an ocean hazard setback that is landward of the vegetation line, a distance no less than 30 times the shoreline erosion rate or 60 feet, whichever is greater; and
- (G) With the exception of swimming pools, the development defined in 15A NCAC 07H.0309(a) may be allowed oceanward of the static vegetation line; and
- (H) Development shall not be eligible for the exception defined in 15A NCAC 07H.0309(b); and
- (I) Issuance, revocation, and expiration of the static line exception shall occur under the conditions defined in 15A NCAC 07J.1200.

(b) In order to avoid weakening the protective nature of ocean beaches and primary and frontal dunes, no development shall be permitted that involves the removal or relocation of primary or frontal dune sand or vegetation thereon which would adversely affect the integrity of the dune. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable, and any disturbance of any other dunes shall be allowed only to the extent allowed by 15A NCAC 07H.0308(b)~~Rule .0308(b) of this Section.~~

(c) Development shall not cause irreversible damage to documented historic architectural or archaeological resources documented by the Division of Archives and History, the National Historical Registry, the local land-use plan, or other sources.

(d) Development shall comply with minimum lot size and set back requirements established by local regulations.

(e) Mobile homes shall not be placed within the high hazard flood area unless they are within mobile home parks existing as of June 1, 1979.

(f) Development shall comply with general management objective for ocean hazard areas set forth in 15A NCAC 07H.0303~~Rule .0303 of this Section.~~

(g) Development shall not interfere with legal access to, or use of, public resources nor shall such development increase the risk of damage to public trust areas.

(h) Development proposals shall incorporate measures to avoid or minimize adverse impacts of the project. These measures shall be implemented at the applicant's expense and may include actions that:

- (1) minimize or avoid adverse impacts by limiting the magnitude or degree of the action,
- (2) restore the affected environment, or
- (3) compensate for the adverse impacts by replacing or providing substitute resources.

(i) Prior to the issuance of any permit for development in the ocean hazard AECs, there shall be a written acknowledgment from the applicant that the applicant is aware of the risks associated with development in this hazardous area and the limited suitability of this area for permanent structures. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development.

(j) All relocation of structures shall require permit approval. Structures relocated with public funds shall comply with the applicable setback line as well as other applicable AEC rules. Structures including septic tanks and other essential accessories relocated entirely with non-public funds shall be relocated the maximum feasible distance landward of the present location; septic tanks may not be located ~~seaward~~ oceanward of the primary structure. In these cases, all other applicable local and state rules shall be met.

(k) Permits shall include the condition that any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration as defined in 15A NCAC 07H.0308(a)(2)(B)~~Rule .0308(2)(B) of this Section.~~ The structure(s) shall be relocated or dismantled

**15A NCAC 07H.0306 published in Register on July 16, 2008 and subsequently modified by DCM staff**  
within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach renourishment takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time. This condition shall not affect the permit holder's right to seek authorization of temporary protective measures allowed under 15A NCAC 07H.0308(a)(2)~~Rule .0308(a)(2) of this Section.~~

*History Note:* Authority G.S. 113A-107; 113A-113(b)(6); 113A-124;  
Eff. September 9, 1977;  
Amended Eff. December 1, 1991; March 1, 1988; September 1, 1986; December 1, 1985;  
RRC Objection due to ambiguity Eff. January 24, 1992;  
Amended Eff. March 1, 1992;  
RRC Objection due to ambiguity Eff. May 21, 1992;  
Amended Eff. February 1, 1993; October 1, 1992; June 19, 1992;  
RRC Objection due to ambiguity Eff. May 18, 1995;  
Amended Eff. April 1, 2007; November 1, 2004; June 27, 1995; **December 1, 2008.**

**SUBCHAPTER 07J – PROCEDURES FOR PROCESSING AND ENFORCEMENT OF MAJOR AND MINOR DEVELOPMENT PERMITS, VARIANCE REQUESTS, APPEALS FROM PERMIT DECISIONS, ~~AND~~ DECLARATORY RULINGS, AND STATIC LINE EXCEPTIONS**

**SECTION .1200 – STATIC VEGETATION LINE EXCEPTION PROCEDURES**

**15A NCAC 07J .1201 REQUESTING THE STATIC LINE EXCEPTION**

(a) Any local government or permit holder of a large-scale beach fill project, herein referred to as the petitioner, that is subject to a static vegetation line pursuant to 15A NCAC 07H.0305, may petition the Coastal Resources Commission for an exception to the static line in accordance with the provisions of this Section. For the purpose of this Rule, long-term is defined as a period of no less than 30 years from the date of the submittal of the static line exception request.

(b) A petitioner shall be eligible to submit a request for a static vegetation line exception after five (5) years have passed since the completion of construction of the initial large-scale beach fill project as defined in 15A NCAC 07H.0305 that required the creation of a static vegetation line. For a static vegetation line in existence prior to the effective date of this Rule, the award-of-contract date of the initial large-scale beach fill project, or the date of the aerial photography or other survey data used to define the static vegetation line, whichever is most recent, shall be used in lieu of the completion of construction date.

(c) A static line exception request applies to the entire static vegetation line within the jurisdiction of the petitioner including segments of a static vegetation line that are associated with the same large-scale beach fill project. If multiple static vegetation lines or line segments within the jurisdiction of the petitioner are associated with different large-scale beach fill projects, then the static line exception defined in 15A NCAC 07H.0305 and the procedures outlined in this Section shall be considered separately for each large-scale beach fill project.

(d) A static line exception request shall be made in writing by the petitioner responsible for the management and maintenance of the long-term, large-scale beach fill project(s) or the petitioner that is the recipient of a long-term U.S. Army Corps of Engineers storm protection project. ~~For the purpose of this Rule, long term refers to a period of no less than 30 years from the date of the static line exception request.~~ A complete static line exception request shall include the following:

- (1) A summary of all beach fill projects in the area for which the exception is being requested including the initial large-scale beach fill project associated with the static vegetation line, subsequent maintenance of the initial large-scale project(s) and beach fill projects occurring prior to the initial large-scale project(s). To the extent historical data allows, the summary shall include construction dates, contract award dates, volume of sediment excavated, total cost of beach fill project(s), funding sources, maps, design schematics, pre- and post-project surveys and a project footprint;
- (2) Plans and related materials including: reports, maps, tables and diagrams for the design and construction of the initial large-scale beach fill project that required the static vegetation line, subsequent maintenance that has occurred, and anticipated ~~planned~~ maintenance needed to achieve a design life providing no less than 30 years of shore protection from the date of the static line exception request. The plans and related materials shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work;
- (3) Documentation, including maps, geophysical and geological data, to delineate the location and volume of compatible sediment as defined in 15A NCAC 07H.0312 necessary to construct and maintain the large-scale beach fill project defined in Part 2 of this Rule over its design life. This documentation shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work; and
- (4) Identification of the financial resources or funding sources ~~bases~~ necessary to fund the large-scale beach fill project over its design life.

(e) A static line exception request shall be submitted to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. Written acknowledgement of the receipt of a completed static line exception request, including notification of the date of the meeting at



which the request will be considered by the Coastal Resources Commission, shall be provided to the petitioner by the Division of Coastal Management.

(f) The Coastal Resources Commission shall consider a static line exception request no later than the second scheduled meeting following the date of receipt of a complete request by the Division of Coastal Management, except when the petitioner and the Division of Coastal Management agree upon a later date.

#### **15A NCAC 07J .1202 REVIEW OF THE STATIC LINE EXCEPTION REQUEST**

(a) The Division of Coastal Management shall prepare a written report of the static line exception request to be presented to the Coastal Resources Commission. This report shall include:

- (1) A description of the area affected by the static line exception request;
- (2) A summary of the large-scale beach fill project that required the static vegetation line as well as the completed and ~~anticipated~~ ~~planned~~ maintenance of the project(s);
- (3) A summary of the evidence required for a static line exception; and
- (4) A recommendation to grant or deny the static line exception.

(b) The Division of Coastal Management shall provide the petitioner requesting the static line exception an opportunity to review the report prepared by the Division of Coastal Management no less than 10 days prior to the meeting at which it is to be considered by the Coastal Resources Commission.

#### **15A NCAC 07J .1203 PROCEDURES FOR APPROVING THE STATIC LINE EXCEPTION**

(a) At the meeting that the static line exception is considered by the Coastal Resources Commission, the following shall occur:

- (1) The Division of Coastal Management shall orally present the report described in 15A NCAC 07J.1202.
- (2) A representative for the petitioner may provide written or oral comments relevant to the static line exception request. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.
- (3) Additional parties may provide written or oral comments relevant to the static line exception request. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

(b) The Coastal Resources Commission shall authorize a static line exception request following affirmative findings on each of the ~~criteria presented~~ ~~conditions contained~~ in 15A NCAC 07H.0306(a)(8)(A). The final decision of the Coastal Resources Commission shall be made at the meeting at which the matter is heard or in no case later than the next scheduled meeting. The final decision shall be transmitted to the petitioner by registered mail within ten business days following the meeting at which the decision is reached.

(c) The decision to authorize or deny a static line exception is a final agency decision and is subject to judicial review in accordance with G.S. 113A-123 and G.S. 150B-243.

#### **15A NCAC 07J.1204 REVIEW OF THE LONG-TERM BEACH-FILL PROJECT AND APPROVED STATIC LINE EXCEPTIONS**

(a) Progress Reports. The petitioner that received the static line exception shall provide a progress report to the Coastal Resources Commission at intervals no greater than every five (5) years from date the static line exception is authorized. The progress report shall address the ~~three (3) conditions~~ ~~criteria~~ defined in 15A NCAC 07H.0306(a)(8)(A) and be submitted in writing to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. The Division of Coastal Management shall provide written acknowledgement of the receipt of a completed progress report, including notification of the meeting date at which the report shall be presented to the Coastal Resources Commission to the petitioner.

(b) The Coastal Resources Commission shall review a static line exception authorized under 15A NCAC 07J.1203 at intervals no greater than every five (5) years from the initial authorization in order to renew its findings for ~~each of the~~ conditions defined in 15A NCAC 07H.0306(a)(8)(A). The Coastal Resources Commission shall also consider the following conditions:

- (1) Design changes to the initial long-term beach fill project defined in 15A NCAC 07J.1201(d)(2) provided that said changes are designed and prepared by the U.S. Army

Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work;

- (2) Design changes to the location and volume of compatible sediment, as defined by 15A NCAC 07H.0312, necessary to construct and maintain the large-scale beach fill project defined in 15A NCAC 07J.1202(d)(2), including design changes defined in this Rule provided that said changes have been designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work; and
- (3) Changes in the financial resources or funding sources**bases** necessary to fund the long-term beach fill project defined in 15A NCAC 07H.0306(a)(8)(A). If the project has been amended to include design changes defined in this Rule, then the Coastal Resources Commission shall consider the financial resources or funding sources**bases** necessary to fund said changes.

(c) The Division of Coastal Management shall prepare a written summary of the progress report and present it to the Coastal Resources Commission no later than the second scheduled meeting following the date the report was received, except when a later meeting is agreed upon by the local government or community submitting the progress report and the Division of Coastal Management. This written summary shall include a recommendation from the Division of Coastal Management on whether the conditions defined in 15A NCAC 07H.0306(a)(8)(A) as well as this Rule have been met. The petitioner submitting the progress report shall be provided an opportunity to review the written summary prepared by the Division of Coastal Management no less than 10 days prior to the meeting at which it is to be considered by the Coastal Resources Commission.

(d) The following shall occur at the meeting at which the Coastal Resources Commission reviews the static line exception progress report:

- (1) The Division of Coastal Management shall orally present the written summary of the progress report as defined in this Rule.
- (2) A representative for the petitioner may provide written or oral comments relevant to the static line exception progress report. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.
- (3) Additional parties may provide written or oral comments relevant to the static line exception progress report. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

#### **15A NCAC 07J.1205 REVOCATION AND EXPIRATION OF THE STATIC LINE EXCEPTION**

(a) The static line exception shall be revoked immediately if the Coastal Resources Commission determines, during the review of the petitioner's progress report identified in 15A NCAC 07J.1204, that any of the **criteria** conditions under which the static line exception is authorized, as defined in this Section and 15A NCAC 07H.0306, **are not being met** ~~no longer exist~~.

(b) The static line exception shall expire immediately at the end of the design life of the long-term beach fill project defined in 15A NCAC 07H.0306(a)(8)(A) and 15A NCAC 07J.1201(d) including subsequent design changes to said project as defined in 15A NCAC 07J.1204(b).

(c) In the event a progress report is not received by the Division of Coastal Management within five years from either the static line exception or the previous progress report, the static line exception shall be revoked automatically at the end of the five-year interval defined in 15A NCAC 07J.1204(b) for which the progress report was not received.

(d) The revocation or expiration of a static line exception is considered a final agency decision and is subject to judicial review in accordance with G.S. 113A-123 and G.S. 150B-23.

#### **15A NCAC 07J.1206 LOCAL GOVERNMENTS AND COMMUNITIES WITH STATIC VEGETATION LINES AND STATIC LINE EXCEPTIONS**

(a) A list of static vegetation lines in place for petitioners and the conditions under which the static vegetation lines exist, including the date(s) the static line was defined, shall be maintained by the Division of Coastal Management. A list of static line exceptions in place for petitioners and the conditions under which the exceptions exist, including the date the exception was granted, the dates the progress reports were received, the design life of the long-term beach fill project and the potential expiration dates for the



*15A NCAC 07H.0306 published in Register on July 16, 2008 and subsequently modified by DCM staff*

static line exception, shall be maintained by the Division of Coastal Management. Both the static vegetation line list and the static line exception list shall be available for inspection at the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124  
Eff. December 1, 2008



North Carolina Department of Environment and Natural Resources  
**Division of Coastal Management**

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

September 10, 2008

**MEMORANDUM**

**TO:** CRC & Interested Parties  
**FROM:** Tancred Miller  
**SUBJECT:** Rulemaking Update

Along with this memo is a spreadsheet that contains all of the Commission's rules that are currently in the rulemaking process—from those being proposed for initial action to those reviewed by the Rules Review Commission since the last CRC meeting. Listed below is a description and recent history of the CRC's action on each rule. Complete drafts of rules scheduled for public hearing at this meeting will be available on the DCM website.

**RULE DESCRIPTIONS**

1. 15A NCAC 7H.0205 Coastal Wetlands (Marsh Alteration)  
**Status:** Public hearing in September.  
The purpose of the proposed amendments to this rule is to begin regulating certain types of marsh alteration, primarily mowing and burning. The CRC has received two Attorney General Opinions asserting the Commission's authority to regulate marsh alteration as development. Staff does not feel that alteration is a ubiquitous problem, and has scientific evidence that most mowing and burning seen in NC is not detrimental to the marsh. CRC approved draft rule language in March.
2. 15A NCAC 7H.0208 Estuarine System Use Standards (Docks & Piers provisions)  
**Status:** Approved for public hearing.  
The CRC approved this rule for public hearing in July 2007, conditional on review and approval of the MFC's new definition of SAV habitat and satisfactory permitting coordination with DCM. DMF and DCM reported on the SAV habitat definition in May and on the interagency coordination agreement that has been developed. The CRC approved the docks and piers provisions in July 2008, to be sent to public hearing.
3. 15A NCAC 7H.0306 General Use Standards for Ocean Hazard Areas (Setbacks)  
**Status:** Completed public hearings and eligible for adoption in September 2008.  
The amendments to 7H.0306 tie beachfront building setbacks to the size of the structure, not the use. The revisions include graduated setback factors for buildings greater than 5,000 square feet, and do not allow for cantilevering oceanward of the setback line. Staff will present responses to public comments, and recommend final rule language, in September.

400 Commerce Avenue, Morehead City, North Carolina 28557  
Phone: 252-808-2808 \ FAX: 252-247-3330 \ Internet: [www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

4. 15A NCAC 7H.0308 Specific Use Standards for Ocean Hazard Areas  
**Status:** Going to public hearing.  
Staff presented proposed changes in July to the sandbag provisions in this rule. The changes lengthen the duration and number of times that sandbags can be used in inlet hazard areas when a community is pursuing inlet relocation, and allow sandbags to be placed more than 20 feet from the structure being protected if the Director finds that it is justified. The Commission approved the changes for public hearing.
5. 15A NCAC 7H.0309 Use Standards for Ocean Hazard Areas: Exceptions  
**Status:** Going to public hearing.  
The CRC approved draft changes in March to make the development limitations in this rule conform with pending changes to 7H.0306, and approved additional changes to the pier house section in May to allow construction and expansion of pier houses oceanward of the setback. The Commission approved the changes for public hearing.
6. 15A NCAC 7H.0310 Use Standards for Inlet Hazard Areas  
**Status:** Scheduled for discussion in November 2008.  
The CRC has seen the new inlet hazard area delineations prepared by its Science Panel on Coastal Hazards and had further discussion in July 2008. Staff will present draft rule language to the CRC at the November meeting.
7. 15A NCAC 7H.1100 GP for Construction of Bulkheads & Placement of Riprap  
**Status:** Going to public hearing.  
The Commission approved this rule in May for public hearing. Proposed changes to this rule result from the CHPP recommendation that the CRC encourage alternatives to vertical stabilization structures on estuarine shorelines. See Bonnie Bendell's March memo CRC-08-08 for a complete discussion of the proposed changes.
8. 15A NCAC 7H.1200 GP for Construction of Piers, Docks & Boat Houses  
**Status:** Going to public hearing.  
The CRC approved this rule for public hearing in July 2007, conditional on review and approval of the MFC's new definition of SAV habitat and permitting coordination with DCM. Staff presented an update in July on the interagency coordination protocols and review draft rule changes and the CRC approved the rule for public hearing.
9. 15A NCAC 7H.1400 GP for Construction of Groins in Estuarine & Public Trust Waters  
**Status:** Public hearing in September.  
Proposed changes to this rule result from the CHPP recommendation that the CRC encourage alternatives to vertical stabilization structures on estuarine shorelines. Proposed changes include allowing materials other than wood, prescribing a maximum spacing and frequency, and clarifying how structures are measured. See Bonnie Bendell's March memo CRC-08-08 for a complete discussion of the proposed changes.
10. 15A NCAC 7H.2100 GP for Marsh Enhancement Breakwaters  
**Status:** Public hearing in September.  
Proposed changes to this rule result from the CHPP recommendation that the CRC encourage alternatives to vertical stabilization structures on estuarine shorelines. Proposed changes are primarily definitional and to ensure consistency with other shoreline stabilization rules. See Bonnie Bendell's March memo CRC-08-08 for a complete discussion of the proposed changes.

11. 15A NCAC 7H.2400 GP for Placement of Riprap for Wetland Protection

**Status:** Public hearing in September.

Proposed changes to this rule result from the CHPP recommendation that the CRC encourage alternatives to vertical stabilization structures on estuarine shorelines. Proposed changes include a definitional clarification and changes to the dimensions and geometry of structures. See Bonnie Bendell's March memo CRC-08-08 for a complete discussion of the proposed changes.

12. 15A NCAC 7J.0701 Variance Petitions

**Status:** Public hearing in September.

CRC adopted amendments to 7J.0701 that require claimants to initially file either a variance request or a contested case, and not pursue both options at the same time. Proposed rule changes have been through public hearing but were returned to the CRC because of an objection by the RRC. CRC's Variance Subcommittee proposed changes to address RRC's objection and recommended sending the rule back to public hearing.

13. 15A NCAC 7J.0702 Staff Review of Variance Petitions

**Status:** Completed legislative review, effective 07/03/2008.

CRC adopted amendments to 7J.0702 that outline procedures for staff review, including the timing and preparation of stipulated facts and staff recommendations. More than 10 individuals objected to the proposed rule after it had been approved by the RRC. Under the APA, the rule was subject to legislative review. The rule was not disapproved by the Legislature, and is now effective.

14. 15A NCAC 7J.0703 Procedures for Deciding Variance Petitions

**Status:** Public hearing in September.

CRC adopted amendments to 7J.0703 that outline procedures for situations in which the Commission cannot reach a final decision due to incomplete stipulated facts. Proposed rule changes have been through public hearing but were returned to the CRC because of an objection by the RRC. This rule was also objected to by more than 10 individuals, but is not subject to legislative review because it was not approved by the RRC. CRC's Variance Subcommittee proposed changes to address the RRC's objection and recommended sending the rule back to public hearing.

15. 15A NCAC 7J.1200 Static Line Exception Procedures

**Status:** Eligible for adoption.

Staff developed 7J.1200 to define the administrative requirements of applying for, receiving, and maintaining a static line exception. The rule also describes the criteria for qualifying for an exception, CRC procedures for granting an exception, and circumstances that would cause an exception to expire or be repealed. The CRC reviewed this proposed rule in September 2007 and approved it for public hearing. Staff is coordinating the timing between this rule and 7H.0306.

16. 15A NCAC 7M.0300 Shorefront Access Policies

**Status:** Public hearing in September.

Amendments to 7M. 0300 would establish a reporting requirement for user fees collected at state-funded access sites; give DCM the ability to take the lead in acquiring land and constructing access facilities without a city or county applicant; and includes provisions to utilize funds outside the usual funding cycle in order to take advantage of unique opportunities.

**COASTAL RESOURCES COMMISSION RULEMAKING STATUS - SEPTEMBER 2008**

Item #	Rule Citation	Rule Title	Spetember '08 Status	CRC Action 3/1/2008	CRC Action 5/1/2008	CRC Action 7/1/2008	CRC Action 9/1/2008	CRC Action 11/1/2008
1	15A NCAC 7H.0205	Coastal Wetlands	Going to Public Hearing	Approved for Hearing			Public Hearing	Eligible for adoption
2	15A NCAC 7H.0208	Estuarine System Use Standards	Scheduled for discussion	Discussion of SAV definition	Discussion of SAV definition	Approved for Hearing		Public hearing
3	15A NCAC 7H.0306	General Use Standards for Ocean Hazard Areas	In public hearings	Approved for Hearings		Public Hearings	Eligible for adoption	
4	15A NCAC 7H.0308	Specific Use Standards for Ocean Hazard Areas	Going to Public Hearing			Approved for Hearing		Public hearing
5	15A NCAC 7H.0309	Use Standards for Ocean Hazard Areas: Exceptions	Discussion of staff changes	Discussed changes	Approved for Hearing	Approved for Hearing		Public hearing
6	15A NCAC 7H.0310	Use Standards for Inlet Hazard Areas	Scheduled for discussion		Discussion of progress	Discussion of draft language		Discussion of draft language
7	15A NCAC 7H.1100	GP. Constr. of Bulkheads & Placement of Riprap	Going to Public Hearing		Approved for Hearing			Public hearing
8	15A NCAC 7H.1200	GP for Construction of Piers, Docks & Boat Houses	Scheduled for discussion	Discussion of SAV Definition	Discussion of SAV Definition	Approved for Hearing		Public hearing
9	15A NCAC 7H.1400	GP for Construction of Groins in Estuarine & PT Waters	Going to Public Hearing		Approved for Hearing		Public Hearings	Eligible for adoption
10	15A NCAC 7H.2100	GP for Marsh Enhancement Breakwaters	Going to Public Hearing		Approved for Hearing		Public Hearings	Eligible for adoption
11	15A NCAC 7H.2400	GP for Placement of Riprap for Wetland Protection	Going to Public Hearing		Approved for Hearing		Public Hearings	Eligible for adoption
12	15A NCAC 7J.0701	Variance Petitions	Going to Public Hearing		Approved for Hearing		Public Hearing	Eligible for adoption
13	15A NCAC 7J.0702	Staff Review of Variance Petitions		No legislative action, effective July 3rd. No further action necessary.				
14	15A NCAC 7J.0703	Procedures for Deciding Variance Petitions	Going to Public Hearing		Approved for Hearing		Public Hearing	Eligible for adoption
15	15A NCAC 7J.1200	Static Line Exception Procedures	In public hearings	Approved for Hearings		Public Hearings	Eligible for adoption	
16	15A NCAC 7M.0300	Shorefront Access Policies	Going to Public Hearing				Public Hearings	Eligible for adoption

# Summary of Environmental Legislation Enacted in the 2008 Legislative Session

## Air Quality

### **H 2529 Extend Climate Change Commission 2008**

Extends the Legislative Commission on Global Climate Change and requires a final report by October 1, 2009.

## Marine Fisheries

### **S 1340 Sale of Blocks of Ten Day CRFLs**

Provides for the purchase of 10 ten-day blocks of coastal recreational fishing licenses by owners of boats that are 23 feet or longer.

## Open Space

### **S 1862 State Nature and Historic Preserve Removal**

Removes 1.19 acres of Lake Waccamaw State Park from the State Nature and Historic Preserve and the State Parks System for a DOT right-of-way.

### **H 2496 State Park Systems Additions**

Adds Bear Paw State Natural Area and Yellow Mountain State Natural Area to the State Parks System.

### **H 1889 Wildlife Land Property Tax Changes**

Establishes land managed for wildlife conservation as a new class eligible for the lower present-use value tax rate currently applied to agricultural and forestry land.

## Water Quality

### **S 1967 Improve Coastal Stormwater Management**

Modifies the Coastal Stormwater Rules adopted by the Environmental Management Commission. Included among the significant changes to rule adopted by the EMC were:

#### Threshold for Obtaining a Permit

All non-residential development in the coastal counties will be required to have a stormwater permit if the development:

1. Adds 10,000 square feet or more of built-upon area;
2. Requires a sedimentation/erosion control plan; or
3. Requires a CAMA permit.

Residential development that is located more than ½ mile from shellfishing waters will require a stormwater permit if the project requires an erosion and sedimentation control plan or a CAMA permit (same as the existing coastal stormwater rules.)

A stormwater permit will also be required for some small-scale residential development located within ½ mile of shellfishing waters that would not otherwise require a stormwater permit. A one-time, non-renewable permit will be required for projects that add more than 10,000 square feet of built upon area if the built upon area exceeds 12% of the overall project area.

#### Stormwater Control for Limited Residential Development

The small-scale residential development located within ½ mile of shellfish waters will be required to control the stormwater runoff from the first 1.5 inches of rain through use of cisterns, rain barrels, rain gardens or other stormwater best management practices.

#### Wetlands

Coastal Area Management Act (CAMA) wetlands (defined in G.S. 113-229 and generally limited to wetlands capable of growing in areas influenced by saltwater) will be excluded from the area of the project site for purposes of calculating the percentage of impervious surface. (The EMC rule had excluded all wetlands from the calculations.)

#### Buffer Requirements

The legislation requires a 50-foot buffer (30 feet for redevelopment) for new nonresidential development and for new residential development that involves one acre or more of land-disturbing activity or requires a CAMA permit. The 50-foot buffer does not apply to small-scale residential development that requires only a one-time, nonrenewable stormwater permit. The small projects would continue to comply with CAMA buffer requirements and buffer requirements associated with specific water quality classifications (such as nutrient sensitive waters designations). The legislation recognizes buffer exemptions for certain types of projects such as urban waterfront development projects and upland marinas. In addition, all development projects can request a buffer variance from the Division of Water Quality.

#### Grandfathering Provisions

A number of exclusions are provided for projects that have already obtained one of a broad list of local or state permits or authorizations.

#### Rescission of Phase II Designations

The Phase II designations of Morehead City, Atlantic Beach and Washington are rescinded.

#### **S 1046 Yadkin Project Study**

Directs the Environmental Review Commission to study the impacts of a potential new fifty year Federal Energy Regulatory Commission (FERC) license to Alcoa Power for the dam on the Yadkin River. Directs DENR to consider the report in the evaluation of a 401 water quality certification associated with the FERC relicensing.

### **S 1885 Promote Private Compensatory Mitigation**

Allows developers to use the state's Ecosystem Enhancement Program to meet wetlands and stream mitigation requirements only if a private wetlands mitigation bank is unable to provide the necessary mitigation.

### **S 1259 Public Water Service Warranties**

Provides that water supplied by a public water system is not subject to certain warranties.

## **Water Supply**

### **S 1872 Extend Water Allocation Study**

Extends the Environmental Review Commission's study of water allocation and requires a final report by October 1, 2010.

### **H 2499 Improve Drought Preparedness and Response**

Makes a number of changes to improve the state's ability to respond to drought, including:

- Requires the Department of Agriculture and Consumer Service to survey agricultural water users and provide, by county and watershed, information on water use by persons who withdraw 10,000 gallons of water or more per day for agricultural activities;
- Requires local government and large community water systems to adopt and implement water conservation measures in response to drought or other water shortage.
- Authorizes DENR to require water systems to report weekly on water usage during periods of drought;
- Requires separate water meters for new in-ground irrigation systems.
- Streamlines the process for declaring a water shortage emergency and moves some emergency powers from the Environmental Management Commission to the Secretary of Environment and Natural Resources;
- Provides additional criteria for water systems to be eligible for state funding, including metering all water usage and using a water rate structure that does not give residential water customers a lower per unit water rate as water use increases;
- Strengthens enforcement authority related to water use reporting, water shortage emergencies and water conservation measures;
- Directs the Commission for Public Health to adopt rules to authorize the use of gray water during periods of drought; and
- Prohibits private restrictive covenants from requiring irrigation of landscaping during periods of drought if a state or local government agency has imposed water conservation measures.

### **H 821 Specify Out of State Areas for IBT Notice**

Modifies the existing Inter-basin Transfer statute to specifically identify the geographic area outside the state, and within an affected river basin, where notice of a proposed IBT



must be provided. The bill also provides for the ERC to study the delineation of major river basins and sub-basins as a component of the Water Allocation Study.

## **Waste Management**

### **H 819 Electronic Recycling Amends/Add TVs**

Provides for an electronics recycling program for televisions and delays the effective date of the entire program until January 1, 2010.

### **H 1134 Cleanup of Abandoned Manufactured Homes**

Designates money from the Solid Waste Trust Fund to be used for grants to counties for the cleaning up and recycling of abandoned mobile homes.

### **H 2498 Underground Storage Tank Program Amendments 2008**

Raises fees on tank owners to \$420 per year, in part, to assist with the cleanup of free product sites. The bill also requires the department to implement a pilot program using site specific cleanup standards.

### **H 2530 Solid Waste Tax Changes/Unsalable OTP Refund**

Makes technical adjustments to the solid waste tip fee, including changing from a monthly to quarterly collection, establishing a bad debt deduction and adjusting how the proceeds from the tip fee are distributed between the counties and municipalities.

## **Environmental Health**

### **H 2524 Disapprove Dyed Milk Rule**

Disapproves the Dyed Milk Rule, as adopted by the NC Board of Agriculture; and mandates that all raw milk sold for animal consumption must include proper labeling stating "Not for Human Consumption."

## **Miscellaneous**

### **S 845 Amend Environmental Laws/Technical Corrections 2008**

The annual catch-all bill included a number of changes to environmental programs:

- Expands the contaminants required to be tested in the private well program beginning October 1, 2009;
- Temporarily limits EMC rulemaking with regard to coastal stormwater;
- Allows underground storage tank owners to pay fees under protest in certain circumstances;
- Adopts new impervious surface requirements for parking areas; and
- Directs DENR to aggressively compel responsible parties of groundwater contamination to assess and remediate the contamination.

### **H 2438 2008 Budget Technical Corrections**

Directs the Department of Crime Control and Public Safety to fund 5 positions for floodplain mapping with existing funds until receipts from the floodplain mapping fee are sufficient to support them. Also makes clarifying, technical changes to the two-thirds bond act contained in the budget, which is being used to finance Green Square.

### **H 2431 Studies Act of 2008**

The Studies bill contains a number of provisions authorizing the Environmental Review Commission to study:

- Costs and benefits of adopting the California motor vehicle emission standards in North Carolina;
- Feasibility of implementing a stormwater management program without requiring permits;
- Consolidation of environmental regulatory programs under a single, full-time environment commission;
- Permitting of wind energy facilities;
- Hazard disclosures in coastal real estate transactions;
- Phase-out of hog lagoons;
- Protection of conservation land from eminent domain;
- Creation of a recycling program for fluorescent lamps.

The Studies bill also directs that the Joint Legislative Commission on Seafood and Aquaculture may study the feasibility of increasing the production, processing and marketing of aquaculture products in the State.

Lastly, the Studies bill establishes a Legislative Study Commission on Urban Growth and Infrastructure Issues. Among the topics to be considered are options for fostering regional planning for water and transportation infrastructure. The Commission will report its recommendations to the 2009 General Assembly.

## **Budget Bill**

### **H 2436 Modify Appropriations Act of 2007**

The 2008 budget for the Department includes increased funding in a number of areas and establishes new positions in several divisions. Some of the highlights include:

- \$107 million in general obligation bonds for the construction of the Green Square complex, including the new DENR office building and Nature Research Center, in downtown Raleigh;
- \$50 million in certificates of participation for land conservation projects;
- \$20 million for Water Resource Development projects;
- \$2 million in recurring funding to expand the Oyster Sanctuary Program;
- \$2.7 million for the NC Zoo Polar Bear Exhibit Renovation and Expansion;

- \$600,000 for the NC Zoo Africa Pavilion Replacement Planning;
- \$341,305 in recurring funding for the landslide hazard mapping program;
- \$276,624 in recurring funding for the Environmental Stewardship Initiative;
- \$200,000 for NC Ag Cost Share Technical Assistance;
- \$72,633 in recurring funding for a Lagoon Conversion Program position;
- \$108,550 in recurring funding for swine farm compliance positions;
- \$500,000 in recurring funding for 8.62 DMF Commercial License positions;
- \$660,000 in non-recurring money to assist with drought, including interconnections, water audits and public education;
- \$482,384 in recurring funding for water supply planning and drought response;
- \$2.45 million for the Clean Water Revolving Fund match;
- \$5.5 million for the Drinking Water Revolving Fund match; and
- \$100 million in funding for the Clean Water Management Trust Fund

Special provisions in the budget bill include:

- Amendments to the language governing the Bernard Allen Emergency Drinking Water Fund;
- A new reporting requirement for the Inactive Hazardous Sites Program;
- Establishment of an agricultural drought response cost share program;
- Transfer of \$400,000 from the Dry Cleaning Solvent Cleanup Fund to be used for the cleanup of inactive hazardous sites and to provide alternative drinking water;
- Creation of eleven new inspector positions in the UST program;
- Redirecting \$750,000 from the Inspection and Maintenance Air Pollution Control Account to be used for litigation expenses in the Tennessee Valley Authority litigation;
- Transfer of the Prairie Ridge Land to DENR;
- Allocation of \$146,312 for river herring research from the Fishery Resource Grant Program;
- Direction to UNC and DENR to study the use and recycling of plastics;
- Putting the Forest Development Fund under continuation review;
- Establishment of the Conservation Easement Endowment Fund; and
- A requirement that the Division of Parks and Recreation study the feasibility of establishing a state park in McDowell County.



## MEMORANDUM

To: CRC and CRAC Members  
From: Hope Sutton, Stewardship Coordinator, NC Coastal Reserve  
Re: Bird Island Coastal Reserve field trip during September CRC meeting

The option field trip to see the Bird Island component of the NC Coastal Reserve is scheduled for Wednesday, September 24<sup>th</sup>, from 9 am to 11 am. Participants should meet on the beach at the 40<sup>th</sup> St. walkover on Sunset Beach. The walk is approximately 1.5 miles down the beach. (3 miles total) We will walk at a moderate pace. Trip leaders will be Frank Nesmith and Hope Sutton.

On the field trip to Bird Island you can expect to see the various natural communities that make up a typical barrier island – ocean beach, dunes, maritime shrub forest, salt marsh, and tidal flat. You will also learn about barrier island dynamics, the history of Bird Island and management of this Reserve under the Coastal Reserve program. Various migrating shorebirds and the endangered Sea Beach Amaranth are likely to be seen. The walk will conclude with a visit to the Kindred Spirits mailbox.

### Directions to the 40<sup>th</sup> St. walkover:

From Sea Trail Resort, take Hwy 179 East to Sunset Beach (also Shoreline Drive). Cross the bridge and follow Sunset Blvd. south to W. Main St. Turn right and continue to the end of the road. There are only a few marked parking spaces, but parking on the side of Main St. is allowed. The walkover is directly across from 40<sup>th</sup> St. and is obviously marked as a public access.



## MEMORANDUM

To: Jim Gregson, Director  
From: Hope Sutton, Stewardship Coordinator  
Re: Masonboro Island NERR Post-season Report

The 2008 summer season at Masonboro Island was not unlike the last several years. The Fourth of July drew a similar large crowd of several thousand visitors, both to the waters behind the island and to the northern cove beaches of the island. Like previous years, many of the law enforcement agencies had active patrols in the waters around Masonboro, but there were few actual calls to law enforcement.

Markedly different this season was the fact that several boat loads of drunken revelers were deposited post-party on the south end of Wrightsville Beach and at private boat docks by water taxi service captains. Also, at least three visitors with emergency health situations were delivered to Wrightsville Beach. Wrightsville Beach Police and Ocean Rescue, by necessity, handled these cases and dealt with the drunken visitors as they made their way up Wrightsville Beach and back to their homes or cars. Additionally, significant quantities of trash were left behind by the crowd, which area residents and businesses stepped in to clean up on July 5<sup>th</sup>.

Several newspaper articles followed, stirring up public concern over use and management of the island, the "out of control" party atmosphere, and the overflow burden to the Town of Wrightsville Beach. In order to get a handle on the situation and gather information to inform future management of the island, especially during holidays, peak times and on the popular north end, two meetings were coordinated. The first was intended to bring together all of the law enforcement agencies associated with the island. Despite the fact that this meeting was by invitation, the Mayor of Wrightsville Beach, two alderman, a New Hanover County Commissioner, the County Assistant Attorney and a State Representative attended, in addition to the invited representatives from the Town of Wrightsville Beach Police Department, Fire Department and Town Administration, the Division of Marine Fisheries Marine Patrol, the Wildlife Resources Commission, the New Hanover County Sheriffs Patrol, the US Coast Guard, NC State Parks, and the Town of Carolina Beach Police Department. The meeting was productive and led to the possibility of an interlocal agreement between the agencies, which will facilitate enforcement and reduce confusion and liability concerns. Also discussed were plans for the approaching Labor Day holiday, with agencies clarifying what resources they would have on the ground in the Masonboro Island area and the Sheriff's Department committing to having officers on the island no later than two weekends prior.

The meeting received media attention from two local papers and two local TV stations. One question that came out of this meeting from both the State Representative and the County Assistant Attorney is whether

it would be appropriate to include Masonboro under the Parks Department. Reserve staff and County staff are both looking into this possibility.

Prior to the second meeting, which was originally intended to better coordinate cleanup efforts after the Labor Day holiday, the idea of creating a proactive trash reduction and public education event came about. Therefore, the second meeting also became a planning effort to rally partners and volunteers to support this event. This meeting and the organizational effort that followed were also covered extensively by the media.

Eventually a number of sponsors and partner agencies and organizations, along with over 50 volunteers, came together to create what was loosely known as the Masonboro Island Trash Blitz. (Sponsors included the Carolina Estuarine Reserve Foundation, Green Coast Recycling, Waste Management, Wrightsville Water Taxi, Tidal Creek Cooperative Food Market, local resident Richard Johnson and Sea Tow. Partners included New Hanover County, the Towns of Wrightsville Beach and Carolina Beach, The Nature Conservancy, and the Coastal Land Trust.) Three stations were manned at three public boat ramps for the three days of the holiday weekend, dumpsters were placed near booths where volunteers educated boaters about Masonboro Island and appropriate use, and hundreds of trash bags were handed out. The event was again covered in the local press and news.

During the Labor Day holiday, the Sheriff's department had a complement of officers assigned to the Masonboro effort. The peak staffing on Saturday was 13 officers with two boats, two ATVs and two tents. By Monday, the effort was scaled back to 7 officers. The officers' protocol was to speak with visitors upon landing to distribute the CR's "Guide to Visiting Masonboro Island" and offer trash bags. Captain Ward and Lieutenant Payne, the commanding officers for the effort, report that the vast majority of interactions they had with visitors to the island were very positive. There were some visitors who chose not to stay on the island after becoming aware of the presence of law enforcement officers. There were other visitors who thanked the officers for their presence and mentioned that it was the first time in years they felt comfortable bringing their children to the island on a holiday weekend.

The post-holiday cleanup became yet another media event, with two reporters and photographers and one TV crew accompanying the Site Manager and a single volunteer to assess the damage. Less than a single trash bag's worth of waste was collected from the northern quarter of the island.

Follow up through the winter and spring will include pursuing the interlocal agreement between the law enforcement agencies, additional public education efforts such as workshops, website content and outreach to area organizations, planning for similar efforts during next seasons big holiday weekends, and additional planning with the Sheriff's Department for next season to find the best compromise between allowing the Reserve to be accessible for recreation and appropriate use of protected resources.



DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
TRAVEL EXPENSE REIMBURSEMENT/RECONCILIATION FORM

\*\*\*PLEASE USE YOUR TAB KEY TO ACCESS AVAILABLE FIELDS\*\*\*

Employee

Boards, Councils, Commission, and Committees

Non-DENR Employee

INSTRUCTIONS TO CLAIMANT: Submit one original to your division Travel Contact. Attach all necessary original receipts and other supporting documents to this form, including any prior written approval of excess registration, lodging and out-of-state travel. Retain one (1) copy for your records. Please complete amount, company, account, and center fields. **File no later than 30 days after month in which travel ends.** Print in ink or type. Make all corrections by drawing line through erroneous data and entering correct data. Do not use white-out. Initial all corrections or revisions.

Beacon ID No./Social Security No. B <input type="text"/>	Division/Section/Board, etc.: CRC/CRAC	New Claimant: New Address:
Claimant's Name (First, Middle Initial, Last)	Title:	
	Headquarters (City):	
Claimant's Address (Street)	Duty Station (If different from Headquarters):	
(City, State, Zip)	Period Covered by this Request:	
	From: <input type="text"/>	Through: <input type="text"/>
Remit Code/Message:		

*Under penalties of perjury I certify this is a true and accurate statement of the city I have examined this reimbursement request and certify that funds are available for lodging, expenses and allowances incurred in the service of the State, and this in the proper accounting codes to pay this claim, and this request complies with all Department and State travel policies and regulations. all Department and State travel policies and regulations. Original Signature and date required.*

\_\_\_\_\_  
(Claimant) (Date) (Supervisor) (Date)

**P-Card Reconciliation** - A copy of the approved Travel Authorization, if required, must also be attached to process this reconciliation. (Do not forget receipts.)

P-Card Number:						
	AMOUNT	COMPANY	ACCOUNT	CENTER	Accrual Code	
1	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
2	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
3	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
4	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
5	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
6	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
7	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
8	XXXXXXXXXXXXXXXXXX	16 XXXXXXXX	53 XXXXXXXXXX	XXXXXXXXXXXXXXXXXX		
9	\$0.00	Total P-Card Expenses				

	AMOUNT	COMPANY	ACCOUNT	CENTER	Accrual Code
1		16 01	53 2731	1625-6251	
2		16 01	53 2732	1625-6251	
3		16 01	53 1651	1625-6251	
4		16	53		
5		16	53		
6		16	53		
7		16	53		
8		16	53		
9	\$0.00	Total Employee Expenses		Pay Entity: 16	

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(A/P Initials) (DATE)    
(Control Number) (Control Date)

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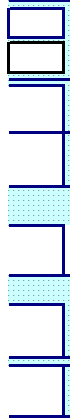
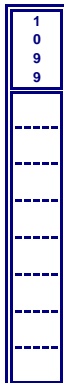
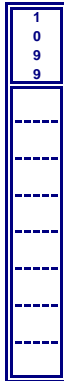


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**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
 TRAVEL EXPENSE REIMBURSEMENT FORM  
 \*\*\*PLEASE USE YOUR TAB KEY TO ACCESS AVAILABLE FIELDS\*\*\***

Claimant Name: \_\_\_\_\_ 0 Beacon ID #/Social Security # \_\_\_\_\_

Date: \_\_\_\_\_ Page: 2 of \_\_\_\_\_

Day	Travel		Transportation			Subsistence			Other Travel Expenses		
	From	To	0:00	In-State	Out-of-State	0:00	In-State	Out-of-State	0:00	Explanation	Amount
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R			B					
			A			L					
Depart	am	pm				D					
Return	am	pm				Meal Total	0.00	0.00			
Daily Private Car Mileage @ 0.33 rate/mile			P	0.00		H					
Purpose of Trip:			Day Total	0.00	0.00	Day Total	0.00	0.00	Day Total		0.00
			R	0.00	0.00	Meal Totals	0.00	0.00	Total Other		0.00
			A	0.00	0.00	Hotel Totals	0.00	0.00			
			P	0.00	0.00						

**NOTE:** Total Transportation

Daily total for subsistence not to exceed authorized amount for in-state or out-of-state travel.  
**Maximum Subsistence:**  
 In-State \$97.75  
 Out-of-State \$111.75

**LEGEND:**  
 (1) Mode of Travel: R - Rental Car, A - Airfare, P - Private Car  
 (2) Type of Subsistence: B - Breakfast, L - Lunch, D - Dinner, H - Hotel  
 (3) Other Travel Expenses: ONLY Taxi, parking, baggage, telephone, or registration