

NC COASTAL RESOURCES COMMISSION

April 29, 2009

NOAA/NCNERR Administration Building

Beaufort, 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, April 29th

1:00 COMMISSION CALL TO ORDER (Auditorium) Bob Emory, Chair

- Roll Call
- Approval of February 11-12, 2009 Meeting Minutes
- Executive Secretary's Report
- Chairman's Comments

Jim Gregson
Bob Emory

VARIANCES

- Riggings – (CRC-VR-06-33) Kure Beach (*remand from Superior Court*),
Kure Beach, Sandbag time limit
- Bald Head Island Ltd. - (CRC-VR-09-01) Bald Head Island, 30' buffer

Christine Goebel

Christine Goebel

CONTESTED CASES

- Stirewalt/Overton v. DCM (08 EHR 1090) Figure Eight Island, Pool in Setback

Christine Goebel

ACTION ITEMS

- Adopt 15A NCAC 7H .0308(a)(2) Temporary Erosion Control Structures
- Adopt 15A NCAC 7H .1100 General Permit for the Construction of Bulkheads and the Placement of Riprap for Shoreline Protection in Estuarine and Public Trust Waters and Ocean Hazard Areas
- Adopt 15A NCAC 7H .1200 General Permit for the Construction of Piers: Docks: and Boat Houses in Estuarine and Public Trust Waters and Ocean Hazard Areas

OLD/NEW BUSINESS

- Future Meetings

Bob Emory

5:00 ADJOURNMENT



N.C. Division of Coastal Management
www.nccoastalmanagement.net

NC COASTAL RESOURCES COMMISSION (CRC)
February 11-12, 2009
Crystal Coast Civic Center
Morehead City, NC

Present CRC Members

Bob Emory, Chairman
Joan Weld, Vice-Chair (Chaired Meeting from 1:45 p.m. until 2:30 p.m. 2/12)

James Leutze	Wayland Sermons
Chuck Bissette	Melvin Shepard
Charles Elam	Ed Mitchell
David Webster	Bob Wilson (present at 2:00 p.m. 2/11)
Jerry Old (present at 1:30 p.m. 2/11)	Lee Wynns
Bill Peele	Veronica Carter

Present Coastal Resources Advisory Council Members (CRAC)

Dara Royal, Chair
Penny Tysinger, Co-Chair

Bob Shupe	Webb Fuller
William Wescott	William Gardner, Jr.
Charles Jones	J. Michael Moore
Rhett White	Jerry Parks
Tim Tabak	Judy Hills
Eddy Davis	Carlton Davenport
Ray Sturza	Tracy Skrabal
Randy Cahoon	Spencer Rogers
Dave Weaver	Anne Deaton
Christine Mele	Al Hodge
Bill Morrison	Phil Harris
Joe Beck	Travis Marshall

Present Attorney General's Office Members

Jennie Hauser
Christine Goebel
Ward Zimmerman

CALL TO ORDER/ROLL CALL

Chairman Emory called the meeting to order and reminded Commissioners of the need to state any conflicts due to Executive Order Number One and also the State Government Ethics Act.

Angela Willis called the roll and each Commissioner in attendance reported no conflicts. Renee Cahoon was absent. Based upon this roll call, Chairman Emory declared a quorum.

PRESENTATIONS

Terminal Groins Background; Use in Florida

Dr. Robert Dean, P.E.

University of Florida

Dr. Robert Dean reviewed an outline of what would be presented. The basic idea will be to distinguish between terminal groins (terminal structures) and the normal groins and the way they are used and applied. Dr. Dean stated that he has seen literature that explains that terminal groins will behave in the same way as normal groins. He stated he would do his best to explain the difference, explain the difference between terminal groins and jetties, and describe terminal groins and their placement on either the updrift side of an inlet or the downdrift side. He will further discuss the processes associated with terminal structures adjacent to inlets. He has surveyed the terminal structures in the Gulf of Mexico and along the Atlantic coast.

Dr. Dean stated that it is his view that terminal structures are not complicated. They have functioned effectively in many places including North Carolina and the bottom line is there has been no installation where they have caused bad effects. There has been no place where the effects have been unexpected or have caused erosion to the adjacent beaches. When there are two barrier islands with an inlet and a structure is placed along the northern boundary of the southern barrier island, this is an example of a terminal groin on the downdrift side. The long shore sediment transport or literal drift is headed from north to south. It has been my experience that most terminal groins are on the downdrift side, but that is not exclusive. The difference between terminal groins and usual groin application is that in many cases groins are placed along a long beach with the sediment transport from north to south. The sediment will collect against the north side of the groin and there will be associated erosion on the downdrift side. The normal application for a groin is designed to trap sand from the system and the key difference is terminal groins at the end of the system retain sand in the system. They do not trap it; they keep it from being lost from the overall system.

The difference between terminal groins and jetties are that jetties extend much further out. Jetties collect sand on the north side of the inlet. Jetties derive their name from the intent to jet sand out of the inlet for navigational purposes. This is not the intent of terminal groins.

During a flood tide when the water is flowing into the inlet, there will be currents that will carry sand into the inlet. On the ebb tide, when the currents are flowing out of the inlet, there is also sand that flows towards the inlet on both sides of the inlet. If you think about a terminal groin on the downdrift side, its purpose is to prevent the sand from being carried into the inlet and retain sand on the barrier island.

Dr. Dean stated he has been involved with Florida's beaches for 43 years and in 1966 he became interested in the 56 inlets and how terminal structures seemed to work. There are 19 inlets on the east coast and 37 on the west coast. An example was shown of an inlet on the west coast showing the erosion on the end of the island. The reason this island was eroding so rapidly was because there was a phosphate loading terminal which was dredged fairly deeply. This dredging caused the sand from the Gulf of Mexico side to peel off and go around and deposit in the deeper channel. There was a historic lighthouse that was being threatened and the first two terminal groins were designed. There has been no beach nourishment in this location. All of the sand has built up from sand flowing from north to south and prevented by the terminal groin from entering the deep channel. Another example was shown on the west coast of Florida. A terminal structure was built in 1981 and the benefits are on both the updrift and downdrift sides. The longshore sediment transport is not very much. There are two terminal structures and by looking at historic data, they have performed extremely well. An example was shown on the east coast of Florida. A terminal structure was built in 1975. A model study was conducted on this inlet. This terminal structure prevented the sand from flowing into the deepened channel and retains the sand on the adjacent barrier island that would be lost. On the lower east coast of Florida, an inlet was shown which was cut in 1928. Prior to the construction of the south terminal structure, the local and federal government would nourish this area. The sand would erode very quickly (within two to three years) and deposit in the bay. The sand would be dredged from the bay and put back onto the beach. There was nothing to prevent it from being carried back into the bay and the process was not very effective. In 1975 on the downdrift side, an engineer from the State of North Carolina designed a structure that has been very effective. Following the effectiveness of the structure on the downdrift side, a second structure was built on the updrift side and had a beneficial effect. Another example was shown further north. This inlet was cut in 1892 by a team of mules and it had caused the downdrift barrier island to erode at a rapid rate. This shoreline had eroded at 31 feet per year over more than a century. In 1981 a terminal groin was constructed at the north end and you can see the effects. If you cut off the flow of sand to the inlet you have to be careful that the sand on the inside of the inlet does not erode. The southern erosion was not due to the terminal structure. In 1975, Dr. Dean moved to Maryland and was asked by the Baltimore District of the Army Corps of Engineers to examine the cause of shoaling inside of Ocean City Inlet. The inlet was cut by a hurricane in 1933. We found that during major storms the sand would flow from the south to the north over the low portion of the jetty. The jetty was lower than the natural elevation of the beach. We reasoned if you could cut off this supply of sand then the island would erode less. We recommended raising the jetty and placing three detached breakwaters to stabilize the north end of the island.

North Carolina has two terminal structures (both on the downdrift side). These are Oregon and Beaufort Inlets. A terminal groin was placed at the north end of Pea Island in 1989 and completed in 1991. What happens if you take the structure away? You would recognize that the sand would peel off and go into Oregon inlet. The terminal groin acts as a support for the sand that has built up to the south. There is an extensive database for this area. There may be some controversies in this area, but I have watched this and as it was built the beach followed it out.

There is no uncertainty about whether this has been effective or not. In Margery Overton's review report number 33 dated December 2007, she says, 'that as of December 12, 2007 the project erosion rates are much less than the historical rates in the first four miles of the study area. In the fifth and sixth mile, the rates are mostly below the historical rates and do not significantly exceed the historical rates. In summary, the construction of the groin does not appear to have caused an adverse effect to the shoreline over the six mile study area.'

The other terminal groin in North Carolina is on the downdrift side of Beaufort Inlet. Locally, the net longshore sediment transport is from west to east. If you were to remove this groin, the sand would peel off and be transported into Beaufort Inlet. There is no uncertainty in my mind about whether these structures have been effective. I have recently examined the number of terminal structures on the downdrift sides of inlets starting with the Gulf of Mexico going clockwise to Massachusetts. There are a total of 22 structures and I did not see any adverse effects of these structures.

Terminal groins differ from the usual groin application. They also differ from jetties. We have reviewed the sand transport processes in the vicinity of inlets. There is generally sand transport toward the inlet on both the updrift and downdrift sides. We have reviewed a number of inlets with downdrift terminal structures and have not seen ill effects. There are two inlets in North Carolina with downdrift terminal structures that have proved to function effectively.

(PowerPoint presentation available at www.nccoastalmanagement.net)

South Carolina Hardened Structure Policy and Use of Terminal Groins

Dr. Paul Gayes, Director

Center for Marine and Wetland Studies

Coastal Carolina University

Dr. Gayes stated that South Carolina is experiencing some similar analysis and consideration of how to manage the coastline. Our state is different than North Carolina in terms of its processes, the morphology of the coast, and development patterns. We could break down the South Carolina coast into four zones based on the combination of morphology, process and development. The first one, close to the border of North Carolina, is referred to as the grand strand. It is centered on the city of Myrtle Beach where there is a large tourism based economy. The north-central portion of the coast is centered on Cape Romain which is an undeveloped stretch (about 1/3 of the state is undeveloped). There is a zone around the Charleston area where there are classic barrier islands. Around the Hilton Head area the coast is rather different, largely because the tide is tremendously greater as we move towards Georgia and tidal inlets become more important.

The grand strand area is a mainland coast. There are not many inlets and there is very high ground. The erosion rates here are fairly low (1/2 foot to one foot per year). This is the center of a lot of our developed, large-scale accesses to the State and the public. One of the things about the grand strand area, much like some of the southern North Carolina zones, is there is a limited amount of sediment in our area. There is a lot of renourishment going on, but some of our borrow sites are getting out of the three mile limit.

In the central portion of the coast down to the Cape Romain area, we have a dramatic range in coastal styles. None of this is developed, but some of our highest erosion rates in the state are in this area (eight to ten meters per year). We are under extreme sediment starvation.

When we get into the Charleston area there is a lot of population along the coast. The Isle of Palms has had a lot of interest in this area because as we get into this part of the state and the inlets become much bigger, the tidal ranges get greater, and there is a lot of variability around these inlets. Most of our erosion problems are associated with these inlet systems. Folly Beach and Morris Island are signature erosional areas for our coast. There are a fair number of groins and structures in Edisto Island's beachfront community. The Charleston area was dominated by some changes that happened in the 1860's. Charleston Harbor, prior to the construction of jetties for navigation in Charleston Harbor, the main flows out of the harbor were bent out to the south. Jetties were constructed in the mid-1800's and redirected these flows and some considerable changes in this section of the coast occurred. As we go further to the south, there have been groins established at Hunting Island State Park along with renourishment. Fripp Island to the south also has severe erosional issues. Hilton Head has been fairly successful in its management.

Like most coastal states, we have experienced an explosion of development rushing to the coastline. Prior to 1988, the State did not have much jurisdiction in managing the coastal zone. There was a critical line set up at the scarp or the landward toe of the dune and landward of that where the state had no jurisdiction. In 1987 the state assembled a blue ribbon panel that was asked to consider long-term solutions to beach erosion problems. That panel came back with findings that 57 miles of the state were critically eroding. The general consensus at the time was that the beach (width and health) is an important economic engine to our state. The panel viewed coastal erosion as a threat to the beach and dune system, the economy, coastal habitat, and property. Some important findings of fact taken into consideration were that sea level was scientifically documented but may increase and needed to be considered and that armoring the coastline had not proven to be effective. Retreat was determined to be the best long term strategy for the state. In 1988 the beachfront management act came out and implemented a lot of the panel's recommendations and established new jurisdictional lines. One line was in an area away from inlets called standard zones. The other was around inlets called inlet zones. From there a setback line was established which was a function of erosion rate. It became apparent that in much of our state we do not have a dune line from which to draw a jurisdictional line. We had to come up with another mechanism to do this. We took some long term monitoring of beach profiles and looked at areas that were disturbed and made projections of the volume of sediment that had been robbed from the beach system as well as the geometry which had been modified and project back where the ideal dune crest would be and draw the line there. The baseline that was drawn ten years ago is in the middle of some of our very populated areas. From the baseline there is a forty year times the annual erosion rate setback line and this is where development is regulated. The baseline is updated every ten years. The baseline migrates landward and the jurisdiction rolls with it. This has been some of our problems in implementing our regulations, because we are running into issues of restricting uses of property that had not been restricted before. In 1988, restrictions that came in with the beachfront management act included no construction seaward of the baseline, no new seawalls, if an existing seawall was destroyed it could only be replaced with sloping structures and they had to be moved back ten feet from the building foundations, and all vertical seawalls would be removed after 30 years and be replaced with sloping structures. Our first challenge was natural with Hurricane Hugo. This destroyed many houses along our coast and many were rebuilt further landward and behind the

baseline. There were also a number of seawalls that were destroyed and were replaced with sloping structures. The next challenge was legal. We had a large lawsuit involving two lots on the Isle of Palms that were seaward of the baseline and unbuildable under the 1988 Act. The owner sued the State claiming a taking of the property and it went to the U.S. Supreme Court which ruled in his favor and remanded it back to the State for damages. Around that time the State made some revisions to our Act. Construction seaward of the baseline could now happen under a special permit. We will allow these if they are no bigger than 5,000 feet, structures should be as landward as practicable, no structure could be further seaward than the adjoining neighbors, should never be on the active primary dune or active beach, seawalls cannot be part of the foundation, if the house is ever located on the active beach it has to be moved, destroyed seawalls cannot be rebuilt, the threshold for damages on seawalls decreased and the thirty year time limit was removed. While the court was determining damages, the State issued two permits to the property owner. The State purchased the land, transferred the permits, sold the land, and the property was built on in 1995 and 1998. We continue to be in a retreat policy and are committed to renourishment.

There have been 21 renourishment projects in the last 18 years. A total of 96 miles of coastline have been renourished. The cost of these projects is tallied at about 194 million dollars and the volume of sand pumped is close to 30 million cubic yards.

At present, existing groins can be reconstructed, repaired or maintained. New groins may be allowed only on beaches that have high erosion rates and are threatening existing development. This has been troubling for us as erosion rates being “high” are in the eye of the beholder. In addition to these requirements, any efforts for new groins or repair have to be in concert with ongoing renourishment. Monitoring is required to ensure there aren’t detrimental impacts downdrift. A performance bond or letter of credit is required that allows for the mitigation of any damages that would occur downdrift. If monitoring indicates that there is a downdrift effect then the groin is to be reconfigured, removed, or renourishment/mitigation is paid for downdrift. Adjacent or downdrift communities are to be notified of applications for groins. If there is a claim of effect, the State will require action on the part of the permit applicant.

In 2008-2009 the State established a shoreline change advisory committee to revisit the beachfront management act. We are trying to examine the effectiveness of this Act and to look for recommendations and modifications of this law to move forward into the future. We are getting to the public hearing phase and it is getting tense as we revisit this. The Governor’s climate panel had a recommendation to consider, in addition to carbon emission reduction, an establishment of a legislative panel to work on potential adaptation strategies for climate change and sea level rise. We are seeing concerns about effects in the long term and what our future may be. We have had some unintended consequences as a result of our success in South Carolina. Effective structures are in the eye of the beholder. You have to ask yourself if you are trying to protect the beach, are you trying to protect the structures or are you trying to protect both? For some of the beaches, if you ask if they are successful under each of these criteria, you would get a different answer. There is some discussion in the State about what it means when we protect structures instead of the beach. The conceptual goal of retreat in South Carolina has not been happening in the midterm and this is due to persistent renourishment projects. There are a few issues to deal with in the long term. There are concerns about continued sea level rise, changes in climates, concerns about the economy, and concerns about episodic events. None of

these structures will do anything to protect the coast from large hurricanes. (*PowerPoint presentation available at www.nccoastalmanagement.net*)

Geomorphology of N.C.'s Northern Inlets; Sediment Budgets; Sea Level Rise

Dr. Stanley Riggs

East Carolina University

Dr. Riggs stated that our coastal systems are complex. If we are going to talk about locking up inlets with terminal groins or stabilizing the barrier islands in a time when sea level is rising at fairly significant rates, we have to think longer term than today, tomorrow and next year. If we want to preserve a vital coastal economy and the resources upon which that economy is based we have to start thinking about sea level rise and sediment supply. None of this works if you don't have any sediment. It is not an equal world out there. No two barrier islands are equal when it comes to sediment supply. Some beaches are very lucky and have a large sediment supply, some beaches are very unlucky and don't have any, and the human processes have played a very large role in changing those sediment supplies.

Whether we like it or not we live in the ice age world. A slide was shown of what the earth looked like eighteen to twenty thousand years ago when glacial ice covered a good share of North America. Sea level rises and falls continuously. At this moment in time we are at an interglacial episode (warm period) between glacial episodes. When the climate is warm, the ice is mostly gone and sea level is high. This has been occurring for about two million years and there have been about forty of these episodes. This is a very well established climatic pattern. The last interglacial period was the last time the climate was as warm as it is today (and maybe a little bit warmer). This was 125,000 years ago. We had a shoreline in North Carolina where the ocean occupied the shoreline during this period. We are on a plateau today. The importance of this is that there will always be a shoreline where the ocean intersects the land surface. The shoreline will change as the climate changes and as sea level changes. For 18,000 years the shoreline has been moving. We know how it has moved. If the rest of the ice in Greenland and Antarctica melt, most of the North Carolina coastal plain goes under water. All of the sediments and marine deposits in response to the rise and fall of sea level have been going on for a long time. The barrier islands were not there 18,000 years ago. About 9,000 years ago we began flooding up the river valleys. Pamlico Sound was not as deep and we did not start to begin to get marine sediments in it until 7,000 years ago. All of the estuaries are drowned river valleys. Around 3,000 to 4,000 years ago we began to produce our barrier islands. The rate of sea level rise is a variable rate. Barrier islands come and go and are not permanent. The barrier islands are still moving. In the 1800's the sea level rate changed again. The sea level rate in North Carolina doubled. By 1900, it doubled again to 16 inches per 100 years. In this period of time all of our barriers began to recede. In general, all the barrier islands are receding. The Duck tide gauge has been there for twenty years and has measured 18 inches per 100 years. An important thing to remember is that our coastal system is very low. Most of the barrier islands are only three or four feet above sea level. Many counties (Pamlico, Hyde, Dare, Currituck, large parts of Carteret) are only one foot above sea level. When we are talking about climate change and rising sea level, we are talking about very dramatic changes taking place to our coastal system. Our barrier islands are receding on the front side. An 1852 survey shows one piece of barrier island on the outer banks has receded 2,500 feet in 151 years (this is 75% of the island width that has been lost). In the 1950's Highway 12 was built and it has been rebuilt and moved landward four

times since then. It is now on Pamlico Sound and there isn't any place for it to go. This is an area that needs to breach, form an inlet and develop new width. This is the process by which these islands migrate uphill and landward in response to rising sea level. In North Carolina we are already at the mean of what IPC says will happen at 2100. This is important to keep in mind when managing the barrier islands.

Sediment supply becomes the next big component for the long term. If you don't have any sediment available, you end up producing a little bit of sand that is sitting on top of older stuff. About 70-80% of our barrier islands are a simple barrier island. You can dig down and hit older sediments or rock very quickly. These islands are low and narrow, they overwash and breach and are not the best places to put houses. If you have a lot of sand available you build these complex islands. You prograde seaward if you have a lot of sand, you get big back barrier dune fields, you get ridges and swales. Kitty Hawk Woods, Buxton Woods, and Bogue Banks are all examples of complex islands. They have maritime forests on them. There are three basic sources of sand we are dealing with out here. The paleotrunk rivers (Roanoke, Cape Fear) that come off of the piedmont and the Appalachians carry sand during climatic times, there are big delta dumps on the continental shelf, and there is a lot of old sand. As sea level rises across these, they build the barriers. In the Nags Head Woods and Kitty Hawk Woods area it is all old paleo, river channel, and delta sands. Most of our coast doesn't have these rivers associated with them. Large portions of our shelf are rock. The two big sources of sand are the cape shoal structures (Lookout, Frying Pan). With rising sea level, these were important in the production of the barrier islands.

Oregon Inlet opened in 1846 in a hurricane. It migrated from 1846 down to its present location. In 1989 the inlet was hardened and stabilized. It had moved about 2.5 miles in this period of time. There is a bridge over Oregon Inlet and the groin is already in there. The highway on Pea Island was paved in 1952. The bridge was built in 1962-63. As the Oregon Inlet migrated south, it got to the end of the bridge and was about to leave the bridge stranded in the inlet. The decision was made to build a groin and put a rock revetment around the end of it to stop the migration of the inlet. The Oregon Inlet was migrating from 1849-1980 at a rate of 77 feet per year. In 1980-1988 it really picked up and increased by several times. By 1988-1989, in one or two little storm events, it threatened the bridge completely. When the bridge was built, it was built with a fixed navigation span with the assumption that the channel was going to stay there under the fixed navigation span. The inlet was migrating. From day one, they had to start dredging. All of the dredging that has been done since 1962 was dumped offshore and out of the system. As you dump more and more of the inlet sand offshore, the rate of migration increases which threatened the end of the bridge. The terminal groin was built to save the bridge and it was a success from this point of view. But, let's look downstream to see what the consequence was. The Pea Island Wildlife Refuge is twelve miles long. After the construction of the terminal groin, the first six miles of Pea Island beach were nourished with sand from the annual inlet dredging instead of dumping it offshore. Somewhere between seven and eight million cubic yards of sand were pumped on the first six miles. The bottom line is even with all of the sand that has been pumped up there, Pea Island's ocean shoreline is continuing to erode at rates up to 22 feet per year. This is the fastest in the state by quite a bit. There are three D.O.T. hotspots. The first is one to two miles south of Oregon Inlet. This road has not gone into the sea because we have pumped all of the sand in there and it builds up a very large dune field (which has been very expensive). With every nor'easter the D.O.T. bulldozers are out there trying to keep the road open from the sand moving across it. A large storm will come along that will take this road

out. When we go down four to six miles in an area they call the sandbay, three miles of road had been moved inland of the power lines. This event cost 3.5 million dollars and erosion continues. By the time we get to eleven to twelve miles down at site number three (the S-Curves), this road was replaced in 1988 and formed the S-Curves which is now in the ocean again. This whole system is eroding at incredibly high rates of recession. The D.O.T. has put sandbags in as a desperate effort to protect the road. The Pea Island Highway 12 maintenance costs, which are post terminal groin, have been a minimum of ten million dollars plus seven to eight million cubic yards of sand that has been dredged just to try to hold the line on Pea Island. The one to two mile area beyond the terminal groin has accumulated sand beautifully, but no place else is there any evidence of anything other than increased rates of erosion in the downstream section.

The N.C. State Port in Morehead City has had dredging since the early 1900's. The groin was built in the 1960's. This is now a 45-foot deep channel and for a long time all of this sand associated with the Port was dumped offshore. A lot of the ebb tide delta is a result of dumping. The County has recently sued the Corps over this. Because of this, this area has had a tremendous amount of nourishment sand put on it. The erosion rates from Fort Macon down to Atlantic Beach have increased. The groin does trap sand, but it increases erosion rates. From 1978 to 2004, Fort Macon and Atlantic Beach (the east six miles) have received 13 million cubic yards of sand. This is a direct consequence of the structure (terminal groin) and this downstream cost has to be considered.

We know a lot about the science of these areas. North Carolina's ongoing shoreline recession is a direct consequence of storm dynamics and a rising sea level with minimal sand supplies. We do not have a whole seafloor of sand out there. If there is an island that is in trouble, it is in trouble because it never has had a lot of sand available. The sediment budget becomes really crucial and the rising sea level is not going to get any better. A terminal groin will not solve either the sea level rise or the minimal sediment supply problem except on a very local basis where it may trap sand and it may very well exacerbate the shoreline erosion problems in the downstream, and in some cases the upstream, areas. North Carolina must begin adapting to the changes in sea level in order to maintain a sustainable coastal economy and protect those resources (the barrier island resources, the inlet resources, the estuarine resources). This is what the economy is based on and if we lock it all up, ultimately you will not have a barrier island system and you will not have the beaches without pumping sand. If you don't have the sand to pump, you are in trouble. It is time the CRC, the DCM, and the State of North Carolina really take this serious. We cannot think about just today's storm event. We have to think about a decadal scale impact of these storms. We have to think in terms of where we are going to be ten and twenty years from now. The decisions we make in this legislative session this year could impact the state for one hundred years. We cannot afford that. This is a dynamic, changing system and we have to change with it.

Geomorphology of N.C.'s Southern Inlets
Dr. William Cleary
University of North Carolina-Wilmington

Dr. Cleary stated this presentation will deal with an overview of North Carolina's southern inlets. The presentation focuses on the ebb tidal delta (outer bar) and the main channel and how these features are related to the erosion and accretion pattern that occur along the adjacent shorelines. A cartoon was shown which showed a very large pile of sand that can approach several scores of

millions of cubic yards which is the ebb tidal delta. This feature plays a significant role in the erosion and accretion pattern along the shoreline. As the waves approach (from the upper right) they are bent or refracted in such a way that they set up a current that runs opposite the literal current. You are actually moving sand into the estuary which causes shoaling and deterioration of the navigation channels. The deepest part of the channel is the main ebb channel. The main channel is connected to marginal flood channels that bring the flood waters in when the tide turns. More often than not in North Carolina, this main channel is seldom if ever midway between the two barriers and seldom if ever is the shore normal or perpendicular. Rather it tends to be offset to one side or another and aligned towards one of the barriers. The ebb channel typically bisects the large ebb tidal delta, which contains many millions of cubic yards, and when the sandbars form and move toward the land they will attach. More often than not in North Carolina, the channel is skewed to one side or the other and you develop an asymmetric ebb tidal delta. Up until 1959, Ocean Isle Beach was in fairly good shape. It had nothing to do with sea level rise, changes in sediment supply, or storms. It has to do with the realignment of the channel which can affect a mile on opposite sides of the shoulders. To exacerbate the situation, the throat section of the ebb channel can literally migrate several thousands of feet exacerbating the erosion or accretion on opposite sides of the inlet. A good example of this would be Rich Inlet, Shallotte Inlet and Lockwood Folly Inlet.

Bogue Inlet borders Bogue Banks and Bear Island. These are sand rich islands that contain upwards of twenty-five times more sand per kilometer of coast than the islands that occur south of New River Inlet. Bogue Inlet is an extremely large inlet. This inlet has gone through a very systematic change in the configuration of the ebb tidal delta, the flood delta, and the channels. Between 1938 and 2002, this ebb channel migrated toward Bogue Banks (Emerald Isle) a distance of approximately 9,650 feet. During that time it has wobbled back and forth within the throat. We study this inlet trying to get a handle on how it functions. Since 1981, the channel migrated toward Emerald Isle a distance of about 4,100 feet. As it migrated toward Emerald Isle it changed the configuration of the ebb tidal delta. That had a significant impact in that it provided accretion along the oceanfront while the inlet margin was eroding and all of the Bear Island (Hammocks Beach) side was eroding. Between 1973-2001 Bear Island eroded on average about 300 feet. By contrast, the Bogue Banks side accreted upwards of about 200 feet on average. In 2005, the channel was relocated. This changed around the erosion and accretion patterns in this area. It is taking some time for the huge pile of sand in the offshore area to remobilize and adjust to the position of the channel.

Farther to the south is New River Inlet and this inlet borders a relatively large tidal river. Onslow Beach has been eroding since the 1930's. The North Topsail Beach side had been accreting for about a mile downdrift of the inlet from 1960 until 1990. From 1990 until the present, it has undergone erosion. The culprit in this erosion scenario is the channel which used to be shore perpendicular and then skewed over. The simple solution would be to realign the channel, restore the ebb tidal delta apex to the left and the area would accrete once again. The significant amount of erosion is not due to change in sediment supply; it is due to the fact that the channel has shifted a little bit toward the Onslow Beach side. The Corps has typically dredged significant amounts of sand from New River Inlet channel and placed it along this section of the coastline. It is highly unlikely that this sand will stay.

If you go about twenty miles to the south, you run into New Topsail Inlet which is the longest lived migrating inlet in North Carolina. It opened prior to 1720 and has migrated in excess of

about ten or eleven kilometers. The channel has migrated a distance of about 5,700 feet at variable rates. There is a preferred orientation of the channel toward Topsail Beach and that has had a significant impact upon the shape of Topsail Beach since the 1930's. In 1954, the channel was skewed and the inlet was migrating at relatively slow rates from 1949-1962. A lot of the erosion on Topsail Island deals with the truncation over a period of time. In addition to the migration of the inlet, which averaged about 120 feet per year, there was a breach by a storm. The pile of sand was bypassed to the updrift barrier which is Topsail Island and the inlet migration picked up and had a significant impact on the erosion on the updrift barrier which is Topsail Beach. There have been two other episodes like this breaching between the 1950's and 1995. This becomes important when you begin to think about terminal groins. As the inlet migrated to the south, the shape of the ends of Topsail Island increased in width from 1938-2006.

A large amount of change can occur in a short period of time. You should be cautioned to look at long-term erosion rate data and really look at the details of short term erosion when you look at inlets. There is a lag effect in terms of the erosion or accretion along the shoreline when an inlet changes its orientation.

Mason Inlet borders Wrightsville Beach and Shell Island. This inlet opened in the 1850's and migrated toward the hotel. Then it was relocated in 2002. Between 1974 and 1997 the channel migrated at rates of about 165 feet per year. It probably would not have continued migrating to the south, but probably would have closed off. The reason this inlet migrated so rapidly (up to rates of about 297 feet per year) was because the access channel was completely filled in and the size of the inlet was reduced, the cross section area was reduced, the amount of water going in and out was reduced, and the size of the shoals in the offshore area was reduced. The inlet continues to migrate. The access channel to the intercoastal waterway filled in causing the inlet to migrate. They attempted to put in a terminal groin, but they were denied the permit. The inlet was relocated in 2002 and three months after this there was a significant amount of shoaling. By 2004, there had been significant shoaling within Banks Channel (the access channel) and Mason Creek. The same thing is happening on Figure Eight Island. Looking toward Figure Eight Island from Wrightsville Beach in 1975, you can see a wide beach section on Figure Eight Island. At this time, Mason's Inlet was a healthy inlet (large ebb tidal delta and the sound side channels were fairly clean and large). If you look at 1984 you begin to see that they have had some erosion problems. The reason this erosion was taking place was because the island had changed its plant form as Mason's inlet migrated towards the area. This hotspot still exists today.

I have been asked to comment on Masonboro Inlet because people have this idea that the proposed groins will create problems and will do the same thing to the downdrift islands that this inlet project did. I would differ with this greatly. The Masonboro Inlet north jetty was started in 1965 and in 1981 the south jetty was completed and this forms a complete literal barrier for sand transport from the north. The island south of the inlet, Masonboro Island, is a thirteen kilometer (eight mile long) barrier island that is the posterchild for what this inlet stabilization might do. At the south end of Masonboro Island is Carolina Beach Inlet which is a relatively small inlet which was opened in 1952. In my opinion, this inlet has just as much impact on this island as the jetties at the northern end of Masonboro Island. In 1964 the volume of the ebb tidal delta was about eight million cubic yards. By 1984, the volume of sand in the ebb tidal delta amounted to about twelve million cubic yards. If I were to go out and measure the amount of sand that is in Masonboro Island and compare it to the amount of sand that is in the two inlet systems, you will find that there is four times as much sand in the ebb and flood tidal deltas of Carolina Beach and

Masonboro Inlet than there is in the entire length of Masonboro Island. This is primarily due to jetties and stabilization of an inlet since 1950. The terminal groin will not do this as some people will lead you to believe. The geology and shoreline changes have been studied for Masonboro Island (images of the 1938 shoreline and the 2002 shoreline were shown). When you look at this, you would say that Carolina Beach Inlet has had a far greater impact on the island in terms of a negative impact than the jetties on the north end. There is some justification saying that Masonboro Inlet had an impact on the center section of the island. If you look at the southern portion of the island, you can see the island is changing dramatically (1972 and 2003 images were shown). The island has rolled back on itself at least 500 or 600 feet since 1972. The net average erosion rate for the center section of the island is 328 feet, 308 feet by the headland, and near Carolina Beach Inlet the rate is 538 feet. This is not due to the terminal groin scenario. It is due to a huge jetty that impounds sand in the ebb tidal delta.

The last two inlets will be Lockwoods Folly Inlet and Shallotte Inlet. These would also be good candidates for terminal groins. Since 1982, Lockwoods Folly Inlet channel had been aligned toward the Oak Island side. As a result of this, this island built out substantially. In 2002, the channel broke through and it is almost shore perpendicular. The area on Holden Beach, which had been an erosion zone, is not building out. By contrast, the Oak Island side is beginning to erode. Shallotte Inlet is a relatively unique inlet in the sense that there is no flood tidal delta, no corresponding lagoon, and no accommodation space. Any of the sand that moves in here is creating a navigation hazard that has to be dredged. This is a perfect site for a terminal groin. The channel favored accretion on Ocean Isle. In 1970, the channel swung over to the Holden Beach side and this area began to build up. In 2001, the Corps of Engineers relocated the channel in an attempt to restore the Ocean Isle side to what it looked like forty years earlier. Contrary to popular belief, the erosion is not due to the Corps project, it is a remnant of the configuration that existed when the channel was skewed toward Holden Beach. No amount of nourishment is going to protect this area unless you are able to put up a terminal groin to restore the beach.

If this issue comes before the Commission again, you need to look at each inlet in detail because each one is unique. I do not believe that placing a groin in the proper orientation in Rich Inlet, Shallotte Inlet, or possibly Lockwoods Folly Inlet would cause damage to the adjacent beaches.

Regulatory History of Hardened Structures Ban

Steve Benton

CRC Science Panel on Coastal Hazards

Steve Benton stated he was here to show how the Coastal Resources Commission got to where they are now with regards to the shoreline erosion control structure regulations. As most of you know, North Carolina's regulations dealing with oceanfront erosion control structures are pretty strict. In 1974, the CAMA was enacted and the CRC and CRAC were created and spent the first three to four years looking at various elements of the program that were required under CAMA (land-use planning, setting up partnerships with local governments) and did not get too involved in developing regulations right away. Part of the reason for this was the CRC inherited the regulations that dealt with estuarine systems from a program that already existed. They did begin discussing the concerns and roles that shoreline structures had on oceanfront systems that they were seeing in other parts of the country, particularly New Jersey that would build tremendous shoreline structures and wound up with no beach. The CAMA specifically said that

it wanted to protect this resource and make sure that we continue to have the beach. The Commission was not interested in things that would cause troubles to these resources, but they are also required to balance the development interests. The initial regulations that were going on with the oceanfront that they had inherited were sand dune rules that were being protected under another state law. In 1979, the Commission had been looking at the issue of coastal erosion and they came out with a set of erosion rates that were used to support an oceanfront setback program. At that point they decided they could tell everybody about the erosion hazard that they were facing on their part of the beach. The initial set of guidelines came out for a program which allowed anybody to do whatever they wanted for structures that existed before June 1, 1979 because people that had built before the erosion rate data and storm studies would not have known any better. Anything after this date had a prohibition of hard structures. This went along for about three or four years and it wasn't too long before there were problems with this. There were a number of areas that were experiencing higher erosion rates. One particular hotspot was in Dare County in Kill Devil Hills. This area had a long-term average erosion rate of four or five feet, but over the last couple of years had experienced between eight and twelve feet per year erosion. Half of the Sea Ranch Hotel had been built before June 1, 1979 but the other half after. This left a dilemma on how to deal with this. The Commission was receiving a lot of pressure to do something about these rules. In January 1984, the Secretary of the Department of Natural Resources came before the Commission and asked that they form a task force to look into the problem of dealing with erosion control structures on the oceanfront. A task force was developed with sixteen members representing the CRC, CRAC, local government officials, Corps of Engineers, and State officials. They also put together a group of fourteen advisors which included several engineers, a couple of geologists, planners, and several lawyers. They began meeting in February and broke up into two different committees. One committee looked at technical aspects of the issue and another committee looked at the planning elements (costs, legal challenges). As they were meeting, the Town of Kill Devil Hills came before the Commission with a permit request to sink a barge 350 feet offshore off of the end of Third Street. The Commission asked the task force to look at the proposal and to come up with some ideas on how to deal with the permit. Based on the task force's ideas, the Commission put together a permit which included a number of conditions and to allow the permit to be issued. Some property owners objected to the proposal. Eventually, the permit was issued and the objectors appealed it, but the Commission refused to hear it. The Town decided to not put the barge in place. In July the task force finished their work and prepared a report and sent it to the Commission at their July meeting. The report had two parts. The first was background information that the task force had considered during their discussions. The second part contained recommended policies, proposed guidelines and other actions that resulted from the findings in the first part. Many of these axioms and recommended studies have been continued in the efforts of the Coastal Resources Commission on their oceanfront development management program. The last thing in the task force report was a set of recommendations for regulations and guidelines for erosion control structures. The recommendations included the statement that to permanently stabilize the location of a shoreline by massive seawalls and similar protection devices that do not preserve the public trust rights should not be allowed. The standards recommended prohibiting sand trapping through the use of groins and breakwaters and prohibiting shoreline hardening by the construction of bulkheads and seawalls. The recommendations from the task force said that the project design must incorporate features adequate to protect public use of the beach and to prevent or mitigate the impacts of increased erosion on nearby properties. The main point is that the task force did not absolutely ban hard structures if a long line of conditions were met. When the CRC received the task force report,

they said that it was appropriate for dealing with oceanfront erosion control structures statewide. At their September meeting, a series of resolutions were adopted that were related to the recommendations that the task force had provided. At the November meeting, intense debate revolved around the ability of the CRC to actually incorporate all of the conditions outlined by the task force necessary to mitigate the impacts of allowing sandtrapping devices or hard structures on the oceanfront. A CRAC member expressed his concern that any active approval of permanent materials such as wood or concrete would lead to a hardening of the shoreline and because of the potential impact, the CRC should prohibit them as a matter of policy. This changed the nature of the debate. The CRC took out the language that was recommended by the task force and they were prohibited. On completion of a series of public hearings and a final review at the January 1985 CRC meeting, it was unanimously adopted by the Commission. The rules were in place and going along smoothly until 1989 when the Bonner Bridge over Oregon Inlet was threatened by a series of storms. There was a push to build the terminal groin there to protect the bridge. The CRC amended their rules to allow for an exception for structures necessary to protect a bridge providing the only access to a substantial population on a barrier island. This focused the exception on one place which was Oregon Inlet. There was also an extensive monitoring program set up and it is still going on. In 1992, Fort Fisher was being eroded away and it is a national historic structure. It could not be moved as it was an earthen fort. It was not the kind of thing that you could depend on a beach nourishment project to protect because a big storm could go over the top of the beach nourishment project and wipe out the fort. The only viable option for protecting the historic structure was to build a traditional rock riprap. Downstream from that it was public land and there was not much there and would not have an offsite impact. The CRC adopted another special exemption to add to the Bonner Bridge exception which would allow for a structure for protection of a historic site of national significance that is imminently threatened by shoreline erosion. They added another exception in there for political reasons that allowed structures necessary to maintain an existing commercial navigation channel. The Oregon Inlet jetties were a topic that was extremely sensitive to the Commission because it was an issue that was decided before the CAMA. It was something that is sacred to the folks in Dare County and it would be difficult to come out with guidelines that would cause that project any jeopardy. The general notion was that the jetties were not technically erosion control structures and would not be subject to the guidelines.

From then on until about 2003 there were efforts to hold on to the erosion control structures ban. There were a lot of variances and appeals. In 2003, in response to all of the variances and appeals, Senator Basnight provided force of law to the structure ban by passing House Bill 1028 which prohibited construction of permanent erosion control structures in an ocean hazard AEC. In 2007, another Senate Bill was enacted that was adopted to authorize the CRC to implement a pilot project to study the use of terminal groins for ocean inlet stabilization. This brings us back to where we were when we initiated the Outer Banks Erosion Task Force. We have learned a great deal about how to more effectively engineer structures on the oceanfront. We have learned a great deal more about the physical processes effecting North Carolina's beaches and islands. It appears the Legislature has directed that we reconstitute an Outer Banks Erosion Task Force type of initiative to update the original effort. We need to be careful of a couple of things. We don't need to be caught in a trap of making a finding that there is no data supporting some adverse impact when there have been no studies to generate data. If we are to effectively evaluate the use of terminal groins for inlet stabilization we need to look at what inlet stabilization might do to natural inlet processes and their role in ecosystems. We must look at inlet stabilization on barrier island health and the response to rising sea level. If we can characterize and quantify

these kinds of issues then we have a chance of realistically evaluating the use of terminal groins for ocean and inlet stabilization. This is an opportunity for coastal geologists and coastal engineers to work collaboratively rather than at odds with each other.

PUBLIC HEARINGS

15A NCAC 07H .0308(a)(2) Temporary Erosion Control Structures

Mack Paul of K&L Gates stated that he had presented a proposed rule to the CRC in July. He stated that there is a continuing concern about the overall approach and some of you are new to the Commission since that timeframe. We have a continuing concern about the timeframes. Back in the 1990's the CRC went to an approach that established a two year timeframe for sandbags and five years if it was a community actively seeking a nourish project. That was extended in 2000 to expire in 2008. It continues to be a problematic approach in that in the rule, the timeframes are not consistent with the time it takes to implement these projects. The science committee proposed an approach that we feel makes sense. This included limiting the size and with this they would have a limited time by their very nature and then you would not have to worry about enforcing the artificial timeframes that create a lot of drain on resources and friction when the timeframes hit. We continue to urge the Commission to consider an approach that would either handle sandbags by limiting their size or making them permissible to stay in place as long as they are in a community with a comprehensive strategy in place for pursuing beach nourishment or in inlet areas that have an inlet relocation project planned.

Comments on the draft as it is, we do appreciate Staff's cooperation as we worked on an approach as it related to inlet areas and this was an improvement to recognize that inlet areas are unique and do need to be considered separately and the rules extend the timeframe to eight years. One issue is that the rule says that structures that are imminently threatened can only be permitted once unless they are in an inlet area. Then it goes on to say that if you continue to be threatened after eight years you can get an additional eight years. I think there needs to be some clarification that if you have been permitted once you can be permitted again if you do a project and the erosion comes back later. This should be clarified. Back when the rule was changed in 2000 to extend it to May 2008, the clock was reset at that time for properties that were permitted. The rule is not clear how existing properties in inlet areas would be affected once these rules go into effect. We would urge that they could be beneficially affected by getting more time if they are in an inlet area. In summary we would urge you to consider the broader issue about these time limits and what impact that has in terms of enforcement.

15A NCAC 07H .1100

General Permit for Construction of Bulkheads and Placement of Riprap for Shoreline Protection in Estuarine and Public Trust Waters and Ocean Hazard Areas

No comments were received on this rule.

15A NCAC 07H .1200

General Permit for Construction of Piers, Docks, and Boathouses in Estuarine and Public Trust Waters and Ocean Hazard Areas

Jess Hawkins stated that he is a member of the N.C. Marine Fisheries Commission which is the body setup by the General Assembly to conserve the marine and estuarine resources for the state of North Carolina. Mr. Hawkins further stated that he is here to provide comments on the

proposed CRC dock and pier rules, but these comments do not reflect the comments of the entire body of the Commission and written comments will be provided by March 16, 2009. The comments do reflect the views of myself and Dr. BJ Copeland. The way our bureaucracy is set up is there are committees set up and Dr. Copeland and myself have the privilege of being the co-chairs of Habitat and Water Quality committee. We have talked about this issue for some time as has the CHPP Steering Committee. Both Dr. Copeland and myself truly appreciate the responsibility you folks have in trying to balance the use of our natural resources in North Carolina with the conservation of these resources. We are faced with similar challenges on our Commission, mainly with a more limited audience from the fishermen's standpoint. It is very intense sometimes and we try to maintain and enhance our fisheries stocks with the economic and social use of those resources. Dr. Copeland and myself want to thank you for proposing these measures. This is definitely a step forward and will better protect critical fish habitat such as SAV and primary nursery areas. This is a focus of the CHPP. I want to speak briefly about the habitat these rules are trying to better protect. Both SAV and primary nursery areas are critical fish habitat for numerous juvenile fish and shellfish in North Carolina. Out of our 2.3 million acres, the MFC has classified about eighty thousand plus acres as primary nursery areas. Yet this small amount of habitat contributes to the production of about ninety percent of our commercial fisheries production in our state and sixty percent of our recreational production. It is estimated that our fisheries resources in the state contribute about one billion dollars annually to our economy. Not only is it a social and conservation aspect, it is also an economic aspect. North Carolina has about 200,000 acres of SAV in the high salinity areas. We have vegetation in other areas but we do not know as much about those as we do in the high salinity areas. When I say high salinity I am talking about the eastern side of Pamlico Sound along the Outer Banks, Core Sound, and Bogue Sound. We are second only to Florida in the amount of critical fish habitat of SAV in the whole country. This habitat is the nursery area for little speckled trout, red drum, blue crabs, and bay scallops. We also want you to know that the MFC has recognized that these habitats are important and we have in turn placed restrictions on fisherman in utilizing those. Trawling and dredging are curtailed in primary nursery areas. The entire eastern side of the Outer Banks is closed to dredging and trawling. If you look at the western side of the Sound, there are primary nursery areas and these are closed to certain fishing practices as a way to try to protect the habitat for those juvenile fish. As you are probably aware, these dock and pier rules before you today are a result of over a year's worth of work by your staff and others which included Water Quality and Fisheries experts. As a result of those discussions, these experts had recommended a minimum of 2.5 feet as a minimum water depth in primary nursery areas, SAV areas, and shellfish areas where a general permit rule for docks and piers would apply. The fisheries experts informed us, as part of the CHPP Steering Committee as well as the Habitat and Water Quality Committee, that three feet would be preferred. As a result of looking at the balance of use of these areas with the use of boaters and the use of riparian land owners that wanted to have access, a better depth would be 2.5 feet. When you as a body took this out to public hearing, it was changed to two feet. Dr. Copeland and I would like to urge you to increase the minimum depth threshold back to 2.5 feet as proposed by the working group. Thank you for your efforts to strengthen these protections for fisheries habitats and the opportunity to speak.

MINUTES

Jerry Old made a motion to approve the minutes of the November 2008 CRC meeting. Veronica Carter seconded the motion.

David Webster offered an amendment to the motion to correct a typographical error on page six in the motion for the Town of Pine Knoll Shores land use “plane” which should read “plan”.

Jerry Old and Veronica Carter accepted this amendment and the motion passed unanimously (Weld, Leutze, Bissette, Elam, Elam, Webster, Old, Peele, Sermons, Shepard, Mitchell, Wilson, Wynns, Carter).

EXECUTIVE SECRETARY’S REPORT

Jim Gregson, DCM Director, gave the following report.

Sandbags Update

Last month, an Administrative Law Judge dismissed a motion to stay enforcement by 18 recipients of sandbag removal letters. The homeowners sought permission to repair their sandbag structures while they pursue variance relief, and also sought to keep DCM from going forward with enforcement. After the ruling from Judge Overby, the Division sent Notices of Violation to homeowners who received the first round of sandbag removal letters in September. So far, 16 have filed variance requests to further extend their sandbag time limits.

State Budget

Gov. Perdue directed State agencies to reduce their budgets by an additional 2%, for a total of a 7% reduction so far. DCM has been able to meet the budget cuts so far, partly by using lapsed salaries from a vacant field rep position in Morehead City.

The budget issues will definitely have an impact on CRC meetings this year. We have begun meeting for 1 ½ days only to reduce hotel expenditures, and I have restricted staff from attending CRC meetings unless absolutely necessary. We have also changed some meeting locations to take advantage of reduced staff travel and free meeting space. It may become necessary to reduce the total number of meetings as well.

Offshore Drilling Committee

Commissioners Leutze and Sermons, and DCM’s coastal hazards specialist Dr. Jeff Warren, have been named to a 24-member legislative task force that will examine the effects of offshore oil and natural gas exploration. Dr. Leutze is one of the co-chairs of the committee, along with Doug Rader of the Environmental Defense Fund. The committee will review research on offshore drilling, hold public hearings and examine the economic benefits and costs.

OPSC Public Meetings

DCM and the N.C. Coastal Resources Law, Planning and Policy Center will hold four public hearings in February and March to gain public input on the draft report from the organizations’ Ocean Policy Steering Committee.

Meetings will be held at the following locations and times:

- Feb. 25, 5:30-7:30 p.m. - Pine Knoll Shores Aquarium (Big Rock Theater), 1 Roosevelt Blvd., Pine Knoll Shores, N.C.
- Feb. 26, 5:30-7:30 p.m. - Northeast Branch, New Hanover County Library, 1241 Military Cutoff Rd., Wilmington, N.C.
- March 9, 5:00 – 7:00 p.m., Parker Lincoln Building, Conference Room 1H 120, 2728 Capital Blvd., Raleigh, N.C.
- March 10, 5:30-7:30 p.m. - Nags Head Beach Fire Station 16, South Wing, 5314 S. Croatan Hwy, Nags Head, N.C.

The draft report is available for download from our web site, under “What’s New” on the left side of the homepage.

Pivers Island Grant

The Clean Water Management Trust Fund Board has awarded DCM and its partners \$496,000 for implementation of the stormwater plan on Pivers Island. The Division has formed a partnership with the NOAA Center for Coastal Fisheries and Habitat Research and the Duke University Marine Laboratory to develop a plan to implement innovative and state-of-the-art technologies to reduce stormwater runoff and aquaculture effluent into estuarine waters and reduce adverse environmental impacts of marine laboratory operations on Pivers Island, in Beaufort NC. The grant, awarded through the Clean Water Management Trust Fund’s Innovative Stormwater Initiative, is a follow up to the successful completion of the stormwater master plan *to Minimize Impacts to Surrounding Critical Estuarine Habitats* – funded by the Trust fund in 2003. As with the stormwater plan, this implementation project will utilize the educational and research expertise of institutions located on the Island to provide a public education model to support efforts to reduce the environmental impact of coastal development, as well as for future projects funded by the Clean Water Management Trust Fund.

Reserve Summer Education Programs

This summer the Rachel Carson Coastal Reserve will again host educational programs for students of all ages. All classes will be hands-on, field-based estuarine studies. The programs are:

- **Junior Naturalist Program**
Beginning June 17, the Junior Naturalist program for students in grades 4-8 will run Wednesdays through Aug. 5, from 9 a.m.-12 p.m. Students will conduct field investigations of estuaries. Activities will include marsh seining, water quality sampling, animal population studies, beach and marsh profiles and phytoplankton identification.
- **Adventures in the Estuary**
Two sessions of Adventures in the Estuary will be held this summer for students in grades 1-3. The first session will be June 16, 18, 23 and 25, and the second session will be Aug. 4, 6, 11 and 13. Each session is \$40 for all four classes. Classes are 9 a.m.–12 p.m.
- **Preschool Storytime and Crafts**
For the youngest students, Preschool Storytime and Crafts will be held from 9-10 a.m. on June 15, July 13 and Aug. 10. These sessions will include a story, estuarine critter

observation and a related craft. All preschool sessions are free of charge, but registration is required. Topics will include hermit crabs, birds and snails.

NERRs 312 Review

The N.C. National Estuarine Research Reserve will be evaluated by NOAA April 20-24. The evaluation team will spend the week meeting with staff and partners, and visiting the sites to evaluate compliance with federal regulations, management plans, and grants. Public meetings will be held on April 21 in Wilmington and April 22 in Beaufort to provide the general public the opportunity to comment as required by the CZMA.

LAC Meeting

The local advisory committee for the Rachel Carson component of the Reserve will meet on March 19 at the Reserve office in Beaufort. The committee will discuss management and programs at the site.

Staff News

Alex Houston started with the Reserve on January 5 and will be working for two years on the research and education components of the recently awarded grant to the Reserve and NOAA to study estuarine shoreline stabilization. Alex has a master's degree in Wildlife Biology from Purdue University and has worked with N.C. Wildlife Resources Commission as an assistant waterbird biologist and for NOAA on sea turtles. She will work out of the Beaufort office.

Dr. Bo Dame is the Reserve's new Northern Sites Manager. Bo began work on February 9 and is managing the three northern sites of the Reserve, Currituck Banks, Kitty Hawk, and Buxton Woods, from the Reserve's office in Kitty Hawk. Bo has a B.S in Geological Sciences from Lehigh University, a M.A. in Marine Science from the VA Institute of Marine Science, and a Ph.D. from East Carolina University in Coastal Resources Management.

CHAIRMAN'S COMMENTS

Chairman Emory stated there were some excellent presentations on groins and an even wider discussion of beach processes. All of this information will be very helpful as we move on and I hope we get a chance to reflect on these things.

There is a lot going on in the newspapers about sandbags and groins. Not all of it is complimentary to the CRC, but it is helpful to remind ourselves of the progress we are making.

The Beach and Inlet Management Plan is still being developed and when it is complete we will have a tool to do a more comprehensive job of managing the beach and inlet. In some ways it is also a response to sea level rise. Our static line and setback rules are working their way through the process and we will be able to implement these. We will be receiving ocean policy recommendations soon and these will give an idea of the issues we need to be working on in the next few years. In concert with the other resource agencies, we will continue to grind away at the CHPP recommendations. Sometimes it seems that we are bogged down in details, but we should remind ourselves that we have gotten some things done and still have a lot to do.

Dr. Leutze stated that Governor Perdue has signed an agreement that would set up a South Atlantic Coastal Alliance between Florida, South Carolina, Georgia and North Carolina. The

intent is to help attract federal funds for addressing common problems and common issues. The CRC might consider coordination with other similar organizations in other states and see where best practices might be identified that would be helpful to all of us. He further stated that there was a color brochure at our seats which was intended to present facts on terminal groins. It was a well produced piece of material and was clearly intended to be in opposition to terminal groins, but there was no clear indication of where the materials came from. Dr. Leutze asked that on controversial issues and matters to be presented to the Commission, it should be identified as to where it came from.

Chairman Emory stated that any items that are put onto the table for the Commission should go through the DCM staff. Chairman Emory congratulated Commissioners Leutze and Sermons on their appointment to the oil panel.

CRAC REPORT

Dara Royal gave the CRAC report.

Dara Royal introduced the new members of the Advisory Council Tracy Skrabal appointed to the science and technology seat, Jerry Parks to the local health director seat, and Charles Jones as the Carteret County representative.

Dara stated the CRAC recommends approval of the Town of Emerald Isle land use plan amendment.

Boots Elam made a motion to approve the Emerald Isle land use plan amendment. Joan Weld seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Dara stated the CRAC recommends approval of the Town of Manteo land use plan amendment.

Jim Leutze seconded the recommendation for approval of the Town of Manteo land use plan amendment. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Dara stated that after discussions during the last two CRAC meetings about seeking a dedicated source of state funding for beach projects, the Council drafted a resolution for the General Assembly to request the creation of a beach inlet and waterway trust fund subject to annual appropriation. This is a timely request given the work being done on the BIMP. We will be asking our legislative representatives to establish the fund and asking our appointing bodies to make the same request. The Council also voted to invite the CRC to consider taking its own action either in support of the fund or in support of our action. Wayland Sermons stated that a specific request for the state to create a trust fund and utilize a portion of the sales tax puts a larger picture on this resolution. It is a huge step when a body such as the CRC requests from the State and specifies the funding source. He stated that he agrees that the State should use all efforts to generate beach nourishment and inlet management, but wonders if the CRC has had discussion when asking for a specific and dedicated revenue source. Jim Leutze asked to strike "an annual appropriation of a portion of the State sales tax revenue to be used with local matching funds". This would not specify the revenue source and may handle Commissioner Sermons objections. Commissioner Leutze recommended requesting an annual appropriation to be used with local matching funds. Dara Royal agreed. Wayland Sermons stated there wouldn't

be anything wrong in asking for the establishment of a trust fund that would have matching funds and an appropriate revenue source appropriation each year in the General Assembly. The State's sales tax is a greatly guarded source of revenue by the Legislature. Dara added that when looking at the accommodations taxes generated in the eight ocean counties and how much sales tax it sends to the State it would have more than paid for projects that have been done in the last decade. All of us in local government understand that sales tax is closely guarded and in these economic times considered critical. Melvin Shepard stated that this goes deeper than what we think it does. Going back more than twenty years, it has always been the responsibility of the Corps of Engineers to dredge the waterways and to keep the inlets open. When Governor Perdue was a senator, the Corps of Engineers' budget had been cut and they were threatening to dredge only about three inlets in the state, she commented that maybe we needed our own dredging. The money for this has always come from the federal budget and North Carolina has been reluctant to get into substituting state money for what is, or ought to be, federal funds. Chairman Emory stated that when the BIMP is completed, this will just be a plan unless there is some money. Whether we endorse this resolution today or something similar to it in a year or two when the BIMP is ready, we will need to ask for money whether it is spent on inlet and channel maintenance or not. There will need to be a source of funds or nothing will happen. Melvin Shepard stated that if we are going to ask for funds from a certain place, we might want to include something that says that the State would work closely with the Corps of Engineers to produce money for waterway management. The Corps thinks they have the right to be selective with inlet dredging. Federal money should be included in this resolution. Jim Leutze stated the amount of federal funds is problematic depending on economic conditions, the attitude of the President, the attitude of the Office of Management and Budget. In order to have some stability in our coastal areas, many people would like to have some sort of trust fund similar to the highway trust fund. The implication is that we consider these things as infrastructure and these are important. If you are going to maintain infrastructure, you are going to have to have an identified source of funds. Otherwise, you are dependent upon our representatives to get special funding for dredging. This is not a good way to do business and is not a good way to stabilize this very important resource. We know the Corps of Engineers are the people who call the shots and they have to have the money. I am not comfortable identifying the revenue sources, but some way or another, a principal should be established that there is a need for a trust fund. Dara Royal stated that maybe the focus is drilling down to the local level and getting their share, but there is importance in having a dedicated source of funding at the state level. In the twenty to thirty year history that Melvin spoke of, the Water Resources Development Plan has really not been a plan, but mainly project driven. The state has been committed to matching federal dollars when those were there. One of the things that has occurred in the last five years, in terms of the navigation dredging, the State has set aside some supplemental dredging funds that we have used along with local dollars (counties and municipalities) to leverage the limited amount of federal dollars that were there to keep the navigation channels and inlets open. We have already moved in this direction within the context of the BIMP to plan for that in a more cost effective manner and know the piece at the State level is there. Joan Weld stated that we need a more comprehensive plan. Just to have a resolution is shallow. Something of this magnitude and importance should have an ad hoc committee that would put a plan together rather than just a resolution. Jerry Old stated that the last time the CRC talked about this; there was a discussion about adding to the twenty coastal counties' sales tax to help fund this. Are we looking at an addition to the sales tax or an appropriation out of the statewide budget? Dara responded that it would be out of the State budget and not an addition. The CRAC purposefully tried to keep this resolution broad to allow the process to work as it needs to. Bob Wilson stated this is a major

issue. He said that he could support a resolution that asks the State to take this seriously and look at the alternatives and try to get some buy-in from the political establishment in Raleigh. There are a lot of models out there. Florida has a model. There is a sales tax, local sales taxes, and the income stream that is coming from the offshore fishing license. All of the money from the fishing license goes to Wildlife and we have major issues here that don't have anything to do with the Wildlife Resource Commission. I would like to see a resolution that asks the State to study this and come back with something. Maybe we could put some of our people with the State in helping to guide them with this. A resolution like this is nice, but it really doesn't have any sizzle to it. This is a major issue and I think there are great models, resources and funding that the Legislature could form a committee to study this. Melvin Shepard agreed with Bob Wilson. Chairman Emory asked that Melvin Shepard and Bob Wilson join in discussion with a few members of the CRAC to work on this and present it during the afternoon session.

Dara stated that there was discussion during the CRAC meeting to address the current CRC and CRAC meeting format. Some Council members have expressed dissatisfaction that the interaction between the Commission and the Advisory Council has decreased since the standing committee meetings were suspended. The Advisory Council is also finding it difficult to schedule sufficient meeting time with the 1 ½ day meeting format. The CRAC would like to revisit this issue with the CRC at a future meeting.

DENR UPDATE

Robin Smith, Asst. Secretary for the Environment, gave a DENR update. She stated that since the last meeting there has been a change in Administration. The Governor has already expressed a strong interest in renewable energy and building a green economy in North Carolina. The Legislature is in session. Bills are being introduced. The big issue this year will be the budget for both the Legislature and the Department. Jim Gregson mentioned the seven percent reversions from this year's budget. All State agencies were also asked to identify seven percent in permanent (continuing) cuts for next year's proposed budget. Permanent cuts are much more difficult than reversions because you cannot use things like lapsed salary money to meet those targets. It is much more likely with permanent cuts that we will see loss of positions. The Department's plan in terms of meeting the proposed seven percent cuts identified a number of reductions in positions, however these were all vacant positions. There were other positions that were moved from state appropriation to other funding sources such as federal funds or receipts. There were cuts in operating money proposed. After the initial set of seven percent reductions, the Departments were also requested to identify a number of program cuts. The Governor will put her budget together and at that time the Department's proposed cuts will be looked at to see if more cuts are needed. The Legislature will make the final decision on which cuts will move forward. Because of the budget situation, the State budget office has held back most of the conservation acquisition funds that had been authorized last year as certificates of participation. In the last session of the General Assembly about fifty million dollars had been authorized and the state budget office has indicated that only ten of the fifty will be released because of the budget situation. There is a lot of activity around the Economic Stimulus Plan. This has been taking up a lot of time as we try to get prepared for what has been a moving target. We are trying to get prepared to meet the very tight timelines for getting money out through the different funds once Congress authorizes the Bill and releases the money to the federal agencies. There will be drinking water money, there will be waste water money which will include stormwater and watershed restoration. These two areas will be funded through the normal EPA grant

process. Every year we get grant funds from EPA for drinking water projects and for waste water projects. This economic stimulus money is coming through those same two grant pipelines to the State. The expectation is we will have to apply for an EPA grant for the money that North Carolina can receive. They are asking us to submit preliminary project lists for that application and we have this done based on conversations with local governments. We are also doing a formal solicitation for projects by letter. We can supplement the list prior to the EPA approval. There will also be a public notice of the final list. The lists are longer than the money that we will receive and all projects will not be funded and there will be decisions to make about how the money is allocated. We expect to get between 150 and 200 million for these two areas. There will also be money coming through the Army Corps of Engineers for water resources development projects. Our understanding is that the Corps will use its existing process and I think the Corps has a list of projects authorized in North Carolina that they do not have complete funding for and they will likely go down that list and allocate whatever money they receive through the stimulus package to the projects that are already on the North Carolina authorized list. There will be a good chunk of money for transportation projects in North Carolina. What the Federal Highways Administration has told D.O.T. is that those projects have to be projects that are already through environmental review. We are not talking about brand new projects in this category, we are talking about things that are already on the list and have already progressed through the environmental review process and have a NEPA document completed. There will be a very short time to obligate this money and that is why everyone is scurrying around trying to get organized before Congress even enacts the Bill. The EPA will have thirty days to act on these State applications for funding and then states will have about 180 days for water and wastewater. The clear expectation is that if the funds aren't obligated, then Congress will sweep up the funds and redistribute them again. We are trying to make sure that we are prepared in terms of permitting and environmental documents and that we are not getting bogged down with projects that cannot move quickly. On the other hand, with water and wastewater, we have an opportunity to solicit some projects that may not be in the door yet (rehabilitation projects, maintenance and repair projects for water and sewer lines). These types of projects would be very easy to permit quickly and would meet a very clear state need. We are encouraging local governments to come to us with projects that meet this criteria.

VARIANCES

Young (CRC-VR-08-01), New Hanover County, Thirty Foot Buffer

Ward Zimmerman of the Attorney General's Office represented Staff. Mr. Zimmerman stated the Petitioner proposes to construct a driveway extension linking an existing dirt drive with an existing garage. The property is located at 6700 Alligator Road in Wilmington and the west side of the property is adjacent to the Cape Fear River. The proposed development is within the CRC's 30-foot buffer. Petitioner seeks relief from strict application of 15A NCAC 07H .0209(d)(10).

Mr. Zimmerman reviewed the stipulated facts of this variance request. Staff and Petitioners agree on all four of the statutory criteria which must be met in order to grant the variance. Mr. Zimmerman stated that Mr. John Young was not present.

Jerry Old 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 with ten votes (Elam, Old, Bisette, Wynns, Peele, Shepard, Wilson, Carter, Leutze, Mitchell) and three opposed (Wilson, Sermons, Weld).

Jim Leutze made a motion to support Staff's position that hardships result from conditions peculiar to the Petitioner's property. Chuck Bisette seconded the motion. The motion passed with eleven votes (Elam, Old, Bisette, Wynns, Wilson, Peele, Shepard, Webster, Carter, Leutze, Mitchell) and two opposed (Sermons, Weld).

Jim Leutze made a motion to support Staff's position that hardships do not result from actions taken by the Petitioner. David Webster seconded the motion. This motion passed with ten votes (Elam, Old, Bisette, Wynns, Peele, Shepard, Webster, Carter, Leutze, Mitchell) and three opposed (Wilson, Sermons, Weld).

Jim Leutze made a motion to support Staff's position that the variance request will be consistent with the spirit, purpose, and intent of the rules, standards, or orders issued by the Commission; will secure public safety and welfare; and preserve substantial justice. The Petitioner is required to include some method of conveyance in his project design as indicated in the Staff's position. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

This variance was granted.

NCDOT ((CRC-VR-08-55) Dare County; Sand Compatibility

Ward Zimmerman of the Attorney General's Office represented Staff. Mr. Zimmerman stated the Petitioner has proposed a beach habitat restoration on NC 12 in Dare County. The proposed project would place approximately 200,000 cubic yards of sand on the beach face at the Rodanthe S-Curves. The application was denied based on the proposed development's inconsistency with the CRC's shore-perpendicular topographic and bathymetric surveying of the recipient beach and sediment sampling requirements. Petitioner seeks relief from 15A NCAC 07H .0312(1)(c) and 07& .0312(1)(d).

Mr. Zimmerman reviewed the stipulated facts of this variance request. Staff and Petitioners agree on all four criteria required to be met in order to grant this variance. Scott Slusser of the Attorney General's Office Transportation Section is present to speak on behalf of Petitioners.

Scott Slusser of the Attorney General's Office represented Petitioners. Mr. Slusser stated the D.O.T. placed sandbags on NC 12 and a condition of their special use permit issued by US Fish and Wildlife Service was to complete a beach habitat restoration. The recipient beach was transected six times, but based on the small size of the beach the minimum number of sediment samples was not met. Mr. Slusser reviewed the stipulated facts which he contends supports the granting of this variance. NCDOT will monitor the physical and biological elements of the beach four times per year under the supervision of the Fish and Wildlife Service and the Wildlife Resources Commission.

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. Chuck Bisette seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Jerry Old made a motion to support Staff's position that hardships result from conditions peculiar to the petitioner's property. Chuck Bisette seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Jerry Old made a motion to support Staff's position that the hardships do not result from actions taken by the Petitioner. Chuck Bisette seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Jerry Old made a motion to support Staff's position that the variance request 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. Chuck Bisette seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

This variance was granted.

NC Seafood Industrial Park Authority (CRC-VR-08-56), Dare County; Pier ¼ Rule
Christine Goebel of the Attorney General's Office represented Staff. This variance request was filed on behalf of N.C. Seafood Industrial Park Authority. Clark Wright is present and will represent Petitioners. Petitioner's property is located on the northeastern half of Wanchese Harbor on Roanoke Island in Dare County. The proposed development is a reconfiguration that would eliminate nine existing slips and reconfigure them with a net gain of three slips. Petitioners seek relief from strict application of 15A NCAC 07H .0208(b)(6)(J)(iii). Ms. Goebel reviewed the stipulated facts of this variance request and stated that Petitioners and Staff agree on all four variance criteria.

Clark Wright of Davis Hartman Wright, PLLC represented Petitioners. Mr. Wright stated that Mr. Bob Peele the Director of the N.C. Seafood Industrial Commission was present if any answers of a technical nature are needed. Mr. Wright stated that the Petitioners agree with the Staff on each of the four variance criteria.

Wayland Sermons made a motion to support Staff's position that strict application of the rules, standards or orders issued by the Commission will cause the Petitioner unnecessary hardship. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bisette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Wayland Sermons made a motion to support Staff's position that hardships result from conditions peculiar to the petitioner's property. The motion was seconded by Jerry Old.

The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Wayland Sermons made a motion to support Staff's position that the hardships do not result from actions taken by the Petitioner. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Wayland Sermons made a motion to support Staff's position that the proposed development is consistent with the spirit, purpose, and intent of the rules, standards, or orders issued by the Commission; will secure public safety and welfare; and preserve substantial justice. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

This variance was granted.

Rouse (CRC-VR-08-57), Onslow County; Pier ¼ Rule

Ward Zimmerman of the Attorney General's Office represented Staff. Mr. Zimmerman stated Bill Raney will represent the Petitioners, John and Debra Rouse. Petitioners own a lot located at 116 Leslie Drive in Hubert, Onslow County. Petitioners applied for a CAMA major permit to build a docking facility consisting of a pier, platform and two boat lifts. Petitioners seek relief from strict application of 15A NCAC 07H .0208(b)(6)(J)(iii). Mr. Zimmerman reviewed the stipulated facts of this variance request and stated that Staff and Petitioners agree on all four variance criteria.

Attorney Bill Raney of Wessell and Raney represented Petitioners. Mr. Raney reviewed the four criteria and stated Petitioners agree with Staff on all four criteria.

Jim Leutze made a motion to support Staff's position that strict application of the CRC's rules, standards or orders cause the Petitioner unnecessary hardship. David Webster seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Jim Leutze made a motion to support Staff's position that hardships result from conditions peculiar to the Petitioner's property. David Webster seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

Jim Leutze made a motion to support Staff's position that hardships do not result from actions taken by the Petitioner. David Webster seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

David Webster made a motion to support Staff's position that the proposed development is consistent with the spirit, purpose and intent of the rules, standards or orders issued by the Commission; secures public safety and welfare; and will preserve substantial justice. Jim

Leutze seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Leutze, Mitchell).

This variance was granted.

Town of Oak Island- (CRC-VR-09-02), 30' Buffer and Oceanfront Setback

Christine Goebel of the Attorney General's Office represented Staff. Ms. Goebel stated Brian Edes, Town Attorney for Oak Island, is present and will represent Petitioners. Ms. Goebel stated the Petitioner owns an existing water treatment system in Oak Island. The Commission approved a variance of the large structure setback for Phase I of the wastewater collection and treatment project in November 2007. Petitioners seek a variance from the large structure setback and the applicable 30-foot estuarine shoreline buffer for Phase II.

Ms. Goebel reviewed the stipulated facts of this variance request and stated that Staff and Petitioners agree on all four variance criteria.

Brian Edes, Oak Island Town Attorney, stated Jerry Walters, Town Manager, Troy Davis, wastewater project director, and Council member Dara Royal are present to answer questions. Mr. Edes stated Petitioners are in agreement on the four criteria and reviewed the stipulated facts that he contends constitute granting of the variance request.

Charles Elam made a motion to support Staff's position that strict application of the applicable rules, standards, or orders issued by the Commission cause the Petitioner unnecessary hardships. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Charles Elam made a motion to support Staff's position that hardships result from conditions peculiar to the Petitioner's property. Jerry Old seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Jerry Old made a motion to support Staff's position that hardships do not result from actions taken by the Petitioner. David Webster seconded the motion. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

Charles Elam 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 public safety and welfare; and preserve substantial justice. The motion passed unanimously (Elam, Old, Bissette, Wynns, Wilson, Sermons, Peele, Weld, Shepard, Webster, Carter, Mitchell) (Leutze absent for vote).

This variance was granted.

PRESENTATIONS

Teleconferencing and Other Meeting Technologies (CRC 09-06)

Josh Shepherd

Josh Shepherd, Management Information Systems Manager for the Division of Coastal Management, stated he will show some possible solutions for conducting CRC meetings remotely using technology rather than meeting as a group and incurring the expenses of travel. Mr. Shepherd provided the Commission a fact sheet that was prepared by North Carolina's Attorney General. This sheet summarizes the requirements that are set out in North Carolina General Statute 143-318. When the CRC conducts a meeting it is a public meeting and there are requirements that the public has to be able to view and participate. All of our public meetings have to be publically noticed. If we chose to look at an alternative method of meeting, the requirements will remain the same. The public does not have the right to speak during a public meeting except in the case of a public hearing. The public has the right to listen to electronic meetings. If we were to meet remotely, we would have to provide the public with a mechanism for listening in and potentially recording the meetings. It is a requirement that we take meeting minutes and these must be available by request from the public. Voting and variance presentations would have to be considered if a teleconferencing method were to be implemented.

Some general practices the CRC follows include the roll call which is done verbally at each meeting to ensure a quorum, the record of individual voting is taken, presentations, and variances and contested cases. Another issue that would have to be addressed if the Commission decides to meet remotely is the Chairman controlling the meeting. There would need to be a mechanism for that to still take place when we are not face to face.

The technologies that are available to the Commission are limited to technologies that are supported by the State. One option available is the conference call. This is an audio option only. The Commission has exercised this option in the past for emergency meetings. There are three variations for this option (meet-me number, attendant based meeting, 800-number service). Video conferencing would be a second alternative. The NC Aquariums take advantage of this alternative. It is a television with a camera on it. One of the limitations of this system is you would not want to have more than five or six participants on each end due to the screen resolution and the ability to interact. It is a full two-way system with both audio and video and requires an internet connection. The next option that is available to the State is webconferencing. Webconferencing is primarily a computer solution. There is software that you would run on your individual machine and typically requires a high speed internet connection. The last option is a hybrid option and this combines two or more of these technologies. You can utilize the computer to convey information such as a presentation while using the telephone to conduct the audio portion. The videoconferencing solution can tie into webinar technology. Another option would be mini-meetings where several gather at CAMA regional offices and use technology to link the locations together.

There are concerns about technical difficulties that could prevent a meeting location from being able to participate. This could affect the quorum or the public wanting to make a comment from a particular location. If we look at the potential of holding mini-meetings, we have to be able to accommodate the public. Also, the DCM offices continue to function as a place of business even when we are having and meeting and we would not want to overwhelm Staff that are still working. The face-to-face interaction would be limited if we were to meet remotely which would eliminate sidebar conversations between Commissioners and Staff. The media also wants to have access to Commissioners during meetings and this could be limited. Large documents (maps, architectural drawings) could be a problem as they are not easily viewed electronically.

Materials are often passed out at the meeting and we would have to figure out how to accommodate last minute documents and handouts.

PUBLIC COMMENT AND INPUT

Clark Wright stated he wrote legislation that assisted in the passing of the special license tag to support the Appalachian Trail. It has raised one third of a million dollars. I also live in New Bern and we were in the GTP area. There was a GTP tag and a special assessment for a period of years to raise money. I would encourage you to look at the possibility of a targeted license tag allotment over a period of years as a possible funding source. I think it merits this Commission saying they advocate that the Legislature find a permanent trust fund type source of funding. You may want to talk with the Administrative Office of the Court about technology. There are more and more portions of legal proceedings that are being done through various technology link ups including first appearances in criminal cases. The federal courts are doing it as well. OAH's new facilities, where the RRC meets, has an overflow room with a technological hookup. I was the Governor's lawyer on offshore drilling for four years. I think I know more about this than anyone in the State of North Carolina. I would love to offer input and expertise. There is still a green file cabinet within DOJ full of my materials. The key issue is secondary and cumulative impacts onshore. A critical issue is revenue sharing. This is one of the largest sources of revenue for the federal budget. Don't forget when you deal with wind that there may be view shed issues. I think the CRC will be on the hot seat more, and probably should be, about clean water management. DCM should be the lead agency on all stormwater issues in the twenty coastal counties. This would need to come with staffing and funding. I think I have a lot to offer with 24 years of struggling with these issues.

Jack Nichols stated he is a homeowner on Bald Head Island. We have owned two homes on Bald Head Island since May 1987. We first owned a villa on South Beach and then we moved to Cape Fear Trail in 1991 on West Beach. One reason for us moving away from the villa was the problems created by the high rate of erosion and frequent storm surges on the ocean. When we moved to our villa in 1987 there were numerous homes and a large inn and restaurant in front of our villas. In four years the inn and all the homes were gone. The villas had become front row property. The home on Cape Fear Trail which was built in 1989 was issued a permit using a sixty foot minimum setback from the first line of stabilization and our home was actually built over 140 feet back. Our lot is over 200 feet deep, 200 feet across, is on the waterfront side, and narrows at the entrance of 50 feet. The home is 2,000 square feet. In 2002, a second CAMA permit was issued confirming our sixty foot setback when we added a screened porch on the side. We sold our Cape Fear Trail home two years ago to a Bald Head Island neighbor, subject to the sale of his home. About six months ago this purchaser checked with CAMA officials locally and was told that our home was in the inlet hazard area and was in violation of the 240 feet setback restriction and was not rebuildable if it was destroyed. The prospective purchaser then put this transaction on hold until the issue was resolved. In October of last year we had a meeting with the local CAMA official and he told us that the minimum setback for our home, which was built in 1989, was sixty feet and should have been 180 feet based on a six foot annual erosion rate for the inlet hazard area. He said that the erosion rate for the entire inlet hazard area was based on a 1988 erosion rate from South Beach. He went on to say that an erosion rate for West Beach did not exist and added that the 1998 erosion rate was eight feet and our setback requirement was increased to 240 feet. Our lot is 200 feet deep which means our lot was not buildable under the 180 feet or 240 foot setback. In further conversation and e-mails, I was told that our property was in violation of the setback requirements of the inlet hazard area at the time

of construction. I asked when it was decided by CAMA to use erosion rates from South Beach to establish the setbacks for West Beach. I was told that the CAMA records which show the minimum setback for structures for West Beach were inconsistent from the late eighties through the nineties which may have been caused by the CAMA officers using a minimum two foot erosion rate factor because erosion rates had not been established on West Beach. The records show that at least six structures on West Beach were permitted for minimum setbacks of sixty feet between 1989 and 2003 and ours was one of them. I feel that it is improper to use ocean erosion rates to determine setbacks on West Beach property on Bald Head Island because the actual historical erosion rates have been much lower on the river. It is obvious that the flow of the river current has protected the property on the river from strong ocean currents and surges. In my eighteen years of living on Bald Head Island there has been minor erosion balanced by frequent accretion resulting in little or no change in the vegetation line. Until five or six years ago when major changes were made to the shipping channel in the river, we are now experiencing greater erosion rate and the Village government has taken the combined action of renourishment and vegetation planting to stabilize West Beach. In summary, I feel that on Bald Head Island it is unreasonable and arbitrary to use erosion rates for South Beach to establish setback requirements on West Beach. This issue should be resolved as soon as possible. The erosion rates and setbacks on the River West Beach properties should be set at two feet and 60 feet respectively until the erosion rates can be measured and the major issues are addressed.

Andy Sayre stated he has lived on Bald Head Island for fifteen years and represents himself and Bald Head Island. I appear before you today wearing four hats. First, I have been on the Bald Head Island Village Council for almost twelve years. I would like to think that I am well informed. However, over the past six months or so I have been surprised and increasingly alarmed by the potentially broad and uncertain implications of the present and proposed IHA rules. The well being of individual property owners and the Village's tax base depends on clear rules. It appears the regulations have not been logical, well communicated, nor uniformly administered. The Village of Bald Head Island is a relatively new entity and in a formative state. Please ensure that any IHA regulations do not threaten the desirability of Bald Head nor its financial stability. Secondly, I am the owner of a property within the IHA. It is a large lot of about one and a half acres with good elevation. We bought it as a retirement investment in 1996 and it has seemingly appreciated well over the years, at least the Brunswick County tax office thought so. As recently as June 2008, I had an appraisal done in order to refinance. This appraisal agreed with the Brunswick County evaluation. I recently requested from the local CAMA officer information on what building restrictions might apply. He informed me that the setback from the river is 240 feet which makes the lot unbuildable. Except for a couple of feet of erosion that occurred after the Corps of Engineers realigned and deepened the navigation channel, the lot looks exactly as it did when we bought it. I cannot afford to lose the value of this lot. I am appealing both the 2008 and 2009 property taxes and I am also concerned that I may be in default of my loan for breach of a technical loan covenant. I continue to pay the bank, but doubt the bank would be sympathetic if the lot were worthless. This is an unacceptable situation. Thirdly, I am in the building business and my wife owns a real estate company which concentrates solely on Bald Head property including several lots located in the IHA. In an already difficult market, otherwise viable transactions in the IHA have come to a complete halt. In our community, the health of the real estate market translates to the health of the community. Finally, I am a past board member of the BHI Club. I was involved in the recent multi-million dollar renovation of the clubhouse. Before committing these substantial dollars, we evaluated

alternate locations for a totally new building. We were unable to identify any viable alternate sites. When the time comes to replace this building it simply has to remain on its present site.

PRESENTATIONS

***At this time, Joan Weld took over as Chair for the meeting.*

Variance Rules Update (CRC 09-01)

Christine Goebel

Christy Goebel stated that at the November 2008 CRC meeting the Commission sent 15A NCAC 07J .0701 and 7J .0703 to the Rules Review Commission. Staff counsel for the RRC raised some objections to these rules after their review and requested technical changes. In 7J .0701, RRC counsel objected to some of the changes based on the lack of statutory authority of the CRC to the proposed requirement that a variance petitioner waive their right to pursue a contested case in order to seek a variance. In 7J .0703 the RRC counsel requested verification that OAH would only determine facts in a contested variance situation. Copies of the objections were provided to members of the CRC. DCM staff, legal counsel to staff and legal counsel for the CRC have all reviewed these rules and recommend that the CRC accept the changes as requested by the RRC counsel. RRC counsel has stated that these changes are not substantial changes and would not require renofice and public comment again. These rules could be reviewed by the RRC at their next meeting. Even with the changes that have been taken out of the text, we would request that these rules continue to move forward. These rules propose a much less cumbersome timeline on DCM staff and counsel, cleans up the language, allows voting on variances without presentations, and makes it clear that variances can be heard at emergency meetings of the CRC.

Review and Progress on CRC Priorities (CRC 09-08)

Mike Lopazanski

Mike Lopazanski stated at the January 2008 CRC meeting, the Commission took quite a bit of time to discuss emerging issues as well as current workload on the part of the Commission and the Division in order to establish a schedule and prioritize how we bring these things before the Commission. Staff presented several issues that we thought would likely come before the Commission at some point in time and asked for guidance as to what would be the most important in terms of scheduling on the agenda. After a day long process, the Commission determined there were seven top priorities. These priorities were estuarine shoreline stabilization, public access, sea level rise, energy production, public education, review of the 7B planning guidelines, and general estuarine management.

The first priority was estuarine shoreline stabilization. As you will recall the big driving force behind the Commission's agendas has been the CHPP recommendations. The Commission has addressed the shoreline stabilization rules and looked for ways of promoting alternatives for vertical stabilization methods. A few actions that have been taken include the location of bulkheads. The rules have been changed and have gone to public hearing dealing with the location of bulkheads and the fee has been increased to \$400.00. We looked at riprap and changes have to been made to the maximum distance that riprap can be placed waterward of coastal marshes and increased the slope of riprap for ease of construction. We are trying to encourage alternatives and riprap is one of them. The CHPP Steering Committee is still looking at the shoreline stabilization rules. A subcommittee has been looking at further ways for the Commissions to be involved in encouraging alternatives to bulkheads. Updates will be provided to the CRC as the Steering Committee and subcommittee come up with recommendations. The

Division is moving forward with some property owner outreach activities. As a result of the shoreline stabilization subcommittee, there was an estuarine shoreline biological processes workgroup put together. This workgroup developed shoreline technique recommendations that would be tied with shoreline types. We have talked a lot about marsh sills, particularly the marsh sill GP which we continue to struggle with. The Commission directed Staff to look at ways to turn the GP into something usable by meeting with regulatory agencies involved and discussing their issues. A workshop has been proposed at the end of March in which the various regulatory agencies will be gathered together to talk about these issues.

There has been a major revision made to the shoreline access policies through the public beach and coastal waterfront grant to address public access. This will give DCM more flexibility in the types of projects that we fund as well as the ability to act on opportunities of acquisition. The Waterfront Access Study Committee recommendations looked at working waterfronts but also included access provisions in their recommendations. One of their focuses was ocean piers and methods that could be put into place to keep these opportunities for ocean pier fishing available to the citizens of the State. The Commission has put forward rule amendments to the pier house regulations in which we will allow pier houses to be rebuilt oceanward of the setback and we will allow two-story structures with limited commercial opportunities. We still need to work on including working waterfronts as a management topic in the 7B land use planning guidelines (this will come up in the review of the land use planning guidelines in early 2010). We have had a few presentations on incorporating public access into our permits, most notably trying to increase opportunities for access at marinas. The CRAC has been working on this and we anticipate bringing this back to them.

Sea level rise was identified as a priority for the Commission. Most of our discussions so far have centered on the roll the CRC will have in addressing sea level rise. Addressing the cause is out of the jurisdiction of the Commission, so we will look at response and adaptations. There have been several presentations dealing with the state of the science. You can look at some of the actions taken on oceanfront setbacks as being a measured response to sea level rise. The CRAC has been incorporating sea level rise as an agenda item while the Commission has been tied up with other issues.

We have been talking about two different things in regards to energy production. The Commission has devoted an entire meeting to presentations and discussions on wind energy. You have been kept up to date on the actions of the Environmental Management Commission and their legislative directive to look at the permitting structure currently in place for constructing a wind energy facility. DCM staff have continued to work with the DENR wind energy work group and continue to stay in touch with how this issue is going to develop. We recognize that the water dependency would be an issue for the siting of these facilities. This has been put on hold until the EMC report to the legislature is finalized. The Ocean Policy Study Committee recommendations will also be coming before the Commission in April. There will be more direction and possible action needed by the Commission. The Commission has been updated on changes to the moratorium for oil and gas exploration and development. You heard this morning that the legislative study committee has been appointed to look at this issue.

In May, the Division education plan was presented to the Commission. This highlighted some of the main focuses including the missions and goals of the Division. The implementation of the education plan hinged on a compliance education coordinator position which we had secured

funding for and then we lost the funding for it. The future implementation of this will be dependant on staff time. The Coastal Reserve program has continued with their series of workshops.

The 7B planning guidelines were listed as a priority because they are mandated by CAMA to be reviewed every five years. The Commission has certified 33 land use plans and 27 have completed the draft review process. The review of the guidelines is now due, but we want to have all of the local governments go through the process so we will have a clear picture of where changes need to be made in the guidelines.

Estuarine management includes a variety of issues. The in depth discussion of SAV and the dock and pier rules are evident of the desire to move forward with a comprehensive estuarine management plan. Estuarine shoreline mapping will provide the base information from which we can take a more comprehensive approach. A methodology has been completed for delineation of the estuarine shoreline and a pilot project is in place with ECU that will look at Hyde and Beaufort Counties. We expect to identify shoreline structures, shoreline types, and the workgroup report and have this completed by June 2011.

NC Coastal Reserve Research (CRC 09-04)

Dr. John Fear

Dr. Fear stated the Coastal Reserve Program is a joint federal/state partnership. The federal partner is NOAA and the state partner is the NCDCM. The Reserve has three main programs which are research, stewardship, and education. Today we will look at the research programs of which there are three main branches that we engage in. The first is a system-wide monitoring program, the second is the graduate research fellowship, and lastly is the directed site research. The goal of the research program is to provide new information on coastal ecosystems. We have very valuable coastal resources and we need to do all we can to manage them appropriately. We conduct and foster research projects to generate new data, enhance our implementation of the system wide monitoring program, and ensure the research results that we generate are disseminated to end users.

The system wide monitoring program is a nationwide monitoring program. This provides a very powerful data set for estuarine water quality. There are three phases. Phase one is monitoring water quality and weather conditions. Phase two looks at habitat change. Phase three looks at watersheds and classifies how the land is being used. This was initiated in 1994. This is a long-term data set and provides a great opportunity to see how our estuaries have changed through time. The Coastal Reserve will be working on a synthesis report this year to look back at the data since 1994 and see if we can pull out any changes. The changes will be examined relative to climate change or development. One of our goals will be to expand this program to other areas of the North Carolina coast.

The graduate research fellowship is for work that has to be done within the Reserve boundaries. This is a great way to have work that is important to North Carolina conducted and funded by someone else. It is a great way to maintain ties to the academic community because students always need money and this program allows us to interact with students, interact with researchers, and get work done on the Reserves. Some examples of topics that have been worked on include looking at mercury levels in sparrows at Masonboro Island, examining oyster

reef restoration methods, and tracking fecal coliform sources. All of these issues are important to management agencies.

The final aspect of the program is directed research. This represents classic research projects. These are hypothesis driven, conducted within the Reserves and Reserve's watersheds. The idea is to provide the baseline science needed to develop sound management decisions and quality educational materials.

***Bob Emory returned to Chair the meeting.*

CRC Science Panel Inlet Hazard Area Recommendations

Dr. Margery Overton, Chair CRC Science Panel

Dr. Overton stated the science panel meeting minutes have been distributed to the CRC members and these recommendations are as of the last science panel meeting. She stated she has been asked to talk to the Commission about the deliberations from the science panel and will try to represent the opinions of the panel as a whole. One of the things we are bonded on is the love of data and the comments are based on data driven analysis. She stated the science panel encourages the use of erosion rates in the inlet hazard area that are derived from shorelines in the inlet hazard area. The variability in shoreline position is much larger in the inlet areas than along the shorelines and we feel it is a key attribute of what is going on and it should be used in developing the setback within the inlet hazard area. Many times in our discussions we debate whether or not we can do this from shorelines, as DCM has historically done. We wonder if we should be using elevation or underlying geology. When it comes to the inlets, one size doesn't fit all. As we did with mapping the boundaries, an inlet by inlet approach is important. We use setbacks to reduce the risk of property loss, reduce the encroachment of properties onto the beach, and to reduce the amount of tax money spent to respond to problems. (Graphs were shown). The science panel has struggled with trying to formulate this in a way that is simple to implement and is consistent with practices along the non-inlet sections. We have looked at two formulations. We are attempting to put this into a formulation that is not too mathematical. There has been discussion that the vegetation line is telling us something different in the inlet areas than it does along the shoreline. The panel has spent some time looking at the vegetation line from the historical data. One concept was to use a vegetation line that is a hybrid. We believe an inlet by inlet approach is important. We understand it is more time consuming, but our recommendation would be that we take the time to look at this and bring it back at a later date.

Proposed Development Policies for Revised Inlet Hazard Areas (CRC 09-05)

Dr. Jeff Warren

Dr. Warren stated we are looking at the twelve developed inlets and have opted to not direct resources toward the non-developed inlets. There are two rules (7H .0304 and 7H .0310). 7H .0304 addresses the inlet hazard area boundaries. In September 2007, Dr. Overton presented the results of a multiple year study on defining the box boundaries. The boxes have remained the same with the exception of one. A lot of people are using the existing inlet policy development rules into the new boxes. In September 2007, Staff stated we should not move forward with the new boxes because we need to look at the policy of what you can do inside of the boxes in tandem. Draft policy recommendations were before the CRC in July. There were three major issues which have been worked on since. The first was an issue specific to Bald Head Island and

we feel we have achieved a resolution on this and the Commission approved a revised boundary at the November meeting. The other two issues were how the erosion rate were determined and Dr. Overton touched on this briefly today about variability and the data sets used and how the current rules extrapolate the erosion rate from outside of the inlet hazard area throughout the entire inlet. There were two people who spoke during public comment that talked about how badly it is affecting their lots on West Beach. What do you use to measure the setback from? This ties into variability as well because as you saw in the presentations yesterday, the shorelines behave quite differently inside the inlet zones. You can see rapid changes within weeks. Dealing with this variability is a challenge. This is one reason the proposed sandbag rules on the inlet hazard shorelines are addressed differently.

We have spent the past couple of months going through the tax records and coming up with the best estimates that we can come up with. The number of structures located inside both the existing and the proposed inlet hazard areas were shown via PowerPoint (available at www.nccoastalmanagemet.net).

There were some general concerns of the science panel. The erosion rates for the inlet hazard areas were recalculated as part of our study to define the new boundaries. We did this with multiple data sets. The 1998 erosion rate data was referenced. The science panel wanted to be able to use the new data we generated from the inlet hazard area project instead of the 1998 data, because they felt it more accurately represented the variability in the area. Staff agrees with this, but we may need to do this in a phased approach. The science panel wants to consider the variability of the vegetation and shorelines when siting development. The shorelines and vegetation line swing wildly. The vegetation line may not be the best reference point for measuring a setback landward from. The science panel suggests considering multiple setback criteria and use the most restrictive. They also suggest considering inlet-specific methods for siting development.

The major point of the science panel is the erosion rate. There are rules in place for inlet hazard area development. Currently, to determine the erosion rate in an inlet hazard area you take the adjacent ocean erodible area. The current rule will not work with the new boxes. DCM understands that there is a better way, but it is time to update the entire coast. We could phase into the approach. We could use the same rates we use today in most cases, with a few exceptions. As a part of the phased approach, we would look at the entire shoreline including the inlets and develop new sets of transects that wrap radially around the inlet and give a much better sense of what the shoreline is doing. This is something that will be a long and thorough process and could take a year or two. DCM would suggest continuing to use the existing erosion rate maps. We can move forward with draft policy and some rules. We can effectively use the rates that are on the maps now, but immediately start to redo the erosion rate for the entire coast and not just the inlets. In areas on the maps that do not have an erosion rate associated with them, you would be safe to default to the minimum erosion rate of two feet per year. DCM would also suggest a grandfather provision. The current regulations do not put a limit on single family home size in inlet hazard areas. The only restriction is 5,000 square feet for multi-family and commercial. To be consistent with the updated setback policies adopted, we would use a size and not use management technique. If you limit one structure to 5,000 square feet you need to limit all structures to 5,000 square feet. This will limit the density in the area as well as the size. There are currently structures that are greater than 5,000 square feet that are not currently in inlet hazard areas, but will be in the proposed areas. By putting in a grandfather clause, you could

allow these structures to rebuild to their pre-existing size as long as they meet the current setback regulations. Currently pools are allowed in the ocean erodible area. DCM recommends the CRC not allow pools in the setback in the inlet hazard area because of the wild variability of the vegetation and shoreline. Sandbags are addressed in a separate rule, but are related to the inlet hazard areas. In 7H .0308 there is a provision to manage the inlet hazard areas differently. In the proposed rule there is a provision to use sandbags as many times as necessary if you are in the inlet hazard area and on the oceanfront.

In the current inlet hazard area, there are no commercial or multifamily structures allowed that are greater than 5,000 square feet. There is a development density not to exceed one unit per 15,000 square feet. The oceanfront setbacks are based on the adjacent ocean erodible area erosion rate and extrapolated throughout the oceanfront shoreline. You cannot use the single family exception, which means if your lot was platted before 1979 and you cannot meet the setback you cannot put a smaller structure as far back on the lot as feasible.

DCM's policy approach is to keep it small and keep it back. We would propose no development should be allowed that is greater than 5,000 square feet. This would exclude public beach and water access, linear infrastructure, and the other exceptions currently listed in 7H .0309. The oceanfront setback should be based temporarily on the 1998 erosion rate and put a two foot per year minimum on map areas without printed rates. We would recommend continuing to use the vegetation line for setback measurement. This is something that has worked for the State very well. We agree with the science panel that the vegetation line should not be the only setback consideration. We would use the model that we used in the static line exception rule, that in addition to meeting a minimum setback based on erosion rate as measured from the vegetation line also go as far back as feasible and be no further oceanward than the landward most adjacent development. We also propose to allow the single-family exception. Pools should be disallowed oceanward of the inlet hazard area setback. A grandfather clause should also be added for the ninety-one existing structures greater than 5,000 feet to rebuild if the appropriate setback can be met.

Draft rule language has not been provided. DCM would recommend to the Commission that this be discussed today and if these concepts are agreeable to the CRC, take them out to the stakeholders. DCM Staff will come back before the CRC in April with draft rule language. The draft rule language could then be sent out for public hearing following the April meeting.

After discussion it was determined that DCM Staff would present their final report at the April meeting. The Science Panel will bring their methodology for the erosion rates back to the Commission for their review. The CRC will look at both proposals in a comparative way.

Summary of BIMP Public Meetings (CRC 09-07)

Steve Underwood

Mr. Underwood stated a summary of the public meetings was provided to each Commissioner. This document was also sent to each person that attended the meeting so they could see that everything they brought up was captured in the summary and could see what happened at the other regional meetings. The first public meeting was held between December 2 and December 11. There were a total of about 120 people that attended these meetings. A second round of meetings has been scheduled. The locations of the next meetings will be at the same locations as the first meetings with the exception of Regions 2c and 3a which will be held at the Pine Knoll

Shores Aquariums. At the first round of meetings we showed each of the regions, some of the data sets that were in these regions, and some of the strategies that had been employed in the past. Then we broke out into round table discussions and had some specific questions and topics that we wanted to address and wanted to document the comments, questions and concerns. There were five questions that we asked at the meetings during the roundtable discussions (1) Are there any other data sets that you are aware of that have been missed to date? (2) Do you have any other specific comments on proposed procedures within the study? The public seemed to be fine with the delineations of the various regions and liked the idea of the regional approach. (3) Do you have any other specific comments on proposed beach and inlet management strategies? One of the consistent responses we got was the beneficial use of dredged material. There should be diversity of options determined by regions. There should be more tools in the toolbox other than just beach nourishment for strategies for the coast. Other responses to this question included not ignoring inlets as sediment sources, retreat and removal of structures when appropriate, and the monitoring of beaches over time. (4) Do you have any other specific comments on how projects should be prioritized and funded? Responses included the amount of public access should be tied to the funding, permanent funding source appropriated annually by the General Assembly, and a variety of ways to raise money through occupancy and sales taxes. (5) What additional information on beaches and inlets would be helpful to you or your community? Responses included data for EA and EIS, offshore sand resources inventory work, and data should be readily available to the public. Since the public meetings, we have gotten letters from Bald Head Island and New Hanover County Commissioners with specific comments on what they think is important and should be included in the BIMP.

Update since the public meetings: A couple of weeks ago, we met with Moffatt and Nichol to preview some of the economic data that is generated from the coastal communities. We are seeing that the local economies are generating billions of dollars. We saw a nice overview of dredging practices that have been going on by the Army Corps of Engineers including the cost of the projects, where the sand has been placed over time, and sediment budgets around the inlets. We are allowing a lot of sand to be taken out of the system and it is being dumped offshore. We realize that what we are currently doing is not sustainable. We also looked at the coastal shorelines assessment (vulnerability) along the coast. This was a comprehensive overview of the coastal processes and past strategies for managing these regions. Peter Revella has been brought onto the team with Moffatt and Nichol to be creative about how to meet with local contacts in each region, state representatives of the General Assembly, and federal representatives. The BIMP is putting all this information together in a context that shows how these strategies and functions will provide the direction that we want to go with in North Carolina. We can absolutely show the citizens of North Carolina that they can see it as a logical investment. It is a way for North Carolinians to start to do something sustainable for these resources that everybody loves so much (oceanfront, sounds, and estuaries). We have another meeting set between DENR advisory group and BIMP Advisory Committee. Moffatt and Nichol will present the information to this group on February 23 in Raleigh.

OLD/NEW BUSINESS

Dara Royal reviewed the changes made to the joint resolution from the CRC and CRAC seeking establishment of a North Carolina beach, inlet and waterway trust fund study commission.

Bob Wilson made a motion that the CRC adopt the revised resolution. Melvin Shepard seconded the motion. The motion passed unanimously (Elam, Old, Wynns, Sermons, Peele, Weld, Shepard, Wilson, Carter, Mitchell) (Bissette, Leutze absent for vote).

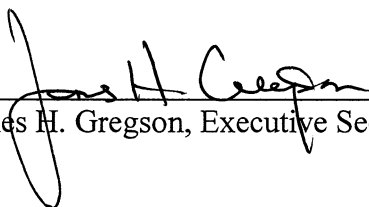
Chairman Emory requested that a letter be sent to the speakers from yesterday's presentations expressing the CRC's appreciation for their time. Chairman Emory advised the Commission that Dr. Joseph Gore, former CRC Commissioner, has died.

Melvin Shepard cautioned the Commission to be mindful of talking about matters of the Commission in social settings, especially when several members of the Commission are gathered together.

Chairman Emory stated that a good amount of time for discussion should be scheduled at the April meeting for the inlet hazard area methodology comparison. There is also interest in getting Dr. Overton to present monitoring data from Oregon Inlet. The meeting format will also be discussed at the April meeting as requested by the CRAC.

With no further business, the CRC adjourned.

Respectfully submitted,


James H. Gregson, Executive Secretary


Angela Willis, Recording Secretary

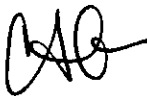


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State of North Carolina

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: April 16, 2009 (for the April 29, 2009 CRC Meeting)
RE: **Variance Request by The Riggings Homeowners Association, Inc.**

Petitioner is a Homeowners Association for The Riggings condominium development in Kure Beach, New Hanover County. They own oceanfront property where the development is currently located. They have sought, and have been granted four prior variances from this Commission to keep sandbags in front of their property for a period longer than allowed by Rule 15A NCAC 7H .1705(a)(7). In January of 2008, the CRC denied this current variance request. In January of 2009 at the Judicial Review hearing in New Hanover Superior Court, Judge Jay Hockenbury remanded the variance request back to the CRC for a rehearing. The Petitioner again seeks a variance to keep the bags in place longer, as described herein.

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 Variance Criteria
- Attachment D: Petitioners’ Variance Request Materials and Attachments
- Attachment E: Additional Exhibits
- Attachment F: A copy of the remand Order from Judge Hockenbury
- Attachment G: Copies of revised positions of the parties

cc: The Riggings HOA c/o William Wright, Esq., Petitioner
Town of Kure Beach CAMA LPO
Jennie W. Hauser, Special Deputy Attorney General & CRC Counsel
DCM Staff

ATTACHMENT A

RELEVANT STATUTES OR RULES

N.C.G.S. 113A § 115.1 Limitations on erosion control structures

(a) As used in this section:

(1) “Erosion control structure” means a breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure.

(2) “Ocean shoreline” means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term “ocean shoreline” includes an ocean inlet and lands adjacent to an ocean inlet but does not include that portion of any inlet and lands adjacent to the inlet that exhibits the characteristics of estuarine shorelines.

(b) No person shall construct a permanent erosion control structure in an ocean shoreline. The Commission shall not permit the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline. . . This section shall not be construed to limit the authority of the Commission to adopt rules to designate or protect areas of environmental concern, to govern the use of sandbags, or to govern the use of erosion control structures in the estuarine shoreline.

**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.

 - (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. For purposes of this Rule, a community is considered to be actively pursuing a beach nourishment project if it has:
 - (A) been issued a CAMA permit, where necessary, approving such project,

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.

STIPULATED FACTS

ATTACHMENT B

1. Riggings Homeowners, Inc. (“Riggings HOA”) is a non-profit corporation organized under the laws of the State of North Carolina. “The Riggings” is also the name of the 48-unit residential condominium project bordering the Atlantic Ocean in Kure Beach, New Hanover County, North Carolina, whose unit owners are members of Riggings HOA.
2. Immediately south of The Riggings is Fort Fisher, a North Carolina State Park, which is also located on the shoreline of the Atlantic Ocean.
3. In the 1920’s some of the coquina rock outcropping northeast of Fort Fisher was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project.
4. The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide.
5. An intertidal rock outcrop community near Fort Fisher, known as the Fort Fisher Coquina Outcrop Natural Area, was entered on the official North Carolina Registry of Natural Heritage Areas on February 6, 1982.
6. Among other things, coquina rock outcroppings can provide a partial natural barrier against the threat of beach erosion.
7. Currently some of these coquina rock outcroppings are within sight of The Riggings, and the southern portion of a large outcropping is situated in front of the northern section of The Riggings.
8. A large part of the rock outcroppings within sight of The Riggings was uncovered during Hurricane Floyd, and its vegetation was uprooted by the storm surge.
9. Since 2000, beach nourishment projects conducted by the U.S. Army Corps of Engineers have covered some coquina rock outcroppings north of The Riggings.
10. The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
11. The first CAMA permits for sandbags at The Riggings were issued by the Local Permit Officer for the Town of Kure Beach.

12. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management (“DCM”).
13. In 1994 DCM issued CAMA General Permit No. 13355-D, which authorized repair of the sandbags and the addition of new ones.
14. Permit No. 13355-D was modified in February 1995 to allow the filling of holes in the sandbag revetment with sandbags.
15. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could legally remain in place until May 1, 2000.
16. From July 1995 to January 1996, in order to protect Fort Fisher from the effects of erosion from the Atlantic Ocean, the State of North Carolina erected, or caused to be erected, a permanent revetment.
17. At the time that this revetment was erected, the general policy of the State of North Carolina did not permit the construction of hardened structures like the Fort Fisher revetment because of the recognition of the adverse erosion effects that such structures can cause to adjacent properties. However, the revetment was constructed under an exception to this policy for the protection of federal and state historic sites, such as Fort Fisher.
18. Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased.
19. On May 26, 2000, the Coastal Resources Commission (“CRC”) granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag until May 26, 2001.
20. The Carolina / Kure Beach Renourishment Project of 2001 included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
21. Riggings HOA made various attempts to get the United States Army Corps of Engineers to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts did not succeed.

22. The Corps of Engineers informed U.S. Representative Mike McIntyre by letter dated February 25, 2000, that the “primary reason that the (beach nourishment) project stops short of the Riggings is due to the intertidal coquina rock outcropping.” The letter further states that the “rock outcropping has been declared a natural heritage area by the North Carolina Natural Heritage Program and burying them was not an acceptable alternative.”
23. On February 4, 2002, CRC granted a variance to the Riggings HOA, extending the deadline for removal of the sandbags until May 23, 2003.
24. On May 9, 2003, CRC signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005.
25. After obtaining estimates for relocating the condominium, Riggings HOA sought financial assistance in relocating certain of the condominium buildings by contacting the North Carolina Division of Emergency Management (“NCDEM”), the Natural Heritage Trust Fund and DCM, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or FEMA grants.
26. In July 2004 the Town of Kure Beach was awarded a \$3.6 million FEMA grant to acquire a portion of the property on the ocean-side where some of the buildings comprising The Riggings are located, once these buildings were relocated across the street. The grant included \$2.7 million dollars from FEMA, with the individual unit owners of The Riggings being required to contribute the remaining \$900,000.
27. In March 2005 Riggings HOA was working with architects and surveyors to finalize plans to rebuild across the street and to remove the current structures. It also had contractors ready to start construction once the planning was complete.
28. In its most recent variance order, dated April 25, 2005, CRC said the sandbags were to be removed “prior to the expiration of the FEMA grant.”
29. In order to comply with the provisions of the grant, Riggings HOA was required to obtain the unanimous consent of the unit owners. On May 1, 2006, Riggings HOA notified the Town of Kure Beach that twenty-four of the homeowners of The Riggings had voted not to accept the FEMA pre-disaster grant. Although it is not certain why each individual owner voted as he or she did, among the reasons owners may have voted against the grant were:

- a. Each unit owner would have been required to contribute approximately \$125,000 towards the cost of relocation and reconstruction. Some homeowners lacked the financial capability to relocate.
 - b. There was no guarantee in the grant contract that the provisions of the grant, particularly the provision regarding the use of the oceanfront property, would not change.
 - c. Some owners had been informed by the holders of their mortgages that no relocation of the units could occur without their consent, and some of those lenders had expressed concerns about whether that consent would be given.
30. Subsequently, DCM was notified on June 20, 2006, by the State Hazard Mitigation Officer of NCDDEM that the grant had been terminated, notwithstanding its June 30, 2007 expiration date, and had been closed out June 1, 2006.
 31. The Carolina / Kure Beach Renourishment Project of 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but again fell approximately 1,500 feet short of The Riggings.
 32. Sometimes sandbags at The Riggings are buried under sand and sometimes they are exposed. This depends on the beach profile, which can change quickly.
 33. A former member of the U.S Army Corps of Engineers is on record as stating that the Riggings sandbags have not had any deleterious effect on surrounding property nor have they come into contact with the Atlantic Ocean except during major storm events.
 34. Whether the public can walk along the beach without detouring landward around the sandbags depends on the beach profile at the time, but even at high tide the public can get around the sandbags by going between the sandbags and The Riggings buildings closest to the ocean.
 35. The Riggings HOA proposes that the sandbags remain in place until such time as their proposed Habitat Enhancement Project, a copy of which is incorporated herein by reference, and/or a renourishment project, either privately or publicly funded, has been completed.

For the Petitioner:

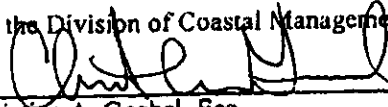


Matthew Buckmiller, Esq.

Counsel for Petitioner
Shipman & Wright, LLP
675 Military Cutoff Road, Suite 106
Wilmington, NC 28405

Date: 12/19/07

For the Division of Coastal Management:



Christine A. Goebel, Esq.
Assistant Attorney General
N.C. Department of Justice
Attorney for Respondent
9001 Mail Service Center
Raleigh, NC 27699-9001

Date: 12/19/07

ATTACHMENT C

Petitioner's and Staff'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. (Taken verbatim from their revised written response to the criteria)

Riggings Homeowner's, Inc. (herein "Riggings") applies to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow them to maintain temporary sandbags to protect their property longer than is allowed under the rules, and until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. (See Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request))

In issuing the variance extensions to the Riggings in April 2005, May 2003, February 2002 and August 2000, the Commission has stated, that "the Riggings Condominium has been imminently threatened by erosion since 1985 and that the sandbag revetment in question has been used to protect it since that time." (R.O.P., pp. 119-142) Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of the rules to the Riggings' property would result in unnecessary hardship. (Id.) Since those previous Variance Orders there has been no change in the hardships the Riggings property will suffer if it is not granted a variance.

Based on legally permissible criteria, Staff cannot demonstrate that the Riggings will suffer any less hardship now than they did previously and cannot articulate one factor which would justify their change in position that the strict application of the rules results in an unnecessary hardship to the Riggings property.¹ As such, no fundamental change has occurred to the Riggings property since

¹ The only change that has occurred to the Riggings is that some of the unit owners' denied the FEMA grant for potential relocation, however pursuant to Judge Hockenbury's remand of this case this is not a factor this tribunal can look at. Even if this tribunal were inclined to consider the FEMA Grant and the possibility of relocation as a factor or factors in their analysis, the uncontroversial evidence before the CRC was that acceptance of the FEMA grant by the Riggings was not possible. Stipulated Fact # 29 stated: (i) that the Riggings HOA, in order to accept the grant, was required to obtain the unanimous consent of the unit owners; (ii) that each unit owner would have been required to contribute approximately \$125,000.00 towards the cost of relocation and reconstruction; and (iii) that some owners had been informed by the holders of their mortgages that no relocation of the units could occur without their consent, and some of those lenders had expressed concerns about whether that consent would be given. (Id. at p. 6-7) In addition to these stipulated facts the Affidavits of Riggings homeowners demonstrate that they voted "No" towards accepting the FEMA Grant because they lacked the \$125,000.00 necessary for relocation. (Id. at p. 102-104) While only one homeowner vote in the negative was needed to turn down the FEMA grant, at least three homeowners voted "No" towards accepting the FEMA grant

their previous variance request, where the CRC and Staff found unnecessary hardships, which would be grounds for a change in position.

The stipulated evidence is that the threat to the Riggings property is as apparent and imminent as it was at those previous times when the previous variances were granted and, if anything, the situation has worsened. (*Id.* at p. 6-7) “The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.” (*Id.* (Stipulated Fact # 10) (“Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased”)) Without the sandbag revetment, the beach in front of the Riggings Condominium will be subject to increased erosion from nor’easters, hurricanes and other storms. Petitioner’s continuing efforts to convince the U.S. Army Corps of Engineers to extend the Carolina/Kure Beach renourishment project have not succeeded so far, and nothing else has happened to reduce the erosion threat. (*Id.* (Stipulated Fact # 21) More importantly, there is no evidence in the record to support any conclusions that unnecessary hardships to Petitioner’s property, based on the unique nature of the Property, would no longer exist with strict application of the rules.²

The strict application of these rules, which require removal of the sandbags, will cause serious damage and eventually destruction of the Riggings Condominium which will deprive Riggings’ owners of *any* use of their property much less a reasonable one. This forced hardship upon the residents of the Riggings Condominium is unnecessary since adherence to these rules accomplishes no significant public purpose or benefit. Allowing the sandbags to remain for the requested time will not significantly compromise the rule’s purpose, which is to preserve the ocean beach for public use, and will permit the residents of the Riggings Condominium time to explore alternative options that do not cause an extreme hardship to befall onto them, such as private renourishment of the beach if public authorities are unwilling. (*Id.* at p. 60-100) Only a short segment of the beach, approximately 300 feet, is affected by the sandbags, an insignificant area when compared to the large area of the beach immediately to the south of the Riggings on which the State has built a seawall to protect Fort Fisher State Park. (*Id.* (Stipulated Fact # 34)

There is no evidence in the record to suggest the hardships the Riggings will suffer if their sandbags are removed are any less severe than they were when their first sandbag variance was granted, and in fact the evidence is to the contrary. Accordingly this tribunal must find that the Riggings has satisfied element #1 for a variance request.

because they lacked the financial capability to provide the funds necessary for relocation. (R.O.P., pp. 102-104 (Affidavits of John Parnell, Patty Forest, and Sandy Lemma))

² Pursuant to Judge Hockenbury’s Order the proper inquiry in a variance request before the CRC is concerning the property and not the property owner. (Hockenbury Order at p. 10)

Staff's Position: No.

In the past, Staff had agreed with Petitioner that strict application of the development rules regarding how long the sandbag structures could remain caused Petitioner an unnecessary hardship. Staff agreed that the use of temporary erosion control structures, such as these sandbag structures, is to afford homeowners time to retreat from erosion by relocating their property, or to obtain beach nourishment. After initially attempting to secure nourishment for their property, and obtaining variances from the Commission to pursue this option, Petitioner discovered that, according to the Army Corps of Engineers, nourishment was not an acceptable alternative at this location due to the coquina rock located in front of their property. See Stipulated Facts #21-22 Having failed at the nourishment option in 2000, Petitioner then began trying to retreat from the erosion by attempting to secure funds to relocate the structures away from the Ocean Hazard area. See Stipulated Facts # 25-27 At the variance hearing in April 2005, Petitioner emphasized the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current Riggings site for a park, and Petitioner would retreat by rebuilding the structures to an adjacent parcel by June 2007. These new facts concerning the Petitioner's proposed retreat and relocation were the primary reason staff supported the April 2005 variance request, and its finding that an unnecessary hardship existed. Staff understood the award of the grant to be extraordinary, and noted that it appeared that Petitioner's retreat option was about to come to fruition, and so removal of the sandbag structure at that time would be an unnecessary hardship. However, in the four years since the last variance hearing, the members of the Petitioner-HOA have not been able to get the required support from its members, formally rejected the FEMA grant in 2006. Based on the current variance petition, Petitioner has apparently abandoned any retreat plan, being the one proposed in the FEMA grant or otherwise, as their current request is now to keep the sandbags "...until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publically funded, has been completed." See Stipulated Fact # 35. Based on the current stipulated facts, Staff now contends that the application of the rules, standards, or orders of the Commission will not cause Petitioner unnecessary hardships, as explained below.

In 2003, the CAMA was amended to include N.C.G.S. § 113A-115.1, which prohibited the use of erosion control structures along the ocean shoreline. The Commission's rules did allow for the continued use of "temporary erosion control structures" made of sandbags to protect only immanently threatened structures which were those within 20 feet of the erosion scarp. The installation and design standards in the CRC's rules reflect the temporary nature of the structures, and demonstrate that sandbags were not intended as permanent fortresses. Further, the Commission stated in 15A NCAC 07M.0202(e) that these temporary measures are to be used "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." This

rule demonstrates that sandbags should only offer immediate relief and time to find a permanent solution.

When evaluating this variance factor of whether “strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships,” it is instructive to look at guidance from the North Carolina Court of Appeals. The Court looked at the CAMA variance criteria in the case of Williams v. NCDENR, DCM and CRC, 144 N.C. App. 479, 548 S.E. 2d 793 (2001). In Williams, the Court stated,

“We hold that to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner’s ability to make *reasonable use* of his property.”

Id. at 487 (emphasis added). The standard is not, as Petitioner appears to contend, that no “fundamental changes” have taken place since the last variance.

In evaluating this variance criteria for this variance hearing based on the facts stipulated to by the parties, Staff contend that there are few *reasonable* uses for property that has been imminently threatened behind a sandbag structure for the last 24 years, and which has suffered damage from erosion multiple times during this period. Staff believes that any reasonable expectations of use for this property should be decreasing with every passing hurricane, nor’easter, and storm, as the property continues to suffer from the effects of the continuing erosive forces of the ocean, something which is common to Ocean Hazard areas all along the North Carolina coast. Additionally, the amount of time the bags have been allowed to remain is far beyond the scope of what the rules allow, and the sandbag structure today has taken on the characteristics of a permanent erosion control structure which is prohibited under the CAMA. As the reasonable uses for this property continue to erode with the continuing erosive forces placed on the property by the Atlantic Ocean, the strict application of the Commission’s time limits for sandbag structures does not cause the Petitioner and its property unnecessary hardship.

Finally, Petitioner offers no proposed solution which is approved by the Commission and which is different from those offered in the past. As stated above, the Commission’s approved responses to oceanfront erosion are retreat through demolition or relocation, or nourishment. This Petitioner was afforded extra time through earlier variances to pursue, albeit unsuccessfully, beach nourishment for the area in front of its property. There is no evidence that the circumstances which prevented it in the past have changed and would now allow nourishment in the near future. Additionally, while Petitioner had hopes to retreat from the erosion through relocation, and had taken some concrete steps to this end including obtaining the grant, having discussions with architects and other consultants, and securing a variance to continue with the

relocation process, this process has apparently now been abandoned by Petitioner.

Instead, Petitioner now proposes the “Habitat Restoration Project” which may very well be illegal based on the hardened structures ban of N.C.G.S. § 113A-115.1. In the alternative, Petitioner also proposes a new nourishment project, either privately or publically funded, which would likely cover the natural heritage and hard-bottom habitat coquina rock. Both of these proposals may not even be permissible, may be illegal, no funding has been identified, and so staff feels they are not real steps toward finding a permanent solution to Petitioner’s erosion problem.

In conclusion, staff contend that the strict application of the applicable development rules, standards, or orders issued by the Commission” do not cause the petitioner unnecessary hardships because, using the Court of Appeals’ reasoning from Williams for this factor, the Petitioner can make reasonable use of its property, despite the strict application of the sandbag time limits, because the reasonable uses for Petitioner’s property have been significantly reduced as the erosional forces of the Atlantic Ocean continue to impact Petitioner’s property. Petitioner attempted to get nourishment and abandoned that effort, then attempted retreat through relocation and abandoned that effort. Now, it has proposed keeping the sandbags until completion of its proposed habitat project, which is likely illegal, is built, or until a theoretical but not planned or permitted future nourishment project, with no identified source of funding, is completed. As Petitioner has tried and failed at both the retreat and nourishment options, and now offers no concrete plan to resolve the continuing effects of erosion in the short-term, the reasonable uses for this property are greatly diminished, and so strict enforcement of the Commission’s time limits for sandbags will not cause Petitioner unnecessary hardships.

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. (Taken verbatim from their revised written response to the criteria)

The next step in the variance process is that CRC is required to determine whether the Riggings hardships that would result from strict applications of the rules arise from conditions peculiar to the property. This tribunal must focus on the peculiar conditions of the Riggings property, and not the Riggings unit owners.¹ Accordingly, the fact that the Riggings has used the sandbags for twenty (20) years is irrelevant. The factors that the CRC must examine in determining whether would be hardships result from conditions that are peculiar to the property are the location, size, and/or topography of the Property. There is no evidence to suggest that the Riggings is not unique or that it does not suffer hardships solely because it is unique.

The Riggings is unlike any other property in the State of North Carolina that has applied for or otherwise been eligible for a variance from the CRC in order to keep sandbags in front of their property for a period longer than allowed by their rules. The Riggings is truly stuck between a rock and a hard place, and the CRC, supported by Staff, have concluded that the aforementioned conditions are peculiar to the Riggings' Property when issuing its previous Orders. (R.O.P., pp. 119-142) There is no other property in the State of North Carolina where a coquina rock natural barrier was removed by the government for a public purpose: namely the construction of U.S. Highway 421. During the 1920's, some of the coquina rock outcropping in the near vicinity of the Riggings was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project. (Stipulated Fact #3) The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide. (Id. at #4) The parties have stipulated that coquina rock outcroppings provide a natural barrier against the threat of beach erosion; outcroppings that have been designated as a natural heritage area and accordingly, there is no dispute that due to the removal of the coquina rock, that protection no longer exists for the Riggings. (Id. at #6)

Additionally, the Riggings is the only property in the State of North Carolina that is located immediately adjacent and contiguous to a North Carolina State Park, Fort Fisher. After being threatened by erosion for a period of many years, Fort Fisher was permitted to construct a permanent revetment or hardened structure, which at the time it was constructed was contrary to the general policy of the State of North Carolina against the construction of hardened structures. (Id. at #16-18)

The hardened structure prohibition was adopted in recognition of the adverse erosive effects that such structures can cause to adjacent property. (Id.) This policy was abandoned, at least

¹ Denial of the FEMA grant by some of the Riggings unit owners and the fact that the Riggings owned additional property where the project might be relocated is not a factor that this tribunal can examine. (Hockenbury Order at p. 9-11)

legislatively, because it was believed that Fort Fisher was worthy of protection. (Id.) From July 1995 to January 1996, the State of North Carolina erected the revetment, and after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased, meaning the State of North Carolina by its direct actions caused the Riggings shoreline to erode. (Id.)

In addition, the Riggings is also the only property in the State of North Carolina located in a municipality (Town of Kure Beach) and a county (New Hanover), which have undertaken large beach renourishment projects using public money on three separate occasions since 2000. (Id. at #21) The Carolina/Kure Beach Renourishment Projects of 2001 and 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but fell approximately 1,500 feet short of the Riggings Condominium. These projects have not included the beach front adjacent to the Riggings purportedly, because of a policy that prevents burying of coquina rock outcroppings. (Id. at #22) The Riggings HOA made various attempts to get the United States Army Corps of Engineers (herein “Corps of Engineers”) to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts were not successful. (Id. at #21) The parties have stipulated that coquina rock has been exposed and then buried on the beachfront just north of the Riggings project during both of the two prior public beach renourishment projects. (Id. at #9) In addition, the beach renourishment to the north of the Riggings has further exacerbated the erosion in front of the Riggings as the increased beach frontage to the north of the Riggings due to renourishment now serves as a “feeder beach” which captures ocean sands that would normally feed down to the Riggings to provide the Riggings increased shoreline. (R.O.P., p. 78)

As such, there is no new evidence, after this tribunal had previously found the Riggings property peculiar, to suggest the hardships the Riggings property would suffer if the Riggings were forced to remove their sandbags did not result from conditions peculiar to their Property; namely the beach renourishment projects to the North and the Fort Fisher revetment to the South which have increased the erosion of sand in front of the Riggings. Indeed, there is no more unique property in the State than the Riggings and there is no evidence to indicate otherwise.

Staff's Position: No.

As indicated in prior Staff Recommendations and Orders of the CRC, Staff had agreed that Petitioner’s unnecessary hardship results from conditions which were peculiar to the Petitioners’ property--specifically the location of coquina rock formations preventing the placement of sand in past nourishment projects, and the Fort Fisher rock revetment. While both of these structures still exist, Staff has now argued in the previous factor that the Petitioner no longer has an unnecessary hardship. As the statutory variance criteria is, “[d]o such hardships result from conditions peculiar to the petitioner’s property, such as location, size, or topography of the property?”, it is logical that if there are no hardships identified in the first criteria, then there can

not be an unnecessary hardship that results from conditions peculiar to the property. That is what is now being argued by Staff.

Petitioner's argument focuses on the long history of the coquina rock in the area near its property, and on the Fort Fisher revetment, and argues that these features have (1) prevented the beach in front of Petitioner's property in the inclusion of a nourishment project, and (2) have increased erosion on the beach in front of Petitioner's property. The coquina being the Corps' reason not to include the Riggings in its public nourishment project, while unfortunate for Petitioner, does not constitute an unreasonable use of Petitioner's property which causes Petitioner unnecessary hardships. This is because beach nourishment is not an automatic right of an oceanfront owner, and so causes no unnecessary hardships to Petitioner. Also, Stipulated Fact #18 states, "Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased." Any effects on the erosion rate in front of Petitioner's property by the construction of the revetment at Fort Fisher were temporary and occurred in 1995-96. As there has been no significant increases in the erosion rate at Petitioner's property caused by the Fort Fisher revetment, the only hardship which remains is the regular erosive forces of the Atlantic Ocean. There are no stipulated facts that these regular erosive forces are caused by the coquina or Fort Fisher revetment. These regular erosive forces are certainly not peculiar to Petitioner's property, and are no different than the many others properties in the Ocean Hazard AECs, where the Commission's rules acknowledge that such areas have a "special vulnerability to erosion or other adverse effects of sand, wind, and water. . ." and have a "substantial possibility of excessive erosion or flood damage." 15A NCAC 7H.0301.

As Petitioner suffers no unnecessary hardship, no unnecessary hardship is caused by conditions peculiar to Petitioner's property. Additionally, the hardship of erosion is a known hardship for oceanfront owners, and was acknowledged by the Commission's rules, specifically in the Ocean Hazard AECs definitions enacted in 1977. There is nothing peculiar or unique about the forces impacting Petitioner's property. Instead, this "special vulnerability to erosion or other adverse effects of sand, wind, and water..." is common to all oceanfront owners in the Ocean Hazard AECs.

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

Petitioner's Position: No. (Taken verbatim from their revised written response to the criteria)

“Actions” taken by the petitioner is the third statutory requirement for a variance request and there is no evidence to suggest that any action of the Riggings caused the erosion problems on its Property. And the evidence shows that the Riggings has been as proactive as possible to find a solution to their erosion problems.¹ The Riggings Condominium was built in 1984. As with many other threatened structures on the oceanfront when erosion problems appeared, sandbags were used to protect the condominium. (*Id.* at #10) The initial property lines extended 380 feet from Highway 421 towards the Atlantic Ocean. The Riggings oceanfront property now has diminished to almost half of its original size. The Riggings owners had no way of knowing that designation of the coquina rock outcropping as a Registered Natural Heritage Area, would make the beach in front of the Riggings ineligible for the Carolina/Kure Beach renourishment project. Similarly, the Riggings had no part in the construction by the Corps of Engineers of the Seawall Revetment which further exacerbated the Riggings’ erosion. It is the combined action of State and Federal agencies that have created these potential hardships and there is no evidence at all to suggest that any action the Riggings has taken has caused the potential hardships for their property should their variance request be denied.

Furthermore, the Commission, in concurrence with Staff’s previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that the Riggings hardship does not result from actions it has taken. (R.O.P., pp. 119-142) Accordingly, there has been no additional evidence submitted since those previous variance requests were granted which would support the notion that the hardship on the Riggings would result from any actions it has taken.

Staff's Position: Yes.

Staff notes that Petitioner’s argument, that they did not cause the coquina rock’s National Heritage Area designation and were not involved in construction of the Fort Fisher rock revetment, ignore the fact that these two things have existed since 1982 and 1995, respectively. Petitioner was first aware of the erosion problems at their site in 1985 when the structures became imminently threatened and the sandbag structures were first installed. Additionally, the Commission’s rules, enacted in 1977, themselves acknowledge the “special vulnerability to erosion or other adverse effects of sand, wind, and water. . .” which is common to all oceanfront

¹ Consideration of whether the Riggings could relocate or the denial of the FEMA Grant is again something this tribunal cannot consider. The FEMA Grant cannot be considered, and even if this tribunal wanted to there is no evidence to suggest that i) it has caused the erosion problems to Petitioner’s property, which is the analysis the CRC should undertake, as those problems were caused by the combined action of State and Federal agencies.

owners in the Ocean Hazard AECs, including Petitioner. Since the time the erosion at this site was apparent to Petitioner, it has attempted and failed at getting a nourishment project extended to its area of the beach, and then later, to complete its retreat through relocation plan. This Commission had even granted Petitioner extensions for its sandbag removal deadline to allow Petitioner the ability to fully explore both these options to address their erosion problem. Nonetheless, Petitioner has now abandoned its attempts to retreat from the erosion through relocation of its structures, and is focusing now on a proposed hardened structure and/or nourishment.

Petitioner has now proposed the possibility of a future publically or privately funded nourishment project which has not been designed, permitted, or a funding source identified. Petitioner proposes this despite knowing that at least since the 2000, the Corps indicated that the coquina rock would likely prevent nourishment being placed at or near the Riggings. Additionally or in the alternative, Petitioner also proposes a habitat restoration plan that is likely in conflict with the hardened structures ban of N.C.G.S. § 113A-115.1, and also has not been permitted or a funding source identified. These proposals, which will certainly be costly and both do not identify a funding source, seem highly unlikely to Staff to come to pass, as Petitioner has indicated in Stipulated Fact # 29 that “some homeowners lacked the financial capability (of \$125,000) to relocate” when voting on the FEMA grant in 2006. Staff believes that the chances are slim that homeowners unable to afford the \$125,000 supplemental relocation costs in 2006 could now all afford to fund a private nourishment or habitat restoration plan.

Despite the lack of concrete details for either plan now proposed, Petitioner requests that they be able to keep the sandbags until one of these projects is completed. Staff is very concerned that as in the past, Petitioner will make promises that they have a solution to the erosion problem affecting their property, but could easily again fail to implement a permanent solution and the bags would remain even longer then the 24 years they have existed thus far. Staff is also concerned that Petitioner’s request to keep the bags until one of it’s solutions is complete, is much too open-ended. These projects may be illegal or not-permittable and if never completed, the bags would remain indefinitely. For these reasons, any hardships Petitioners might face, though Staff argue above that there are no unnecessary hardships affecting Petitioners now, are a result of their own inability to react to their long-standing situation with a long-term solution of nourishment or retreat through relocation.

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

Petitioner's Position: Yes. (Taken verbatim from their revised written response to the criteria)

The CRC's main objective for the ocean hazard area AEC is to eliminate unreasonable danger to life, property, and amenities. *See 15A NCAC 7M.0201*. Other important objectives include achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development, minimizing loss of 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, reducing the public costs of inappropriately sited developments, and protecting present common law and statutory rights of access to, and use of the lands and waters of, the coastal area. N.C. Gen. Stat. § 113A-102.

Extension of the variance is consistent with these aforementioned objective/purposes by avoiding the financial waste that would result from exposing the Riggings Condominium to erosion and eventual damage and destruction before the owners can explore viable alternative options. It will also reduce potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach.

Issuing the requested variance will also preserve substantial justice. The Riggings is in a unique situation since one government agency requires removal of the sandbags but allows protection through community beach nourishment projects, while another government agency has prohibited beach nourishment for the Riggings because the area has been designated a Registered Natural Heritage Area by yet a third government agency. The only stated purpose that might be compromised if the variance is extended is the public right of access to, and use of, the beach. However, the citizens of North Carolina have not been inconvenienced by the maintenance of the sandbags since even at high tide the public can get around the sandbags by going between the sandbags and the Riggings buildings closest to the ocean. (*Id.* at #34). In addition there would be no harm in granting the variance request as the Corps of Engineers has stated that the sandbags at the Riggings have had not deleterious effect on surrounding property or property owners. (*Id.* at #33, p. 101 (Affidavit of Tom Jarrett, Former Member of United States Army Corps of Engineers))

For the aforementioned reasons, the variance will secure the public safety and welfare as well.¹

Furthermore, while there is no harm done by permitting a variance extension in this case, the denial of a variance will have a profoundly deleterious impact on all members of the Riggings HOA who will be forced to leave their homes and the good memories that reside therein. In addition, a denial would send a clear message to the citizens of New Hanover County and North Carolina that the government would intentionally kick its own citizens out of their homes for seemingly no important or compelling governmental purpose. Most would not find substantial justice in that result.

The record evidence in this matter is that the Riggings, at its own expense, would finance its own beach renourishment. Staff should concede that sandbags are allowed to remain if a property is planning to take place in beach renourishment but fails to consider the Riggings personal beach renourishment funded entirely by the Riggings as a viable alternative. The owners of the Riggings have not sought and do not seek to have the sandbags remain permanently. Instead, the Riggings see it as a temporary solution. Through the variance request *sub judice* the Riggings seeks to implement a more permanent solution; one that other property owners in that area, through the government, have already had the benefit of, beach renourishment. The most recent variance request by the Riggings seeks simply to have owners at the Riggings be fed out of the same spoon as other property owners to the north and south of the Riggings. If the variance request were permitted, for the period before beach renourishment the public would continue to have full access to the beach adjacent to the Riggings and the sandbags would continue to serve a viable function of protecting threatened structures, and the property will therefore be saved. For years, the given reason why the beach in front of the Riggings has not been renourished was that the US Army Corps of Engineers

¹ If this tribunal is inclined to consider the denial of the FEMA Grant, which would be impermissible pursuant to Judge Hockenbury's Order it should consider the following. The Riggings had no option but to deny the FEMA Grant to move their homes. The FEMA grant required a 100% vote from all Riggings homeowners. Even one vote in the negative would nullify the grant. Moreover, under the Riggings HOA Declaration and Bylaws, a termination of the Riggings HOA would likely be needed to relocate the Condominium. This would require an affirmative vote of 100% of all the Riggings homeowners, which was not achieved. Riggings HOA members voted in the negative for several reasons. First, the grant was undervalued in that it would cost each homeowner approximately \$125,000 to relocate. Most, if not all, Riggings homeowners lacked the financial capability to provide such substantial monetary funds. Second, it was not guaranteed in the Grant contract that the provisions of the Grant, particularly the provision regarding the use of the oceanfront property, would not change. Third, Riggings homeowners were told by the mortgage holders on their homes that their mortgages could not be transferred to the new location. Finally, Riggings HOA was prohibited from building on the "relocation" property due to the Town of Kure Beach's Board of Adjustment Ruling on April 28, 1992, and their subsequent reaffirmation of that ruling on September 22, 2000. Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.

would not permit coquina rock seaward of the Riggings to be covered. However, what the Corps of Engineers apparently did not know or consider was that the coquina rock outcropping seaward of the Riggings was removed for a public purpose, thereby depriving the Riggings of the natural protection that other property owners to the North and South have. The Corps also failed to consider that the beach renourishment projects undertaken in 2000 and 2007 uncovered and then recovered coquina rock, thereby eliminating their stated reasons as justification for not providing the owners at the Riggings the same protection that other property owner in Pleasure Island have otherwise been entitled to.

Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that issuing the Riggings a variance request is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice. (R.O.P., pp. 119-142)

Staff can't articulate one legitimate reason why the variance should be denied other than the fact that the Riggings owner have been granted variances before, and if this tribunal was inclined to base their variance decision on that fact, this tribunal would again be making a variance decision based on the characteristics and conditions of the property owners and not the property, which would violate Judge Hockenbury's instructions in his Order that the proper inquiry in a variance request is concerning the property and not the property owner. (Page 10 of Judge Hockenbury Order) Accordingly there is no reason, based on the consideration of legally permissible criteria, why the CRC should or can deny the Riggings variance as the Riggings has satisfied all four elements to be granted a variance request.

Staff's Position: No.

Staff understands that one of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property, and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff disagrees. Staff believes that while the sandbags were meant to be a temporary band-aid while Petitioner sought nourishment and then retreat through relocation, the bags have instead inflated expectations of what reasonable uses are for the property. Petitioner continues to rely on the sandbags to protect or reduce damage from storms, instead of finding a realistic lasting solution to erosion problems. Instead of learning from prior failed attempts at nourishment and retreat through relocation, Petitioner now proposes more of the same regarding nourishment, as well as a problematic habitat restoration plan which is likely a hardened structure banned by the CAMA.

The rule authorizing the use of sandbags is found under the heading of “Specific Use Standards for Ocean Hazard Areas” and specifically describes the allowable ocean shoreline erosion control activities. These standards make it clear that 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 bulkheads, seawalls, revetments, jetties, groins and breakwaters.”

15A NCAC 7H.0308(a)(1)(b). To allow property owners some temporary relief from erosion, sandbags are allowed only in very limited circumstances. The rules only allow sandbags in very limited sizes, in very limited situations, in very limited locations, and for a very limited period of time. Petitioner’s contentions that the intent of the rule is to allow them to take whatever measures are necessary to protect their structures, for how ever long that may take the Petitioner, if those measures are even ever taken, is plainly contradicted by the rules. The Petitioner has already been afforded an extra nine years by the Commission, in addition to the 13 initial years the sandbags were allowed. The previous extensions of one, two, or three years at a time, were granted while Petitioner was taking specific actions for nourishment and then retreat through relocation. These short, defined extensions in order to take specific action were deemed by the Commission to be within the spirit of the rules regarding attempts to eliminate unreasonable danger to life, property, and amenities. However, the current open-ended, undefined request based on the completion of one of the two proposed plans by Petitioner, both of which are questionably permissible or likely illegal, and lack clear funding sources simply is not within the spirit of the Commission’s rules for temporary erosion control structures.

Petitioner’s argument also fails to address the importance of the Commission’s other stated goals of preventing encroachment of permanent structures on public beach areas, of preserving the natural ecological conditions of the barrier dune and beach systems, and protecting present common law and statutory rights of access to, and use of the lands and waters of the coastal area. While Petitioner points to Stipulated Fact # 34 and notes that the public can pass, though sometimes by walking up near Petitioner’s property, this ignores the continued existence of the sandbag structure on the public beach area and the increasing encroachment of the buildings impedes the public’s rights of access and use of the beach area. While the public may be able to pass by, it certainly cannot use the beach where the sandbags are located, a large area of the public’s beach shown in the site photographs included in the record. As argued above, the existing sandbag structure is continually losing its “temporary” characteristics and is becoming a more permanent illegal hardened erosion control structure, contrary to the CAMA and the Commission’s rules and objectives.

In addition to Petitioner's request not being consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission as described above, it also does not secure the public safety and welfare as required by this variance factor. Petitioner simply argues that it meets this criteria by avoiding "potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach." While this "harm" is speculative and could be avoided altogether if the structures were relocated as once proposed, Petitioner also ignores the impacts to public safety and welfare from the existing sandbags which would continue if this variance is granted and the bags are allowed to remain. In addition to the bags impeding the public's rights of access and use of the beach area, these bags, some of which fall subject to the ocean's forces and wear out, can cause real safety concerns for the public, primarily those of entanglement in derelict bags. Examples of this can be seen in the site pictures in the accompanying power-point presentation.

Finally, this variance factor requires Petitioner to demonstrate that the requested variance would preserve substantial justice. Petitioner claims that because it is in a unique position where DCM requires removal of the sandbags but the Corps won't allow nourishment because of the coquina designation by the heritage designation, and because the impacts on the public beach are not all that bad since the public can still pass along the beach even at high tide, substantial justice would be preserved.

Staff contend that instead, substantial justice would not be preserved if a time extension was granted for Petitioner's sandbags until their newly proposed nourishment project or habitat restoration plan is completed. It appears to Staff that Petitioners are no longer working diligently to seek nourishment, to implement their habitat restoration plan, and have abandoned attempts to relocate the buildings, as evidenced by the lack of a retreat/relocation plan proposed in this variance petition. While past variances were granted for short, defined periods of time in order to take specific prescribed steps, first for nourishment and then for retreat through relocation, Petitioner's current proposal is vastly different. The current proposals have significant problems in that they may not be permissible, may be illegal, and have no clear source of funding. Petitioner has been granted extraordinary help by this Commission through the past time extensions and afforded enough time to make real attempts at nourishment and retreat through relocation. As attempts at both these responses to erosion endorsed by the Commission's rules have failed or been abandoned by Petitioner, to grant an extension now to re-try these options would not preserve substantial justice. Allowing the bags to remain until one of those plans is completed, if ever, would be no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

**STAFF RECOMMENDATION
ATTACHMENT D**

Petitioner's Variance Request Materials

Including:

- Variance Form (DCM Form 11)
- Answer to four variance criteria
- Copy of FEMA grant document
- May 1, 2006 letter from Petitioner to Mayor
- The Riggings Beach Fill Plan
- The Riggings Habitat Restoration Plan
- Affidavit of Tom Jarrett
- Affidavit of John Parnell
- Affidavit of Patty Forest
- Affidavit of Sandy Iemma

S Shipman & Wright, L.L.P.

A T T O R N E Y S A T L A W

11 South Fifth Avenue • Wilmington, North Carolina 28401
(T) 910.762.1990 • (F) 910.762.6752 • 800.762.1990

Gary K. Shipman
Board Certified Civil Trial Specialist
National Board of Trial Advocacy

William G. Wright

Angellque Adams

Brian A. Geschickter

August 22, 2006


Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 27699

Re: Riggings Home Owners Association CAMA Variance Request

To Whom It May Concern:

Please find enclosed CAMA Variance Request for Riggings Home Owners Association with referenced attachments A-D and exhibits A-D. Please do not hesitate to contact me should you have any questions.

Sincerely,



Jolen B. Jozefowicz
Paralegal

/bj

Enclosures

cc: Attorney General's Office
Ms. Jean Cashion

PRACTICE AREAS

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CAMA VARIANCE REQUEST

06-33

Petitioner supplies the following information:

Riggings Homeowners' Association
1437 Forth Fisher Blvd.
Kure Beach, NC 28449

Attorneys:
Gary Shipman
William Wright
Shipman & Wright, L.L.P.
11 South Fifth Avenue
Wilmington, NC 28401
Telephone: (910) 762-1990
Facsimile: (910) 762-6752
gshipman@shipmanlaw.com
wwright@shipmanlaw.com

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?

Erect and temporarily maintain a sandbag revetment on the ocean shoreline in front of the Riggings Condominium.

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

Rules 15A NCAC 7H.0308 (a)(2)(F) and (N).

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

Without the sandbags' protection the Riggings Condominium property will ultimately fully erode and the condominium on such property will be destroyed.

Can you obtain a permit for a portion of what you wish to do? N 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.

We are not allowed to maintain sandbags to protect the Riggings condominium. The removal of sandbags will in turn lead to the complete erosion of the Riggings property, extinguishing all uses of the property.

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).]

See Attachment A(1)

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

See Attachment A(2)

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

See Attachment A(3)

- 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.

See Attachment A(4)

Please attach copies of the following:

Permit Application and Denial documents

Site Drawing with Survey and Topographical Information (NEED)

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.]

1. *See Attachment B: Facts Relied Upon.*
2. *See Attachment C: Site Drawing with Survey and Topographical Information.*

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.]

See Attachment D for Relevant Documents.

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

Date: 8/22/2006

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 22nd day of August, 2006.


Signature of Petitioner or Attorney

ATTACHMENT A

1. *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.*

In issuing the variance extensions in April 2005, May 2003, February 2002 and August 2000, the Commission has stated, that "the Riggings Condominium has been imminently threatened by erosion since 1985 and that the sandbag revetment in question has been used to protect it since that time." See Finding of Fact # 2 in the Final Orders attached as Exhibit A for 2005, Exhibit B for 2003, Exhibit C for 2002, and Exhibit D for 2000. Without the sandbag revetment, the beach in front of the Riggings Condominium will be subject to increased erosion from nor'easters, hurricanes and other storms.

Furthermore, the Commission concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of these rules to Petitioner's property will result in unnecessary hardship. See Conclusion of Law #4 in the respective attached Final Orders.

Today, the threat to the condominium is as imminent as it was at those previous times and, if anything, has worsened. Petitioner's continuing efforts to convince the U.S. Army Corps of Engineers to extend the Carolina/Kure Beach renourishment project have not succeeded so far, and nothing else has happened to reduce the erosion threat.

The strict application of these rules, which require removal of the sandbags, will cause serious damage and eventually destruction of the Riggings Condominium which will deprive Riggings' owners of any use of their property much less a reasonable one. This forced hardship upon the residents of the Riggings Condominium is unnecessary since adherence to these rules accomplishes no significant public purpose or benefit. Allowing the sandbags to remain for the requested time will not significantly compromise the rule's purpose, which is to preserve the ocean beach for public use, and will permit the residents of the Riggings Condominium time to explore alternative options that do not cause an extreme hardship to befall onto them. Only a short segment of the beach, approximately 300 feet, is affected by the sandbags, an insignificant area when compared to the large area of the beach immediately to the south of the Riggings on which the State has built a seawall to protect Fort Fisher State Park. Similarly, interference with public use of the beach is minimal since the sandbags are covered by sand much of the time, and even when uncovered they allow persons to pass between the high tide line and the building,

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

Our situation is unique in that we are located at the very end of approximately 3 miles of renourished public beach. A beach renourishment program for Kure Beach was completed in May 2001 and stopped less than 1500 feet north of the Riggings property because of three coquina rock outcroppings. These rocks, which at one time were quarried for use in highway projects, are now considered "Registered Natural Heritage Areas" and cannot be covered with sand or disturbed in any manner. Thus the Riggings

have been prevented so far from being a part of any beach nourishment program, even though a far greater portion of the coquina rock outcropping is north of the Riggings, not directly in front of it. In a recent renourishment program approximately 2500 feet north of the Riggings, other beach areas containing coquina outcroppings were included in the renourishment project and covered by sand.

Adjacent to the property to the south, the U.S. Army Corps of Engineers has constructed a rock seawall to protect Fort Fisher State Park. Between the rock seawall and the renourished part of the beach, the force from the incoming tides is channeled onto the beach in front of the Riggings, accelerating the erosion process.

The Riggings is truly stuck between a rock and a hard place, and the Commission has concluded that the aforementioned conditions are peculiar to the Riggings' Property when issuing the Final Orders in April 2005, May 2003, and August 2000. *See* Conclusion of Law #5 in the respective attached Final Orders.

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

The Riggings Condominium was built in 1984. As with many other threatened structures on the oceanfront when erosion problems appeared, sandbags were used to protect the condominium. The initial property lines extended 380 feet from Highway 421 towards the Atlantic Ocean. The Riggings oceanfront property now has diminished to almost half of its original size. The Petitioners had no way of knowing that designation of the coquina rock outcropping as a Registered Natural Heritage Area, would make the beach in front of the Riggings ineligible for the Carolina/Kure Beach renourishment project. Similarly, we had no part in the construction by the Corps of Engineers of the Seawall Revetment which further exacerbated the Riggings' erosion. It is the combined action of State and Federal agencies that have created these hardships.

4. 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 CRC's main objective for the ocean hazard area AEC is to eliminate unreasonable danger to life, property, and amenities. *See 15A NCAC 7M.0201*. Other important objectives include achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development, minimizing loss of 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, reducing the public costs of inappropriately sited developments, and protecting present common law and statutory rights of access to, and use of the lands and waters of, the coastal area.

Extension of the variance is consistent with these aforementioned objective/purposes by avoiding the financial waste that would result from exposing the Riggings Condominium to erosion and eventual damage and destruction before the owners can explore viable alternative options. It will also reduce potential debris from the Riggings that can harm other structures.

Issuing the requested variance will preserve substantial justice. The Riggings is in a unique situation since one government agency requires removal of the sandbags but allows protection through community beach nourishment projects, while another government agency has prohibited beach nourishment for the Riggings because the area has been designated a Registered Natural Heritage Area by yet a third government agency.

The only stated purpose that might be compromised if the variance is extended is the public right of access to, and use of, the beach. However, this restraint on public beach access is de minimis since any restraint on public use will be temporary because 1) the sandbags are normally covered by sand and 2) the beach area in question constitutes only a small portion of Kure Beach, which is sandwiched between the three mile long Kure Beach renourishment project and the over one-half mile long Fort Fisher State Park seawall.

For the aforementioned reasons, the variance will secure the public safety and welfare as well.

Similarly, while it may be argued that the Riggings HOA has "had their chance," they had no option but to deny the FEMA Grant to move their homes. The FEMA grant required a 100% vote from all Riggings homeowners. Even one vote in the negative would nullify the grant. Moreover, under the Riggings HOA Declaration and Bylaws, a termination of the Riggings HOA would likely be needed to relocate the Condominium. This would require an affirmative vote of 100% of all the Riggings homeowners, which was not achieved.

Riggings HOA members voted in the negative for several reasons. First, the grant was undervalued in that it would cost each homeowner approximately \$125,000 to relocate. Most, if not all, Riggings homeowners lacked the financial capability to provide such substantial monetary funds. Second, it was not guaranteed in the Grant contract that the provisions of the Grant, particularly the provision regarding the use of the oceanfront property, would not change. See "Attachment D." Third, Riggings homeowners were told by the mortgage holders on their homes that their mortgages could not be transferred to the new location. Finally, Riggings HOA was prohibited from building on the "relocation" property due to the Town of Kure Beach's Board of Adjustment Ruling on April 28, 1992, and their subsequent reaffirmation of that ruling on September 22, 2000. See "Attachment D."

Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.

Furthermore, while there is no harm done by permitting a variance extension in this case, the denial of a variance will have a profoundly deleterious impact on all members of the Riggings HOA who will be forced to leave their homes and the good memories that reside therein. In addition, a denial would send a clear message to the citizens of New Hanover County and North Carolina that the government would intentionally kick its own citizens out of their homes for seemingly no important or compelling governmental purpose. Most would not find substantial justice in that result.

Petitioner's Attachment B

(Omitted because it was their proposed Stipulated Facts, which are replaced by the Final Stipulated Facts found at Attachment B to the Staff Recommendation)

**NORTH CAROLINA
PRE-DISASTER MITIGATION PROPERTY ACQUISITION AND
RELOCATION PROJECT GRANT AGREEMENT**

THIS PRE-DISASTER MITIGATION PROPERTY ACQUISITION AND RELOCATION PROJECT GRANT AGREEMENT (the Agreement) is entered into by and between the State of North Carolina, Department of Crime Control and Public Safety, Division of Emergency Management, Raleigh, North Carolina (hereinafter referred to as the "AGENCY/GRANTEE"), and Town of Kure Beach (hereinafter referred to as the "RECIPIENT/ SUBGRANTEE").

WHEREAS, Congress authorized financial assistance to States and communities for Pre-Disaster Mitigation project and activities; and

WHEREAS, the Federal Emergency Management Agency recognizes a need to provide States and communities with much needed source of pre-disaster mitigation funding for cost-effective hazard mitigation activities that are part of a comprehensive mitigation program, and that reduce injuries, loss of life, and damage and destruction of property; and

WHEREAS, the North Carolina Emergency Management Act, N.C.G.S. §166A-1 *et seq.*, N.C.G.S. §166A-6.01(b)(2)a.3. (Senate Bill 300), N.C.G.S. §143B-476; §203 and §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 *et seq.*, *as amended*, §102 of the Disaster Mitigation Act of 2000, P.L. 107-73, 115 Stat. 651, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002 and Catalog of Federal Domestic Assistance (CFDA) §83.557 authorize the relationship as described herein; and

WHEREAS, the RECIPIENT/SUBGRANTEE represents that it is fully qualified, possesses the requisite skills, knowledge, qualifications and experience to provide the services identified herein, and does agree to perform as described herein;

NOW, THEREFORE, the AGENCY/GRANTEE and the RECIPIENT/ SUBGRANTEE do mutually agree as follows:

(1) SCOPE OF WORK

The RECIPIENT/SUBGRANTEE shall draft the Pre-Disaster Mitigation Property Acquisition and Relocation Project, as described in Attachment A to this Agreement, in accordance with the approved scope of work indicated therein, the estimate of costs indicated therein, the allocation of funds indicated therein, and the terms and conditions of this Agreement.

RECIPIENT/SUBGRANTEE shall not deviate from the approved Project and the terms and conditions of this Agreement. RECIPIENT/SUBGRANTEE shall comply with any and all applicable statutes, rules, regulations, ordinances, codes and standards in performing work funded under this Agreement.

(2) **FUNDING AND INSURANCE**

The AGENCY/GRANTEE shall provide Pre-Disaster Mitigation Program Funds for costs incurred in performing the Project identified in Attachment A as follows:

Federal Share	\$ 2,713,218
Local In-kind Match	\$ 904,406
TOTAL	\$ 3,617,624

Allowable costs shall be determined in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*, §102 of the Disaster Mitigation Act of 2000; 44 C.F.R. Part 13; OMB Circular A-87, N.C.G.S. §166A-6.01(b)(2)b. (Senate Bill 300), and other applicable Pre-Disaster Mitigation Program guidance.

The RECIPIENT/SUBGRANTEE shall utilize the forms entitled "Request for Advance" and "Cost Report" to obtain funds under this agreement. RECIPIENT/ SUBGRANTEE shall not receive funds under this agreement if it does not submit a Cost Report or Request For Advance form. To receive funds under this agreement, RECIPIENT/ SUBGRANTEE shall complete the Designated Agent Form and forward it to the appropriate Division of Emergency Management Pre-Disaster Mitigation Program Project Manager. As per Paragraph 12(d) of this Agreement, if RECIPIENT/SUBGRANTEE designates different representatives or designated agents, RECIPIENT/SUBGRANTEE shall notify AGENCY/ GRANTEE.

To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form. These forms are hereby incorporated into this Agreement by reference. Following full execution of this Agreement, the Fiscal Section of the Department of Crime Control and Public Safety will forward the Cost Report to the RECIPIENT/ SUBGRANTEE. (See sample Cost Report attached). RECIPIENT/ SUBGRANTEE shall complete the Cost Report and attach appropriate invoices or other appropriate documentation and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. AGENCY/ GRANTEE will reimburse RECIPIENT/SUBGRANTEE for eligible costs

*Don't have **

RECIPIENT/SUBGRANTEE shall not deviate from the approved Project and the terms and conditions of this Agreement. RECIPIENT/SUBGRANTEE shall comply with any and all applicable statutes, rules, regulations, ordinances, codes and standards in performing work funded under this Agreement.

(2) FUNDING AND INSURANCE

The AGENCY/GRANTEE shall provide Pre-Disaster Mitigation Program Funds for costs incurred in performing the Project identified in Attachment A as follows:

Federal Share \$ 2,713,218
Local In-kind Match

TOTAL

Allowable costs shall be determined in Stafford Disaster Relief and Emergency et seq., as amended, §102 of the Disaster C.F.R. Part 13; OMB Circular A-87, N Bill 300), and other applicable Pre-Dis

The RECIPIENT/SUBGRANTEE shall for Advance" and "Cost Report" to ob RECIPIENT/ SUBGRANTEE shall n agreement if it does not submit a Cost form. To receive funds under this agr SUBGRANTEE shall complete the D to the appropriate Division of EmERGE Mitigation Program Project Manager. Agreement, if RECIPIENT/SUBGRA representatives or designated agents, notify AGENCY/ GRANTEE.

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Steve Dodson
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Should have
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Builders Mutual
INSURANCE COMPANY

here Builders Come First

shall

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To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form. These forms are hereby incorporated into this Agreement by reference. Following full execution of this Agreement, the Fiscal Section of the Department of Crime Control and Public Safety will forward the Cost Report to the RECIPIENT/SUBGRANTEE. (See sample Cost Report attached). RECIPIENT/SUBGRANTEE shall complete the Cost Report and attach appropriate invoices or other appropriate documentation and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. AGENCY/GRANTEE will reimburse RECIPIENT/SUBGRANTEE for eligible costs

in increments of Five Hundred Dollars (\$500.00) or greater. The final payment of funds will be made only after the plan created pursuant hereto has been completed by the RECIPIENT/SUBGRANTEE and approved by the AGENCY/GRANTEE, submission of all required documentation and a request for final reimbursement.

RECIPIENT/ SUBGRANTEE agrees, as a condition of receipt of funding pursuant to this Agreement, where necessary, to obtain reasonably available, adequate, and necessary insurance for the type or types of hazard for which the major disaster was declared, in accordance with the requirements of the Flood Insurance Administration (FIA), 44 C.F.R. Parts 206, 209 and any other applicable law or regulation.

(3) DUPLICATION OF BENEFITS PROHIBITION

In accordance with the provisions of 42 U.S.C. §5155 (Section 312 of the Stafford Act) duplication of benefits is prohibited. The RECIPIENT/ SUBGRANTEE shall notify the AGENCY/GRANTEE, as soon as practicable, of the existence of any insurance coverage for the costs identified in the application, and of any entitlement to or recovery of funds from any other source for the Project costs, including, as applicable, Federal, State, local and private funding. Allowable costs shall be reduced by the amount of duplicate sources available. The RECIPIENT/ SUBGRANTEE shall be liable to the AGENCY/GRANTEE to the extent that the RECIPIENT/SUBGRANTEE receives duplicate benefits from any other source for the same purposes for which the RECIPIENT/ SUBGRANTEE has received payment from the AGENCY/GRANTEE.

The RECIPIENT/SUBGRANTEE shall immediately remit to the AGENCY/ GRANTEE any duplication of benefits payment received by the RECIPIENT/ SUBGRANTEE. In the event the AGENCY/ GRANTEE determines a duplication of benefits has occurred RECIPIENT/SUBGRANTEE hereby authorizes the Controller of the Department of Crime Control & Public Safety to take offset action against any other available funding due the RECIPIENT/SUBGRANTEE. In addition, RECIPIENT/SUBGRANTEE shall ensure, as a condition of funding under this Agreement, that all required Privacy Act releases and Duplication of Benefit paperwork is completed.

(4) INCORPORATION OF LAWS, RULES, REGULATIONS AND POLICIES

Both the RECIPIENT/SUBGRANTEE and the AGENCY/GRANTEE shall be governed by applicable State and Federal laws, rules and regulations, including but not limited to those identified in Attachments B, C, and D.

(5) **PERIOD OF AGREEMENT**

This Agreement becomes effective upon execution of the signatures of all parties of the agreement. The date of execution shall be the date of the last signature. The termination date is June 30, 2007 unless terminated earlier in accordance with the provisions of paragraphs (6), (8), (11), (13) or (17).

(6) **MODIFICATION OF CONTRACT**

Either party may request modification of the provisions of this Agreement. Changes, which are mutually agreed upon, shall be valid only when reduced in writing, duly signed by each of the parties hereto, and attached in the original of this Agreement.

(7) **RECORD KEEPING, PROCUREMENT AND PROPERTY MANAGEMENT**

- (a) If applicable, RECIPIENT/SUBGRANTEE's performance under this Agreement shall be subject to 44 C.F.R. Part 13, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments" and/or OMB Circular No. A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations," and/or OMB Circular No. A-87, "Cost Principles for State and Local Governments," OMB Circular No. A-21, Cost Principles for Educational Institutions," or OMB Circular No. A-122, "Cost Principles for Nonprofit Organizations."
- (b) If applicable, all financial and programmatic records, supporting documents statistical records and other records of RECIPIENT/SUBGRANTEE shall be retained pursuant to 44 C.F.R. Part 13. All original records pertinent to this Agreement shall be retained by the RECIPIENT/SUBGRANTEE for three years following the date of termination of this Agreement or of submission of the final closeout report, whichever is later, with the following exceptions:
- If any litigation, claim or audit is started before the expiration of the three year period and extends beyond the three year period, the records will be maintained until all litigation, claims or audit findings involving the records have been resolved.
- (c) All records, including supporting documentation of all program costs, shall be sufficient to determine compliance with the

completed or may take such other action as set forth in paragraph (11). The AGENCY/GRANTEE may terminate the Agreement with a RECIPIENT/SUBGRANTEE if reports are not received within thirty (30) days after written notice by the AGENCY/GRANTEE. "Acceptable to the AGENCY/GRANTEE" means that the work product was completed in accordance with generally accepted principles and is consistent with the Budget and Scope of Work, Attachment A.

- (d) Upon request by the AGENCY/GRANTEE, the RECIPIENT/SUBGRANTEE shall provide such additional program updates or information as may be required by the AGENCY/GRANTEE.

(9) **MONITORING**

The RECIPIENT/SUBGRANTEE shall constantly monitor its performance under this Agreement to ensure that time schedules are being met, the Budget and Scope of Work is being accomplished within specified time periods, and other performance goals are being achieved. Such review shall be made for each function, or activity set forth in Attachment A to this Agreement and incorporated by reference herein.

(10) **LIABILITY**

- (a) Except as otherwise provided in subparagraph (b) below, the RECIPIENT/SUBGRANTEE shall be solely responsible to parties with whom it shall deal in carrying out the terms of this agreement, and shall save the AGENCY/GRANTEE harmless against all claims of whatever nature by third parties arising out of the performance of work under this agreement. For purposes of this agreement, RECIPIENT/SUBGRANTEE agrees that it is not an employee or agent of the AGENCY/GRANTEE, but is an independent contractor.
- (b) Any RECIPIENT/SUBGRANTEE who is a state agency or subdivision, agrees to be fully responsible for its own negligent acts or omissions or tortious acts. Nothing herein is intended to serve as a waiver of sovereign immunity by any RECIPIENT/SUBGRANTEE to which sovereign immunity applies. Nothing herein shall be construed as consent by a state agency or subdivision of the State of North Carolina to be sued by third parties in any matter arising out of any contract.

(11) **DEFAULT: REMEDIES: TERMINATION**

- (a) If any of the following events occur ("Events of Default"), all

requirements and objectives of the Budget and Scope of Work – Attachment A – and all other applicable laws and regulations.

- (d) The RECIPIENT/SUBGRANTEE, its employees or agents, including all subcontractors or consultants to be paid from funds provided under this Agreement, shall allow access to its records at reasonable times to the AGENCY/GRANTEE, its employees, and agents. "Reasonable" shall be construed according to the circumstances but ordinarily shall mean during normal business hours of 8:00 a.m. to 5:00 p.m., local time, on Monday through Friday. "Agents" shall include, but not be limited to, auditors retained by the AGENCY/GRANTEE.

(8) REPORTS

- (a) The RECIPIENT/SUBGRANTEE shall provide monthly progress reports to the AGENCY/GRANTEE, using the attached Progress Report Form, Attachment F. Reports are due by the tenth of the following month. Reports shall indicate the status and completion date for each plan funded, any problems or circumstances affecting completion dates, or the scope of work, or the plan costs, and any other factors reasonably anticipated to result in noncompliance with the terms of the grant award. Interim inspections shall be scheduled by the RECIPIENT/SUBGRANTEE prior to the final inspection and may be requested by the AGENCY/GRANTEE based on information supplied in the progress reports.

The AGENCY/GRANTEE may require additional reports as needed. The RECIPIENT/SUBGRANTEE shall, as soon as possible, provide any additional reports requested by the AGENCY/GRANTEE. The AGENCY/GRANTEE contact will be the Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist for all reports and requests for reimbursement.

- (b) RECIPIENT/SUBGRANTEE shall provide the AGENCY/GRANTEE with a close-out report on forms provided by the AGENCY/GRANTEE. The close-out report is due no later than forty-five (45) days after termination of this Agreement or upon completion and approval of the plan that is the subject of this Agreement.
- (c) If all required reports and copies are not sent to the AGENCY/GRANTEE or are not completed in a manner acceptable to the AGENCY/GRANTEE, the AGENCY/GRANTEE may withhold further payments until they are

obligations on the part of the AGENCY/GRANTEE to make any further payment of funds hereunder shall, if the AGENCY/GRANTEE so elects, terminate, and the AGENCY/GRANTEE may at its option exercise any of its remedies set forth herein, but the AGENCY/GRANTEE may make any payments or parts of payments after the happening of any Events of Default without thereby waiving the right to exercise such remedies, and without becoming liable to make any further payment:

1. If any warranty or representation made by the RECIPIENT/SUBGRANTEE in this Agreement or any previous Agreement with the AGENCY/GRANTEE shall at any time be false or misleading in any respect, or if the RECIPIENT/SUBGRANTEE shall fail to keep, observe or perform any of the terms or covenants contained in this Agreement or any previous agreement with the AGENCY/GRANTEE and has not cured such in timely fashion, or is unable or unwilling to meet its obligations thereunder;
 2. If any material adverse change shall occur in the financial condition of the RECIPIENT/SUBGRANTEE at any time during the term of this Agreement from the financial condition revealed in any reports filed or to be filed with the AGENCY/GRANTEE, and the RECIPIENT/SUBGRANTEE fails to cure said material adverse change within thirty (30) days from the time the date written notice is sent by the AGENCY/GRANTEE;
 3. If any reports required by this Agreement have not been submitted to the AGENCY/GRANTEE or have been submitted with incorrect, incomplete or insufficient information;
 4. If the RECIPIENT/SUBGRANTEE has failed to perform and complete in timely fashion any of the services required under the Budget and Scope of Work attached hereto as "Attachment A".
 5. If the necessary funds are not available to fund this agreement as a result of action by Congress, the N.C. Legislature, or the Office of State Budget and Management.
- (b) Upon the happening of an Event of Default, then the AGENCY/GRANTEE may, at its option, upon written notice to the RECIPIENT/SUBGRANTEE and upon the RECIPIENT/

SUBGRANTEE's failure to timely cure, exercise any one or more of the following remedies, either concurrently or consecutively, and the pursuit of any one of the following remedies shall not preclude the AGENCY/GRANTEE from pursuing any other remedies contained herein or otherwise provided at law or in equity:

1. Terminate this Agreement, provided that the RECIPIENT/SUBGRANTEE is given at least fifteen (15) days prior written notice of such termination. The notice shall be effective when placed in the United States mail, first class mail, postage prepaid, by registered or certified mail return receipt requested, to the address set forth in paragraph (12) herein;
 2. Commence an appropriate legal or equitable action to enforce performance of this Agreement;
 3. Withhold or suspend payment of all or any part of a request for payment;
 4. Exercise any other rights or remedies which may otherwise be available under law.
- (c) The AGENCY/GRANTEE may terminate this Agreement for cause upon such written notice to RECIPIENT/SUBGRANTEE of such termination and specifying the effective date thereof, at least one (1) day before the effective date of termination. Cause shall include, but not be limited to, misrepresentation in the grant application, misuse of funds; fraud; lack of compliance with applicable rules, laws and regulations; failure to perform in a timely manner, and refusal by the RECIPIENT/SUBGRANTEE to permit public access to any document, paper, letter, or other material subject to disclosure under N.C. General Statutes.
- (d) Suspension or termination constitutes final AGENCY/GRANTEE action. Notification of suspension or termination shall include notice of administrative hearing rights and time frames.
- (e) The RECIPIENT/SUBGRANTEE shall return funds to the AGENCY/ GRANTEE if found in non-compliance with laws, rules, regulations governing the use of the funds or this Agreement.
- (f) Notwithstanding the above, the RECIPIENT/SUBGRANTEE shall not be relieved of liability to the AGENCY/GRANTEE by virtue of any breach of Agreement by the RECIPIENT/SUBGRANTEE.

The AGENCY/ GRANTEE may, to the extent authorized by law, withhold any payments to the RECIPIENT/SUBGRANTEE for purpose of set-off until such time as the exact amount of damages due the AGENCY/GRANTEE from the RECIPIENT/SUBGRANTEE is determined.

(12) **NOTICE AND CONTACT**

- (a) All notices provided under or pursuant to this Agreement shall be in writing, first class, certified mail, return receipt requested, to the representative identified below and said notification attached to the original of this Agreement.
- (b) The name and address of the AGENCY/GRANTEE contract manager for this Agreement is:

**Hazard Mitigation Section Chief
Department of Crime Control & Public Safety
NC Division of Emergency Management
Disaster Recovery Operations Center
1830-B Tillery Place
Raleigh, NC 27604**

- (c) The name and address of the Representative of the RECIPIENT/ SUBGRANTEE (Designated Agent) responsible for the administration of this Agreement is:

**Overnight and Mailing Address
Tim Fuller, Commissioner
Town of Kure Beach
117 Settlers Lane
Kure Beach, NC 28449**

- (d) In the event that different representatives (designated agents) are designated by either party after execution of this Agreement, notice of the name, title and address of the new representative (new designated agent) will be rendered as provided in (12)(a) above. To receive funds under this agreement, RECIPIENT/ SUBGRANTEE shall complete the Designated Agent Form and forward it to the appropriate Division of Emergency Management Hazard Mitigation Grant Program Project Manager or Hazard Mitigation Specialist. To receive funds under this agreement, the Designated Agent shall sign the Cost Report or Request for Advance Form.

(13) **OTHER PROVISIONS**

- (a) The validity of this Agreement is subject to the truth and accuracy of all the information, representations, and materials submitted or provided by the RECIPIENT/SUBGRANTEE, in the Application, in any subsequent submission or response to the AGENCY/GRANTEE request, or any submission or response to fulfill the requirements of this Agreement, and such information, representations, and materials are incorporated by reference. The lack of accuracy thereof or any material changes shall, at the option of the AGENCY/GRANTEE and with thirty (30) days written notice to the RECIPIENT/SUBGRANTEE, cause the termination of this Agreement and the release of the AGENCY/GRANTEE from all its obligations to the RECIPIENT/SUBGRANTEE.
- (b) This Agreement shall be construed under the laws of the State of North Carolina and venue for any actions arising out of this Agreement shall be filed in State Court in Wake County, North Carolina. If any provision hereof is in conflict with any applicable statute or rule, or is otherwise unenforceable, then such provision shall be deemed null and void to the extent of such conflict, and shall be deemed severable, but shall not invalidate any other provision of this Agreement.
- (c) No waiver by the AGENCY/GRANTEE of any right or remedy granted hereunder or failure to insist on strict performance by the RECIPIENT/ SUBGRANTEE shall affect or extend or act as a waiver of any other right or remedy of the AGENCY/GRANTEE hereunder, or affect the subsequent exercise of the same right or remedy by the AGENCY/ GRANTEE for any further or subsequent default by the RECIPIENT/ SUBGRANTEE. Any power of approval or disapproval granted to the AGENCY/GRANTEE under the terms of this Agreement shall survive the terms and life of this agreement as a whole.
- (d) Where applicable, all National Flood Insurance Program documentation and repetitive loss information will bear the notice:
- “The information contained in this document is legally privileged and confidential. Its use is protected under the privacy act of 1974, 5 U.S.C., Section 552(a). Use of this information should be restricted to applicable routine use cited in the systems notice published in 56 FR 26415.”**

(14) **AUDIT REQUIREMENTS**

- (a) If applicable, RECIPIENT/SUBGRANTEE shall provide the following completed documentation to the AGENCY/GRANTEE:
- Designation of Applicant's Agent;
 - State-Applicant Disaster Assistance Agreement;
 - Private Non-Profit Organization Certification (if required);
 - Summary of Documentation Form itemizing actual costs expended for large project payment requests;
 - Monthly Progress Reports;
 - Hard copies of Single Audit Reports within 60 days of close of fiscal year.

If the RECIPIENT/SUBGRANTEE fails to provide any of the documentation discussed or requested in this Agreement, the AGENCY/GRANTEE will be under no obligation to reimburse the RECIPIENT/SUBGRANTEE for eligible expenses.

- (b) The RECIPIENT /SUBGRANTEE agrees to maintain financial procedures and support documents and to establish and maintain a proper accounting system to record expenditures of disaster assistance funds in accordance with generally accepted accounting principles or as directed by the Governor's Authorized Representative, to account for the receipt and expenditure of funds under this Agreement. If applicable, RECIPIENT/SUBGRANTEE shall conduct audit(s) pursuant to the Single Audit Act of 1984, 31 U.S.C. •7501 et. seq., 44 C.F.R. Part 14, OMB Circular A-133, "Audits of States, Local Governments, and Non-profit Organizations," and applicable North Carolina laws, rules and regulations. Further, RECIPIENT/SUGRANTEE must provide a hard copy of the Single Audit Report within sixty (60) days of the close of its fiscal year. Otherwise, pursuant to 44 C.F.R. §13.43, the AGENCY/GRANTEE may withhold or suspend payments under any grant award.
- (c) These records shall be available at all reasonable times for inspection, review, or audit by the N.C. State Auditor and other personnel duly authorized by the AGENCY/GRANTEE. "Reasonable" shall be construed according to circumstances, but ordinarily shall mean normal business hours of 8:00 a.m. to 5:00 p.m., Eastern Standard Time, Monday through Friday.
- (d) The RECIPIENT/SUBGRANTEE shall also provide the AGENCY/ GRANTEE with the records, reports or financial

statements upon request for the purposes of auditing and monitoring the funds awarded under this Agreement.

- (e) The RECIPIENT/SUBGRANTEE shall provide the AGENCY/GRANTEE and the Office of the State Auditor with an annual financial audit report.
- The annual financial audit report shall include all management letters and the RECIPIENT/SUBGRANTEE's response to all findings, including corrective actions to be taken.
- (f) In the event the audit shows that the entire funds disbursed hereunder, or any portion thereof, were not spent in accordance with the conditions of this Agreement, the RECIPIENT/SUBGRANTEE shall be held liable for reimbursement to the AGENCY/GRANTEE of all funds not spent in accordance with these applicable regulations and Agreement provisions within thirty (30) days after the AGENCY/GRANTEE has notified the RECIPIENT/SUBGRANTEE of such non-compliance.
- (g) The RECIPIENT/SUBGRANTEE shall retain all financial records, supporting documents, statistical records, and any other documents pertinent to this contract for a period of three years after the date of submission of the final expenditures report. However, if litigation or an audit has been initiated prior to the expiration of the three-year period, the records shall be retained until the litigation or audit findings have been resolved.

(15) SUBCONTRACTS

- (a) If the RECIPIENT/SUBGRANTEE subcontracts any or all of the work required under this Agreement, the RECIPIENT/SUBGRANTEE agrees to include in the subcontract that the subcontractor is bound by the terms and conditions of this Agreement with the AGENCY/GRANTEE.
- (b) The RECIPIENT/SUBGRANTEE agrees to include in the subcontract that the subcontractor shall hold the AGENCY/GRANTEE and RECIPIENT/SUBGRANTEE harmless against all claims of whatever nature arising out of the subcontractor's performance of work under this Agreement, to the extent allowed and required by law.
- (c) If the RECIPIENT/SUBGRANTEE subcontracts, a copy of the executed subcontract must be forwarded to the

AGENCY/GRANTEE within ten (10) days of execution of said subcontract.

- (d) Contractual arrangement shall in no way relieve the RECIPIENT/SUBGRANTEE of its responsibilities to ensure that all funds issued pursuant to this grant be administered in accordance with all state and federal requirements.

(16) TERMS AND CONDITIONS

This Agreement and any exhibits and amendments annexed hereto and any documents incorporated specifically by reference represents the entire Agreement between the parties and supersedes all prior oral and written statements or agreements.

(17) STANDARD CONDITIONS

The RECIPIENT/SUBGRANTEE agrees to be bound by the following standard conditions:

- (a) The State of North Carolina's performance and obligation to pay under this Agreement is contingent upon an annual appropriation by the North Carolina Legislature (where applicable) and/or the Congress of the United States to provide funding for Pre-Disaster Mitigation Project Grant projects.
- (b) If otherwise allowed under this Agreement, extension of an agreement for contractual services shall be in writing and shall be subject to the same terms and conditions set forth in the initial agreement.

Upon FEMA approval, there shall be only one extension of the agreement unless the failure to meet the criteria set forth in the agreement for completion of the agreement is due to events beyond the control of the RECIPIENT/SUBGRANTEE.

- (c) The AGENCY/GRANTEE reserves the right to unilaterally cancel this Agreement for refusal by the RECIPIENT/SUBGRANTEE to allow public access to all documents, papers, letters or other material subject to the provisions of N.C. General Statutes and made or received by the Contractor/RECIPIENT/SUBGRANTEE in conjunction with the Agreement.

(18) ATTACHMENTS

- (a) All attachments to this Agreement are incorporated as if set out fully herein.
- (b) In the event of any inconsistency or conflict between the language of this Agreement and the attachments hereto, the language of such attachments shall be controlling, but only to the extent of such conflict or inconsistency.
- (c) This Agreement includes the following attachments or documents incorporated by reference as if fully set out herein:
 - 1. Attachment A Approved Project Budget & Scope of Work
 - 2. Attachment B Program Statutes and Regulations
 - 3. Attachment C Lobbying Prohibition/Certification
 - 4. Attachment D Statement of Assurances
 - 5. Attachment E Special Conditions
 - 6. Cost Reports and Request for Advance
 - 7. Progress Report Form
 - 8. N.C. Division of Emergency Management minimum criteria for local hazard mitigation projects

(19) FUNDING/CONSIDERATION

- (a) This is a cost-reimbursement Agreement. The RECIPIENT/SUBGRANTEE shall be reimbursed for costs incurred in the satisfactory performance of work hereunder in an amount not to exceed **Three Million, Six-Hundred Seventeen Thousand, Six Hundred and Twenty-Four Dollars (\$3,617,624)** subject to the availability of funds. The above-referenced costs do not include the Local share to be provided by the RECIPIENT/SUBGRANTEE in the amount of **Nine Hundred and Four Thousand, Four Hundred and Six Dollars (\$904,406)**.
- (c) Any advance payment under this Agreement is subject to the approval of the AGENCY/GRANTEE. The amount that may be advanced may not exceed the expected cash needs of the RECIPIENT/SUBGRANTEE for a three-day period. For a federally funded contract, any advance payment is also subject to 44 C.F.R. Part 13, Federal OMB Circulars, A-110, A-122 and the Cash Management Improvement Act of 1990. If an advance payment is requested, the budget data on which the request is

based and a justification statement shall be submitted to the Division of Emergency Management Contract Manager using the Cost Report and Request for Advance Form. RECIPIENT/SUBGRANTEE shall specify the amount of advance payment needed and provide an explanation of the necessity for and proposed use of these funds.

- (d) All funds shall be requested using the appropriate forms that are provided by the AGENCY/GRANTEE.

(20) STATE LOBBYING PROHIBITION

No funds or other resources received from the AGENCY/GRANTEE in connection with this Agreement may be used directly or indirectly to influence legislation or any other official action by the N.C. General Assembly or any state department.

Refer to Attachment C for additional terms and provisions relating to lobbying.

(21) LEGAL AUTHORIZATION

The RECIPIENT/SUBGRANTEE certifies with respect to this Agreement that it possesses the legal authority to receive the funds to be provided under this Agreement and that, if applicable, its governing body has authorized, by resolution or otherwise, the execution and acceptance of this Agreement with all covenants and assurances contained herein. The RECIPIENT/SUBGRANTEE also certifies that the undersigned possesses the authority to legally execute and bind RECIPIENT/SUBGRANTEE to the terms of this Agreement.

Pursuant to the North Carolina Emergency Management Act, N.C.G.S. §166A-6.01(b)(2)a.3. (Senate Bill 300); §203 and §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*, §102 of the Disaster Mitigation Act of 2000, P.L. 107-73, 115 Stat. 651, Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002; 44 C.F.R. Parts 201 and 206; and the Catalog of Federal Domestic Assistance (CFDA) §83.557 communities are eligible to apply for Pre-Disaster Mitigation Project Project Grants. Communities on probation or suspended under 44 C.F.R. Part 60 of the NFIP are not eligible.

(22) ASSURANCES

The RECIPIENT/SUBGRANTEE shall execute and comply with the Statement of Assurances incorporated as Attachment D.

(23) **SPECIAL CONDITIONS**

- (a) The RECIPIENT/SUBGRANTEE shall comply with the special conditions set forth in Attachment E, attached hereto and incorporated by this reference.
- (b) Failure of the RECIPIENT/SUBGRANTEE to comply with the special conditions listed in Attachment E or the program statutes and regulations in Attachments B and D of this Agreement shall be cause for the immediate suspension of payments or the immediate termination of this Agreement.

(24) **HAZARD MITIGATION PLAN**

If RECIPIENT/SUBGRANTEE is a local governmental entity, RECIPIENT/ SUBGRANTEE shall complete and adopt an all-hazards mitigation plan in a manner satisfactory to the State Hazard Mitigation Officer within three hundred and sixty-five (365) calendar days following execution of this Agreement. The all-hazards mitigation plan shall be developed in accordance with the minimum criteria for local hazard mitigation plans as determined by the AGENCY/ GRANTEE. The minimum criteria are incorporated by reference into this Agreement as if fully set out herein.

(25) **VOLUNTEER LABOR**

The RECIPIENT/SUBGRANTEE shall have the authority to use volunteer labor or any other labor force and shall have the authority to use acquired materials, equipment and supplies necessary to construct, build or erect replacement housing in areas affected by FEMA-1134-DR-NC, FEMA-1240-DR-NC, FEMA-1291-DR-NC and FEMA-1292-DR-NC. Further, when constructing, building, or erecting replacement housing in the aforementioned affected areas, the RECIPIENT/SUBGRANTEE shall use the replacement housing in lieu of purchasing eligible property pursuant to 44 C.F.R. Section 206.434(d) under the AGENCY/GRANTEE Hazard Mitigation Acquisition and Relocation Program.

The RECIPIENT/SUBGRANTEE may use the difference between the actual cost to construct replacement housing and the pre-disaster fair market value of the acquired property as a credit or offset against the grant to acquire additional eligible properties.

(26) **PROJECT IMPLEMENTATION REQUIREMENTS FOR PRE-DISASTER MITIGATION PROJECTS**

all value after Hurricane

Pursuant to the Interim Rule set forth as 44 C.F.R. §209.10(b) by FEMA at Vol. 65, No. 29 of the Federal Register, participating property owners may receive assistance up to the fair market value of their real property as of September 1, 1999 (reduced by any potential duplication of benefits from other sources)...

Pursuant to the Interim Rule set forth as 44 C.F.R. §209.10(c) by FEMA at Vol. 65, No. 29 of the Federal Register, the following restrictive covenants must be conveyed in the deed to any property acquired, accepted, or from which structures are removed:

- (1) The property must be dedicated and maintained in perpetuity for uses compatible with open space, recreational, or wetlands management practices; and
- (2) No new structure(s) will be built on the property except for the following:
 - (i) A public facility that is open on all sides and functionally related to a designated open space or recreational use;
 - (ii) A public rest room; or
 - (iii) A structure that is compatible with open space, recreational, or wetlands management usage and proper floodplain management policies and practices, which the FEMA Director approves in writing before the construction of the structure begins.
- (3) After completing the project, no application for additional disaster assistance will be made for any purpose with respect to the property to any Federal entity or source, and no Federal entity or source will provide such assistance.
- (4) Any structures built on the property must be located to minimize the potential for flood damage, be floodproofed, or be elevated to the Base Flood Elevation plus one foot of freeboard.
- (5) Every two years on October 1st, the RECIPIENT/SUBGRANTEE will report to the AGENCY/GRANTEE certifying that the property continues to be maintained consistent with the provisions of this Agreement.
- (6) Allowable open space, recreational, and wetland management uses include parks for outdoor recreational

Campground

activities, nature reserves, cultivation, grazing, camping (except where adequate warning time is not available to allow evacuation), temporary storage in the open of wheeled vehicles which are easily movable (except mobile homes), unimproved, permeable parking lots, and buffer zones. Allowable uses generally do not include walled buildings, flood reduction levees, or other uses that obstruct the natural and beneficial functions of the floodplain.

IN WITNESS WHEREOF, the AGENCY/GRANTEE and the RECIPIENT/SUBGRANTEE have each executed this Agreement, this the _____ day of _____ 2004.

CONTRACTING AGENCY
DIVISION OF EMERGENCY MANAGEMENT
DEPARTMENT OF CRIME CONTROL
AND PUBLIC SAFETY

WITNESS:

Gail M. Raynor

BY:

Kenneth B. Taylor

DR. KENNETH B. TAYLOR, DIRECTOR
DIVISION OF EMERGENCY MANAGEMENT
DATE 10/13/2004

WITNESS:

BY:

GERALD A. RUDISILL, JR.
DEPUTY SECRETARY
DEPARTMENT OF CRIME CONTROL
& PUBLIC SAFETY
DATE _____

WITNESS:

Frances Jones

BY:

Tim Fuller

TIM FULLER
COMMISSIONER
TOWN OF KURE BEACH
RECIPIENT/SUBGRANTEE
FEDERAL EMPLOYER I.D. #56-6002681
DATE Oct 28, 2004

APPROVED AS TO PROCEDURES:

BY:

BENNIE AIKEN, CONTROLLER
DEPARTMENT OF CRIME CONTROL
& PUBLIC SAFETY
DATE _____

APPROVED AS TO FORM SUBJECT TO EXECUTION BY GERALD A. RUDISILL, JR., DEPUTY SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

BY: Charles A. Feun
ASSISTANT ATTORNEY GENERAL

ATTACHMENT A

BUDGET AND SCOPE OF WORK

RECIPIENT/SUBGRANTEE shall implement the Pre-Disaster Mitigation Project summarized below and as described in the approved Project application (Project # PDM-C-PJ-04-NC-2003-0001). That application is hereby incorporated by reference into this Agreement. The AGENCY/GRANTEE shall reimburse eligible costs according to the following expenditures:

? what are they - line items - exactly what is going to be done

I. **Funding Summary**

A. Project Costs:

Federal Share	\$ 2,713,218
Local In-kind Match	\$ 904,406
TOTAL	\$ 3,617,624

II. Scope of Work Summary

The scope of work includes acquisition and demolition of the condominium complex:

**The Riggins
1437 Ft. Fisher Boulevard, South
Kure Beach, NC 28449**

ATTACHMENT B

PROGRAM STATUTES AND REGULATIONS

This Agreement, the North Carolina Legislature, the Hazard Mitigation Grant Program (HMGP) and the North Carolina Division of Emergency Management as administrators of this Pre-Disaster Mitigation Grant are governed by the following statutes and regulations:

- (1) The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et. seq. *as amended*;
- (2) The Disaster Mitigation Act of 2000, §102;
- (3) 44 C.F.R. Parts 7, 9, 10, 13, 14, 17, 18, 25, 206, 220, 221, 44 C.F.R. Part 209 and any other applicable FEMA policy memoranda and guidance documents;
- (4) Chapter 166A of the N.C. General Statutes, N.C.G.S. §166A-1 et. seq., "The N.C. Emergency Management Act";
- (5) State of North Carolina Administrative Plan for the Hazard Mitigation Grant Program (the §404 Plan);
- (6) The North Carolina Hazard Mitigation §322 Plan developed pursuant to the §322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §5121 et seq., *as amended*;
- (7) All applicable laws and regulations delineated in Attachments D&E of this Agreement;
- (8) All applicable laws, ordinances, codes, rules, regulations, licensing requirements and other regulatory matters that are applicable to the work performance under this Agreement, including those of federal, state and local agencies having appropriate jurisdiction.

ATTACHMENT C

LOBBYING PROHIBITION

The undersigned certifies, to the best of his or her knowledge and belief, that:

- (a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence either directly or indirectly an officer or employee of any state or federal agency, a member of the N.C. Legislature, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-L. "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (c) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representative of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

RECIPIENT/SUBGRANTEE

BY: 

TIM FULLER
COMMISSIONER
TOWN OF KURE BEACH

ATTACHMENT D

STATEMENT OF ASSURANCES

The RECIPIENT/SUBGRANTEE hereby assures and certifies that:

- (a) It possesses legal authority to enter into this agreement, and to execute the proposed program.
- (b) Its governing body has duly adopted or passed as an official act a resolution, motion or similar action authorizing the filing of the HMGP application to FEMA, including all understandings and assurances contained therein, and directing and authorizing the RECIPIENT/SUBGRANTEE's chief executive officer to act in connection with the application and to provide such additional information as may be required.
- (c) No member of or delegate to the Congress of the United States, and no Resident Commissioner, shall be admitted to any share or part of this agreement or to any benefit to arise from the same. No member, officer, or employee of the RECIPIENT/SUBGRANTEE, or its designees or agents, no member of the governing body of the locality in which the program is situated, and no other public official of such locality or localities who exercises any functions or responsibilities with respect to program during his tenure or for one year thereafter, shall have any interest direct or indirect, in any contract or program assisted under this agreement. The RECIPIENT/SUBGRANTEE shall incorporate or cause to be incorporated, in all such contracts or subcontracts a provision prohibiting such interest pursuant to the purposes stated above.
- (d) It will comply with and conduct audit(s) pursuant to the Single Audit Act of 1984, 31 U.S.C. §7501 et. seq., 44 C.F.R. Part 14, OMB Circular A-133 "Audits of States, Local Governments and Non-profit Organizations", and applicable North Carolina laws, rules and regulations. Additionally, the RECIPIENT/ SUBGRANTEE shall comply with the requirements related to audits and financial management pursuant to the Single Audit Act of 1984, 31 U.S.C. §7501 et. seq. and shall provide the documentation discussed below and requested under this Agreement. RECIPIENT/ SUBGRANTEE must provide a hard copy of the Single Audit Act Report within sixty (60) days of the close of its fiscal year. Otherwise, pursuant to 44 C.F.R. §13.43, the AGENCY/SUBGRANTEE may withhold or suspend payments under any grant award. Failure to provide such documentation or to comply with said requirements shall terminate any obligation on behalf of the AGENCY/ GRANTEE to reimburse the RECIPIENT. SUBGRANTEE for eligible expenses.

D-2

1. The AGENCY/GRANTEE shall review the RECIPIENT/SUBGRANTEE's performance periodically to determine whether the RECIPIENT/SUBGRANTEE has substantially completed its program as described in the approved Application and this Agreement. Training and technical assistance shall be provided by the AGENCY/GRANTEE, within limits of staff time and budget, upon written request by the RECIPIENT/SUBGRANTEE and/or upon a determination by the AGENCY/GRANTEE of RECIPIENT/ SUBGRANTEE need.
2. The RECIPIENT/SUBGRANTEE shall allow the AGENCY/ GRANTEE to carry out monitoring, evaluation, and technical assistance and shall assure the cooperation of its employees, sub-RECIPIENT/SUBGRANTEES and subcontractors during such activities.
3. In the event that the AGENCY/GRANTEE suspends funding pursuant to the provision of this Agreement, said suspension shall take effect as of the receipt of the notice of said suspension by the RECIPIENT/SUBGRANTEE. Any requests for payment for which the AGENCY/GRANTEE has not yet disbursed payment shall be subject to said suspension.
4. Should the RECIPIENT/SUBGRANTEE fail to enforce the provisions of any promissory note, mortgage, security agreement, or other obligation specified in any Participating Party Agreement or in written contract with a beneficiary, contractor, agent, or sub-RECIPIENT/SUBGRANTEE who received payment or benefit from funds disbursed under this Agreement, the AGENCY/ GRANTEE may, with thirty days (30) written notice to the RECIPIENT/SUBGRANTEE, automatically substitute itself for the RECIPIENT/SUBGRANTEE in said Participating Party Agreement or written contract for the purpose of enforcing said Participating Party Agreement or written contract and may, at its discretion, continue to administer said Participating Party Agreement or written contract.

5. The RECIPIENT/SUBGRANTEE's application for funds to the State for funding consideration under the FEMA Hazard Mitigation Grant Program is made a part of this Agreement by reference.
6. RECIPIENT/SUBGRANTEE shall establish and maintain a proper accounting system to record expenditures of disaster assistance funds in accordance with generally accepted accounting principles or as directed by the Governor's Authorized Representative. The RECIPIENT/SUBGRANTEE, its employees, and agents, shall maintain records and supporting documents as prescribed in 44 CFR Part 13, Subpart C "Reports, Records Retention and Enforcement". These records shall be maintained at a readily accessible site within the jurisdiction and under the jurisdiction's control.
7. Program Income is defined in 44 CFR Section 13.25. Program Income must be returned to the AGENCY/GRANTEE within five (5) days of receipt, to the following address:

**Controller
N.C. Department of Crime Control
& Public Safety
512 N. Salisbury Street
Raleigh, NC 27603**

8. All RECIPIENT/SUBGRANTEE or sub-RECIPIENT/SUBGRANTEE contracts for which the N.C. Legislature is in any part a funding source, shall contain language to provide for termination with reasonable costs to be paid by the RECIPIENT/ SUBGRANTEE for eligible contract work completed prior to the date the notice of suspension or termination is received by the RECIPIENT/SUBGRANTEE may not be funded with funds provided under this Agreement unless previously approved in writing by the AGENCY/GRANTEE. All sub-RECIPIENT/ SUBGRANTEE contracts shall contain provision for termination for cause or convenience and shall provide for the method of payment in such event.
9. All amendments requiring prior AGENCY/GRANTEE

approval must be approved in writing by the AGENCY/GRANTEE prior to the RECIPIENT/SUBGRANTEE's submission of a closeout package. Any closeout package received prior to the written approval of said amendment is considered void ab initio, and is not considered a closeout package for the purposes of eligibility or potential penalty issues related to closeout.

10. Submission of inaccurate information by the RECIPIENT/SUBGRANTEE in monitoring report responses; audit or audit finding responses; quarterly, closeout, program income, or other reports; or Requests for Funds that result in subsequent official AGENCY/GRANTEE action based on that inaccurate information (such as the granting of administrative or final closeout status, releasing funds, or clearing findings) may at the option of the AGENCY/GRANTEE, subject the RECIPIENT/SUBGRANTEE to revocation of the official AGENCY/GRANTEE action(s) predicated on that report or submission, (e.g., revocation of closeout status, audit clearance, monitoring report clearance, etc.).

(e) Where applicable, it will comply with:

- (1) Contract Work Hours and Safety Standards Act of 1962, 40 U.S.C.327 et seq., requiring that mechanics and laborers (including watchmen and guards) employed on federally assisted contracts be paid wages of not less than one and one-half times their basic wage rates for all hours worked in excess of forty hours in a work week; and
- (2) Federal Fair Labor Standards Act, 29 U.S.C. Section 201 et seq., requiring that covered employees be paid at least the minimum prescribed wage, and also that they be paid one and one-half times their basic wage rates for all hours worked in excess of the prescribed work-week.
- (3) Davis-Bacon Act, 40 U.S.C. §276a et. seq.
- (4) National Environmental Policy Act of 1969, 42U.S.C. §4321; et. seq.; EO115154; EO11988; Coastal Zone Management Act of 1972, 16U.S.C. §1451 et. seq.; Section 176(c) of the Clean Air Act of 1955, 42U.S.C. §7401 et. seq.; Safe Drinking Water Act of 1974, 42U.S.C. §300f et.


D-5

seq.; Endangered Species Act of 1973, 16U.S.C. §1532 et. seq.; Wild and Scenic Rivers Act of 1968, 16U.S.C. §1271 et. seq.

- (5) Section 106 of the National Historic Preservation Act of 1966, 16U.S.C. §470 et. seq.; EO11593; Archaeological and Historic Preservation Act of 1974, 16U.S.C. §469a-1 et. seq.

(f) It will comply with:

- (1) Title VI of the Civil Rights Act of 1964 (P.L. 88-352), and the regulations issued pursuant thereto, which provides that no person in the United States shall on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity for which the RECIPIENT/SUBGRANTEE receives Federal financial assistance and will immediately take any measures necessary to effectuate this assurance.
- (2) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the RECIPIENT/ SUBGRANTEE, this assurance shall obligate the RECIPIENT/ SUBGRANTEE, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits;
- (3) Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975, as amended (42 U.S.C.; 6101-6107) which prohibits discrimination on the basis of age or with respect to otherwise qualified handicapped individuals as provided in Section 504 of the Rehabilitation Act of 1973;
- (4) Executive Order 11246 as amended by Executive Orders 11375 and 12086, and the regulations issued pursuant thereto, which provide that no person shall be discriminated against on the basis of race, color, religion, sex or national origin in all phases of employment during the performance of federal or federally assisted construction contracts; affirmative action to insure fair treatment in employment, upgrading, demotion, or transfer; recruitment advertising; layoff or termination, rates of pay or other forms of compensation; and election for training and apprenticeship.

- (g) The RECIPIENT/SUBGRANTEE agrees to comply with the Americans With Disabilities Act (Public Law 101-336, 42 U.S.C. Section 12101 et seq) if applicable, which discrimination by public and private entities on the basis of disability in the areas of employment, public accommodations, transportation, State and local government services, and in telecommunications.
- (h) It will comply with the Anti-kickback (Copeland) Act of 1934, 18 U.S.C. Section 874 and 40 U.S.C. Section 276a, which outlaws and prescribes penalties for "kickbacks" of wages in federally financed or assisted construction activities. It will comply with the provision of the Hatch Act, which limits the political activity of employees. 
- (i) It will comply with the provision of the Hatch Act, which limits the political activity of employees.
- (j) It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 as amended. Pub. L. 93-156, 87 Section 975, approved December 31, 1973. Section 103(a) required, on and after March 2, 1974, the purchase of flood insurance in communities where such insurance is available as a condition for the receipt of any Federal financial assistance for construction or acquisition purposes for use in any area, that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards. The phrase "Federal financial assistance" includes any form of loan, grant guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.
- (k) It will require every building or facility (other than a privately owned residential structure) designed, constructed, or altered with funds provided under this Part to comply with the "uniform Federal Accessibility Standards," (UFAS) which is Appendix A to 41 CFR Part 40 for residential structures. The RECIPIENT/ SUBGRANTEE will be responsible for conducting inspections to ensure compliance with these specifications by the contractor.
- (l) The RECIPIENT/SUBGRANTEE will comply with applicable N.C. General Statutes when negotiating contracts for services.
- (m) It has adopted and is enforcing a policy prohibiting the use of excessive force by law enforcement agencies within its jurisdiction against any individuals engaged in nonviolent civil rights demonstrations, and has

D-7

adopted and is enforcing a policy of enforcing applicable State and federal laws against physically barring entrance or exit from a facility or location which is the subject of such nonviolent civil rights demonstration within its jurisdiction in accordance with section 519 of Public Law 101-140 of the 1990 HUD Appropriations Act.

- (n) It will comply with Title IX of the Education Amendments of 1972, as amended (20 U.S.C.: 1681-1683 and 1685-1686) which prohibits discrimination on the basis of sex;
- (o) It will comply with the Drug Abuse Office and Treatment Act of 1972 (P.L. 91-616) as amended, relating to nondiscrimination on the basis of drug abuse;
- (p) It will comply with the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, relating to nondiscrimination on the basis of alcohol abuse or alcoholism.
- (q) It will comply with 523 and 527 of the Public Health Service Act of 1912 "(42 U.S.C. 290 dd-3 and 290 ee-3)", as amended, relating to confidentiality of alcohol and drug abuse patient records;
- (r) It will comply with Lead-Based Paint Poisoning Act "(42 U.S.C. 4801 et seq.)" which prohibits the use of lead based paint in construction of rehabilitation or residential structures;
- (s) It will comply with the Energy Policy and Conservation Act, 42 U.S.C. §6291 et. Seq.
- (t) RECIPIENT/SUBGRANTEE certifies that it:
 - (1) Is not presently debarred, suspended, proposed for debarment, declared ineligible, sentenced to a denial of Federal benefits by a State or Federal court, or voluntarily excluded from participating in Federal grants or awards by any Federal department or agency; and
 - (2) Has not within a three-year period preceding this contract been convicted of or had a civilian judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

D-8

- (3) Is not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (2) above; and,
 - (4) Has not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.
- (u) **RECIPIENT/SUBGRANTEE** further agrees that it will include the above certifications, without modification, in all lower tier contracts and in all solicitations for lower tier contracts.

E-1

ATTACHMENT E

SPECIAL CONDITIONS

This agreement shall be executed by the RECIPIENT/SUBGRANTEE, and returned to the AGENCY/GRANTEE at the following address:

**Hazard Mitigation Section Chief
Department of Crime Control & Public Safety
NC Division of Emergency Management
1830-B Tillery Place
Raleigh, NC 27604**

This agreement will be executed within thirty (30) days after receipt. All time periods in this Agreement refer to calendar days. After receipt by the AGENCY/GRANTEE of the signed Agreement, the AGENCY/GRANTEE will execute this Agreement and return an original to the RECIPIENT/SUBGRANTEE.

**Tim Fuller, Commissioner
Town of Kure Beach
117 Settlers Lane
Kure Beach, NC 28449**

**The Riggings Home Owners Association
1437 Fort Fisher Blvd.
P.O. Box 157
Kure Beach, NC 28449**

RECEIVED MAY 10 2006

May 1, 2006

TO: Mayor Tim Fuller
Town of Kure Beach Commissioners
Stacey Fuller, Mitigation Specialist

FROM: Jean Cashion, President of The Riggings HOA



RE: FEMA Grant for the Riggings

I am writing to let you know that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant. There were also ten homeowners who were either absent or failed to turn in their proxy for the meeting. I, as well as, our entire board of directors and homeowners appreciate the many hours of time spent working on our behalf regarding the grant. Unfortunately legal issues regarding transfer of deeds, financial issues, time, and various other factors have made acceptance of the grant impossible for many homeowners.

We are very well aware of the serious problem of erosion and will continue to work toward a workable and acceptable solution. We also look forward to working with Mayor Fuller and Commissioners for the Town of Kure Beach as we move forward to solve our problems. Words can only convey a portion of the gratitude that we feel for the help that we have received from all of you. Kure Beach is indeed a most wonderful place to live.

Thank you for your help and please call me at 919-776-7019, if you have any questions.

EVALUATION OF BEACH FILL OPTION RIGGINGS CONDOMINIUM KURE BEACH, NORTH CAROLINA

INTRODUCTION

The Riggings Homeowners Association, Inc. (RHOA) proposes to seek permits that would allow it to pay for the southward extension of the Kure Beach storm damage reduction project to include the shoreline fronting its property. The Kure Beach project was initially constructed by the Corps of Engineers (USACE) between June 1997 and February 1998. Due to concerns over possible burial of the coquina rock outcrop in front of the Riggings and predicted high rates of erosion from the fill if placed in this area, the federal project terminated north of the Riggings Condominium.

The Kure Beach project covers a total of 18,000 feet of shoreline including a 1,500-foot transition section on the south end. The primary or main fill section covers 16,500 feet of the project shoreline and consists of a 25-foot wide artificial dune constructed to an elevation of 13.5 feet above National Geodetic Vertical Datum (NGVD) fronted by a 50-foot wide storm berm at elevation 9.0 feet above NGVD. The 1,500-foot transition section also includes a dune with a variable crest elevation and the storm berm for about 1,000 feet. The last 500 feet of the project consists of a tapered 6.5-foot NGVD berm which gradually merges with the existing shoreline. The volume of material needed to fill the entire active beach profile is placed in front of the 9-foot NGVD berm in the form of a variable width construction berm at elevation +6.5 ft NGVD. Typical cross-sections of the main beach fill and transition fill are shown on Figure 1.

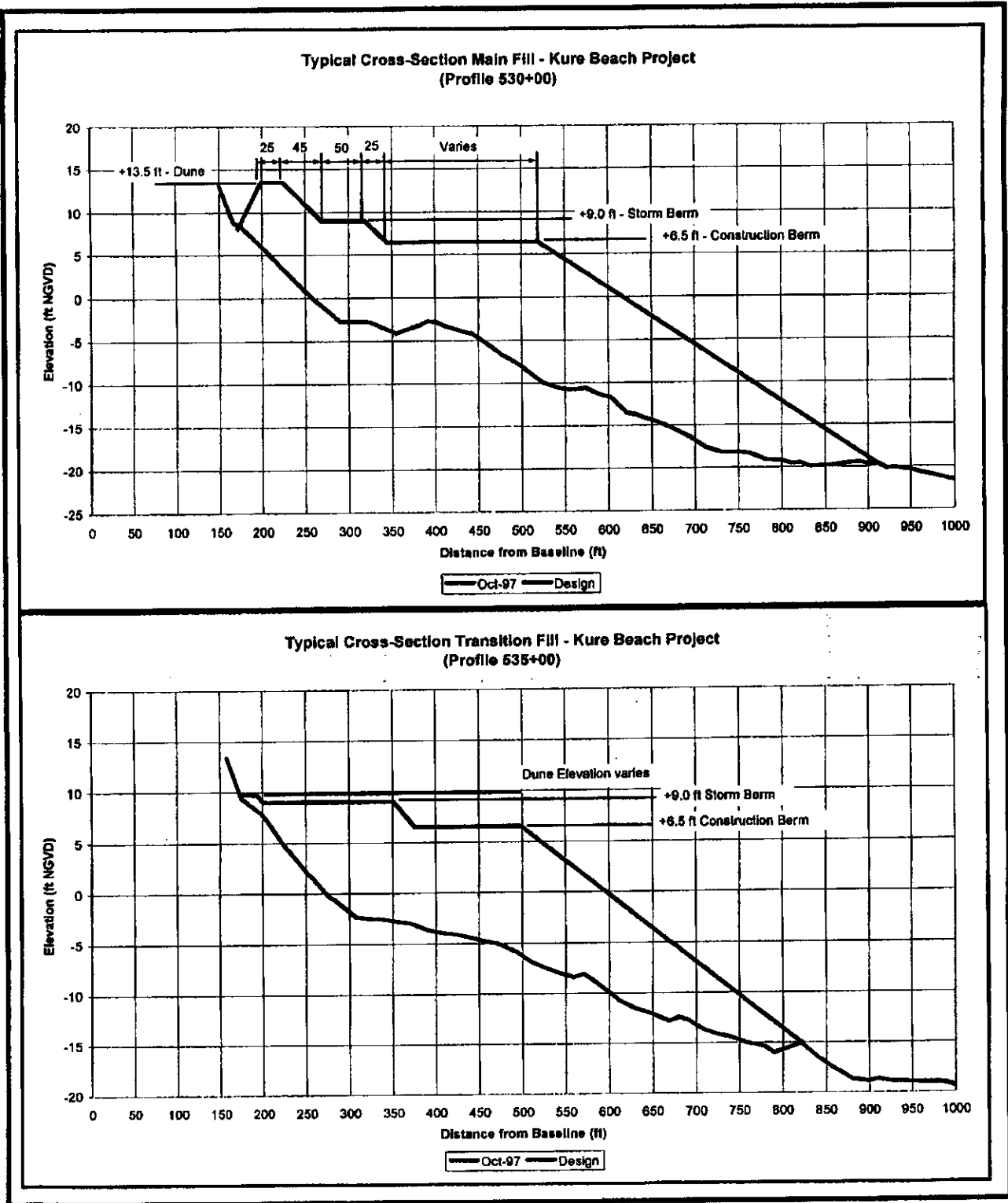


Figure 1. Typical cross-sections of the Kure Beach storm damage reduction project.

The main fill section of the Kure Beach project ends at a point approximately 2,030 feet north of the north property line of the RHOA while the south end of the transition section ends 530 feet north of the north property line. Approximately 550 feet of shoreline fronting the Dunes Condominiums was also excluded from the Kure Beach project.

Periodic nourishment of the Kure Beach project is on a three-year renourishment cycle with past nourishment operations conducted in April-May 2001, March-April 2004, and April-May 2007. The next periodic nourishment operation is scheduled for calendar year 2010. The initial fill for the Kure Beach project was obtained from a borrow area located approximately 2 miles offshore. Material for the first renourishment cycle came from the Cape Fear River navigation channel as a byproduct of the Wilmington Harbor deepening project while the 2004 and 2007 nourishment operations used the offshore borrow area.

Between July 1995 and January 1996, the USACE and the State of North Carolina constructed a stone revetment to protect the Fort Fisher State Historic Site (Figure 2). The northern terminus of the stone revetment abuts the south property line of the RHOA. The USACE began collecting beach profile surveys along the 2,500 feet of shoreline north of the revetment in May 1995. The monitoring surveys, which are conducted about every 6 months, are intended to document pre- and post-revetment behavior of this section of the shoreline; however, the surveys also captured the performance of the southern end of the Kure Beach project following its initial construction and subsequent nourishment operations. The complete survey data set (May 1995 to May 2007) for the area extending from the north wingwall of the revetment to the end of the main fill section of the Kure Beach project, provided by USACE, was used to assess the possible performance of a beach fill placed in front of the Riggins and assess the potential for burial of the coquina rock outcrop.

The USACE profile stations of interest in this evaluation, referenced to the Fort Fisher baseline, are shown on Figure 3 and include profiles 530+00, 535+00, 539+00, 543+00, 547+00, 550+00, 552+00, and 555+00. As a matter of reference, profile 530+00 approximates the south end of the main fill section of the Kure Beach project while profile 543+00 is slightly north of the end of the south transition. Profiles 547+00 and 550+00 lie outside of the direct placement area of the Kure Beach project. Profiles 547+00 and 550+00 appear to cut across the coquina rock outcrop located just north of the Riggins. Profile 550+00 is located near the north property line of the RHOA while profile 552+00 is near the center of the RHOA property. Profile 552+00 also cuts across the coquina rock outcrop located directly seaward of the Riggins. Profile 555+00 extends seaward from the north wingwall of the Fort Fisher revetment and cuts across the coquina rock outcrop south of the Riggins.

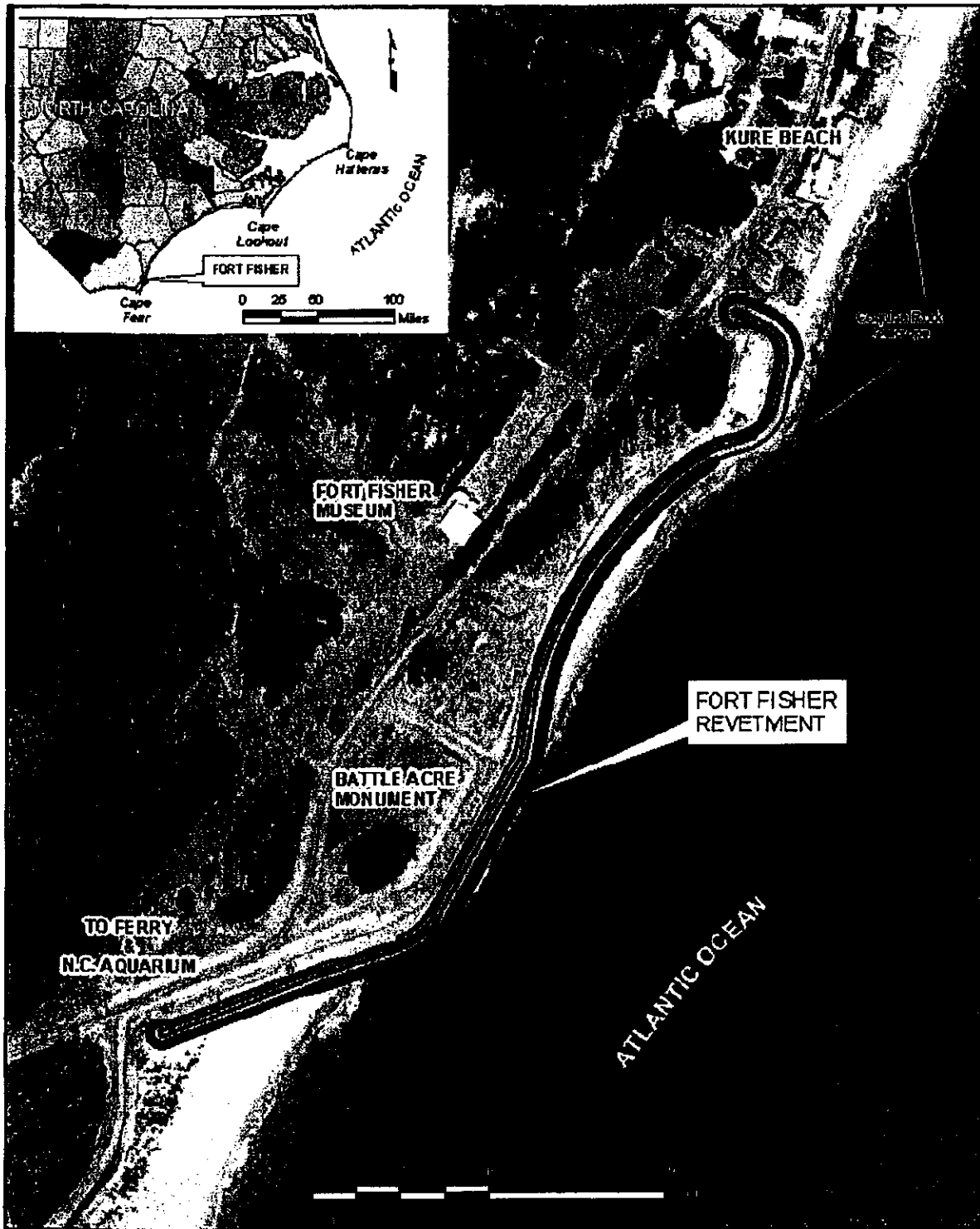


Figure 2. Fort Fisher revetment (Copied from USACE Fort Fisher Monitoring Program – Report No. 9)

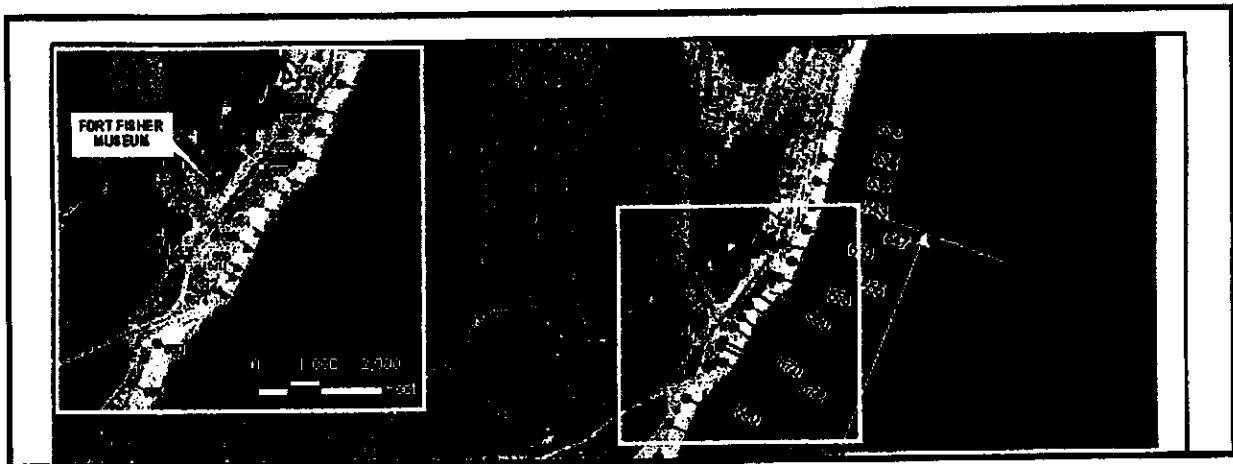


Figure 3. Fort Fisher Monitoring Program beach profile stations (Copied from USACE Fort Fisher Monitoring Program – Report No. 9)

All of the beach profile surveys generally covered the area landward of the -2-foot NGVD (approximately mean low water (MLW)) depth contour with surveys conducted between October 1997 and October 2001 extending out beyond the -30-foot NGVD depth contour. The area landward of the -2-foot depth contour (MLW) essentially represents the visible portion of the beach.

The two areas of interest with regard to the extension of the Kure Beach project; namely, (1) the predicted performance of the fill extension and (2) the potential burial of the coquina rock outcrops, are addressed in the following sections.

BEACH FILL PERFORMANCE

The USACE beach profile data was used to determine changes in the position of the +2-foot NGVD (MHW) contour and changes in the volume of material landward of the -2-foot NGVD (MLW) depth contour for each of the profile stations listed above.

Mean High Water (+2-ft NGVD) Shoreline Changes.

Plots of the cumulative change in the position of the +2-foot NGVD contour between May 1995 and May 2007 for each profile are provided in Figures 4 to 11. The overall rate of change in the position of the +2-foot contour between May 1995 and May 2007, determined by linear regression, is given on each plot. Profiles 530+00 to 547+00, which received some direct fill placement associated with the Kure Beach project, also have rates of change for the +2-foot contour that occurred prior to the initial fill and following each of the nourishment operations (initial, 1st renourishment, and 2nd renourishments). Note that profile 547+00 lies outside the authorized limits of the Kure Beach project, however, some of the fill material apparently spilled out of the authorized placement area during construction resulting in some widening of the beach.

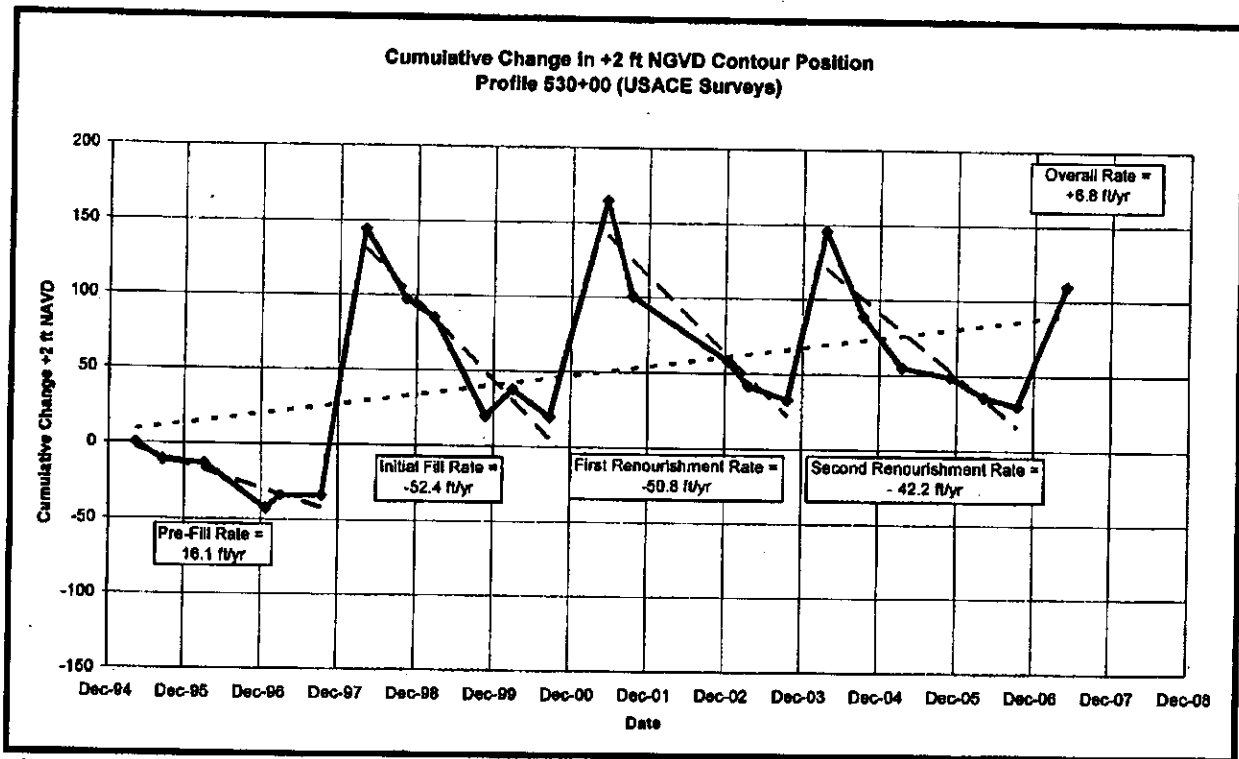


Figure 4. Cumulative change in +2-foot contour position for Profile 530+00.

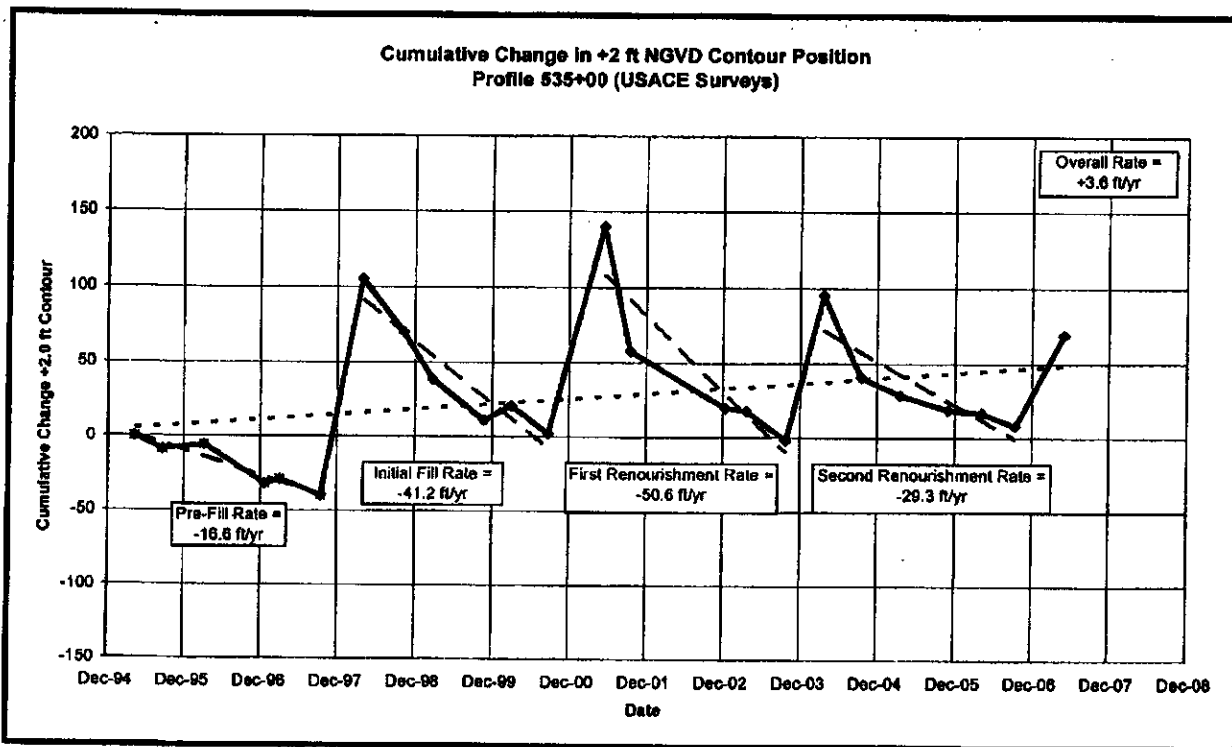


Figure 5. Cumulative change in +2-foot contour position for Profile 535+00.

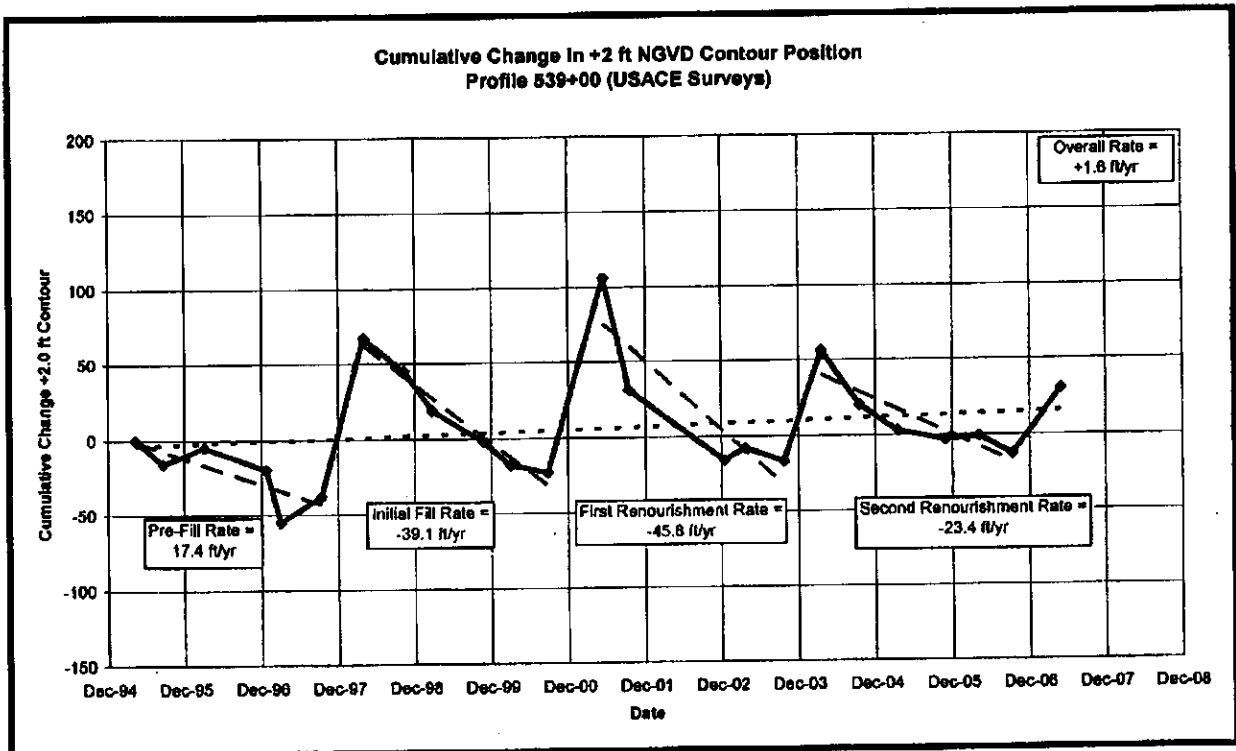


Figure 6. Cumulative change in +2-foot contour position for Profile 539+00.

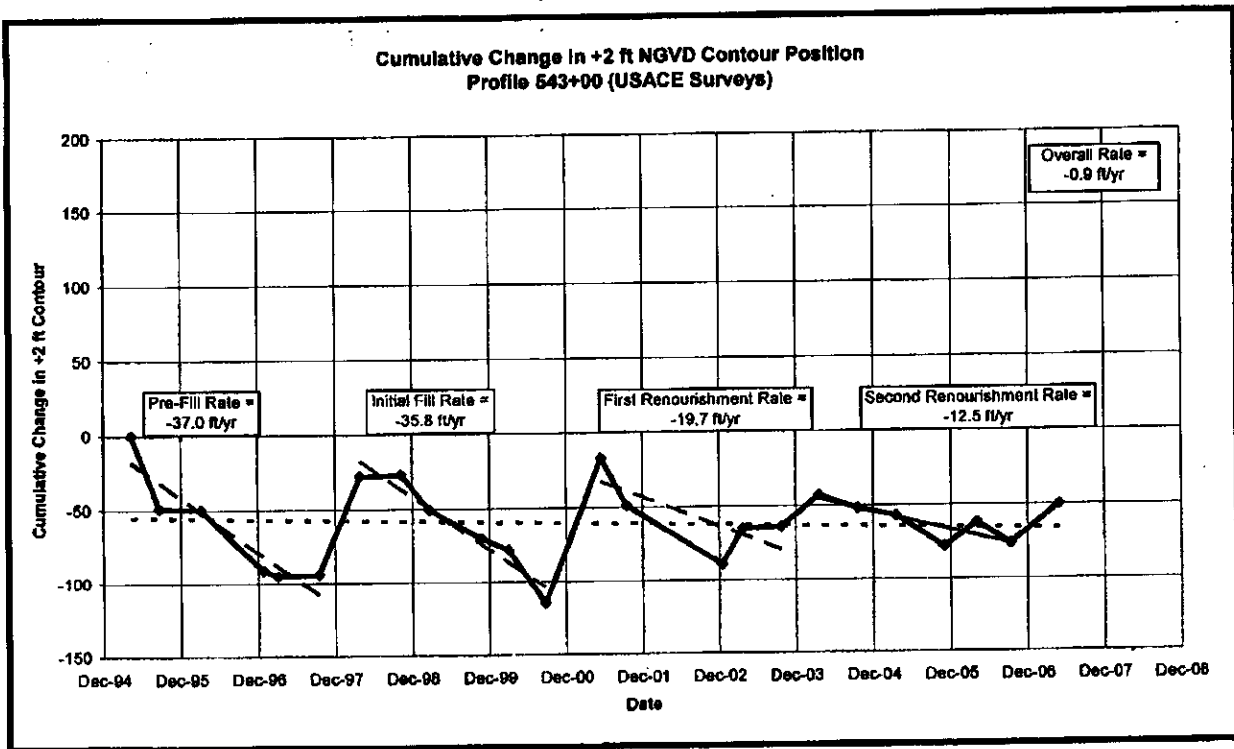


Figure 7. Cumulative change in +2-foot contour position for Profile 543+00.

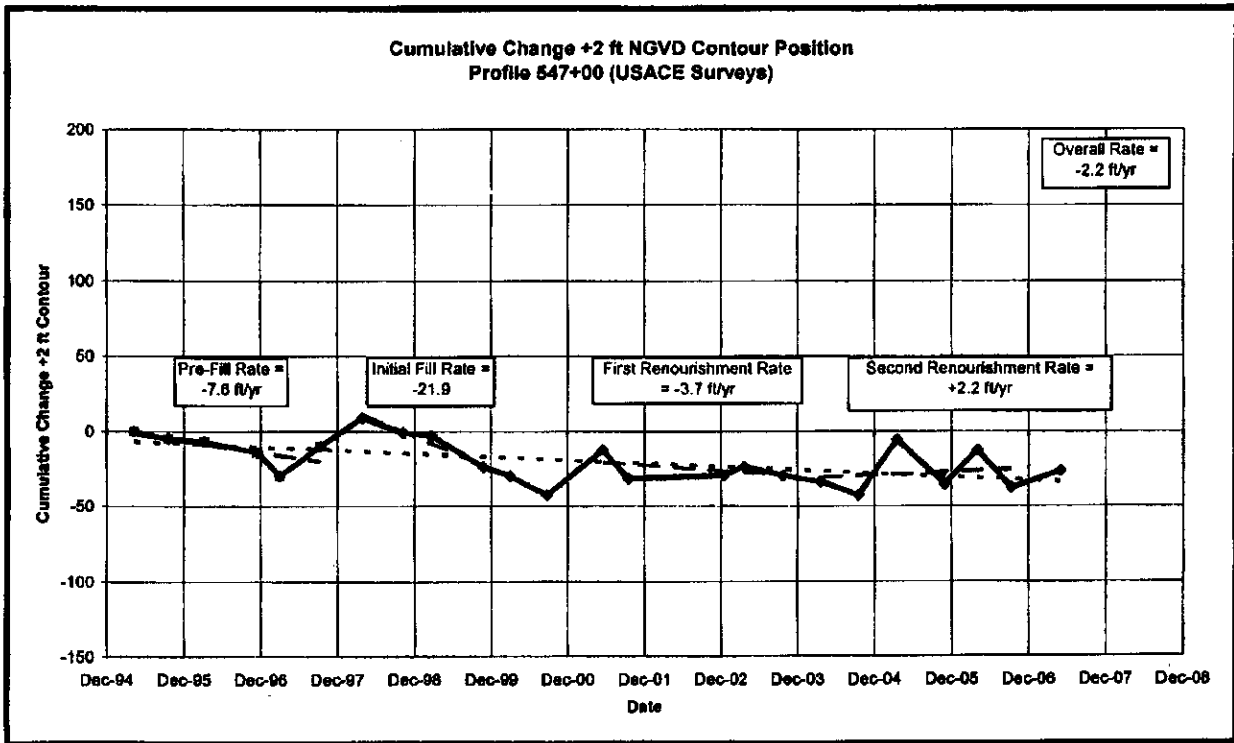


Figure 8. Cumulative change in +2-foot contour position for Profile 547+00.

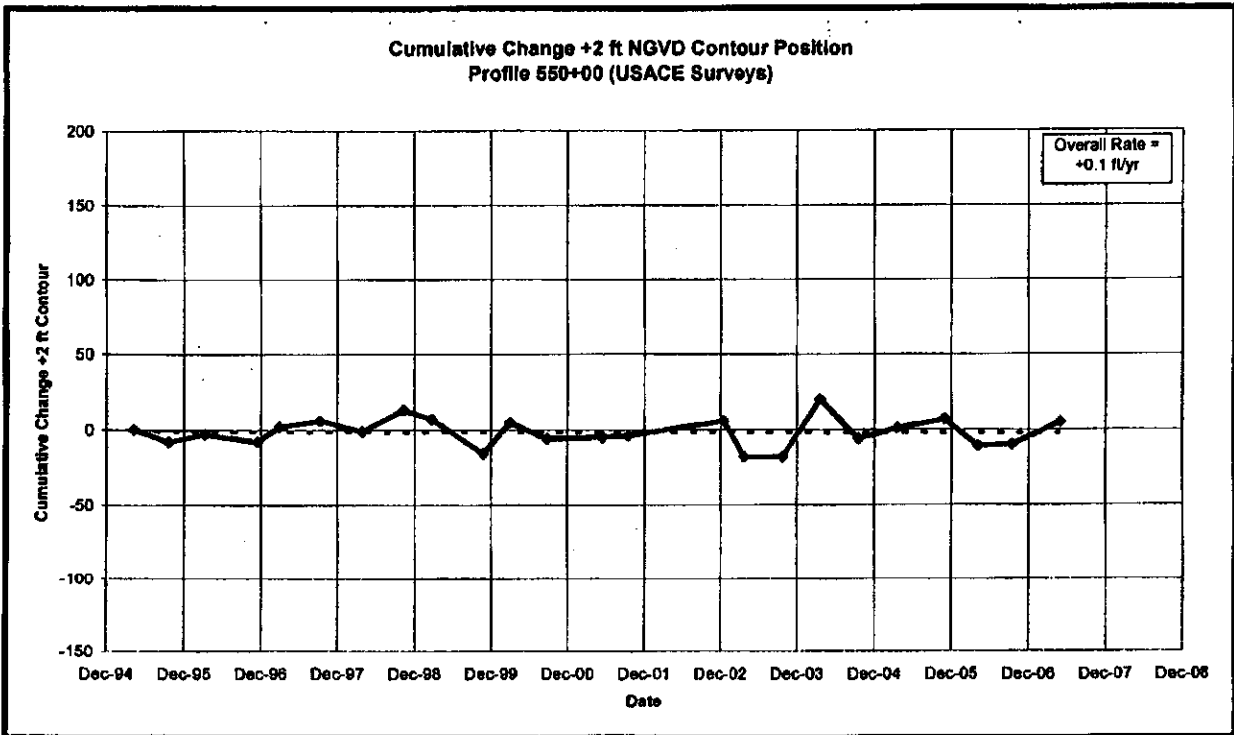


Figure 9. Cumulative change in +2-foot contour position for Profile 550+00.

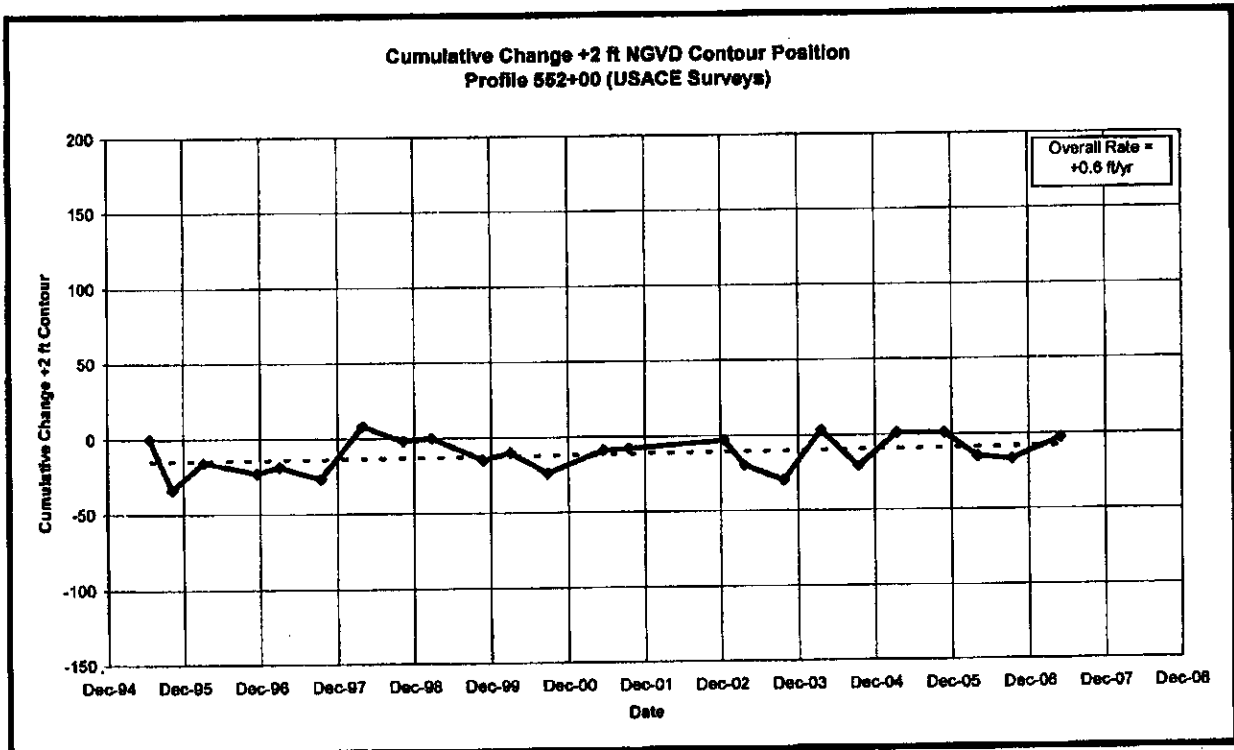


Figure 10. Cumulative change in +2-foot contour position for Profile 552+00.

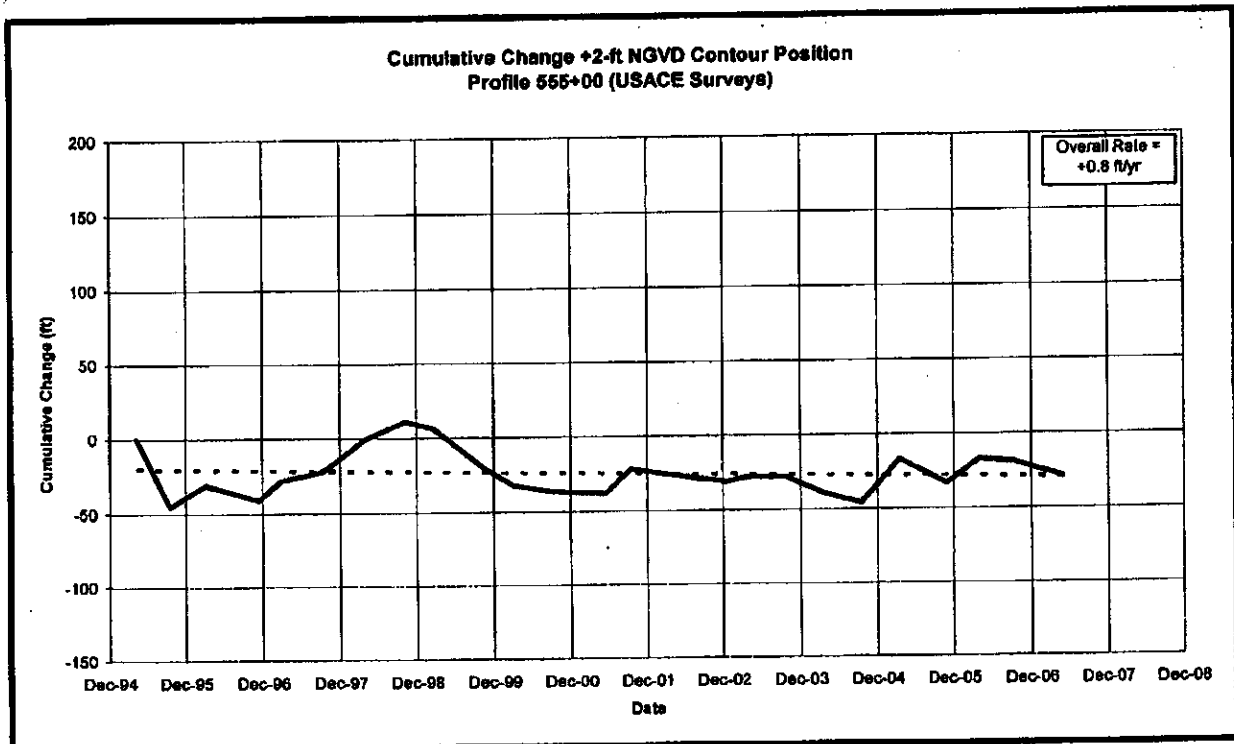


Figure 11. Cumulative change in +2-foot contour position for Profile 555+00.

An analysis of the rates of change in the +2-foot contour position found the change rates to be dependent on alongshore position, as represented by the profile station number, and the added width of the beach provided by each fill increment. To demonstrate this relationship, the rate of change in the +2-foot contour position was normalized by dividing the rate of change of the +2-foot contour by the increase in beach width (see Table 1) and the resulting average normalized rates plotted versus the profile station as shown in Figure 12.

Table 1. Post-fill rates of change in the position of the +2-foot NGVD contour and normalized rates of change.

Profile	Fill	Fill Width (W) (ft)	Recession Rate (ER) (ft/yr)	Normalized Rate = ER/W
530+00	Initial	178	-52.4	-0.29
	First Renourishment	145	-50.8	-0.35
	Second Renourishment	113	-42.2	-0.37
	Average			-0.34
535+00	Initial	145	-41.2	-0.28
	First Renourishment	138	-50.6	-0.37
	Second Renourishment	97	-29.3	-0.30
	Average			-0.32
539+00	Initial	105	-39.1	-0.37
	First Renourishment	129	-45.8	-0.36
	Second Renourishment	73	-23.4	-0.32
	Average			-0.35
543+00	Initial	66	-35.8	-0.54
	First Renourishment	98	-19.7	-0.20
	Second Renourishment	21	-12.5	-0.60
	Average			-0.45
547+00	Initial	19	-21.9	-1.15
	First Renourishment	30	-3.7	-0.12
	Second Renourishment	-4	2.2	-0.55
	Average			-0.61

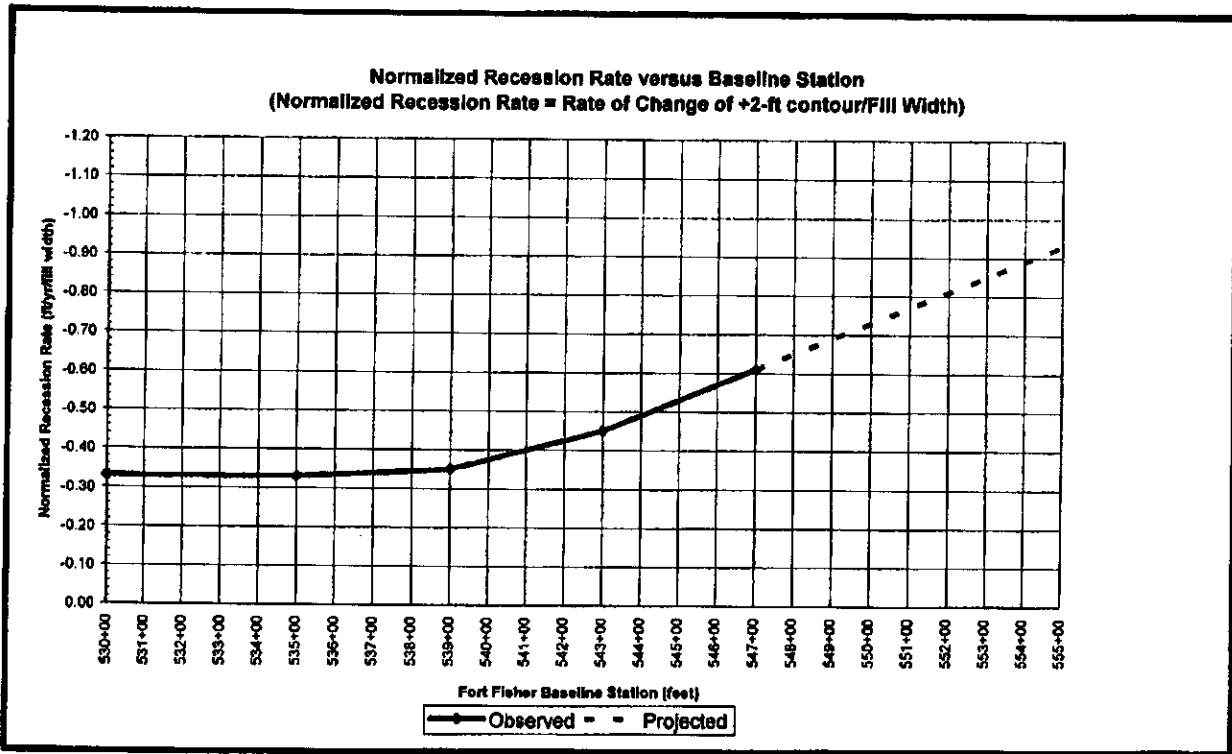


Figure 12. Normalized +2-foot contour change rate versus baseline (profile) station.

The solid blue line in Figure 12 runs through the observed average normalized recession rates of the +2-foot NGVD contour presented in Table 1 while the red dashed line is a projection of the normalized recession rates into the shoreline area fronting the Riggings. This projection was used to estimate expected recession rates for the +2-foot NGVD contour (MHW shoreline) for various fill widths with these projected rates given in Table 2.

Table 2. Estimated recession rates for the +2-foot NGVD shoreline versus fill width in the area fronting the Riggings.

Profile	Fill Width (feet)						
	25	50	75	100	125	150	175
550+00	-18.3	-36.5	-54.8	-73.0	-91.3	-109.5	-127.8
552+00	-20.3	-40.5	-60.8	-81.0	-101.3	-121.5	-141.8
553+00	-21.3	-42.5	-63.8	-85.0	-106.3	-127.5	-148.8
554+00	-22.5	-45.0	-67.5	-90.0	-112.5	-135.0	-157.5
555+00	-23.3	-46.5	-69.8	-93.0	-116.3	-139.5	-162.8

The estimated recession rates for a fill placed in front of the Riggings are only slightly less than the added beach width implying regardless of the added width of beach, most of the added width would be gone within a year to a year and a half.

Volumetric Changes Landward of the -2-foot NGVD Contour.

Volumetric changes landward of the -2-foot NGVD contour were analyzed in a manner similar to the changes in the +2-foot NGVD contour except rates of volume change following each nourishment cycle were computed for all profiles even if they did not directly receive beach fill. Plots of the cumulative change in volume above -2 feet NGVD and the linear regression rates of volume change following each nourishment operation as well as the pre-fill rates are given in Figures 13 to 20.

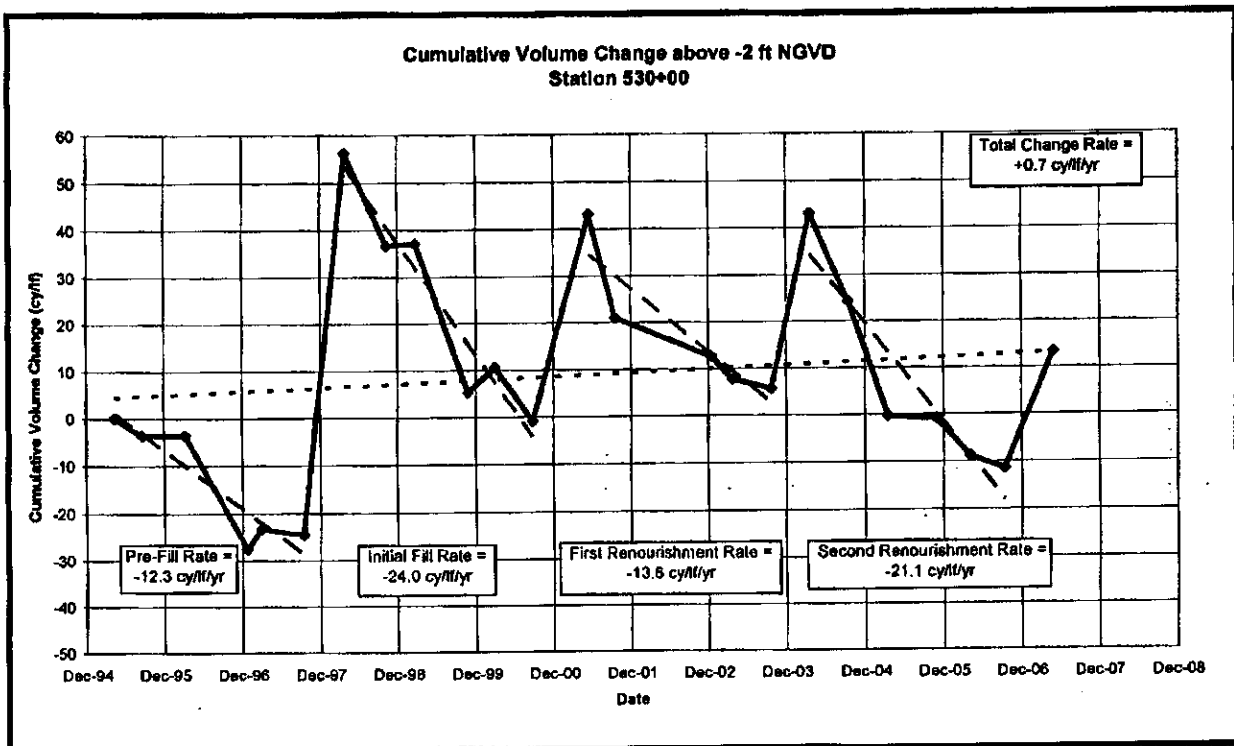


Figure 13. Cumulative volume change above -2 ft NGVD for profile 530+00.

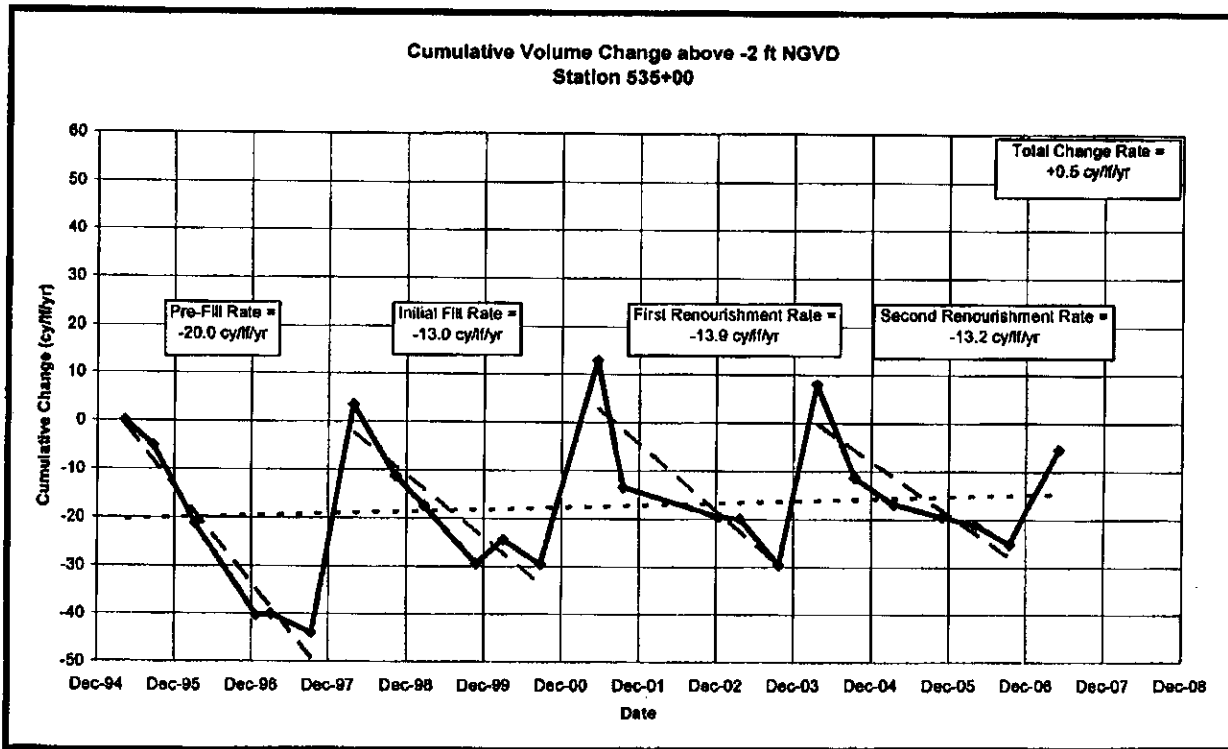


Figure 14. Cumulative volume change above -2 ft NGVD for profile 535+00.

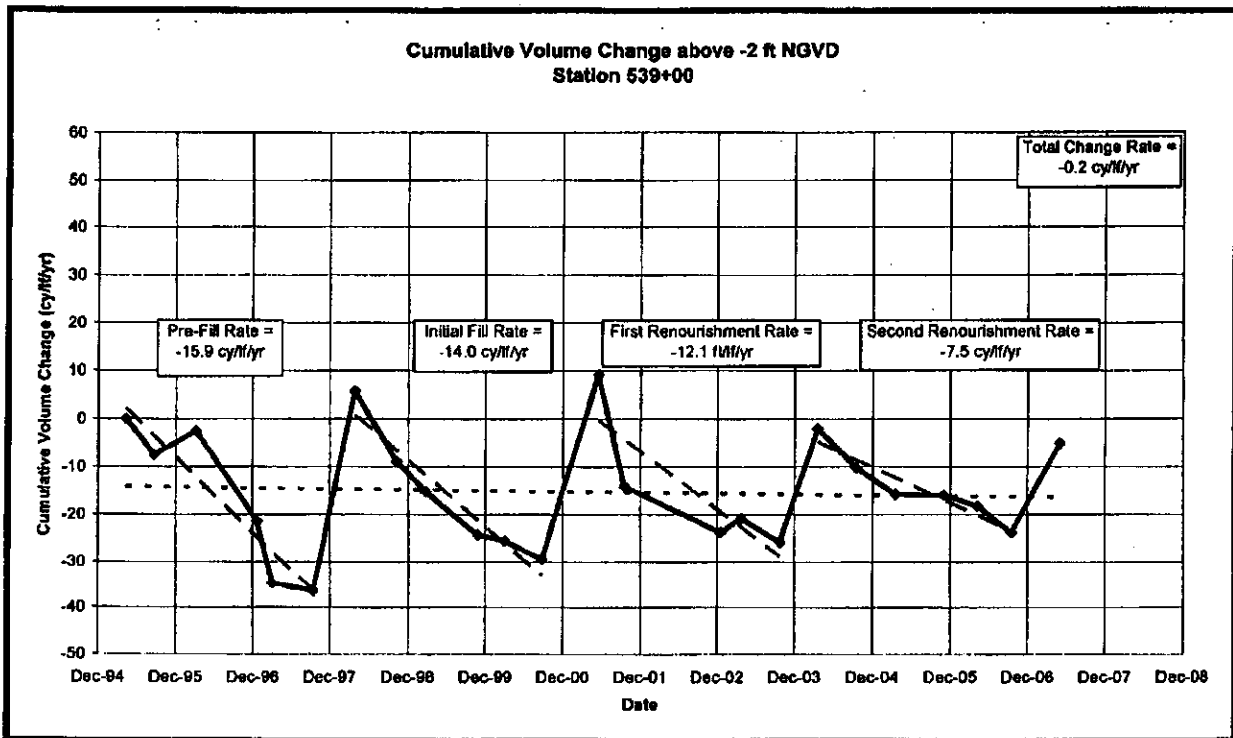


Figure 15. Cumulative volume change above -2 ft NGVD for profile 539+00.

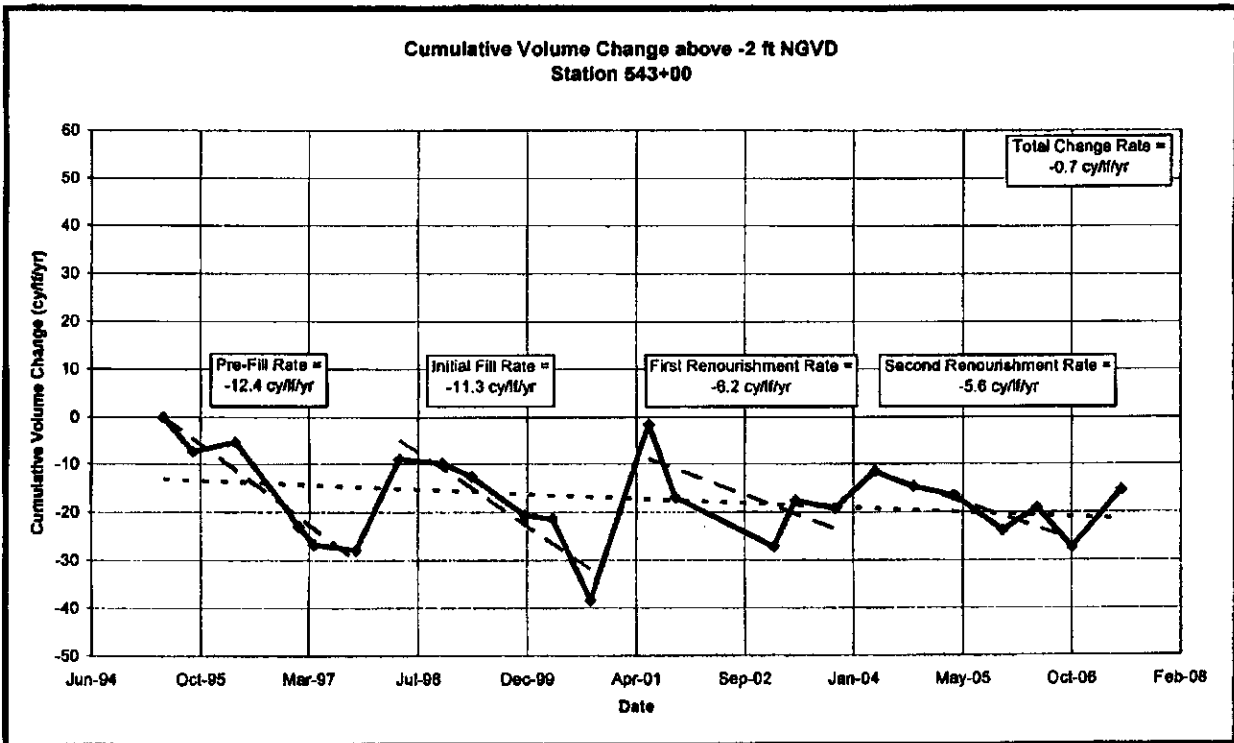


Figure 16. Cumulative volume change above -2 ft NGVD for profile 543+00.

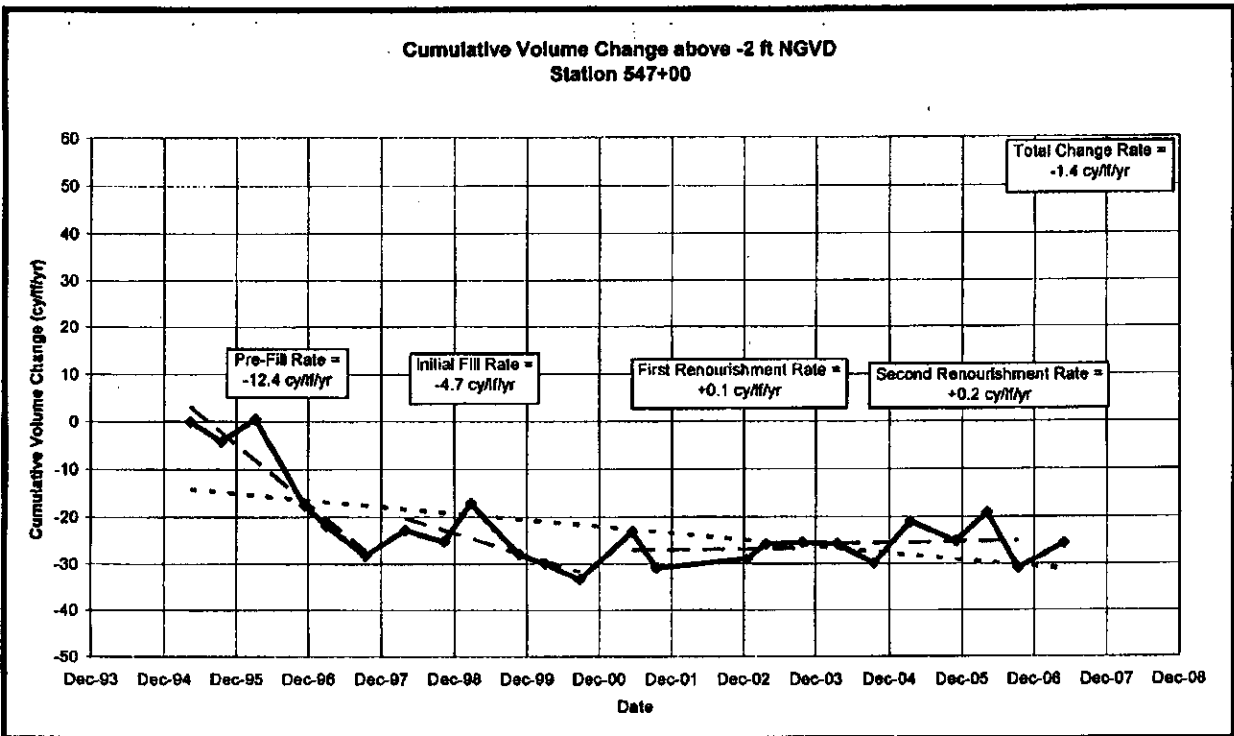


Figure 17. Cumulative volume change above -2 ft NGVD for profile 547+00.

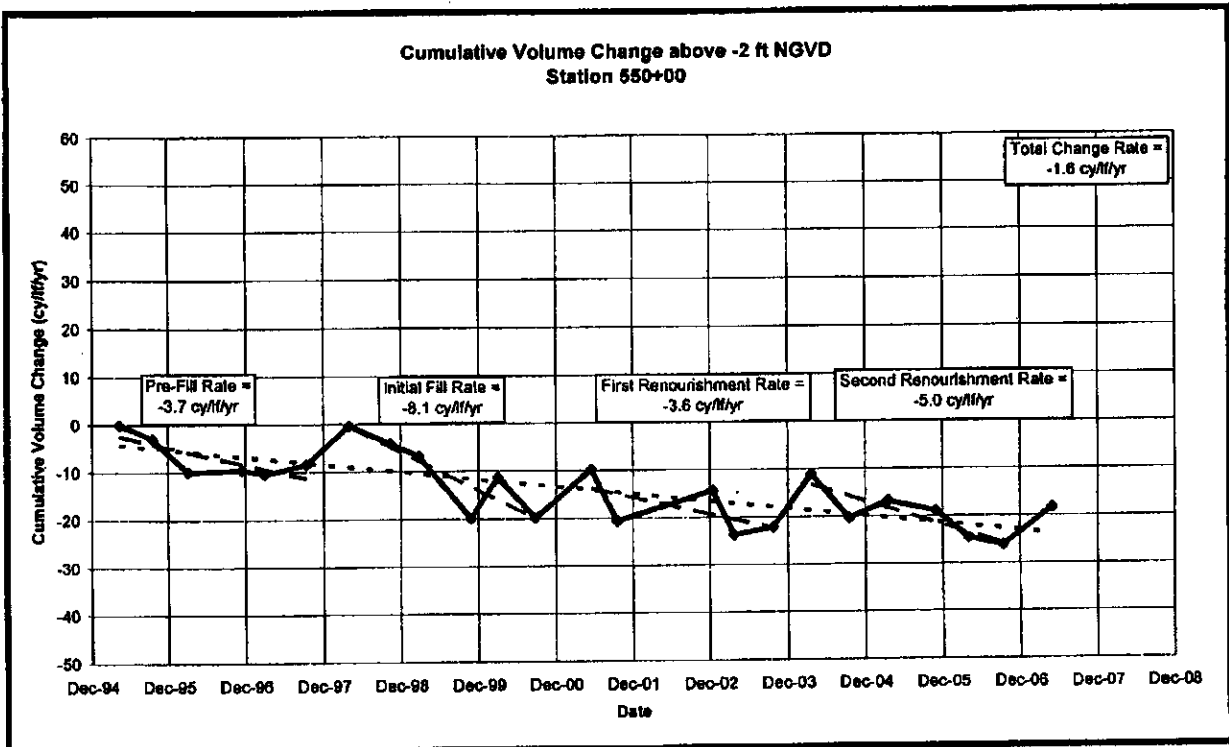


Figure 18. Cumulative volume change above -2 ft NGVD for profile 550+00.

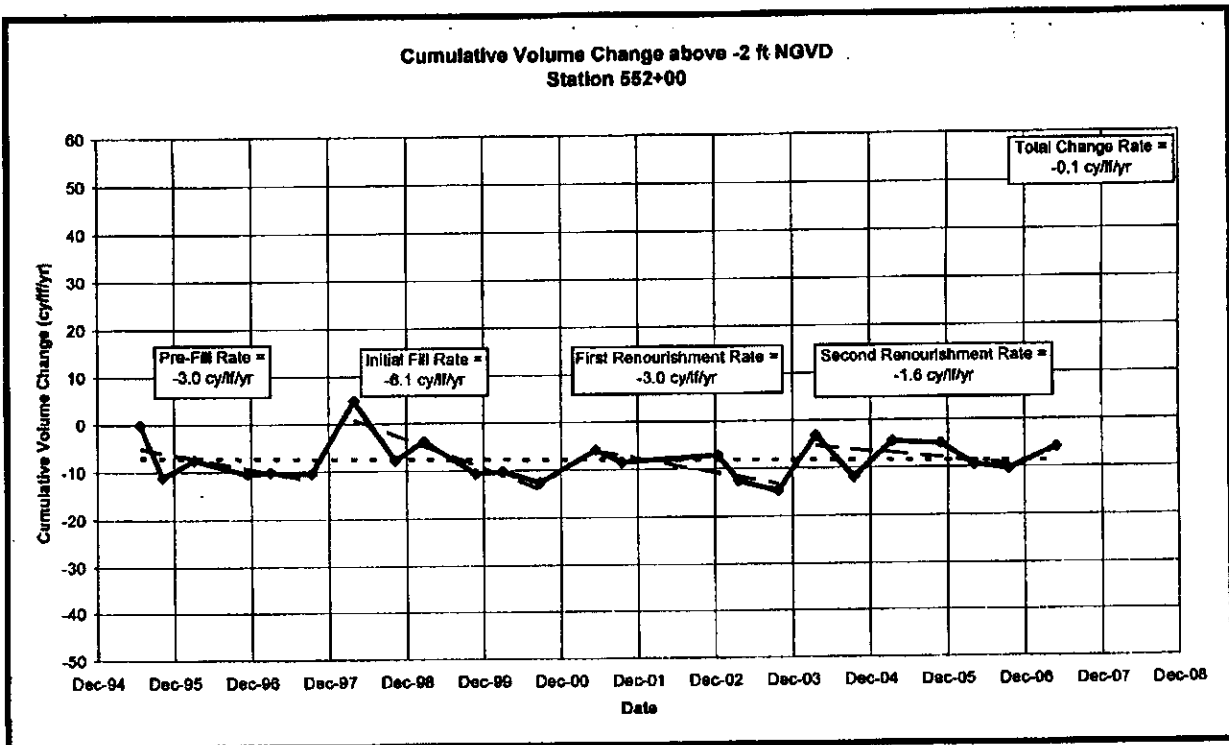


Figure 19. Cumulative volume change above -2 ft NGVD for profile 552+00.

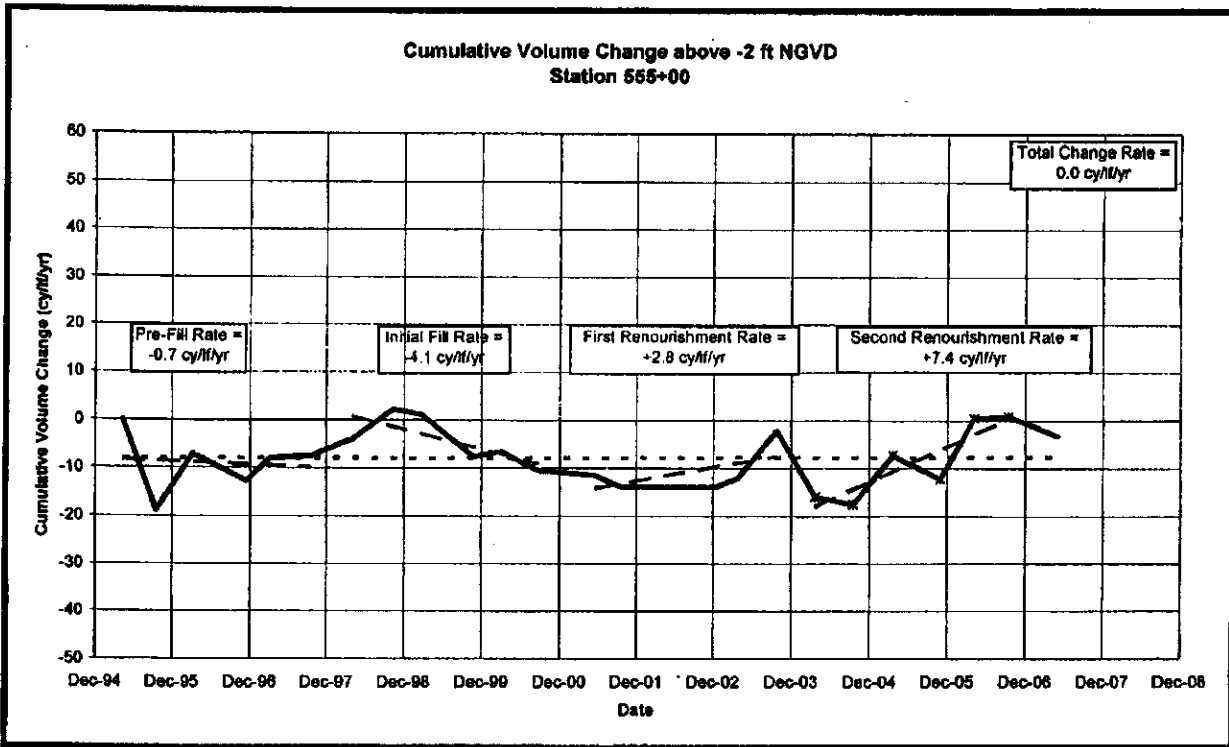


Figure 20. Cumulative volume change above -2 ft NGVD for profile 555+00.

Table 3 provides a summary of the volume of material placed above the -2-foot depth contour for profiles 530+00 to 547+00, the volumetric erosion rate of the material placed above -2 feet NGVD, and the width of the construction berm created by the fill. As a matter of note, the total volume of material placed on each profile out to the -20-foot NGVD depth contour during each nourishment operation was approximately twice the amount placed above -2 feet NGVD. For example, the total volume placed on profile 530+00 during initial construction was 174.3 cy/lf versus 80.8 cy/lf placed above -2 feet NGVD. This same general relationship was observed at other profiles that included survey coverage out to the -20-foot depth contour.

Surveys of profiles 530+00, 539+00, and 543+00 between April 1998 and September 2000, or following the initial fill extended out to the -20-foot NGVD contour and were used to estimate the total volumetric change on the profiles relative to changes above the -2-foot NGVD depth contour. For these three profiles, the average volume change for the initial fill out to -20 feet NGVD was 1.7 times the rate observed above -2 feet NGVD. Again using profile 530+00 as an example, the volume rate of change for the initial fill above -2 feet NGVD was -24.0 cy/lf/yr while the total volume change out to -20 feet NGVD was -40.6 cy/lf/yr. This average relationship will be used later to estimate total volume losses for the southward extension of the Kure Beach project.

The volumetric rate of erosion above -2 feet NGVD (ER) for profiles 530+00 to 547+00 following each nourishment operation (only initial for 547+00) were normalized by dividing the erosion rate by the width (W) of the fill with the results provided in Table 3. The average ratio

of ER/W at each profile station was plotted versus the profile station as shown in Figure 21. As can be seen on Figure 21, ER/W increases from profile 539+00 to 547+00. This general trend was extended south to include the shoreline fronting the Riggings (red dashed line in Figure 21). The projected ER/W values were used to estimate possible volumetric erosion rates above -2 ft NGVD for a fill placed south of profile 547+00 to profile 555+00. These projected volumetric erosion rates for various fill widths are given in Table 4.

Table 3. Fill volumes above -2 feet NGVD, volumetric erosion above -2 feet NGVD, fill widths, and normalized volumetric erosion rates (ER/W) for profiles 530+00 to 547+00.

Profile	Fill Operation	Volume of fill above -2 ft NGVD (V) cy	Volumetric Erosion Rate (ER) above -2 ft NGVD cy/lf/yr	Width of Fill (W)	Normalized Volumetric Erosion Rate = (ER/W)
530+00	Initial	80.8	-24.0	178	-0.135
	1 st Renourishment	44.1	-13.6	145	-0.094
	2 nd Renourishment	37.4	-21.1	113	-0.187
	Average	54.1	-19.6	145	-0.138
535+00	Initial	47.5	-13.0	145	-0.090
	1 st Renourishment	42.4	-13.9	138	-0.101
	2 nd Renourishment	37.6	-13.2	97	-0.136
	Average	42.5	-13.4	127	-0.109
539+00	Initial	42.2	-14.0	105	-0.133
	1 st Renourishment	38.6	-12.1	129	-0.094
	2 nd Renourishment	23.8	-7.5	73	-0.103
	Average	34.9	-11.2	102	-0.110
543+00	Initial	19.0	-11.3	66	-0.171
	1 st Renourishment	36.7	-6.2	98	-0.063
	2 nd Renourishment	7.6	-5.6	21	-0.267
	Average	21.1	-7.7	62	-0.167
547+00	Initial	5.2	-4.7	19	-0.247

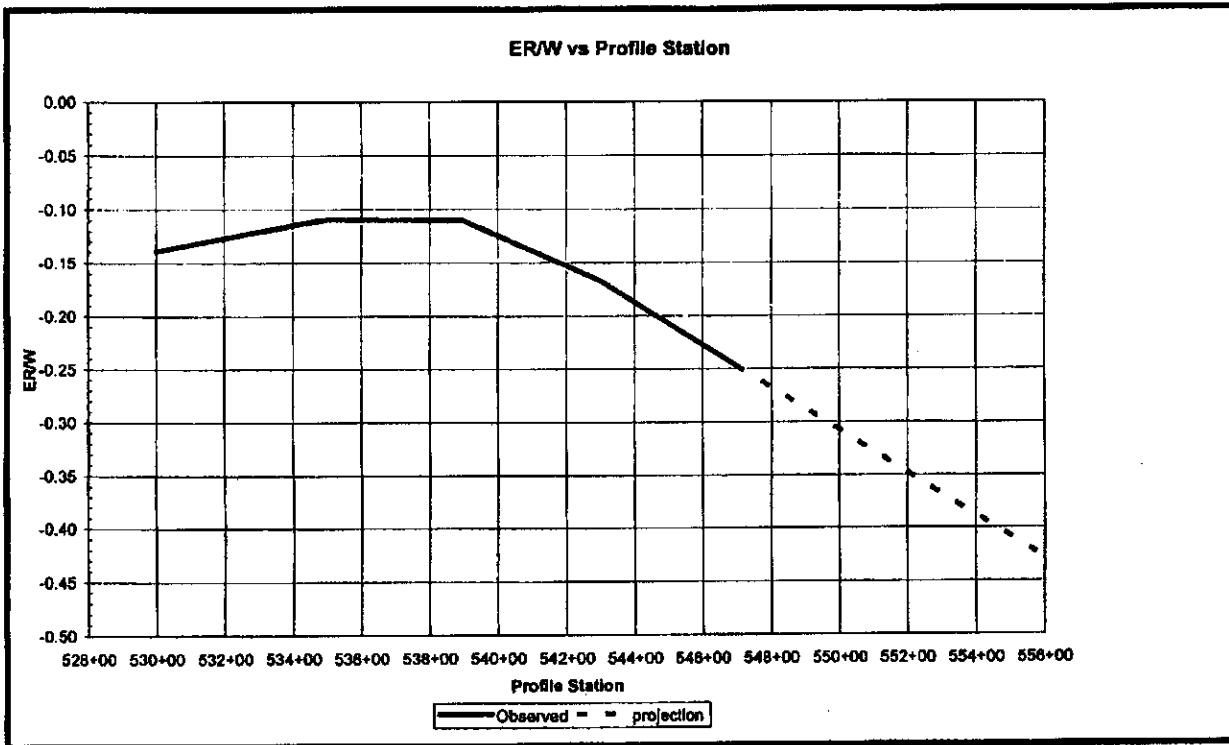


Figure 21. Normalized volumetric erosion rate (= ER/W) versus profile station. Blue line is observed and red dashed line is projected south to include the Riggings shoreline.

Table 4. Estimated volumetric erosion rates for various beach fill widths placed along the Riggings shoreline. Volumetric erosion rates apply to material placed above the -2-foot NGVD depth contour.

Profile	Estimated ER/W (From Fig 21)	Volumetric Erosion Rate (cy/lf/yr) above -2 feet NGVD for Beach Fill Widths =		
		25 feet	35 feet	50 feet
547+00	-0.247	-6.2	-8.7	-12.4
550+00	-0.308	-7.7	-10.8	-15.4
552+00	-0.348	-8.7	-12.2	-17.4
555+00	-0.408	-10.2	-14.3	-20.4

The beach fill widths referenced in Table 4 represent the width of the construction berm. As a general rule, approximately 0.5 cubic yard/lineal foot of fill is needed above -2-foot NGVD for each foot of width of the construction berm. Accordingly, placement rates above -2 feet NGVD for the 25-foot, 35-foot and 50-foot beach widths given in Table 4 would be 12.5, 17.5, and 25.0 cubic yards/lineal foot, respectively.

Based on the volumetric rates of placement above -2 feet NGVD, the life of the fill along the Riggings shoreline would range from about 2 years at profile 547+00 to 1.2 years at profile 555+00. The recession rates for the +2-ft contour would seem to indicate the fill would be essentially gone within 1 to 1.5 years. The reason for this apparent difference in the longevity of

the fill based on recession rates for the +2-foot contour and volumetric erosion rates is due to the normal adjustments in the shape of the beach profile that occur immediately following placement. The fill templates for the Kure Beach project (Figure 1) included a construction berm. The construction berm contains material that is expected to slough seaward as the fill material adjusts to wave and tide conditions. When placed, the slope of the material seaward of the crest of the construction berm is normally much steeper than the slope of the natural beach. Over time, the fill material will assume slopes comparable to the slopes of the natural beach and this post-nourishment adjustment is reflected in abnormally high recession rates of the upper portion of the beach profile.

The estimated total volume losses, i.e., out to -20 feet NGVD, for the various fill widths are provided in Table 5 with the total volume loss based on the 1.7 factor discussed above.

Table 5. Estimated volumetric erosion rates out to -20 feet NGVD for various fill widths placed along the Riggings shoreline.

Profile	Estimated ER/W (From Fig 21)	Volumetric Erosion Rate (cy/lf/yr) out to -20 feet NGVD for Beach Fill Widths =		
		25 feet	35 feet	50 feet
547+00	-0.247	-10.5	-14.8	-21.1
550+00	-0.308	-13.1	-18.4	-26.2
552+00	-0.348	-14.8	-20.7	-29.6
555+00	-0.408	-17.3	-24.3	-34.7

General Assessment of Beach Fill Performance in Front of the Riggings.

A beach fill placed directly in front of the Riggings would seemly have a relatively short duration in terms of significant and long-term widening of the beach based on the information provided above. However, the disposal of material north of the Riggings and the southward transport of that material have reduced shoreline recession and volumetric changes in this area. Prior to the construction of the Kure Beach project and the Fort Fisher revetment, shoreline recession rates measured at profiles 550+00, 552+00, and 555+00 averaged -4.5, -6.2, and -6.9 ft/yr, respectively (USACE, Aug 2006). For the total survey period included in the USACE monitoring program (May 1995 to May 2007) shoreline change rates for these three stations have averaged +0.1, +0.6, and +0.8 ft/yr, respectively (see Figures 9 to 11), i.e., all three profiles have experienced relative stability.

In essence, the south end of the Kure Beach project acts as a “feeder beach” for the shorelines located south of the project. The north wingwall of the Fort Fisher revetment may also have some influence on the shoreline immediately to the north (see Figure 22) due to its seaward protuberance, but this impact is believed to be relatively minor.



Figure 22. New Hanover County 2006 aerial photo (New Hanover County GIS Online Mapping Service).

The implication of the observed shoreline behavior fronting the Riggings during the post-Kure Beach project period suggest one possible ameliorating measure for protection of the Riggings would be to overfill the south end of the Kure Beach project beyond the limits authorized for the USACE project. By adding more material to the south end of the Kure Beach project, this section of the project would become an even more effective “feeder beach” as sediment transport

off the end of the fill would increase and help maintain the beach fronting the Riggings. The creation of a larger "feeder beach" on the south end of the Kure Beach project could be combined with a relatively small beach fill directly in front of the Riggings. With the added influx of material off the south end of the Kure Beach project, the performance of the fill directly in front of the Riggings should be better than that predicted above.

Before formulating a plan involving direct placement of material in front of the Riggings and/or the use of a feeder beach, potential impacts on the coquina rock outcrops must be considered.

Impacts of Kure Beach Project on Coquina Rock Outcrops.

The exact location of the coquina rock outcrops located between profiles 530+00 and 555+00 is not known. An estimate of the location of the rock outcrops was made from the USACE plan drawings for the Kure Beach project which show some general outlines of the coquina rock. The source of this information is not clear, however, the locations appear to be reasonable based on aerial photos of the area.

Plots of the profiles taken between 539+00 and 555+00 before and after the initial, 1st renourishment, and 2nd renourishment operations are provided on Figures 23 to 28 with rough estimates of the location of the coquina rock outcrops, taken from the USACE design drawings, indicated on each profile. The primary point of emphasis for these plots is to demonstrate the apparent direct burial of the northernmost coquina rock outcrop during fill placement at profiles 539+00 and 543+00 and secondary and ephemeral burial of the coquina rock outcrops south of the direct placement area.

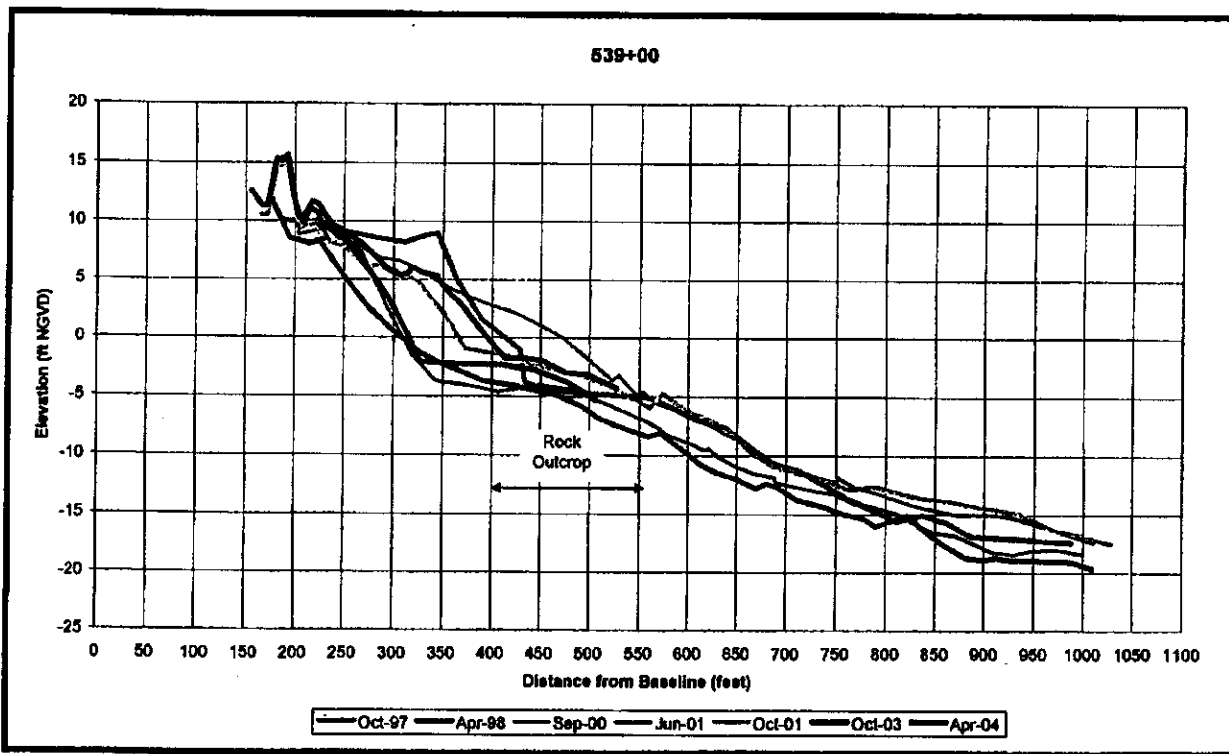


Figure 23. Offshore fill adjustments at Profile 539+00 (direct fill area).

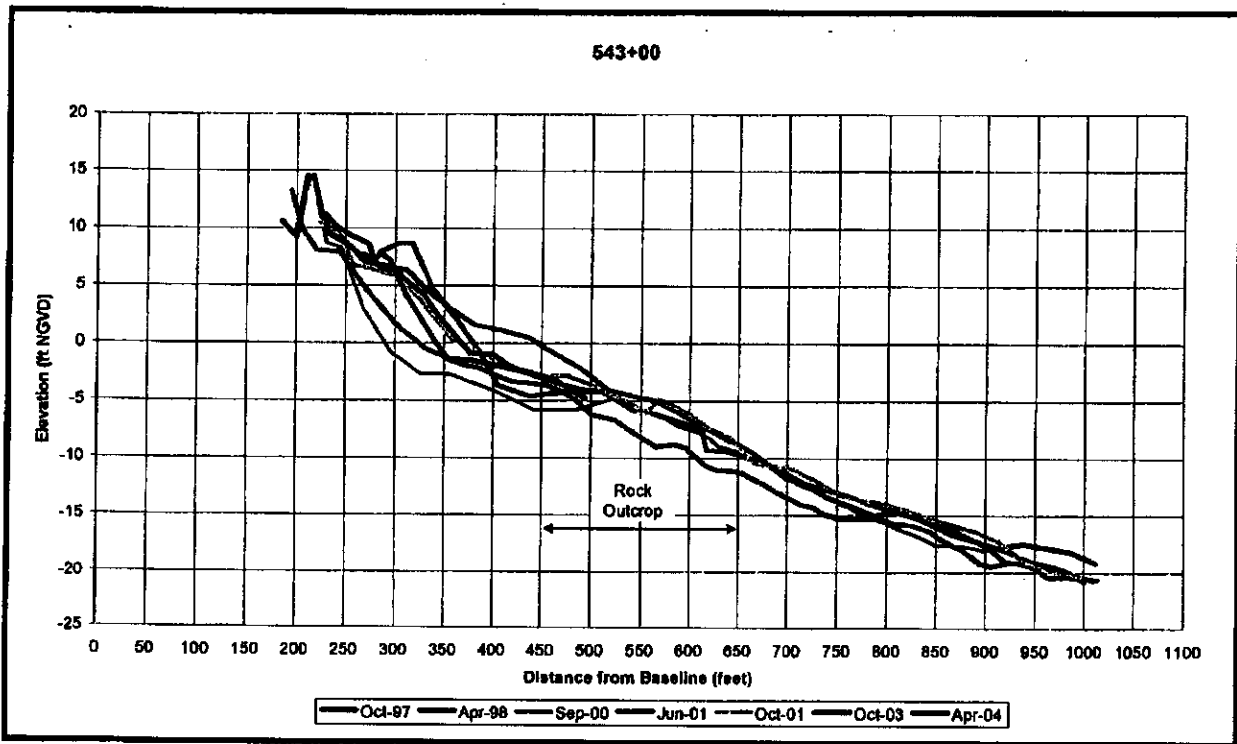


Figure 24. Offshore fill adjustments at Profile 543+00 (direct fill area).

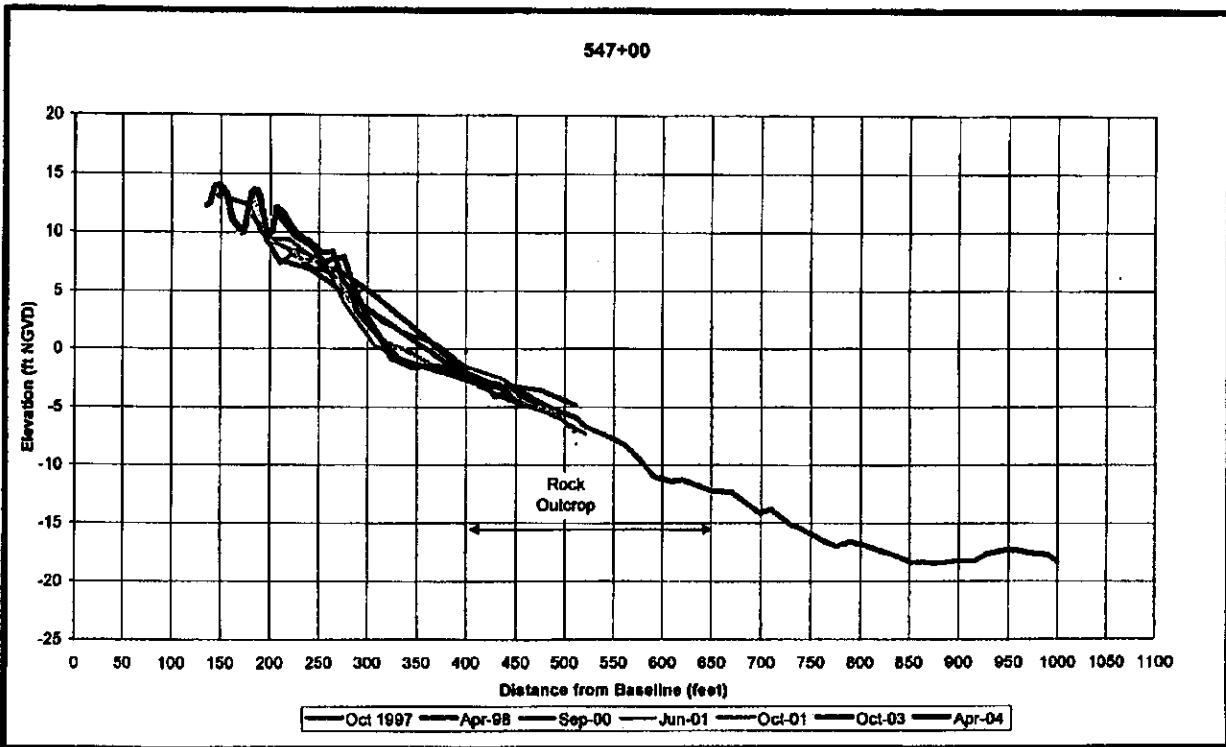


Figure 25. Offshore changes at Profile 547+00 south of direct fill area.

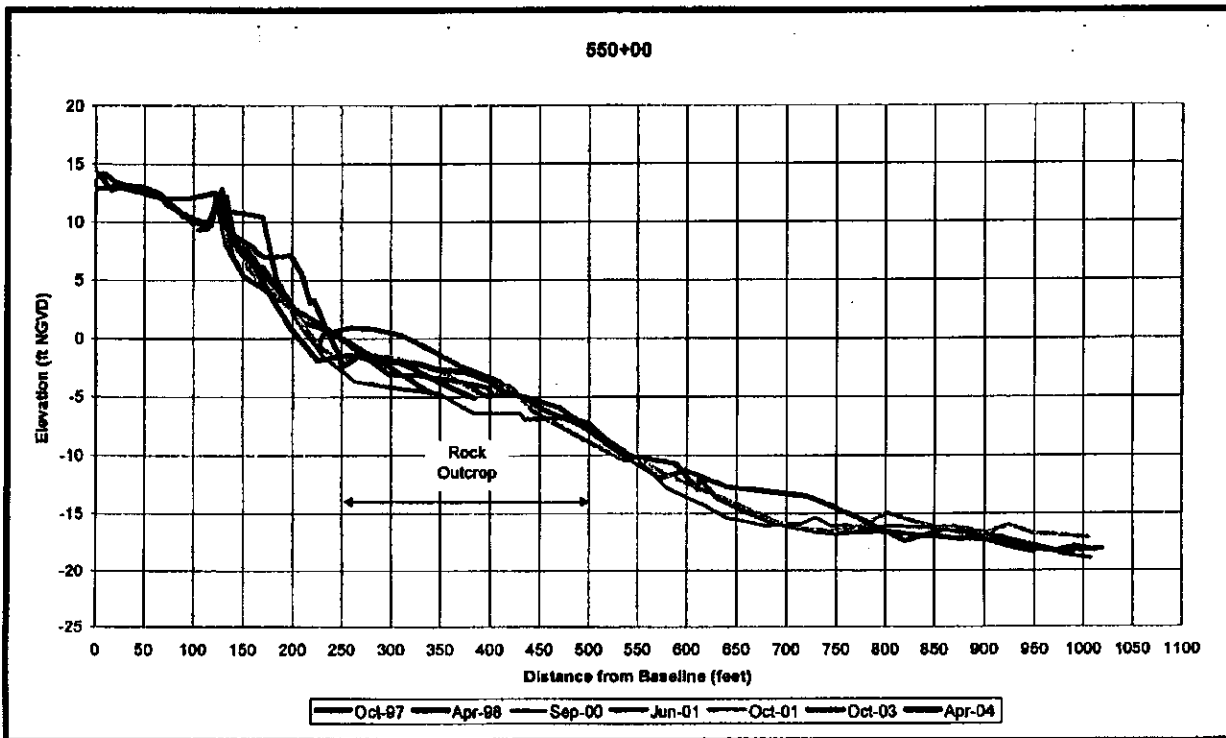


Figure 26. Offshore changes at Profile 550+00 south of direct fill area.

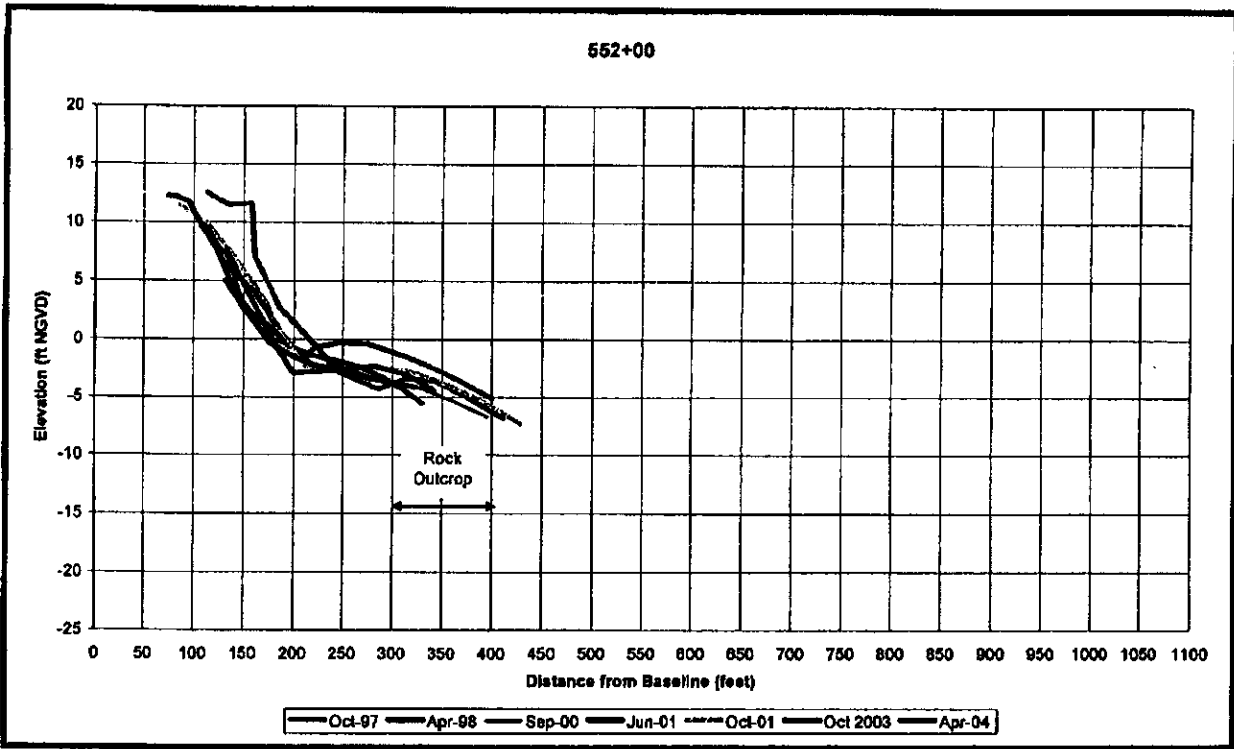


Figure 27. Offshore changes at Profile 552+00 south of direct fill area.

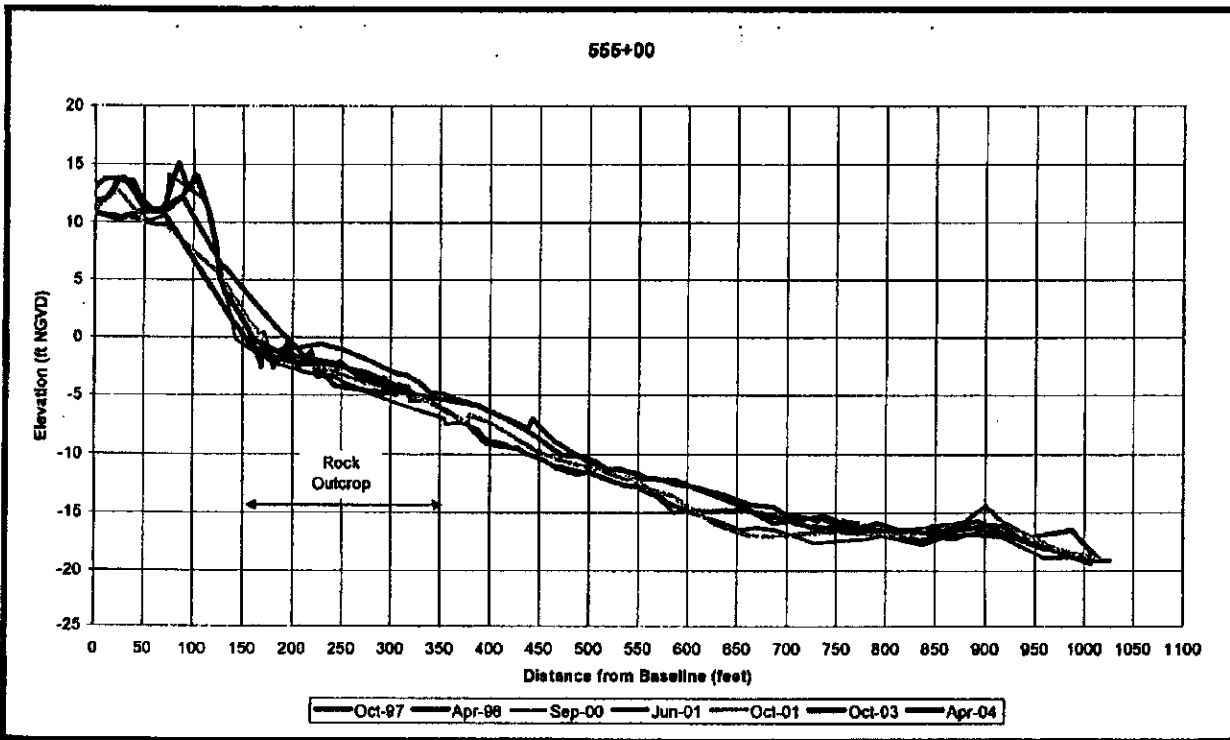


Figure 28. Offshore changes at Profile 555+00 south of direct fill area.

During each nourishment operation, the rock outcrops experienced some direct and indirect burial between profiles 539+00 and 543+00. The greatest amount of direct burial occurred during the 1st renourishment (June 2001 survey) which used material from the deepening of Wilmington Harbor. The material from the harbor deepening project was apparently finer than the material obtained from the offshore borrow area which resulted in rather flat fill slopes. The direct burial associated with the harbor material was short lived as indicated by the October 2001 survey which indicated considerable deepening of profiles 539+00 and 543+00 between the +5-foot and -5-foot NGVD depth contours. The initial fill and the 2nd renourishment profiles assumed much steeper slopes during placement and appeared to closed with the pre-fill profile in water depths around -5 feet NGVD, resulting in only minimal direct burial of the near shore coquina rock outcrops. Post-placement adjustments of material from the offshore borrow area (initial and 2nd renourishment) moved sediment seaward resulting in some indirect burial of the rock outcrops.

In the area south of the direct fill placement (profiles 547+00 to 555+00), offshore sediment transport into the apparent outcrop areas was not as extensive and was probably associated with normal fluctuations in the near shore bottom due to changes in wave and tide conditions. One exception appears to be the June 2001 survey where considerable change was observed generally between 0 NGVD and -10 feet NGVD. Again, the June 2001 profiles reflect changes associated with the finer fill material obtained from the Wilmington Harbor deepening project. With a high percentage of the material being displaced seaward during and immediately following placement, this material obviously spread south rather rapidly resulting in the observed near shore changes. As was the case for profiles 539+00 and 543+00, the near shore accumulation of material caused by the harbor material was essentially gone by October 2001. Similar responses south of the direct placement areas did not occur following the initial and 2nd renourishment due to the apparent coarseness of the fill material.

Summary of Impacts on the Coquina Rock Outcrops.

Construction and subsequent periodic nourishment of the Kure Beach project has had some direct and indirect impacts the near shore coquina rock outcrops. Direct burial of the rock outcrops appeared to be minimal when the coarser material from the offshore borrow area was used compared to the impacts associated with the Wilmington Harbor material. Even with the Wilmington Harbor material, the direct burial of the rock outcrops did not persist very long with most of the material removed by normal littoral transport processes within 4 months.

South of the direct placement area for the Kure Beach project, sediment transported off of the fill did not produce any significant indirect burial of the near shore rock outcrops as profiles 547+00 to 555+00 only experienced what appeared to be normal fluctuations. Again the one exception was following the 1st renourishment cycle, but this impact was of short duration.

Riggings Beach Nourishment Plan.

The behavior of the Kure Beach project and its impacts on the shoreline and beach south of the project area suggest beach nourishment could be used to provide some level of erosion protection

for the Riggings. While direct placement of a massive beach fill in front of the Riggings would not be practical due to high rates of erosion of the fill, a minimal beach fill, with a placement rate of 25 cubic yards/lineal foot, together with the addition of material to the south transition section of the Kure Beach project to act as a feeder beach, would appear to have the potential to provide a reasonable level of erosion protection for the Riggings. This relatively small beach fill would serve as a pilot or test project to determine the feasibility and effectiveness of the overall plan. Post project monitoring would be conducted to document the performance of the fill and determine if significant burial of the near shore coquina rock outcrops occur. In addition to the profile surveys, pre- and post-nourishment biological assessments of the rock outcrops would be performed by marine biologist.

Details of the pre- and post-construction monitoring program will be developed during the permitting process. In general, characterization of the coquina rock habitat would be accomplished by marine biologist trained in the procedures and methods of BEAMR (Benthic Ecological Assessment for Marginal Reefs) developed by Coastal Planning & Engineering. BEAMR involves a completed census of physical, abiotic, and biotic functional groups (parameters) within each sample quadrat established along geo-referenced transects.

The proposed beach fill would begin at profile 530+00 with the additional volume rate of placement gradually increasing from 0 to 25 cy/lf at station 545+00 (end of the Kure Beach transition fill). The fill would continue at 25 cy/lf between profiles 545+00 and 555+00 and then transition to 0 cy/lf at profile 560+00 located in front of the Fort Fisher picnic area. A typical cross-section of the proposed fill is shown in Figure 29 with the preliminary layout shown in Figure 30. The estimated total volume of the fill would be 50,000 cubic yards.

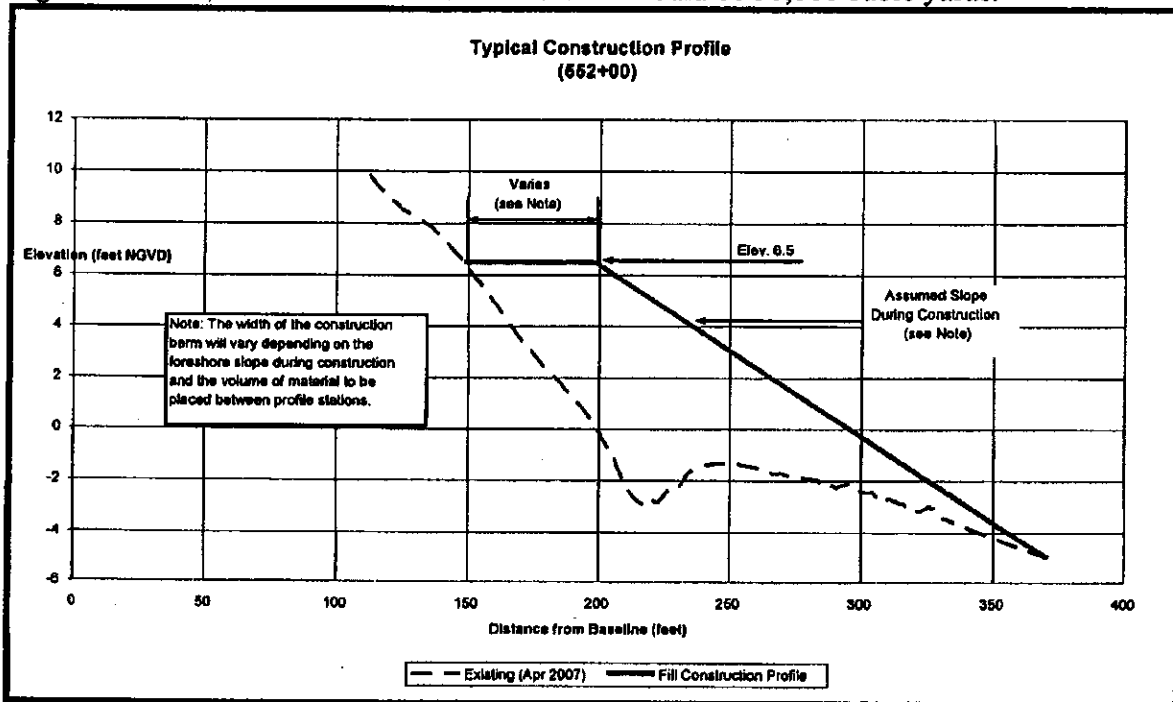


Figure 29. Typical cross-section proposed fill.

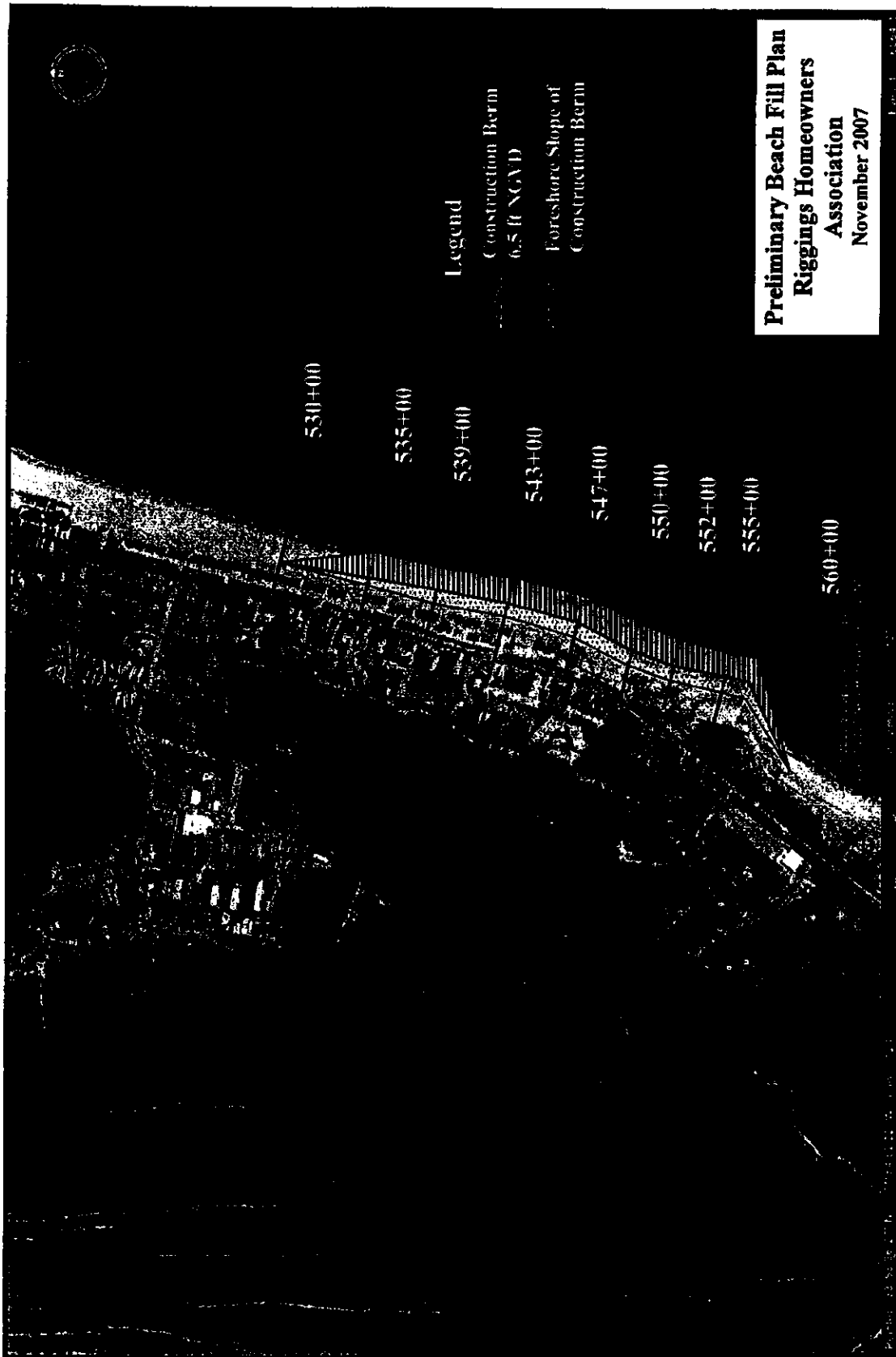


Figure 30. Preliminary beach fill plan for the Riggings Condominium.

Cost Estimate. Detailed cost estimates for the construction and pre- and post-construction monitoring have not been prepared at this time. Based on bids received for the 2007 Kure Beach renourishment, unit costs for the beach fill material could range from \$5.00/cubic yard to \$9.00/cubic yard. The Corps of Engineers estimate for the 2007 nourishment was \$4.60/cubic yard; however, the low bidder offered \$8.94/cubic yard. In this regard, the 2007 Kure Beach nourishment was one of three jobs included in the bid package, namely, Kure Beach, Ocean Isle, and Carolina Beach, so the costs for the Kure Beach portion may have been inordinately high. The average unit costs received for the nourishment operation, including the Corps of Engineers estimate, was approximately \$7.00/cubic yard. Accordingly, the cost for placing 50,000 cubic yards between profile 530+00 and 560+00 could range from \$250,000 to \$450,000. In addition, the Riggings HOA may have to pay for incremental mobilization and demobilization costs associated with the southward extension of the fill project.

Pre- and post-construction beach profile monitoring should not be very expensive and may well be covered by the Corps of Engineers Fort Fisher monitoring program. The significant monitoring costs would be associated with the biological monitoring of the coquina rock outcrop. Again, estimates of these costs cannot be made until input is provided from the various State and Federal resource agencies.

Predicted Fill Performance.

Placement of 25 cy/lf of fill would require a construction berm width of approximately 50 feet. Accordingly, the predicted performance of the fill is based on projected volumetric erosion rates of the fill out to -20 feet NGVD (Table 5). Based on these projected rates, the fill would apparently be gone in about one year. However, the rates given in Table 5 were developed without the benefit of the additional material placed on the south end of the Kure Beach project to serve as a feeder beach. The added influx of material off of the south end of the Kure Beach project should reduce the predicted volumetric erosion and prolong the life of the fill. At this preliminary stage of the plan development, the impact of the feeder beach material has not been addressed as this would require numerical modeling of the beach fill behavior which is beyond the scope of this preliminary design.

Summary.

Construction of a minimal beach fill along the shoreline fronting the Riggings Condominium combined with a feeder beach added to the south end of the Kure Beach project appears to offer some degree of erosion protection for the Riggings. The costs of providing the fill could approach \$500,000 with additional costs associated with pre- and post-construction monitoring.

There would be some impacts on the near shore coquina rock outcrops due to direct and indirect burial of these near shore features; however, the existing Kure Beach project is also having some impact on the rock outcrops. Should the Riggings proposal be permitted, pre- and post-construction monitoring of the coquina rock outcrops provide detailed information on the degree of the impacts of both the Kure Beach project and the proposed southward extension. The

results of the coquina rock monitoring would provide information on the biological characteristics and importance of the near shore rock formations that is not presently available.

Coquina Rock Outcrop Habitat Restoration – Kure Beach, NC
Prepared for Riggings Homeowners Association, Inc.

by
Coastal Planning & Engineering of NC, Inc.

The Riggings Condominium was constructed in 1985 near the boundary between the town of Kure Beach and the Fort Fisher State Historic Site (Figure 1). Erosion of the shoreline fronting the condominium became an immediate problem prompting the Riggings Homeowners Association (Riggings HOA) to obtain a permit from the State in 1985 to construct a sand bag revetment. Over the years, the Riggings HOA has sought and been granted permit extensions for the sand bag revetment.

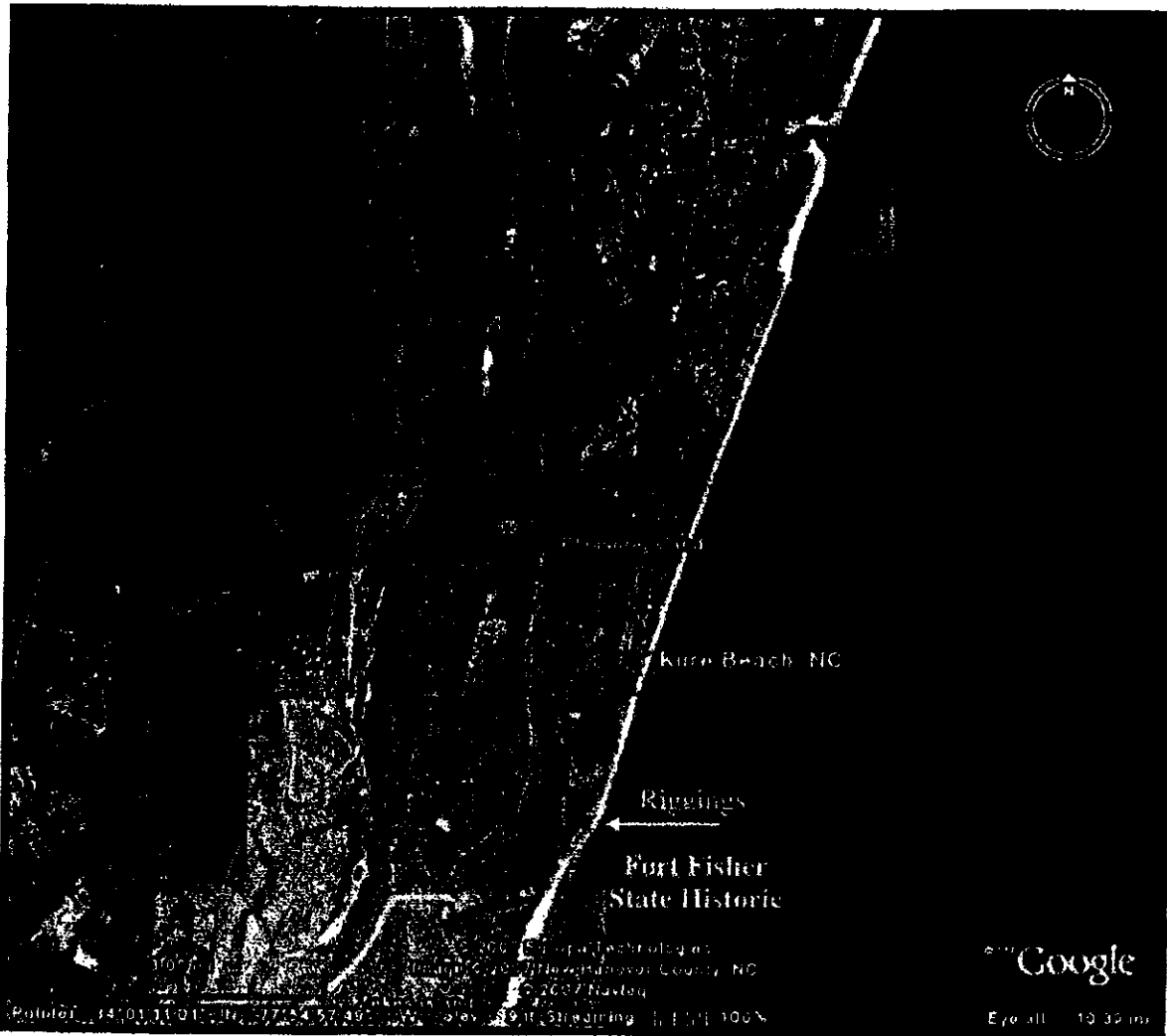


Figure 1. Location map.

The shoreline fronting the Riggings Condominium is unique as it contains an intertidal and subtidal coquina rock outcrop that extends from the beach into the surf zone. According to the State's Coastal Habitat Protection Plan⁽¹⁾, the outcrop "supports a diversity of organisms such as starfish, anemones, sea urchins, crabs, octopi, and numerous fish species." In addition to providing a unique habitat not found along other sections of the North Carolina coast, the coquina rock outcrop also has a major influence of shoreline processes in the area. Over the years, the coquina rock outcrop appears to have suffered some deterioration due in part to man's activities and the constant exposure to ocean waves, currents, and coastal storms.

Based on historical accounts, approximately 6,000 cubic yards of coquina rock was removed from the beach northeast of Fort Fisher around 1926⁽²⁾. The rock was used for road base along a section of US Highway 421 that passes through the area. Immediately following the removal of the coquina rock, the shoreline fronting Fort Fisher began to erode at an inordinate rate, receding approximately 280 feet between 1926 and 1931⁽²⁾. Erosion of the shoreline fronting the Fort Fisher State Historic Site continued, resulting in the loss of some of the remaining earthen mound fortifications. In 1996, a 3,040-foot long rubble mound revetment was constructed along the historic site shoreline to protect the remaining fortifications.

The erosion of the Fort Fisher shoreline eventually began to impact the shoreline north of the historic site exposing two coquina rock outcrops as shown on a 1956 aerial photo of the area (Figure 2). The southernmost outcrop effectively functioned as a groin for several years as evidence by the condition of the shoreline in 1963 (Figure 3). Between 1963 and 1985 (Figure 4), the southernmost outcrop appeared to diminish in size which lessened its influence on the shoreline to the north. In this regard, the coquina rock is very friable and is easily eroded by constant wave action, currents, and occasional coastal storms. As the shoreline north of the fort continue to erode, the second or northern outcrop began to have a greater influence on the shoreline by impounding material to the north. With the southern outcrop slowly decreasing in size, its ability to retain material also diminished. This combined with the entrapment of material north of the northern outcrop induced accelerated erosion of the shoreline fronting the Riggings Condominium.



Figure 2. 1956 aerial photo. (Photo from US Army Corps of Engineers, Wilmington District).

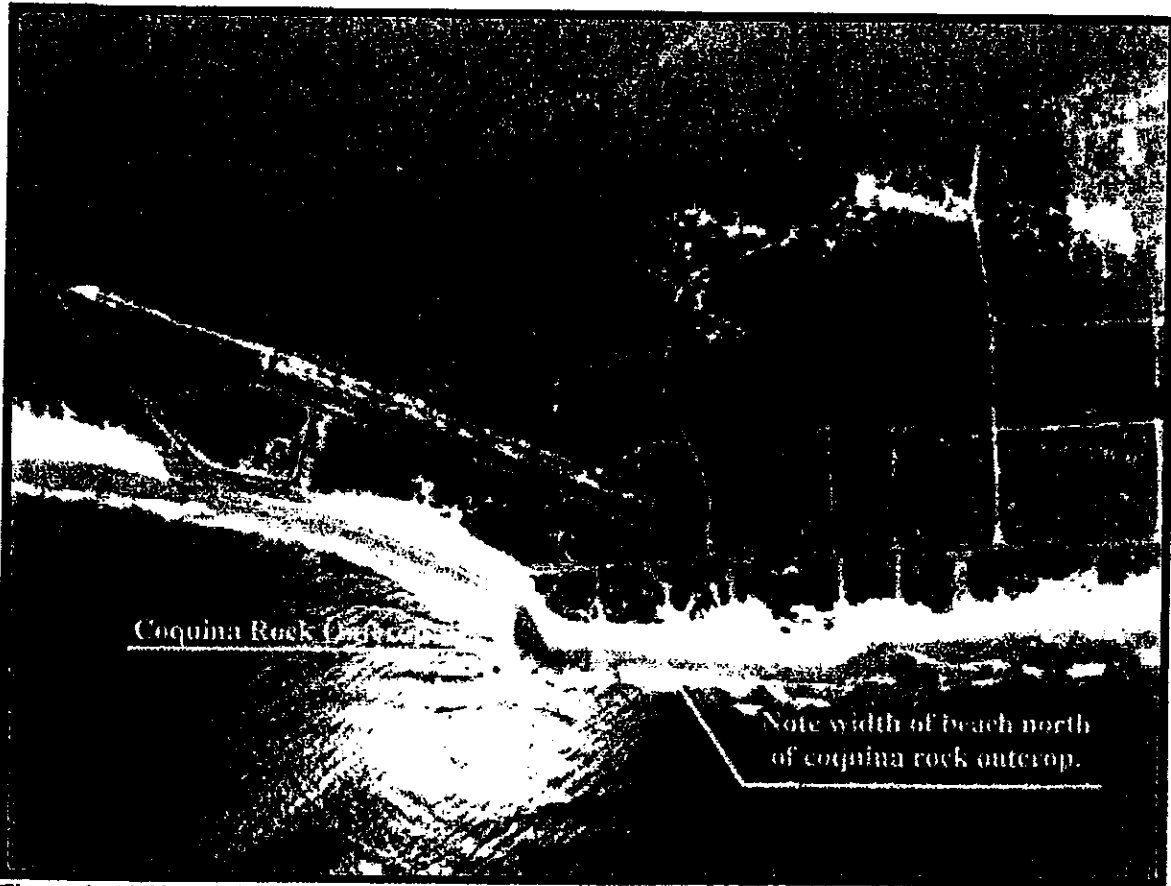


Figure 3. 1963 aerial photo showing coquina rock outcrop south of the Riggings Condominium property and relatively wide beach north of the outcrop. (Photo from US Army Corps of Engineers, Wilmington District).

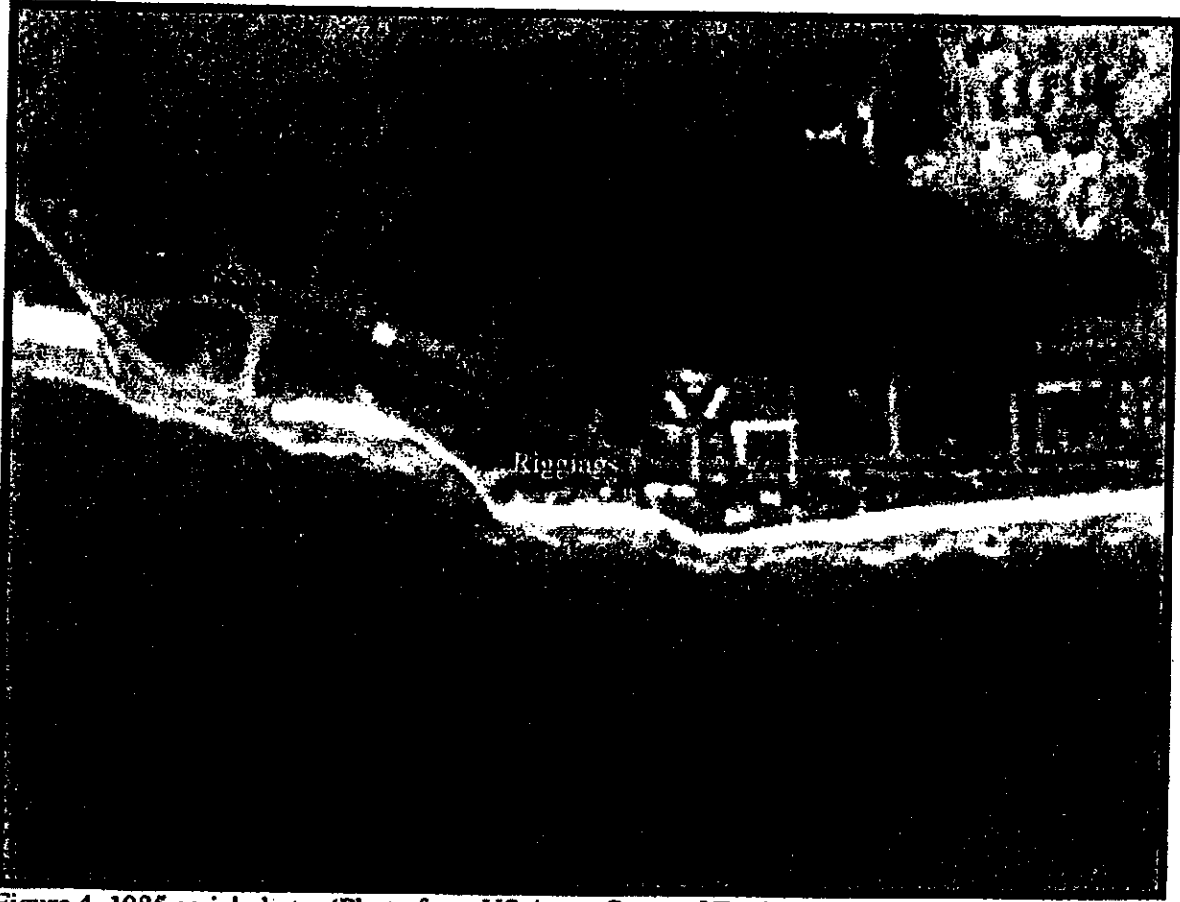


Figure 4. 1985 aerial photo. (Photo from US Army Corps of Engineers, Wilmington District).

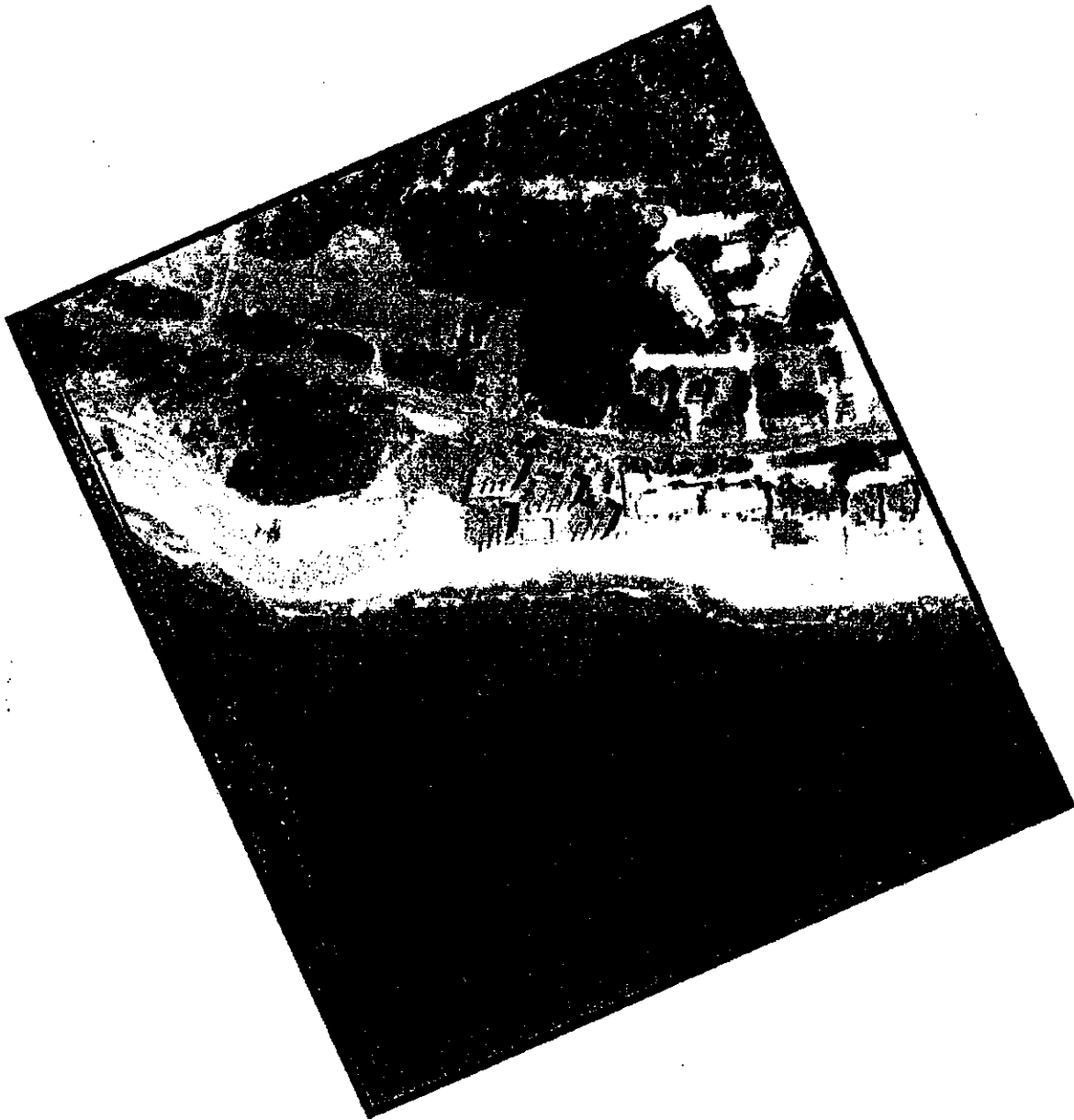


Figure 5. Existing shoreline condition. (Photo from Google Earth).

The current condition of the shoreline fronting the Riggings Condominium is shown on Figure 5. The rock outcrop south of the Riggings Condominium shown on Figure 5 appears to be considerably smaller than that shown on the 1963 photo (Figure 3) while the northern outcrop has become more prominent. Ground level photos of the northern outcrop, taken on December 12, 2006, are provided on Figure 6 while a view looking south toward the Fort Fisher revetment is provided on Figure 7. The ground level photos of the northern outcrop support its groin-like characteristics. Also, there is clear evidence that this outcrop is also undergoing erosion as large

chunks of rock were observed along the beach fronting the Riggings Condominium. To the south of the Riggings Condominium, the rubble mound revetment protecting the Fort Fisher State Historic Site now extends into the surf zone during high tide as a result of continued shoreline erosion fronting the Riggings Condominium and appears to be exerting groin-like influences on the shoreline.

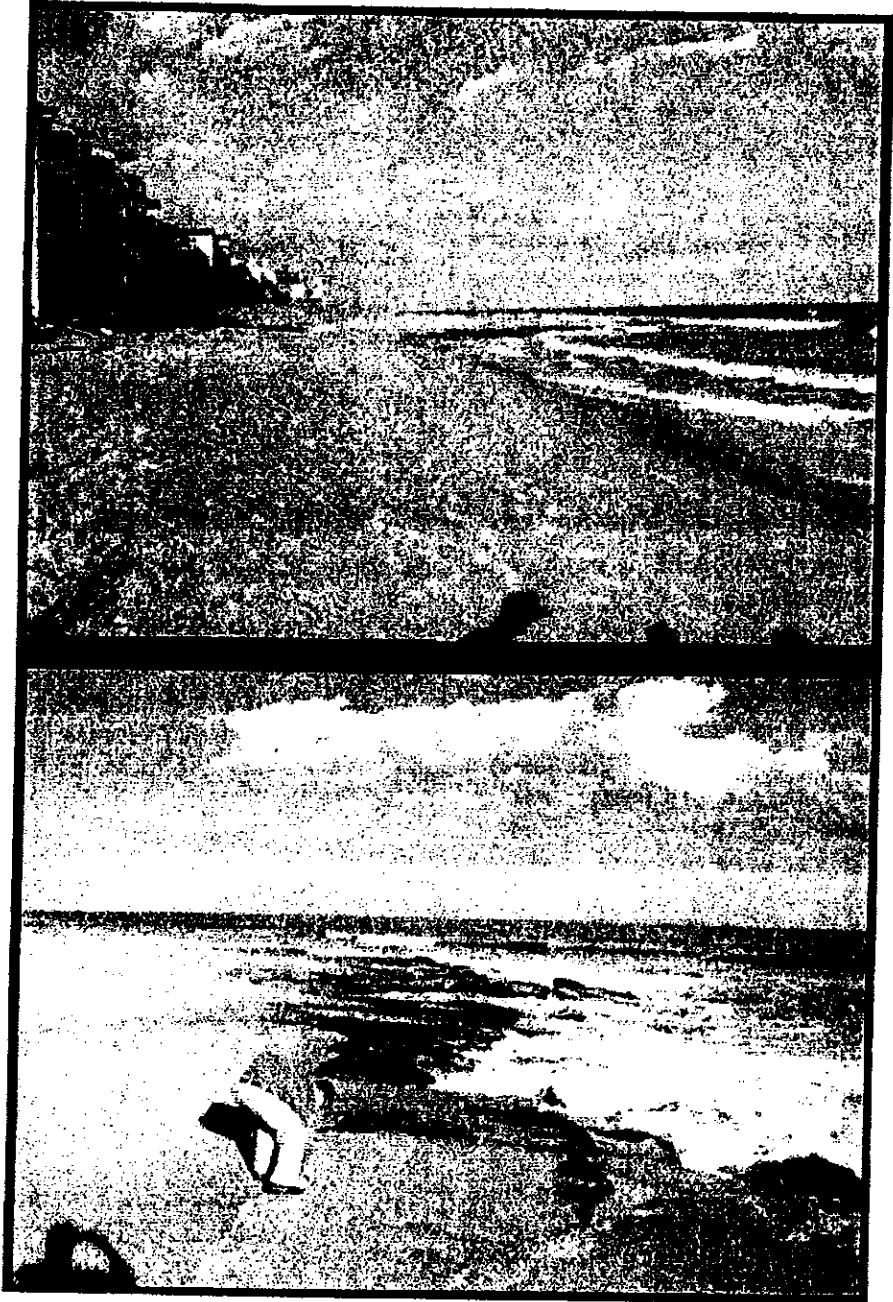


Figure 6. Ground level photos of the northern coquina rock outcrop (December 12, 2006).

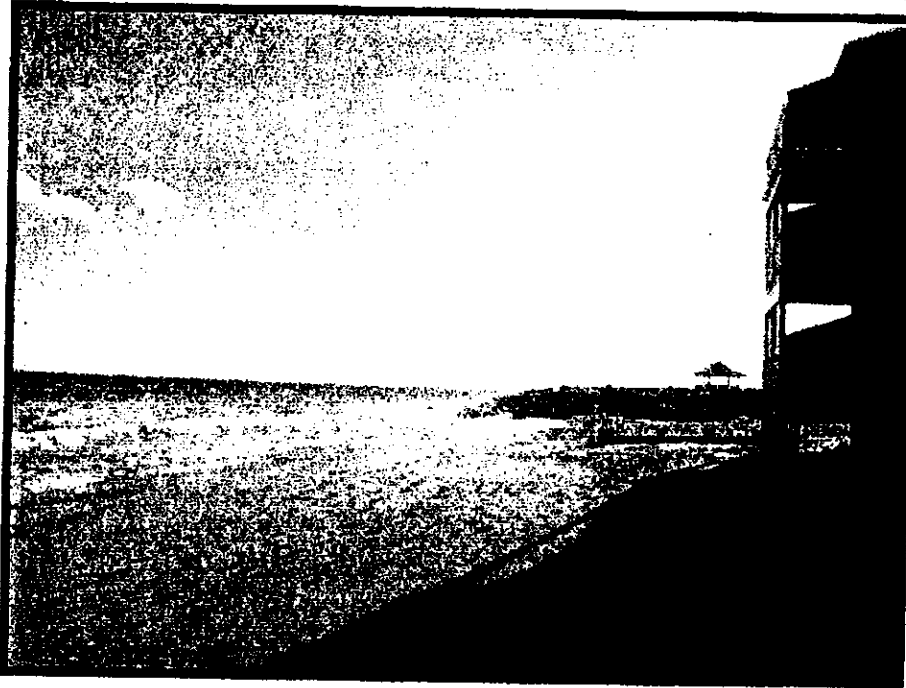


Figure 7. Ground level photo looking south of the Riggings Condominium showing north end of the Fort Fisher revetment.

Between June 1997 and February 1998, the Corps of Engineers constructed a federal storm damage reduction project along the shoreline of Kure Beach. The project included the placement of over 4.3 million cubic yards of beach fill material obtained from a borrow area located approximately 2 miles offshore. Due to concerns over possible burial of the coquina rock outcrops, the federal project terminated 600 feet north of the Riggings Condominium. The project was nourished in April-May 2001 with slightly over 1 million cubic yards of material obtained from the deepening of the Wilmington Harbor navigation project. At the present time (January 2007), the second periodic nourishment operation is underway, again using the offshore borrow area.

Attempts by the Riggings HOA to have the federal project extended south failed. While the Riggings Condominium shoreline may be receiving some secondary benefits from the federal project as a result of increased influx of sediment that is eroded from the federal project, this influx of new material has not substantially improved the shoreline situation facing the Riggings Condominium.

Given the unique nature of the shoreline fronting the Riggings Condominium and the importance of the coquina rock outcrop on the local marine resources as well as the shoreline, the Riggings HOA proposes to develop a habitat restoration project in the form of an artificial nearshore reef to restore a portion of the rock outcrop removed in the 1920's. The restoration

project would take place along the shoreline located between the two existing outcrops as shown on Figure 8. As a matter of reference, the distance between the two rock outcrops is approximately 650 feet while the length of the proposed artificial reef would be around 250 feet, the width of the Riggings Condominium property.

The proposed reef shown on Figure 8 is only conceptual. Detailed design and development of the habitat restoration plan will consider a wide range of possible reef configurations, lengths, and locations in order to develop a project that would provide the greatest level of environmental enhancement and protection to the existing rock outcrops.

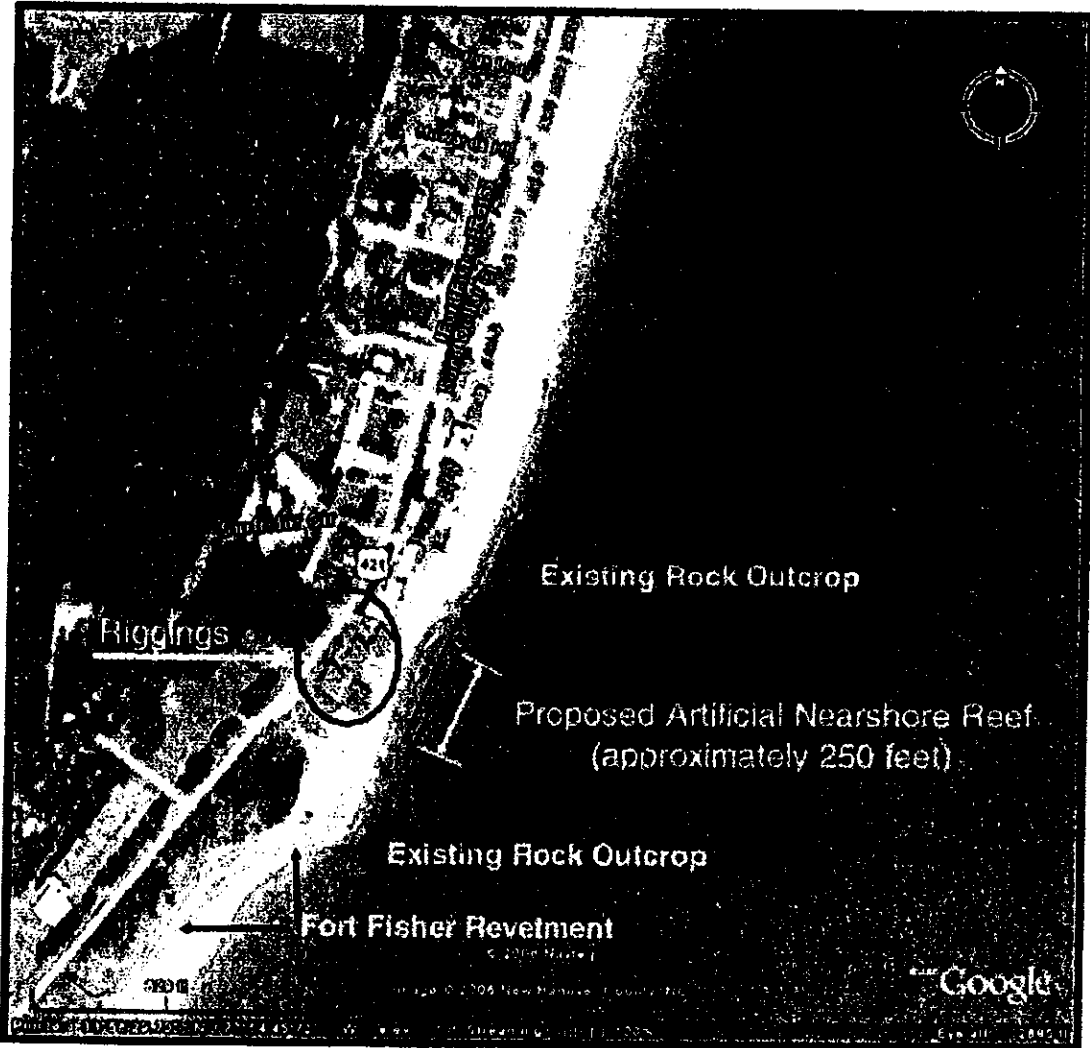


Figure 8. Concept plan, coquina rock restoration.

Detailed development of the habitat restoration plan will require a considerable amount of geologic, engineering, and environmental investigations. Of prime consideration is the installation of artificial units that would be fully compatible with the existing rock outcrop and provide a habitat comparable to the natural rock outcrops. Stability considerations will also be paramount to assure that the artificial units remain in place during severe storm conditions. Steps that would be taken to fully develop the habitat restoration project are presented later.

While there are a multitude of possible artificial units that could be used to construct the artificial nearshore reef such as marine limestone, concrete slabs, granite units, etc., the present concept is based on using a propriety unit know as Reef Balls™. A photograph of typical Reef Balls™, which are made of concrete, is provided on Figure 9. Reef Balls™ come in various sizes as shown in Table 1 which was copied from the Reef Ball Foundation website (<http://www.artificialreefs.org/index.html>).

Table 1
Reef Ball™ Specifications

Size	Width	Depth	Weight	Concrete Volume	Surface Area	Notes
Large	3.0 ft (0.91 m)	3.0 ft (0.91 m)	1,000 lbs (453 kg)	0.27 cu yd (0.21 cu m)	21.4 sq ft (2.0 sq m)	
Medium	2.0 ft (0.61 m)	2.0 ft (0.61 m)	500 lbs (227 kg)	0.13 cu yd (0.10 cu m)	10.7 sq ft (1.0 sq m)	
Small	1.5 ft (0.46 m)	1.5 ft (0.46 m)	250 lbs (113 kg)	0.07 cu yd (0.05 cu m)	5.4 sq ft (0.5 sq m)	
Mini	1.0 ft (0.30 m)	1.0 ft (0.30 m)	125 lbs (57 kg)	0.03 cu yd (0.02 cu m)	2.7 sq ft (0.25 sq m)	
Extra Large	4.0 ft (1.22 m)	4.0 ft (1.22 m)	2,000 lbs (907 kg)	0.54 cu yd (0.41 cu m)	42.8 sq ft (4.0 sq m)	
Extra Medium	3.0 ft (0.91 m)	3.0 ft (0.91 m)	1,500 lbs (680 kg)	0.41 cu yd (0.31 cu m)	32.1 sq ft (3.0 sq m)	
Extra Small	1.0 ft (0.30 m)	1.0 ft (0.30 m)	100 lbs (45 kg)	0.02 cu yd (0.01 cu m)	1.6 sq ft (0.15 sq m)	
Oyster	1.5 ft (0.46 m)	1.0 ft (0.30 m)	114 lbs (52 kg)	0.04 cu yd (0.03 cu m)	3.1 sq ft (0.29 sq m)	

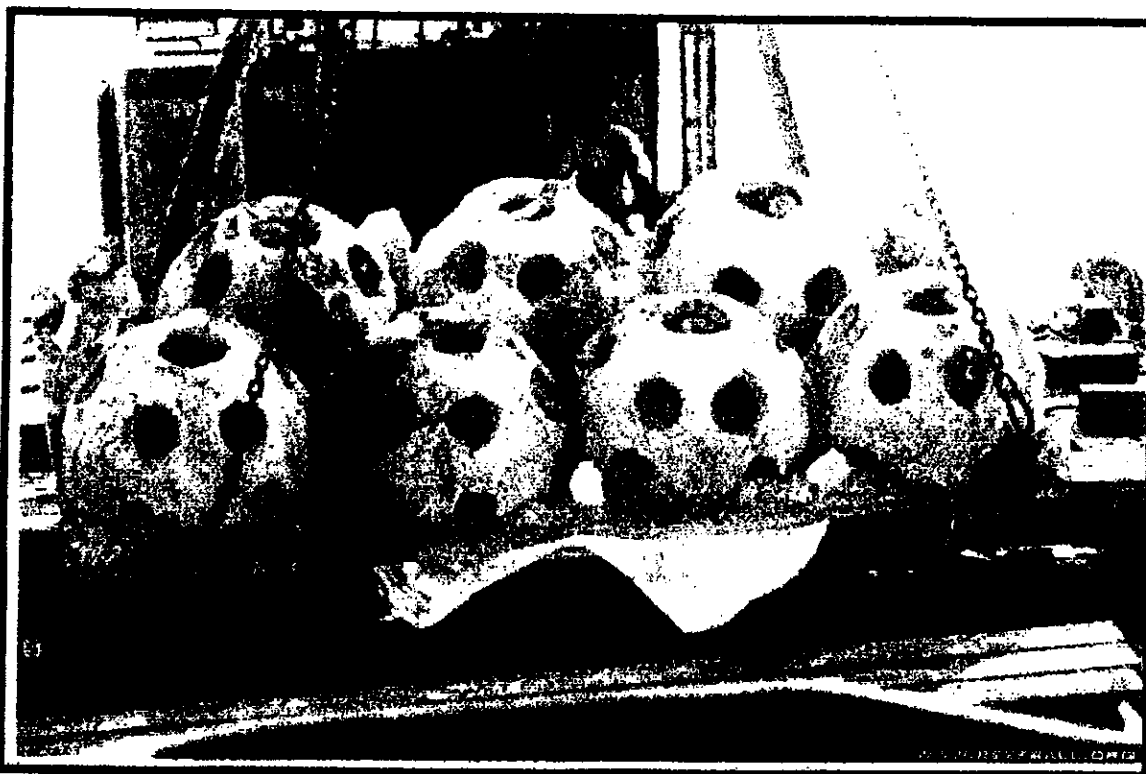


Figure 9. Reef Balls™ ready for installation (source: <http://www.artificialreefs.org/index.html>).

Due to stability considerations, the style of the Reef Balls needed for the restoration project could range from the Goliath (6 feet wide x 5 feet high) to the Reef Ball (6 feet wide x 3.8 feet high). The crest elevation of the artificial reef would be at or just below mean tide level. Accordingly, the reef would be constructed in water depths of between 4 and 5 feet relative to mean tide level.

Typical installations of similar reefs have included 3 to 5 rows of reef balls resulting in widths of the order of 18 to 30 feet. Two examples of nearshore reefs constructed in water depths similar to conditions existing offshore of the Riggings Condominium are shown on Figures 10 and 11. In both instances, the artificial reefs were situated approximately 100 to 110 feet seaward of the pre-placement shoreline. Depending on the final length of the artificial reef and the number of rows of Reef Balls, between 125 and 150 Reef Balls™ would be needed to construct the artificial reef along 250 feet of shoreline immediately offshore of the Riggings Condominium. Costs for the nearshore reef would depend on its size and environmental site conditions. Information in an internet brochure by The Reef Company⁽⁵⁾ gives a range of costs from \$200,000 to \$1,000,000 for a 100 meter (328-foot) long nearshore artificial reef.

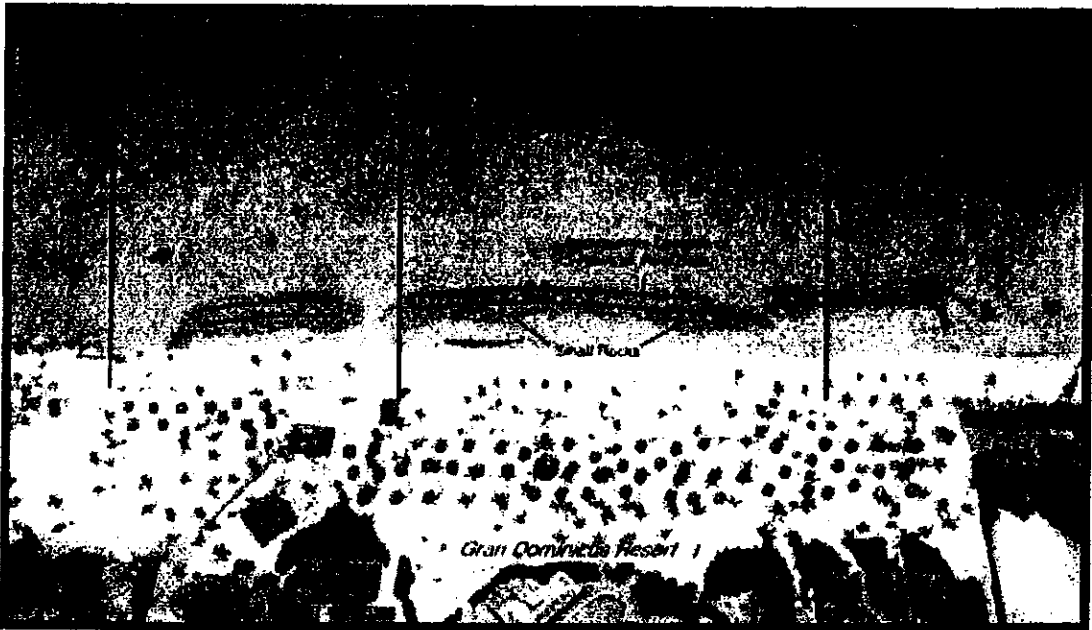


Figure 10. Example of nearshore reef constructed with Reef Balls™, Gran Dominicus Beach Resort, southern shore of the Dominican Republic⁽³⁾.



Figure 11. Example of nearshore reef constructed with Reef Balls™, Marriott Resort, Grand Cayman⁽⁴⁾.

Engineering and environmental considerations that would be undertaken to fully develop the coquina rock restoration plan include but are not necessarily limited to the following:

1. Meetings with various state and federal resource agencies to obtain their input, concerns, and suggestions regarding the design of the artificial reef and its potential positive and negative impacts.
2. Hydrographic and topographic surveys of the area situated between the two outcrops. The topographic survey would extend landward to the seaward face of the structures while the hydrographic survey would extend seaward to approximately the 25 foot depth contour measured relative to the North American Vertical Datum (NAVD). If conditions allow, the hydrographic survey would be conducted using multibeam technology in order to capture the 3-dimensional characteristics of the rock outcrop below the water surface.
3. Subsurface investigations to determine the thickness of the rock outcrops and other foundation conditions required for the design of the artificial reef.
4. Assessment of wave and water level characteristics for both normal and storm conditions. This information would be used to determine the stability requirements of the artificial reef units (natural or man-made) as well as the wave energy transmission through and over the reef.
5. Evaluation of changes in the size of the coquina rock outcrops and changes in the shoreline over time using aerial photos.
6. Evaluation of the potential impacts of the reef on sediment transport upcoast, downcoast, and immediately landward of the reef. This evaluation would be used to predict possible negative and positive shoreline impacts due to the reef.
7. Documentation of the flora and fauna using or associated with the rock outcrops.

References

1. North Carolina Coastal Habitat Protection Plan, Michael W. Street, Anne S. Deaton, William S. Chappell, and peter D. Mooreside, North Carolina Department of Environment and Natural Resources, Division of Marine Fisheries, Morehead City, NC, July 1, 2004.
2. To Great and Useful Purpose-A History of the Wilmington District, U.S. Army Corps of Engineers, Ronald B. Hartzer.
3. Appendix: Survey data and Beach Profile Graphs for the Reef Ball™ Artificial Reef Submerged Breakwater at Gran Dominicus Beach Resort, Near Bayahibe, Dominican Republic, Dr. Lee E. Harris, Florida Institute of Technology, Melbourne, Florida, May 2001.
4. Status Report for the Submerged Reef Ball™ Artificial Reef Submerged Breakwater Beach Stabilization Project for the Grand Cayman Marriott Hotel, Dr. Lee E. Harris, Florida Institute of Technology, Melbourne, Florida, August 2003.
5. The Reef Company Internet Brochure, Reef Ball Development Group, Ltd, <http://www.reefbeach.com/internetbrochurereefbeachcompany.htm>

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, *ex rel.*,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)


AFFIDAVIT OF TOM JARRETT

TOM JARRETT, being first duly sworn, deposes and says:

I am Tom Jarrett, a former member of the United States Army Corps of Engineers, and I possess unique knowledge related to the Riggings Condominiums. I am over the age of eighteen (18) and competent to testify to the matters contained herein. It is my testimony that the Riggings' sandbags have not had any deleterious effect on surrounding property nor have they come into contact with the Atlantic Ocean except during major storm events.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 20 day of September, 2007.

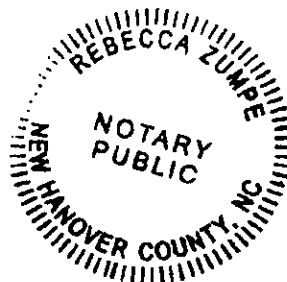

TOM JARRETT

Sworn to and subscribed before me

This the 20th day of September, 2007.


NOTARY PUBLIC

My Commission Expires: 5/29/2011



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

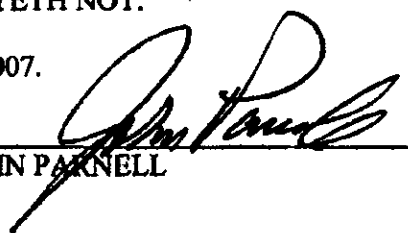
AFFIDAVIT OF JOHN PARNELL

JOHN PARNELL, being first duly sworn, deposes and says:

I am John Parnell and have been a resident of the Riggings Condominiums. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

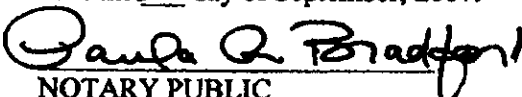
This the 21 day of September, 2007.



JOHN PARNELL

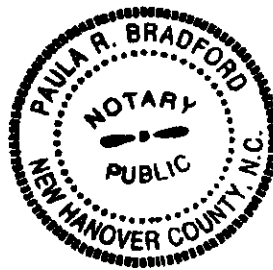
Sworn to and subscribed before me

This the 21 day of September, 2007.



NOTARY PUBLIC

My Commission Expires: 12-18-07



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

AFFIDAVIT OF PATTY FOREST

PATTY FOREST, being first duly sworn, deposes and says:

I am Patty Forest and have been a resident of the Riggings Condominiums since they were constructed. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 17 day of September, 2007.

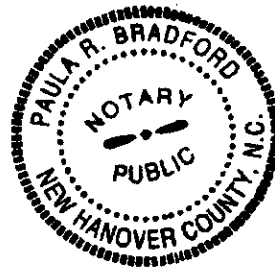
Patty Forest
PATTY FOREST

Sworn to and subscribed before me

This the 17 day of September, 2007.

Paula R. Bradford
NOTARY PUBLIC

My Commission Expires: 12-18-07



STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-1865

STATE OF NORTH CAROLINA, <i>ex rel.</i> ,)
WILLIAM G. ROSS, JR., Secretary,)
DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
)
Plaintiff,)
)
v.)
)
RIGGINGS HOMEOWNERS, INC.,)
)
Defendant.)

AFFIDAVIT OF SANDY IEMMA

SANDY IEMMA, being first duly sworn, deposes and says:

I am Sandy Iemma and have been an owner of the Riggings Condominiums since they were constructed. I am over the age of eighteen (18) and competent to testify to the matters contained herein. At a Riggings Homeowners' Association Meeting in 2006, I voted "No" towards accepting the FEMA pre-disaster grant because I lacked the financial capability to provide the funds necessary for relocation.

AND FURTHER THE DEPONENT SAYETH NOT.

This the 17th day of September, 2007.

Sandy Iemma
SANDY IEMMA

Sworn to and subscribed before me

This the 17th day of September, 2007.

Thelma Mann
NOTARY PUBLIC

My Commission Expires: _____ My Commission Expires 11-27-2010



STAFF RECOMMENDATION ATTACHMENT E

Other Exhibits

Including:

- July 10, 2006 letter from DCM to Petitioner, with attachments
- August 15, 2006 NOV letter from DCM to Petitioner
- September 18, 2006 CNOV letter from DCM to Petitioner
- CRC's Final Order for Variance 05-02
- CRC's Final Order for Variance 03-06
- CRC's Final Order for Variance 01-15
- CRC's Final Order for Variance 00-10
- Information from the Coastal Habitat Protection Plan, Hard Bottom Chapter



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

Michael F. Easley, Governor

Charles S. Jones Director

William G. Ross Jr., Secretary

July 10, 2006

CERTIFIED MAIL # 7004 2890 0002 3425 1661
RETURN RECEIPT REQUESTED

Ms. Jean Cashion, President
Riggings Homeowners' Association
1437 Fort Fisher Blvd.
Kure Beach, North Carolina 28449

Re: Removal of Sandbags
Riggings Condominiums
New Hanover County

Dear Ms. Cashion:

In July 2004, the Town of Kure Beach was awarded a \$3.6 million dollar FEMA grant to acquire the current site of the Riggings Condominiums once the buildings are relocated across NC Highway 421. The grant included approximately 7 million dollars from FEMA and a \$904,406.00 local in-kind match, which was to be achieved by the Riggings' donation of its oceanfront parcel after the condominiums were relocated. On February 14, 2005, the Riggings Homeowners' Association filed a Variance Request with the Director, Division of Coastal Management to allow the existing sandbags to remain in place until the condominiums could be relocated across the street. As you are aware, this was the fourth such Variance Request by the Riggings Homeowners' Association for extensions of the deadlines for removal of the sandbags, which have been in place since 1985.

The North Carolina Coastal Resources Commission (CRC) heard the Petition for Variance by the Riggings Homeowners' Association on April 8, 2005 in Morehead City, North Carolina. The CRC granted the variance from T15A NCAC 7H.1705(a)(7) in a Final Order dated April 25, 2005, signed by Courtney Hackney, Chairman of the CRC. The Final Order allowed the sandbags to remain in place until the FEMA grant expired and required the Riggings Homeowners' Association to remove the sandbags prior to the expiration of the grant.

On May 1, 2006, the Riggings Homeowners' Association notified the Town of Kure Beach that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant and that legal issues regarding transfer of deeds, financial issues, time and various other factors have made acceptance of the grant impossible for many homeowners.

On May 17, 2006, Mr. Tim Fuller, Mayor, Town of Kure Beach, notified the N.C. Division of Emergency Management (NCEM) that the Town had been informed by the Board of Directors of the Riggings Homeowners' Association that the Homeowners' Association had not gotten sufficient voluntary participation to fulfill the terms of the FEMA grant to relocate the Riggings and was therefore unable to continue with the grant. The Town of Kure Beach, as agent for the grant, requested that the grant be terminated and that funds be made available to other applicants or programs.

127 Cardinal Drive Extension, Wilmington, North Carolina 28405-3645
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Page 116

Ms. Jean Cashion, President
Riggings Homeowners' Association
July 10, 2006
Page Two

On June 20, 2006, Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the grant had been terminated. Mr. Crew stated that notwithstanding the June 30, 2007 expiration date of the grant agreement between Kure Beach and NCEM, the grant would be closed out effective June 1, 2006.

This Office has recently received a request from Mr. Michael Bledsoe, Sr., Acting Property Manager for the Riggings, to replace additional sandbags which would supplement an earlier authorization given by this office on April 17, 2006, to repair 15 sandbags damaged by Hurricane Ophelia.

This letter is to notify you that all existing sandbags located at the Riggings Condominium site must now be removed. The requirement for the removal of the sandbags is based on the following: 1) the conditions of the CRC Final Order dated April 25, 2005 required that the sandbags be removed prior to the expiration of the FEMA grant; 2) the FEMA grant was terminated by the NCEM, at the request of the Town of Kure Beach, acting as agent for the Riggings Homeowners' Association; and 3) the FEMA grant expired on June 1, 2006, when it was officially closed out by NCEM. All existing sandbags must be removed within 30 days of receipt of this letter to avoid a Notice of Violation, civil penalties and/or an injunction. This letter is also to notify you that because the time period for the sandbags remaining in place has expired, no additional sandbags may be installed. Please keep in mind that the requirement to remove the sandbags does not eliminate your ability to protect the threatened structures by the creation of protective sand dunes pursuant to N.C.G.S. § 113A-103 (5)(b)(5).

I have attached copies of the above-mentioned documents and letters for your convenience. Please call me at (910) 796-266 if you have questions concerning this matter.

Sincerely,


Jim Gregson
District Manager

ENCLOSURES

cc: Charles Jones, DCM
Ted Tyndall, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)

127 Cardinal Drive Extension, Wilmington, North Carolina 28405-3345
Phone: 910-910-796-7215 Fax: 910-395-3964 Internet: www.nccoastalmanagement.net

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Page 117

**The Riggings Home Owners Association
1437 Fort Fisher Blvd.
P.O. Box 157
Kure Beach, NC 28449**

RECEIVED MAY 10 2006

May 1, 2006

TO: Mayor Tim Fuller
Town of Kure Beach Commissioners
Stacey Fuller, Mitigation Specialist

FROM: Jean Cashion, President of The Riggings HOA

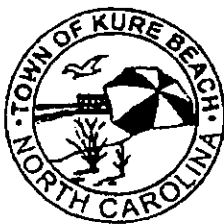


RE: FEMA Grant for the Riggings

I am writing to let you know that twenty four homeowners of the Riggings voted "No" toward accepting the FEMA pre-disaster grant. There were also ten homeowners who were either absent or failed to turn in their proxy for the meeting. I, as well as, our entire board of directors and homeowners appreciate the many hours of time spent working on our behalf regarding the grant. Unfortunately legal issues regarding transfer of deeds, financial issues, time, and various other factors have made acceptance of the grant impossible for many homeowners.

We are very well aware of the serious problem of erosion and will continue to work toward a workable and acceptable solution. We also look forward to working with Mayor Fuller and Commissioners for the Town of Kure Beach as we move forward to solve our problems. Words can only convey a portion of the gratitude that we feel for the help that we have received from all of you. Kure Beach is indeed a most wonderful place to live.

Thank you for your help and please call me at 919-776-7019, if you have any questions.



TOWN OF KURE BEACH

117 SETTLERS LANE • POST OFFICE BOX 3 • KURE BEACH, NORTH CAROLINA 28449
TELEPHONE (910) 458-8216 • FAX (910) 458-7421

May 17, 2006

RECEIVED JUN 01 2006

Ms. Stacy Fuller
N.C. Department of Crime Control and Public Safety
Division of Emergency Management
1830 B Tillery Place
Raleigh, N.C. 27604

Subject: FEMA Pre-Disaster Mitigation Grant
The Riggings, Kure Beach, N.C.

Dear Ms. Fuller:

We have been informed by the Board of Directors of the Riggings Homeowner's Association that they have not gotten sufficient voluntary participation to fulfill the terms of the FEMA grant to relocate the Riggings and are therefore unable to continue with the grant.

The Town of Kure Beach, as agent for the grant, hereby requests that you terminate this grant and make the funds available to other applicants or programs.

Thank you for all your help on this project. Everyone involved made a great effort to make this a successful example of pre-disaster mitigation. We look forward to working with you again in the future.

Sincerely,
Town of Kure Beach

Tim Fuller
Mayor

cc: Ms. Mary Ellen Stevens-Simmons, Office of Congressman Mike McIntyre
Ms. Jean Cashion, Riggings Homeowner's Association



North Carolina Department of Crime Control and Public Safety
Division of Emergency Management

Michael F. Easley, Governor
Bryan E. Beatty, Secretary

H. Douglas Hoell, Jr., Director

June 20, 2006

Jim Gregson
NC Division of Coastal Management
127 Cardinal Drive
Wilmington NC 28504

**RE: FEMA Pre-Disaster Mitigation Grant # PDM-C-PJ-04-NC-2003-0001
Town of Kure Beach, NC acquisition and demolition of Riggings Condominiums**

Mr. Gregson:

Per our telephone conversation, this letter will confirm that the above referenced grant has been terminated. Pursuant to the terms of the grant agreement between NCEM and the Town of Kure Beach, Kure Beach has withdrawn the project and asked that the North Carolina Division of Emergency Management as Grantee return the obligated Federal share of funds to the Federal Emergency Management Agency.

Notwithstanding the June 30, 2007 expiration date of the grant agreement between Kure Beach and NCEM, we will notify FEMA of the town's withdrawal and make arrangements to return obligated funds and close out the grant effective June 1, 2006, the date we received the request from Kure Beach as Subgrantee.

Please let me know if I may provide you with any further information.

Sincerely,

Chris Crew, CFM
State Hazard Mitigation Officer

Copy to Tim Fuller, Mayor, Kure Beach

MAILING ADDRESS:
4716 Mail Service Center
Raleigh, NC 27699-4716
Telephone: 919-715-8000



LOCATION:
1830-B Tillery Place
Raleigh, NC 27604-1356
Fax: 919-733-6129



RECEIVED

AUG 18 2006

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

Michael F. Easley, Governor

Charles S. Jones, Director

William G. Ross Jr., Secretary

NOTICE OF VIOLATION
August 15, 2006

CERTIFIED MAIL #7004 2510 0001 8280 0260
RETURN RECEIPT REQUESTED

Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
1437 Fort Fisher Blvd.
Kure Beach, North Carolina 28449

RE: VIOLATION(S) OF CAMA GENERAL PERMIT NO. 13355-D
CAMA VIOLATION #06-71-D

Dear Ms. Cashion:

This letter confirms that on August 15, 2006, Robb Mairs, Field Representative with the Division of Coastal Management, was onsite at your property located at the Riggings Condominiums adjacent to the Atlantic Ocean located in or near Kure Beach, off Fort Fisher Blvd, New Hanover County, North Carolina. The purpose of the visit was to monitor the permitted development of the temporary erosion control structure (sandbags) adjacent to the Atlantic Ocean. Please reference my July 16, 2006 letter to you concerning the required removal of the temporary erosion control structure. The July 16, 2006 letter notified you that the structure must be removed within 30 days of receipt of the letter to avoid a Notice of Violation, civil penalties and/or an injunction.

Information gathered by me for the NC Division of Coastal Management shows that you have violated the terms or conditions of CAMA/Dredge and Fill State Permit No. 13355-D which was issued to you by the Coastal Resources Commission and the North Carolina Department of Environment and Natural Resources. I hereby request that you immediately *CEASE AND DESIST* such violation(s) and comply with the terms and conditions of the above permit.

On December 3, 1994, State Permit No. 13355-D was issued to The Riggings Homeowners' Association for the installation of new sandbags adjacent to the Atlantic Ocean on property located in New Hanover County, North Carolina, off Fort Fisher Blvd. This permit was issued for a CAMA Major Development in an Area of Environmental Concern, in accordance with North Carolina General Statutes (N.C.G.S.) 113A-118, and for excavation and filling, N.C.G.S. 113-229(a). This permit included the following terms and conditions(s):

1. A temporary erosion control structure may remain in place for up to two years after the date of approval if it is protecting a building with a total floor area of 5000 sq. ft. or less, or for up to five years if the building has a total floor area or more than 5000 sq. ft. A temporary erosion control structure may remain in place for up to five years if it is protecting a bridge or a road. The property

127 Cardinal Drive Ext., Wilmington, North Carolina 28405-3845

Phone: (910) 796-7215 \ FAX: 910-350-2004 \ Internet: www.nccoastalmanagement.net Page 121

owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period.

For the following reasons, you are in violation of the above terms and conditions(s) of your permit:

1. The Riggings Homeowners' Association was granted four variances from the Coastal Resources Commission (CRC) allowing the time period for removal of the sandbags authorized under CAMA General Permit No.13355-D and the preexisting sandbags and to be extended. The last CRC Variance, issued in a final order dated April 25, 2005, allowed the sandbags to remain in place until the expiration of a FEMA grant which was awarded to the Town of Kure Beach to acquire the current site of the Riggings Condominiums once the buildings are relocated across NC Highway 421.
2. Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the FEMA grant had been terminated effective June 1, 2006.
3. My July 10, 2006 letter notified you that the sandbags must be removed within 30 days of the receipt of the letter that was delivered by the U.S. Postal Service on July 14, 2006.
4. An inspection of the property on August 15, 2006 revealed that the sandbags had not been removed.

If the terms and conditions of a permit are not complied with, the permit is null and void from the date of its issuance. To comply with the terms and condition(s) of the permit issued to you, you must:

1. Remove all existing sandbags at the Riggings Condominium site. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

If you intend to cooperate with this request, please sign one of the attached Restoration Agreements and return it in the enclosed, self-addressed envelope within ten (10) days of receipt of this letter. Failure to comply with this request or respond back to this office prior to the requested deadline with an acceptable schedule for compliance will be interpreted as a refusal to cooperate and will result in a Notice of Continuing Violation, as well as a court injunction being sought ordering compliance.

A civil penalty of up to Twenty-Five Hundred Dollars (\$2500) may be assessed, or an injunction or criminal penalty may be sought against any person who violates a CAMA Major Development permit. It is the policy of the Coastal Resources Commission to assess a minimum civil penalty of \$350 against all violations. This is done to recoup some of the costs of investigating violations and/or to compensate the public for any damage to its natural resources. Whether a higher amount will be assessed will depend on several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration of the affected resources is requested but is not undertaken or completed satisfactorily, a substantially higher civil penalty will be assessed and a court injunction will be sought ordering restoration (N.C.G.S. 113A-126). In addition, criminal penalties, damages, and/or an injunction may be sought against any person who violates a Dredge and Fill Permit in accordance with N.C.G.S. 113-229(k) and (l).

The relevant statutes and regulations are available from this office, and I am willing to assist you in complying with the requirements of these laws. A site inspection will be made in the near future to determine whether this REQUEST TO CEASE AND DESIST has been complied with. I request that you contact me immediately.

Ms. Jean Cashion
August 15, 2006
Page 3 of 4

Thank you for your time and cooperation in resolving this important matter. If you have any questions about this or related matters, please call me at (910) 796-7215. Upon completion of the restoration as requested in the Restoration Plan Agreement to the satisfaction of the Division of Coastal Management, you will be notified as to the amount of the civil assessment for failure to act in accordance with the terms, conditions, or requirements of such permit.

Sincerely,



Jim Gregson
District Manager

Cc: Ted Tyndall, Assistant Director, DCM
Roy Brownlow, Compliance Coordinator, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)
William G. Wright (Shipman and Wright)

ENCLOSURE

RESTORATION PLAN AND AGREEMENT
For
Riggings Homeowners' Association Property
CAMA Violation No. 06-71D
Property located at 1437 Fort Fisher Blvd., New Hanover County

All existing sandbags at the Riggings Condominium site must be completely removed. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

I, Jean Cashion, as President of the Riggings Homeowners' Association, agree to remove all existing sandbags at the Riggings Condominium site and to coordinate the removal with the Division of Coastal Management.

We agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by September 15, 2006, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: _____

DATE: _____

It is the policy of the Coastal Resources Commission to levy a minimum civil assessment \$350 and higher against all violations of this type depending upon the damage to the resources. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.



North Carolina Department of Environment and Natural Resources

Division of Coastal Management

Michael F. Easley, Governor

Charles S. Jones, Director

William G. Ross Jr., Secretary

NOTICE OF CONTINUING VIOLATION

September 18, 2006

CERTIFIED MAIL #7006 0100 0000 0881 9774
RETURN RECEIPT REQUESTED

RECEIVED

SEP 21 2006

N.C. ATTORNEY GENERAL
Environmental Division

Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
PO Box 157
Kure Beach, North Carolina 28449

RE: NOTICE OF CONTINUING VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT – CAMA VIOLATION #06-71-D

Dear Ms. Cashion:

This letter is in reference to the Notice of Violation that was issued to you on August 15, 2006 by the North Carolina Division of Coastal Management for unauthorized development in violation of the Coastal Area Management Act (CAMA). The violation occurred onsite your property located at the Riggings Condominiums adjacent to the Atlantic Ocean located in or near Kure Beach, off Fort Fisher Blvd., New Hanover County, North Carolina.

Information gathered by me for the NC Division of Coastal Management shows that you have violated the terms or conditions of CAMA/Dredge and Fill State Permit No. 13355-D which was issued to you by the Coastal Resources Commission and the North Carolina Department of Environment and Natural Resources. I hereby request that you immediately **CEASE AND DESIST** such violation(s) and comply with the terms and conditions of the above permit.

On December 3, 1994, State Permit No. 13355-D was issued to The Riggings Homeowners' Association for the installation of new temporary erosion control structures, in this case sandbags, adjacent to the Atlantic Ocean on property located in New Hanover County, North Carolina, off Fort Fisher Blvd. This permit was issued for a CAMA Major Development in an Area of Environmental Concern, in accordance with North Carolina General Statutes (N.C.G.S.) 113A-118, and for excavation and filling, N.C.G.S. 113-229(a). This permit included the following terms and conditions(s):

1. A temporary erosion control structure may remain in place for up to two years after the date of approval if it is protecting a building with a total floor area of 5000 sq. ft. or less, or for up

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Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 2 of 4

to five years if the building has a total floor area or more than 5000 sq. ft. A temporary erosion control structure may remain in place for up to five years if it is protecting a bridge or a road. The property owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period.

Any subsequent violation of these narrative standards as incorporated within the permit shall be a permit violation. For the following reasons, you are in violation of the above terms and conditions(s) of your permit:

1. The Riggings Homeowners' Association was granted four variances from the Coastal Resources Commission (CRC) allowing the time period for removal of the sandbags authorized under CAMA General Permit No.13355-D and for the pre-existing sandbags to be extended. The last CRC Variance, issued in a final order dated April 25, 2005, allowed the sandbags to remain in place until the expiration of a FEMA grant which was awarded to the Town of Kure Beach to acquire the current site of the Riggings Condominiums once the buildings were relocated across NC Highway 421.
2. Mr. Chris Crew, State Hazard Mitigation Officer with the N.C. Division of Emergency Management, notified the Division of Coastal Management that the FEMA grant had been terminated effective June 1, 2006.
3. My July 10, 2006 letter notified you that the sandbags must be removed within 30 days of the receipt of the letter that was delivered by the U.S. Postal Service on July 14, 2006.
4. An inspection of the property on August 15, 2006 revealed that the sandbags had not been removed.

To comply with the terms and condition(s) of the permit, you must:

Totally remove all existing sandbags at the Riggings Condominium site. The method of removal must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

A civil penalty of up to Twenty-Five Hundred Dollars (\$2,500) may be assessed, or an injunction or criminal penalty may be sought against any person who violates a CAMA Major Development permit. It is the policy of the Coastal Resources Commission to assess a minimum civil penalty of \$350 against all violations. This is done to recoup some of the costs of investigating violations and/or to compensate the public for any damage to its natural resources. Whether a higher amount will be assessed will depend on several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration of the affected resources is requested but is not undertaken or completed satisfactorily, a substantially higher civil penalty will be assessed and a court injunction will be sought ordering restoration (N.C.G.S. 113A-126). In addition, criminal penalties, damages, and/or an injunction may be sought against any person who violates a Dredge and Fill Permit in accordance with N.C.G.S. 113-229(k) and (l).

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Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 3 of 4

You have failed or refused to complete the restoration requested in both my July 16, 2006 letter and the August 15, 2006 Notice of Violation. Based on the following, I conclude your failure or refusal to comply with the permit terms and conditions constitutes a willful and continuing violation of the Coastal Area Management Act.

In accordance with the N.C. Administrative Code, Subchapter 7J.0409(f)(4)(G)(ii), you may be subject to a daily minimum penalty of one hundred dollars (\$100.00) per day starting from the date of receipt of the Notice of Violation. A court order may also be sought for an injunction to require restoration as described above.

Once the project site is brought into compliance with terms and conditions of CAMA/Dredge and Fill State Permit No. 13355-D, you will be notified as to the amount of a civil assessment. Please call me at (910) 796-7215 should you decide to enter into good faith negotiations in resolving this matter. I am available to meet with you onsite to discuss the requested restoration measures.

Sincerely,


Jim Gregson
District Manager

Cc: M. Ted Tyndall, Assistant Director, DCM
Roy Brownlow, Compliance Coordinator, DCM
Jill Hickey, DOJ
Christine Goebel, DOJ
James E. Wallace (Registered Agent, Riggings Homeowners, Inc.)
William G. Wright (Shipman and Wright)

ENCLOSURE

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Riggings Homeowners' Association
c/o Ms. Jean Cashion, President
September 18, 2006
Page 4 of 4

RESTORATION PLAN AND COMPLIANCE AGREEMENT
For
Riggings Homeowners' Association Property
CAMA Violation No. 06-71D
Property located at 1437 Fort Fisher Blvd., New Hanover County

All existing sandbags at the Riggings Condominium site must be completely removed. The method of removal of the sandbags must be coordinated through and approved by the Division of Coastal Management prior to the placement of heavy equipment on the ocean beach.

I, Jean Cashion, President of the Riggings Homeowners' Association, agree to have all existing sandbags removed from the Riggings Condominium site and to coordinate the removal with the Division of Coastal Management.

The Riggings Homeowners' Association agrees to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by September 15, 2006, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: _____

DATE: _____

It is the policy of the Coastal Resources Commission to levy a minimum civil assessment \$350 and higher against all violations of this type depending upon the damage to the resources. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.

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STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC-VR-05-02

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOME)
OWNERS ASSOCIATION)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on April 8, 2005, in Morehead City, North Carolina pursuant to N.C.G.S. § 113A-120.1 and T15A NCAC 71.0700, et seq. Assistant Attorney General Christine A. Goebel appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Deborah Holmes appeared on behalf of Petitioner Riggings Home Owners Association.

Upon consideration of the record documents and the arguments of the parties, the CRC adopts the following:

STIPULATED FACTS

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the



POST-IT FILE DATE	10/11	DATE	4/5/05	PAGE	7
TO	JIM GRIGSON	FROM	JILL HICKEY		
CO. D-ET					
PHONE #			716-6600		

- sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
 7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could remain in place for five years from May 1, 1995, i.e., until May 1, 2000.
 8. The sandbags at the Riggings Condominium were to be removed on or before May 1, 2000.
 9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
 10. The Riggings Homeowners Association, Inc. did not seek judicial review of the Commission's Order.
 11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
 12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is directly in front of the Riggings.
 13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.
 14. The coquina rock outcroppings were registered as the Fort Fisher Coquina Outcrop Natural Area on February 6, 1982.
 15. Sometimes the sandbags are buried under sand and sometimes they are exposed depending on the beach profile which can change quickly.
 15. Whether the public can walk along the beach without detouring landward around the

sandbags depends on the beach profile, but even at high tides, the public can get around the bags by going between the bags and the most oceanward building.

17. Between 1996 and 2000, North Carolina was struck by a high number of hurricanes. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher, and Hurricane Bonnie struck the area in 1998. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.

18. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.

19. The last Carolina/Kure Beach Renourishment Project in 2001 included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.

20. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina/Kure Beach Renourishment Project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.

21. The Corps of Engineers informed U.S. Representative Mike McIntyre by letter dated February 25, 2000 that the "primary reason that the (beach nourishment) project stops short of the Riggings is due to the intertidal coquina rock outcropping." The letter further states that the "rock outcropping has been declared a natural heritage area by the North Carolina Natural Heritage Program and burying them was not an acceptable alternative.

22. The Riggings Homeowners Association owns property across the street of sufficient size to

relocate or rebuild all the buildings.

23. The Riggings Homeowners Association worked with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council approved the initial relocation proposal.

24. After obtaining estimates for relocating the condominium, the Riggings Homeowners Association sought financial assistance in relocating the condominium by contacting the North Carolina Division of Emergency Management, the Natural Heritage Trust Fund and the Division of Coastal Management, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or FEMA grants.

25. On February 4, 2002, the Coastal Resources Commission granted a variance to the Riggings Condominium Association further extending the deadline for removal until May 23, 2003.

26. On October 8, 2002, Chris Crew of the North Carolina Division of Emergency Management met with Petitioners' representatives, the Carolina Beach mayor and other elected officials and determined among other findings that the Riggings is "potentially eligible" for flood mitigation assistance funds which will become available in 2003.

27. On May 9, 2003, the Commission signed an order granting a variance to allow the sandbags to remain in place until May 9, 2005.

28. In July 2004, the Town of Kure Beach was awarded a \$3.6 million dollar FEMA grant to acquire the current site once the Riggings relocates across the street. The grant includes \$2.7 million dollars from FEMA, and the Petitioners will contribute the remaining \$900,000.00, consisting mainly of the oceanfront land donation to the City once they have relocated. The grant lasts until June 2007.

29. As of March 2005, Petitioners are currently working with architects and surveyors to finalize plans to rebuild the structures across the street and remove the current structures, and have contractors ready to start construction once the planning is complete.

30. The current Variance Request was filed with the Director, Division of Coastal Management, on February 14, 2005 to keep the sandbags in place until the relocation has taken place.

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Petitioner has demonstrated that strict application of Rule 15A NCAC 7H .1705(a)(7) will result in unnecessary hardship. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
5. Petitioner has demonstrated that its hardship is peculiar to Petitioner's property. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
6. The Petitioner has demonstrated that its hardship does not result from actions it has taken. The Petitioner's variance request materials and the staff recommendation are incorporated by reference as support for this conclusion.
7. The Petitioner has demonstrated that its proposed development is within the spirit, purpose and intent of the Commission's rules; that it will secure public safety and welfare; and that it will preserve substantial justice. The Petitioner's variance request materials and the staff

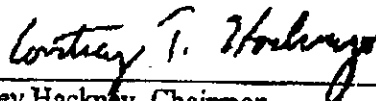
recommendation are incorporated by reference as support for this conclusion.

ORDER

THEREFORE, the variance from 715A NCAC 7H.1705(a)(7) is GRANTED to allow the sandbags to remain in place until the FEMA grant expires in June, 2007. Petitioner shall be responsible for removal of the sandbags prior to expiration of the FEMA grant. This condition is consistent with Petitioner's representation at the April 8, 2005 CRC meeting, that the grant requires Petitioner to remove the sandbags prior to its expiration.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining a CAMA permit from the proper permitting authority.

This the 25 day of April, 2005.



Courtney Hackney, Chairman
Coastal Resources Commission

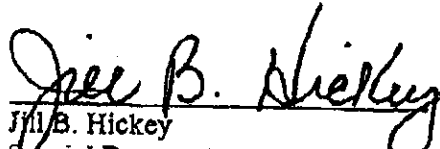
CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service CERTIFIED MAIL, RETURN RECEIPT REQUESTED with sufficient postage for delivery and addressed to:

RIGGINGS HOME OWNERS ASSOCIATION
Lloyd Steve Goodson
316 Valley Rd.
Fayetteville, NC 28305

Christine A. Goebel Hand Delivery
Assistant Attorney General
N.C. Department of Justice

This the 25 day of April, 2005.



Jill B. Hickey
Special Deputy Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6942
Counsel to the Commission

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC - VR - 03 -06

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY THE RIGGINGS)
HOMEOWNERS ASSOCIATION)

FINAL ORDER

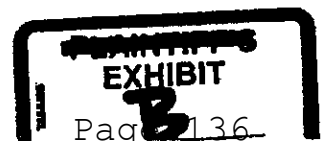
MAY 12 2003

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on April 23, 2003 in Atlantic Beach, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, et seq. Assistant Attorney General David G. Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; H. Glenn Dunn appeared on behalf of Petitioners.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

STIPULATED FACTS

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, could remain in place for five years from May 1, 1995, to and until May 1, 2000.



8. The sandbags at the Riggings Condominium were to be removed on or before ~~May 1, 2000~~.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc. did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.
14. The cochina rock outcroppings were registered as the Fort Fisher Cochina Outcrop Natural Area on February 6, 1982.
15. Sometimes the sandbags are buried under sand and sometimes they are exposed depending on the beach profile which can change quickly.
16. Whether the public can walk along the beach without detouring landward around the sandbags depends on the beach profile, but even at high tides, the public can get around the bags by going between them and the oceanward building.
17. Between 1996 and 2000, North Carolina was struck by a high number of hurricanes. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher, and Hurricane Bonnie struck the area in 1998. The beach has not recovered to its pre-hurricane condition. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.
18. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.
19. The last Carolina Kure Beach Renourishment Project in 2001 included a large part of Carolina Beach and 93 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
20. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the

2001 Carolina Kure Beach Renourishment Project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.

21. The Corps of Engineers informed U.S. Representative Mike McInture by letter dated February 25, 2000 that the "primary reason that the (beach nourishment) project stops short of the Riggings is due to the intertidal cochina rock outcropping." The letter further states that the "rock outcropping has been declared a natural heritage area by the North Carolina Natural Heritage Program and burying them was not an acceptable alternative."
22. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
23. The Riggings Homeowners Association has been working with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council has approved the initial relocation proposal.
24. The relocation proposal may have to be modified because of FEMA guidelines.
25. The Riggings Homeowners Association cannot just relocate the most oceanward building across Highway 421. Because the other buildings block the relocation of the oceanward building, the entire condominium complex must be relocated across the highway.
26. On September 21, 2001 the Riggings Homeowners Association obtained a written estimate from Carolina Specialists, Inc. of Wilmington, N.C. for moving the condominium complex across the Highway 421 to property owned by the Association. The amount of the estimate was \$2,649,978.00. (See Attachment F to the Staff Memorandum)
27. The Association has sought written estimates from other contractors from Myrtle Beach, but has not yet received them.
28. Since obtaining the estimate for relocating the condominium, the Riggings Homeowners Association has sought financial assistance in relocating the condominium by contacting the North Carolina Division of Emergency Management, the Natural Heritage Trust Fund and the Division of Coastal Management, as well as requesting the Town of Kure Beach to act as applicant for beach access and/or FEMA grants.
29. On February 4, 2002, the Coastal Resources Commission granted a variance to the Riggings Condominium Association further extending the deadline for removal until May 23, 2003.
30. Regarding the variance issued to Petitioners in 2002, the DCM staff took the following positions:

MAY 12 2003
DIVISION OF COASTAL MANAGEMENT

- (a) It agreed that unnecessary hardships will result from strict application of the guidelines, rules, standards or other restrictions applicable to the property.
 - (b) It agreed that the condition giving rise to the hardships are peculiar to the property.
31. The Riggings Homeowner's Association has been prohibited from pushing up sand from in front of the sandbags in order to cover them.
 32. Sandbags are the only structural alternative to beach renourishment allowed under CAMA development standards for protecting structures from ocean erosion.
 33. On October 8, 2003, Chris Crew of the North Carolina Division of Emergency Management met with Petitioners' representatives, the Carolina Beach mayor and other elected officials and determined among other findings that the Riggings is "potentially eligible" for flood mitigation assistance funds which will become available in 2003. (Attachment G to the Staff Memorandum is the Site Visit Report by Chris Crew dated 10/18/02.)
 34. On March 7, 2003, Jim Gregson, District Manager, Division of Coastal Management, sent a letter to Steve Goodson, President, Riggings Homeowners Association, advising that all sandbags authorized under CAMA General Permit No. 13355-D must be removed by May 26, 2003.
 35. The current Variance Request was filed with the Director, Division of Coastal Management, on March 24, 2003.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Petitioners have demonstrated that strict application of Rules 15A NCAC 7H 01.01 (2)(F) and (N) to their permit application will result in unnecessary hardship.
5. The Petitioners have demonstrated that their hardship results from conditions peculiar

to the project property.

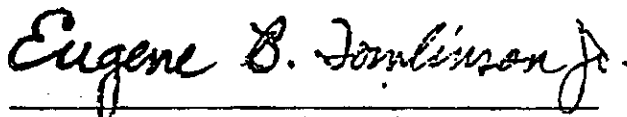
6. The Petitioners have demonstrated that their hardship does not result from their own actions.

7. The Petitioners have demonstrated that their proposed development is within the spirit, purpose and intent of the Commission's rules; that it will secure public safety and welfare; and that it will preserve substantial justice.

ORDER

THEREFORE, the petition for variance from Rules 15A NCAC 7H .0308(a)(2)(F) and (N) is GRANTED for a period of two years from the date of this Order.

This the 9th day of May, 2003.



Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

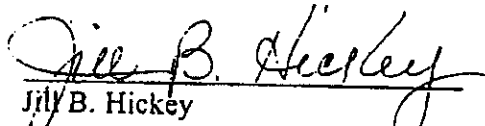
COASTAL MANAGEMENT

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed to:

H. Glenn Dunn
Poyner & Spruill, LLP
PO Box 10096
Raleigh, NC 27605

This the 9 day of May, 2003.


Jill B. Hickey
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6942

STATE OF NORTH CAROLINA

COUNTY OF BRUNSWICK

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOMEOWNERS)
ASSOCIATION)

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC 01 - 15

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on October 23, 2001, in Wilmington, North Carolina pursuant to N.C.G.S. § 113A-120.1 and 15A NCAC 7J.0700, et seq. Assistant Attorney General Dave Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Dina Goodson, President, appeared for Petitioners, Riggings Homeowners Association.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

FINDINGS OF FACT

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit



Officer for the Town of Kure Beach.

4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal Management.
5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, may remain in place for five years from May 1, 1995.
8. The sandbags at the Riggings Condominium must be removed on or before May 1, 2000.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc., did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is located directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.

14. The beach has not recovered to its pre-hurricane condition.
15. During the last four years, North Carolina has been struck by a high number of hurricanes.
16. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher. Hurricane Bonnie struck the area in 1998.
17. The last Carolina Kure Beach Renourishment Project included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
18. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina Kure Beach renourishment project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.
19. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
20. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.
21. On May 26, 2000, the Coastal Resources Commission granted a variance to the Riggings Condominium Association extending the deadline for removing the sandbag revetment until May 26, 2001.
22. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina Kure Beach renourishment project southward all the way to the Riggings complex.
23. The 2001 Carolina Kure Beach renourishment project stopped some 1,500 feet north

of the Riggings Condominium.

24. The Riggings Homeowners Association has been working with the Kure Beach City Council to resolve several issues involving the relocation of the buildings, and the Council has approved the initial relocation proposal.
25. The relocation proposal may have to be modified because of FEMA guidelines.
26. The current Variance Request was filed with the Director, Division of Coastal Management, on June 26, 2001.
27. The Commission's consideration of the Homeowners Association's' current variance request was continued until its October, 2001, meeting.
28. The Homeowner's Association has been prohibited from pushing up sand from in front of its sandbags in order to cover them.

Based on the foregoing Stipulated Facts, the Coastal Resources Commission makes the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.
4. The Commission elects to extend the variance to May 26, 2003.

ORDER

THEREFORE, the petition for variance extending its previous deadline for removal of the

sandbags is GRANTED until May 26, 2003.

This the 4th day of February, ~~2001~~²⁰⁰².

Eugene B. Tomlinson, Jr.

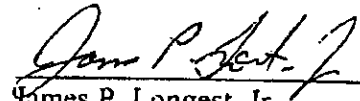
Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Permittee by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by first class mail, certified mail, return receipt requested and addressed to:

Dina Goodson, President
Riggings Homeowners Association
316 Valley Rd.
Fayetteville, NC 28305

This the 4th day of ~~November, 2001~~ ^{February, 2002}


James P. Longest, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6954

ep. 52507

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

BEFORE THE NORTH CAROLINA
COASTAL RESOURCES COMMISSION
CRC 00 - 10

IN THE MATTER OF:)
PETITION FOR VARIANCE)
BY RIGGINGS HOMEOWNERS)
ASSOCIATION)

FINAL ORDER

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on May 26, 2000, in Tarboro, North Carolina pursuant to N.C.G.S. § 113A-120.1 and T15A NCAC 7J.0700, et seq. Assistant Attorney General Dave Heeter appeared for the Department of Environment and Natural Resources, Division of Coastal Management; Dina Goodson, President, appeared for Petitioners, Riggings Homeowners Association.

Upon consideration of the stipulated facts, record documents and the arguments of the parties, the CRC adopts the following:

FINDINGS OF FACT

1. The Riggings Homeowners Association, Inc., represents unit owners in the Riggings Condominium which is located in Kure Beach, New Hanover County, North Carolina.
2. The Riggings Condominium has been imminently threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time.
3. The first CAMA permits for sandbags at the Riggings were issued by the Local Permit Officer for the Town of Kure Beach.
4. Since 1992, the CAMA permits for the sandbags have been issued by the Division of Coastal



Management.

5. In 1994, the DCM issued CAMA General Permit No. 13355-D authorizing the repair of the sandbags and the addition of new ones.
6. Permit No. 13355-D was modified in February, 1995, to allow the filling of holes in the revetment with sandbags.
7. The sandbags which were in place when Permit No. 13355-D expired on March 5, 1995, may remain in place for five years from May 1, 1995.
8. The sandbags at the Riggings Condominium must be removed on or before May 1, 2000.
9. In October 1997, after a contested case hearing, the Coastal Resources Commission held that the Riggings Homeowners Association could continue to repair or replace the sandbags permitted under Permit No. 13355-D for the full period authorized under its rules.
10. The Riggings Homeowners Association, Inc., did not seek judicial review of the Commission's Order.
11. Fort Fisher is located on the shoreline immediately south of the Riggings Condominium, and the Corps of Engineers has constructed a seawall to protect the fort from erosion.
12. There are three Coquina Rock outcroppings within sight of the Riggings Condominium, and the largest one is located directly in front of the Riggings.
13. A large part of the rock outcropping in front of the Riggings was uncovered during Hurricane Floyd, and the vegetation was uprooted by the storm surge.
14. The beach has not recovered to its pre-hurricane condition.
15. During the last four years, North Carolina has been struck by a high number of hurricanes.
16. During 1996 and 99, back-to-back hurricanes made landfall at the mouth of the Cape Fear River almost exactly at Fort Fisher. Hurricane Bonnie struck the area in 1998.

17. The last Carolina/Kure Beach Renourishment Project included a large part of Carolina Beach and 98 percent of Kure Beach but fell approximately 1,500 feet short of the Riggings Condominium.
18. The Riggings Association tried unsuccessfully to get the Corps of Engineers to extend the 2001 Carolina/Kure Beach renourishment project southward all the way to the Riggings complex. The next project will stop some 2,500 feet north of the Riggings with the transition area stopping some 600 feet north of the Riggings.
19. The Riggings Homeowners Association owns property across the street of sufficient size to relocate all the buildings.
20. The Board of Directors of the Riggings Homeowners Association agrees to relocate the buildings within three years as a condition of any variance allowing the sandbags to remain in place for up to three years. The Board agrees to accept such a condition in any variance and not seek administrative or judicial review of it.
21. The Riggings Condominium has a floor area of greater than 5,000 sq. ft.

Based on the foregoing Stipulated Facts, the Coastal Resources Commission makes the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated and there is no question of misjoinder or nonjoinder of parties.
3. All notices for the proceeding were adequate and proper.

4. Application of Rules 15A NCAC 7H .0308(a)(2)(F)&(N) to Petitioner's property will result in unnecessary hardships.

5. Petitioner's hardship does result from conditions peculiar to Petitioner's property.

6. At the time that it adopted Rules 15A NCAC 7H .0308(a)(2)(F)&(N), the Coastal Resources Commission could not have anticipated the combination of conditions currently present at Petitioner's property.

7. The Petitioners have requested a three year extension from the deadlines imposed by Rules 15A NCAC 7H .0308(a)(2)(F)&(N) for removal of sandbags.

8. The Commission elects to grant the variance for a period of one year from May 26, 2000 to May 26, 2001.

ORDER

THEREFORE, the petition for variance from Rules 15A NCAC 7H .0308(a)(2)(F)&(N) is GRANTED for a period of one year from the day the decision was made.

This the 9th day of August, 2000.

Eugene B. Tomlinson Jr.

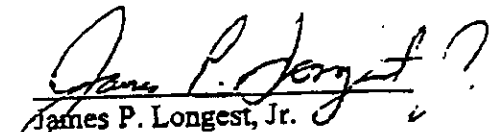
Eugene B. Tomlinson, Jr., Chairman
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have caused the foregoing Final Order to be served upon the Petitioner by depositing a copy thereof in the U.S. Postal Service with sufficient postage for delivery by first class mail, certified mail, return receipt requested and addressed to:

Dina Goodson, President
Riggings Homeowners Association
316 Valley Rd.
Fayetteville, NC 28305


This the 9th day of August, 2000.


James P. Longest, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
(919) 716-6954

ep/42005

Table 7.1 Hard bottom and possible hard bottom locations in North Carolina by coastal bay.
 [Source: Point and line data identified by SEAMAP-SA (2001). Results from Moser and Taylor (1995) in parentheses.]

Bottom Type	Long Bay	Onslow Bay	Raleigh Bay	North of Hatteras	Total
Hard bottom (point)	2 (19)	14 (58)	1 (4)	2 (3)	19 (86)
Hard bottom (line)	3 (6)	25 (39)	1 (2)	0 (2)	29 (49)
Possible hard bottom (point)	1	8	3	4	16
Possible hard bottom (line)	5	37	12	5	59
Total	11 (25)	84 (97)	17 (6)	11 (5)	123 (135)

Twenty sites were reported as high-profile relief, defined by Moser and Taylor (1995) as vertical relief greater than two meters. Two of these sites, one off Carolina Beach and one off New River, are extensive in both area and topographic relief; these areas are particularly close to shore, making them more vulnerable to land-based, fishing, and boating-related impacts. A unique intertidal and subtidal coquina rock outcrop extends from the beach into the surf zone at Fort Fisher. This unique habitat supports a diversity of organisms such as starfish, anemones, sea urchins, crabs, octopi, and numerous fish species. 

Distribution of man-made hard bottom

There are 11 artificial reefs of varying construction located in North Carolina State ocean waters, 28 in federal ocean waters (Map 7.1), and seven in estuarine waters. The estuarine artificial reefs are located in Pamlico Sound, Albemarle Sound, Neuse River, and Pamlico River. The artificial reef program periodically adds material to the 39 existing ocean sites, rather than creating new reefs. Gentile (1992) listed 46 documented wrecks in North Carolina waters south of Hatteras Inlet. The majority of the wrecks is located northeast and west of the mouth of the Cape Fear River (Map 7.1). There are many more wrecks in federal waters, with concentrations around the three cape shoals. There are also two jetty systems and three groin systems along the ocean shoreline. The groins are located on the south side of Oregon Inlet, off the former site of the Cape Hatteras Lighthouse, and at the west side of Beaufort Inlet. There is a single jetty at the west side of Cape Lookout; Masonboro Inlet has jetties on both sides—one attached to Wrightsville Beach and the other attached to Masonboro Island. The Little River Inlet, which is the state boundary between North and South Carolina, also has a dual jetty system, but both structures are located in South Carolina. There are also numerous small groins and jetty systems in estuarine waters, but these features have not been mapped.

For the purposes of this document, estuarine shell bottom (e.g., oyster reefs, beds, bars) is not categorized as hard bottom habitat. Although technically a "hard" substrate that shares some characteristics with hard bottom (e.g., three-dimensional structure), shell bottom differs in its formation, spatial distribution, function, and species composition from those of oceanic hard bottom; it is classified as a distinct habitat type³⁰. In addition, shell bottom can be either inter- or subtidal, whereas hard bottom is typically subtidal (with the single exception of the exposed coquina outcrops near Fort Fisher).

7.2. ECOLOGICAL ROLE AND FUNCTIONS

Productivity

Exposed hard substrate (whether rock outcrops, jetties, artificial materials, or semi-compacted sediments) provides surface area for colonization by invertebrates and algae. Hard substrate with vertical relief or irregular surface areas provides more complex habitat, allowing a greater variety of species to coexist (Wenner et al. 1984). This "live bottom" structure, in turn, provides a source of abundant food and

³⁰ Refer to the Shell Bottom chapter (Chapter 3).

hard bottom in the vicinity of dredge sites.

In North Carolina, the frequency and magnitude of beach nourishment have increased over time.⁸⁵ If all requested and proposed projects are eventually authorized and conducted, a maximum of 155 miles (4.8% of ocean shoreline) could be affected and potentially degraded, excluding the beaches nourished periodically from channel and inlet dredging. All of the existing projects and the majority of the newly authorized projects are located south of Cape Lookout where hard bottom is most abundant, especially in the nearshore area. *The transport of sand from nourished beaches over time should be monitored. Future research should attempt to determine if the probability or extent of burial are affected by sand volume, type, or grain size, by the time-of-year of project initiation, or by the distance between nourished beach and hard bottom. A DENR Beach Management Plan should be developed and implemented which includes specific guidelines to minimize impacts to hard bottom from nourishment projects.* ←

Fishing and diving

Commercial fishing

Bottom longlines, dredges, fish traps, and bottom trawls can cause rapid and extensive physical damage to living and non-living components of hard bottom (SAFMC 1998b). In a comparative analysis of benthic fishing activities, the largest relative declines in benthic species richness and total numbers of individuals were associated with intertidal dredging (Collie et al. 2000). Fishing gear dragged across the bottom causes direct damage and mortality by breaking attached benthic organisms, such as sponges, anemones, and corals, or outcrop structures from the seafloor. Damage is especially extensive where the bottom is uneven and there is a concentration of coral and other invertebrates. The removal of structure and attached benthic organisms decreases species diversity and reduces structural complexity of hard bottom (Watling and Norse 1998). Dragged gear also indirectly damages bottom habitat by increasing the vulnerability of injured organisms to subsequent diseases and predation, smothering invertebrates with sediment (Auster and Langton 1999), and partially or completely destroying burrows and tubes constructed by invertebrates (Watling and Norse 1998). Trawling also results in an immediate reduction of mobile benthic invertebrates (e.g., crabs and polychaete worms) on and adjacent to hard bottom, reducing food resources available to other reef organisms.⁸⁶

Roller-rigged trawls are a specific type of trawl with large rubber discs that is designed to roll over hard bottom habitat without becoming entangled. A study in South Carolina on the effects of roller-rigged trawls found that 32% of the sponges, 30% of the hard corals, and 4% of the soft corals at a hard bottom site were damaged by a single tow (Van Dolah et al. 1987). Damaged individuals require years to completely regenerate to their initial, pre-disturbance sizes, due to the organisms' slow growth rates (Van Dolah et al. 1987). Another study evaluated impacts from a roller-framed shrimp trawl and found that 50% of the sponges, 80% of the hard corals, and 40% of the soft corals were damaged (Tilmant 1979). In addition, catch rates of all animal groups declined over a five-year period; fewer animals may have been available to be caught due to past trawling effort.

Of the fishing gears that can potentially damage hard bottom, longlines, dredges, and fish traps are of minimal concern because they are used little or not at all in North Carolina state waters. There is currently no active dredge fishery in North Carolina's intertidal or subtidal ocean waters. Use of bottom longlines was prohibited by federal regulations in depths of less than 50 fathoms (300 ft) throughout the South Atlantic area as part of Amendment 4 of the Snapper Grouper Fishery Management Plan in 1991 to reduce fishing mortality and habitat damage. Fish traps can cause significant damage if placed on or dragged through hard bottom. However, federal regulations (Amendment 4, Snapper-Grouper Fishery Management Plan) prohibited the use of large fish traps in 1991. Smaller sea bass pots are allowed if equipped with escape vents and biodegradable panels to release undersize fish and eliminate waste from

⁸⁵ Refer to the soft bottom threats section for status, trends, and location of beach nourishment activity, Map 6.2.

⁸⁶ Refer to Appendix L for a list of the fishing gears used in North Carolina waters and their probable habitat impacts.

**STAFF RECOMMENDATION
ATTACHMENT F**

Judge Hockenbury's Remand Order

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 08-CVS-1069

7:07 FEB 20 P 4 02

RIGGINGS HOMEOWNERS, INC.)
BY)

Petitioner,)

vs.)

COASTAL RESOURCES)
COMMISSION OF THE STATE)
OF NORTH CAROLINA and)
ROBERT R. EMORY, Jr., Chairman)
of Coastal Resources Commission)

Respondents.)

ORDER

This appeal came on for hearing before the undersigned Superior Court Judge, presiding over the January 5, 2009 Civil, Non-Jury Session of the Superior Court Division of New Hanover County, the same having been called for hearing on January 6, 2009, upon appeal filed by the Petitioner herein by Petition and a Writ of Certiorari issued by this Court to review the January 31, 2008 Final Order of North Carolina Coastal Resources Commission. The Petitioner was represented by its attorneys, Gary K. Shipman and William G. Wright and Respondents were represented by their attorneys, Assistant Attorneys General Christine A. Goebel and Allen Jernigan.

On August 22, 2006, pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A NCAC 7J.0700, *et. seq.*, Petitioner, Riggings Homeowner's, Inc. (herein "Petitioner" or "Riggings") applied to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow Petitioner to maintain temporary sandbags to protect their property until such time as Petitioner's proposed Habitat Enhancement Project and/or a renourishment project, either

A TRUE COPY
CLERK OF SUPERIOR COURT
NEW HANOVER COUNTY
BY: Marie Oliva
Deputy Clerk of Superior Court

privately or publicly funded, has been completed. The Petitioner and the Division of Coastal Management agreed on a set of stipulated facts and on January 17, 2008, Petitioner's variance request was heard at the regularly scheduled CRC meeting. At the meeting, the Riggings variance request was unanimously denied.

In the Order denying Petitioner's variance request, the CRC made the following pertinent Conclusions of Law:

3. The Petitioner has not demonstrated that strict application of Rule 15A NCAC 7H.1705(a)(7) will result in unnecessary hardship. In the past, Staff and the Commission agreed with the Petitioner that strict application of the development rules regarding how long sandbag structures could remain causes petitioner and unnecessary hardship. Staff and the Commission agreed that the use of *temporary* erosion control structures, such as these sandbag structures, is allowable to afford homeowners timers to relocate their property or to seek beach renourishment. In this case, Petitioner discovered that nourishment was not an acceptable alternative at this location, due to coquina rock located in front of its property, and Petitioner began attempting to secure funds to relocate. At the last variance hearing in April 2005, the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current site for a park, once Petitioner rebuilt and removed the current structures by June of 2007, was the primary reason staff and the commission supported the April 2005 variance request, and finding the unnecessary hardship existed. Staff and the Commission understood the award of the grant to be extraordinary, and removal of the sandbag structure at that time, when Petitioner appeared to have crossed the biggest hurdle to relocation, would be an unnecessary hardship. In the nearly 3 years since the last variance hearing, Petitioner has not been able to get the required support from its members, and in May 2006, formally rejected the FEMA grant. Based on the current facts, Staff now contends and the Commission concludes that the application of the rules standards or orders of the Commission will not cause Petitioner unreasonable hardships, and Petition can make reasonable use of its property without a continued variance.

....

4. The Petitioner has not demonstrated that its hardship result from conditions peculiar to Petitioner's property, such as location, size or topography. . . . In the past, the Staff and Commission have agreed that Petitioners [sic] had unnecessary hardship resulting from conditions which were peculiar to the Petitioner's property – specifically the location of the coquina rock formations preventing the placement of sand in past renourishment projects, and the Fort Fisher revetment. While both of these structures still exist, Staff now argues, and the Commission has concluded, that the Petitioner no longer has an unnecessary

hardship, and so there can no longer be an unnecessary hardship resulting from conditions peculiar to the property. At this point, any hardships that may exist are a result of Petitioner's inability to move forward as an Association in order to relocate its buildings, despite years of extra time allowed by previous variances from the Commission. . . .

5. The Petitioner has failed to demonstrate that its hardship does result from actions it has taken. Upon receiving the FEMA grant, Petitioner's decision was to keep the building where it was which could have avoided the need for the sandbag structure if the building was moved.

Petitioner was first aware of the erosion problems at its site in 1985 when the structures imminently threatened and the sandbag structure was first installed. Since 1992, Petitioner has owned a parcel landward of NC 421 where the owners could re-locate, but they have not yet done so. Petitioner has known at least since the 2001 Corps nourishment project that the coquina rock could prevent beach nourishment at or near the Riggings in future projects. Despite Petitioner's awareness of all these circumstances, it has still failed to take concrete actions to move forward with a relocation project. In the past, Petitioner argued that all it needed was a little more time to find funding, but when it finally got the FEMA grant, its membership turned it down.

As in past variances, Petitioner claims to have a new solution, specifically, its "habitat restoration" project or private renourishment. Staff is concerned that, as in the past, Petitioner will make these same promises, but could easily again fail to actually implement a permanent solution and the bags would remain even longer. The Commission shares this concern as well. For these reasons, any hardships Petitioner might face now are a result of its own inability, or unwillingness, to respond to its long-standing situation with a permanent solution.

6. The Petitioner has not demonstrated that its variance request is within the spirit, purpose and intent of the Commission's rules; that it will secure public safety and welfare; and that it will preserve substantial justice. One of the Commission's main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff and the Commission disagree. While the sandbags were meant to be a temporary help, the Petitioner's membership continues to rely on sandbags to protect them from, or reduce damaging storms, instead of making real progress toward a lasting solution. The Petitioner's membership has done so for 23 years. Removal of the sandbags may provide the needed incentive for the Association members finally to relocate across NC 421 farther from the ocean hazard AEC, thereby reducing the public costs of inappropriately sited development and reducing the risks to life, property, and amenities.

....

Staff contends and the Commission agrees that Petitioner has been afforded plenty of time and several "second chances" to relocate the threatened structures or find another permanent solution, but has failed to do so. Allowing the sandbags to remain for any further, uncertain period of time is not within the spirit of the CAMA and the CRC's rules, and for the same reasons, will not protect the public's welfare.

Petitioner has filed to work diligently to relocate the buildings, as evidenced by the refusal of the FEMA grant. Moreover, its newly proposed solutions may not even be permissible and have not progressed far. After repeated extensions, granting any more extensions to allow Petitioner more time to pursue its latest proposals, would no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.

The Order of the CRC is a final agency decision within the meaning of Article 4, Chapter 150B of the North Carolina General Statutes and Petitioner is directly affected by said Order and entitled to judicial review of the CRC's decision. N.C.G.S. § 150B-43 (2008). The CRC's final order, which denied Petitioner's request for a variance from 15A NCAC 7H.1705(a)(7) was received by the Petitioner, through its counsel, on February 7, 2008. The Petition for Judicial Review was timely filed pursuant to N.C. Gen. Stat. § 150B-45 on March 7, 2008.

At the outset, the Respondents contend that Respondent Robert Emory Jr., Chairman of the CRC was improperly named as a Respondent to this appeal. Counsel for Petitioner chose not to object or be heard on the removal of Mr. and Emory, and thus the appeal against Mr. Emory is dismissed with prejudice.

The issues are whether: (I) the decision of the CRC was based on an error of law, in that the CRC applied the wrong standard: "Unreasonable hardship" as opposed to "Unnecessary hardship," as a basis for denying the variance request (II) in placing reliance upon the issues surrounding the Petitioner's application for a FEMA grant and the availability of other property owned by the Petitioners where the Riggings project might be relocated, the CRC violated the

law by denying the Petitioners Equal Protection, and whether the decision denying the variance request was therefore based upon unlawful procedure; and whether (III) the decision of CRC is supported by substantial evidence and whether CRC's decision was arbitrary and capricious, in that it appears that CRC adopted Staff's position as bases for denying the variance request, instead of basing its decision upon the Stipulated Facts.

The Standard of Review

The standard of review to be employed by the trial court on judicial review of an agency decision depends on the particular issues presented by the parties. Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999); Dew v. State ex rel. North Carolina Dept. of Motor Vehicles, 127 N.C. App. 309, 488 S.E.2d 836 (1997). The reviewing court may be required to utilize both the "whole record" and the "de novo" standards of review, when reviewing an agency decision, if warranted by the nature of the issues raised. Skinner v. North Carolina Dept. of Correction, 154 N.C. App. 270, 572 S.E.2d 184 (2002).

When a petitioner alleges that an agency violated his or her constitutional rights, the court will undertake *de novo* review. In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155, 349 N.C. 656, 509 S.E.2d 165 (1998). Similarly, judicial review of whether an agency decision was based on an error of law requires *de novo* review. Hodgkins v. North Carolina Real Estate Com'n., 130 N.C. App. 626, 504 S.E.2d 789 (1998); Beneficial North Carolina, Inc. v. State ex rel. North Carolina State Banking Comm'n., 126 N.C. App. 117, 484 S.E.2d 808 (1997). Where a petitioner asserts that the agency misinterpreted a statute, the proper standard of review for this question was *de novo*, and the reviewing court could substitute its judgment for that of the state agency if the agency's decision was affected by an error of law. Associated Mechanical

Contractors, Inc. v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996); *accord* Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998); Walker v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, 127 N.C. App. 156, 487 S.E.2d 839 (1997); Yates Const. Co., Inc. v. Commissioner of Labor for the State of N.C., 126 N.C. App. 147, 484 S.E.2d 430 (1997); Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999). A *de novo* standard of review applies to claims that an agency violated a constitutional provision, was in excess of statutory authority, made a decision upon unlawful procedure or made some other error of law. Moore v. Charlotte-Mecklenburg Bd. of Educ., --- N.C. App. ---, 649 S.E.2d 410 (2007).

In a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003); R.J. Reynolds Tobacco Co. v. North Carolina Dept. of Environment & Natural Resources, 148 N.C. App. 610, 560 S.E.2d 163 (2002) ("De novo review" requires the court to consider a question anew, as if not considered or decided by the agency previously, and to make its own findings of fact and conclusions of law rather than relying upon those made by the agency).

When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. ACT-UP Triangle, 345 N.C. at 706, 483 S.E.2d at 392; Associated Mechanical Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Powell, 347 N.C. at 623, 499 S.E.2d at 185. The "whole record" test requires the court to determine whether there was substantial evidence to support the agency's conclusions by taking all the evidence, both supporting and conflicting, into account. Powell, 347 N.C. at 623, 499 S.E.2d at 185;

Associated Mechanical Contractors, 342 N.C. at 832, 467 S.E.2d at 401. Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982); Norman v. Cameron, 127 N.C. App. 44, 48, 488 S.E.2d 297, 300 (1997). Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. Johnston Health Care Center, L.L.C. v. North Carolina Dept. of Human Resources, Div. of Facility Services, Certificate of Need Section, , 136 N.C. App. 307, 524 S.E.2d 352 (2000). In interpreting an agency order, the order "should be read as a whole." In re Bass Income Fund, 115 N.C. App. 703, 705, 446 S.E.2d 594, 595 (1994).

In this case, the Court is required to apply two standards of review (i) de novo review for constitutional questions, questions regarding the statutory authority and jurisdiction of the CRC, questions regarding errors of law made by the CRC, and/or questions regarding unlawful procedure of the CRC and; (ii) the "whole record test" is to be applied to determine whether the CRC's Order was supported by substantial evidence, and/or was arbitrary or capricious.

In this case, the Petitioner argues The Final Order issued by the CRC consists of nothing more than the adoption of the Division of Coastal Management's Position statement filed as a "brief" before the CRC, and not on the basis of the Stipulated Facts, which is the only evidence properly presented to the CRC. The Petitioner contends that the decision of the CRC was based on legally impermissible considerations; that the CRC misapplied the applicable statute; and that the Final Order was unsupported and contradictory to the only evidence, the Stipulated Facts, before the CRC. After applying the applicable standards of review, this Court agrees.

I**The Grant of Variance and Unnecessary Hardship versus Unreasonable Hardship**

Petitioner argues the CRC made an error of law by applying the wrong standard of “unreasonable hardship” as opposed to “unnecessary hardship.” The Court agrees.

The North Carolina General Assembly provided the circumstances under which a landowner whose permit has been denied may obtain a variance:

Any person may petition the Commission for a variance granting permission to use the person's land in a manner otherwise prohibited by rules or standards prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. To qualify for a variance, the petitioner must show all of the following:

1. Unnecessary hardships would result from strict application of the rules, standards, or orders.
2. The hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property.
3. The hardships did not result from actions taken by the petitioner.
4. The requested variance is consistent with the spirit, purpose, and intent of the rules, standards, or orders; will secure public safety and welfare; and will preserve substantial justice.

N.C.G.S. § 113A-120.1 (2008).

In the third Conclusion of Law subject Order, the CRC provides in pertinent part: “Staff now contends and the Commission concludes that the application of the rules standards or orders of the Commission will not cause Petitioner unreasonable hardships, and Petition can make reasonable use of its property without a continued variance.” The legal standard, however, is not whether strict application of the rules would result in “unreasonable” hardship to the Petitioner’s property, but whether the hardship would be “unnecessary.” N.C.G.S. § 113A-120.1(1). The Order is unclear and the Court is uncertain as to whether the CRC applied the correct legal standard. Accordingly, it was inappropriate and contrary to the relevant statute to use

“unreasonable” hardship as a basis for any of the conclusions reached by CRC. The Court finds that the CRC Order was ambiguous and unclear that the proper legal standard was used in the denial of the variance request. Therefore this Court reverses the denial of the Petitioner’s variance request, and remands the matter back to the CRC for a new hearing, with a mandate to apply “unnecessary” and not “unreasonable” to the determination of the hardships suffered by the Petitioner.

II

The Commission’s Consideration of the denial of the FEMA Grant and Petitioner’s failure to relocate to its other property

The Petitioner next contends that CRC improperly placed reliance upon the issues surrounding the Petitioner’s application for a FEMA grant and the availability of other property owned by the Petitioners where the Riggings project might be relocated, and that in so doing, the Final Order was made upon unlawful procedure. The Court agrees.

The Court of Appeals in Williams v. North Carolina Dept. of Environment and Natural Resources, 144 N.C. App. 479, 548 S.E.2d 793 (2001) held in pertinent part:

Whether strict application of the Coastal Area Management Act, (hereinafter “CAMA”), places an “unnecessary hardship” on a parcel of property, depends upon the unique nature of the property; not the landowner. If “hardship” stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Accordingly we hold that whether or not the landowner owns other property is irrelevant and insufficient to support [a finding of unnecessary hardship.]

Williams, 144 N.C. App. at 485, 548 S.E.2d at 797-98 (emphasis added).

By examining and placing reliance upon the FEMA grant and the fact that the Petitioner owned additional property where the project might be relocated, the CRC bases its denial of

Petitioner's variance request on impermissible considerations in that it focuses on the condition of the landowner (The Petitioner and its members) and not the proper inquiry, which is the unique nature of the property. Id. The findings concerning the denial of the FEMA grant and the failure to relocate to the Petitioner's other property across NC 421 permeates the CRC's Order in each of its Conclusions of Law (¶¶ 3-6) addressing the denial of the variance.

By examining and placing reliance upon the FEMA grant and the other property owned by the Petitioner, the CRC based its Final Order on an improper factor, and accordingly, the Final Order was made upon unlawful procedure. It is clear to this Court that the CRC improperly utilized this factor as a basis for its Final Order. Consideration and reliance on this information by CRC was clearly improper as the very reason that the circumstances of the landowner are not to be examined according to Williams is so that similarly situated person and property owners are not treated differently, giving rise to equal protection of law issues.

If "hardship" stemmed from the situation of the landowner, then those persons owning less land would have an easier time showing unnecessary hardship than those owning more than one parcel of land. Similarly situated persons would be treated differently, giving rise to equal protection of law issues

Id. at 485, 548 S.E.2d at 797.

The proper inquiry in a variance request before the CRC is concerning the property and not the property owner. In this case, however, the denial of Petitioner's variance request was based in large part on the contention that the Riggings should have accepted the FEMA Grant and relocated. The CRC's consideration of whether the FEMA Grant was rejected by the Riggings and/or whether the Riggings had additional property in which it could relocate was improper in deciding whether or not to grant the variance request. The Final Order focused upon an analysis into the property owners when the sole focus of the CRC's findings should be based on the condition of the property itself.

Similarly, the CRC erred by applying the wrong legal standard of hardship to the petitioner as opposed to hardship to Petitioner's property. The standard, as articulated in Williams, supra, in determining unnecessary hardship is to examine the effect strict application of the rules would have on Petitioner's property, and not the Petitioner itself. Williams, 144 N.C. App. at 485, 548 S.E.2d at 797-98 (holding that hardship depends upon the unique nature of the property; not the landowner.). As such, the CRC erred by applying the wrong standard. In this case, the standard is whether strict application of the rules would result in unnecessary hardship to Petitioner's property; not the Petitioner. That, however, was not the standard applied by the CRC. Because the CRC improperly considered the circumstances surrounding the FEMA grant denial and the other property owned by the Petitioner and the potential for relocation of the project, the Order was made upon unlawful procedure. This error consequently requires reversal and remand. On remand, the Court instructs the CRC that in undertaking a review of Petitioner's variance request, the circumstances surrounding the FEMA grant and the other property owned by the Petitioner shall not be considered by it.

III

Adoption of Staff's Contentions

Petitioner argues that the Final Decision was not supported by substantial evidence in the Record, and the CRC erred in adopting the contentions of Staff without competent evidence in the Record to support its Findings of Fact and/or Conclusions of Law. The Court agrees.

"It is axiomatic that arguments of counsel are not evidence" to form the basis of Conclusions of Law. State v. Collins, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). In the instant case, the Conclusions of Law are not supported by the Findings of Fact, and they must be. The CRC must use independent judgment as to whether or not to grant a variance. The Court is

concerned that the CRC did not undertake an independent analysis of the stipulated facts, which comprise the only competent evidence in the Record. Staff's "position" statements, through counsel or otherwise, do not constitute competent evidence and CRC's "adoption" of Staff's position was clearly erroneous. The Conclusions of law are not supported by the Stipulated Facts, but instead are only supported by the arguments of Counsel and the Staff, which again, does not constitute competent evidence. It is inappropriate for the CRC to recite legal argument as a Conclusion of Law when again, the Findings of Fact must be supported by competent evidence; and the Conclusions of Law must be supported by the Findings of Fact. By not relying on its own conclusions and instead rubber-stamping the Staff recommendations, the CRC's Conclusions of Law were not supported by the findings of fact and/or substantial evidence, and its decision, applying the whole record test, was arbitrary and capricious and therefore, made upon unlawful procedure.

These errors mandate that the Final Order of the CRC be reversed, and that the matter be remanded for a new hearing on the basis of the Stipulated Facts. Upon remand, the CRC is instructed to base its Findings of Fact only upon competent evidence, including any Stipulated Facts, and shall not utilize the "contentions" of Staff or counsel as a basis for its Findings of Fact or Conclusions of Law.

IV

Additional Arguments of Petitioner

Petitioner also argues the Order of the CRC constitutes an unconstitutional taking, the actions of the CRC violate the separation of powers doctrine, and that the CRC is not an impartial tribunal. For the reasons set forth in the CRC's Brief filed with this Court, the Court disagrees that that actions of the CRC violates the separation of powers doctrine or that the CRC

was not an impartial tribunal. As to the issue of whether the CRC Order constitutes an unconstitutional taking, this issue is not ripe for hearing until a final determination of a denial of the variance, per N.C.G.S. § 113A-123(b). Accordingly, these arguments are denied.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding.

2. ROBERT R. EMORY, Jr., Chairman of the Coastal Resources Commission is dismissed with prejudice from this appeal.

3. The Final Order of the CRC was based on an error of law.

4. The Final Order of the CRC was made upon unlawful procedure.

5. The Final Order of the CRC is not supported by substantial evidence in the record, and is arbitrary and capricious.

6. As to the issue of taking by the CRC, it is premature to bring the Petitioner's claim, and thus that issue is denied.

7. As to the issue of a breach of the separation of powers by the CRC, that issue is denied.

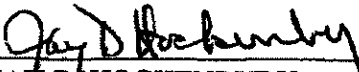
8. That CRC's Order is reversed and this matter is remanded to the CRC pursuant to the instructions contained in this Order.

**WHEREFORE, BASED UPON THE FOREGOING, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED AS FOLLOWS:**

That the Final Order of the CRC, denying the Petitioner's variance application be, and the same is hereby REVERSED. This matter is remanded to the CRC for a new hearing, consistent

with the mandates and instructions contained within this Order. .

This the 18th day of ~~January~~ ^{February}, 2009.



JAY D. HOCKENBURY
SUPERIOR COURT JUDGE

**STAFF RECOMMENDATION
ATTACHMENT G**

Copies of the revised positions of the parties

S Shipman & Wright, L.L.P.

A t t o r n e y s A t L a w

575 Military Cutoff Road, Suite 106 • Wilmington, North Carolina 28405
(T) 910.762.1990 • (F) 910.762.6752 • 800.762.1990
www.shipmanlaw.com

Gary K. Shipman
Board Certified Civil Trial Specialist
National Board of Trial Advocacy

William G. Wright
Certified Mediator

Angelique Adams

Matthew W. Buckmiller

Aileen Wu Viorel

Jean S. Martin

James T. Moore

Catherine H. Lesica

Hugh M. Currin, Jr.

April 8, 2009

Jim Gregson
Division of Coastal Management
400 Commerce Way
Morehead City, NC 28557

Re: Riggings Homeowners Request for Oral Argument in Variance Request

Pursuant to Special Deputy Attorney General's letter of March 10, 2009 please find attached the Riggings revised written statement concerning their variance request. The Riggings also requests the opportunity to present oral argument to the Commission.

Kindly return the copy to me, filed-stamped or received-stamped in the enclosed self addressed envelope.

Should you have any questions or concerns please feel free to contact me.

Sincerely,



Matt Buckmiller
MWB/nfs

Enclosure

cc: Christine Goebel, Esq. (w/encl)

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APR 10 2009

N.C. ATTORNEY GENERAL
Environmental Division

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RIGGINGS POSITION STATEMENT

1. 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.

Riggings Homeowner's, Inc. (herein "Riggings") applies to the Coastal Resources Commission of the State of North Carolina (herein "CRC") for a variance which would allow them to maintain temporary sandbags to protect their property longer than is allowed under the rules, and until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publicly funded, has been completed. (See Record of Proceedings, p. 4-6 (Stipulated Facts), 18-24 (Variance Request))

In issuing the variance extensions to the Riggings in April 2005, May 2003, February 2002 and August 2000, the Commission has stated, that "the Riggings Condominium has been imminently threatened by erosion since 1985 and that the sandbag revetment in question has been used to protect it since that time." (R.O.P., pp. 119-142) Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that application of the rules to the Riggings' property would result in unnecessary hardship. (Id.) Since those previous Variance Orders there has been no change in the hardships the Riggings property will suffer if it is not granted a variance.

Based on legally permissible criteria, Staff cannot demonstrate that the Riggings will suffer any less hardship now than they did previously and cannot articulate one factor which would justify their change in position that the strict application of the rules results in an unnecessary hardship to the Riggings property.¹ As such, no fundamental change has occurred to the Riggings property since their previous variance request, where the CRC and Staff found unnecessary hardships, which would be grounds for a change in position.

The stipulated evidence is that the threat to the Riggings property is as apparent and imminent as it was at those previous times when the previous variances were granted and, if anything, the situation has worsened. (Id. at p. 6-7) "The Riggings has been threatened by erosion since 1985, and a sandbag revetment has been used to protect it since that time." (Id. (Stipulated Fact # 10)

¹ The only change that has occurred to the Riggings is that some of the unit owners' denied the FEMA grant for potential relocation, however pursuant to Judge Hockenbury's remand of this case this is not a factor this tribunal can look at. Even if this tribunal were inclined to consider the FEMA Grant and the possibility of relocation as a factor or factors in their analysis, the uncontroversial evidence before the CRC was that acceptance of the FEMA grant by the Riggings was not possible. Stipulated Fact # 29 stated: (i) that the Riggings HOA, in order to accept the grant, was required to obtain the unanimous consent of the unit owners; (ii) that each unit owner would have been required to contribute approximately \$125,000.00 towards the cost of relocation and reconstruction; and (iii) that some owners had been informed by the holders of their mortgages that no relocation of the units could occur without their consent, and some of those lenders had expressed concerns about whether that consent would be given. (Id. at p. 6-7) In addition to these stipulated facts the Affidavits of Riggings homeowners demonstrate that they voted "No" towards accepting the FEMA Grant because they lacked the \$125,000.00 necessary for relocation. (Id. at p. 102-104) While only one homeowner vote in the negative was needed to turn down the FEMA grant, at least three homeowners voted "No" towards accepting the FEMA grant because they lacked the financial capability to provide the funds necessary for relocation. (R.O.P., pp. 102-104 (Affidavits of John Parnell, Patty Forest, and Sandy Iemma))

("Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased") Without the sandbag revetment, the beach in front of the Riggings Condominium will be subject to increased erosion from nor'easters, hurricanes and other storms. Petitioner's continuing efforts to convince the U.S. Army Corps of Engineers to extend the Carolina/Kure Beach renourishment project have not succeeded so far, and nothing else has happened to reduce the erosion threat. (*Id.* (Stipulated Fact # 21) More importantly, there is no evidence in the record to support any conclusions that unnecessary hardships to Petitioner's property, based on the unique nature of the Property, would no longer exist with strict application of the rules.²

The strict application of these rules, which require removal of the sandbags, will cause serious damage and eventually destruction of the Riggings Condominium which will deprive Riggings' owners of *any* use of their property much less a reasonable one. This forced hardship upon the residents of the Riggings Condominium is unnecessary since adherence to these rules accomplishes no significant public purpose or benefit. Allowing the sandbags to remain for the requested time will not significantly compromise the rule's purpose, which is to preserve the ocean beach for public use, and will permit the residents of the Riggings Condominium time to explore alternative options that do not cause an extreme hardship to befall onto them, such as private renourishment of the beach if public authorities are unwilling. (*Id.* at p. 60-100) Only a short segment of the beach, approximately 300 feet, is affected by the sandbags, an insignificant area when compared to the large area of the beach immediately to the south of the Riggings on which the State has built a seawall to protect Fort Fisher State Park. (*Id.* (Stipulated Fact # 34)

There is no evidence in the record to suggest the hardships the Riggings will suffer if their sandbags are removed are any less severe than they were when their first sandbag variance was granted, and in fact the evidence is to the contrary. Accordingly this tribunal must find that the Riggings has satisfied element #1 for a variance request.

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

The next step in the variance process is that CRC is required to determine whether the Riggings hardships that would result from strict applications of the rules arise from conditions peculiar to the property. This tribunal must focus on the peculiar conditions of the Riggings property, and not the Riggings unit owners.³ Accordingly, the fact that the Riggings has used the sandbags for twenty (20) years is irrelevant. The factors that the CRC must examine in determining whether would be hardships result from conditions that are peculiar to the property are the location, size, and/or topography of the Property. There is no evidence to suggest that the Riggings is not unique or that it does not suffer hardships solely because it is unique.

² Pursuant to Judge Hockenbury's Order the proper inquiry in a variance request before the CRC is concerning the property and not the property owner. (Hockenbury Order at p. 10)

³ Denial of the FEMA grant by some of the Riggings unit owners and the fact that the Riggings owned additional property where the project might be relocated is not a factor that this tribunal can examine. (Hockenbury Order at p. 9-11)

The Riggings is unlike any other property in the State of North Carolina that has applied for or otherwise been eligible for a variance from the CRC in order to keep sandbags in front of their property for a period longer than allowed by their rules. The Riggings is truly stuck between a rock and a hard place, and the CRC, supported by Staff, have concluded that the aforementioned conditions are peculiar to the Riggings' Property when issuing its previous Orders. (R.O.P., pp. 119-142) There is no other property in the State of North Carolina where a coquina rock natural barrier was removed by the government for a public purpose: namely the construction of U.S. Highway 421. During the 1920's, some of the coquina rock outcropping in the near vicinity of the Riggings was allowed by the Board of County Commissioners of New Hanover County to be removed by a contractor for use in the completion of a section of U.S. Highway 421, a public project. (Stipulated Fact #3) The contractor removed approximately 6,000 cubic yards of rock, taking it from a strip approximately 50 to 100 feet wide. (Id. at #4) The parties have stipulated that coquina rock outcroppings provide a natural barrier against the threat of beach erosion; outcroppings that have been designated as a natural heritage area and accordingly, there is no dispute that due to the removal of the coquina rock, that protection no longer exists for the Riggings. (Id. at #6)

Additionally, the Riggings is the only property in the State of North Carolina that is located immediately adjacent and contiguous to a North Carolina State Park, Fort Fisher. After being threatened by erosion for a period of many years, Fort Fisher was permitted to construct a permanent revetment or hardened structure, which at the time it was constructed was contrary to the general policy of the State of North Carolina against the construction of hardened structures. (Id. at #16-18) The hardened structure prohibition was adopted in recognition of the adverse erosive effects that such structures can cause to adjacent property. (Id.) This policy was abandoned, at least legislatively, because it was believed that Fort Fisher was worthy of protection. (Id.) From July 1995 to January 1996, the State of North Carolina erected the revetment, and after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of the Riggings increased, meaning the State of North Carolina by its direct actions caused the Riggings shoreline to erode. (Id.)

In addition, the Riggings is also the only property in the State of North Carolina located in a municipality (Town of Kure Beach) and a county (New Hanover), which have undertaken large beach renourishment projects using public money on three separate occasions since 2000. (Id. at #21) The Carolina/Kure Beach Renourishment Projects of 2001 and 2007 included a large part of Carolina Beach and 98 percent of Kure Beach, but fell approximately 1,500 feet short of the Riggings Condominium. These projects have not included the beach front adjacent to the Riggings purportedly, because of a policy that prevents burying of coquina rock outcroppings. (Id. at #22) The Riggings HOA made various attempts to get the United States Army Corps of Engineers (herein "Corps of Engineers") to extend beach nourishment projects to include the shoreline immediately adjacent to The Riggings, but the attempts were not successful. (Id. at #21) The parties have stipulated that coquina rock has been exposed and then buried on the beachfront just north of the Riggings project during both of the two prior public beach renourishment projects. (Id. at #9) In addition, the beach renourishment to the north of the Riggings has further exacerbated the erosion in front of the Riggings as the increased beach frontage to the north of the Riggings due to renourishment now serves as a "feeder beach" which captures ocean sands that would normally feed down to the Riggings to provide the Riggings increased shoreline. (R.O.P., p. 78)

As such, there is no new evidence, after this tribunal had previously found the Riggings property peculiar, to suggest the hardships the Riggings property would suffer if the Riggings were forced to remove their sandbags did not result from conditions peculiar to their Property; namely the beach renourishment projects to the North and the Fort Fisher revetment to the South which have increased the erosion of sand in front of the Riggings. Indeed, there is no more unique property in the State than the Riggings and there is no evidence to indicate otherwise.

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

“Actions” taken by the petitioner is the third statutory requirement for a variance request and there is no evidence to suggest that any action of the Riggings caused the erosion problems on its Property. And the evidence shows that the Riggings has been as proactive as possible to find a solution to their erosion problems.⁴ The Riggings Condominium was built in 1984. As with many other threatened structures on the oceanfront when erosion problems appeared, sandbags were used to protect the condominium. (*Id.* at #10) The initial property lines extended 380 feet from Highway 421 towards the Atlantic Ocean. The Riggings oceanfront property now has diminished to almost half of its original size. The Riggings owners had no way of knowing that designation of the coquina rock outcropping as a Registered Natural Heritage Area, would make the beach in front of the Riggings ineligible for the Carolina/Kure Beach renourishment project. Similarly, the Riggings had no part in the construction by the Corps of Engineers of the Seawall Revetment which further exacerbated the Riggings’ erosion. It is the combined action of State and Federal agencies that have created these potential hardships and there is no evidence at all to suggest that any action the Riggings has taken has caused the potential hardships for their property should their variance request be denied.

Furthermore, the Commission, in concurrence with Staff’s previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that the Riggings hardship does not result from actions it has taken. (R.O.P., pp. 119-142) Accordingly, there has been no additional evidence submitted since those previous variance requests were granted which would support the notion that the hardship on the Riggings would result from any actions it has taken.

4. *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 CRC’s main objective for the ocean hazard area AEC is to eliminate unreasonable danger to life, property, and amenities. *See 15A NCAC 7M.0201.* Other important objectives include achieving an optimal balance between the financial, safety and societal factors involved in coastal hazard area development, minimizing loss of 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, reducing the

⁴ Consideration of whether the Riggings could relocate or the denial of the FEMA Grant is again something this tribunal cannot consider. The FEMA Grant cannot be considered, and even if this tribunal wanted to there is no evidence to suggest that i) it has caused the erosion problems to Petitioner’s property, which is the analysis the CRC should undertake, as those problems were caused by the combined action of State and Federal agencies.

public costs of inappropriately sited developments, and protecting present common law and statutory rights of access to, and use of the lands and waters of, the coastal area. N.C. Gen. Stat. § 113A-102.

Extension of the variance is consistent with these aforementioned objective/purposes by avoiding the financial waste that would result from exposing the Riggings Condominium to erosion and eventual damage and destruction before the owners can explore viable alternative options. It will also reduce potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach.

Issuing the requested variance will also preserve substantial justice. The Riggings is in a unique situation since one government agency requires removal of the sandbags but allows protection through community beach nourishment projects, while another government agency has prohibited beach nourishment for the Riggings because the area has been designated a Registered Natural Heritage Area by yet a third government agency. The only stated purpose that might be compromised if the variance is extended is the public right of access to, and use of, the beach. However, the citizens of North Carolina have not been inconvenienced by the maintenance of the sandbags since even at high tide the public can get around the sandbags by going between the sandbags and the Riggings buildings closest to the ocean. (*Id.* at #34). In addition there would be no harm in granting the variance request as the Corps of Engineers has stated that the sandbags at the Riggings have had not deleterious effect on surrounding property or property owners. (*Id.* at #33, p. 101 (Affidavit of Tom Jarrett, Former Member of United States Army Corps of Engineers))

For the aforementioned reasons, the variance will secure the public safety and welfare as well.⁵

Furthermore, while there is no harm done by permitting a variance extension in this case, the denial of a variance will have a profoundly deleterious impact on all members of the Riggings HOA who will be forced to leave their homes and the good memories that reside therein. In addition, a denial would send a clear message to the citizens of New Hanover County and North Carolina that the government would intentionally kick its own citizens out of their homes for

⁵ If this tribunal is inclined to consider the denial of the FEMA Grant, which would be impermissible pursuant to Judge Hockenbury's Order it should consider the following. The Riggings had no option but to deny the FEMA Grant to move their homes. The FEMA grant required a 100% vote from all Riggings homeowners. Even one vote in the negative would nullify the grant. Moreover, under the Riggings HOA Declaration and Bylaws, a termination of the Riggings HOA would likely be needed to relocate the Condominium. This would require an affirmative vote of 100% of all the Riggings homeowners, which was not achieved. Riggings HOA members voted in the negative for several reasons. First, the grant was undervalued in that it would cost each homeowner approximately \$125,000 to relocate. Most, if not all, Riggings homeowners lacked the financial capability to provide such substantial monetary funds. Second, it was not guaranteed in the Grant contract that the provisions of the Grant, particularly the provision regarding the use of the oceanfront property, would not change. Third, Riggings homeowners were told by the mortgage holders on their homes that their mortgages could not be transferred to the new location. Finally, Riggings HOA was prohibited from building on the "relocation" property due to the Town of Kure Beach's Board of Adjustment Ruling on April 28, 1992, and their subsequent reaffirmation of that ruling on September 22, 2000. Indeed some members of the Riggings HOA, by voting in the affirmative to move the Condominium, have done, and are still feverishly, doing all they can to resolve this situation. At least as to these Riggings members the granting of a variance would preserve substantial justice until they have an adequate time to explore further options.


seemingly no important or compelling governmental purpose. Most would not find substantial justice in that result.

The record evidence in this matter is that the Riggings, at its own expense, would finance its own beach renourishment. Staff should concede that sandbags are allowed to remain if a property is planning to take place in beach renourishment but fails to consider the Riggings personal beach renourishment funded entirely by the Riggings as a viable alternative. The owners of the Riggings have not sought and do not seek to have the sandbags remain permanently. Instead, the Riggings see it as a temporary solution. Through the variance request *sub judice* the Riggings seeks to implement a more permanent solution; one that other property owners in that area, through the government, have already had the benefit of, beach renourishment. The most recent variance request by the Riggings seeks simply to have owners at the Riggings be fed out of the same spoon as other property owners to the north and south of the Riggings. If the variance request were permitted, for the period before beach renourishment the public would continue to have full access to the beach adjacent to the Riggings and the sandbags would continue to serve a viable function of protecting threatened structures, and the property will therefore be saved. For years, the given reason why the beach in front of the Riggings has not been renourished was that the US Army Corps of Engineers would not permit coquina rock seaward of the Riggings to be covered. However, what the Corps of Engineers apparently did not know or consider was that the coquina rock outcropping seaward of the Riggings was removed for a public purpose, thereby depriving the Riggings of the natural protection that other property owners to the North and South have. The Corps also failed to consider that the beach renourishment projects undertaken in 2000 and 2007 uncovered and then recovered coquina rock, thereby eliminating their stated reasons as justification for not providing the owners at the Riggings the same protection that other property owner in Pleasure Island have otherwise been entitled to.

Furthermore, the Commission, in concurrence with Staff's previous position regarding the Riggings, concluded in its Variance Orders in April of 2005, May 2003 and August 2000 that issuing the Riggings a variance request is within the spirit, purpose, and intent of the commission's rules; that it will secure public safety and welfare, and that it will preserve substantial justice. (R.O.P., pp. 119-142)

Staff can't articulate one legitimate reason why the variance should be denied other than the fact that the Riggings owner have been granted variances before, and if this tribunal was inclined to base their variance decision on that fact, this tribunal would again be making a variance decision based on the characteristics and conditions of the property owners and not the property, which would violate Judge Hockenbury's instructions in his Order that the proper inquiry in a variance request is concerning the property and not the property owner. (Page 10 of Judge Hockenbury Order) Accordingly there is no reason, based on the consideration of legally permissible criteria, why the CRC should or can deny the Riggings variance as the Riggings has satisfied all four elements to be granted a variance request.

Respectfully submitted,



Gary K. Shipman
William G. Wright
Matthew W. Buckmiller
SHIPMAN & WRIGHT, LLP
575 Military Cutoff Road, Suite 106
Wilmington, NC 28405
Telephone: 910-762-1990
Facsimile: 910-762-6752



State of North Carolina

ROY COOPER
ATTORNEY GENERAL

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

April 13, 2009

By First Class Mail and email

Mr. Jim Gregson, Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Re: Riggings Variance on Remand for April 2009 CRC meeting

Dear Mr. Gregson:

Please find enclosed the Respondent's revised position on the four variance criteria for the Riggings Variance, which was remanded back to the CRC for rehearing. These revised positions are being submitted in response to the direction from Jennie Hauser, Special Deputy AG and CRC Counsel, in her March 10, 2009 letter to the parties.

Respondent- DCM also requests the opportunity to present oral argument to the CRC at the April 2009 meeting, and requests that the usual 5 minute time limit be increased to 15 minutes to afford the parties adequate time to address the lengthy facts and argument in this case.

Thank you for your attention to this matter. With best wishes, I am

Sincerely,

A handwritten signature in black ink, appearing to read "Christine Anne Goebel".

Christine Anne Goebel
Assistant Attorney General

Enclosure

cc(w/enc.): Jennie W. Hauser, Special Deputy AG and CRC Counsel, email & hand delivery
Gary Shipman, William Wright & Matthew Buckmiller, Esq., by email & US mail
Angela Willis, Assistant to DCM Director, by email & US mail

Respondent's Revised Responses to the Variance Criteria for the April 2009 Remand of the Variance Request by The Riggings HOA, Inc., CRC-VR-06-33

- 1. 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.**

Staff's Position: No.

In the past, Staff had agreed with Petitioner that strict application of the development rules regarding how long the sandbag structures could remain caused Petitioner an unnecessary hardship. Staff agreed that the use of temporary erosion control structures, such as these sandbag structures, is to afford homeowners time to retreat from erosion by relocating their property, or to obtain beach nourishment. After initially attempting to secure nourishment for their property, and obtaining variances from the Commission to pursue this option, Petitioner discovered that, according to the Army Corps of Engineers, nourishment was not an acceptable alternative at this location due to the coquina rock located in front of their property. See Stipulated Facts #21-22 Having failed at the nourishment option in 2000, Petitioner then began trying to retreat from the erosion by attempting to secure funds to relocate the structures away from the Ocean Hazard area. See Stipulated Facts # 25-27 At the variance hearing in April 2005, Petitioner emphasized the fact that the Town had recently been awarded a \$3.6 million dollar FEMA grant to acquire the current Riggings site for a park, and Petitioner would retreat by rebuilding the structures to an adjacent parcel by June 2007. These new facts concerning the Petitioner's proposed retreat and relocation were the primary reason staff supported the April 2005 variance request, and its finding that an unnecessary hardship existed. Staff understood the award of the grant to be extraordinary, and noted that it appeared that Petitioner's retreat option was about to come to fruition, and so removal of the sandbag structure at that time would be an unnecessary hardship. However, in the four years since the last variance hearing, the members of the Petitioner-HOA have not been able to get the required support from its members, formally rejected the FEMA grant in 2006. Based on the current variance petition, Petitioner has apparently abandoned any retreat plan, being the one proposed in the FEMA grant or otherwise, as their current request is now to keep the sandbags ". . . until such time as their proposed Habitat Enhancement Project and/or a renourishment project, either privately or publically funded, has been completed." See Stipulated Fact # 35. Based on the current stipulated facts, Staff now contends that the application of the rules, standards, or orders of the Commission will not cause Petitioner unnecessary hardships, as explained below.

In 2003, the CAMA was amended to include N.C.G.S. § 113A-115.1, which prohibited the use of erosion control structures along the ocean shoreline. The Commission's rules did allow for the continued use of "temporary erosion control structures" made of sandbags to protect only immanently threatened structures which were those within 20 feet of the erosion scarp. The installation and design standards in the CRC's rules reflect the temporary nature of the structures, and demonstrate that sandbags were not intended as permanent fortresses. Further, the Commission stated in 15A NCAC 07M.0202(e) that these temporary measures are to be used

“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.” This rule demonstrates that sandbags should only offer immediate relief and time to find a permanent solution.

When evaluating this variance factor of whether “strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships,” it is instructive to look at guidance from the North Carolina Court of Appeals. The Court looked at the CAMA variance criteria in the case of Williams v. NCDENR, DCM and CRC, 144 N.C. App. 479, 548 S.E. 2d 793 (2001). In Williams, the Court stated,

“We hold that to determine whether a parcel of property suffers from unnecessary hardship due to strict application of CAMA, the CRC must make findings of fact and conclusions of law as to the impact of the act on the landowner’s ability to make *reasonable use* of his property.”

Id. at 487 (emphasis added). The standard is not, as Petitioner appears to contend, that no “fundamental changes” have taken place since the last variance.

In evaluating this variance criteria for this variance hearing based on the facts stipulated to by the parties, Staff contend that there are few *reasonable* uses for property that has been imminently threatened behind a sandbag structure for the last 24 years, and which has suffered damage from erosion multiple times during this period. Staff believes that any reasonable expectations of use for this property should be decreasing with every passing hurricane, nor’easter, and storm, as the property continues to suffer from the effects of the continuing erosive forces of the ocean, something which is common to Ocean Hazard areas all along the North Carolina coast. Additionally, the amount of time the bags have been allowed to remain is far beyond the scope of what the rules allow, and the sandbag structure today has taken on the characteristics of a permanent erosion control structure which is prohibited under the CAMA. As the reasonable uses for this property continue to erode with the continuing erosive forces placed on the property by the Atlantic Ocean, the strict application of the Commission’s time limits for sandbag structures does not cause the Petitioner and its property unnecessary hardship.

Finally, Petitioner offers no proposed solution which is approved by the Commission and which is different from those offered in the past. As stated above, the Commission’s approved responses to oceanfront erosion are retreat through demolition or relocation, or nourishment. This Petitioner was afforded extra time through earlier variances to pursue, albeit unsuccessfully, beach nourishment for the area in front of its property. There is no evidence that the circumstances which prevented it in the past have changed and would now allow nourishment in the near future. Additionally, while Petitioner had hopes to retreat from the erosion through relocation, and had taken some concrete steps to this end including obtaining the grant, having discussions with architects and other consultants, and securing a variance to continue with the relocation process, this process has apparently now been abandoned by Petitioner.

Instead, Petitioner now proposes the "Habitat Restoration Project" which may very well be illegal based on the hardened structures ban of N.C.G.S. § 113A-115.1. In the alternative, Petitioner also proposes a new nourishment project, either privately or publically funded, which would likely cover the natural heritage and hard-bottom habitat coquina rock. Both of these proposals may not even be permissible, may be illegal, no funding has been identified, and so staff feels they are not real steps toward finding a permanent solution to Petitioner's erosion problem.

In conclusion, staff contend that the strict application of the applicable development rules, standards, or orders issued by the Commission" do not cause the petitioner unnecessary hardships because, using the Court of Appeals' reasoning from Williams for this factor, the Petitioner can make reasonable use of its property, despite the strict application of the sandbag time limits, because the reasonable uses for Petitioner's property have been significantly reduced as the erosional forces of the Atlantic Ocean continue to impact Petitioner's property. Petitioner attempted to get nourishment and abandoned that effort, then attempted retreat through relocation and abandoned that effort. Now, it has proposed keeping the sandbags until completion of its proposed habitat project, which is likely illegal, is built, or until a theoretical but not planned or permitted future nourishment project, with no identified source of funding, is completed. As Petitioner has tried and failed at both the retreat and nourishment options, and now offers no concrete plan to resolve the continuing effects of erosion in the short-term, the reasonable uses for this property are greatly diminished, and so strict enforcement of the Commission's time limits for sandbags will not cause Petitioner unnecessary hardships.

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

Staff's Position: No.

As indicated in prior Staff Recommendations and Orders of the CRC, Staff had agreed that Petitioner's unnecessary hardship results from conditions which were peculiar to the Petitioners' property--specifically the location of coquina rock formations preventing the placement of sand in past nourishment projects, and the Fort Fisher rock revetment. While both of these structures still exist, Staff has now argued in the previous factor that the Petitioner no longer has an unnecessary hardship. As the statutory variance criteria is, "[d]o such hardships result from conditions peculiar to the petitioner's property, such as location, size, or topography of the property?", it is logical that if there are no hardships identified in the first criteria, then there can not be an unnecessary hardship that results from conditions peculiar to the property. That is what is now being argued by Staff.

Petitioner's argument focuses on the long history of the coquina rock in the area near its property, and on the Fort Fisher revetment, and argues that these features have (1) prevented the beach in front of Petitioner's property in the inclusion of a nourishment project, and (2) have increased erosion on the beach in front of Petitioner's property. The coquina being the Corps' reason not to include the Riggings in its public nourishment project, while unfortunate for Petitioner, does not constitute an unreasonable use of Petitioner's property which causes

Petitioner unnecessary hardships. This is because beach nourishment is not an automatic right of an oceanfront owner, and so causes no unnecessary hardships to Petitioner. Also, Stipulated Fact #18 states, "Initially after the construction of the revetment at Fort Fisher, the rate of erosion of the shoreline in front of The Riggings increased, but since then the rate of erosion has decreased." Any effects on the erosion rate in front of Petitioner's property by the construction of the revetment at Fort Fisher were temporary and occurred in 1995-96. As there has been no significant increases in the erosion rate at Petitioner's property caused by the Fort Fisher revetment, the only hardship which remains is the regular erosive forces of the Atlantic Ocean. There are no stipulated facts that these regular erosive forces are caused by the coquina or Fort Fisher revetment. These regular erosive forces are certainly not peculiar to Petitioner's property, and are no different than the many others properties in the Ocean Hazard AECs, where the Commission's rules acknowledge that such areas have a "special vulnerability to erosion or other adverse effects of sand, wind, and water. . ." and have a "substantial possibility of excessive erosion or flood damage." 15A NCAC 7H.0301.

As Petitioner suffers no unnecessary hardship, no unnecessary hardship is caused by conditions peculiar to Petitioner's property. Additionally, the hardship of erosion is a known hardship for oceanfront owners, and was acknowledged by the Commission's rules, specifically in the Ocean Hazard AECs definitions enacted in 1977. There is nothing peculiar or unique about the forces impacting Petitioner's property. Instead, this "special vulnerability to erosion or other adverse effects of sand, wind, and water..." is common to all oceanfront owners in the Ocean Hazard AECs.

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

Staff's Position: Yes.

Staff notes that Petitioner's argument, that they did not cause the coquina rock's National Heritage Area designation and were not involved in construction of the Fort Fisher rock revetment, ignore the fact that these two things have existed since 1982 and 1995, respectively. Petitioner was first aware of the erosion problems at their site in 1985 when the structures became imminently threatened and the sandbag structures were first installed. Additionally, the Commission's rules, enacted in 1977, themselves acknowledge the "special vulnerability to erosion or other adverse effects of sand, wind, and water. . ." which is common to all oceanfront owners in the Ocean Hazard AECs, including Petitioner. Since the time the erosion at this site was apparent to Petitioner, it has attempted and failed at getting a nourishment project extended to its area of the beach, and then later, to complete its retreat through relocation plan. This Commission had even granted Petitioner extensions for its sandbag removal deadline to allow Petitioner the ability to fully explore both these options to address their erosion problem. Nonetheless, Petitioner has now abandoned its attempts to retreat from the erosion through relocation of its structures, and is focusing now on a proposed hardened structure and/or nourishment.

Petitioner has now proposed the possibility of a future publically or privately funded nourishment project which has not been designed, permitted, or a funding source identified.

Petitioner proposes this despite knowing that at least since the 2000, the Corps indicated that the coquina rock would likely prevent nourishment being placed at or near the Riggings. Additionally or in the alternative, Petitioner also proposes a habitat restoration plan that is likely in conflict with the hardened structures ban of N.C.G.S. § 113A-115.1, and also has not been permitted or a funding source identified. These proposals, which will certainly be costly and both do not identify a funding source, seem highly unlikely to Staff to come to pass, as Petitioner has indicated in Stipulated Fact # 29 that “some homeowners lacked the financial capability (of \$125,000) to relocate” when voting on the FEMA grant in 2006. Staff believes that the chances are slim that homeowners unable to afford the \$125,000 supplemental relocation costs in 2006 could now all afford to fund a private nourishment or habitat restoration plan.

Despite the lack of concrete details for either plan now proposed, Petitioner requests that they be able to keep the sandbags until one of these projects is completed. Staff is very concerned that as in the past, Petitioner will make promises that they have a solution to the erosion problem affecting their property, but could easily again fail to implement a permanent solution and the bags would remain even longer then the 24 years they have existed thus far. Staff is also concerned that Petitioner’s request to keep the bags until one of it’s solutions is complete, is much too open-ended. These projects may be illegal or not-permittable and if never completed, the bags would remain indefinitely. For these reasons, any hardships Petitioners might face, though Staff argue above that there are no unnecessary hardships affecting Petitioners now, are a result of their own inability to react to their long-standing situation with a long-term solution of nourishment or retreat through relocation.

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

Staff’s Position: No.

Staff understands that one of the Commission’s main objectives for the ocean hazard AEC is to eliminate unreasonable danger to life, property, and amenities, pursuant to 15A NCAC 7M.0201. While Petitioner argues that allowing the sandbag structure to remain is the best way to achieve this goal, Staff disagrees. Staff believes that while the sandbags were meant to be a temporary band-aid while Petitioner sought nourishment and then retreat through relocation, the bags have instead inflated expectations of what reasonable uses are for the property. Petitioner continues to rely on the sandbags to protect or reduce damage from storms, instead of finding a realistic lasting solution to erosion problems. Instead of learning from prior failed attempts at nourishment and retreat through relocation, Petitioner now proposes more of the same regarding nourishment, as well as a problematic habitat restoration plan which is likely a hardened structure banned by the CAMA.

The rule authorizing the use of sandbags is found under the heading of “Specific Use Standards for Ocean Hazard Areas” and specifically describes the allowable ocean shoreline erosion control activities. These standards make it clear that 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 bulkheads, seawalls, revetments, jetties, groins and breakwaters.”

15A NCAC 7H.0308(a)(1)(b). To allow property owners some temporary relief from erosion, sandbags are allowed only in very limited circumstances. The rules only allow sandbags in very limited sizes, in very limited situations, in very limited locations, and for a very limited period of time. Petitioner’s contentions that the intent of the rule is to allow them to take whatever measures are necessary to protect their structures, for how ever long that may take the Petitioner, if those measures are even ever taken, is plainly contradicted by the rules. The Petitioner has already been afforded an extra nine years by the Commission, in addition to the 13 initial years the sandbags were allowed. The previous extensions of one, two, or three years at a time, were granted while Petitioner was taking specific actions for nourishment and then retreat through relocation. These short, defined extensions in order to take specific action were deemed by the Commission to be within the spirit of the rules regarding attempts to eliminate unreasonable danger to life, property, and amenities. However, the current open-ended, undefined request based on the completion of one of the two proposed plans by Petitioner, both of which are questionably permissible or likely illegal, and lack clear funding sources simply is not within the spirit of the Commission’s rules for temporary erosion control structures.

Petitioner’s argument also fails to address the importance of the Commission’s other stated goals of preventing encroachment of permanent structures on public beach areas, of preserving the natural ecological conditions of the barrier dune and beach systems, and protecting present common law and statutory rights of access to, and use of the lands and waters of the coastal area. While Petitioner points to Stipulated Fact # 34 and notes that the public can pass, though sometimes by walking up near Petitioner’s property, this ignores the continued existence of the sandbag structure on the public beach area and the increasing encroachment of the buildings impedes the public’s rights of access and use of the beach area. While the public may be able to pass by, it certainly cannot use the beach where the sandbags are located, a large area of the public’s beach shown in the site photographs included in the record. As argued above, the existing sandbag structure is continually losing its “temporary” characteristics and is becoming a more permanent illegal hardened erosion control structure, contrary to the CAMA and the Commission’s rules and objectives.

In addition to Petitioner’s request not being consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission as described above, it also does not secure the public safety and welfare as required by this variance factor. Petitioner simply argues that it meets this criteria by avoiding “potential debris from the Riggings that can harm other structures and/or inhibit public access to the beach.” While this “harm” is speculative and could be avoided altogether if the structures were relocated as once proposed, Petitioner also ignores the impacts to public safety and welfare from the existing sandbags which would continue if this variance is granted and the bags are allowed to remain. In addition to the bags impeding the

public's rights of access and use of the beach area, these bags, some of which fall subject to the ocean's forces and wear out, can cause real safety concerns for the public, primarily those of entanglement in derelict bags. Examples of this can be seen in the site pictures in the accompanying power-point presentation.

Finally, this variance factor requires Petitioner to demonstrate that the requested variance would preserve substantial justice. Petitioner claims that because it is in a unique position where DCM requires removal of the sandbags but the Corps won't allow nourishment because of the coquina designation by the heritage designation, and because the impacts on the public beach are not all that bad since the public can still pass along the beach even at high tide, substantial justice would be preserved.

Staff contend that instead, substantial justice would not be preserved if a time extension was granted for Petitioner's sandbags until their newly proposed nourishment project or habitat restoration plan is completed. It appears to Staff that Petitioners are no longer working diligently to seek nourishment, to implement their habitat restoration plan, and have abandoned attempts to relocate the buildings, as evidenced by the lack of a retreat/relocation plan proposed in this variance petition. While past variances were granted for short, defined periods of time in order to take specific prescribed steps, first for nourishment and then for retreat through relocation, Petitioner's current proposal is vastly different. The current proposals have significant problems in that they may not be permissible, may be illegal, and have no clear source of funding. Petitioner has been granted extraordinary help by this Commission through the past time extensions and afforded enough time to make real attempts at nourishment and retreat through relocation. As attempts at both these responses to erosion endorsed by the Commission's rules have failed or been abandoned by Petitioner, to grant an extension now to re-try these options would not preserve substantial justice. Allowing the bags to remain until one of those plans is completed, if ever, would be no longer preserve substantial justice because to do so would essentially constitute a permanent variance for Petitioner, while allowing only truly temporary sandbag structures for other threatened structures along the coast.



Christine A. Goebel
Assistant Attorney General and
Counsel for Division of Coastal Management

N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6600 phone
(919) 716-6767 fax
cgoebel@ncdoj.gov



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

P.O. BOX 629
RALEIGH, NC 27602

REPLY TO:
WARD ZIMMERMAN
ENVIRONMENTAL DIVISION
TEL: (919) 716-6600
FAX: (919) 716-6767
wzimmerman@ncdoj.gov

MEMORANDUM

TO: Coastal Resources Commission
FROM: Ward Zimmerman, Assistant Attorney General
DATE: April 17, 2009 (for the April 29 CRC Meeting)
RE: **Variance Request # 09-01 by Bald Head Island Limited, LLC.**

Petitioner proposes a paved marina access road in Southport, Brunswick County, North Carolina. The proposed project includes the construction of an eight-foot wide paved access road at Deep Point Marina in addition to five wooden landings at the dock entrances off of the Cape Fear River. Petitioner's application was denied based on the proposed development's inconsistency with the Coastal Resources Commission's (CRC) 30-foot buffer rule in 15A NCAC 7H.0209(d)(10), and 15A NCAC 07H.0208(a)(1) and (a)(2)(B) which state that "[u]ses which are not water dependant shall not be permitted in coastal wetlands, estuarine waters and public trust areas" and that "[b]efore receiving approval for location of a use or development within these AEC's, the permitting authority shall find that no suitable alternative site or location outside of the AEC exists for the use or development." Petitioner seeks a variance from these requirements.

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 Response to Criteria
Attachment D: Petitioner's Variance Request and Other Exhibits

cc: George L. Fletcher, Attorney for Petitioner
Brunswick County CAMA LPO
DCM Staff
Jennie Hauser, Special Deputy Attorney General

ATTACHMENT A
(Relevant Rules)

15A NCAC 07H.0208

(a) General Use Standards

- (1) Uses which are not water dependent shall not be permitted in coastal wetlands, estuarine waters, and public trust areas. Restaurants, residences, apartments, motels, hotels, trailer parks, private roads, factories, and parking lots are examples of uses that are not water dependent. Uses that are water dependent may include: utility easements; docks; wharfs; boat ramps; dredging; bridges and bridge approaches; revetments, bulkheads; culverts; groins; navigational aids; mooring pilings; navigational channels; simple access channels and drainage ditches.
- (2) 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:
 - (A) The location, design, and need for development, as well as the construction activities involved shall be consistent with the stated management objective.
 - (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, shellfish beds, beds of submerged aquatic vegetation, spawning and nursery areas, important nesting and wintering sites for waterfowl and wildlife, and important natural erosion barriers (cypress fringes, marshes, clay soils).

15A NCAC 7H.0209

(d) Use Standards.

- (10) Within the Coastal Shorelines category (estuarine and public trust shoreline AECs), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of the following:
 - (A) Water-dependent uses as described in Rule 07H .0208(a)(1) of this Section;
 - (B) Pile-supported signs (in accordance with local regulations);
 - (C) Post- or pile-supported fences;
 - (D) Elevated, slatted, wooden boardwalks exclusively for pedestrian use and six feet in width or less. The boardwalk may be greater than six feet in width if it is to serve a public use or need;

- (E) Crab Shedders, if uncovered with elevated trays and no associated impervious surfaces except those necessary to protect the pump;
- (F) Decks/Observation Decks limited to slatted, wooden, elevated and unroofed decks that shall not singularly or collectively exceed 200 square feet;
- (G) Grading, excavation and landscaping with no wetland fill except when required by a permitted shoreline stabilization project. Projects shall not increase stormwater runoff to adjacent estuarine and public trust waters;
- (H) Development over existing impervious surfaces, provided that the existing impervious surface is not increased and the applicant designs the project to comply with the intent of the rules to the maximum extent feasible;
- (I) Where application of the buffer requirement would preclude placement of a residential structure with a footprint of 1,200 square feet or less on lots, parcels and tracts platted prior to June 1, 1999, development may be permitted within the buffer as required in Subparagraph (d)(10) of this Rule, providing the following criteria are met:
 - (i) Development shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities such as water and sewer; and
 - (ii) The residential structure development shall be located a distance landward of the normal high water or normal water level equal to 20 percent of the greatest depth of the lot. Existing structures that encroach into the applicable buffer area may be replaced or repaired consistent with the criteria set out in Rules .0201 and .0211 in Subchapter 07J of this Chapter; and
- (J) Where application of the buffer requirement set out in 15A NCAC 07H .0209(d)(10) would preclude placement of a residential structure on an undeveloped lot platted prior to June 1, 1999 that are 5,000 square feet or less that does not require an on-site septic system, or on an undeveloped lot that is 7,500 square feet or less that requires an on-site septic system, development may be permitted within the buffer if all the following criteria are met:
 - (i) The lot on which the proposed residential structure is to be located, is located between:
 - (I) Two existing waterfront residential structures, both of which are within 100 feet of the center of the lot and at least one of which encroaches into the buffer; or
 - (II) An existing waterfront residential structure that encroaches into the buffer and a road, canal, or other open body of water, both of which are within 100 feet of the center of the lot;
 - (ii) Development of the lot shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities;
 - (iii) Placement of the residential structure and pervious decking may be aligned no further into the buffer than the existing residential structures and existing pervious decking on adjoining lots;

- (iv) The first one and one-half inches of rainfall from all impervious surfaces on the lot shall be collected and contained on-site in accordance with the design standards for stormwater management for coastal counties as specified in 15A NCAC 02H .1005. The stormwater management system shall be designed by an individual who meets applicable State occupational licensing requirements for the type of system proposed and approved during the permit application process. If the residential structure encroaches into the buffer, then no other impervious surfaces will be allowed within the buffer; and
- (v) The lots must not be adjacent to waters designated as approved or conditionally approved shellfish waters by the Shellfish Sanitation Section of the Division of Environmental Health of the Department of Environment and Natural Resources.

ATTACHMENT B
(Stipulated Facts)

1. Bald Head Island Limited, LLC (Limited) has been the owner and developer of Bald Head Island since 1984. Bald Head Island was originally comprised of approximately 12,000 acres of land and estuarine marsh. The actual development on the Island consists of approximately 2,000 acres with the balance having been donated to the state of North Carolina for conservation purposes.
2. Plans call for a total of approximately 2,000 dwelling structures when Island build-out is completed; with the vast majority of those structures being single family and cluster single family homes.
3. In addition to visits by homeowners Bald Head Island receives thousands of annual visitors who rent vacation accommodations, visit the Old Baldy Lighthouse and participate in the programs of the Bald Head Island Conservancy. All of those individuals are transported through the existing Indigo Plantation Marina; however, these operations will be transferred to the Deep Point Marina in early summer of 2009. The entire Deep Point project totals seventy eight acres and will accommodate parking for 3,000 vehicles. According to records maintained by Limited in excess of 300,000 annual passenger trips are taken on ferries operated by the applicant.
4. With the exception of limited access by private boat, all persons, supplies, and materials are delivered to Bald Head Island by passenger ferries owned and operated by Limited; or barge service provided by Limited. The ferry is the principal means of evacuation for persons involved in medical emergencies. Passenger ferry operations are regulated by the North Carolina Utilities Commission.
5. The property immediately at issue is nine acres on which has been developed the Deep Point Marina. This development has taken place under the authority of CAMA Major Permit Number 91-96, issued on June 3, 1996. The marina bulkhead and entrance channel were completed in 2000. Since this completion, barge service and contractor/employee ferry operations have taken place from Deep Point. Ferry passengers currently utilize an existing covered landing dock and related walkways.
6. Limited is nearing completion of its new Deep Point passenger terminal, a multi-level 40,000 square foot structure authorized under Permit 91-96. Much of the design and ultimate function of the terminal was dictated by the requirements of the Transportation Safety Administration in the areas of passenger, baggage and staging security.
7. Deep Point passenger operations will primarily utilize Limited's two eighty-two foot passenger catamaran ferries. When placed in service at total capacity these vessels will have US Coast Guard K-boat certification enabling them to carry 230 passengers per trip. Currently these vessels are certified to carry 149 passengers per trip.

8. Limited is currently completing development of an 80 slip marina within a large portion of the Deep Point marina basin. The entire marina, including ferry and other commercial operations, will accommodate 100 slips. There is a jetty wall on the south shore.
9. The items sought through this present variance request pertain only to the recreational marina located generally southwest of the marina entrance and south jetty wall.
10. Pursuant to requests dated July 8, 2008 Limited initially sought:
 - (a) a minor modification of Permit 91-96 to allow it to construct an eight-foot wide paved access surface approximately 12 feet waterward of the normal water level within the thirty foot normal high water line, approximately a quarter mile in length, and approximately six-feet landward of the permitted six-foot wooden walkway that surrounds the recreational marina now under development. This was also to include a single 28 by 28 ft. paved turn-around area.
 - (b) a minor modification of Permit 91-96 to allow it to construct five (5) 20 by 28 ft. landings (platforms) at the tops of the ramps, within 30 feet of the normal water level, that allow access to the five floating pier or dock structures within the recreational marina, identified as Docks A, B, C, D, and E/F.
 - (c) a minor modification of Permit 91-96 to allow construction of a Deep Point Marina entrance sign out in the water as depicted on drawing DPM-5.
11. Pursuant to a letter dated August 28, 2008, the Division of Coastal Management denied the request for minor permit modification to allow the construction of the paved access surface and the turn-around area finding that it was to be located within the 30-foot Coastal Shoreline buffer inconsistent with 15A NCAC 07H.0209(d) (10); and also denied the request for minor permit modification to allow construction of five 20 by 28 ft. wooden landings or platforms at the tops of the dock access ramps within the 30-foot Coastal Shoreline buffer, based on a determination that the total square footage of the five structures was 2,800 square feet and thus in excess of the 200 feet allowed under 15A NCAC 07H.0209 (d)(10).
12. Pursuant to a letter dated December 5, 2008, DCM denied the request for a minor permit modification to allow placement of marina signage in the Public Trust Areas and Estuarine Waters Areas of Environmental Concern, due to three main reasons: the sign was considered a non-water dependent structure; a feasible high ground alternative location existed; and the proposed project was inconsistent with 15A NCAC 07H.0208(a)(1) and 15A NCAC 07H.0208(a)(2)(b). During the course of the review of the in-water sign request, the U.S. Army Corps of Engineers indicated that they did not object to the proposed project.
13. Limited has now voluntarily withdrawn its original request for a variance for the placement of proposed marina signage in the Public Trust Areas and Estuarine Waters Areas of Environmental Concern.

14. The paved surface (road) requested by applicant runs from the Harbormaster's Office around the recreational marina to the entrance channel bulkhead a total distance of one-quarter of a mile.
15. Each of the five landings or platforms requested at the tops of the dock access ramps measures 20 by 28 ft. or 560 square feet, for a total area of 2,800 square feet.
16. The five landings or platforms requested will serve the six docks (A through F) and the number of slips (individual boat or vessel moorings) shown adjacent to the following dock designation:

A Dock	6 slips
B Dock	17 slips
C Dock	19 slips
D Dock	11 slips
E/F Dock	27 slips (total)

These existing docks have been used since 2000.

17. The Deep Point marina was originally sited and permitted in 1996, at which point in time the thirty foot buffer did not exist. Marina site clearing and excavation began in 1997 and 1998.
18. Under DCM Form MP-3 and the original CAMA Permit the Applicant's Deep Point marina development has an allowed impervious surface coverage within the 75 foot AEC of 112,900 square feet. The south and west sides of the marina were depicted as 100% impervious coverage within 30 feet of the marina.
19. Permit No. 91-96 was modified on December 11, 2008, to remove approximately 9,200 square feet of impervious area from the buffer that was authorized in the original proposal.
20. The access road surface and marina landings, if included in impervious coverage, will constitute a total of approximately 91,000 square feet impervious coverage at the site in question. The proposed road detail calls for a cross-slope road surface which diverts rainfall away from the marina. NPDES Phase II Stormwater Rules focus on a 1 ½ inch storm event. In the case of an 8 foot wide road this amounts to a 1 cubic foot of rain water per foot of road. The rock base plus asphalt pavement will place the road surface at approximately 5 inches above normal grade. A 2 foot wide area of flat ground with a 3 horizontal to 1 vertical foot side slope to the road is sufficient to hold the 1 cubic foot of water, but it would infiltrate into the ground more quickly than it could build up. The area around the marina is of a porous sandy nature and has a low density stormwater permit (SW8-071004) which does not require additional treatment. Applicant also plans a 3 foot buffer between the marina bulkhead and the 6 foot perimeter boardwalk, planted with native grasses and wildflowers.

21. Applicant's marina site was originally permitted for 22 acres of clear cut parking sheet with drainage to a wet pond; as constructed the site will utilize a number of treed infiltration basins.
22. Applicant's marina site was originally to employ septic service for handling wastewater, but now has sewer lines in place with treatment by wastewater treatment plant.

ATTACHMENT C

(Petitioner's Position and Staff's Response 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.**

Petitioners' Position: Yes.

Petitioner contends that the application of the cited rules constitutes an unnecessary hardship because the rules do not appear to address facts and characteristics inherent to this property and project. The rules are directed at individual piers, docks and related structures such as are customarily built on residential lots or smaller tracts. This quite naturally might lead to hardship in cases such as the one that is the subject of this request, involving a 100 slip facility.

The thirty foot high water set back became effective after the marina was designed and initially permitted in 1996. The original design for the marina was largely driven by the characteristics of the property, and these are the characteristics which CAMA took into account when issuing the permit. The 8' wide paved surface is meant as a safety/access road surrounding the recreational portion of the marina running from the Harbormaster's Office to the northeast end of the marina (F-Dock) at the entrance channel bulkhead. The distance from the Harbormaster's Office to this point is approximately one quarter of a mile. One of the principal purposes of this surface is to allow access for fire and other emergency vehicles; including equipment that would be employed in order to contain a fuel or hazmat spill.

In addition, the first CAMA permit for the Deep Point site that was issued before the marina was constructed tasked Limited to assure adequate trash pickup to keep the waters of the marina clean. Petitioners' plans call for the Harbormaster to use electric golf carts or similar vehicles for daily trash pickups. Servicing numerous trash receptacles that surround the marina as well as garbage generated by recreational use is better accomplished by these means, which in turn serves the original intent at the time of permitting, as well as preventing degradation of the adjacent waters and land within the AEC.

At the time the marina was originally sited/permitted in 1996, there was not an issue with placing the minimal width paved surface between the adjacent wetland and the marina bulkhead. The property has not changed; nor has the concept for the marina. The paved access surface will facilitate a limited and defined use that will occur behind a substantial bulkhead within the marina confines. When one considers that this use is being made in the interest of safety and the environmental objectives upon which CAMA is in part premised, Petitioners submit that it becomes the reasonable use for the property and to do otherwise becomes a hardship per se.

Petitioners also suggest that the 200 square foot dock landing limitation is more appropriate for an individual residential dock and landing constructed on an individual lot. Deep Point Marina is both a commercial and recreational 100 slip marina. There are five docks servicing six to seventeen slips served by each of the proposed wooden landings. Petitioners contend that if the rule is applied as currently cited, only 40 square feet is allowed for each

landing. Handicap turn around space (5' diameter circle) alone requires 20 square feet of clear space at the top of each ramp.

By way of further illustration, if one allocates the total decks and landings square footage requested by Petitioners among all the boat slips, the area allocable to each slip is well below the regulatory limitation. Eighty individual piers or docks would arguably qualify for a total of 16,000 square feet of deck or landing space. However, these five landings will occupy only 3,000 square feet, or less than 40 square feet per each boat accommodated, well below the 200 square foot total contained in the rule. It is only in the aggregate that an issue arises; but no provision is made in the rule for this circumstance. Petitioners believe that a marina such as this, permitted, constructed and operated under a total use of the property, becomes reasonable because more citizens can make use of the coastal environment via a facility that has less total impact upon the AEC. Since strict application of the rule will not allow for this result, it can only be reasonably concluded that an unnecessary hardship exists by virtue of the application of the rule.

Staff's Position: Yes.

Staff agrees with Petitioner that the application of the cited rules constitutes an unnecessary hardship in this situation. The 100-slip marina was permitted in 1996 prior to adoption of the "30-foot buffer rule" for 100% impervious area along both the south and west sides of the marina basin that was dug out of high ground. Although the permit was amended to reduce this impervious percentage in late 2008, staff believes that the applicant does make a good case that the original project design allowed for flexibility in the modifications of imperviousness for which strict application of the 30' buffer does not now allow. Staff believes that the petitioner has made a sound argument for the need to provide safe and useable access for both fire and emergency vehicles at this marina that functions as a transportation corridor for all of Bald Head Island, as well as the need to provide safe handicap accessible turnaround spaces at the top of each off-loading ramp.

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

Petitioners' Position: Yes.

Deep Point Marina is situated along the Cape Fear River/Intracoastal Waterway, at the north end of Southport, adjacent to the NC Southport-Fort Fisher State Ferry Site at the end of NC Route 211/Ferry Road. The 78 acre site was purchased in 1996 in order to provide sufficient parking capacity for future build out of Bald Head Island and to accommodate the corresponding demands for passenger ferry and barge operations. The marina basin was sited with much feedback from CAMA, and the entrance channel was shifted based on CAMA recommendations. The final siting was within approximately 25' of the east wall of the marina. Petitioners recall that at the time the 30' buffer restrictions were not in place.

The Deep Point Marina Passenger Ferry Terminal has undergone much thought and planning as to staging passenger and baggage drop-off and pick-up. The Bald Head Island Ferry

is now and will likely continue to be the largest passenger carrying operation in the state, conducting the most frequent passenger runs between destinations. The ferries are currently certified to carry 149 passengers and when the Deep Point facility is completed will be certified under US Coast Guard K-Boat requirements for the carriage of up to 230 passengers. As a consequence of this the property design and marina operation were driven by the need for a sizeable passenger ferry terminal, the design of which was independently influenced by Transportation Safety Administration and US Coast requirements.

While ferry operations do not directly necessitate this variance request, the needs and requirements of the Ferry Terminal were of prime importance in shaping the whole site. The recreational portion of the marina is located mostly on the southern end of the marina, instead of being wrapped around the whole marina as would usually be the case. Petitioners believe that the 80 boat slips at issue require sufficient access for safety vehicles and equipment; and that the decks and landings as requested are reasonable given this property and project.

Petitioners assert that it is thus the comprehensive character of the marina with the incorporated recreational component that constitutes conditions peculiar to the property which in turn cause the hardship under the rules as currently applied.

Staff's Position: Yes.

Although staff does not believe that Petitioner's property where the marina is located is any more peculiar than most upland basins, staff does agree with Petitioner that the fact that the marina basin was sited and permitted with guidance and direct feedback from the Division in 1996 to ensure protection of water quality and estuarine resource habitat, yet met the needs of the applicant in providing for an island community. As the Petitioner stated, the marina project site is one of the largest if not the largest passenger carrying operations in the state. Staff also agrees that the size of the mainland-based passenger ferry terminal operation incorporating a recreational component does create conditions within the basin itself that could be considered peculiar to the property thus causing the hardship.

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

Petitioners' Position: No.

Petitioners note that with regard to the paved access to the marina slips, the marina permit was issued in 1996, before the 30' "buffer rule" was in existence. Although there have been numerous minor permit modifications through the years, the basic design, size and siting of the marina is the same as initially approved in 1996. It is the previously approved characteristics of design and siting that apparently have come into question under the current rules application, which in turn creates hardship. It is impossible to shift the marina, and the space constraints due to the 404 wetland were not an issue when the marina was constructed.

The Deep Point Marina is a comprehensive development providing for passenger ferry, cargo and recreational boater usage, constructed pursuant to an equally comprehensive matrix of permits and approvals. The design and engineering was determined by the characteristics of the

site and best reasonable usage. Petitioners submit that the deck and landing limitation was misapplied to this set of facts in that it does not address the attributes of a large marina. As Petitioners have previously set forth above, if this issue is approached from the standpoint of allocation of the total deck and landing area among the number of slips served, the total square footage is well below that which would be permitted for this number of pier or dock users.

Staff's Position: No.

Staff agrees with the Petitioner that the hardships essentially result in the application of the 30' buffer rule being applied to a project that was designed, permitted, and constructed in 1996, years before the buffer rule came into effect. Staff does, however, point out that the project changes and permit modification request is an action taken by the Petitioner.

Staff believes that the original 1996 permit allowed more flexibility in the Petitioner's ability to modify the permit in regard to the percentage imperviousness. It should be noted that much of the proposal could have been permitted if the applicant had not requested a modification of the permit in 2008 to remove the impervious area from the buffer along the east and south sides of the basin within the buffer. A point in fact is that 15A NCAC 07H.0209 (d)(10)(H) allows for redevelopment over existing impervious surfaces (in this case, permitted but not constructed), provided that the impervious surface is not increased and the applicant designs the project to comply with the intent of the rules to the maximum extent feasible. The buffer rule, by design, has limited flexibility with only 10 specific exceptions to the rule.

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.

Petitioners' Position: Yes.

Petitioners contend that the primary purpose of the requested paved access surface is to provide access for fire and emergency vehicles and transportation of equipment in the event of an emergency. In order to accomplish this purpose the surface must access all marina slips and run to the channel entrance bulkhead. These vehicles are heavy and are not particularly suited for travel on the sand based surface of the marina site generally. Petitioners submit that these concerns for safety are entirely consistent with the applicable rules, the underlying intent, and justice.

The size (square footage) of the wood dock landings is based on the placement of items that are necessary for a safe and modern marina including life rings and lines, site lighting, bike racks, dock carts and suitable garbage receptacles. There is also a concern for ample space to accommodate handicap access. In addition, the total area of deck or landing space will be substantially less than would be allowable in the case of individual or smaller structures serving the same number of boaters. The minor changes sought pursuant to Petitioners' variance request will have no conceivable adverse impact on water quality or the surrounding estuarine areas. In fact, to the extent that they facilitate better trash containment and collection, they will prevent degradation of the surrounding waters.

Petitioners assert that the changes requested will not expand the usage of the permitted area or enlarge the development. They will, however, improve the use and enjoyment of this facility by members of the public; a facility which in and of itself will provide significant recreational access to these waters and surrounding coastal environments. Most importantly, the changes will contribute to improved safety for those using the marina.

Staff's Position: Yes.

Staff believes that the applicant has tried to meet the spirit, purpose, and intent of the rules with the design of the road around the marina basin. The Petitioner has proposed an engineered-designed road that diverts rainfall away from the marina and one that creates a 2' wide area of flat ground with a 3 horizontal to 1 vertical side slope to the road sufficient to hold 1 cubic foot of water and infiltrate into the ground. The road project is designed to handle a 100-year 24-hour storm event. In addition, it should be noted the applicant has already installed a main parking area that requires sheet flow to a wet pond and will utilize a number of treed infiltration basins to protect water quality runoff from the site.

In regard to the five platforms, the engineer has stated that the natural sands of the site are capable of infiltrating water at a rate of 20 inches per hour. Staff believes that this is sufficient to meet the spirit, purpose, and intent of the buffer rule around this high ground marina basin.

Staff agrees that granting this variance would secure the public's safety and welfare by not only protecting the public's resources through an innovative stormwater design, but by providing safe and reliable access to the facility and the island itself.

Granting the variance would also allow the Petitioner to proceed with the overall basic design for the high ground marina basin that was originally designed and permitted in 1996. The permit originally authorized two sides of the marina basin buffer to be completely impervious. Allowing for the construction of the platforms and the road with an associated innovative design to address water quality runoff would preserve substantial justice.

ATTACHMENT D
(Petitioner's Variance Request and Other Exhibits)

CAMA VARIANCE REQUEST

RECEIVED

JAN 15 2009

N.C. ATTORNEY GENERAL
Environmental Division

Petitioner supplies the following information:

Your Name Bald Head Island Limited, LLC (Bruce Marek, P.E., Agent)
Address P.O. Box 3069
Telephone 910-457-7517
Fax and/or Email 910-457-7463 bmarek@bhisland.com

Name of Your Attorney (if applicable) George L. Fletcher Fletcher, Ray & Satterfield, LLP
Address 131 Racine Drive Suite 201 Wilmington, NC 28403
Telephone 910-251-9900
Fax and/or Email 910-251-9667 gfletch@fletcherlaw.com

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?

1. To have an 8-foot wide paved access road with a turnaround for emergency vehicles and harbormaster access to the end of the Deep Point Marina, within the 30' marina buffer. Drawing DPM-6
2. To have five 20' x 28' wooden landings (platforms), one each at the tops of the ramps leading to A, B, C, D & F Docks of the recreational portion of the 100 slip marina. This size is requested to allow for space for "raccoon proof" garbage receptacles, dock cart storage, ring buoy storage, a bike rack, and proper space for handicap turnaround without encroaching on the continuous flow of pedestrian traffic on the already approved parallel to bulkhead 6' wood walkway. Drawing DPM-4
3. To have an 8' x 20' V-shaped marina entrance sign, north of the Deep Point Marina entrance channel, in the waters of the Cape Fear River, landward of a line between the end of the ADM Pier and the Deep Point Jetty (waterward) end. Drawing DPM-5

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

1. 15A NCAC 07H.0209(d)(10) (A) Private Roads that are non-water dependent within 30 of normal high water;
2. 15A NCAC 07H.0209(d)10) (F) Decks/Observation Decks limited to slatted, wooden, elevated, and unroofed decks that shall not singularly or collectively exceed 200 square feet.
3. 15A NCAC 07H.0208(a)(1) "Uses which are not water dependent shall not be permitted in coastal wetlands, estuarine waters and public trust areas" and 15 NCAC 07H.0208(a)(2)(b) "Before receiving approval for location of a use or development within these AEC's, the permitting authority shall find that no suitable alternative site or location outside of the AEC Exists for the use or development."

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.

Actually this is best expressed as a qualified "no" when viewed in context. The marina is home to the Bald Head Island Passenger Ferries and the tug/barge service to the island. Limited is already well into development and construction of the recreational marina; and some passenger (contractor) operations have been operating out of Deep Point since 2001. The barge service to the island has been operating out of the marina entrance channel berth since 2000, and prior to that was operating off the beach-head on the site since 1996. This has been accomplished pursuant to the original permit and a number of renewals and minor modifications occurring since 1996. We believe that the best, most reasonable and safest use of the marina, including the recreational portion of the marina, can be accomplished pursuant to the designs and structures sought by this variance request. We also believe that the rules should not be strictly applied in this instance because of the unique characteristics of this property and indeed all large marinas. As discussed infra., we contend that the spirit of CAMA and its rules and regulations is fully served by this request.

Can you obtain a permit for a portion of what you wish to do? yes___ If so, please state what the permit would allow.

A number of what the applicant has identified as Marina Necessities/Accessories have already been approved. And, as stated the general marina permit has been issued since 1996. However the three matters at issue under this request have been denied by DCM rulings. In this instance we believe that the access surface, size of decks and landings, and signage location are important stand alone issues; although integral to overall design and marina operations.

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.

1. We will not have safe access for emergency vehicles along the major docks.
2. The top of ramp dock landings will be undersized for safe usage of the marina.
3. Place the marina entrance sign in a location that is visible from both the north and south approaches from the Cape Fear River to the marina, considering the visual obstructions from the ADM fixed pier and the entrance to the adjacent NC State Ferry landing at Prices Creek.

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).]

In general we believe that application of the cited rules constitutes an unnecessary hardship because the rules do not appear to address facts and characteristics inherent to this property and project, or for that matter any sizeable commercial/recreational marina. The rules, although thoughtfully drafted, are directed at individual piers, docks and related structures such as are customarily built on residential lots or smaller tracts. This quite naturally might lead to hardship in cases such as the one that is the subject of this request involving a 100 slip facility.

The thirty foot high water set back became effective after the marina was designed and initially permitted in 1996. The original design for the marina was largely driven by the characteristics of the property, and these are the characteristics which CAMA took into account when issuing the permit. The 8' wide paved surface is meant as a safety/access road surrounding the recreational portion of the marina running from the Harbormaster's Office to the northeast end of the marina (F-Dock) at the entrance channel bulkhead. The distance from the Harbormaster's Office to this point is approximately one quarter of a mile. One of the principal purposes of this surface is to allow access for fire and other emergency vehicles; including equipment that would be employed in order to contain a fuel or hazmat spill.

In addition, the first CAMA permit for the Deep Point site issued before the marina was constructed tasked Limited to assure adequate trash pickup to keep the waters of the marina clean. Our plans call for the Harbormaster to use electric golf carts or similar

vehicles for daily trash pickups. Servicing the numerous trash receptacles that surround the marina as well as garbage generated by recreational use is better accomplished by this means, which in turn serves the original intent at the time of permitting, as well as preventing degradation of the adjacent waters and land within the AEC.

At the time the marina was originally sited/permited in 1996 there was not an issue with placing the minimal width paved surface between the adjacent wetland and the marina bulkhead. The property has not changed; nor has the concept for the marina. The paved access surface will facilitate a limited and defined use that will occur behind a substantial bulkhead within the marina confines. When one considers that this use is being made in the interest of safety and the environmental objectives upon which CAMA is in part premised, we submit that it does become the reasonable use for the property and to do otherwise becomes a hardship per se.

Continuing in this regard we suggest that the 200 sq ft dock landing limitation is more appropriate for an individual residential dock and landing constructed on an individual lot. Deep Point Marina is both a commercial and recreational 100 slip marina. There are five docks servicing six to seventeen slips served by each of the proposed wooden landings. If the rule is applied as currently cited only 40 sq ft is allowed for each landing. Handicap turn around space (5' diameter circle) alone requires 20 sq ft of clear space at the top of each ramp.

By way of further illustration, if one allocates the total decks and landings square footage herein requested among all the boat slips the area allocable to each slip is well below the regulatory limitation. Eighty individual piers or docks would arguably qualify for a total of 16,000 square feet of deck or landing space. However, these five landings will occupy only 3,000 square feet, or less than 40 square feet per each boat accommodated, well below the 200 square foot total contained in the rule. It is only in the aggregate that an issue arises; but no provision is made in the rule for this circumstance.

We believe that a marina such as this, permitted, constructed and operated under a comprehensive plan better accomplishes the regulatory intent of CAMA. The applicant's total use of the property becomes reasonable in fact because more citizens can make use of the coastal environment via a facility that has less total impact upon the AEC. Since strict application of the rule will not allow this result, it can only be reasonably concluded that an unnecessary hardship exists by virtue of the application of the rule.

Turning to our request with regard to the location of marina signage, we believe that a variance is justified because the current ruling of the DCM fails to take into account the unique circumstances that arise at this project and property, which it turn produces an unnecessary hardship. Approaching the marina property from the northeast boaters traveling the Cape Fear River/ICW encounter the lengthy Archer Daniels Midlands (ADM) pier, Price's Creek (the inlet on which the terminal for the Southport-Fort Fisher Ferry is located) and then Limited's Deep Point Marina within a distance of 3000 feet. Approaching from the southwest, the Deep Point Marina, Price's Creek and the ADM pier are still prominent navigational features; and below the Deep Point Marina are a

number of lengthy private piers and small inlets.

Even using charts, GPS and Plotters, which many recreational boaters carry today, the features near the property can be confusing. This possibility is all the more likely at night or during reduced visibility because all of these features are marked by the standard red and green lighted markers. The ADM facility is purely commercial and handles larger sea going vessels. The car ferries that operate in and out of Price's Creek are sizeable and have little room to maneuver in that inlet. We believe that placement of the Deep Point Marina sign as requested will reduce the likelihood of confusion when identifying the marina entrance from among all these features. This in turn will help avoid potential safety issues if pleasure boaters were to encounter commercial vessels because of a mistake in locating the marina entrance.

With safety and the avoidance of confusion being the primary concerns we seek to address via this request, we suggest that placement of the sign as requested becomes, in part, the reasonable use of the property. We also note that the Army Corps of Engineers does not object to this request.

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

Deep Point Marina is situated along the Cape Fear River/Intracoastal Waterway, at the north end of Southport, adjacent to the NC Southport-Fort Fisher State Ferry Site at the end of NC Route 211/Ferry Road. The 78 acre site was purchased in 1996 in order to provide sufficient parking capacity for future build out of Bald Head Island and to accommodate the corresponding demands for passenger ferry and barge operations. The marina basin was sited with much feedback from CAMA, and the entrance channel was shifted based on CAMA recommendations. The final siting was within approximately 25' of the east wall of the marina. We recall that at the time the 30' buffer restrictions were not in place.

The Deep Point Marina Passenger Ferry Terminal has undergone much thought and planning as to staging passenger and baggage drop-off and pick-up. The Bald Head Island Ferry is now and will likely continue to be the largest passenger carrying operation in the state, conducting the most frequent passenger runs between destinations. The ferries are currently certified to carry 149 passengers and when the Deep Point facility is completed will be certified under US Coast Guard K-Boat requirements for the carriage of up to 230 passengers. As a consequence of this the property design and marina operation were driven by the need for a sizeable passenger ferry terminal, the design of which was independently influenced by Transportation Safety Administration and US Coast Guard requirements.

While ferry operations do not directly necessitate this variance request, the needs and requirements of the Ferry Terminal were of prime importance in shaping the whole site. The recreational portion of the marina is located mostly on the southern end of the

marina, instead of being wrapped around the whole marina as would usually be the case. We believe that the 80 boat slips at issue require sufficient access for safety vehicles and equipment; and that the decks and landings as requested are reasonable given this property and project. The location of the property, adjacent to the Southport-Fort Fisher ferry operation and ADM pier, and other existing piers and small inlets, is a condition peculiar to the Deep Point Marina that creates the hardship from the signage prospective.

It is thus the comprehensive character this marina with the incorporated recreational component that constitutes conditions peculiar to the property which in turn cause the hardship under the rules as currently applied.

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

With regard to the paved access to the marina slips we note that when the marina permit was issued in 1996 the 30' "buffer rule" was not in existence. Although there have been numerous minor permit modifications through the years the basic design, size and siting of the marina is the same as initially approved in 1996. It is the previously approved characteristics of design and siting that apparently have come into question under the current rules application, which in turn creates the hardship. It is impossible to shift the marina, and the space constraints due to the 404 wetland were not an issue when the marina was constructed.

The Deep Point Marina is a comprehensive development providing for passenger ferry, cargo and recreational boater usage, constructed pursuant to an equally comprehensive matrix of permits and approvals. The design and engineering was determined by the characteristics of the site and best reasonable usage. We submit that the deck and landing limitation was misapplied to this set of facts in that it does not address the attributes of a large marina. As we have shown supra, if this issue is approached from the standpoint of allocation of the total deck and landing area among the number of slips served the total square footage is well below that which would be permitted for this number of pier or dock users.

In the case of our request regarding the location of the marina signage we note that these concerns arise because of the influences on this property from substantial neighboring commercial and public transportation operations, matters that are completely separate from actions taken by the applicant.

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 primary purpose of the requested paved access surface is to provide access for fire and emergency vehicles and transportation of equipment in the event of an emergency. In order to accomplish this purpose the surface must access all marina slips and run to the

channel entrance bulkhead. These vehicles are heavy and are not particularly suited for travel on the sand based surface of the marina site generally. We submit that these concerns for safety are entirely consistent with the applicable rules, the underlying intent, and justice.

The size (square footage) of the wood dock landings is based on the placement of items that are necessary for a safe and modern marina including life rings and lines, site lighting, bike racks, dock carts and suitable garbage receptacles. There is also a concern for ample space to accommodate handicap access. In addition, the total area of deck or landing space will be substantially less than would be allowable in the case of individual or smaller structures serving the same number of boaters. The minor changes sought pursuant to this variance request will have no conceivable adverse impact on water quality or the surrounding estuarine areas. In fact, to the extent that they facilitate better trash containment and collection they will prevent degradation of the surrounding waters.

With regard to location of the marina signage we submit that our request falls largely in the realm of concern for public safety as it seeks to avoid confusion and potential encounters between commercial and private vessels/boaters. In addition, within the letter and spirit of the applicable rules mooring pilings and pilings used for navigational aids would likely be permitted; we believe that this use is similar in application.

The changes requested will not expand the usage of the permitted area or enlarge the development. They will, however, improve the use and enjoyment of this facility by members of the public; a facility which in and of itself will provide significant recreational access to these waters and surrounding coastal environments. Most importantly the changes will contribute to improved safety for those using the marina.

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.]

Please see the attached list of Attachments and Exhibits.

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

Date: *January 13, 2009*

Signature: *George L. Fletcher*
By RAN

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, by personal delivery, UPS or Fed-Ex 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 13th day of January, 2009.

George L. Fletcher
Signature of Petitioner or Attorney *BY RAW*

**In Re: Variance Request of Bald Head Island Limited LLC
Attachments and Exhibits**

1. Minor Permit Modification Request dated July 8, 2008 re: Access surface (road).
2. Minor Permit Modification Request dated July 8, 2008 re: deck and landings.
3. Minor Permit Modification Request dated July 8, 2008 re: Location of marina signage.
4. Division of Coastal Management (DCM) letter dated August 28, 2008 denying modification request re: access road and square footage of decks and landings.
5. DCM letter dated December 5, 2008 denying modification request re: location of marina signage.
6. Original DENR/CRC Permit No. 91-96
7. Deep Point Marina drawing dated October 1, 2008 showing approved structures-DPM 3 with submittal letter.
8. Deep Point Marina drawing dated January 21, 2008 depicting the requested variance items per revision three submission to DCM (DPM-3a) with submittal letter.
9. Deep Point Marina drawing dated July 8, 2008 depicting decks/landings as requested and illustrative photos-DPM 4.
10. Deep Point Marina drawing dated July 8, 2008 depicting marina signage as requested and illustrative photos-DPM 5.
11. Deep Point Marina drawing dated July 8, 2008 depicting paved surface area-DPM 6.
12. Deep Point Marina Overall Site Plan.
13. Aerial depicting Deep Point Marina and nearby features including ADM Plant pier facility and State Ferry Terminal for Southport-Fort Fisher Ferry.
14. Digitized depiction of Bald Head Island ferries moored at Deep Point Passenger Terminal.
15. Review of Deep Point Permit history (2 pages).

16. Two pages of photos depicting areas in the vicinity of the proposed sign location.

17. Three pages of photos depicting construction and development at the Deep Point Marina generally.

18. Original Site Plan for "Pfizer Tract"

19. DCM Form MP-3 dated October 16, 1995

20. Cover Letter of Submittal dated October 16, 1995

21. Original CAMA Permit No. 91-96

22. Applicant's combined marina plat dated April 14, 2009

Bruce Marek, P.E.
P. O. Box 3069
Bald Head Island, NC 28461
910-457-7517
July 8, 2008

Ms. Heather Coats
NCDENR Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405

**Re: CAMA Permit #91-96 Minor Modification Request: Deep Point Marina, Southport, NC
Drawing DPM6 7-8-08 Fire Department Access Road**

Dear Ms. Coats:

Included are five 24" x 36" copies of drawing DPM6 dated & sealed 7-8-08, for the Bald Head Island Limited, LLC owned Deep Point Marina. This minor modification request is specifically for the 8' wide Fire Department/Emergency Vehicles access road along the south and east perimeters of the Deep Point Marina. Also included is one copy of Stormwater Drawing SW8-071004 Deep Point Marina Basin Low Density, seal dated 10-3-07, with DWQ approval date 10-16-07.

As shown on our detail, we are proposing an 8' wide safety/harbor master access road to the north end of F-Dock. In our stormwater permit, we have 7100 sf of "streets" approved for this purpose. The north end of F-Dock is approximately 850 lf from the already CAMA approved turnaround at the restaurant entrance. It is also approximately a quarter of a mile to the Harbor Master Office. Hopefully it will never need to be used for its intended purpose as a Fire/EMT Access Road, but 850 feet is a long way to lug hoses or a stretcher. I have seen the disastrous effects of boat fires, and I have had a couple of heart attacks myself. As a professional engineer, I do like to adhere to my duty to protect the health and safety of the people of the State of North Carolina. More and more so, we are required to follow the NFPA regulations relating to Marina Design.

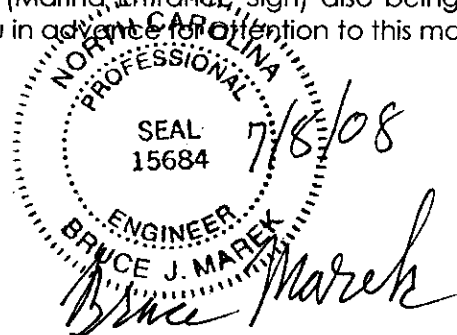
Ideally, this access road would be incorporated into our simultaneous DPM3 Marina Necessities/Amenities Request. We have separated it out per your recommendation as this separate DPM6 submission, with the understanding that you will be denying this request and requiring us to seek a variance from the CRC.

Hopefully we can have staff recommendation that will allow us to successfully pursue obtaining a variance for what I consider a "marina necessity". As we have discussed many times in the past year since my first DMP3 Marina Necessities submission, the original CAMA permits for this marina date back to 1996. Rules at that time would not have precluded this road within 30' of the marina bulkhead. Additionally, the marina basin was sited specifically with guidance from CAMA as to its final location to the wetland(s). We are constrained with a wetland as close as 25' to the bulkhead along F-dock, so feel that we should be allowed to implement our "road for safety" as shown. I am including a check for \$100 for this "Minor Modification" request to CAMA Permit # 91-96.

We would like to be scheduled for the variance as soon as possible, and want to mention that we would also like for DPM4 (Dock Landings) and DPM 5 (Marina Entrance Sign) also being submitted today to be scheduled for the same date. Thanking you in advance for attention to this matter.

Respectfully,

Bruce Marek, P.E.
For Bald Head Island Limited, LLC Planning Dept.
cc: Jim Henry, Director, BHI Planning & Development
M. Kent Mitchell, CEO, Bald Head Island Limited LLC



Bruce Marek, P.E.
P. O. Box 3069
Bald Head Island, NC 28461
910-457-7517
July 8, 2008

Ms. Heather Coats
NCDENR Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405

**Re: CAMA Permit #91-96 Minor Modification Request: Deep Point Marina, Southport, NC
Drawing DPM4 7-8-08 Dock Landings**

Dear Ms. Coats:

Included are five 24" x 36" revised copies of drawing DPM4 dated & sealed 7-8-08, for the Bald Head Island Limited, LLC owned Deep Point Marina. This minor modification request is specifically for appropriate sized dock landings at the top of the ramps to A, B, C, D & E/F docks.

As shown on our detail, to have adequate space on these water dependent structures for raccoon proof trash enclosures, bicycle racks, dock cart storage as well as wheel chair turning radius not in the alignment of the 6' wood walkway, the necessary wood decked landing size is 20'x28' each.

We sincerely believe that the CAMA regulation of 200 sf total of pervious wood dock landings is not appropriate for a 100 slip recreational/commercial marina project. Ideally, these 5 larger dock landings would be incorporated into our simultaneous DPM3 Marina Necessities/Amenities Request. We have separated them out per your recommendation as this separate DPM4 submission, with the understanding that you will be denying this request and requiring us to seek a variance from the CRC.

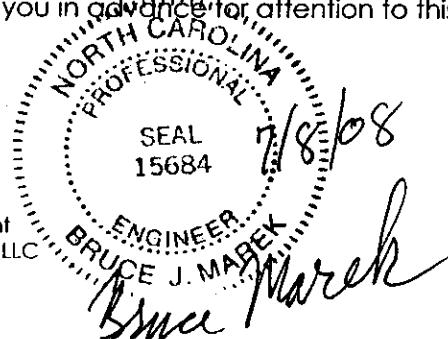
Since the state is looking for more water access for the people of the State of North Carolina, I hope that these appropriately sized marina dock landings will be looked on favorably. Building a new marina is difficult and expensive. This project has had a CAMA permit for 12 years, and we have yet to open up the recreational side of the marina. It would be a shame if all of the planning and development time has actually harmed us in trying to develop a world class marina in Southport, NC. An individual homeowner's permissible dock landing at 200 sf doesn't come close to having the space needs of recreational marina docks serving the boat owners, guests and trash of upwards of 20 boats per landing.

Bald Head Island Limited, LLC has always done a tasteful and environmentally sensible job at its 2 other marinas (Bald Head Island and Indigo Plantation Marina). Hopefully we can have staff recommendation that will allow us to successfully pursue obtaining a variance for what I consider a "marina necessity". I have previously submitted BHI Planning Department check #1322 for \$100 for this "Minor Modification" request to CAMA Permit # 91-96.

We would like to be scheduled for the variance as soon as possible, and want to mention that we would also like for DPM5 (Marina Sign) and DPM 6 (Fire/Safety Access Road) also being submitted today to be scheduled for the same date. Thanking you in advance for attention to this matter.

Respectfully,

Bruce Marek, P.E.
For Bald Head Island Limited, LLC Planning Dept.
cc: Jim Henry, Director, BHI Planning & Development
M. Kent Mitchell, CEO, Bald Head Island Limited LLC



Bruce Marek, P.E.
P. O. Box 3069
Bald Head Island, NC 28461
910-457-7517
July 8, 2008

Ms. Heather Coats
NCDENR Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405

**Re: CAMA Permit #91-96 Minor Modification Request: Deep Point Marina, Southport, NC
Drawing DPM5 7-8-08 Marina Entrance Sign**

Dear Ms. Coats:

Included are five 24" x 36" revised copies of drawing DPM5 dated & sealed 7-8-08, for the Bald Head Island Limited, LLC owned Deep Point Marina. This minor modification request is specifically for an in the water marina entrance sign.

As shown on our detail, we are proposing an approximate 8'x20' 2-sided Vee-shaped in-the-water sign north of the Deep Point Marina north jetty, to the west of a line between the north jetty end and the A.D.M. Pier end. This is outside of any navigation channel or route.

I have given much consideration to this sign location, and based on the A.D.M. Pier location, a land based sign does not adequately project the marina message to vessels travelling southward down the Cape Fear River. Placing the sign on one of the Deep Point Jetties would obscure the navigational lights on the jetty. Tucked behind the line between pier end and jetty end will not impact larger vessels or non-local vessels navigation lines. It actually can be a good warning "sign" if someone inadvertently gets tucked in between the shore and the jetty end.

Ideally, this marina entrance sign would be incorporated into our simultaneous DPM3 Marina Necessities/Amenities Request. We have separated it out per your recommendation as this separate DPM5 submission, with the understanding that you will be denying this request and requiring us to seek a variance from the CRC.

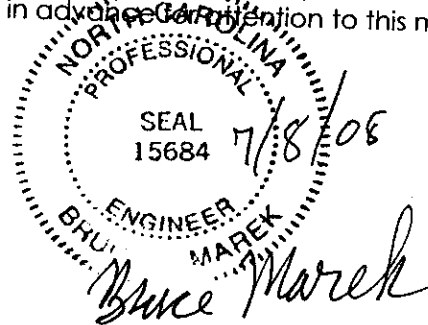
Allowing boaters to be aware of this new facility and planned fuel docks, pump out and restaurant should be welcome. There are studies that indicate a key to a successful marina is making sure that the boating public knows what your services include. We are just trying to have a world class marina in Southport, NC.

Hopefully we can have staff recommendation that will allow us to successfully pursue obtaining a variance for what I consider a "marina necessity". I have previously submitted BHI Planning Department check #1323 for \$100 for this "Minor Modification" request to CAMA Permit # 91-96.

We would like to be scheduled for the variance as soon as possible, and want to mention that we would also like for DPM4 (Dock Landings) and DPM 6 (Fire/Safety, Access Road) also being submitted today to be scheduled for the same date. Thanking you in advance for your attention to this matter.

Respectfully,

Bruce Marek, P.E.
For Bald Head Island Limited, LLC Planning Dept.
cc: Jim Henry, Director, BHI Planning & Development
M. Kent Mitchell, CEO, Bald Head Island Limited LLC





91-96

DPM 4 & DPM 6

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 28, 2008

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Bald Head Island Limited, LLC
c/o Mr. Bruce Marek, P.E.
P.O. Box 3069
Bald Head Island, NC 28461

Dear Mr. Marek:

This letter is in response to your two written requests, acting as authorized agent for Bald Head Island Limited, LLC, in which authorization is requested to modify CAMA Major Permit Number 91-96, issued June 3, 1996 under the Coastal Area Management Act (CAMA) and State Dredge and Fill Law. The two requests were seeking authorization to construct an 8-foot wide paved access road located 6 feet landward of the wooden walkway at Deep Point Marina, a 28-foot x 28-foot paved turn-around at the northeastern end of the proposed paved access road, and secondly, five wood landings (platforms) at the dock entrances measuring 20 feet by 28 feet. Both requests were received by the Division of Coastal Management July 9, 2008. Based on the state's review, the Division of Coastal Management has made the following findings:

- 1) The proposed paved 8-foot wide access road and the 28 ft. x 28 ft. paved turn-around area would be located entirely within 30 feet of the normal high water line.
- 2) The five proposed 20 ft. x 28 ft. wooden landings (platforms), totaling an area of 2,800 square feet, would be located entirely within 30 feet of the normal high water line and exceed the total allowable platform area of 200 square feet set forth in NCAC 07H.0209(d)(10).
- 3) Based upon the above referenced findings, the Division has determined that the proposed project (although requested via two letters dated July 8, 2008) is inconsistent with the following rules of the Coastal Resources Commission:
 - a) 15A NCAC 07H.0209(d)(10), which states "*Within the Coastal Shorelines category (estuarine and public trust shoreline AECs), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of the following: (A) Water-dependent uses as described in Rule 07H.0208(a)(1) of the Section;*" 15A NCAC. 07H.0208 specifically lists private roads and parking areas as uses that are not water dependent.

- b) 15A NCAC 07H.0209(d)(10), which states "*Within the Coastal Shorelines category (estuarine and public trust shoreline AECs), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of the following: (F) Decks/Observation Decks limited to slatted, wooden, elevated and unroofed decks that shall not singularly of collectively exceed 200 square feet.*" The total combined area for the five proposed decks totals 2,800 square feet, exceeding the allowable 200 square feet.

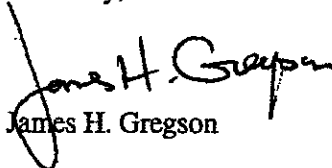
Given the preceding findings, it is necessary that your request for a modification of a CAMA Major Permit under the Coastal Area Management Act and State Dredge and Fill Law be denied. This denial is made pursuant to N.C.G.S. 113A-120(a)(8) which requires denial for projects inconsistent with the state 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 Doug Huggett at (252) 808-2808, extension 212.

Sincerely,



James H. Gregson

cc: Colonel Jefferson Ryscavage – U.S. Army Corps of Engineers, Wilmington, NC
David Kennedy, Director – OCRM/NOAA, Silver Spring, MD
David Timpy, ACOE- Wilmington
Steve Everhart, DCM – Wilmington.



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

December 5, 2008

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Bald Head Island Limited, LLC
c/o Mr. Bruce Marek
P.O. Box 3069
Bald Head Island, NC 28461

Dear Mr. Marek:

This letter is in response to your written request, acting as authorized agent for Bald Head Island Limited, LLC, in which authorization was requested to modify CAMA Major Permit Number 91-96 under the Coastal Area Management Act (CAMA). Authorization was requested to construct an 8-foot by 20-foot V-shaped sign to be located in the waters of the Cape Fear River north of the Deep Point Marina entrance channel. This minor modification request was received by the Division of Coastal Management's Wilmington regional office on July 9, 2008. Based on the state's review, the Division of Coastal Management has made the following findings:

- 1) The proposed sign would be located in both Estuarine Waters and Public Trust Areas of Environmental Concern.
- 2) The U.S. Army Corps of Engineers had no objection to the proposed project.
- 3) Signs of this nature are considered non-water dependent structures. Furthermore, the Division of Coastal Management believes that a feasible high ground alternative location for this sign exists.
- 4) 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) 15A NCAC 07H.0208(a)(1), which states "*Uses which are not water dependent shall not be permitted in coastal wetlands, estuarine waters, and public trust areas.*"; and
 - b) 15A NCAC 07H.0208(a)(2)(b), which states "*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.*"

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

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Bald Head Island Limited, LLC

December 5, 2008

Page 2

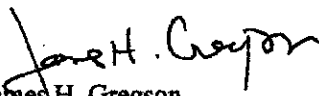
Given the preceding findings, it is necessary that your request for a modification of a CAMA Major Permit under the Coastal Area Management Act be denied. This denial is made pursuant to N.C.G.S. 113A-120(a)(8) which requires denial for projects inconsistent with the state guidelines for Areas of Environmental 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 the 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 Doug Huggett at (252) 808-2808, extension 212.

Sincerely,


James H. Gregson

cc: Colonel Jefferson Ryscavage – U.S. Army Corps of Engineers, Wilmington, NC
David Kennedy, Director – OCRM/NOAA, Silver Spring, MD
Steve Everhart, DCM-Wilmington
DCM Central Files

STATE OF NORTH CAROLINA
Department of Environment, Health & Natural Resources
and
Coastal Resources Commission

Permit

- for
- Major Development in an Area of Environmental Concern
pursuant to NCGS 113A-118
- Excavation and/or filling pursuant to NCGS 113-229

Issued to Bald Head Island, Limited, P. O. Box 3069, Bald Head Island, NC 28461

authorizing development in Brunswick County at Cape Fear River, at Southport off of SR1540

, as requested in the permittee's application dated 10/16/96 incl. att. workplan drawings,

site plan dated rev. 2/15/96 & sheets 4, 7 & 11-13 of 13 for bulkhead & jetty detail dated rec. 11/15/95.

This permit, issued on 1-3-96, is subject to compliance with the application (where consistent with the permit), all applicable regulations, special conditions and notes set forth below. Any violation of these terms may be subject to a fine, imprisonment or civil action; or may cause the permit to be null and void.

Excavation

- 1) In order to protect juvenile fish and other estuarine resources, excavation of the entrance channel in the River may not take place between February 1 and July 31 of any year without prior approval of the Division of Coastal Management in consultation with the Division of Marine Fisheries.
- 2) An earthen plug will be left between the inland basin and the Cape Fear River until excavation landward of the plug has been completed. To prevent sedimentation in adjacent waters, 24 hours will be allowed to elapse before the plug is removed.

(See attached sheet for Additional Conditions)

This permit action may be appealed by the permittee or other qualified persons within twenty (20) days of the issuing date. An appeal requires resolution prior to work initiation or continuance, as the case may be.

This permit must be accessible on-site to Department personnel when the project is inspected for compliance.

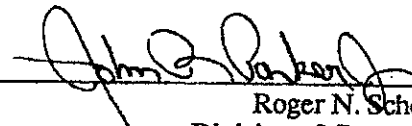
Any maintenance work or project modification not covered hereunder requires further Departmental approval.

All work must cease when the permit expires on

December 31, 1999

In issuing this permit, the State of North Carolina agrees that your project is consistent with the North Carolina Coastal Management Program

Signed by the authority of the Secretary of DEHNR and the Chairman of the Coastal Resources Commission.



Roger N. Schechter, Director
Division of Coastal Management

This permit and its conditions are hereby accepted.

ADDITIONAL CONDITIONS

- 3) All excavated materials will be confined landward of the mean high water (MHW) elevation contour within adequate dikes or other retaining structures to prevent the spillover of solids into any vegetated wetlands or surrounding waters.
- 4) The terminal end of the pipeline from the dredge into the diked retention area will be positioned at or greater than 50 feet from any part of the dike and a maximum distance from spillways to prevent dike erosion and to allow adequate settlement of suspended solids.
- 5) A water control structure will be installed at the intake end of the effluent pipe leading from the retention area to ensure maximum settlement of suspended solids.
- 6) Flow from the diked retention area will be confined by pipe, trough, or similar device to a point at or below the mean low water (MLW) elevation contour to prevent gully erosion and siltation.
- 7) No excavated or fill materials will be placed any time in any vegetated wetlands or waters.
- 8) No vegetated wetlands will be filled.
- 9) Excavation will not exceed ten (10) feet below the elevation of mean low water (MLW).
- 10) The temporary placement or double handling of excavated or fill materials within waters or vegetated wetlands is not authorized.

Bulkhead Construction

- 11) All bulkheads will be positioned in strict accordance with permit plans.

Marina Flushing/Water Quality Certification

- 12) (a) The Division of Environmental Management issued Water Quality Certification Nos. 3025 and 2668 for this project on May 29, 1996. Any violation of that Certification will be considered a violation of this permit.
- (b) All project activity will be conducted in a way that prevents a significant increase in turbidity outside the area of construction or construction-related discharge. Increases such that the turbidity in the waterbody is 25 NTUs or less are not considered significant.

ADDITIONAL CONDITIONS

Stormwater Management

- 13) The Division of Environmental Management issued Stormwater Management Permit No. 951012 on April 24, 1996. Any violation of this SW Permit will be considered a violation of this CAMA permit.

NOTE: The permittee is encouraged to provide a buffer between all upland development and adjacent wetlands. A 30-50 buffer is recommended.

NOTE: An Erosion and Sedimentation Control Plan will be required for this project. This plan must be filed at least thirty (30) days prior to the beginning of any land-disturbing activity. Submit this plan to the Department of Environment, Health and Natural Resources, Land Quality Section, 127 Cardinal Drive Extension, Wilmington, NC 28405-3845.

Archaeological Resources

- 14) Prior to initiation of ground-disturbing construction activities in the immediate vicinity of archaeological sites 31BW564** and 31BW571, an archaeological assessment (site testing) will be conducted to evaluate if the sites are eligible for listing in the National Register of Historic Places.
- 15) If either site 31BW564** or 31BW571 is determined eligible for listing in the National Register of Historic Places, and if the sites will be adversely affected by proposed construction activities, a detailed impact mitigation plan will be developed and executed.
- 16) All archaeological investigations will be conducted under the direction of an experienced archaeologist. Upon completion of the site testing and evaluation process, a written report will be submitted to the N. C. Division of Archives and History. Any mitigation plans developed for the site must be approved by the Division of Archives and History prior to implementation.

Other Requirements and Recommendations

- 17) Prior to jetty construction or other structural installation in the River, an Easement is required from the State Property Office, Department of Administration (telephone: 919/733-4346).

NOTE: The proposed entrance connection and work adjacent the highway right-of-way should be coordinated through the local DOT District office in Wilmington, and the Ferry Division.

NOTE: Spoil areas can breed mosquitoes. Therefore, Bald Head Island mosquito control or the Division of Environmental Health should be consulted to help prevent creating mosquito breeding habitat.

ADDITIONAL CONDITIONS

Endangered Species Protection

- 18) The permittee will ensure that the following construction guidelines are followed to avoid impacts to the Federally endangered West Indian Manatee (*Trichechus manatus*):
- (a) The permittee will instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees.
 - (b) The permittee will advise all construction personnel that there are civil and criminal penalties for harming, harassing or killing manatees which are protected under the Marine Mammal Protection Act of 1972 and the Endangered Species Act of 1973. The permittee and any contractor may be held responsible for any manatee harmed, harassed or killed as a result of construction activity.
 - (c) Siltation barriers will be properly secured and made of material in which manatees cannot become entangled. The barriers will be regularly monitored to avoid manatee entrapment. Barriers must not block manatee entry or exit from essential habitat.
 - (d) All vessels associated with the project will operate at "no wake/idle" speeds at all times while in water where the draft of the vessel provides less than four feet clearance from the bottom. Vessels will follow routes of deep water whenever possible.
 - (e) If manatees are seen within 100 yards of the dredging area, all appropriate precautions will be implemented to ensure protection of the manatees. These precautions will include operating all equipment in such a manner that moving equipment does not come any closer than 50 feet of any manatee. If a manatee comes within 50 feet of an operating piece of equipment, or vice versa, the equipment will immediately be shut down.
 - (f) Any collision with, or injury to, a manatee will be reported immediately to:

Mr. Robert O. Turner
Manatee Coordinator
6620 Southport Drive, South
Suite 330
Jacksonville, Florida 32216-0912
(904) 232-2580

- (g) The permittee will maintain a log detailing sighting, collisions or injuries to manatees should they occur during the construction period. Following project completion, a report summarizing incidents and sightings will be submitted to Mr. Robert O. Turner.

Marina Operational Conditions

- 19) The marina entrance channel jetties shall be permanently lighted. Such lights and signals shall be in keeping with U. S. Coast Guard specifications and regulations. Lights shall be installed at the expense of the permittee.
- 20) The permittee shall provide for the life of the project fuel and waste spillage protection around the marine maintenance site to protect surface waters in the event of a spill.
- 21) This permit does not authorize the interference with any existing or proposed Federal project. The permittee will not be entitled to compensation for damage or injury to the authorized structure or work that may be caused from existing or future operations undertaken by the United States in the public interest.
- 22) No attempt will be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the authorized work. Use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.
- 23) The permittee will maintain the authorized work in good condition and in concordance with the terms and conditions of this permit. The permittee is not relieved of this requirement if he abandons the permitted activity without having the permit transferred to a third party.
- 24) Prior to occupancy of any new slips authorized under this permit, the permittee will permanently equip the marina with a pumpout facility to service boats with holding tanks.
- 25) The marina shall prominently post and enforce a no sewage discharge policy at the entrance and exit from the main pier.
- 26) No sewage, whether treated or untreated, shall be discharged at any time from boats using the marina. Any sewage discharge at the dock facility shall be considered a violation of this permit for which the permittee is responsible. This prohibition shall be applied and enforced throughout the entire existence of the permitted structure.
- 27) Marina operation rules detailing safety and clean boat handling practices will be posted.
- 28) Trash receptacles, sufficient in numbers, to provide easy access and capacity will be installed at the marina prior to occupancy.

ADDITIONAL CONDITIONS

- 29) This permit authorizes only the docks, piers and other structures and uses located in or over the water that are expressly and specifically set forth in the permit application. No other structures, whether floating or stationary, may become a permanent part of this marina without permit modification. No non-water dependent uses of structures may be conducted on, in, or over public trust waters without permit modification.

NOTE: The permittee is reminded that any additional work not depicted on the attached plans involving basic subdivision infra-structure, marina amenities, including dock design and channel markers, will require a modification of this permit. Should a question arise as to the requirement for further authorization, do not hesitate to contact the Division of Coastal Management.

NOTE: The permittee is reminded of the need to maintain a suitable spoil disposal site at the project for future channel and basin maintenance.

Bruce Marek, P.E.
P. O. Box 3069
Bald Head Island, NC 28461
910-457-7517
October 1, 2008

Ms. Heather Coats
NCDENR Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405

Re: CAMA Permit #91-96 Minor Modification Request: Deep Point Marina, Southport, NC
Marina Necessities & Amenities per Drawing DPM3 Rev 8: 10-1-08 Includes Typical Marina Necessities within the 30' Marina Buffer and Necessities/Amenities within the 75' Marina AEC

Dear Ms. Coats:

Included are five 24" x 36" copies of drawing DPM3 Rev 8 dated & sealed 8-18-08, for the Bald Head Island Limited, LLC owned Deep Point Marina. Note that my first submittal for this Necessities & Amenities project was submitted July 9, 2007. With subsequent drawing revisions dated 9-4-07, 12-6-07, and 1-21-08, 4-24-08, 5-15-08, 7-8-08 & 8-18-08 based on your comments. I believe that I have finally removed all marina necessity items that you felt would delay us obtaining this minor modification. We are already working on a variance request for some of those items

I have previously submitted a 24" x 36" copy of approved Low Density Deep Point Marina Area Stormwater Permit #SW8-071004 for your reference. It includes all of the over land impervious items that I am asking for, as well as an additional 752 sf of "miscellaneous other" in case final transformer pads, electrical kiosks, storage shed entry pads, etc. needs to be slightly larger than our first estimates. Also, at this time we are only asking for CAMA permission for one of our two Stormwater permitted 526 sq ft impervious gazebo/ pergolas (N). I had one in the 30' buffer for stormwater, which I have eliminated per your comments.

My 2/25/2000 and 7/9/07 Deep Point Marina and Slip layout drawings were approved only for slip layout, and did not include all of the marina necessary items that ended up as multiple Letters of Refinement and Minor Modifications at Bald Head Island Marina (CAMA#172-87) and Indigo Plantation Marina (CAMA #41-85). The intent of this minor modification is to get one approval for the numerous items around the recreational part of the marina in one minor modification. On drawing DPM3, buildings and the 6' wide wood boardwalk around the marina perimeter that are already CAMA permitted based on the original permit and other minor modifications are so indicated.

The benefit of being involved in the design/engineering of 3 marinas for the same client, Bald Head Island Limited, LLC, means that by this third marina we have a pretty good idea of all of the water dependent necessities and amenities that need to be built at a marina.

Below is a list of items. Designations start with Letter A. On the drawing(s) requested items are in red.

A. Slip width change to slip F20 for use as a catamaran slip (50' x 36' width): this involved a slight shift and reconfiguration of slips F12 thru F20, without any increase in number of slips. Revised layout is shown in red in the marina basin; existing permitted layout is shown in a black & white detail mid-left on the drawing.

B. Harbormaster Storage Sheds (4): 144 sq ft roof area each (100 sf building footprint) accessory structures. All are now outside of the 30' buffer, but within the 75'AEC. B1 is between the harbormaster office and the fuel dock (A-Dock). B2 & B3 are near the gazebo/pergola N, and B4 is near the "crofters" Q1&Q2. An impervious entry pad of 40 sq ft is associated with each of these sheds.

C. Wood Dock Landings (5): Within the marina buffer, at the top of each of 5 ramps at A, B, C, D & E/F. To be built at 40 sf each (in 2 pieces), connected to the 6' wide previously permitted wood boardwalk. This totals the allowable per marina 200 sf of landing CAMA Limit. Note that this amount of landing does not allow sufficient area for trash cans, dock cart storage, bike racks, etc.

D. Ramps from landings to the Floating Docks (8). 4'-6" wide x 26'+/- Aluminum Ramps. Six are shown at the recreational part of the marina and designated D-1 thru D-6, and two are shown at the ferry maintenance dock. I always assumed ramps as part of permitted slip layout drawings(s), but I have not found ramps specifically mentioned in our permits. Please include in this minor mod if necessary.

E. Electrical Transformers/Junction Enclosures/pads (5) shown: Electrical engineer/power company will decide final locations based on wiring path(s) available. Assumption is to have a transformer or junction enclosure within 25' to 50' of the electrical panels. Along with transformers is the underground electrical wiring necessary to power the transformers, and all service wiring. Stormwater permit is for 64 sf of transformer pads. Pads will be based on electric company enclosure sizes, estimated at 6 sf for small enclosures and 12 sf +/- for larger enclosures

F. Electrical Kiosks (8): for the electrical power panels, these marina dependent panel backboards are shown within the 30' marina buffer with approx 48 sf roof area each. The stormwater permit includes 385 sf of electrical panel roofs. We do not know yet if A-Dock will require 1 or 2 panel boards. Note that the electrical panels need to be accessed to reset circuit breakers. The roofs are a life safety feature to protect the workers from rain.

G. Marina Holding Tank Pump Out Shore Side Tank: This is a pump station for the A-Dock (fuel dock) holding tank pump out. There is already an additional pump out permitted for the ferries in the marine maintenance area.

H. Pump Out Station: This is the dock component on A-Dock to shore side tank/pump G

I. Fish Cleaning Station (1): Aluminum or stainless steel, cantilevered from wood boardwalk, between A-Dock & B-Dock along walkway.

J. Dockmaster/Fuel/Ice Sales Screened Gazebo: (1) At A-Dock/Fuel Dock end in slip A6. Approx 12' x 20' footprint/screened area (no fixed walls). 14' x 22' with roof overhangs. Having attendant location near the pumps for busy summer season is desirable from a safety & turnaround standpoint.

K. Fuel dispensers and hose reels indicated on the fuel dock (A-Dock). There will also be an isolation/transfer box near the top and the bottom of the A-dock ramp, in order to shut-off fuel to the dock in storm conditions. Fuel piping will be double wall piping per UST regulations. Fuel lines and valves will run underground through both the Marina buffer and the 75' marina AEC. Note: Fuel tank location for the 12,000 gal diesel tank and the 8000 gallon gasoline tank and the vent piping are outside of the AEC, in the turnaround south of the harbormaster office, and are already in our CAMA Permit.

L. Wood Handicap Ramp (Labeled in Red, drawn in black): L1 is from between the B Dock & C Dock Landings up to the Harbor Master Office/the marina parking turnaround. This wood handicap compliant ramp has the required ADA landings every 30' and is shown at a 1V:12H slope. Due to FEMA Flood Zone Regulations, the Harbormaster Office (Finished Floor Elevation 13.0) is raised on a plateau above the marina bulkhead cap (Elevation 6.1'+/-). The handicap ramp is required for the vertical rise due to the 4' retaining wall in front of the Harbor Master Office and Retail Space.

M. Over-The-Water 16'x16' Roofed Gazebo/8'x17' Wood Platform/Landing. The end of F- Dock is over a quarter of a mile from the Harbormaster office. This roofed, open air structure will have bench seats which will provide for respite from rain or sun, with alignment as shown.

N. Gazebo/Pergola similar to the pictured gazebo/ pergola at Bald Head Island Marina. N is outside of the Marina Buffer but inside of the 75' Marina AEC. It has 526 sq ft of roof (22'x24'+/-). Deck size is 24'x42'. A pervious "pergola" area covers the unroofed portion. Stormwater permit is for two such structures at 526 sf of impervious each = 1052 sf, but we have reduced our CAMA request to just one at this time.

O. Pool & Pool Deck outside of the 30' Marina Buffer, but within the 75'AEC. 1500 sf impervious is in Stormwater Permit SW8-071004 for the Pool Deck not under the roof line, with the pool size being approximately 34' x 48' (pools are considered pervious surfaces). Note that we have included a rendered detail of the Harbor Master Building showing pool and deck. There is an architectural pool "overflow" area along the east side of the pool, which is sited outside of the 30' marina buffer.

P. Impervious Surfaces/Parking P1-P3: Speckled red areas on the drawing. 7500 sf is Stormwater Permitted as "parking". It is all shown outside of the 30' marina buffer, with the majority within the 75' AEC. Part of P2 is outside of 75'. P3 is a 20'x20' impervious pad between crofters Q1 & Q2, with some of the area underneath the crofter decks.

Q. Crofters (2): These are outside of the 30' Marina buffer, but within the 75' Marina AEC. Q1 has a stormwater permitted 510 sf roofed area and A2 has 600 sf roofed area. These 2-3 story crofters are Bald Head Island style small buildings with living or office space above a break-away walled garage. Shown with 8' wide decks around perimeters of buildings (assumed 2' roof overhangs, thus decking shown as 6' outside of roof edges. Architectural styling is not complete, so roof shapes may change..

R. Wetland Boundary Fence/Bench/Knee wall. Please note that there is a 404 wetland indicated the east of the E & F-dock bulkheads. This constrains our useful area along this side. In order to protect the wetland area, we have provided on the drawing a detail showing a sloppy vee/6x6 post knee wall, with 3"x10" horizontal cap, all with ground contact treated lumber. We have now limited this "knee wall" to the areas outside of the 30' marina buffer.

In addition to the above listed items, the following three items which are so closely related to the water dependent needs of the marina but don't seem to be listed in other CAMA permits are the following utilities. I include them if you feel the need to specifically list them in this minor modification.

1. Telephone, Cable TV & DSL service lines & junction boxes, underground sewer & fuel lines.. Location of lines: inside of the 30' marina buffer, with appropriate utility separations and depths.

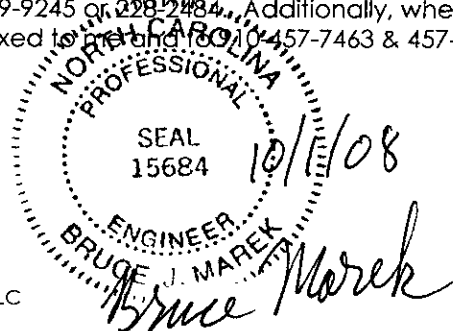
2. Installation of a water/fire main(s), service laterals and hydrants and/or fire standpipes. North Carolina building code has adopted several of the NFPA Fire Codes, with which we need to comply as appropriate to provide adequate levels of fire/life safety. Included in water service lines are landscape irrigation lines (with valve boxes), and any required back-flow preventers.

3. Site Lighting: for the boardwalks, dock landings, etc.

I have previously submitted a Bald Head Island Planning Department check for \$100 for "Minor Modification" to CAMA Permit # 91-96 for Marina Necessities/Accessories. If you have any questions and/or comments, please call me at 910-457-7517, 799-9245 or 228-2284. Additionally, when the minor mod is completed, please have copies e-mailed or faxed to me and to 910-457-7463 & 457-7220.

Respectfully,

Bruce Marek, P.E.
For Bald Head Island Limited, LLC Planning Dept.
cc: Jim Henry, Director, BHI Planning & Development
M. Kent Mitchell, CEO, Bald Head Island Limited LLC



Bruce Marek, P.E.
P. O. Box 3069
Bald Head Island, NC 28461
910-457-7517
January 21, 2008

Ms. Heather Coats
NCDENR Division of Coastal Management
127 Cardinal Drive Extension
Wilmington, NC 28405

Re: CAMA Permit #91-96 Minor Modification Request: Deep Point Marina, Southport, NC
Marina Necessities & Amenities per Drawing DPM-3 Rev 1-21-08 Includes Typical Marina Necessities/Ammenities within the 30' Marina Buffer and/or 75' Marina AEC. Acceptance of new SW8-071004 Deep Point Marina Basin Low Density Stormwater Permit for impervious surfaces of the above items.

Dear Ms. Coats:

Enclosed, please find five 24" x 36" copies of drawing DPM-3 Rev 3 dated & sealed 1-21-08, for the Bald Head Island Limited, LLC owned Deep Point Marina. I have previously also submitted; copies of State Stormwater Permit SW8-071004 with drawing dated & sealed 10-3-07 and DWQ approved 10-16-07. Note that my first submittal for the Necessities & Amenities drawing was submitted July 9, 2007.

This latest revision incorporates your & Doug Huggett's recent comments. I have moved the 4 proposed harbormaster sheds (B) out of the 30' marina buffer. I have also totally removed the Pergola/ Gazebo(D2) that was in the marina buffer near the north end of F-Dock. I have per our discussions added three over the water 16'x16' roofed gazebos (with storage benches) as a place to escape rain/sun at both ends of F-Dock (O1 & O2), and at the D-Dock to E-Dock landing (O3). One Pergola/Gazebo (D1) remains outside of the 30' buffer, but within the 75' AEC.

My 2/25/2000 and 7/9/07 Deep Point Marina and Slip layout drawings, did not include all of the marina necessary items that ended up as multiple Letters of Refinement and Minor Modifications at Bald Head Island Marina (CAMA#172-87) and Indigo Plantation Marina (CAMA #41-85). The intent of this minor modification is to get approval for these numerous items in one minor modification. On drawing DPM-3, items that are already CAMA permitted based on the original permit and other minor modifications are shown in gray. The area for the Deep Pointy Marina Low Density Stormwater permit SW8-071006 is shaded in yellow. The already permitted 6' wood walkway is shown in brown, but the plotted brown came out very dark. We have used a blue roof for the crofters, sheds and electrical (roofed) kiosks.

The benefit of being involved in the design/engineering of 3 marinas for the same client, Bald Head Island Limited, LLC, means that by this third marina we have a pretty good idea of all of the marine dependent necessities that need to be built at a first class marina. There may be some slight juggling of locations as the marina design evolves, but DPM-3 and the following lists are pretty well all-inclusive.

I did do an enlarged detail of our proposed wood landings at the top of the various dock ramps. I have also included pictures of our typical dock carts (58"x32") and our raccoon-proof trash can enclosures (37"x36"). Architectural Graphic Standards indicates a 5' maneuvering area behind the back of a bike in a bike rack. Typical one person adult bikes are 5'-6" long. Thus, approximate 10'-6" x 8'-0" of space is needed for a 4-5 bike rack. I hope these details explain better the need for our requested wood landing sizes. Note that the travel path of the previously approved 6' wood walkway runs through the landing area.

Below is a list of letter designated items. Designations start with Letter A.

A. Crofters(2) These are outside of the 30' Marina buffer, but within the 75' Marina AEC. A1 has a stormwater permitted 510 sf roofed area and A2 has 600 sf roofed area. Crofters are Bald Head Island style small buildings on piles with bedroom(s) or office space above a break-away walled garage. Part of possible storage scheme for the restaurant. With wood balconies, decks & stairs, footprint for each is approximately 800 sf. Included in the stormwater streets/parking allotment is a 20' x 20' parking pad. (One shed B1 is now shown at this location)

B. Harbormaster Storage Sheds (4): 12'x12' max roof area each (100 sf building footprint) accessory structures. All are now outside of the 30' buffer, but within the 75'AEC. B1 is near the crofters. B2 & B3 are near the pergola/gazebo, and the fourth will be near the harbor master building. An impervious entry pad of approximate 40 sq ft is associated with each of these sheds.

C. Electrical Kiosks (9): for the marina power panels, these panel backboards are roughly 4'-5'x8'-10' roof area, depending on the associated dock slips and power requirements. These are labeled C1-C10: C9 is existing near the ferry slip position G1. Stormwater permit is for 385 sf of roof. There is an additional 752 sf of miscellaneous "other" impervious if needed.

D. Pergolas/Gazebo similar to the pictured pergola/gazebo from Bald Head Island Marina along Keelson Row near the Sailing Clubhouse. D1 is outside of the Marina Buffer but inside of the 75' Marina AEC, near the restaurant. It is approximately 20' x 42', with roof area of 20'x20'. Stormwater permit is for two such pergola/gazebos at 526 sf of impervious each = 1052 sf.

E. Electrical Transformers/Junction (6) Enclosures/pads shown: Electrical engineer/power company will decide final locations based on wiring path(s) available. Assumption is to have a transformer or junction enclosure within 25' to 50' of the electrical panel kiosks. Along with transformers is the underground electrical siring necessary to power the transformers, and all service wiring. Stormwater permit is for 64 sf of transformer pads. There is an additional 752 sf of miscellaneous "other" impervious if needed.

F. Fish Cleaning Station: With wood decking. Permit Request: 1, between A-Dock & B-Dock.

G. Marina Holding Tank Pump-Out Stations: (2) One at A-Dock (fuel dock), and one for the ferries. The pump out for the ferries is already included in a prior minor mod for the site. It will most likely be near slip G4, but possibly at slip G1. At A-dock, G1 indicates the pump out station portion on the fuel dock, and G2 is indicating the landside tank/pump component.

H. Dockmaster/Fuel Sales Office : (1) At A-Dock/Fuel Dock end in slip A6. Approx 14' x 20' building, 18' x 24' with overhangs. Picture shown is for similar structure at nearby Southport Marina. Fuel Sales office helps by having attendant at the pumps for busy summer season. Closely attended pumps is a plus for fuel spill prevention, and turnaround time is quicker/safer for the boating public. Spill prevention materials and fuel system monitors would be included in the dockmaster/fuel sales office H. We will seek a variance for this item if not approvable as drawn.

J. J-Dock. A 250' x 8' wide dock along the north side of the southern marina entrance bulkhead. Bald Head Island Limited annually hosts one or two sailing regattas, and there is often a lack of slip space for the out of town trailerable and small crane launchable boats such as J-24's, Melges 24's and Ranger 22's. Likewise, in summer, this dock can be used by locals coming to the Marina Restaurant. During Spring and Fall, this provides us with transient overnight space for larger yachts awaiting a weather window. This 250' dock could berth 10 small boats or 2-3 megayachts. We are asking for 10 slip positions to be added for this "new" J-Dock. Additionally, one new slip x 50' is created at position F21 due to the geometry/location of J-Dock. We are thus asking for the addition of 11 slips to our existing 100 slip marina slip count for a total of 111 slips.

K. Fuel dispensers and hose reels are indicated on the fuel dock (A-Dock). There will be an isolation/transfer box somewhere near the top and the bottom of the A-dock ramp, in order to shut-off fuel to the dock in storm conditions. Fuel piping will be double wall piping per UST regulations. Fuel lines and

valves will run underground through both the Marina buffer and the 75' marina AEC. Note: Fuel tank location for the 12,000 gal diesel tank and the 8000 gallon gasoline tank and the vent piping are outside of the AEC, in the turnaround south of the harbormaster office. Modification request is for entire fuel system, tanks, monitor system, fuel lines, isolation/transfer boxes, dispensers and hose reels. Tanks themselves were also shown on a prior minor mod.

L. Grill pad. Brick Pavers. One shown near north end of F-dock, outside of 30' marina buffer, inside of 75' AEC. Approximate 90 sf pavers. Approx 350 sf of wood deck w/wood bench seats and/or picnic tables. The impervious pad will be subtracted out of the 752 sf of miscellaneous "other" impervious.

M. Marina Entrance Sign (1 Double Sided) 10'x20' solar lighted. An example is shown on the drawing of the Southport Marina sign. Similar level of information for Deep Point's accommodations and contact information. Shown north of the east end of the north jetty. Not sure if this is a CAMA jurisdictional item, or other reviewing agency.

N. Wood Handicap Ramps 6' wide, N1 from A-Dock Landing to the Harbormaster Office and N2 from the D-Dock Landing to the Harbormaster/Retail Store area. Due to FEMA Flood Zone Regulations, the Harbormaster Office and Retail Store are on a plateau approximately 6' above the marina bulkhead cap. Plateau is created by a 4' high +/- retaining wall at 30' off of the bulkhead cap, just outside the marina buffer. With a 1:12 grade of the soil coming off of the bulkhead to the waterside of the ramp 24' off of the wall, the ramps required vertical rise is approximately 4'. Maximum 1:12 slope, plus 6' flat landings every 32' of run are required. Wood decks outside of the marina buffer but inside the 75' AEC are shown at N1 & N2.

O. Three over the water 16'x16' roofed gazebos (with storage benches) as a place to escape rain/sun at both ends of F-Dock (O1 & O2), and at the D-Dock to E-Dock landing (O3). Gazebo O1 is approximately ¼ mile from the Harbor Master Building. Similar metal roof as pergola/gazebo D1, but with some sort of ornamental top.

Below are the non-labeled items that may or may not need to be mentioned in the minor modification. They are so closely related to the marina usage that they seem obviously automatically included, but I don't want to miss anything. I mention them though for you to include on the minor modification if you feel it is necessary.

1. Land-side landings 7 landings/8 ramps for the recreational portion of the marina, and 2 landings/4 ramps for the ferry side of the marina. These are wood decking, and incorporate bulletin boards, bike racks, dock dolly storage, a life ring & fire extinguisher, garbage cans, etc. 20'x28' landings are shown at A,B,C & D docks, with 12' x 20' landings at the other positions. We feel that these are appropriate sizes for safe access to the boating related activities of this marina. Over water gazebos O1-O3 will be incorporated into the Landing/Ramp design.

2. Telephone, Cable TV & DSL service lines & junction boxes, Sewer Lines. Location of lines: inside of the 30' marina buffer, outside of the tieback deadmen, which are approximately 20' off the marina wall.

3. Installation of a 6" water/fire main with hydrants and/or fire standpipes. North Carolina building code has adopted NFPA 303 Fire Code, with which we need to comply as appropriate.

4. Site Lighting: Not sure if we will stick with the hangman's post type lighting poles, lighthouse topped bollard lighting and/or 8x8 wood post bollard lighting that are on the island or come up with a new style, but we will have a need for site lighting. Don't know if you care. Locations, tbd.

5. Please note that there is a 404 wetland indicated approximately 25' to 30' east of much of the 450 lf of the F-dock bulkhead. This constrains our useful area along this side. I anticipate some sort of wood bench/fence/wall type protection to keep people out of the 404. No definitive design has yet been proposed.

6. Impervious Parking & Pool Deck outside of the 30' Marina Buffer. Speckled Yellow area on the drawing. 1500 sf is Stormwater Permitted for the Pool Deck, and 7500 sf is permitted for Parking. Pool Deck is within the 75' AEC, and the parking is mostly within the 75' AEC.

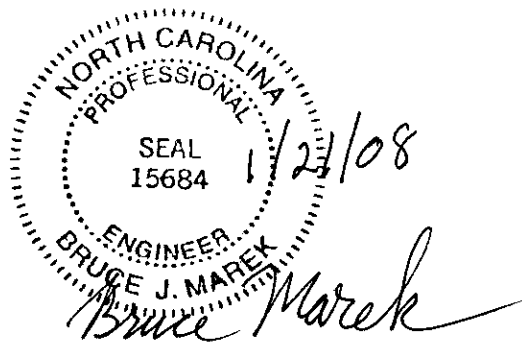
7. Last, we request acceptance of the proposed 7100 sf of marina impervious path (appx 8.2' x 860 LF) for use as harbormaster access for trash pickup and for emergency vehicle access to the northern end of F-Dock. Due to site constraints of the 404 wetland, this path is shown within the 30' marina buffer. It is permitted under Low Density Stormwater Permit SW8-071004. Due to the very high infiltration rate of the surrounding sand soils (>20"/hr infiltration rates) runoff will not reach the marina. The harbormaster will, like on Bald Head, have a mini-truck or golf cart to service the docks/landings.

Note that the marina location in 1996 was determined after several studies and multiple rounds of comments from CAMA and other review agencies. At that time, I do not believe there was a restriction on impervious surface for such access roads in the marina buffer. For safety of the public, having ambulance/fire truck/hazmat vehicle access to the marina end is well justified. We are asking for the narrowest of roads to meet both safety and marina trash collection functional requirements. As an engineer, I feel that this road is a reasonable design for safe water dependent use of the marina by the citizens of North Carolina. We will seek a variance for this item if not approvable as drawn.

I have previously submitted a check for \$100 for "Minor Modification" to CAMA Permit # 91-96 for Marina Necessities/Accessories. If you have any questions and/or comments, please call me at 910-457-7517, 799-9245 or 228-2484. We will seek a variance for any item if not approvable as drawn. Additionally, when the minor mod is completed, please have copies faxed to 910-457-7463 & 457-7220.

Thanking you in advance for attention to this matter.

Respectfully,

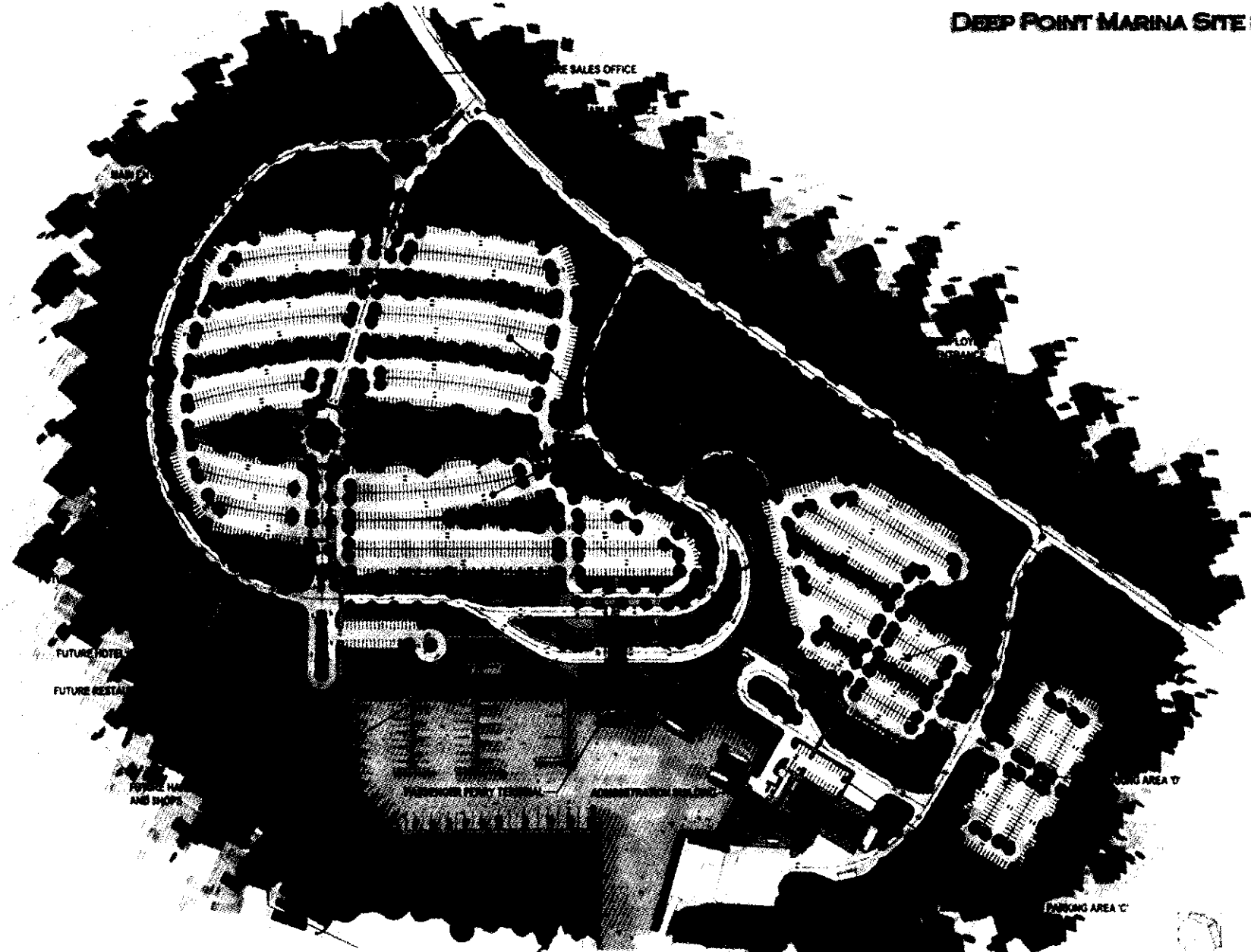


Bruce Marek, P.E.
For Bald Head Island Limited, LLC Planning Dept.

Enclosures

cc: Jim Henry, Director, BHI Planning & Development
M. Kent Mitchell, CEO, Bald Head Island Limited LLC

DEEP POINT MARINA SITE PLAN



Deep Point Marina - Southport, NC

ATTACHMENT #12

OVERALL SITE PLAN
 DATE: APRIL 4, 2007



DEEP POINT MARINA MAIN FERRY TERMINAL



ATTACHMENT #14

DEEP POINT PERMIT HISTORY

06/03/96: Original Permit Approval (based on revised site plan dated 2-15-96 and details dated 11-15-95)

Renewals:

- 12/08/99 – 1st renewal
- 02/14/02 - 2nd renewal
- 02/23/04 – 3rd renewal
- 09/18/06 – 4th renewal
- 12/31/07 – 5th renewal

Amendments:

- 04/27/06 – Name change to Bald Head Island Limited from Bald Head Island Management
- 09/18/06 – Name change adding “LLC” to Bald Head Island Limited

Minor Modifications:

- 08/19/99: Minor Modification - placement of 30 ft of rip rap extension
- 05/22/00: Minor Modification - expansion of the Marina basin approx. 23' to the west plus revised slip layout.
- 07/16/04: Minor Modification - additional 140 parking spaces
- 05/01/07: Minor Modification - Upland Development
 - 3 future marina buildings
 - restaurants
 - hotel outside of 75' AEC
 - spoil basin building
 - 6' wide wood boardwalk adjacent to existing bulkhead
 - underground storage tanks outside of 75' AEC
 - truck wash
- *07/09/07: Minor Modification - increase depth in marina, increase finger pier lengths to full length, clarify slip count, include typical marina necessities such as ramp landing pads, electrical kiosks & transformers, dockmaster sheds, west side entrance channel jetty walk, etc., within the 75' marina AEC (pending)
- 07/20/07: Minor modification approved to increase depth in marina
- Minor Modification – Marina necessities & amenities per drawing DPM-3 Rev 8: 10-01-08 Approved 12/12/08
- *10/18/07: Minor Modification – Increase finger pier lengths to full length clarify slip count approval
- 02/19/08: Minor Modification – request for rip rap or gabion placement under new main ferry

Letters of Refinement:

- 7/16/99 Phasing Plan
- 12/03/04: LOR - concrete slab over existing impervious surface
- 12/10/07: LOR for temporary walkway over water to access contractor ferry landing
- 10/22/07: LOR for ferry "lift"
- 12/11/07: LOR bulkhead reinforcement

MISC:

- 05/31/96 Water Quality Certification
- 06/25/04: Letter of permission/notification intent to implement emergency repairs
- 01/31/07: Mining Permit #10-39 (pending)
- 10/09/07: Request for repair maintenance – permits for marina bulkhead
- 02/04/08: 401 Water quality certification

SIGN PLACEMENT HERE
ON NORTH JETTY WILL
BLOCK VIEW OF
NAVIGATION LIGHT
FOR DEPARTING BARGE

NAVIGATION LIGHT
ON NORTH JETTY

APPROX. LOCATION
OF PROPOSED SIGN
SEE AERIAL VIEW
ATTACHMENT #12

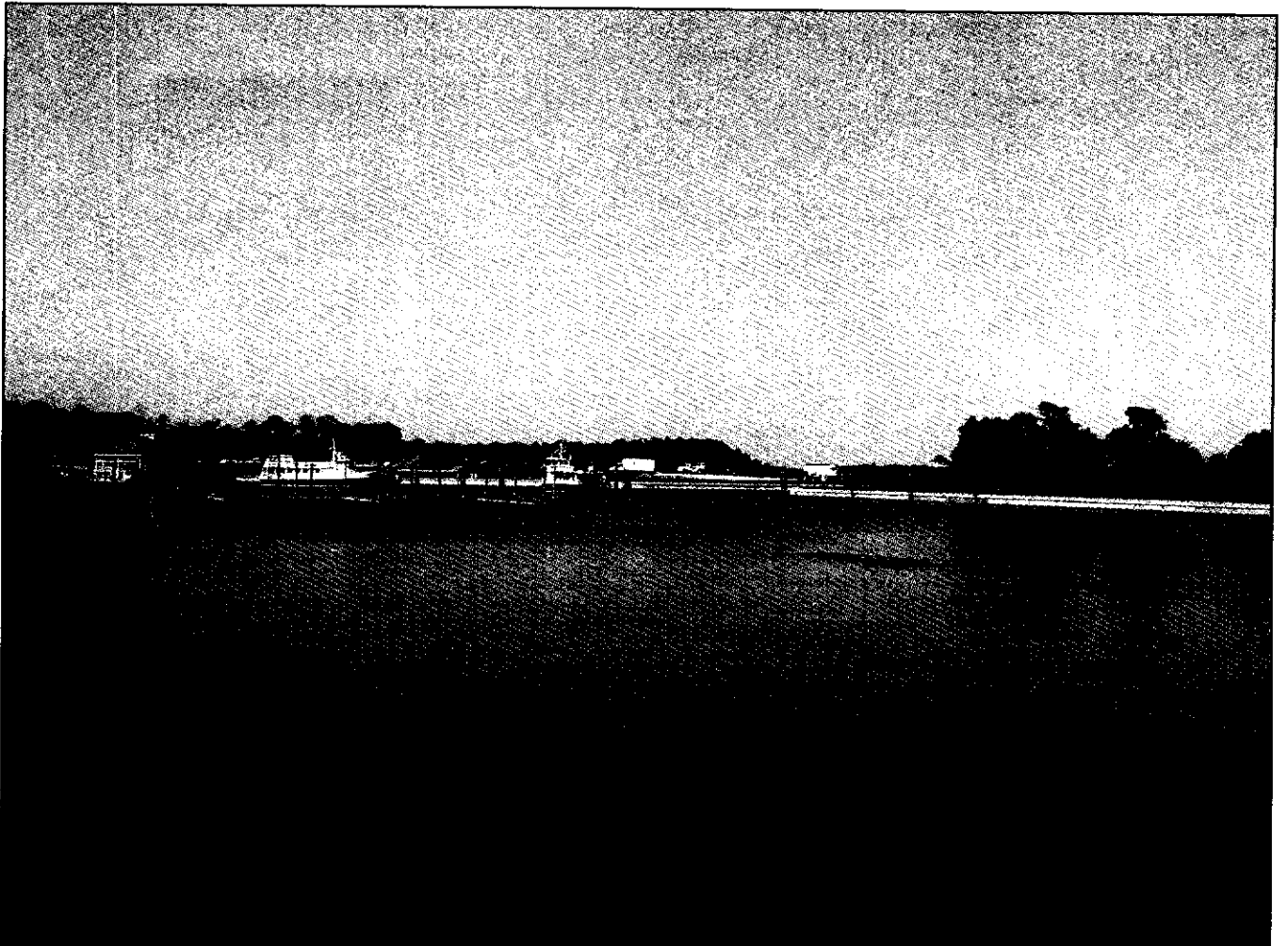


NAVIGATION LIGHT
ON SOUTH JETTY

APPROX. LOCATION
OF SIGN POSITION
FOR BERTH VIEW

SIGN PLACEMENT HERE
ON SOUTH JETTY WILL
BLOCK VIEW OF
NAVIGATION LIGHT
FOR DEPARTING FERRIES









UPLAND DEVELOPMENT

RECEIVED
NOV 15 1995

(Construction and/or land disturbing activities)

DIVISION OF COASTAL MANAGEMENT

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.

- a. Type and number of buildings, facilities, units or structures proposed 6 Marine related structures
- b. Number of lots or parcels No residential development proposed at this time.
- c. Density (give the number of residential units and the units per acre) N/A
- d. Size of area to be graded, filled or disturbed including roads, ditches, etc. 53 AC
- e. If the proposed project will disturb more than one acre of land, the Division of Land Resources must receive an erosion and sedimentation control plan at least 30 days before land disturbing activity begins. If applicable, has a sedimentation and erosion control plan been submitted to the Division of Land Resources? Yes No
If yes, date submitted Will submit plan prior to development.
- f. List the materials (such as marl, paver stone, asphalt, or concrete) to be used for paved surfaces. Marl, concrete, asphalt, concrete pavers.
- g. Give the percentage of the tract within 75 feet of MHW or NWL, or within 575 feet in the case of an Outstanding Resource Water, to be covered by impervious and/or built-upon surfaces, such as pavement, buildings, rooftops, or to be used for vehicular driveways or parking. 112,900 SF
- h. Projects that require a CAMA Major Development Permit may also require a Stormwater Certification. Has a site development plan been submitted to the Division of Environmental Management for review? Yes No
If yes, date submitted October 16, 1995
- i. Describe proposed method of sewage disposal. Septic tank with ground absorptic or connection to City of Southport
- j. Have the facilities described in Item i. above received state or local approval? No
(Attach appropriate documentation)
- k. Describe location and type of proposed discharges to waters of the state (for example, surface runoff, sanitary wastewater, industrial/commercial effluent, "wash down" and residential discharges). Surface runoff into grass swales, infiltration basin and retention basins.
- l. Describe proposed drinking water supply source (e.g. well, community, public system, etc.) Community, well and public
- m. Will water be impounded? Yes No
If yes, how many acres? _____
- n. If the project is a oceanfront development, when was the lot(s) platted and recorded? NA

Pfizer Tract

Applicant or Project Name

[Signature]
Signature Bird head Island
Director of Planning

October 16, 1995

Date

Permit Class

NEW

Permit Number

91-96

STATE OF NORTH CAROLINA
Department of Environment, Health & Natural Resources
and
Coastal Resources Commission

Permit

Major Development in an Area of Environmental Concern
pursuant to NCGS 113A-118

Excavation and/or filling pursuant to NCGS 113-229

Issued to Bald Head Island, Limited, P. O. Box 3069, Bald Head Island, NC 28461

authorizing development in Brunswick County at Cape Fear River, at Southport off of SR1540

, as requested in the permittee's application dated 10/16/96 incl. att. workplan drawings
site plan dated rev. 2/15/96 & sheets 4, 7 & 11-13 of 13 for bulkhead & jetty detail dated rec. 11/15/95.

This permit, issued on 1-3-96, is subject to compliance with the application (where consistent with the permit), all applicable regulations, special conditions and notes set forth below. Any violation of these terms may be subject to a fine, imprisonment or civil action; or may cause the permit to be null and void.

Excavation

- 1) In order to protect juvenile fish and other estuarine resources, excavation of the entrance channel in the River may not take place between February 1 and July 31 of any year without prior approval of the Division of Coastal Management in consultation with the Division of Marine Fisheries.
- 2) An earthen plug will be left between the inland basin and the Cape Fear River until excavation landward of the plug has been completed. To prevent sedimentation in adjacent waters, 24 hours will be allowed to elapse before the plug is removed.

(See attached sheet for Additional Conditions)

This permit action may be appealed by the permittee or other qualified persons within twenty (20) days of the issuing date. An appeal requires resolution prior to work initiation or continuance, as the case may be.

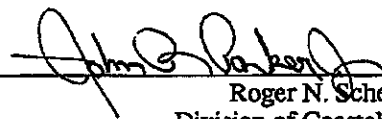
This permit must be accessible on-site to Department personnel when the project is inspected for compliance.

Any maintenance work or project modification not covered hereunder requires further Departmental approval.

All work must cease when the permit expires on
December 31, 1999

In issuing this permit, the State of North Carolina agrees that your project is consistent with the North Carolina Coastal Management Program.

Signed by the authority of the Secretary of DEHNR and the Chairman of the Coastal Resources Commission.



Roger N. Schechter, Director
Division of Coastal Management

This permit and its conditions are hereby accepted.

Signature of Permittee

ADDITIONAL CONDITIONS

- 3) All excavated materials will be confined landward of the mean high water (MHW) elevation contour within adequate dikes or other retaining structures to prevent the spillover of solids into any vegetated wetlands or surrounding waters.
- 4) The terminal end of the pipeline from the dredge into the diked retention area will be positioned at or greater than 50 feet from any part of the dike and a maximum distance from spillways to prevent dike erosion and to allow adequate settlement of suspended solids.
- 5) A water control structure will be installed at the intake end of the effluent pipe leading from the retention area to ensure maximum settlement of suspended solids.
- 6) Flow from the diked retention area will be confined by pipe, trough, or similar device to a point at or below the mean low water (MLW) elevation contour to prevent gully erosion and siltation.
- 7) No excavated or fill materials will be placed any time in any vegetated wetlands or waters.
- 8) No vegetated wetlands will be filled.
- 9) Excavation will not exceed ten (10) feet below the elevation of mean low water (MLW).
- 10) The temporary placement or double handling of excavated or fill materials within waters or vegetated wetlands is not authorized.

Bulkhead Construction

- 11) All bulkheads will be positioned in strict accordance with permit plans.

Marina Flushing/Water Quality Certification

- 12)
 - (a) The Division of Environmental Management issued Water Quality Certification Nos. 3025 and 2668 for this project on May 29, 1996. Any violation of that Certification will be considered a violation of this permit.
 - (b) All project activity will be conducted in a way that prevents a significant increase in turbidity outside the area of construction or construction-related discharge. Increases such that the turbidity in the waterbody is 25 NTUs or less are not considered significant.

ADDITIONAL CONDITIONS

Stormwater Management

- 13) The Division of Environmental Management issued Stormwater Management Permit No. 951012 on April 24, 1996. Any violation of this SW Permit will be considered a violation of this CAMA permit.

NOTE: The permittee is encouraged to provide a buffer between all upland development and adjacent wetlands. A 30-50 buffer is recommended.

NOTE: An Erosion and Sedimentation Control Plan will be required for this project. This plan must be filed at least thirty (30) days prior to the beginning of any land-disturbing activity. Submit this plan to the Department of Environment, Health and Natural Resources, Land Quality Section, 127 Cardinal Drive Extension, Wilmington, NC 28405-3845.

Archaeological Resources

- 14) Prior to initiation of ground-disturbing construction activities in the immediate vicinity of archaeological sites 31BW564** and 31BW571, an archaeological assessment (site testing) will be conducted to evaluate if the sites are eligible for listing in the National Register of Historic Places.
- 15) If either site 31BW564** or 31BW571 is determined eligible for listing in the National Register of Historic Places, and if the sites will be adversely affected by proposed construction activities, a detailed impact mitigation plan will be developed and executed.
- 16) All archaeological investigations will be conducted under the direction of an experienced archaeologist. Upon completion of the site testing and evaluation process, a written report will be submitted to the N. C. Division of Archives and History. Any mitigation plans developed for the site must be approved by the Division of Archives and History prior to implementation.

Other Requirements and Recommendations

- 17) Prior to jetty construction or other structural installation in the River, an Easement is required from the State Property Office, Department of Administration (telephone: 919/733-4346).

NOTE: The proposed entrance connection and work adjacent the highway right-of-way should be coordinated through the local DOT District office in Wilmington, and the Ferry Division.

NOTE: Spoil areas can breed mosquitoes. Therefore, Bald Head Island mosquito control or the Division of Environmental Health should be consulted to help prevent creating mosquito breeding habitat.

ADDITIONAL CONDITIONS

Endangered Species Protection

18) The permittee will ensure that the following construction guidelines are followed to avoid impacts to the Federally endangered West Indian Manatee (*Trichechus manatus*):

- (a) The permittee will instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees.
- (b) The permittee will advise all construction personnel that there are civil and criminal penalties for harming, harassing or killing manatees which are protected under the Marine Mammal Protection Act of 1972 and the Endangered Species Act of 1973. The permittee and any contractor may be held responsible for any manatee harmed, harassed or killed as a result of construction activity.
- (c) Siltation barriers will be properly secured and made of material in which manatees cannot become entangled. The barriers will be regularly monitored to avoid manatee entrapment. Barriers must not block manatee entry or exit from essential habitat.
- (d) All vessels associated with the project will operate at "no wake/idle" speeds at all times while in water where the draft of the vessel provides less than four feet clearance from the bottom. Vessels will follow routes of deep water whenever possible.
- (e) If manatees are seen within 100 yards of the dredging area, all appropriate precautions will be implemented to ensure protection of the manatees. These precautions will include operating all equipment in such a manner that moving equipment does not come any closer than 50 feet of any manatee. If a manatee comes within 50 feet of an operating piece of equipment, or vice versa, the equipment will immediately be shut down.
- (f) Any collision with, or injury to, a manatee will be reported immediately to:

Mr. Robert O. Turner
Manatee Coordinator
6620 Southport Drive, South
Suite 330
Jacksonville, Florida 32216-0912
(904) 232-2580

- (g) The permittee will maintain a log detailing sighting, collisions or injuries to manatees should they occur during the construction period. Following project completion, a report summarizing incidents and sightings will be submitted to Mr. Robert O. Turner.

Marina Operational Conditions

- 19) The marina entrance channel jetties shall be permanently lighted. Such lights and signals shall be in keeping with U. S. Coast Guard specifications and regulations. Lights shall be installed at the expense of the permittee.
- 20) The permittee shall provide for the life of the project fuel and waste spillage protection around the marine maintenance site to protect surface waters in the event of a spill.
- 21) This permit does not authorize the interference with any existing or proposed Federal project. The permittee will not be entitled to compensation for damage or injury to the authorized structure or work that may be caused from existing or future operations undertaken by the United States in the public interest.
- 22) No attempt will be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the authorized work. Use of the permitted activity must not interfere with the public's right to free navigation on all navigable waters of the United States.
- 23) The permittee will maintain the authorized work in good condition and in concordance with the terms and conditions of this permit. The permittee is not relieved of this requirement if he abandons the permitted activity without having the permit transferred to a third party.
- 24) Prior to occupancy of any new slips authorized under this permit, the permittee will permanently equip the marina with a pumpout facility to service boats with holding tanks.
- 25) The marina shall prominently post and enforce a no sewage discharge policy at the entrance and exit from the main pier.
- 26) No sewage, whether treated or untreated, shall be discharged at any time from boats using the marina. Any sewage discharge at the dock facility shall be considered a violation of this permit for which the permittee is responsible. This prohibition shall be applied and enforced throughout the entire existence of the permitted structure.
- 27) Marina operation rules detailing safety and clean boat handling practices will be posted.
- 28) Trash receptacles, sufficient in numbers, to provide easy access and capacity will be installed at the marina prior to occupancy.

ADDITIONAL CONDITIONS

- 29) This permit authorizes only the docks, piers and other structures and uses located in or over the water that are expressly and specifically set forth in the permit application. No other structures, whether floating or stationary, may become a permanent part of this marina without permit modification. No non-water dependent uses of structures may be conducted on, in, or over public trust waters without permit modification.

NOTE: The permittee is reminded that any additional work not depicted on the attached plans involving basic subdivision infra-structure, marina amenities, including dock design and channel markers, will require a modification of this permit. Should a question arise as to the requirement for further authorization, do not hesitate to contact the Division of Coastal Management.

NOTE: The permittee is reminded of the need to maintain a suitable spoil disposal site at the project for future channel and basin maintenance.



BALD HEAD ISLAND

October 16, 1995

Mr. Ed Brooks & Mr. Bob Stroud
DEHNR-CAMA
127 Cardinal Drive Extension
Wilmington, NC 28405

Gentlemen:

Please find enclosed a Major Development Permit application form and subsequent site plans for the proposed Pfizer Tract development located in Southport, North Carolina.

The emphasis behind this proposed development is to provide one centralized facility for all aspects of Bald Head Island day to day activities to and from the Island. The major components of this proposed development include a 4.7 AC marina, barge and ferry landings, parking for residents, resort guests, employees and contractors, administrative offices, warehouse and receiving.

The overall development site is 171.8 AC. This site consists of very well drained soils and has undulating topography ranging from a low elevation of 7' MSL and a high point of 24' MSL. In addition, this site contains both CAMA and Army Corps 404 wetlands which were delineated in the field, surveyed and approved by the two respective agencies.

With regard to land use plan and tabulations (see enclosure) each area has a parcel allocation with intended use, acres, percent of impervious coverage and impervious coverage in acres. The proposed impervious acreage for this development is 64.5 AC which equates to an overall percent of impervious coverage of 37.5% (64.5/171.8) for the entire tract.

Pending permit approvals, this project will be a phase development with phase one being the marina, infrastructure, marine maintenance and some parking areas. The remaining development will be on an on needed basis.

ANOTHER WORLD



POST OFFICE BOX 3069, BALD HEAD ISLAND, NORTH CAROLINA 28461 · 1-800-234-1666

02'

01'

78°

59'

58'

57'

56'

01'

Mr. Ed Brooks & Mr. Bob Stroud
DEHNR-CAMA
October 16, 1995
Page Two

01'

34°

34°

Lastly, I would like to emphasize that this development was based on long range projections of a facility and development which could accommodate total buildout on Bald Head Island.

A check in the amount of \$250 is enclosed for the major modification fee.

Please contact me at 910-457-7339 with any questions or comments.

Respectfully,



Daniel H. Weeks, ASLA
Director of Planning

Enclosure

cc: Kent Mitchell
Ken Stewart
Ken Kirkman
David Edwards

56'

56'

55'

55'

54'

54'

53'

53'

52'

52'

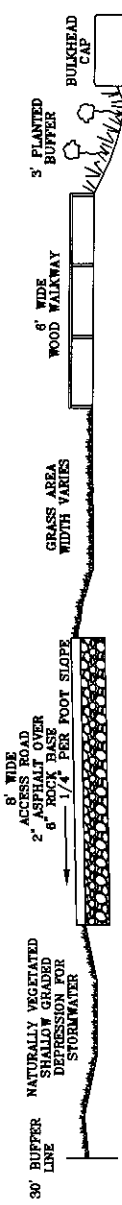
FOR: Bald Head Island
Planning Dept.



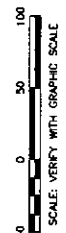
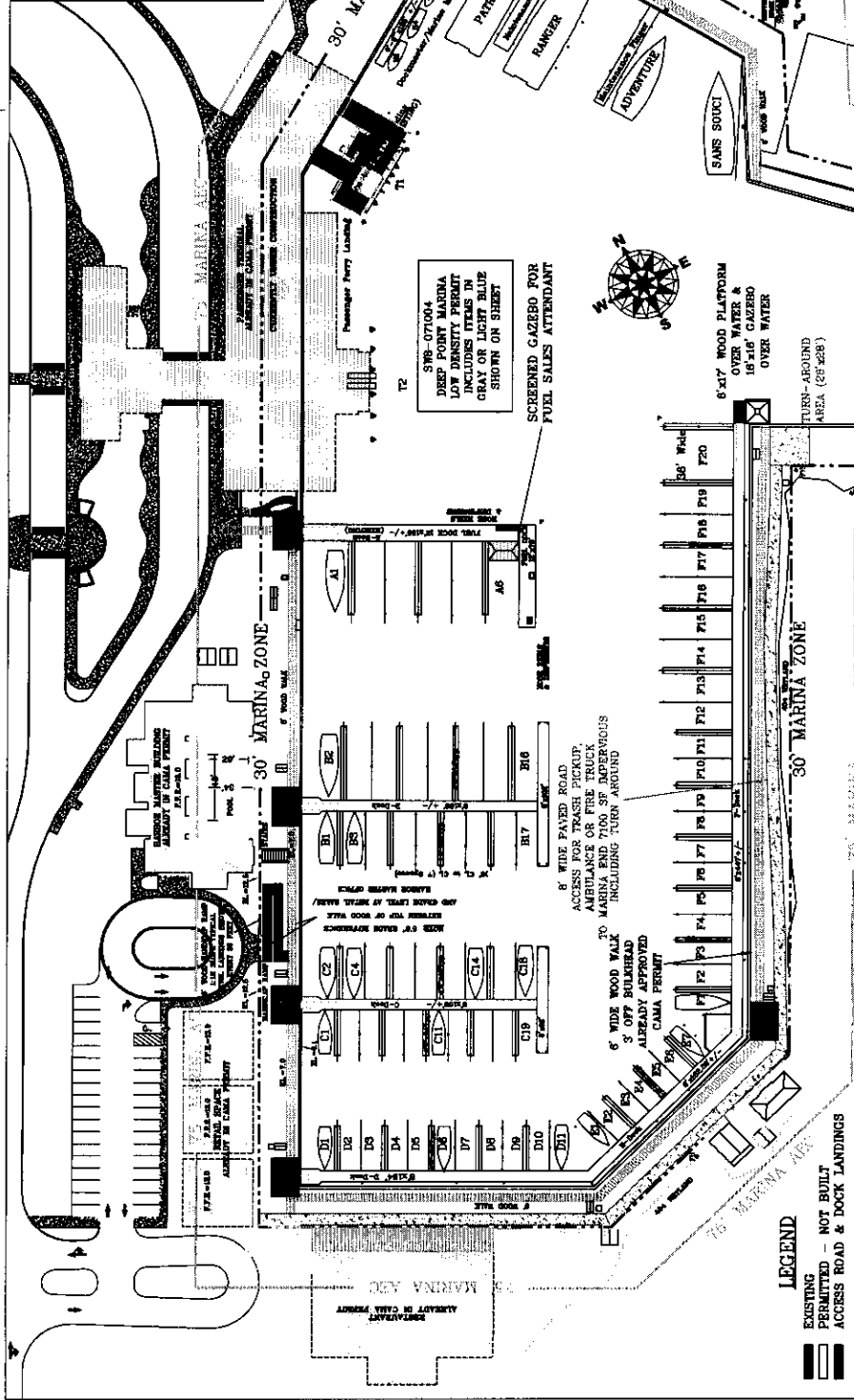
Bruce Marek
4/14/2009

BRUCE MAREK, P.E.
P.O. Box 3069 BALD HEAD ISLAND
NORTH CAROLINA 28461
(910) 457-7517

DEEP POINT MARINA
SOUTHPORT, NC
CAMA 91-96
APRIL 14, 2009
VARIANCE SUPPLEMENT



ACCESS ROAD CROSS-SECTION



- LEGEND**
- EXISTING
 - PERMITTED - NOT BUILT
 - ACCESS ROAD & DOCK LANDINGS

NOTE:
THE 75' MARINA ARE THE ORIGINAL PERMIT OF 6-3-96 WITHIN 12,800 SF OF IMPERVIOUS COVERAGE WAS PERMITTED. THE 30' MARINA ARE THESE WERE NOT PERMITTED. THE 22,000 SF OF IMPERVIOUS COVERAGE IS CURRENTLY ALLOCATED TO THE PROPOSED ACCESS ROAD WOULD ADD 7160 SF IMPERVIOUS TOTAL IMPERVIOUS WOULD THEN BE 68,100 SF THIS IS 78.9% OF PERMITTED IMPERVIOUS

IN RE: CAMA VARIANCE REQUEST (CRC-VR-09-01)

BALD HEAD ISLAND LIMITED, LLC (Applicant)

SUPPLEMENTAL STATEMENT ON BEHALF OF
BALD HEAD ISLAND LIMITED, LLC

This Supplemental Statement is offered on behalf of Bald Head Island Limited, LLC in support of its Variance Request originally served on January 13, 2009. The initial Variance Request in addition to all supporting statements, stipulations, documents, and exhibits are incorporated by reference. However, the applicant has decided to voluntarily withdraw item No. 3 from its original Request wherein it sought a variance with regard to placement of its marina entrance sign. This Variance Request was originally docketed for hearing before the Coastal Resources Commission on February 12, 2009, but was continued by agreement between counsel for the Applicant and the Attorney General's Office.

Subsequent to February 12th representatives for the Applicant and members of Division of Coastal Management Staff have met and conducted a number of discussions with regard to the two remaining items within the Variance Request: (1) that Applicant be allowed to construct an 8-foot wide paved access road with turnaround space for use by its marina management and to allow emergency vehicle access to a portion of its marina that is within the 30-foot marina buffer; and (2) that it be allowed to construct five 20 by 28 foot wooden landings atop the access ramps within its 100 slip marina. These discussions have been cordial and productive. However DCM Staff believe that the Request for Variance should proceed for hearing and the Applicant and Staff do not have an agreement at this point. DCM Staff has suggested that the Applicant submit the following supplemental comments as a follow up to the discussions between the parties, addressing site specific stormwater considerations including efforts to minimize impacts with innovative approaches.

Bald Head Island Limited's Deep Point Marina, located in Southport NC, was originally permitted on June 3, 1996 as CAMA Permit No. 91-96 and referred to at the time as the "Pfizer Tract." A site plan revision dated February 15, 1996 subsequently became the site drawing. The site plan, original application cover letter, DCM Form MP-3 and original Permit are attached hereto. Original exhibits No. 9 (DPM-4) and 11 (DPM-6) have been combined into a drawing dated April 14, 2009 (also attached) which depicts variance items requested in red, existing development in black, and permitted but not yet constructed items in blue. A detail of the road cross section in relation to the 30 foot marina buffer showing typical road slope away from the marina is included on this drawing.

As stated in the attached cover letter dated October 16, 1995, this marina project was to be a phased development over a period of years. Per Form MP-3 the Permit allowed 112,900 square feet of impervious surface within the 75 foot AEC. (At that time

there was no requirement for the 30 foot marina buffer.) The south and west sides of the marina were depicted as 100% impervious coverage within 30 feet of the marina. Applicant submits that the requested access road and marina landings (if included) will yield an impervious coverage of 91,000 square feet, well below the permitted AEC impervious limitation of 112, 900 square feet.

Bald Head Island Limited believes that the five marina landings should be considered water dependent necessities. DCM has declined this interpretation. However, Applicant submits that if both the landings and access road are evaluated in the context of the total originally permitted impervious coverage and stormwater characteristics at this site granting of the variances is warranted. Limitation of impervious coverage to the least amount reasonably required is a major way to satisfy stormwater concerns. Bald Head Island Limited has extensive experience in the construction of minimally invasive roads given to the use of golf carts as the means of personal transportation on its Bald Head Island development. The requested eight foot surface honors that approach, while recognizing that a minimum amount of surface rigidity is required to support heavy emergency vehicles. (Use of turf stone or grass pavers was considered but rejected in light of this need.) However, the surrounding natural sands are capable of infiltrating water at a rate of 20 inches per hour.

The proposed road detail calls for a cross-slope road surface which diverts rainfall away from the marina. NPDES Phase II Stormwater Rules focus on a 1 ½ inch storm event. In the case of an 8 foot wide road this amounts to 1 cubic foot of rain water per foot of road. The rock base plus asphalt pavement will place the road surface at approximately 5 inches above natural grade. A 2 foot wide area of flat ground with a 3 horizontal to 1 vertical foot side slope to the road is sufficient to hold the 1 cubic foot of water, but it would infiltrate into the ground more quickly than it could build up. We submit that infiltration is sufficient to control a 100 year 24 hour storm (.61 inches per hour of intensity) whereas requirements are only for the 1 year 24 hr storm event (.15 inches per hour of intensity). In recent years the State has encouraged infiltration type systems including infiltration basins, bio-retention basins, and rain gardens. In this case the soils are of a quite porous sandy nature such that even the naturally vegetated road shoulder will control the 1 ½ inch rain event. The area around the marina has a low density stormwater permit (SW8-071004) which does not require additional treatment. We also plan a 3 foot buffer between the marina bulkhead and the 6 foot perimeter boardwalk, planted with native grasses and wildflowers.

In the larger context the Applicant has made other efforts to minimize stormwater impacts. The main parking area was originally permitted for 22 acres of clear cut parking sheet flowing to a wet pond, but now will utilize a number of treed infiltration basins which add aesthetics and take advantage of the natural properties of the sandy soil. Many mature trees have been transplanted as opposed to removed. The site and marina pump out station were originally permitted for septic system, however pursuant to agreements with the City of Southport sewer lines have been constructed allowing access to a waste water treatment plant.

In summary Bald Head Island Limited believes that the marina structures that are the subject of this Variance Request constitute site impervious coverage that is significantly below (20%) the amount originally permitted, while improving overall safety and operation of the marina. The minimal width access road, designed with a high infiltration rate into naturally vegetated sandy soils, presents minimal and entirely acceptable impacts upon the adjacent waters in line with both the letter and spirit of applicable regulations.



State of North Carolina

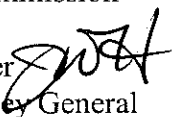
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

Reply to:
Jennie Wilhelm Hauser
Environmental Division
Tel: (919)716-6600
Fax: (919)716-6767
jhauser@nedoj.gov

ROY COOPER
ATTORNEY GENERAL

MEMORANDUM

TO: Coastal Resources Commission

FROM: Jennie Wilhelm Hauser 
Special Deputy Attorney General

DATE: December 12, 2008

RE: Contested Case Hearing for:
John S. Stirewalt, Architect, Agent for V. Parker Overson, Landowner v. DCM,
08 EHR 1090

The above referenced contested case will be reported to the Commission at its February 11-13, 2009 meeting. Since you will exercise your quasi-judicial duty in this proceeding, the rule forbidding ex parte communication applies as well as the CRC's Internal Operating Procedures. No party nor its representative may discuss the case with you unless all parties have an opportunity to participate in the discussion. The parties include the Division of Coastal Management and its staff. You are required to make your decision based upon the information in the Official Record and no other source of information. For that reason, it is advisable to avoid discussing the case with any person other than members of the Commission and your counsel. You may refer persons who attempt to discuss the case with you to me.

You will be receiving the Official Record and any exceptions soon.

Index
Stirewalt, V. Parker Overton
v.
DCM
08 EHR 1090

Official Record from the Office of Administrative Hearings

Transcript of Hearing Held August 15, 2008 1

Decision November 24, 2008 190

Section I

Petition 205

Notice/Orders 210

Section II

Respondent’s Prehearing Statement 217

Petitioner’s Prehearing Statement 222

Respondent’s Motion to Dismiss 228

 Exhibit A CAMA Permit No. 08-013 Denial Letter 232

Petitioner’s Memorandum of Law in Opposition to Motion to Dismiss 234

Response to Motion to Dismiss 245

Order denying Respondent’s Motion to Dismiss 262

Section III

Request for Hearing 266

Notices 269

Subpoenas 276

Section IV

Recommended Decision 284

Respondent’s Proposed Decision 293

Section V

Petitioner’s Exhibits 319

Respondent’s Exhibits 327

Respondent's Oversized Exhibits 20, 21 and 29
will be made available by calling Beth Warren 919/716-6945
NCDOJ Environmental Division

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

JOHN S. STIREWALT, ARCHITECT,)
AGENT FOR B. PARKER OVERTON,)
LANDOWNER,)
)
)
Petitioner,)
)
vs.) Case No. 08 EHR 1090
)
NC DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES, DIVISION)
DIVISION OF COASTAL MANAGEMENT,)
)
Respondent.)

Bolivia, North Carolina
August 15, 2008
9:00 a.m.

**ADMINISTRATIVE HEARING
TRANSCRIBED FROM AN OPEN-MICROPHONE RECORDING**

The above-entitled matter came on for hearing before The Honorable Joe L. Webster, Administrative Law Judge Presiding, on the 15th day of August, 2008, in Courtroom Number 6 of the Brunswick County Courthouse, Bolivia, North Carolina, commencing at 9:00 a.m.

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APPEARANCES

APPEARING ON BEHALF OF THE PETITIONER:

Hopf and Higley, PA, by
James F. Hopf, Esq.
1694 East Arlington Boulevard, Suite E
Greenville, North Carolina 27858

APPEARING ON BEHALF OF THE RESPONDENT:

North Carolina Department of Justice, by
Elizabeth Jill Weese, Esq.
Assistant Attorney General
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

Reporter's Note: Quoted material is reproduced as read or
quoted by the speaker. Proper names are spelled
phonetically unless spelled into the record.

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I N D E X

PAGE NO.

PARKER OVERTON

Direct Examination by Mr. Hopf.....	9
Cross-Examination by Ms. Weese.....	14
Redirect Examination by Mr. HOpf.....	16

JOHN STIREWALT

Direct Examination by Mr. Hopf.....	18
Cross-Examination by Ms. Weese.....	36
Redirect Examination by Mr. Hopf.....	51
Recross-Examination by Ms. Weese.....	59

ROB LINCOLN MAIRS

Direct Examination by Mr. Hopf.....	60
Cross-Examination by Ms. Weese.....	71
Redirect Examination by Mr. Hopf.....	72
Recross-Examination by Ms. Weese.....	74

CHRISTINE BOUFFARB

Direct Examination by Mr. Hopf.....	75
Further Direct Examination by Mr. Hopf.....	83

OPENING STATEMENT by Ms. Weese.....	87
-------------------------------------	----

CHRISTINE BOUFFARB (recalled)

Direct Examination by Ms. Weese.....	92
Cross-Examination by Mr. Hopf.....	110
Redirect Examination by Ms. Weese.....	114

1
2
3
4
5
6
7
8
9
10
11
12
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14
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20
21
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24
25

I N D E X

(continuing)

PAGE NO.

ROB LINCOLN MAIRS (recalled)

Direct Examination by Ms. Weese..... 115

Cross-Examination by Mr. Hopf..... 129

Further Cross-Examination by Mr. Hopf..... 143

MICHAEL TED TYNDALL

Direct Examination by Ms. Weese..... 146

Cross-Examination by Mr. Hopf..... 164

Further Cross-Examination by Mr. Hopf..... 174

CLOSING ARGUMENT by Mr. Hopf..... 177

CLOSING ARGUMENT by Ms. Weese..... 183

CERTIFICATE..... 189

- - - - -

E X H I B I T S

	<u>PETITIONER'S EXHIBIT</u>	<u>IDENTIFIED/OFFERED/RECEIVED</u>		
1				
2				
3	1 CAMA application	27	85	85
4	2 3/18/08 letter from Bouffard	33	85	85
5	to Stirewalt			
6	3 3/25/08 letter from Stirewalt	33	85	85
7	to Bouffard			
8	4 4/9/08 letter from Bouffard	35	85	85
9	to Stirewalt			
10	5 3/10/08 invoice from Stirewalt	35	85	85
11	to Overton			
12	6 Plan drawings for pool	28	85	85
13	7 Engineer drawing for pool	29	85	85
14	<u>RESPONDENT'S EXHIBIT</u>			
15	1 Photograph	117	120	120
16	2 Photograph	117	120	120
17	3 Photograph	14	122	122
18	4 Photograph	121	122	122
19	5 Photograph	121	122	122
20	6 Photograph	121	122	122
21	7 Photograph	122	128	128
22	8 Photograph	123	128	128
23	9 Photograph	123	128	128
24	10 Photograph	124	128	128
25	11 Photograph	126	128	128

E X H I B I T S

(continuing)

3	<u>RESPONDENT'S EXHIBIT</u>	<u>IDENTIFIED/OFFERED/RECEIVED</u>		
4	12 Photograph	126	128	128
5	19 CAMA minor permit application	93	106	106
6	20 Site plan submitted with	101	106	106
7	application			
8	21 Structural drawing submitted	50	106	106
9	with application			
10	22 Notice to adjacent landowner	94	106	106
11	23 Notice to adjacent landowner	94	106	106
12	24 Notice to adjacent landowner	95	106	106
13	certified receipts			
14	25 Notice of filing of	96	106	106
15	application for CAMA minor			
16	development permit			
17	26 Affidavit of publication of	96	106	106
18	notice of filing application			
19	for CAMA minor development			
20	permit			
21	27 3/18/08 additional information	99	106	106
22	letter			
23	28 3/25/08 letter from Stirewalt	103	106	106
24	29 Site plan submitted by	103	106	106
25	Stirewalt			

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E X H I B I T S

(continuing)

	<u>RESPONDENT'S EXHIBIT</u>	<u>IDENTIFIED/OFFERED/RECEIVED</u>			
	30	3/31/08 notice to extend	104	106	106
		time to grant or deny			
		CAMA permit			
	31	4/9/08 notice letter of	105	106	106
		denial of CAMA minor permit			

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Thereupon, the following proceeding was held:

THE COURT: We're ready to go on record in the matter of John S. Stirewalt, Architect Agent for B. Parker Overton, Landowner, Petitioner versus North Carolina Department of Environment and Natural Resources, Division of Coastal Management, 08 EHR 1090.

James F. Hopf represents the Petitioner in this matter and Elizabeth J. Weese, Assistant Attorney General from the North Carolina Department of Justice, represents the Respondent.

Mr. Hopf, if you are ready to call your first witness, you may do so.

MR. HOPF: Thank you, Your Honor. Petitioner would call Mr. Parker Overton.

THE COURT: Place your left hand on the Bible and raise your right hand.

- - - - -

PARKER OVERTON,
a witness called on behalf of the Petitioner, being first duly sworn in the above-entitled matter, was examined and testified on his oath as follows:

THE COURT: All right. You may be seated.

1 MR. HOPF: May I proceed, Your Honor?

2 THE COURT: Yes, you may.

3 MR. HOPF: Thank you.

4 **DIRECT EXAMINATION**

5 **BY MR. HOPF:**

6 Q. Would you state your name for the Court, please.

7 A. My name is Parker Overton.

8 Q. Mr. Overton, where do you live?

9 A. In Greenville, North Carolina.

10 Q. How long have you lived in Greenville?

11 A. Sixty-four years.

12 Q. Do you own a piece of property and a house on

13 Figure Eight Island?

14 A. I do.

15 Q. What is the address - street address for that

16 property?

17 A. It's 13 Comber Road.

18 Q. How long have you owned that property?

19 A. Since 1994.

20 Q. When you purchased that property, was it a vacant

21 property or was the home already there?

22 A. It was a vacant property. I built there.

23 Q. Okay. And then when did you buy it versus when

24 you built the home?

25 A. I built immediately. I had another piece of

1 property across the street that I had bought and -
2 I bought that one in 1994. Let me correct that.
3 I bought it in 1994 and sold it in 1996, and I
4 bought this one in 1994 and built in 1995.

5 Q. All right. Do you - you do not have a swimming
6 pool on that property, correct?

7 A. No sir.

8 Q. All right. At some point, did you become
9 interested or become aware that you could put a
10 pool on that property?

11 A. I found out in February of this year, I could put
12 a pool on that property.

13 Q. And after finding that out, did you retain John
14 Stirewalt to pursue the design and architecture of
15 the pool?

16 A. Well, he's the way I found out about it. I was
17 concerned, you know, with the erosion because at
18 Figure Eight we found out over the years there was
19 what they call a rapid erosion permit, and then -
20 but we were never told about it. We were always
21 told about the permit that we could not do
22 anything to our property.

23 MS. WEESE: Objection to the hearsay,
24 Your Honor.

25 THE COURT: Objection sustained.

1 Q. Okay. Let me just try to ask you a few more
2 questions. At some point - well, at some point,
3 you decided to pursue putting a pool on the
4 property, correct?

5 A. Back in February.

6 Q. Okay. And you retained Mr. Stirewalt to do the
7 design or to pursue that for you?

8 A. Well, I can't tell the rest of the story unless I
9 finish my sentence I had a few minutes ago.

10 Q. Okay. Well, let me ask you this: You hired
11 Mr. Stirewalt to pursue a permit?

12 A. Mr. Stirewalt designed my original house.

13 Q. Okay.

14 A. Okay. And I was under the impression that I may
15 have to move my house, so I wanted to find out
16 what I could do with the existing structure that
17 was there. If I could - you know, if I had to
18 move the house, if I could put a swimming pool on
19 the property, if I could keep a deck on the
20 property, and at that time, Mr. Stirewalt called
21 me back - he said, "I'll check into it." He
22 called me back and says, "Parker, I found out that
23 you can have a swimming pool now."

24 And I said, "You're kidding?"

25 He said, "No. You can have a swimming pool

1 now."

2 And I said, "Well, what do you need to do?"

3 He said, "You need to get a - you know, the
4 people from CAMA to come out to take a look at the
5 property and establish the area of established
6 vegetation." So I told him to do that.

7 And a person came out. I do not know the
8 name. I mean the people here do, and at that
9 time, I said, "What do we need to do now?"

10 He said, "We have to have plans drawn."

11 I said, "All right. How much is that?"

12 He said, "Twelve thousand five hundred
13 dollars."

14 And so that's the end of story.

15 Q. Did you direct him to move forward, then?

16 A. I did. I did.

17 Q. Okay. With pursuing a permit under CAMA?

18 A. Permit under CAMA - actually, engineer drawings -
19 we had to have engineer drawings.

20 Q. All right. And you indicated that the cost for
21 the drawings or whatever Mr. Stirewalt did was
22 around twelve thousand five hundred dollars?

23 A. His cost for the drawings were twelve thousand
24 five hundred dollars - for his and the engineer
25 drawings.

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MR. HOPF: Your Honor, may I approach
the witness?

THE COURT: Yes, you may.

Q. Let me show you a document, and ask you if you've
ever seen that before?

A. Oh, yeah. My wife has too. She's the one that
paid the bill.

Q. Okay. And is that a bill from Mr. Stirewalt for
twelve thousand five hundred dollars for the
drawings that were - you've talked about?

A. This is his fee and the fee of the engineer.

Q. Okay. And you paid that bill?

A. Yes, sir.

Q. Okay. Thank you.

MR. HOPF: I'll offer this later, Your
Honor, through Mr. Stirewalt.

THE COURT: All right.

MR. HOPF: Okay. Mr. Overton, thank
you. That's all I have.

THE COURT: Cross-examination?

MS. WEESE: Briefly, Your Honor. May I
approach the witness?

THE COURT: Yes, you may.

- - - - -

CROSS-EXAMINATION

BY MS. WEESE:

Q. Good morning, Mr. Overton.

A. How are you doing today?

Q. Doing very well, thank you. My name is Elizabeth Weese. I'm an Assistant Attorney General. I'm representing the Division of Coastal Management and the permitting officer in your case. And I want to show you what's been marked as Respondent's Exhibit 3 for identification.

MS. WEESE: And I apologize. I need to show it to your counsel first.

Q. And I want to ask you if you recognize that?

(RESPONDENT'S EXHIBIT NO. 3

(MARKED FOR IDENTIFICATION

A. Oh, yes, ma'am. That's the Cliff of Figure Eight.

Q. And is that the house that Mr. Stirewalt designed for you?

A. Yes, ma'am, it is.

Q. All right. Thank you very much.

A. And I also would like to add, if you don't mind, is when I built this house, I had a one-hundred-foot pier that went out to the front. I thought you'd like to know this.

Q. Oh, my goodness. Well, that speaks volumes,

1 doesn't it? Thank you very much, Mr. Overton.

2 I have one more point of clarification, Mr.
3 Overton. Was that a pier - the hundred-foot-
4 pier - or a beach accessway?

5 A. No. It was my pier.

6 Q. It was a pier?

7 A. Yeah. In fact, if I had known we were going to
8 have pictures, I would have brought my pictures
9 because, you know, what does the Bible say about
10 the man who builds his house upon the sand and the
11 one who builds upon the rock?

12 I mean I would have never bought that
13 property if I didn't have a couple of hundred feet
14 of sand in front of the house for dunes, which I
15 mentioned to you earlier about the rapid erosion
16 permit, and then the next permit was, you had to
17 wait until the almighty Atlantic Ocean got within
18 twenty feet of your front door. And that was
19 the - the reason for the sandbags.

20 Q. Thank you. Thank you, sir.

21 MR. HOPF: Any additional questions?

22 MS. WEESE: No additional questions.

23 THE WITNESS: Your Honor, may I make a
24 statement while I'm here, sir?

25 THE COURT: You have to respond in

1 connection with what the lawyers ask you. Is
2 there any redirect?

3 **REDIRECT EXAMINATION**

4 **BY MR. HOPF:**

5 Q. Mr. Overton, do you have anything else to add?

6 A. I don't want to waste anybody's time here. I just
7 want to get what's right, and I respect the time
8 that - Your Honor, that you have to be here today
9 and I got up at four-fifty this morning and left
10 Greenville to drive here today.

11 But just to do what's right for all involved.
12 I mean, if I can have a swimming pool and the law
13 says we can have a swimming pool, let's put a
14 swimming pool in. If I can't have a swimming
15 pool, let's don't do it and give me my twelve
16 thousand five hundred dollars back, and everybody
17 will be happy. So it's not a big argument here of
18 who is right and who is wrong. But from the
19 bottom of my heart, I'll be - I need to tell you
20 how I feel if you'd like to hear it.

21 Q. Mr. Overton, let me ask you this: Is it your
22 understanding that the rules of North Carolina
23 allow you to put a swimming pool in on that
24 property?

25 A. Yes, or I wouldn't have spent twelve thousand five

1 hundred dollars.

2 Q. Exactly. And that's why you hired Mr. Stirewalt
3 and pursued that and paid that amount of money
4 because your understanding was that the law
5 allowed you to put a pool in, correct?

6 A. Right.

7 Q. Okay. All right. Anything else you want to add?

8 A. I forgot where I was going. I feel that when you
9 look at this rule - and when John Stirewalt called
10 me back and said, "You can have a swimming pool."

11 And I said, "I can have a swimming pool?"

12 He said, "Yes, sir." He said, "Swimming
13 pools are exempt."

14 And I don't want to go into speculation, but
15 this is how I feel from the bottom of my heart.
16 That some CRC board member in the past whose
17 property may have been threatened put this rule
18 in, and I'm sorry that---

19 MS. WEESE: Your Honor, I have to object
20 to this speculation.

21 THE COURT: All right. Objection
22 sustained.

23 MR. HOPF: Thank you, Mr. Overton.

24 THE WITNESS: Thank you.

25 THE COURT: You may step down.

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THE WITNESS: Thank you, sir.

THE COURT: You may call your next witness.

MR. HOPF: Thank you, Your Honor. We would call Mr. John Stirewalt.

- - - - -

JOHN STIREWALT,
a witness called on behalf of the Petitioner, being first duly sworn in the above-entitled matter, was examined and testified on his oath as follows:

THE COURT: All right. You may be seated.

DIRECT EXAMINATION

BY MR. HOPF:

Q. Would you state your name for us, please.

A. John Stirewalt.

Q. Mr. Stirewalt, where are you from?

A. I live in Wilmington, North Carolina.

Q. What do you do there?

A. I'm an architect.

Q. How long have you been doing that kind of work?

A. Since 1972.

Q. To be a practicing, if you will, architect in North Carolina, do you have - are there certain - are there educational requirements or testing

1 requirements?

2 A. Yes. We're required to attend an accredited
3 architectural education facility and get our
4 degree and perform a number of hours of what we
5 call hard time and then apply to the State and
6 receive permission and then subsequently take our
7 state boards, and then there is continuing
8 education on top of that.

9 Q. So the education and the boards you just described
10 were something you did prior to starting practice
11 back in the early '70s?

12 A. That's correct.

13 Q. Since that time when you passed the boards, have
14 you on a yearly or some periodic basis maintained
15 your continuing education requirement?

16 A. Yes, I have. It's required to maintain our
17 license.

18 Q. All right. And you currently have that license to
19 practice as an architect here in North Carolina?

20 A. Yes.

21 Q. Have you maintained that consistently since back
22 in the '70s?

23 A. Yes.

24 Q. Okay. What does your - just generally your
25 architecture business or practice consist of on a

1 day-to-day basis in Wilmington just generally?

2 A. Until the past year when the economy turned down,
3 we did primarily residential houses. I've done a
4 lot of homes out on Figure Eight, approximately
5 ninety - ninety-two homes out there. We do some
6 office retail, and we've done a couple of churches
7 and offices, but primarily residential.

8 Q. I would assume that, being in Wilmington, a large
9 part of your practice would involve homes that are
10 along the coast, is that true?

11 A. That's correct.

12 Q. Are there particular rules that apply for doing
13 architectural work in coastal areas, for example,
14 as opposed to inland areas?

15 A. Yes. In all areas of our design and construction,
16 we are governed by the laws of North Carolina and
17 the National Building Code, and there's a specific
18 section regarding inlet areas and high hazard
19 ocean areas along the coast for the design of
20 buildings that are in that area.

21 Q. What is a high hazard coastal area?

22 A. It's an area that's mapped out by the Coastal Area
23 Management folks. We're just told where they are,
24 and we're given a set of rules to design by in
25 those areas.

1 Q. In your work as an architect, are you familiar
2 with the North Carolina Building Code?

3 A. Yes.

4 Q. What role, if any, does that code play in your
5 work as an architect?

6 A. The code is a minimum standard to which we must
7 design our buildings to. Specifically, in an
8 ocean hazard or high hazard area, there is another
9 set of specific rules governing the depth of
10 pilings and the wind forces and uplift forces and
11 a lot of things that go along with that to make a
12 structure stronger in the hundred-and-thirty-mile-
13 an-hour wind zone than there are for an inland
14 house, for instance.

15 Q. So if I understand you correctly, there are
16 specific requirements in the North Carolina
17 Building Code that are relevant to high hazard
18 coastal areas?

19 A. Yes.

20 Q. Did I understand you correctly, too, when you said
21 that the building code is a minimum standard which
22 you must follow?

23 A. That's correct.

24 Q. So it is not - it is not arbitrary or it is not
25 something you can choose to follow or not, is

1 that---

2 A. No. You must at least follow those requirements.

3 Q. Okay. Are you familiar with Mr. Overton's
4 property at 13 Comber Road on Figure Eight?

5 A. Very familiar.

6 Q. You've been to that property, correct?

7 A. Yes.

8 Q. Is that property in a high hazard coastal area?

9 A. Yes.

10 Q. So those specific requirements that you described
11 relative to the code apply to Mr. Overton's
12 property on Figure Eight?

13 A. That's correct.

14 Q. At some point, were you in contact with
15 Mr. Overton about his property on Figure Eight and
16 the installation of the swimming pool?

17 A. Yes. And back in February of this year, he called
18 me and told me that he was going to have to do
19 something about his house because of the erosion
20 there. It looked like he might have to move it.
21 But he asked me what he would be allowed to leave
22 on his property; could he leave his garage, for
23 instance; could he park there.

24 So I looked into the regulations and found
25 several things, and I called him and told him what

1 was allowed in that area, and one of those was a
2 swimming pool.

3 Q. Which - do you recall which section you looked at
4 when you found an exception for a swimming pool?

5 A. It was in the CAMA regulations, Section .0309, I
6 believe. I'm not---

7 Q. Do you have that with you today?

8 A. No. 15A NCAC 07H .0309, "Use Standards for Ocean
9 Hazard Areas: Exceptions."

10 Q. Okay. Are you looking at that now, or is that
11 just a---

12 A. That's a reference I made when I wrote to Parker
13 and explained to him my feelings on why a swimming
14 pool would be allowed up there.

15 MR. HOPF: May I approach the witness,
16 Your Honor?

17 THE COURT: Yes, you may.

18 Q. Mr. Stirewalt, let me hand you a document, and ask
19 if you've ever seen that before?

20 A. Yes, this looks familiar.

21 Q. What is that, if you know?

22 A. These are the CAMA regulations, "Use Standards for
23 Ocean Hazard Areas: Exceptions."

24 Q. Is that the section you're referring to with
25 regard to swimming pools?

1 A. Yes.

2 Q. Does that section of the CAMA code indicate that
3 swimming pools are an exception which are
4 allowable in the coastal areas?

5 A. Yes.

6 Q. Is that the section you were proceeding under with
7 regard to Mr. Overton's property and the
8 installation and design of the swimming pool?

9 A. Yes.

10 Q. Okay. Tell us what you did after Mr. Overton
11 retained you to move forward with regard to a pool
12 on his property.

13 A. As in every case when I do - design a residence
14 along the ocean area, I'll call my local CAMA
15 representative, who in this case was Christine
16 Bouffard, and explain the address and what we want
17 to do and ask them to come out and stake the CAMA
18 line for us. So I called Christine, and she said
19 that she wanted Rob Mairs to meet us up there
20 also.

21 Q. Why is it significant to have them stake a line?

22 A. That line historically is moved with erosion
23 forces, and they're the governing body who set the
24 lines for us.

25 Q. Does that - did you call that the vegetation line?

1 A. Well, I call it the CAMA line.

2 Q. Okay. Is that the same as the vegetation line?

3 A. In most cases, it is.

4 Q. Is that line significant with regard to where

5 you're allowed to build?

6 A. Absolutely.

7 Q. That's why that line is important?

8 A. Yes.

9 Q. And that is determined as far as actual physical

10 location on a piece of property by the CAMA

11 representatives?

12 A. Yes.

13 Q. That's not something you do?

14 A. As far as I'm concerned, it is. I don't know how

15 they set the line, but when they set the line,

16 it's gospel for us.

17 Q. But my point is, it's not something you do?

18 A. No.

19 Q. Or it's not something that the landowner would do?

20 A. No.

21 Q. Okay. It's up to the state officials, the CAMA

22 representatives to do that?

23 A. Yes.

24 Q. All right. Did they come out pursuant to your

25 request and---

1 A. Yes, like, the next day or so.

2 Q. Who came out?

3 A. Christine Bouffard and Rob Mairs.

4 Q. Okay. Did you indicate to them why you were
5 asking them to come out, in other words, that you
6 were interested in a swimming pool?

7 A. Yes. I explained to them at that time that the
8 owner desired a swimming pool on his property and
9 that I requested them to stake a vegetation line
10 for me. At that point, Rob Mairs picked a stake
11 up and proceeded to set the vegetation line, and I
12 went over with a tape measure. And he and I both
13 measured the distance from the first piling line
14 of the structure of the house so that we would
15 have a reference we could always refer to, and
16 that was the establishment of the vegetation line.

17 Q. Okay. At the time that they came out to stake the
18 line, had you submitted an application for a minor
19 development permit for the pool?

20 A. No. I needed the vegetation line established
21 before I could proceed with the CAMA application.

22 Q. Did you subsequently submit an application for a
23 permit?

24 A. Yes.

25 MR. HOPF: Your Honor, may I approach?

1 THE COURT: Yes, you may.

2 A. (continuing) Let me explain also that while Rob
3 and Christine were there and I explained to them
4 we were going to build a swimming pool, Rob asked
5 me to present drawings for the pool that I
6 proposed along with the site plan when I made the
7 application. It's not normal when we do a
8 residence, for instance, that we design a house
9 before we apply for the CAMA permit. We just do a
10 footprint. But in this case, they wanted to see
11 the drawings along with the original CAMA
12 application.

13 Q. All right. I'm going to hand you what I've marked
14 as Exhibit 1, and ask you if you can identify
15 that?

16 (PETITIONER'S EXHIBIT NO. 1

17 (MARKED FOR IDENTIFICATION

18 A. Yes. This looks like a copy of my original CAMA
19 application.

20 Q. It consists of two pages?

21 A. Yes.

22 Q. Is that your signature on the bottom of page 2?

23 A. Yes.

24 Q. On behalf of - as an applicant on behalf of the
25 landowner, correct?

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A. That's correct.

Q. And this pertains to Mr. Overton's property that we've been talking about this morning?

A. At 13 Comber, yes.

Q. And you just testified that in addition to this application, you submitted detailed design drawings, is that right?

A. That's correct.

Q. And that was at the request of the CAMA representative?

A. Rob Mairs.

Q. Which was somewhat unusual, is that right?

A. Yes. I mean we don't have to submit drawings for a house when we apply for a CAMA permit.

Q. All right. Mr. Stirewalt, I hand you what I've marked as - for identification as Exhibit Number 6. Can you identify that?

(PETITIONER'S EXHIBIT NO. 6)

(MARKED FOR IDENTIFICATION)

THE COURT: Did you say 6?

MR. HOPF: Yes, sir. I'm a little bit out of order.

THE COURT: If it's okay, I'm going to put 6 on this just so I can follow---

MR. HOPF: Hopefully, I'll catch back

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up.

THE COURT: All right.

Q. Can you identify that, Mr. Stirewalt?

A. Yes. This is a plan drawing for the swimming pool prepared by my structural engineer.

Q. And that's for Mr. Overton's property, correct?

A. Yes.

Q. I hand you, Mr. Stirewalt, what I've marked for identification as Number 7, and ask you if you can identify that?

(PETITIONER'S EXHIBIT NO. 7)

(MARKED FOR IDENTIFICATION)

A. Yes. This is, again, a drawing prepared by my structural engineer. It's a cross section through the swimming pool showing the structure of the pool itself.

Q. Are these drawings what you submitted with the CAMA application?

A. Yes.

Q. For their consideration on this permit, correct?

A. Yes.

Q. All right. When you discussed this plan for approval with the CAMA representatives, specifically Ms. Bouffard and Mr. Mairs, did you talk to them at all about the code requirements

1 for the design and construction?

2 A. Yes. I didn't try to hide anything at all. I
3 told Rob - I said, "Look. We want a swimming
4 pool. It's allowed under the code." I, in fact,
5 had a copy of the code that showed that swimming
6 pools were exempt up to the vegetation line, and
7 he agreed. And I told him - my exact words were,
8 "I can't set a bathtub out here and meet the code.
9 I've got to design a swimming pool that meets all
10 the guidelines, as I understand them, for a high
11 hazard area along the coast structurally."

12 Q. What did you mean when you say you told him you
13 couldn't just set a bathtub out there?

14 A. When we seal a set of drawings that we prepared,
15 we're stating that, to the best of our knowledge,
16 that structure will at least meet the minimum
17 requirements of all the codes involved that we
18 design under. Again, those are minimum standards,
19 and we don't want to design something that's going
20 to be washed away with the second wave.

21 Q. When you say "a bathtub," you're using that as an
22 analogy for a pool - a pool that you just sit in
23 the ground?

24 A. Yes.

25 Q. As opposed to a pool that's designed, as per your

1 plans, to be anchored into the ground?

2 A. That's correct.

3 Q. Is the concern that a pool - a liner pool, I'll
4 call it, bathtub-type, sitting in the ground would
5 be washed out?

6 A. Oh, absolutely. A section of the code that we
7 fell under was--- Let's see. "The design of this
8 pool will require compliance with the relevant
9 provisions of the North Carolina Building Code.
10 Section 16.24 of the code requires designs to
11 comply with ASCE 24 in coastal high hazard areas.
12 Section 9.5 of the ASCE 24 addresses pools and
13 states, 'Inground and aboveground pools shall be
14 designed to withstand all flood-related loads and
15 load combinations.' This requires," according to
16 my structural engineer - they're the ones who do
17 the technical analysis. I don't do that. That's
18 why I hire them. "This requires a pile-supported
19 concrete structure or similar substantial
20 structure that can withstand buoyancy forces,
21 lateral forces, and other considerations."

22 Q. Are buoyancy forces, forces that would push it
23 up---

24 A. Yes.

25 Q. ---from the water table?

1 A. Yes.

2 Q. Okay. Therefore, the need to anchor it down, is
3 that right?

4 A. Very substantially, yes.

5 Q. Because of the coastal conditions?

6 A. That's correct.

7 Q. What is the ASCE that you mentioned? When you
8 said ASCE 24 for high hazard coastal areas, is
9 that another code?

10 A. That's part of a code that the international code
11 refers us to from the section of high hazard area
12 design.

13 Q. Is that incorporated into the North Carolina
14 Building Code?

15 A. Yes.

16 Q. Okay. And you indicated or did you indicate that
17 when you described this to Mr. Mairs, he
18 acknowledged the exception in Section 309 for
19 swimming pools in coastal areas?

20 A. Yes. Yes.

21 Q. Okay. Did you then prepare and have the drawings
22 prepared that we've already identified here this
23 morning and submit that to the CAMA
24 representatives?

25 A. Yes.

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MR. HOPF: Your Honor, may I approach?

THE COURT: Yes.

Q. Let me hand you what I've marked for identification as Exhibit Number 2, and ask you if you can identify that?

(PETITIONER'S EXHIBIT NO. 2)

(MARKED FOR IDENTIFICATION)

A. Yes. This is a letter from Christine Bouffard, March 18th, saying that we originally accepted your application under the impression that it was complete, and she asked me to prepare several other items to go along with the application, which we did.

Q. I hand you what I've marked for identification Exhibit Number 3, and ask you if you can identify that?

(PETITIONER'S EXHIBIT NO. 3)

(MARKED FOR IDENTIFICATION)

A. Yes.

Q. What is that?

A. It's a letter I wrote to - in response to Christine on March 25th. I enclosed drawings reflecting the changes that she had requested in her March 18 letter and items 1 through 4 were noted on the plans.

1 Q. So was that March 25th letter that you wrote to
2 Ms. Bouffard in response to her March 18th letter,
3 which is Exhibit 2?

4 A. Yes. She had stated in her March 18 letter that
5 it was her determination based on the drawings
6 that there were inconsistencies with the
7 limitations of the design for the swimming pool
8 and the use hazards on the shoreline policies.

9 And my response was that "My concern was
10 first noted at our on-site meeting on February
11 20th with you and Rob Mairs referencing those
12 issues. My response to these issues is the same
13 question I asked at that meeting, specifically
14 that Section .0309, 'Use Standards for Ocean
15 Hazard Areas,' excepted swimming pools."

16 And I mentioned, there again, that I had
17 mentioned before I couldn't just place a bathtub
18 out there, that it had to be substantially
19 designed structurally.

20 Q. What happens, Mr. Stirewalt, if you - as an
21 architect if you do not follow the building code?

22 A. I'd end up losing my license.

23 Q. Okay. Let me hand you, Mr. Stirewalt, what I've
24 marked as Exhibit Number 4 for identification, and
25 ask if you can identify that?

1 (PETITIONER'S EXHIBIT NO. 4

2 (MARKED FOR IDENTIFICATION

3 A. Yes. It's a letter dated April 9th, again, from
4 Christine Bouffard. It's the denial of our CAMA
5 permit that we applied for.

6 Q. So is this the response to the application for the
7 permit for Mr. Overton to put a pool on his
8 property?

9 A. Yes.

10 Q. And it was denied, correct?

11 A. Yes.

12 Q. Let me show you what I'll mark for identification
13 as Exhibit 5. We previously talked about this.

14 (PETITIONER'S EXHIBIT NO. 5

15 (MARKED FOR IDENTIFICATION

16 A. This is an invoice dated March 10th to Mr. Parker
17 Overton for my services and the services of my
18 structural engineer, twelve thousand five hundred
19 dollars, to design his pool.

20 Q. Was that paid by Mr. Overton?

21 A. Yes.

22 Q. Okay.

23 MR. HOPF: Thank you, Mr. Stirewalt.

24 That's all I have at this time. Ms. Weese
25 may want to ask you a few questions.

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THE COURT: Your witness, Ms. Weese.

MS. WEESE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. WEESE:

Q. Good morning, Mr. Stirewalt.

A. Good morning, Ms. Weese.

Q. Now you agree that this property is in the ocean hazard area, don't you?

A. Yes, ma'am.

Q. Okay. And do you still have a copy of 15A NCAC 7H .0308 up there? Oh. Excuse me. I misspoke. I wanted to know if you had a copy of .0309 up there with you.

A. Yes.

Q. Okay. Now would you read to yourself subparagraph (a) of that rule.

A. Yes.

Q. Looking at 15A NCAC .0309 subparagraph (a), and here we are dealing with exceptions in ocean hazard areas. Do you see where it says, "The following types of development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of this subchapter if all other provisions of this subchapter and other state and local regulations are met"?

1 A. Yes.

2 Q. Isn't that what subparagraph (a) says?

3 A. Yes.

4 Q. Okay. All right. Now drop down after the nine
5 exceptions are iterated. Will you take a look at
6 the paragraph following the ninth exception, which
7 is swimming pools?

8 THE COURT: Where are you referring to
9 again?

10 MS. WEESE: 15A NCAC .0309 subparagraph
11 (a)(9). And I would be happy to provide the
12 Court with a copy if that would be helpful.

13 THE COURT: I'm not seeing it here, so
14 you might want to do that.

15 MS. WEESE: Okay. May I approach, Your
16 Honor?

17 THE COURT: Yes.

18 MS. WEESE: Thank you.

19 Q. What does that paragraph below paren (9),
20 "swimming pools," say, Mr. Stirewalt?

21 A. "In all cases, this development shall be permitted
22 only if it's landward of the vegetation line;
23 involves no alteration and removal of primary or
24 frontal dunes which would compromise the integrity
25 of the dune as a protective landform or the dune

1 vegetation; as overwalks to protect any existing
2 dunes; is not essential to the continued existence
3 or use of an associated principal development; is
4 not required to satisfy minimum requirements of
5 local zoning, subdivision or health regulations;
6 and meets all other non-setback requirements of
7 this chapter."

8 Q. And I'd just like to emphasize that last sentence
9 says, "and meets all other non-setback
10 requirements of this subchapter," doesn't it,
11 Mr. Stirewalt?

12 A. Yes, ma'am.

13 Q. Okay. So it's not a blanket exception for
14 campsites, parking areas, elevated decks, beach
15 accessways, gazebos, and swimming pools in .0309,
16 is it, Mr. Stirewalt?

17 A. No. But when I read that paragraph---

18 Q. Thank you. Thank you. Yes or no is all---

19 A. ---it appears that we've met all the things that
20 are required in it.

21 Q. You've answered my question. Thank you.

22 THE COURT: He can explain his answer.

23 Do proceed. I didn't hear your response.

24 THE WITNESS: Your Honor, she asked me
25 if this paragraph pertained to us, and I

1 think it did, and we met all the requirements
2 in that paragraph, so we were excepted.

3 Q. Now, Mr. Stirewalt, the reason that what you've
4 been referring to as the CAMA line - and sometimes
5 referred to as the first line of stable natural
6 vegetation - is important is because the general
7 rule is that no development is allowed within that
8 oceanfront setback, isn't that true?

9 A. Yes, without the exceptions.

10 Q. Precisely. Thank you. Without the exceptions.
11 And you've indicated that you have done quite a
12 bit of residential building along the coast, isn't
13 that true?

14 A. Yes, ma'am.

15 Q. Okay. Now are you familiar or aware of North
16 Carolina Administrative Code 15A NCAC 7H .0308,
17 and that is the section of the state guidelines
18 for areas of environmental concern, "Specific Use
19 Standards for Ocean Hazard Areas"?

20 MS. WEESE: And, Your Honor, I also have
21 a copy of that statutory section if that
22 would be helpful.

23 THE COURT: That would be helpful.
24 Anything you have that lets me see---

25 MS. WEESE: May I approach?

1 THE COURT: Yes.

2 MS. WEESE: Thank you.

3 THE COURT: ---lets me see the wording
4 would be helpful.

5 MS. WEESE: Do you have a copy---

6 A. To answer your question, I've read it. I'm not
7 intimately familiar with it. There's a lot of
8 information in that document.

9 MS. WEESE: Well, may I approach, Your
10 Honor, the witness?

11 THE COURT: Yes.

12 MS. WEESE: Thank you.

13 Q. Mr. Stirewalt, for the record, I'm showing you a
14 copy of the "Specific Use Standards for Ocean
15 Hazard Areas," 15A NCAC 7H .0308.

16 A. Yes.

17 Q. You agree. All right. All right. Now under the
18 first subparagraph (a), what does that deal with?
19 I'm sorry.

20 MR. HOPF: I have an extra copy,
21 Ms. Weese, if you'd like him to have one.

22 MS. WEESE: Oh. Is it of the entire
23 rule?

24 MR. HOPF: Of .0308, if that will help
25 you.

1 MS. WEESE: Well, that would help me, I
2 think. Thank you very much.

3 Q. Okay. All right. Subparagraph--- And I'll
4 return to my chair.

5 Mr. Stirewalt, subparagraph (a), what does
6 that address?

7 A. Wait a minute. He doesn't have the green on his
8 like you have. What page are you on?

9 Q. I'm on the---

10 MR. HOPF: I don't have her
11 highlighting. I'm sorry.

12 Q. I'm on the very, very first page, right under the
13 topic of the rule.

14 A. Okay. .0308, "Specific Use Standards for Ocean
15 Hazard Areas."

16 Q. Okay. And the first topic is subparagraph - is
17 paren (a) - paragraph (a). What does that deal
18 with?

19 A. "Ocean Shoreline Erosion Control Activities."

20 Q. Okay. And if you would read on to subparagraph
21 (1) under that, what use standards - that involves
22 "Use Standards Applicable to all Erosion Control
23 Activities." If you would - what does---

24 A. I don't see what this has to do with the swimming
25 pool. I wasn't designing an erosion control

1 structure, so I mean I wasn't concerned with this.

2 Q. Mr. Stirewalt, will you please read paragraph -
3 subparagraph (B) - under .0308(a)(1)(B).

4 A. "Permanent erosion control structures may cause
5 significant adverse impacts on the value and
6 enjoyment of adjacent properties or public access
7 to and use of the ocean beach and, therefore, are
8 prohibited. Such structures include bulkheads,
9 seawalls, revetments, jetties, groins, and
10 breakwaters."

11 Q. Okay. Thank you very much. You can stop right
12 there. Now, Mr. Stirewalt, let's go back to when
13 you contacted Christine Bouffard, who is the local
14 permitting officer for New Hanover County, about
15 meeting you on Mr. Overton's property. Okay? Are
16 you with me?

17 I believe you testified that Ms. Bouffard,
18 the local permitting officer, met you on-site as
19 well as Mr. Rob Mairs, who is a field
20 representative in the Wilmington region with the
21 Division of Coastal Management, is that correct?

22 A. Yes, ma'am.

23 Q. Okay. Now other than making a line call, you
24 didn't specifically tell Ms. Bouffard what you
25 were interested in doing out there, did you?

- 1 A. Yes, ma'am, I did. I told them we were going to
2 put a swimming pool. I needed a vegetation line
3 set to see if there was room for the pool to fit
4 on the property.
- 5 Q. But you discussed many options that day with
6 Ms. Bouffard, didn't you, Mr. Stirewalt?
- 7 A. I was looking at all the exceptions, I think,
8 under there, but the main one was the swimming
9 pool because when I mentioned the swimming pool to
10 Mr. Overton, he said he would like to have a
11 swimming pool on his property.
- 12 Q. But when you spoke to Mr. Overton, that was after
13 you met on-site with Ms. Bouffard and Mr. Mairs,
14 is that correct?
- 15 A. No. I think we spoke before then, and then when I
16 met them was to get the information together for
17 the CAMA application - I think it was. I've got
18 information where we corresponded in February, and
19 I don't think I met Rob and Christine until March.
- 20 Q. Well---
- 21 A. I think those dates are correct.
- 22 Q. Actually, you met - it's Respondent's contention
23 and we'll show that you met with Ms. Bouffard and
24 Mr. Mairs on February 20th.
- 25 A. February 20th, that's correct.

1 Q. Does that help your memory?

2 A. That's correct. Yeah.

3 Q. All right. Great. Well, other than making -
4 asking that a line call be made that day, did you
5 ask for any other specific information? You
6 didn't ask for any other specific information from
7 Ms. Bouffard, did you?

8 A. I can't think of anything other than - I mean that
9 was our main intent, was to set a vegetation line.

10 Q. All right. And you didn't indicate to
11 Ms. Bouffard or Mr. Mairs where you were
12 considering siting a swimming pool were
13 Mr. Overton to choose to put one there, did you?

14 A. Yes, right up---

15 Q. On the day you met with them on-site?

16 A. ---to the vegetation line. That's why Rob and I
17 measured the dimension from the pile line of the
18 house to the vegetation line.

19 Q. So is it your testimony today that when you met
20 with Christine Bouffard and Rob Mairs on
21 Mr. Overton's property in February - on
22 February 20, 2008, you told them - you indicated
23 to them that you wanted to place a pool on the
24 vegetation line?

25 A. Right up to it, yes, ma'am.

1 Q. Right up to the - that's your testimony today?

2 A. Yes.

3 Q. Okay.

4 A. That's why I told I couldn't place a bathtub out
5 there. I know that they'll remember that.

6 Q. Now you didn't show them any site plans or
7 structural drawings that day, did you?

8 A. We hadn't prepared any. The first step is to set
9 the vegetation line. Then, normally, we just
10 apply for a CAMA application with a site plan.
11 Rob indicated to me, because of what I had
12 explained to him what I wanted to do, that he
13 needed structural drawings for the pool when I
14 made the original submittal for the CAMA
15 application.

16 Q. And---

17 A. So they were well-aware that I was going to place
18 a swimming pool there.

19 Q. You also told them that the house might be moved
20 back, didn't you, that day?

21 A. I told them that I had discussed several options
22 with Mr. Overton in the past. In fact, I think,
23 five or six years ago, we even looked at moving
24 his house across the street.

25 Q. Okay. So you did discuss moving the house. Did

1 you discuss possibly building - and you also
2 discussed maybe building a gazebo that day, didn't
3 you?

4 A. I can't recall. I think gazebo was one of the
5 exceptions listed also, but Mr. Overton did not
6 want a gazebo.

7 Q. But you discussed building a deck out there,
8 didn't you?

9 A. A deck around the pool, yes.

10 Q. All right. Now, Mr. Stirewalt, in addition to
11 those two pages of the CAMA application that I
12 believe we've identified as--- Well, I don't
13 think we've put a number next to it. I'm not
14 sure---

15 MS. WEESE: Do you have a number,
16 Mr. Hopf, for your - the CAMA minor permit
17 application?

18 MR. HOPF: Number 1.

19 MS. WEESE: That's 1. Okay. Thank you.

20 MR. HOPF: The actual application.

21 MS. WEESE: Okay.

22 Q. That is the application, and what that is, is a
23 photocopy of the CAMA minor application permit
24 that looked like this, is that correct,
25 Mr. Stirewalt?

1 A. Yes, ma'am.

2 Q. Okay. All right. And you filled that out as
3 Mr. Overton's agent, is that correct?

4 A. That's correct.

5 Q. All right. Now in addition to the structured
6 drawing for the pool--- Excuse me. Strike that.

7 You also submitted with that application a
8 site plan drawing, did you not?

9 A. Yes.

10 MS. WEESE: And may I approach, Your
11 Honor?

12 THE COURT: Yes, you may.

13 Q. So just to be clear, Mr. Stirewalt, isn't this the
14 site plan that you submitted with the application?

15 A. Yes, ma'am. It looks very familiar.

16 Q. And at some point later, you testified that you
17 submitted in response to - an additional
18 information letter from Ms. Bouffard and another
19 site plan drawing---

20 A. Right. We had shown---

21 Q. ---well, the same drawing, but---

22 A. We had shown tiles originally out around the pool
23 because the County allows us like four hundred
24 square feet of tile, so - but we changed that and
25 went to a drip-through decking.

1 Q. Okay. Let me---

2 MS. WEESE: I just want to show Mr. Hopf
3 what I'm showing you.

4 MR. HOPF: [Inaudible].

5 MS. WEESE: I'm about to ask him that.
6 I assume that it is.

7 MR. HOPF: That's fine.

8 MS. WEESE: Thank you very much.

9 Q. Now in addition to---

10 A. May I stand up and look at this?

11 Q. ---the original site plan--- Certainly. Be
12 comfortable.

13 ---now is this the drawing that you submitted
14 in response to her application letter?

15 A. Yes.

16 Q. Okay. And I note - is this your writing on this?

17 A. Yes.

18 Q. Okay. And what does that say?

19 A. "Beach access steps. Additional Info Request
20 Number 3."

21 Q. Okay. And, for the record, as you look at this
22 second site plan that's dated the 26th of March,
23 2006, and it's going to be marked Respondent's
24 Exhibit--- And, again, I'll have to check the
25 number for identification purposes. ---have you,

1 in fact, indicated on here in several places where
2 you're responding to the additional information
3 request?

4 A. Yes.

5 Q. Okay. That was your effort to be responsive?

6 A. Yes.

7 Q. All right. Thank you very much.

8 MS. WEESE: If I may have just one
9 moment, Your Honor.

10 (Thereupon, there was a pause in the
11 proceeding.)

12 Q. Didn't you also - correct me if I'm wrong - you
13 did not provide a structural drawing with the CAMA
14 application?

15 A. No. I did.

16 Q. For the pool?

17 A. Rob Mairs asked that I do that at the time of my
18 submittal.

19 Q. Okay. And that's Petitioner's Exhibit---

20 A. 6 and 7, I think. Which one's that?

21 MR. HOPF: I think that one's 7 in your
22 hand.

23 MS. WEESE: Okay. Yeah. I think it is,
24 and you've called the other one [inaudible].
25 Okay.

1 Q. Before I let you off the stand, Mr. Stirewalt, I
2 would just like to have you take a look---

3 MS. WEESE: Your Honor, may I approach
4 the witness?

5 THE COURT: Yes, you may.

6 MS. WEESE: Thank you, Your Honor.

7 Q. We've got your Exhibit 7, the structural drawing.
8 Just for illustrative purposes, I show you
9 Respondent's Exhibit 21---

10 MS. WEESE: And I hope we can coordinate
11 these numbers - the lawyers can.

12 Q. ---which I'm going to represent to you is an
13 enlargement of that same drawing.

14 (RESPONDENT'S EXHIBIT NO. 21

15 (MARKED FOR IDENTIFICATION

16 Q. Does that appear to you to be an enlargement of
17 that structural drawing?

18 A. Yes, ma'am.

19 MS. WEESE: Okay. All right. Thank you
20 very much, Mr. Stirewalt. I have -
21 Respondent has no further questions for this
22 witness.

23 THE COURT: Any redirect?

24 MR. HOPF: Yes, Your Honor, just
25 briefly.

REDIRECT EXAMINATION

1
2 BY MR. HOPF:

3 Q. Mr. Stirewalt, I'm going to try to hit a few
4 things just quickly that Ms. Weese asked you
5 about. First, if you'll look at Section .0309,
6 "Use Standards for Ocean Hazard Areas." That's
7 the one that has the exception number (9) for
8 swimming pools.

9 Right after exception number (9) for swimming
10 pools, Ms. Weese asked you about that paragraph
11 that begins "In all cases." You with me?

12 A. Yes.

13 Q. And is it your testimony that your design and your
14 work for Mr. Overton with regard to the excepted
15 swimming pool on his property complied with
16 those - with that paragraph - the provisions in
17 that paragraph of .0309?

18 A. That's correct.

19 Q. You were asked about the vegetation line or the
20 CAMA line, and you testified that there is
21 generally - the general rule is, there's no
22 development in the setback area---

23 A. That's correct.

24 Q. ---along the coast?

25 But there are exceptions to that, and those

1 are the exceptions that are set out in .0309,
2 correct?

3 A. Yes.

4 Q. And one of those is for a swimming pool?

5 A. That's correct.

6 Q. Under the CAMA regulations?

7 A. Yes.

8 Q. You were also asked about Section .0308 of the
9 CAMA regulations?

10 A. Yes.

11 Q. Do you have that in front of you?

12 A. (No audible response from witness.)

13 Q. Do you have that there? And was it your testimony
14 that you were not designing an erosion control
15 device for Mr. Overton; you were designing a pool,
16 is that right?

17 A. That's correct.

18 Q. Look at Section .0308, subpart (a), subpart (1),
19 capital (B). It starts out, "Permanent erosion
20 control structures." Are you with me?

21 A. Yes.

22 Q. All right. It talks about that permanent erosion
23 control structures are prohibited?

24 A. That's correct.

25 Q. "Such structures include," and it has a list

1 there. Do you know what a bulkhead is?

2 A. Yes.

3 Q. Were you designing a bulkhead for Mr. Overton?

4 A. No, sir.

5 Q. Do you know what a seawall is?

6 A. Yes.

7 Q. Were you designing a seawall for Mr. Overton?

8 A. No, sir.

9 Q. Do you know what a revetment is?

10 A. I've got a pretty good guess about it.

11 Q. Were you designing a revetment for Mr. Overton?

12 A. No.

13 Q. Do you know what a jetty is?

14 A. Yes.

15 Q. Were you designing a jetty for Mr. Overton?

16 A. No.

17 Q. Do you know what a groin is---

18 A. Yes.

19 Q. ---with regard to ocean control - erosion control
20 issues?

21 A. Yes.

22 Q. Were you designing a groin for Mr. Overton's
23 property?

24 A. No.

25 Q. Do you know what a breakwater is?

1 A. Yes.

2 Q. Were you designing a breakwater structure for
3 Mr. Overton?

4 A. No.

5 Q. And you testified, I believe, did you not, that
6 you specified the location for the proposed pool
7 to Mr. Mairs and/or Ms. Bouffard when they were
8 out there on-site?

9 A. Yes.

10 Q. And it's your testimony also that you could build
11 up to the vegetation line. It was not your
12 intention to cross the vegetation line, is that
13 right?

14 A. That's correct. We were landward of the
15 vegetation line.

16 Q. Landward of the vegetation line which is what the
17 regulations provide?

18 A. Exactly.

19 Q. And that's why it's important to have that
20 location staked out, so you don't cross it and go
21 into the prohibited area, is that right?

22 A. Absolutely.

23 Q. Are you aware--- There was some discussion and
24 questioning about Mr. Overton moving his house.
25 Are you aware whether or not, in fact, Mr. Overton

1 had obtained a permit to move his house several
2 years earlier?

3 A. We had talked about it. I honestly don't know if
4 we ever went ahead and got that permit or not. I
5 can't remember.

6 Q. Okay. If he, in fact, got a permit to move his
7 house, would that surprise you some years earlier?

8 A. No.

9 Q. And that would be consistent with discussions you
10 had had, correct?

11 A. Yes.

12 Q. All right. And, in fact, this issue with the pool
13 came up in the context of Mr. Overton saying,
14 "Well, what can I use the property for if, in
15 fact, I had to move my house?"

16 A. That's correct. That's how it all began.

17 Q. Okay. Let me ask you to look real quickly finally
18 at Section .0308 again. I want to ask you about
19 this because Ms. Weese brought this section up.
20 If you look on the third page - it says, "3 of 4,"
21 at the top right corner. This is .0308, and then
22 two-thirds of the way down, subsection (d) says,
23 "Building Construction Standards." Do you see
24 that?

25 A. Yes.

1 Q. Okay. Under number - subpart number (1), the
2 second sentence says, "Any building constructed
3 within the ocean hazard area shall comply with the
4 relevant sections of the North Carolina Building
5 Code including the Coastal and Flood Plain
6 Construction Standards and the local flood damage
7 prevention ordinance as required by the National
8 Flood Insurance Program." Do you see that?

9 A. Yes.

10 Q. And is that what you were complying or attempting
11 to comply with in following the building code for
12 the coastal hazard area for Mr. Overton's swimming
13 pool?

14 A. Yes.

15 Q. And the next sentence says, "If any provision of
16 the building code or a flood damage prevention
17 ordinance is inconsistent with any of the
18 following AEC standards, a more restrictive
19 provision shall control."

20 A. Yes.

21 Q. Did I read that correctly?

22 A. That's correct.

23 Q. And is that consistent with your testimony that
24 the building code is a must; it has to be
25 followed?

1 A. Yes.

2 Q. And if the building code sets out specific
3 stringent requirements for a pool in a coastal
4 area, you're required to follow it per the code
5 and per this CAMA regulation, are you not?

6 A. Yes.

7 Q. Did you - at the time that you began discussions
8 with Mr. Overton, would I be correct that you had
9 phone discussions with him?

10 A. Yes.

11 Q. You probably - well, let me ask you, did you also
12 have phone conversations with Ms. Bouffard and
13 Mr. Mairs about this property and going out to the
14 site and scheduling things?

15 A. My conversation was with Christine, and she
16 invited Rob, I think.

17 Q. Okay. So if we needed to, we could look at phone
18 records to pin down or corroborate dates that you
19 may have - you discussed these various issues with
20 Mr. Overton and Ms. Bouffard?

21 A. That's correct.

22 MR. HOPF: Okay. Thank you,

23 Mr. Stirewalt. That's all I have.

24 MS. WEESE: No redirect.

25 THE COURT: All right. I have just a

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question or two, I think.

Have you designed swimming pools for properties - similarly-situated properties on Figure Eight Island or any other place?

THE WITNESS: We designed the swimming pool for a house just completed last year, yes, sir, on Figure Eight Island.

THE COURT: And was a CAMA permit granted?

THE WITNESS: Yes, sir.

THE COURT: So how many similar situations have you had in the past five years?

THE WITNESS: CAMA permits being issued for houses we've designed along the coast?

THE COURT: With similar situations as this with swimming pools.

THE WITNESS: A hundred.

THE COURT: With swimming pools?

THE WITNESS: Oh, no. Not all of those had swimming pools.

THE COURT: I'm just talking about similar situations as we have here today.

THE WITNESS: Never one directly oceanfront to the vegetation line. We've

1 designed several within the vegetation line -
2 in the last five years, probably five.

3 THE COURT: All right. Whenever I ask a
4 question, either side may follow up with
5 whatever questions that you have concerning
6 them.

7 MS. WEESE: Your Honor, I have a
8 follow-up question.

9 THE COURT: All right. Let me finish.
10 How far away from here is this property?

11 THE WITNESS: I'm guessing thirty miles.

12 THE COURT: All right. Ms. Weese, you
13 may follow up at this time.

14 MS. WEESE: Thank you, Your Honor.

15 **REXCROSS-EXAMINATION**

16 **BY MS. WEESE:**

17 Q. Mr. Stirewalt, none of those five pools for which
18 you've received CAMA permits were placed on
19 concrete walls that were on pilings on the
20 oceanfront on Figure Eight Island, were they?

21 A. None of those went out to the vegetation line.
22 That was my response.

23 MS. WEESE: Thank you.

24 THE COURT: Any further questions?

25 MR. HOPF: No, Your Honor.

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THE COURT: You may step down. All right. You may call your next witness.

MR. HOPF: Thank you, Your Honor. Petitioner will call Mr. Rob Mairs.

THE HEARING ASSISTANT: What was the last name?

MR. HOPF: Mairs, if I'm pronouncing that correctly.

MR. MAIRS: Yes, sir. Mairs, M-a-i-r-s.

MR. HOPF: M-a-i-r-s.

- - - - -

ROB LINCOLN MAIRS,
a witness called on behalf of the Petitioner, being first duly sworn in the above-entitled matter, was examined and testified on his oath as follows:

THE COURT: You may be seated.

DIRECT EXAMINATION

BY MR. HOPF:

Q. Good morning, Mr. Mairs.

A. Good morning.

Q. How are you doing?

A. Doing all right. Hope you are too.

Q. I don't think we've ever had an occasion to meet. Tell us your name just for the record, please.

A. My name is Rob Lincoln Mairs.

1 Q. How are you employed?

2 THE COURT: Have him to spell his last
3 name first.

4 THE WITNESS: Last name is M-a-i-r-s.

5 Q. How are you employed, Mr. Mairs?

6 A. I'm employed by the North Carolina Department of
7 Environment and Natural Resources through the
8 Division of Coastal Management.

9 Q. On a daily basis, what does your job entail?

10 A. A typical day would be assisting contractors,
11 assisting property owners, and submitting
12 applications for general permits, major permits.
13 So I do a lot of coordination with people that
14 represent them, either engineers, consultants,
15 marine contractors. And then I am also
16 responsible for administrating biological field
17 investigation reports that are circulated
18 throughout different state and federal divisions
19 on proposed major development, and my territory is
20 New Hanover County.

21 And I also - excuse me - I also assist the
22 local permitting officers in each of the
23 governments in New Hanover County, which includes
24 New Hanover County, Wrightsville Beach, Carolina
25 Beach, and Kure Beach with their LPOs. So I work

1 with them almost on a daily basis as well.

2 Q. How long have you been in that role?

3 A. I've been with the Division for five years, sir.

4 Q. Do you have a particular title?

5 A. I am the field representative for New Hanover
6 County.

7 Q. Field representative for New Hanover County?

8 A. My title is field representative, and my territory
9 is New Hanover County.

10 Q. Have you been doing that field representative
11 covering New Hanover County for the five years?

12 A. Yes, sir. I also participated in other counties
13 when needed when we've had vacancies and such, so
14 I would float around every now and then, but
15 primarily, yes, sir, New Hanover County.

16 Q. The local - you mentioned a local permitting
17 officer. Did I get that correct?

18 A. Yes, sir.

19 Q. Is that like Ms. Bouffard?

20 A. Yes, sir. She is designated as a local permit
21 officer, LPO, as part of the Minor Permit Program
22 that we have with New Hanover County. So she is
23 one of the five or six LPOs that I assist and work
24 with and review applications to assist them
25 through the process, if needed.

1 Q. Is she employed - is her employer the County?

2 A. Yes, sir.

3 Q. New Hanover County?

4 A. Correct.

5 Q. Whereas your employer is the State, is that right?

6 A. Yes, sir.

7 Q. All right. But you, in your capacity with the
8 State, assist her in her capacity with the County
9 in dealing with these coastal issues, is that
10 correct?

11 A. That's correct. It's a contract. We have that we
12 train them through workshops. It's part of an
13 agreement that we have with the contract with New
14 Hanover County. And then our office receives CAMA
15 minor permit applications. Once they're
16 submitted, we receive those applications within
17 five days, which is part of the contract that we
18 have, so we have a chance to take a look at them
19 and get an extra set of eyes on them. And then in
20 certain cases, we'll assist the LPOs in unique
21 situations such as this.

22 Q. All right. And forgive me. I'm just trying to
23 get some understanding since you and I have not
24 had a chance to talk before today about this
25 matter. An application in this instance was

1 submitted by Mr. Stirewalt for the property owner
2 Mr. Overton. That application went to
3 Ms. Bouffard?

4 A. Correct.

5 Q. Is that right?

6 A. That's right. That's through their Minor Permit
7 Program, so she would be the LPO that was handling
8 any projects that are within Figure Eight Island,
9 so they would come to her. She was assigned that
10 area. When she receives an application for even a
11 site visit such as Mr. Stirewalt requested, a lot
12 of times, we'll come along and say, "Hey. We'll
13 help you out." And so a lot of times, before even
14 an application is submitted, we'll meet on-site
15 with the agent or the contractor.

16 Q. So in her position as LPO, you said that she
17 received training from the State through you-all
18 to do that?

19 A. Yes, sir. Yes, sir. Yes, we have annual
20 training.

21 Q. And, essentially, as the local permit officer,
22 they assist in handling applications like we're
23 talking about today in the processing and dealing
24 with the issues related to the application?
25 Essentially, they're assisting the State on a

1 local level?

2 A. Correct. It's part of - yeah, it's handled
3 through the local level as part of the contract we
4 have with that local government. So she was
5 assigned and designated as LPO, and then our job
6 is to assist her and train her or the other LPOs
7 in how to identify, you know, areas of
8 environmental concerns, you know, the rules -
9 updated rules, and do a lot of practical fieldwork
10 as well and help them to, you know, be able to
11 locate the first line of stable vegetation or
12 normal highwater activities. So we go there, you
13 know, till they're familiar with the process.
14 We're there to assist them - the field
15 representatives to assist those LPOs through that
16 process until they get to the point to where they
17 can - they're pretty good and are comfortable with
18 the program. And when needed and when asked, we
19 assist them for projects that may be a little
20 unique or tricky.

21 Q. All right. Are you familiar---

22 MR. HOPF: Your Honor, may I approach
23 the witness?

24 THE COURT: Yes.

25 MR. HOPF: These are the original

1 exhibits Mr. Stirewalt had. I just want to
2 leave them at the witness stand. We'll refer
3 to these as needed.

4 Q. Now I'll ask you to look at Exhibit 1. You're
5 familiar, I take it, with an application that was
6 submitted by Mr. Stirewalt for Mr. Overton's
7 property seeking a minor development permit?

8 A. Are you asking me if I'm familiar with this?

9 Q. Familiar with that.

10 A. Yes, sir. Yes, sir.

11 Q. Okay. And at some point, you were called in,
12 correct, to help MS. Bouffard and to deal with
13 issues related to that application?

14 A. I was called in prior to submittal of the
15 application on 2/20/08 with Mr. Stirewalt. So,
16 yeah, I was involved from day one.

17 Q. Okay. Great. And at some point, perhaps it was
18 on February 20th - I'm not sure of the exact date,
19 but you went out to the property and met with
20 Mr. Stirewalt and Ms. Bouffard was there?

21 A. Yes, sir.

22 Q. And discussions were had that day about plans for
23 the property?

24 A. Yes, sir. He presented just - you know, just
25 questions on potential projects that he would like

1 to do, and my initial impression of it was that
2 there was a potential that the house may be moved
3 and what structures would be allowed to remain or
4 propose if that was the case. So I was there to
5 basically stake out that line, pull tapes, and
6 show that here was where the setback line is as
7 of today. And then we did - I did break out the
8 rules and basically went over some of the
9 exceptions that are allowed within the rules.

10 Q. On coastal properties like we're talking about
11 here today, does that - does that line that we've
12 described and been testified to - does that change
13 from time to time?

14 A. Yes, it does. It does change. It could change on
15 a daily basis, you know, depending on the
16 proximity of where the property is. But that line
17 does fluctuate.

18 Q. Which is - am I correct that's why it's important
19 on a case-by-case basis, instance by instance,
20 when there's development that's being proposed to
21 go out and stake it at that time?

22 A. That pretty much establishes, okay, this is where
23 we can design based on that line that's determined
24 by the LPO or the field representative. Then you
25 proceed to design what you're proposing, and then

1 we make sure that it's consistent.

2 Q. You're familiar, are you not, with the provision
3 of the North Carolina Administrative Code .0309
4 and exceptions, which includes specifically the
5 exception for swimming pools?

6 A. Correct.

7 Q. Okay. And you do acknowledge that there is an
8 exception in the code or in the administrative
9 code that allows swimming pools as an exception to
10 the normal rule prohibiting development in that
11 area, correct?

12 A. Yes, it's one of the exceptions under that rule.

13 Q. And on the occasion that you've talked about, you
14 went out, and did you, in fact, stake - measure
15 the line and stake it and determine where that
16 vegetation line or CAMA line was at that time on
17 Mr. Overton's property?

18 A. Yes, sir. We established that line where we were
19 going to pull it from, and then we pretty much
20 measured it back and had a pretty good idea of the
21 line - pretty much almost half of the property it
22 was taking up within that setback, but we - John
23 and I and Christine walked it, and we showed where
24 that line would go and would fall - what would be
25 allowed within that setback.

1 Q. During your dealings with Mr. Stirewalt out there
2 on the property and any time prior or subsequent
3 to that with regard to this issue, was he at all
4 times cooperative and friendly in seeking
5 information from you and working with you on this?

6 A. Oh, yeah. Oh, yeah.

7 Q. You don't have any issues with him in terms of how
8 he handled---

9 A. I've worked with John before in the past on
10 projects, and I don't think I've ever met him in
11 person, but we've corresponded. I've helped him
12 out with some projects that he was involved in on
13 other properties on Figure Eight. So, yeah, we've
14 worked together before.

15 Q. From your experience with him, do you consider him
16 to be a capable and competent architect?

17 A. Yes, sir.

18 Q. Okay. Generally and also with regard to coastal
19 issues?

20 A. Yes, sir.

21 Q. Okay. Do you know when the exception for swimming
22 pools in Section .0309 became effective?

23 A. I'm looking at the bottom of .0309. Those dates
24 at the bottom of it, just above 7H .0310.

25 Q. Yes, sir.

- 1 A. I do not know the exact date when that exception
2 was - what date that exception was amended or
3 applied.
- 4 Q. Do you have any idea even - has it been around for
5 a number of years?
- 6 A. Yes, sir. As long as I've been with the Division
7 of Coastal Management, that rule has been in
8 place.
- 9 Q. And you came exactly when? You said five years.
- 10 A. It's been - this is my fifth year. March 2004.
- 11 Q. Okay. So you came - you came with the State in
12 March of 2004?
- 13 A. I came with the Division of Coastal Management in
14 2004.
- 15 Q. Okay. So you know that as of that date, at least,
16 this exception for pools was in Section .0309?
- 17 A. Yes, sir.
- 18 Q. Okay. Do you know if it existed prior to that
19 date - you yourself?
- 20 A. Yes, I believe so.
- 21 Q. You believe it did?
- 22 A. Yes, sir, I believe it did.
- 23 Q. For some period of years prior to that?
- 24 A. I'd say a number of years. I can't give an exact
25 date, sir, on how many years, but it was prior to

1 that date that that rule was in effect.

2 Q. All right. Okay. Very good.

3 MR. HOPF: Thank you, Mr. Mairs. That's
4 all I have.

5 THE COURT: Any further questions?

6 **CROSS-EXAMINATION**

7 **BY MS. WEESE:**

8 Q. I'd like to ask, Mr. Mairs, how - you stated that
9 you staked the vegetation line when you were on
10 the property with Mr. Stirewalt and Ms. Bouffard,
11 but the decision about the minor permit in this
12 case, that is, the denial of the minor permit
13 application, was made by the local permitting
14 officer, isn't that correct?

15 A. That's correct. It came on the local level.

16 Q. Okay. When you met with Mr. Stirewalt out there
17 on the site, did he have any drawings with you or
18 any---

19 A. No. No, he did not show us any rough type of idea
20 of what he was proposing. It was just - basically
21 just kind of going through establishing that line
22 and talked about potentials for what they could do
23 and if, in fact, they did relocate the house and
24 what structures could remain and what could be
25 built.

1 Q. Okay. Now you were here in the courtroom when
2 Mr. Stirewalt testified that he specifically
3 indicated on that day when he was on-site with you
4 and Ms. Bouffard that he wanted to put a pool
5 right at the vegetation line. Do you recall
6 Mr. Stirewalt doing that?

7 A. I don't recall the exact location. He just
8 basically said within that sixty-foot area, you
9 could put a pool. You could put it outside, but
10 that would be one of the exceptions that would be
11 allowed. Again, we didn't have anything located
12 for us. It was just kind of, you know, just
13 throwing ideas out there, but he didn't specify
14 that it would be in that exact location.

15 MS. WEESE: Your Honor, I'd like to let
16 Mr. Mairs off the stand, subject to recalling
17 him in my case-in-chief, if that - if that
18 would be all right with Your Honor.

19 THE COURT: That is fine.

20 MS. WEESE: Thank you.

21 MR. HOPF: Just one quick question.

22 **REDIRECT EXAMINATION**

23 **BY MR. HOPF:**

24 Q. Mr. Mairs, as to a location, you're familiar with
25 Mr. Overton's property, I take it?

1 A. Yes, sir.

2 Q. Relative to the house and where your vegetation
3 line was staked on that date, there's limited area
4 as to where you could put a pool, you would agree
5 with me?

6 A. Very limited.

7 Q. If you were going to put a pool in, it would have
8 to be in that little area between the house and
9 the vegetation line?

10 A. If they were to basically keep that house as is
11 and put in a pool, yes, that would be one of the
12 areas. There may be an area further outside of
13 that area - outside the setback - but I would say,
14 between the first line and the house, that would
15 be the area you could locate a structure - a pool
16 structure.

17 Q. Okay. All right. And, again, Ms. Bouffard, as
18 local permitting officer, she received training
19 from the State Division of Coastal Management to
20 do her position and has authority to act in her
21 local permitting role in considering and making
22 decisions on permit applications such as we're
23 talking about here today in this case, correct?

24 A. Correct. They have that authority.

25 Q. In this instance, do you have any criticism with

1 the way Ms. Bouffard did her job or her role as
2 local permitting officer with regard to this
3 instance?

4 A. Not at all. She did a very good job, very
5 professional job with that and communicated with
6 us very well. So we were - we were very impressed
7 with the way she handled the application.

8 Q. And do you - in your capacity with the State, do
9 you agree with her decision and the decision that
10 was made here under the CAMA regs to deny this
11 permit?

12 A. Yes, sir.

13 MR. HOPF: All right. Thank you.

14 THE WITNESS: You're welcome.

15 THE COURT: Anything further?

16 **REXCROSS-EXAMINATION**

17 **BY MS. WEESE:**

18 Q. Mr. Mairs, why do you agree with her - can you
19 elaborate on why you agree so strongly with
20 Ms. Bouffard's decision to deny the permit for
21 this pool?

22 A. It's not the pool itself. It's the structural
23 components underneath - underneath the pool that
24 we felt inconsistent with the law, and based on
25 what was provided, that was just basically the tip

1 of the iceberg. It's not the pool or the
 2 location; it's what's supporting that pool and
 3 what that structure would potentially cause or
 4 damage it may cause and function as.

5 MS. WEESE: Thank you. That's all I
 6 have, Your Honor.

7 THE COURT: All right. You may step
 8 down.

9 THE WITNESS: Thank you.

10 THE COURT: We're going to take a
 11 ten-minute recess, and I need to see the
 12 attorneys. We're in recess for ten minutes.

13 (Thereupon, a brief recess was taken.)

14 - - - - -

15 CHRISTINE BOUFFARD,
 16 a witness called on behalf of the Petitioner, being
 17 first duly sworn in the above-entitled matter, was
 18 examined and testified on her oath as follows:

19 THE COURT: All right.

20 **DIRECT EXAMINATION**

21 **BY MR. HOPF:**

22 Q. Would you state your name for us, please.

23 A. Christine Bouffard.

24 Q. And spell that for the court reporter.

25 A. B, as in boy, o-u, two f's, like Frank, a-r-d.

1 Q. Thank you. Ms. Bouffard, how are you employed?

2 A. With New Hanover County.

3 Q. Tell us what you do for New Hanover County.

4 A. I'm a zoning enforcement official, and my primary
5 duty is to enforce the zoning ordinance,
6 floodplain management, and act as a CAMA LPO.

7 Q. CAMA LPO is?

8 A. CAMA local permitting officer.

9 Q. Okay. So acting as a CAMA local permit officer is
10 one of the several hats you wear in your capacity
11 for New Hanover County?

12 A. Yes, sir.

13 Q. And tell us what - just generally, what it
14 involved as an LPO.

15 A. A review minor permits for completeness, site
16 visits for setbacks or to flag a lot for normal
17 highwater or first stable line of vegetation.

18 Q. You're familiar with the property we've been
19 talking about here today on Figure Eight owned by
20 Mr. Overton?

21 A. Yes, sir.

22 Q. You've been out to that property before?

23 A. Yes.

24 Q. In your capacity as LPO, did you work with Rob
25 Mairs with regard to that property and an

1 application by Mr. Stirewalt for a minor
2 development permit?

3 A. Yes, sir.

4 Q. Were you involved in staking the line as we've
5 talked about today, or is that something that
6 Mr. Mairs did with Mr. Stirewalt?

7 A. Mr. Stirewalt called me to go out there and stake
8 that line. I was uncomfortable staking that line
9 on my own, so I called Rob Mairs.

10 THE COURT: If you can speak up a little
11 bit, it would be helpful.

12 Q. Why were you not comfortable with staking the line
13 yourself?

14 A. I know that that end of the island has a
15 significant amount of erosion.

16 Q. All right. So you brought Mr. Mairs in to help
17 you with that, and then, ultimately, that line was
18 staked for this property, correct?

19 A. That's correct.

20 MR. HOPF: May I approach, Your Honor?

21 THE COURT: Yes, you may.

22 Q. Actually, do you see some exhibits up there?

23 A. No.

24 MR. MAIRS: I've got them right here.

25 MR. HOPF: All right. They're coveted

1 items that belong in their files, I guess.

2 Thank you.

3 Q. Let me just hand you these, Ms. Bouffard, so
4 you'll have them. And, specifically, if you would
5 refer to Numbers 2 and 4. Are those - do you
6 recognize those?

7 A. Yes, I do.

8 Q. Are those letters that you wrote to Mr. Stirewalt
9 with regard to the minor development permit
10 application for a pool on Mr. Overton's property?

11 A. Yes.

12 Q. Okay. And these are - are these - do they appear
13 to be true and accurate copies of the letters you
14 wrote?

15 A. They're exact copies.

16 Q. Okay. Thank you. Are you familiar with the North
17 Carolina Administrative Code with regard to
18 exceptions for ocean hazard areas?

19 A. Somewhat. I always do refer to my manual, but
20 yes.

21 Q. All right. Is it your understanding that there is
22 an exception that allows swimming pools?

23 A. Yes.

24 Q. Do you know when that section was adopted?

25 A. No, I do not.

1 Q. Looking at your - at Exhibit Number 4, which is
2 your letter dated April 9th, 2008, denying the
3 permit, what specifically was your - was the
4 denial based on?

5 A. Specifically and mainly, because it constituted a
6 hardened structure - the foundation of the pool.

7 Q. Was there a specific CAMA regulation or standard
8 that that violates, in your opinion?

9 A. Yes.

10 Q. Which one or ones?

11 A. That would be 113A-115.1.

12 Q. Okay. You're referring to a provision of the
13 North Carolina General Statutes 113A-115.1?

14 A. Yes. Yes, I was.

15 Q. Okay. All right. Any other CAMA regulations that
16 you are referring to on - as a basis for the
17 denial in this particular instance? And for
18 simplicity, would you look at the last sentence of
19 your second paragraph in that letter?

20 A. "In addition, your proposal is inconsistent
21 with---" Yes, sir.

22 Q. Okay. So there you've cited .0308, subpart (a),
23 and then .0309, subpart (a). Are those the
24 specific sections that form the basis of the
25 denial in this case?

1 A. Yes.

2 Q. Okay. My point or my question is going to be, are
3 there any other sections, other than what's
4 addressed in your letter, that form the basis for
5 your denial of the permit in this instance?

6 A. No.

7 Q. With regard to Section .0308 as noted in your
8 letter, can you point me to a particular provision
9 in that section that supports your denial?

10 A. I would need to refer to that section.

11 MR. HOPF: I think maybe the copy got -
12 the witness stand copy got picked up with the
13 other papers. Wait a minute. I may have an
14 extra copy.

15 MS. WEESE: If not, I do have some.

16 MR. HOPF: I do. If I may approach,
17 Your Honor?

18 Q. That's .0308. Can you point me to the specific
19 part of that that constituted the basis for your
20 denial?

21 A. (a) and (B).

22 Q. Subparts (a) and (B). Are you talking about
23 Capital (A) and Capital (B) or little (a) and
24 little (b)?

25 A. Capital - well, little (a). I cited the entire

1 rule here.

2 THE COURT: Which - you're referring to
3 which code provision again?

4 MR. HOPF: .0308.

5 Q. Again, let me just ask you that, Ms. Bouffard. I
6 don't want to try to belabor this, but you cited
7 subpart (a) - little (a), which is entitled,
8 "Ocean Shoreline Erosion Control Activities,"
9 correct?

10 A. Correct.

11 Q. Is there a particular part of that that
12 constitutes the basis for your denial of this
13 permit?

14 A. Capital (B).

15 Q. Okay. Dealing with permit erosion control
16 structures?

17 A. Correct.

18 MR. HOPF: Okay. All right. Thank you.
19 That's all I have.

20 THE COURT: Cross-examination?

21 MS. WEESE: Your Honor, I'd like to
22 reserve my questioning of Ms. Bouffard for my
23 case-in-chief, if you please.

24 THE COURT: That will be fine.

25 MS. WEESE: Thank you.

1 THE COURT: Let me just see if I have
2 any questions.

3 Can you explain to a nontechnical person
4 why it is that you denied the permit?

5 THE WITNESS: I went through an
6 extensive review with Mr. Mairs and with my
7 assistant chief during an annual LPO
8 conference with the Assistant Director Ted
9 Tyndall, and it was agreed that the
10 foundation of that pool constituted a
11 hardened structure.

12 THE COURT: Is it possible to have a
13 swimming pool that doesn't have a hardened
14 structure or does not constitute a hardened
15 structure?

16 THE WITNESS: Yes, sir.

17 THE COURT: And what kind of pool would
18 that be?

19 THE WITNESS: Well, I've not ever seen
20 one with the structural components of this
21 pool. Normally, the swimming pools I have
22 reviewed and permitted do not have any type
23 of concrete supports such as this.

24 THE COURT: So it was the supports, but
25 not - I mean pools are made out of cement?

1 THE WITNESS: Correct. Correct. It's
2 the support itself.

3 THE COURT: So if the engineers had not
4 given you plans that had a support itself,
5 would it have - would a permit have been
6 allowed or granted?

7 THE WITNESS: It's possible. It would
8 depend on the drawings submitted. It's
9 possible.

10 THE COURT: Do either side have a
11 follow-up question?

12 MR. HOPF: Yes, Your Honor, real
13 briefly.

14 **FURTHER DIRECT EXAMINATION**

15 **BY MR. HOPF:**

16 Q. Ms. Bouffard, in making your decision on this
17 permit application, did you consider the
18 requirements of the North Carolina State Building
19 Code?

20 A. No, I did not. It had not gotten that far.

21 Q. Are you--- I'm sorry. Go ahead.

22 A. If the pool would have been permitted, a CAMA
23 permit, it would have been issued that would have
24 gone through another review.

25 Q. Are you familiar with the North Carolina State

1 Building Code requirements for swimming pools in
2 coastal hazard areas?

3 A. Not enough to speak about it, no.

4 Q. You were here this morning. Did you hear
5 Mr. Stirewalt's testimony with regard to the
6 requirements of the state building code and
7 swimming pools in high hazard areas?

8 A. Yes.

9 Q. And you disagree with his testimony on the
10 requirements of the code for pools in those areas,
11 or do you know?

12 A. I don't know.

13 Q. Okay. So you can't say one way or the other?

14 A. No, sir.

15 Q. All right. Looking at the exhibit which, I think,
16 was the Exhibit 6 that's on the big blowup -
17 actually, Exhibit 7 in front of you, is that a
18 swimming pool?

19 A. Yes.

20 Q. Okay. And are you aware or do you have any
21 knowledge of what would happen if the foundational
22 supports were not on that pool over time and
23 whether it would survive in that high hazard
24 coastal environment?

25 A. I don't think it would based on erosion.

1 Q. You do not think it would?

2 A. No.

3 MR. HOPF: Okay. Thank you.

4 THE COURT: You may step down. Call
5 your next witness.

6 MR. HOPF: Your Honor, at this time,
7 that's all the witnesses that Petitioner
8 would call. I would like to move the
9 admission of Exhibits 1 through 7, which have
10 been previously identified this morning and
11 testified to by the witnesses. I move that
12 they be admitted into evidence on behalf of
13 the Petitioner.

14 (PETITIONER'S EXHIBIT NOS. 1-7)

15 (OFFERED INTO EVIDENCE)

16 THE COURT: Any objection?

17 MS. WEESE: No objection, Your Honor.

18 THE COURT: Petitioner's Exhibits 1
19 through 7 are admitted. Do you have exhibits
20 that are marked by the reporter?

21 (PETITIONER'S EXHIBIT NOS. 1-7)

22 (RECEIVED INTO EVIDENCE)

23 MR. HOPF: Well, I have my exhibits that
24 I put exhibit stickers on, 1 through 7, that
25 will become part of your record.

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THE COURT: Well, under our rules, we're required to have two copies, and I suppose we could mark the ones that I have here. And I'll let you do that before we leave here today.

MR. HOPF: I'll be glad to do that, Your Honor.

THE COURT: All right.

MS. WEESE: Your Honor, as a housekeeping matter, to the extent that some of Respondent's exhibits are identical to Petitioner's, could we indicate that in the record maybe through a final exhibit list so that we wouldn't have duplicates?

THE COURT: It's entirely okay to have duplicates, and so - just so that we can - that might be the better thing to do.

MS. WEESE: Okay. Thank you, Your Honor.

THE COURT: Are you ready to call your first witness?

MS. WEESE: Your Honor, may I make a brief opening statement?

THE COURT: Yes, you may.

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OPENING STATEMENT BY MS. WEESE

MS. WEESE: Thank you. And then we'll be ready.

Your Honor, one reason I am particularly grateful that you're allowing me to make this opening statement now is because I think it may help to bring into focus what is the - become sort of the elephant in the room.

The North Carolina Coastal Area Management Act was passed by the legislature in 1974, and that legislation governs all development on our coast. It's a unique - somewhat unique---

THE COURT: What year was that passed?

MS. WEESE: It was enacted in 1974, and it's found at Article 7 of Chapter 113A. And it is a unique and progressive approach to dealing with the precious resource that is our coast. As I've said, it does govern all development in the - what is known as the area of environmental concern, our coastal waters.

Now unlike some of our states to the north and south that have coastal waters, North Carolina does not allow by statute

1 permanent erosion control structures on the
2 ocean shoreline, and we heard from the
3 witness stand what some of those structures
4 are. They include breakwaters, groins,
5 seawalls. That is specifically stated at
6 General Statute 113A-115.1(a)(1), which is
7 the definition for erosion control
8 structures, and then right beneath that is to
9 the ocean shoreline definition.

10 The elephant in the room today, Your
11 Honor - the reason we're here today is
12 because Petitioners want you to see the pool,
13 which is the dark area on top, when the
14 evidence really shows that what they've
15 actually applied for was a seawall with a
16 pool on top. That's why - that's why some
17 people - some people can have pools within
18 their oceanfront setback.

19 But in North Carolina, because of our
20 statutory prohibition against seawalls,
21 because of they're erosion control
22 structures - permanent erosion control
23 structures - a pool on top of this much
24 concrete goes down into the sand some sixteen
25 feet and is then pilings is - as Mr. - I

1 can't put it any better than Mr. Mairs - it
2 is the tip of the iceberg.

3 The pool may be well-engineered but - to
4 withstand erosion, but that really is not the
5 issue here because our state law does not
6 allow these kinds of hardened erosion control
7 structures. That's why Mr. Overton and other
8 people in similar situations, who are in
9 highly erodible areas, are limited to the
10 temporary use of sandbags until they can
11 either move their structure back or until the
12 ocean takes its course, and that is - and so
13 that was the basis of the denial.

14 It's not that there's not a pool there.
15 There is a small pool on top of a very deep
16 concrete support with rebar going through it
17 and then pilings driven deep into the sand.

18 THE COURT: Where is erosion control
19 structure defined?

20 MS. WEESE: Erosion control structure,
21 Your Honor, is defined at 113A-115.1(a)(1),
22 and I do have a copy of that statute here.

23 THE COURT: And who is qualified to
24 state what constitutes an erosion control
25 structure?

1 MS. WEESE: Well, Your Honor, it's---

2 THE COURT: Is that a matter of law as
3 to what that is, or is that - and if so, what
4 do I use to determine whether this is--- I
5 know you've called it an erosion control
6 structure, but that doesn't make it so
7 necessarily.

8 MS. WEESE: Then, perhaps it's a mixed
9 question of law and fact, but based on the
10 information that's provided here for the
11 support for this pool, the local permitting
12 officer, the Division of Coastal Management,
13 which is the agency that has been designated
14 to apply and interpret and enforce not only
15 the Coastal Area Management Act but the state
16 guidelines that have been passed by the
17 Coastal Resources Commission for - for this
18 legislation or to carry out these laws - they
19 are the agency designated with making
20 determinations.

21 So that - I would say it's - we have the
22 definition. We can probably get a Webster's
23 Dictionary definition of a seawall and - but
24 to the extent it's a question of fact,
25 architects and coastal management people may

1 disagree.

2 But, Your Honor, in our case-in-chief,
3 we will present testimony that hopefully will
4 explain to your satisfaction why this is an
5 erosion control structure and that - why a
6 denial was entirely appropriate - not only
7 appropriate but required because of our
8 statutes, and that being the case, no local
9 ordinance, no building code, none of those
10 things - none of those issues supercede our
11 law.

12 It's just as Ms. Bouffard just
13 explained, if the permit had been issued,
14 then - then those considerations would have
15 been looked at, and Mr. Stirewalt's expertise
16 with regard to building codes would have come
17 into play. But Respondent's position is, we
18 never got to that point and that that would
19 never take precedence over the ban against
20 hardened structures on the North Carolina
21 coast. Thank you very much, Your Honor.

22 THE COURT: Thank you. You may call
23 your first witness.

24 MS. WEESE: I would like to call
25 Ms. Christine Bouffard, Your Honor.

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THE COURT: You remain under oath.

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CHRISTINE BOUFFARD,

a witness recalled on behalf of the Respondent, having been previously duly sworn in the above-entitled matter, was examined and continued her testimony on her oath as follows:

DIRECT EXAMINATION

BY MS. WEESE:

Q. Good morning, Ms. Bouffard.

A. Good morning.

Q. Mr. Hopf has covered my introductory questions for you during his direct, but I did want to ask, how long have you been employed as a zoning official with New Hanover County?

A. Since May 2004.

Q. Okay. And prior to that, were you employed?

A. Yes, ma'am. I worked for several other municipalities.

Q. In what capacity?

A. Zoning. The City of Wilmington, the City of Havelock, and Saint Lucie County, Florida.

Q. Okay. And what, if any, licenses or certifications do you hold related to your current employment?

1 A. I have a CFM certification, certified floodplain
2 manager.

3 MS. WEESE: And I just want to make
4 sure, can everyone hear her? All right.
5 Great.

6 Q. Okay. Let's see. Now I have some exhibits that
7 I'd like to show you, and some of them you've seen
8 before but under different letters.

9 MS. WEESE: May I approach, Your Honor?

10 THE COURT: Yes, you may.

11 MS. WEESE: Thank you.

12 Q. Ms. Bouffard, take a look at Respondent's
13 Exhibit 19 for identification and tell me if you
14 recognize that document. It's a two-page
15 document.

16 (RESPONDENT'S EXHIBIT NO. 19

17 (MARKED FOR IDENTIFICATION

18 A. Yes, ma'am. That's the application that I
19 received from Mr. Stirewalt.

20 Q. Okay. And is this application part of your
21 permanent file---

22 A. Yes, ma'am.

23 Q. ---in this matter? Okay.

24 And how about Respondent's Exhibit 22; do you
25 recognize that?

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(RESPONDENT'S EXHIBIT NO. 22)

(MARKED FOR IDENTIFICATION)

A. Yes, ma'am.

Q. And what does that appear to be?

A. That's the adjacent notification.

Q. And explain what that - who prepared that?

A. Mr. Stirewalt.

Q. Okay. And why did Mr. Stirewalt prepare what you referred to as an adjacent notification?

A. It's required to notify adjacent property owners or current owners.

Q. When you say "it's required," are you saying it's a required part of the CAMA application---

A. Yes.

Q. ---minor permit application?

A. Yes.

Q. Okay. Do all adjacent landowners have to be notified?

A. Yes, ma'am.

Q. What is Respondent's Exhibit 23?

(RESPONDENT'S EXHIBIT NO. 23)

(MARKED FOR IDENTIFICATION)

A. That's also the same. That's an adjacent notification.

Q. Okay. And Respondent's Exhibit 24, do you

1 recognize that?

2 (RESPONDENT'S EXHIBIT NO. 24

3 (MARKED FOR IDENTIFICATION

4 A. Yes, ma'am. Those are the certified receipts that
5 are required.

6 Q. Certified receipts that are required for---

7 A. Adjacent notification.

8 Q. Okay. And do you keep these - copies of the
9 certified receipts as part of the CAMA file as
10 well---

11 A. Yes, ma'am.

12 Q. ---along with these letters?

13 And Mr. Stirewalt complied completely with
14 that requirement of the CAMA permit application?

15 A. That's correct.

16 Q. Okay. Now after you receive a CAMA minor permit
17 application, there are some things that you as the
18 LPO must immediately do, is that correct?

19 A. Yes, ma'am.

20 Q. Okay. Now is one of those placing a notice in the
21 local paper that a landowner has applied for a
22 CAMA permit?

23 A. That's correct.

24 Q. Okay. If you would take a look at Respondent's
25 Exhibit 25 for identification and ask me - and

1 I'll ask you if you recognize it?

2 (RESPONDENT'S EXHIBIT NO. 25

3 (MARKED FOR IDENTIFICATION

4 A. Okay. Yes, I do.

5 Q. Okay. What is that?

6 A. That is the notice that was published in the
7 paper.

8 Q. Does that notice relate to this - the CAMA permit
9 that we're talking about - application that we're
10 talking about today?

11 A. Part of it does, yes, ma'am.

12 Q. Okay. And what does the other part relate to, for
13 the record?

14 A. That would be another CAMA permit that was being
15 published at the same time.

16 Q. Okay. And do you - what is Respondent's
17 Exhibit 26?

18 (RESPONDENT'S EXHIBIT NO. 26

19 (MARKED FOR IDENTIFICATION

20 A. That is the affidavit of publication.

21 Q. And who prepared that?

22 A. Our administrative assistant.

23 Q. And why do you request an affidavit for
24 publication?

25 A. As proof that it was published in the paper.

1 Q. And, again, because that is something that you
2 must---

3 A. Keep in the file.

4 Q. ---you must publish this as part of your---

5 A. That's right.

6 Q. ---CAMA local permitting? And that's
7 Respondent's 26.

8 Now are all these exhibits - Respondent's 19,
9 22, 23, 24, 25, and 26 - are they all part of the
10 application file - CAMA application file in this
11 case?

12 A. Yes, ma'am.

13 Q. Okay.

14 THE COURT: I missed what 24 was. What
15 is that?

16 MS. WEESE: 24 is a copy of the
17 so-called green cards to show that those
18 notification letters were, in fact, delivered
19 to adjacent landowners, Your Honor.

20 THE COURT: Certified mailing return
21 card?

22 MS. WEESE: Yes. Yes. Two on one page.

23 Q. Now, Ms. Bouffard, what is the first thing you do
24 when you receive a CAMA minor permit application?

25 A. If it's seemingly complete during the initial

1 review, I have it processed with a file number, it
2 gets stamped in, and the twenty-five-day clock
3 begins to tick at that point.

4 Q. And where is the twenty-five-day processing
5 requirement? Is that a zoning office requirement,
6 or is that a CAMA requirement?

7 A. That's a CAMA requirement.

8 Q. Okay. All right. Is that twenty-five business
9 days?

10 A. Twenty-five total days, I believe.

11 Q. Okay. All right. So, in other words, it's a -
12 sounds like a quick turnaround or intended to be?

13 A. Right.

14 Q. What about if an application, upon your initial
15 review, appears to not be complete?

16 A. I stop the clock, and I send out an add-info
17 letter - a letter requesting additional
18 information or clarification.

19 Q. Okay. And according to the CAMA permit - minor
20 permitting process, what are some of the
21 additional items that you might ask for in such a
22 letter?

23 A. I may ask for setbacks to be clarified. I may ask
24 for the sixty-foot setback to be shown. I may ask
25 for other additional information, and in this

1 case, I believe it was sandbags that needed to be
2 located. The sixty-foot setback line needed to be
3 located. I had requested side lateral views, all
4 fences, all beach access.

5 Q. Okay. You've moved ahead of me, which is fine.
6 Is Respondent's Exhibit, for identification,
7 Number 27 - is that the additional information
8 letter that you requested in this case?

9 (RESPONDENT'S EXHIBIT NO. 27

10 (MARKED FOR IDENTIFICATION

11 A. Yes, ma'am.

12 Q. Okay. All right. And is this part of your CAMA
13 file that you keep in your office?

14 A. Yes, ma'am.

15 Q. Okay. Normally keep in there. Now back up for a
16 minute. When someone submits a CAMA application
17 to you, it's essentially the two pages that we've
18 identified as Respondent's Exhibit 19. Those are
19 the two key pages, but often additional or
20 supplemental information is provided, is that
21 correct, by the applicant?

22 A. Yes, ma'am.

23 Q. Okay. Now I believe in this case Mr. Stirewalt
24 provided a site plan with his application which -
25 and a structural drawing of the pool, is that

1 correct? Is that your recollection?

2 A. That's correct.

3 Q. Okay. And---

4 THE COURT: While you're looking for
5 that, let me just ask a question for
6 clarification. Why is it called a CAMA minor
7 permit? Is that minor as opposed to major?

8 THE WITNESS: Major or general, that's
9 correct.

10 THE COURT: Does it have - it doesn't
11 have anything to do with significance or
12 insignificance, does it?

13 THE WITNESS: Minor permits are
14 generally what is landward on a piece of
15 property. I would not permit anything that
16 was out on the water.

17 MS. WEESE: All right. Your Honor, may
18 I approach the witness, please.

19 THE COURT: Yes, you may.

20 MS. WEESE: Thank you.

21 Q. Ms. Bouffard, I'm showing you what's been marked
22 Respondent's Exhibit 20 for identification. And
23 can you take a look at that and see if you
24 recognize that. And I'm also showing you
25 Respondent's Exhibit 21 for identification, and I

1 would like you to review that as well. And then
2 please tell me if they were all - those documents
3 were submitted as part of the original CAMA
4 application.

5 (RESPONDENT'S EXHIBIT NOS. 20-21
6 (MARKED FOR IDENTIFICATION

7 THE COURT: You said exhibits---

8 MS. WEESE: 20 and 21, Your Honor. 20
9 is the site plan submitted with the
10 application, and 21 is a structural drawing
11 submitted with the application.

12 Q. Do you recognize those?

13 A. Yes, ma'am.

14 Q. Okay. Are there some markings on there to
15 indicate that they are a part of this CAMA
16 application process? I keep seeing the number
17 08-13.

18 A. Yes, ma'am. That's the permit number that was
19 assigned.

20 Q. Okay. Now we've had admitted into evidence
21 Petitioner's Number 6.

22 MS. WEESE: May I approach, Your Honor?

23 THE COURT: Yes.

24 MS. WEESE: Thank you.

25 Q. Would you take a look at Petitioner's Number 6. I

1 believe Mr. Stirewalt testified that he also
2 submitted that drawing with the initial
3 application. Do you recognize that?

4 A. No, ma'am, I do not.

5 Q. Is this the first time you've seen that particular
6 drawing?

7 A. Yes, ma'am.

8 Q. Okay. All right. Now back to Respondent's 20 and
9 21, did you keep - do you keep copies of those in
10 your CAMA file in New Hanover County?

11 A. I do.

12 Q. Okay. Despite--- Okay. So Mr. Stirewalt has
13 provided the application - two-page application
14 form, a site plan, and structural drawings.
15 Nevertheless, you sent him Respondent's Exhibit
16 27, for identification, requesting additional
17 information, is that correct?

18 A. That's correct.

19 Q. Okay. And did he provide that additional
20 information?

21 A. He did.

22 Q. Okay. And do you remember in what form it was
23 provided?

24 A. It was a revised site plan.

25 MS. WEESE: Your Honor, may I approach?

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THE COURT: Yes.

Q. I'm showing you what's been marked Respondent's Exhibit 29 for identification. Is that the revised site plan that Mr. Stirewalt submitted to you?

(RESPONDENT'S EXHIBIT NO. 29

(MARKED FOR IDENTIFICATION

A. Yes, ma'am.

Q. Okay. And along with that revised site plan, did he provide Respondent's Exhibit 28 - and you can put that - which has already been admitted as Petitioner's 3, I believe?

(RESPONDENT'S EXHIBIT NO. 28

(MARKED FOR IDENTIFICATION

A. Yes, ma'am.

Q. And what is that?

A. This was a cover letter that came with the revised site plan.

Q. And do you keep that cover letter in your CAMA file?

A. I do.

Q. Okay. As part of your official file. All right. Now if you will now look at Respondent's Exhibit 30 and tell me if you recognize that. And you're looking for a letter dated March 31st.

1 A. I don't believe I have that.

2 Q. That could very well be the case.

3 MS. WEESE: Your Honor, I have neglected
4 to carry that up.

5 THE COURT: Step up.

6 Q. The March 31st letter, notice to extend time.

7 MS. WEESE: I apologize. I'm almost
8 through these.

9 Q. Do you recognize Respondent's Exhibit 30 for
10 identification, Ms. Bouffard?

11 (RESPONDENT'S EXHIBIT NO. 30

12 (MARKED FOR IDENTIFICATION)

13 A. Yes, ma'am.

14 Q. Okay. What is that?

15 A. It's a notice that I sent out certified mail
16 requesting to extend the review period.

17 Q. Okay. And why was that necessary?

18 A. It was felt that this application needed further
19 review. I was going to carry that with me to the
20 annual LPO conference.

21 Q. All right. And by extending the time, were you
22 able to stay within the parameters of the minor
23 permitting process time clock?

24 A. Yes, ma'am.

25 Q. Okay. And is that something you're trained to do

1 as a local permitting officer?

2 A. Yes, ma'am.

3 Q. And do you keep a copy of this notice to extend
4 time to grant or deny the CAMA permit in your
5 official file?

6 A. Yes.

7 Q. Okay. How about Respondent's Exhibit 31? This is
8 a letter that we have seen before, I think,
9 labeled as Petitioner's 4. I want to ask if you
10 recognize that. It's a letter dated April 9th on
11 New Hanover County Inspection Services letterhead?

12 (RESPONDENT'S EXHIBIT NO. 31

13 (MARKED FOR IDENTIFICATION

14 A. Yes, ma'am.

15 Q. Do you recognize that?

16 A. I do.

17 Q. What is it?

18 A. That is my letter denying the permit.

19 Q. Okay. And to whom is the letter addressed?

20 A. It's addressed to Mr. Parker Overton in care of
21 John Stirewalt.

22 Q. Okay. And who is copied on the denial letter?

23 A. Rob Mairs, Ann Hines, my chief, and Parker
24 Overton.

25 Q. All right. And is this part of your official -

1 the CAMA file that you keep in New Hanover County?

2 A. Yes, ma'am.

3 Q. Okay.

4 MS. WEESE: Your Honor, I'd like to move
5 Respondent's Exhibits 19 through 31 into
6 evidence.

7 (RESPONDENT'S EXHIBIT NOS. 19-31)

8 (OFFERED INTO EVIDENCE)

9 THE COURT: Any objections?

10 MR. HOPF: No, Your Honor.

11 THE COURT: Respondent's Exhibits 19
12 through 21 are admitted into evidence.

13 MS. WEESE: Excuse me, Your Honor. 19
14 through 31, I was requesting---

15 THE COURT: 31. I'm sorry. I said 21.

16 (RESPONDENT'S EXHIBIT NOS. 19-31)

17 (RECEIVED INTO EVIDENCE)

18 MS. WEESE: Thank you very much, Your
19 Honor. Appreciate that.

20 Q. Ms. Bouffard, since we've been looking at all
21 these letters, let me ask you, what is your - does
22 your office have a policy about how they send
23 out - how they send letters to your constituents
24 there in the zoning office?

25 A. Yes, ma'am. We send them both first class and

1 certified.

2 Q. Okay. You send them both first class and
3 certified. Do you know why that is?

4 A. We like to ensure that they get a copy or they
5 receive the letter or the notice.

6 Q. Do you recall, with regard to these letters that
7 you sent out regarding this CAMA permit
8 application, whenever you have - did you send
9 letters to both the property owner as well as
10 Mr. Stirewalt---

11 A. Yes, ma'am.

12 Q. ---using the same address?

13 A. Using the address provided on the application.

14 Q. And looking back at the application, were there
15 two addresses provided?

16 A. Yes, ma'am, that's correct.

17 Q. And what were those addresses?

18 A. John Stirewalt was Wilmington, of course, and I
19 believe Mr. Overton had a post office box.

20 Q. All right. Okay. Now do you happen to know
21 whether any of those letters were returned to your
22 office?

23 A. Yes, ma'am. There were three letters that were
24 returned. Two that were certified, and I believe
25 that was one for Mr. Stirewalt and one to

1 Mr. Overton containing the same letter, and that
2 was the notice to extend the review period, and
3 also, Mr. Overton's first class mail - the ad-info
4 letter came back.

5 Q. But of the certified letters that came back, the
6 first class mail did not come back?

7 A. No, ma'am.

8 Q. So you were comfortable with the fact that those
9 were received?

10 A. Yes, because Mr. Stirewalt then submitted the
11 additional information, so I knew he had received
12 it.

13 Q. Okay. Now when you reviewed this application for
14 the first time, do you recall what your initial
15 reaction was as far as whether or not it was going
16 to be - this permit could be granted?

17 A. Yes. Whenever I received the application along
18 with the drawings, it was sort of like a red flag
19 for me. This was not your garden variety pool
20 that was being constructed, and there was a
21 significant amount of concrete.

22 Q. Now when you say there was a significant amount of
23 concrete, do you mean forming the pool or could
24 you explain that, please.

25 A. The structure - the foundation of the pool.

1 Q. Based on your understanding, then, of the state
2 guidelines, the CAMA regulations, whatever name we
3 call them by, could this permit - could a permit
4 for this pool be issued?

5 A. As submitted?

6 Q. As submitted, yes.

7 A. No, ma'am. I do not believe that it could.

8 Q. And I believe you've already testified to this,
9 but just to clarify, did you discuss your thoughts
10 about this permit with the DCM field
11 representative from your area, Rob Mairs?

12 A. Yes, ma'am.

13 Q. Did Mr. Mairs agree with your assessment?

14 MR. HOPF: Objection to what Mr. Mairs
15 may have agreed with or said.

16 MS. WEESE: I'm sorry. I didn't hear
17 the---

18 MR. HOPF: Objection as to what
19 Mr. Mairs may have agreed with or said.

20 THE COURT: If she knows, I will
21 overrule.

22 A. He did.

23 Q. Mr. Mairs did?

24 A. Yes, ma'am.

25 Q. Did agree with your assessment. But, ultimately,

1 the decision about whether or not to grant or deny
2 the permit was yours, isn't that true?

3 A. Yes, ma'am.

4 Q. Okay. But in the course of making your decision,
5 did you seek guidance from - well, obviously
6 Mr. Mairs - other persons at DCM?

7 A. Yes, ma'am.

8 Q. And is that part of your - your LPO training to
9 contact DCM when you're - in order to make
10 determinations?

11 A. Yes, ma'am.

12 Q. Okay. All right. And is it unusual for you to do
13 that?

14 A. No.

15 MS. WEESE: If I could just take a
16 minute, Your Honor.

17 (Thereupon, there was a pause in the
18 proceeding.)

19 MS. WEESE: I have no further questions
20 at this time. Thank you.

21 THE COURT: Cross-examination?

22 MR. HOPF: Thank you, Your Honor.

23 **CROSS-EXAMINATION**

24 **BY MR. HOPF:**

25 Q. Ms. Bouffard, would you agree that Mr. Stirewalt,

1 in submitting this application, took all the
2 necessary steps that were required of him in order
3 to submit the application for the minor
4 development permit?

5 A. Yes, sir.

6 Q. And did he comply with all your requests---

7 A. Yes, sir.

8 Q. ---for additional information?

9 A. Yes, sir.

10 Q. During that process, was he cooperative and
11 professional in all his dealings with you?

12 A. Always.

13 Q. Okay. So he complied with all requirements set
14 forth in the regulations and in terms of
15 requesting this permit?

16 A. That's correct.

17 Q. You were asked about major permit versus a minor
18 permit. Did I understand you to basically say
19 that a minor permit are for things that are
20 landward as opposed to on the water?

21 A. Yes, sir.

22 Q. Generally?

23 A. Generally.

24 Q. Okay. And you would agree that there are - there
25 are different - there's a different handling

1 process for major permits than for minor permits
2 within CAMA?

3 A. Yes, sir.

4 Q. Major permits go to a different channel. In other
5 words, do you deal with major permits as a local
6 permitting officer?

7 A. No, I do not.

8 Q. Okay. And the major permits are dealt with within
9 CAMA or the Division of Coastal Management, and
10 there are different procedures including an
11 expedited process where you can pay some more
12 money as part of your process and get it
13 expedited. Are you familiar with that?

14 A. I can't speak of general or major permits.

15 Q. Okay. Because that's out of your area?

16 A. That's right.

17 Q. All right. And, Ms. Bouffard, you're not a
18 registered structural engineer, correct?

19 A. Correct.

20 Q. And you're not a licensed architect in North
21 Carolina?

22 A. No, sir.

23 Q. And you indicated earlier that you're not familiar
24 with the North Carolina Building Code requirements
25 for - particularly for coastal high hazard areas,

1 right?

2 A. That's correct.

3 MR. HOPF: Thank you.

4 MS. WEESE: I have no more questions,
5 Your Honor.

6 THE COURT: Let me just double-check and
7 make sure I don't have anything else.

8 MR. HOPF: Your Honor, may I ask one
9 more question while you're looking?

10 THE COURT: Yes, you may.

11 Q. (by Mr. Hopf) Ms. Bouffard, did you receive any
12 complaints or comments from adjacent property
13 owners with regard to this application?

14 A. No, sir.

15 MR. HOPF: Thank you.

16 THE COURT: Does your office ever take
17 the opportunity to make suggestions as to
18 what might work if what has been submitted
19 does not meet your approval?

20 THE WITNESS: We do. We have sit-downs
21 with applicants, if that's what you're
22 asking.

23 THE COURT: Did you do it in this case -
24 on this occasion?

25 THE WITNESS: No, sir. I did not

1 include Mr. Stirewalt in my - in [inaudible]
2 review. I reviewed it with my assistant
3 chief first.

4 THE COURT: I mean as to whether or not
5 there was some options available to this
6 applicant other than what had been submitted?

7 THE WITNESS: No, sir.

8 THE COURT: Is there any particular
9 reason that you didn't do it in this case?

10 THE WITNESS: No, no particular reason.
11 I was just reviewing what was submitted.
12 Nothing else had been suggested.

13 THE COURT: All right. Either side
14 might follow up, if you'd like.

15 MS. WEESE: Briefly, Your Honor.

16 **REDIRECT EXAMINATION**

17 **BY MS. WEESE:**

18 Q. Did Mr. Stirewalt or Mr. Overton ask to sit down
19 with you and discuss other options after the
20 permit was denied?

21 A. No, sir - ma'am.

22 MS. WEESE: Thank you. No more
23 questions.

24 MR. HOPF: Nothing, Your Honor.

25 THE COURT: You may step down.

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MS. WEESE: Respondent would call -
recall Rob Mairs, Your Honor.

- - - - -

ROB LINCOLN MAIRS,
a witness called on behalf of the Respondent, being
first duly sworn in the above-entitled matter, was
examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MS. WEESE:

Q. Good morning.

A. Good morning.

THE COURT: I'll just remind the witness
that you're still under oath.

THE WITNESS: Yes, sir.

Q. Mr. Mairs, I wanted to ask whether or not -
earlier you testified that the local permitting
official, Ms. Bouffard, made the call to deny the
permit in this case, and she's testified so as
well.

Did you agree with that decision to deny the
permit?

A. Yes, ma'am.

Q. Do you still agree with that?

A. Yes, ma'am.

MS. WEESE: Your Honor, at this point, I

1 have twelve photographs that have been marked
2 as Respondent's Exhibits 1 through 12 that I
3 would like to hand up to the witness and
4 ask - for identification purposes and ask him
5 to identify and discuss--- I would be happy
6 to let counsel take a look at them. Perhaps
7 we could stipulate them into evidence.

8 (Thereupon, there was a pause in the
9 proceeding.)

10 MR. HOPF: This is the first time we've
11 seen these photographs, and I certainly don't
12 mind her asking about them, although there
13 may be some that don't - that aren't
14 Mr. Overton's property. But she's indicated
15 that Mr. Mairs took these, so maybe he can
16 look through those, and then, obviously, the
17 ones that are not Mr. Overton's, we just need
18 those identified.

19 And, again, I'm not sure exactly what
20 she's offering them for. They show a lot of
21 issues related to erosion up and down the
22 coast, which obviously we're not here about
23 today, but if she's doing it to orient the
24 property, we don't have a problem with that.

25 MS. WEESE: And that really is our

1 focus, is to orient the property.

2 MR. HOPF: Just locationwise?

3 MS. WEESE: Location, right. That will
4 maybe give some focus to the drawings.

5 MR. HOPF: With those caveats, we don't
6 mind her going forward.

7 MS. WEESE: Thank you very much.

8 THE COURT: May I just see them before
9 you---

10 MS. WEESE: Yes. In fact, one of these
11 will be your copy, Your Honor. Would you
12 like to see them before I [inaudible]?

13 THE COURT: No. That's fine. You may
14 proceed.

15 MS. WEESE: Thank you, Your Honor.

16 Q. Mr. Mairs, you have before you photographs that
17 have been marked Respondent's Exhibit 1 through 12
18 for identification purposes only. For now, will
19 you please focus on Respondent's Exhibits 1 and 2
20 and tell me if you recognize those photographs?

21 (RESPONDENT'S EXHIBIT NOS. 1-2

22 (MARKED FOR IDENTIFICATION

23 A. Yes, I do. It's aerial photography that I
24 incorporated into a PowerPoint presentation.

25 Q. Did you take those photos?

1 A. No. I utilized DOT aerial photos that were
2 provided to us in 2006 that we utilize for
3 applications and location of properties.

4 Q. And when you say "utilized by us," are you
5 referring to the Division of Coastal Management?

6 A. Division of Coastal Management, yes, ma'am.

7 Q. Is this standard operating procedure for the
8 Division of Coastal Management to use aerial
9 photography taken by the Department of
10 Transportation?

11 A. Yes, ma'am.

12 Q. Why is that?

13 A. It helps us to get - you know, get a little of bit
14 of a history of the property. We go back in
15 sequences of about five years. And, usually, when
16 we accept an application, I will incorporate using
17 a grid to establish coordinates of the property of
18 interest that is within that application. So that
19 information is provided into the investigation
20 report that I generate so our staff in Morehead
21 City and the staff at the Army Corps of Engineers
22 could utilize it as well locating it.

23 Q. When were these two aerial photos taken?

24 A. These were taken - you can see at the top - it's
25 May 26th, 2006.

1 Q. Now, Mr. Mairs, we've already established that the
2 local permitting officer issues the minor permit
3 application or minor CAMA permits. You're
4 involved in other - other types of CAMA
5 permitting - general permits, major permits.

6 So by way of saying this, I want you to focus
7 your responses to these pictures on the location,
8 not your particular use for your project---

9 A. That's correct.

10 Q. ---as we continue.

11 So can you see the property that's the
12 subject of this contested case hearing in this
13 aerial photograph?

14 A. Yes, ma'am.

15 Q. Is it indicated in any way on those photographs?

16 A. It's indicated with a green arrow.

17 Q. Okay.

18 A. And it's zoomed in on 2 to - zoomed a little
19 closer.

20 Q. Where is the property?

21 A. The property is located on the north end of Figure
22 Eight Island adjacent - just adjacent to Rich
23 Inlet, which is depicted on Exhibit 1. So it's on
24 the very north end of Figure Eight Island.

25 Q. Okay.

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MS. WEESE: Your Honor, I'd ask to have Respondent's Exhibit 1 and 2 entered into evidence.

(RESPONDENT'S EXHIBIT NOS. 1-2
(OFFERED INTO EVIDENCE

THE COURT: Any objection?

MR. HOPF: No, sir.

THE COURT: Respondent's Exhibits 1 and 2 are admitted.

(RESPONDENT'S EXHIBIT NOS. 1-2
(RECEIVED INTO EVIDENCE

MS. WEESE: Thank you, Your Honor.

Q. Now for Respondent's - now if you'd take a look at Respondent's Exhibits 3, 4, 5. And I'm without a copy myself, so if we could just go through the ones that were taken this year and tell me where that number stops, Mr. Mairs, then we could focus on those.

A. 3 through 12 were all taken this year from March through, I believe, July.

Q. All right. Let's focus on the ones that were taken in March. Okay. Would that be Respondent's Exhibits 3 through 8?

A. 3 through 6.

Q. 3 through 6. Okay. Did you take those

1 photographs, Mr. Mairs?

2 (RESPONDENT'S EXHIBIT NOS. 3-6

3 (MARKED FOR IDENTIFICATION

4 A. I did not take Exhibit 3 and 4.

5 Q. How can you tell?

6 A. I was not in the plane. That was taken by Tara
7 Croft, who is our compliance enforcement
8 representative, and I asked her to - she was doing
9 routine surveillance, and I asked her if she could
10 get some photographs of Figure Eight Island for
11 me.

12 Q. All right. Do they fairly and accurately--- Did
13 you see the subject property in March of this
14 year?

15 A. Yes.

16 Q. Okay. Do those pictures fairly and accurately
17 represent the site as it appeared then?

18 A. Yes, ma'am.

19 Q. Okay. And do those photos indicate - is it
20 indicated on those photos the perspective from
21 which they were taken with regard to direction?

22 A. Yes, ma'am, it's indicated at the top.

23 Q. Okay.

24 MS. WEESE: Your Honor, I would like to
25 ask to have Respondent's Exhibits 3 through 6

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admitted into evidence.

(RESPONDENT'S EXHIBIT NOS. 3-6
OFFERED INTO EVIDENCE)

THE COURT: Any objection?

MR. HOPF: No, Your Honor.

THE COURT: Respondent's Exhibits 3
through 6 are admitted.

(RESPONDENT'S EXHIBIT NOS. 3-6
RECEIVED INTO EVIDENCE)

Q. Okay. Let's take a look at Respondent's
Exhibit 7, Mr. Mairs. Did you take that
photograph?

(RESPONDENT'S EXHIBIT NO. 7
MARKED FOR IDENTIFICATION)

A. No, ma'am. That was taken by my district manager,
Dr. Steven Everhart.

Q. Okay. And how can you be sure you did not take
it?

A. How can I be sure?

Q. Yes.

A. I was there with him that day, and I am actually
in that picture assessing the sandbags.

Q. Okay. So that's you in Respondent's Exhibit 7?

A. That's me.

Q. Okay. Does that photograph fairly and accurately

1 represent the site as it appeared in July '08?

2 A. Yes, ma'am.

3 Q. Okay. Now let's take a look at Respondent's
4 Exhibit 8. Did you take that picture?

5 (RESPONDENT'S EXHIBIT NO. 8
6 (MARKED FOR IDENTIFICATION

7 A. No, ma'am. Again, that was taken by Dr. Everhart.

8 Q. And were you and Dr. Everhart on this site at the
9 same time?

10 A. At the same time. We were doing basically the
11 whole strip on the north end where the sandbags
12 exist.

13 Q. Does that photograph fairly and accurately
14 represent the site as it appeared in July 2008?

15 A. Yes, ma'am.

16 Q. And how about Respondent's Exhibit 9; when was
17 that taken?

18 (RESPONDENT'S EXHIBIT NO. 9
19 (MARKED FOR IDENTIFICATION

20 A. That was also taken in July of this year.

21 Q. Okay. Did you take that photograph?

22 A. No, ma'am. That was taken - that was on a later
23 date. That was taken by Shaun Simpson, who is our
24 environmental technician in the Wilmington Office.

25 Q. Do you recognize that - where that photograph was

1 taken?

2 A. Yes, ma'am.

3 Q. Where?

4 A. The Overton property.

5 Q. Okay. How can you recognize it?

6 A. Just my familiarization with the area on the north
7 end and structures that are there. It's a
8 single-family house and my experience on that
9 island.

10 Q. How often are you on Figure Eight Island?

11 A. Generally, I would say at least once a week, but
12 lately, in the last few months, we've been up
13 there once or twice a week, not on this specific -
14 but on the island. I do site assessments, site
15 visits with general contractors that are
16 representing property owners, you know, who apply
17 for pier permits, so I'm there all the time. So
18 very familiar with the island.

19 Q. How about Respondent's Exhibit 11 or 10? Are we
20 on 10 now?

21 A. 10.

22 Q. Okay. Respondent's Exhibit 10, do you recognize
23 that photograph?

24 (RESPONDENT'S EXHIBIT NO. 10)

25 (MARKED FOR IDENTIFICATION)

1 A. Yes, ma'am.

2 Q. Okay. When was it taken?

3 A. That was taken the same day that Shaun and I were
4 up on the island doing the sandbag assessment.

5 Q. And, again, was that in July 2008?

6 A. Yes, ma'am.

7 Q. Does it fairly and accurately represent the site
8 as it appeared to you that day?

9 A. Yes, ma'am.

10 Q. And is that - is that the property that - is that
11 on the Overton property?

12 A. Directly in front of the - the picture is taken
13 directly in front of the Overton property looking
14 south so you do see the adjacent property owner
15 structure. That structure adjacent to this
16 adjacent property or adjacent lot.

17 Q. In a moment, I'm going to ask you to mark that
18 adjacent structure so that we don't confuse it
19 with Mr. Overton's.

20 A. Okay. I believe that is the Nelson property, if
21 I'm not mistaken. Yes.

22 Q. Okay. Now let's see. The other thing - are we up
23 to 12 now?

24 A. We're on 11.

25 Q. We're on 11. Okay. Well, if you would - tell me

1 if you recognize 11.

2 (RESPONDENT'S EXHIBIT NO. 11

3 (MARKED FOR IDENTIFICATION

4 A. Yes, I do. That was shot that same day with Shaun
5 Simpson. She took that shot when we were doing
6 the sandbag assessments, and that's---

7 Q. Okay. And where is that photograph?

8 A. That is taken in front of the Overton property.

9 Q. Okay. And does it fairly and accurately represent
10 the site as it appeared on that day?

11 A. Yes, ma'am.

12 Q. Okay.

13 A. From this angle too. This is looking to the north
14 so that shows the Cagney property adjacent.

15 Q. The Cagney property, did you say?

16 A. The Cagney property, I believe, is the adjacent
17 property owner to the north.

18 Q. And, again, when we finish, I'm going to ask to
19 approach so that you can put an X through those
20 adjacent properties.

21 And now we are at Respondent's 12. Do you
22 recognize that photograph, Mr. Mairs?

23 (RESPONDENT'S EXHIBIT NO. 12

24 (MARKED FOR IDENTIFICATION

25 A. Yes, ma'am.

1 Q. What is that a photograph of?

2 A. That's a shot taken in front of the Overton
3 property looking north.

4 Q. Was it taken in July 2008?

5 A. Yes, ma'am.

6 Q. Do you know whether you or Ms. Simpson---

7 A. Ms. Simpson took that photo.

8 Q. Okay. Does it fairly and accurately represent the
9 site as it appeared that day?

10 A. Yes, ma'am.

11 Q. Do you see adjacent property in that---

12 A. Yes. You see two or three different adjacent
13 property owners based on the angle, so it shows at
14 least three other ones.

15 Q. All right.

16 MS. WEESE: Your Honor, at this point, I
17 would move to have Respondent's Exhibits 1
18 through 12 admitted into evidence with the
19 caveat that Mr. Mairs is going to be marking
20 through any adjacent property that appears in
21 9 through 12 or in any of the photographs.

22 THE COURT: I thought we had already
23 admitted---

24 MS. WEESE: We have.

25 THE COURT: ---1 through 6 maybe or

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something.

MS. WEESE: I apologize, Your Honor. So we - this would be to admit---

THE COURT: What about 7 through 12?

MS. WEESE: 7 through 12, yes, Your Honor.

(RESPONDENT'S EXHIBIT NOS. 7-12
(OFFERED INTO EVIDENCE

THE COURT: Any objection?

MR. HOPF: No objection for the limited purpose of locating and depicting the property as described by Mr. Mairs---

MS. WEESE: At that---

MR. HOPF: ---at that time.

MS. WEESE: We - Respondent will accept that limitation.

THE COURT: 7 through 12 are admitted.

(RESPONDENT'S EXHIBIT NOS. 7-12
(RECEIVED INTO EVIDENCE

MS. WEESE: Okay. Thank you very much.

Q. Mr. Mairs---

MS. WEESE: I need just one minute, Your Honor.

(Thereupon, there was a pause in the proceeding.)

1 MS. WEESE: All right. Your Honor, no
2 further questions.

3 THE COURT: All right. Any further
4 questions of this witness?

5 MR. HOPF: Just a couple, Your Honor.

6 **CROSS-EXAMINATION**

7 **BY MR. HOPF:**

8 Q. Mr. Mairs, in your consideration of the
9 application for a minor development permit in this
10 instance, did you consider the North Carolina
11 Building Code requirements?

12 A. Yes, sir.

13 Q. Are you familiar with the North Carolina Building
14 Code requirements specifically for swimming pools
15 in coastal high hazard areas?

16 A. Yes, sir.

17 Q. You're not a registered structural engineer,
18 correct?

19 A. No, sir.

20 Q. You're not a licensed architect?

21 A. No, sir.

22 Q. You agree that what's shown on this blowup of
23 Exhibit 7 is a swimming pool?

24 A. The top portion of it, I believe, is a swimming
25 pool. The bottom structure is outside of the

1 swimming pool.

2 Q. That bottom part of that structure is attached to
3 the top part as support for the upper part of the
4 structure, correct, as you understand that
5 drawing?

6 A. Proposed, yes. I believe that that structure
7 underneath it is underneath that pool.

8 Q. And do you have any reason to believe or state to
9 this Court that the drawing depicted in Exhibit 7
10 there is inconsistent with or not required by the
11 North Carolina State Building Code for swimming
12 pools in a high hazard area?

13 A. If it is, that would be addressed in our rules. I
14 believe that our rules in 7H address the building
15 codes that are required, but I believe ours
16 would - in this case, I believe that it would be
17 more restrictive in the design of those components
18 supporting the pool.

19 Q. When you say "in ours," you're talking about in
20 the CAMA regulations?

21 A. Yes, sir. The AEC rules, I believe, would come
22 into effect that would preclude a structure like
23 that to be underneath that pool.

24 Q. Is there any definition of a swimming pool or what
25 is a swimming pool in the CAMA regulations?

1 A. I don't believe so.

2 Q. Are there any design requirements for a swimming
3 pool in the CAMA regulations?

4 A. I don't believe so.

5 Q. But there are references in the CAMA regulations
6 requiring adherence to the North Carolina Building
7 Code, correct?

8 A. Yes, sir.

9 Q. And where the building codes specify something,
10 the CAMA regulations say that that building code
11 should be followed, correct?

12 A. If it's inconsistent with our rules, though, then
13 I would say that we would look at whatever is most
14 restrictive in that aspect. So we do address
15 building codes and we rely on the - you know, once
16 it goes through the application process, then that
17 permit would be conditioned to address any other
18 state, federal, or local regulations. So I think
19 that would be handled through the permit
20 condition.

21 Q. Were you here when I asked Ms. Bouffard about
22 Section .0308 and the reference to the North
23 Carolina Building Code?

24 A. Yes, sir, I was here.

25 Q. Under subsection (d)?

1 A. Yes, sir.

2 Q. And it talks about complying with the building
3 code?

4 A. Yes, sir.

5 Q. And you have testified that the CAMA regulations
6 don't set out any design definitions or
7 requirements for pools, right?

8 A. I don't believe they do.

9 Q. All right. But the building code - you've heard
10 testimony here today - does for swimming pools in
11 high hazard areas, correct?

12 A. Could you repeat that?

13 Q. You've heard testimony here today that the
14 building code of North Carolina does set out a
15 design requirements for swimming pools in high
16 hazard areas?

17 A. Correct.

18 Q. And you don't have any reason to disagree with
19 that or dispute that, do you?

20 A. I believe that in this case it would be
21 inconsistent. I think the building code would be
22 addressed for structures that are not in this
23 location, and I believe the location of this
24 structure and the components underneath it would
25 be inconsistent with our AEC rules.

1 Q. I think that - well, in fact, I think you're
2 exactly correct. Isn't it true that we have an
3 inconsistency here? The CAMA regulations don't
4 provide any design requirements and the North
5 Carolina Building Code does, correct?

6 A. I would say for structures, but for structures
7 that are accepted in this location of the setback,
8 I would say we would not - we would not authorize
9 something with these components in that area.
10 These are exceptions. These are expendable
11 structures.

12 Q. And I understand you wouldn't authorize it.
13 That's the basis for your denial of this permit,
14 right? So we're clear on that.

15 A. True.

16 Q. But my question is, for swimming pools -
17 specifically for swimming pools, you've already
18 testified CAMA doesn't provide any guidance in
19 terms of a definition of what a pool is or for the
20 design requirements for a pool in coastal areas,
21 agreed? You've already---

22 MS. WEESE: Objection. Asked and
23 answered.

24 THE COURT: Overruled.

25 Q. You've already said you agree with that? There is

1 no requirement? There is no guideline in CAMA
2 regulations?

3 A. That I'm aware of.

4 Q. That you're aware of. But there are design
5 requirements under the North Carolina Building
6 Code for pools in high hazard areas?

7 A. Correct.

8 Q. All right. And, specifically, in .0308 where the
9 provisions are inconsistent, it says that the more
10 restrictive provision shall control, correct? And
11 I'm talking about the paragraph discussing the
12 building code. That's subpart (B).

13 A. Uh-huh, yeah. I'm reading it right here. Yes,
14 it's the last sentence in the paragraph that
15 addresses other AEC rules. So, in this case, I
16 would say that this would be the - less
17 restrictive to allow for the structure to go in
18 there, so---

19 Q. So it's your testimony that a pool could be built
20 there - can be built there, but it cannot comply
21 with the building code in order to be accepted by
22 CAMA?

23 A. In this location.

24 Q. So if someone in Mr. Stirewalt's position is to
25 design a pool that does not comply with the state

1 building code, which is a mandatory provision,
2 otherwise CAMA will deny it?

3 A. Again, that's case specific on the location of
4 where the pool is located. Whatever structures
5 that are subject to those codes are also subject
6 to our rules and any others state or federal
7 regulations. So, in this case, this is
8 inconsistent with those.

9 Q. It's an inconsistency?

10 A. With our AEC rules.

11 Q. Yes. Okay. Are you familiar with whether
12 Wilmington has jetties and groins in Wrightsville
13 Beach?

14 A. Yes. Navigational jetties, yes, to protect
15 navigational channels.

16 Q. Okay. And, specifically, jetties and groins and
17 seawalls and bulkheads and breakwaters - we've
18 talked about those here this morning - those are
19 specifically defined as erosion control devices
20 under the CAMA regulations, correct?

21 A. Yes, those are in the definition.

22 Q. Those are set out in the definition both in the
23 CAMA regulations, and also, as Ms. Weese noted,
24 the General Statutes of North Carolina defines
25 what an erosion control device is?

1 A. Correct.

2 Q. And it includes those structures?

3 A. It does include the ones that you stated.

4 Q. But it does not include, by definition, swimming
5 pools, does it?

6 A. Correct.

7 Q. Now these photographs that you've been shown, you
8 would agree that the conditions that these types
9 of properties - at this property - coastal
10 properties changes frequently?

11 A. It's very dynamic.

12 Q. It's a dynamic environment, so literally -
13 certainly, from week to week but even day to day,
14 the conditions out other can change?

15 A. Correct.

16 Q. So, literally, these pictures are a snapshot in
17 time, not necessarily representative of what was
18 there the day before or has been there since the
19 pictures were taken. You'd agree with that?

20 A. This shows a pretty good sequence of probably the
21 last few months of what has been going on at this
22 property. These photos are pretty accurate on
23 what's out there today.

24 Q. It's a pretty accurate general description, but
25 you agree that conditions change literally day to

1 day?

2 A. Correct.

3 Q. All right. Let me ask you this, Mr. Mairs. Is
4 there a provision - in a circumstance like this
5 when CAMA does not agree with or like a design of
6 the structure like this pool, is there a mechanism
7 in which CAMA can sit down with the property
8 owner and someone like Mr. Stirewalt working for
9 the owner and come up with a design that will
10 comply with code like the building code but also
11 come within what the CAMA officials would like to
12 see on the coast?

13 A. Yeah, I mean that could be just communication
14 based on responses or additional information that
15 either the local permitting officer or DCM sends
16 out to the applicant. We could get them a
17 description on why we feel there may be some
18 concern, and we can address it that way and say,
19 "Hey. The application is on hold. Here's
20 additional information, and some of the stuff that
21 you are providing could potentially lead toward a
22 denial."

23 So we - I would say it's in the additional
24 letter, and also, there could be - you know, they
25 could call and say, "Hey. Can we have a sit-down?"

1 Can we get everybody together and see if we can
2 find some sort of common ground that would make it
3 consistent?" That happens all the time.

4 Q. Is CAMA willing to do that in this instance for
5 Mr. Overton and this pool design?

6 MS. WEESE: Objection. I'm not sure
7 Mr. Mairs has the authority to speak to that
8 issue, although we will be---

9 MR. HOPF: I'm just asking generally.

10 THE COURT: Objection sustained.

11 Q. Okay. Let me ask you to look at Photograph
12 Number 7. There's some equipment up the beach, if
13 you will - some machinery. Do you see that?

14 A. Yes, sir.

15 Q. Do you know what that is?

16 A. Yes, sir. That is - the adjacent riparian
17 property owner received a CAMA minor permit
18 through New Hanover County to bring in
19 beach-compatible sand to place on top of the bags.

20 Q. Okay.

21 A. So they were currently in the process of doing
22 that. They're just finishing up.

23 Q. Adding sand to the beach?

24 A. Yeah. They went through a CAMA minor permit for
25 that.

1 MR. HOPF: All right. Thank you,
2 Mr. Mairs.

3 MS. WEESE: That's all I have, Your
4 Honor. Thank you.

5 THE COURT: When you say that you were
6 assessing the sandbags in one of these
7 photos, what does that mean?

8 THE WITNESS: Yes, sir. We were asked
9 by the Coastal Resources Commission to
10 address all the sandbags that have been
11 authorized through our Division throughout
12 all twenty coastal counties that were -
13 basically, that information - we've got GPS
14 orients. We got photos of each - we've got
15 two photos of each lot that have sandbags,
16 and that information was compiled in a
17 presentation that was presented by our staff
18 to the Coastal Resources Commission at this
19 past meeting.

20 So we were trying to finalize what we
21 were asked to do. I'm the field
22 representative for New Hanover County, so my
23 job was to go to all - pull all the permits
24 that were issued to the property owners that
25 do have sandbags there, and we just assess -

1 basically go out there and assess basically
2 how the structures are located, the integrity
3 of the structures, are they in compliance, et
4 cetera. We just basically go out there and
5 do an assessment. And this was one of the
6 properties that we went to.

7 THE COURT: So you have to get a CAMA
8 permit to put sandbags in front of your---

9 THE WITNESS: Yes, sir. If your house
10 is deemed as imminently threatened, you could
11 qualify for temporary sandbags, which is a
12 general permit that our office issues. That
13 would come through the State.

14 THE COURT: When you say "temporary,"
15 what does that mean?

16 THE WITNESS: Well, sandbags are -
17 because North Carolina prohibits hardened
18 structures, permanent structures, we do allow
19 for the placement of temporary sandbags to be
20 placed in front of property owners who are
21 imminently threatened. It's a condition that
22 they could keep the bags in place until, say,
23 that local government or that town
24 establishes a renourishment program to keep
25 the houses or, you know, portions of the

1 houses that are threatened or to offer the
2 property owner to relocate the house. So
3 it's a temporary measure and we allow for
4 them, but they do - they do hold conditions.

5 THE COURT: Using Respondent's Exhibit 3
6 there, where is the vegetation line?

7 THE WITNESS: Okay. Exhibit 3, the
8 location of where we located the first line -
9 since there are sandbags located on this
10 property, we located that mark on the
11 landward side of the existing sandbags, and
12 then from that point, you go landward sixty
13 feet. And that is basically the small
14 structure setback, and then the exceptions
15 that come into play fall under .0309, so
16 within that location sixty feet back.

17 So you can see that, I would say, a good
18 majority of the house, as it is today, is
19 within that setback.

20 THE COURT: So where is the proposed
21 location of the pool?

22 THE WITNESS: It would be on the
23 landward side - as proposed, it would be on
24 the landward side of that wooden fence and in
25 between that fence and the structural - I

1 guess the foundational components of that
2 house. So it's a very narrow - narrow area.

3 UNIDENTIFIED MALE: Twelve foot.

4 THE WITNESS: It looks to be, based on
5 the plans that were provided, approximately
6 twelve feet in width and approximately, I'd
7 say, fifty-eight feet in length. So it would
8 be right in front of - pretty much right in
9 front of the house.

10 THE COURT: I'm trying to understand the
11 position that your CAMA office has taken.
12 There are some questions concerning - I think
13 your testimony was that you felt that the
14 CAMA office's position was - code was more
15 stringent than the state building code?

16 THE WITNESS: I believe it would be in
17 this case that the rules that apply for
18 erosion control structures, hardened
19 structures - it would be inconsistent with
20 those areas of environmental concerns in our
21 rules that address those types of structures.

22 THE COURT: I'm trying to understand why
23 the state building code would have a
24 definition of when - what kind of structures
25 you have to have for a pool if, in fact, you

1 never could apply it in a particular
2 situation, at least from the perspective of
3 the CAMA office.

4 THE WITNESS: In this case, I would say
5 that the - that the location of where this -
6 the pool and the components underneath the
7 pool in this location - it would be
8 inconsistent with our rules. I do think that
9 they apply in areas that are still prone to
10 areas of - you know, high hazard flood areas,
11 and I understand that. But I would say, in
12 this case, as proposed, that structure would
13 not.

14 (Tape changed and begins mid sentence.)

15 **FURTHER CROSS-EXAMINATION**

16 **BY MR. HOPF:**

17 Q. ---staked a permissible area, so to speak, is
18 roughly twelve feet wide by fifty-eight feet long
19 on the Overton property?

20 A. No. I was talking about the dimensions of the
21 pool - the dimensions of the proposed pool. So
22 where we located that first line, we basically
23 located the first line or the setback location and
24 what could be - what could be potentially within
25 that area.

1 Q. And the distance from your line back to the house
2 was about twelve feet?

3 A. I've got my field notes that day. It was - I have
4 that approximately seven feet - six and a half
5 feet seaward of the concrete wall or from the
6 existing privacy fence is basically where I
7 located it, and then from that point, we
8 established where the sixty-foot setback would be.

9 So I'm not sure exactly where we pulled it
10 from - I don't remember pulling it from an
11 existing piling, but we pulled it back from - I
12 pulled it from the fixed structure that's running
13 seaward of the - seaward of the property.

14 Q. Okay.

15 A. So I guess you could scale it off and---

16 Q. If Mr. Stirewalt's notes reflect twelve feet three
17 inches from the structure of the house out to the
18 point where you staked the vegetation line, would
19 that be consistent with your recollection?

20 A. The location? Sorry. The area in between?

21 Q. Yes. The distance from the house - the most
22 oceanward part of the house piling out to where
23 you staked the vegetation line.

24 A. I don't have that indicated on my - on my field
25 notes.

1 MR. HOPF: Okay. Thank you. That's
2 all. Thank you, Your Honor.

3 THE COURT: You may step down.

4 THE WITNESS: Did I need to indicate
5 anything?

6 MS. WEESE: Yes. If you would bring
7 those back. I'll give you this pen and you
8 can work on that while we call our next
9 witness, if that would be all right with you,
10 Your Honor.

11 THE COURT: All right.

12 MS. WEESE: Respondent has one more
13 witness.

14 THE COURT: You're wanting him to
15 indicate something on an exhibit that has
16 already been admitted or---

17 MS. WEESE: Well, during---

18 MR. HOPF: I don't have any objection.
19 I think she was going to mark the properties
20 that were not the Overton - or he was going
21 to, based on his---

22 MS. WEESE: Right. I understood that
23 that was part of our agreement that he
24 would---

25 MR. HOPF: That's fine.

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THE COURT: Okay. I was trying to get some clarification on what he was doing.

MR. HOPF: We have no objection to that.

THE COURT: All right. He may do that.

MS. WEESE: At this time, Respondent would call Ted Tyndall, Your Honor.

- - - - -

MICHAEL TED TYNDALL,
a witness called on behalf of the Respondent, being first duly sworn in the above-entitled matter, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MS. WEESE:

- Q. Good morning, Mr. Tyndall.
- A. Good afternoon.
- Q. Oh, afternoon. Okay. Would you please state your full name for the record.
- A. Michael Ted Tyndall.
- Q. And, Mr. Tyndall, where do you work?
- A. I work with the Department of Environment and Natural Resources with the Division of Coastal Management in Morehead City.
- Q. Okay. And what is your position with the Division of Coastal Management?
- A. I'm the assistant director for permits and

1 enforcement for the twenty coastal counties in
2 North Carolina.

3 Q. Okay. How long have you worked with the Division
4 of Coastal Management?

5 A. I've worked with the Division of Coastal
6 Management approximately seventeen years and the
7 State approximately twenty-two.

8 Q. Okay. Have you always held the position of
9 assistant director?

10 A. No. Since my tenure with the Division, I have
11 been a field rep in the Washington Regional
12 Office. I transferred to a field rep in the
13 Morehead City Office, became the district manager
14 in the Morehead City Office after sometime, and
15 then in 2004, became the assistant director for
16 permits and enforcements for the Division.

17 Q. And what are some of your responsibilities as the
18 assistant director for permits and enforcement
19 that is specific to that position?

20 A. The key responsibilities I have is to ensure that
21 the CAMA, Coastal Area Management Act, and the
22 State Dredge and Fill laws are applied accurately
23 and appropriately in the twenty coastal counties
24 in North Carolina. I oversee the four regional
25 offices that we have: the Elizabeth City Office,

1 the Washington Regional Office, the Morehead City
2 Office, and the Wilmington Office. I oversee the
3 district managers there to ensure that they're
4 applying rules appropriately.

5 Q. How often do you get out - do you still get out in
6 the field?

7 A. I do. Litigation seems to be taking more of our
8 time, so I get out less than I used to, but I'm
9 still out in the field approximately one, maybe
10 two days. And most of the time, this is - I'd say
11 one day a week. It's when a district manager or a
12 field rep has some issues that are somewhat
13 complex, the setting is somewhat unique, and
14 they're looking for support, assistance, guidance
15 into how to apply the rules in those settings.

16 Q. Okay. And were it not for all this litigation,
17 would you be out in the field more, do you think?

18 A. I think so. I certainly would. One thing I would
19 like to do is have consistency throughout the
20 state, from the north to the south, and the only
21 way you can do that is to have people that have
22 commonality, have been in all the areas to kind of
23 train everyone in the same way.

24 Q. And just to clarify, when you say "consistency
25 throughout the state," you are referring to only

1 the twenty coastal counties covered by the Coastal
2 Area Management Act, correct?

3 A. That is correct.

4 Q. And in DCM's world, that's the state, right?

5 A. Yeah. When I say throughout the state, certainly,
6 it's just the twenty coastal counties from
7 Currituck to Brunswick County, and in particular,
8 I'm concerned about the areas of environmental
9 concern that the Coastal Resources Commission has
10 established.

11 Q. Is it - well, during the course, then, of your
12 seventeen years with DCM, is it fair to say that
13 you are very familiar with the Coastal Area
14 Management Act?

15 A. I believe so.

16 Q. And how about with the state guidelines that are
17 promulgated by the Coastal Resources Commission;
18 do you have involvement with those on a regular
19 basis?

20 A. I do. One thing that I did fail to mention,
21 certainly, when you asked me earlier as to what
22 duties I have is, I do serve as staff to the
23 Coastal Resources Commission in assisting them in
24 adopting rules and regulations. We draft rules
25 and present it to the Commission for their

1 adoption. So I am familiar with the rules and
2 regulations. I have drafted many rules myself and
3 presented those to the Commission for adoption.

4 Q. And during the course of your career with DCM and
5 particularly now as assistant director, are you
6 familiar with how the Coastal Resources Commission
7 interprets its guidelines?

8 A. I'd like to think so. And, certainly, when there
9 are cases that we have uncertainty ourselves, we
10 will go back to the Commission and ask for a
11 declaratory ruling to make sure that we are
12 interpreting the rules the way they would like.

13 Q. Mr. Tyndall, I neglected when we started talking
14 to ask you to talk a little bit about your
15 educational background since high school.

16 A. I have a - I received a bachelor of science in
17 biology from East Carolina University in 1976. I
18 received a master's in biology from East Carolina
19 University in 1987. I received a master's in
20 business administration from East Carolina
21 University in 1998.

22 Q. With regard to your biology degrees, is there
23 any - are there particular areas of study that you
24 have pursued within that general category?

25 A. My master's degree - my thesis was on the

1 estuarine system. I concentrated on the estuarine
2 fishes and the marsh and the feeding and habitat
3 value that they provide. That would probably be
4 my concentration.

5 Q. Mr. Tyndall, not that this is relevant to the
6 case, but I am new to representing DCM, and so
7 will you just explain what estuarine system - what
8 that means in the context of our coast?

9 A. Yeah. The estuarine system is the area where the
10 saltwater and the freshwater mix. It's the - runs
11 anywhere from probably very low salt content up in
12 the headwaters systems up in the inland areas as
13 well as maybe some of the upper counties where
14 there is less tidal flux from the inlets. It's
15 the estuarine waters, the coastal marsh system.
16 It's the shoreline. It's the interaction of all
17 these systems along the coastal area that we
18 consider the estuarine area.

19 Q. Does that include oceanfront?

20 A. It does include, I believe, the - maybe three
21 miles offshore to ocean water. I think it's -
22 estuarine waters is three miles offshore.

23 Q. Would it include the location of the property in
24 question in this permit?

25 A. Yes, it would.

1 Q. Okay. Well, let's move---

2 MS. WEESE: Your Honor, before I move to
3 the specifics of Mr. Tyndall's involvement in
4 this case, I would like to tender him as an
5 expert in the area of coastal biology and
6 estuarine waters as well as the Coastal Area
7 Management Act with particular emphasis on
8 the state - application of the state
9 guidelines.

10 THE COURT: What says the counsel for
11 Petitioner? I'll give you the opportunity to
12 voir dire the witness, if you'd like.

13 MR. HOPF: Your Honor, I don't have any
14 objection to the extent that Ms. Weese is
15 offering him with regard to his familiarity
16 with CAMA regulations and dealings with CAMA
17 regulations. Is that the scope of - in
18 addition to the biology? I don't have any
19 challenges on the biology issues, but---

20 MS. WEESE: You mean familiarity - his
21 personal knowledge as opposed to making legal
22 determinations?

23 MR. HOPF: Exactly.

24 MS. WEESE: Correct. I'm tendering him
25 for his broad personal knowledge of how those

1 rules are applied and interpreted.

2 MR. HOPF: I don't have any objection to
3 that.

4 THE COURT: All right. He's admitted as
5 an expert in what you've just stated---

6 MS. WEESE: Thank you, Your Honor.

7 THE COURT: ---with the limitations that
8 the attorney brought out.

9 Q. Okay. Well, turning to this particular case,
10 Mr. Tyndall, will you describe your involvement in
11 this case including--- I'll stop there.

12 A. I was asked to provide input into an application.
13 We were having a local permitting officer training
14 session in Morehead City early in the year, and I
15 was asked to look at an application that there was
16 a proposal that was being couched to be a swimming
17 pool proposal in the setback, that there were some
18 unique characteristics in the design or some very
19 substantial structures associated with it, and
20 they asked for my thoughts and input in that.

21 Q. Now in the course of asking for your thoughts and
22 input into that, did you have a chance to see the
23 minor permit application and accompanying
24 structural and site drawings that have been
25 admitted into evidence?

1 A. Yes, I did.

2 Q. Okay. And you're aware of the basis for the
3 permit denial in this case?

4 A. Yes, I am.

5 Q. And did you agree with the local permitting
6 officer's decision to deny this permit?

7 A. Yes, I do.

8 Q. And do you still--- You answered that already.

9 Okay. Mr. Tyndall, are you aware of how the
10 state guidelines address this issue of what
11 happens if design specifications for a structure
12 are inconsistent with the CAMA regulations,
13 particularly since today we're talking about -
14 areas of environmental concern - with those
15 standards?

16 A. Yes, I am.

17 Q. Could you elaborate on that for us?

18 A. Yeah. I will try. I don't have any regulations
19 in front of me, but it does talk about that in
20 certainly development standards, construction
21 standards, they need to be consistent with the
22 North Carolina Building Code and the floodplain
23 ordinance. It speaks to - in those cases where
24 it's in conflict, the more restrictive ones shall
25 apply.

1 In the CAMA regulations, there are two
2 things - it talks about not only the design but
3 the placement of the structure, so it gets into
4 two issues - the location as well as the design.
5 It tries to stay away from design criteria because
6 that certainly is the - in the purview of the
7 North Carolina Building Code, so it just defers
8 back to that. As a matter of fact, it references
9 it in a general statement. It used to be very
10 specific in the regulations, but it was changed to
11 just be generically that you must be consistent
12 with that.

13 So it's a dual-phase approach that it says
14 the placement of where it can be located must be
15 consistent with Coastal Management, and then it
16 must be also consistent with the North Carolina
17 building Code and the floodplain ordinance
18 requirements.

19 Q. So, Mr. Tyndall, it sounds like you're saying that
20 the agency is not saying no to a pool on this
21 property; it's just no to this kind of pool at
22 this location? Is that - am I reading - am I
23 understanding you correctly?

24 A. I think that's exactly what the denial had said,
25 that in this particular location with this design,

1 it does not meet those particular criteria. One
2 thing that I think has gone on is, again, we - the
3 Coastal Resources Commission and their rules defer
4 to the North Carolina Building Code to ensure that
5 those aspects are being handled.

6 Yet, I think the North Carolina Building Code
7 does the same thing by deferring back to the CAMA
8 statute as to the locations of where these things
9 could be. I don't think they get into the
10 location and the placement of it. I think they
11 defer to CAMA, the Act itself, to ensure that the
12 location is appropriate, and then we - and then
13 the CRC defers to the North Carolina Building Code
14 for the design criteria to be met.

15 I think that's the intent of it - for these
16 two rules and these two statutes to work together,
17 and that was the overall intent.

18 Q. Why is placement, especially on the oceanfront,
19 such a concern of the CAMA - of the Coastal Area
20 Management Act and the implementing state
21 guidelines?

22 A. Well, certainly, when you get into - that is the
23 foundation of the CAMA on the oceanfront, is to
24 ensure that the location of structures are
25 designed - are placed such that they protect life

1 and property. They are just by the nature itself
2 and the system that it's being - the development
3 that's taking place, it's a system that is subject
4 to tremendous erosion, scour, erosional forces
5 from the ocean itself.

6 So the regulations set it up such that the
7 minimum setback for most development is sixty feet
8 from the first line of stable natural vegetation.
9 That's the area where there is some stable area.
10 We're going to say - the Commission rules say,
11 "Okay. Let's move back a minimum of sixty feet,"
12 because years ago that's how people financed their
13 homes. They got a thirty-year mortgage.

14 They were saying, "Okay. We're going to give
15 you thirty years, but we're saying the average
16 erosion rate along this particular shoreline would
17 be two feet." You get a mortgage. You can get
18 your house paid for. You get the sixty - thirty-
19 year use out of it. That was the foundation of
20 that setup. So the location was key.

21 The Commission went on to say - and that's
22 what I think we spoke to in regulation as far as
23 .0309. There are certain amenities that the
24 Commission is willing to allow to take place
25 inside that setback - outside or waterward of that

1 sixty-foot setback that are expendable, that do
2 not cause tremendous damage and destruction to
3 neighbors and life and property. It's not key and
4 essential to the maintenance and the longevity of
5 that permanent structure.

6 Decks, walkways, swimming pools, fences -
7 these are the amenities that are allowed because
8 they are negligible. They do not alter the dune
9 system - the protected value of that system.

10 THE COURT: Let me get some
11 clarification before you go further.

12 THE WITNESS: Yes, sir.

13 THE COURT: I have been, obviously,
14 following the testimony here, but I thought I
15 heard through prior witnesses that it was the
16 location behind the vegetation line or behind
17 the - whatever was marked off was okay, but
18 it was the structure.

19 Now you're saying I just heard you say
20 it was both of them - both the structure and
21 the location.

22 THE WITNESS: I'm saying that that is
23 correct. Typically, development - the
24 Commission's rules speak to a first line of
25 stable natural vegetation. That's the

1 leading edge of the dune, we'll say, and then
2 there are setback requirements that are
3 thirty times the annual erosion rate back.
4 And that's where all the permanent structures
5 can be located.

6 In trying to allow typical uses of
7 amenities that fulfill the mission of the
8 management objectives of the ocean hazard
9 areas, which is to protect life and property,
10 the Commission has said, "Okay. We're going
11 to allow certain structures in that setback -
12 in that sixty-foot setback." These
13 structures can be allowed - they can be
14 placed at this location if they meet certain
15 criteria, and the rules spell out various
16 criteria that must be met.

17 And some of those are shall not affect
18 or diminish the protective value of the dune.
19 It talks about shall not be constructed so it
20 takes away the dune value of it to provide
21 that protection for the main structure. So
22 that's why - yeah, structures can be placed
23 on it. It says they shall be permitted in
24 this location if they still meet these other
25 criteria.

1 And that's where the Commission and the
2 LPO is saying - is that it doesn't meet those
3 ifs. It does - we're putting a structure in
4 a dune system that is going down sixteen,
5 twenty-some feet. That in itself has to have
6 diminished value of that dune capacity. That
7 was one of the .0309(a) standards that
8 Ms. Bouffard - Christine denied it on. So
9 yes, they may be placed there, but they're
10 still certain standards and conditions that
11 have to be met.

12 And this - a pool - like they were
13 saying, a pool can be allowed there. One
14 designed such as this with this much
15 structure below it does not meet those other
16 guidelines. Another pool could or other
17 structures could. Now there may be cases
18 where - and I'm not sure what the building
19 code says, but there may be cases where a
20 structure could be designed differently to
21 still meet the building code that doesn't
22 create a hardened permanent erosion control
23 structure that this one is functioning as.

24 That's something that certainly dialogue
25 could take place and we can look at because

1 we, again, defer to the state building code
2 to ensure that it's met. Coastal Management
3 and their representatives do not look into
4 that. We just put a condition on the permit
5 that it shall meet the North Carolina
6 Building Code. Did I answer your question
7 there?

8 THE COURT: Yes.

9 Q. Mr. Tyndall, how do you respond to the question
10 that keeps coming up here regarding this is a
11 pool, not a seawall? In other words, this
12 definition of erosion control structure, have
13 you - what do you understand that to mean?

14 A. Well, there are two things. Certainly, the
15 statute itself, I think you referenced, 113A-115.1
16 speaks to permanent erosion control structures.
17 And it lists, for example, certain structures. It
18 talks about bulkheads. It talks about seawalls.
19 And then it goes on to say, "or similar
20 structures," because you can only be bound by - in
21 writing regulations, by one's imagination.

22 We couldn't list all the types of
23 structures - the Commission couldn't list all the
24 types of structures that serve as permanent
25 erosion control structures. But here's the

1 typical ones that most people are familiar with,
2 and they listed those and then went on to say, "or
3 similar structures."

4 Well, certainly similar structures for a
5 bulkhead or vertical structure is something that
6 prevents the waves from chewing away at the
7 structure - the foundation. You know, to take the
8 sand out and to scour it out and to take the sand
9 out and to cause erosional forces. That's exactly
10 what this particular foundation on this structure
11 is serving as.

12 The top of it certainly looks like a pool and
13 it's dressed up like a pool, but down below has
14 other functions and values that serve a similar -
15 a similar structure as that standard bulkhead or
16 standard seawall.

17 Q. And if - what would happen if this lap lane pool
18 were placed in the location where it is placed now
19 without these support structures?

20 A. Well, it would serve the same purpose that many
21 property owner probably don't want to hear, but it
22 would serve the same function that the Commission
23 has really intended for it to. It would - as
24 erosion came up to the shoreline, it would
25 undercut the swimming pool. The swimming pool

1 would collapse and it would have to be removed.

2 The Commission's rules allow for temporary
3 erosion control structures or sandbags and that's
4 what it says. That's - the only type of temporary
5 erosion control structure will be sandbags. It
6 allows for those sandbags to protect permanent
7 structures, your main house or septic system or
8 road, but it doesn't allow for sandbags to protect
9 these amenities that are allowed as exceptions
10 into the setback because that's what they're
11 saying. These are amenities.

12 They've gotten fancier and more expensive
13 over the time, but the Commission is saying,
14 "We're willing to say, yeah, we're going to allow
15 you to have that structure; however, when it - you
16 know, when the erosion comes and takes, you know,
17 starts, you know, scouring underneath it, you're
18 not allowed to protect it. You need to move it
19 out." And that's the foundation of, you know,
20 temporary erosion control structures versus the
21 permanent erosion control structures and what they
22 can protect.

23 Q. Mr. Tyndall, unless you have anything to add, I
24 have no further questions for you at this time.

25 THE COURT: Cross-examination?

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MR. HOPF: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HOPF:

Q. Mr. Tyndall, good afternoon.

A. Good afternoon.

Q. You've talk about setbacks and what have you. Am I correct that the amount of setback is somewhat dependent upon the size of the structure?

A. Currently, there - that is correct. Currently, there are basically what I would say is two setbacks based on structure size. If you're larger than five thousand square foot, there's a double setback, and that was essentially based upon movability, that initially structures less than five thousand square feet were more movable, and larger structures, you had to have more time and effort to move those. So they put them out of harm's way.

Q. Okay. So larger structure is more, a greater setback?

A. That's correct.

Q. All right. You acknowledge the exemption in Section .0309?

A. The exception.

Q. The exception. Excuse me. The exception for

1 swimming pools, correct?

2 A. That's correct.

3 Q. That's there. You don't dispute that?

4 A. That's correct.

5 Q. When did that exception become law or when was it
6 enacted?

7 A. To be honest, when you asked that question of
8 Mr. Mairs, I looked at the history note, and it
9 did say February of 1981. So I believe that is
10 exactly when that was effective.

11 Q. It's been around a long time?

12 A. Yes. Twenty years - twenty-some years.

13 Q. All right. And I asked Mr. Mairs this. Are you
14 aware of any design criteria or designations in
15 the CAMA regulations for swimming pools?

16 A. I am not.

17 Q. Are you aware of any definitions of what a
18 swimming pool is in the CAMA regulations?

19 A. I am not.

20 Q. Are you familiar with the North Carolina State
21 Building Code?

22 A. Just by reference.

23 Q. Okay. You've heard testimony here today. Are you
24 familiar with requirements - design requirements,
25 construction requirements for swimming pools in

1 high hazard areas along the coast as set out in
2 the building code?

3 A. I'm really not.

4 Q. You're not - you don't consider yourself an expert
5 on the building code, I take it?

6 A. That's exactly right.

7 Q. And I certainly respect your education and
8 background and all your experience, but you're not
9 a registered structural engineer?

10 A. That's correct.

11 Q. And you're not a licensed architect?

12 A. That's correct.

13 Q. Okay. In this instance, did you or did CAMA
14 consider the North Carolina Building Code
15 requirements when you considered the application
16 for this permit?

17 A. We - well, I would have to be very careful in
18 answering that because I'm not sure - my input
19 that I had when that came down was limited to that
20 one day at the LPO workshop and reviewing the
21 plans, you know, in fifteen minutes, looking over
22 it and discussing it with the staff. So it was a
23 very limited discussion that we had at that time
24 that I have direct knowledge of.

25 After that, there's been a lot that we've

1 looked at with the file and discussed and
2 whatever, but during the decision, my recollection
3 is that we did not - it didn't make any difference
4 in regards to what the building code said other
5 than to make sure that when we put something in,
6 if it is issued or if it's not, it has to be
7 referenced and it has to be consistent with that,
8 if we do allow it.

9 Q. So am I correct that if this design which has been
10 testified here today is required under the
11 building code of North Carolina, that really
12 doesn't influence your decision one way or the
13 other on the permit. The location is not proper,
14 so it's not denied?

15 A. That's correct. That's correct.

16 Q. When you were considering this application, did
17 you discuss with Mr. Overton or Mr. Stirewalt any
18 possible options - other options in the design or
19 ways to accommodate the code as well as the CAMA
20 staff desires?

21 A. I did not. I just had conversation with the LPO
22 and Mr. Mairs and Dr. Everhart.

23 Q. Did you suggest that to anybody, or did that come
24 up?

25 A. I did not. There was certainly - I was provided

1 information that there was additional information
2 required and that there was certainly an engineer
3 drawing coming in or it had come in. I was not a
4 hundred percent aware as to what kind of dialogue
5 was taking place between Mr. Stirewalt and
6 Mr. Overton prior, you know - that was really not
7 a part of the conversation. There was a process
8 that had taken place already and the product that
9 was on the table was what I was looking at.

10 Q. Okay. Let me kind of cut to the chase, I think,
11 on this, but basically, CAMA's position on this
12 pool is that it could act as an erosion control
13 structure, and therefore, it's CAMA's belief that
14 that is improper under the CAMA rules?

15 A. I think the foundation is that this is serving as
16 a permanent erosion control structure. The design
17 of it is such that it serves a similar function,
18 similar structure as a bulkhead or retaining - a
19 bulkhead or a seawall.

20 Q. Okay. And you've heard me talk about the
21 different - well, the definition of erosion
22 control devices that's in the regulations, and
23 you've named them, bulkhead, seawall, et cetera.

24 So it's basically your interpretation of the
25 regulation that this would act as one of those

1 devices, and therefore, it's improper?

2 A. And it is, and I certainly want to say it's not
3 unique in this particular case. There have been
4 similar structures over the years that I've had
5 input into, and the call that was made would be
6 consistent with that. And that forced the
7 Commission to actually come up with standards
8 between what a retaining wall was and what a
9 bulkhead was.

10 For many times - for many years, applicants
11 wanted to hold the sand back from blowing into
12 their - underneath their house, so they wanted to
13 put in a structure. And they were designing it
14 like a bulkhead where it was going down into the
15 ground where it could serve to cut erosion from
16 coming in rather than taking the sand - keep the
17 sand from blowing in. It stopped erosion.

18 So the Commission actually came up with some
19 design standards as to what a retaining wall was
20 which retains the sand from coming in but didn't
21 serve as a bulkhead, which was an erosion control
22 structure. So this particular determination that
23 this foundation and this structure was consistent
24 with those type of calls that we had made too,
25 so---

1 Q. You testified that one of CAMA's concerns is
2 damage to neighbors from erosion control devices?

3 A. That is correct.

4 Q. Are you aware - did you hear Ms. Bouffard's
5 testimony that there were no complaints, no
6 concerns raised by any of the adjoining property
7 owners with regard to this application?

8 A. Yes, I did.

9 Q. All right. Do you have any information? Did you
10 receive anything inconsistent with that? Have
11 there been any complaints or concerns raised by
12 adjoining property owners?

13 A. I'm not aware of any.

14 Q. All right. And, again, do you acknowledge the
15 fact that pools are exempted under the CAMA
16 regulations?

17 A. I am aware that swimming pools may be permitted in
18 the setback if they meet certain conditions.

19 MR. HOPF: Thank you, Mr. Tyndall.

20 That's all I have.

21 THE COURT: So what conditions would
22 need to be employed to make this pool
23 acceptable?

24 THE WITNESS: Your Honor, if I may speak
25 without being held as a statement that I

1 would issue a permit without looking at an
2 application or whatever, but certainly, I can
3 speak to some conditions that - some
4 statements that we would offer the applicant
5 that we would look for to ensure that it
6 wasn't an erosion control structure.

7 And, certainly, one is how far down the
8 foundation goes below grade. Again, when
9 you're having erosion coming from the ocean
10 side, it is scouring away, and as long as it
11 scours out - if it continues to scour and
12 undercut the pool at the same grade it
13 could - in other words, if there's a ten-foot
14 dune going down ten foot, if it starts
15 scouring below that, it would still - the
16 dirt and everything would come out from
17 underneath it.

18 So it's not serving as an erosion
19 control structure to stop the erosion from
20 scouring, and that's what our concern would
21 be, is that the scour couldn't take place.
22 We're not promoting scour, but we're also
23 trying to live up to the statute that says no
24 permanent erosion control structure. So
25 we're trying to ensure that, as it scours, it

1 would continue to scour unless you had some
2 temporary erosion control measures or some
3 other shoreline stabilization measures. So
4 the depth of the structure down below grade
5 would be a key factor.

6 The magnitude, the massiveness of it
7 would come into play. How much destruction
8 are you actually - how much of that frontal
9 dune, in this case, below - behind the
10 sandbags - how much of that area are you
11 digging out to install this structure
12 because, again, that is one of the conditions
13 that you're not diminishing the frontal
14 dune's capacity to provide protection.

15 And, certainly, with this particular
16 structure, they were digging out the entire -
17 eighteen, twenty foot deep along the
18 shoreline property - taking that whole
19 frontal dune out. You know, so it didn't
20 meet that condition. So those would be two
21 off the top of my head we certainly would
22 look towards to make sure they were met in
23 the design criteria.

24 THE COURT: It seems like a house's
25 foundation would be a seawall in a sense?

1 THE WITNESS: Your Honor, it is, but
2 it's set back sixty foot from the vegetation
3 line at a minimum, and that's what the
4 Commission is saying, is that we're going to
5 allow these structures, but there's a setback
6 distance at a minimum of sixty feet.

7 THE COURT: So these houses here are set
8 back sixty feet?

9 THE WITNESS: They were set back at
10 least sixty feet when they were constructed,
11 Your Honor, and the erosion has come up to
12 them that much.

13 THE COURT: So how far are they back
14 from the ocean now?

15 THE WITNESS: From the erosion
16 escarpment, probably less than thirty feet -
17 twenty feet - less than twenty feet because
18 they had sandbags. I'm guessing
19 approximately twenty feet. I think
20 Mr. Overton testified that when he built this
21 structure, it was a hundred - a hundred and
22 some feet from the vegetation line, so---

23 THE COURT: All right. Any further
24 questions?

25 MR. HOPF: Just one real quick.

FURTHER CROSS-EXAMINATION

BY MR. HOPF:

Q. Mr. Tyndall, do you have the photographs up there?
Are they still at the witness stand?

MS. WEESE: You still have my copy.

A. I do not.

MR. HOPF: I have them. I was going to
him use the official---

MS. WEESE: Oh, okay. May I approach?
I'll be glad to---

THE COURT: Yes.

Q. You just testified to a dune that you would be
concerned would be destroyed by this pool. Can
you point out what dune you're referring to in
those photographs? Which number?

A. Certainly, I think if you look at - Number 6
probably has a good rendition, picture of the
frontal dune.

Q. Which---

A. Respondent's Exhibit 6.

Q. Okay.

MR. HOPF: May I approach, Your Honor.

Q. Will you point for me - just show me and for the
Judge too.

A. Certainly, this area back in here, and there's

1 obviously something behind the fence.

2 Q. [Inaudible].

3 A. This is beginning of what I'd call the frontal
4 dune now, immediately behind the sandbag structure
5 that was installed.

6 Q. You're basically pointing to the area along the
7 fence?

8 A. Yes. Exhibit 7 shows also behind it. Here's one
9 in front, and there's part where the fence is in
10 that area right there - would be the frontal dune.

11 Q. So it's something below or at the bottom of that
12 fence area?

13 A. In this picture, it's actually in front and below
14 and also behind it.

15 THE COURT: So is it your testimony that
16 digging behind the fence closer to the
17 house would - is that part of the frontal
18 dune also?

19 THE WITNESS: Yes, sir, it is, Your
20 Honor. If I may add, it certainly has - in
21 this particular case, the frontal dune has
22 been already damaged substantially, and
23 that's why the sandbags were put in. But
24 what's remaining in that frontal dune now
25 certainly would be destroyed even more with

1 the substantial swimming pool that would be
2 going in.

3 THE COURT: Is there a plan to refurbish
4 the beach along here, to your knowledge?

5 THE WITNESS: I don't believe there is.
6 Mr. Overton knows more. I'm not---

7 THE COURT: Is that the kind of thing
8 that's encouraged?

9 THE WITNESS: It is. It is. Again,
10 you're talking megabucks, and with the
11 federal government cutting back on how much
12 they're appropriating to state and local
13 governments - are stepping up less frequently
14 than they were early on because of the cost
15 share.

16 Q. Mr. Tyndall, Figure Eight is a private island,
17 correct?

18 A. That's correct.

19 Q. So there's no - there's not federal funds
20 available like there are on the rest of the
21 coastline? Wouldn't you agree?

22 A. I would agree. I mean, certainly, you'd have to
23 have certain amounts of access to be able to get
24 federal funds. But that doesn't mean that that
25 couldn't be established somewhere along the line

1 if it was critical, I think - negotiations.

2 MS. WEESE: No further questions.

3 THE COURT: All right. You may step
4 down.

5 MS. WEESE: That concludes Respondent's
6 case, Your Honor.

7 THE COURT: Let me speak with the
8 attorneys here for a moment.

9 (Thereupon, a brief recess was taken.)

10 **CLOSING ARGUMENT BY MR. HOPF**

11 MR. HOPF: (Tape begins mid sentence.)

12 ---the other witnesses have acknowledged that
13 the building code is relevant to the CAMA
14 regulations. They need to comply with that.
15 That's the force of law. Somebody like
16 Mr. Stirewalt must comply with that, but if
17 they do comply with that, then they are faced
18 with the legal impossibility of satisfying
19 CAMA requirements.

20 And all of that has to be viewed with
21 the backdrop that CAMA's regulations clearly
22 exempt swimming pools in this area, and they
23 may not like that wording, they may wish it
24 was different, but it's clearly an exception
25 or an exemption - exception, I think, is the

1 proper term - under their regulations that
2 the Petitioner pursued.

3 And I've handed up for Your Honor - and
4 I won't belabor it, but the Section .0308 and
5 .0309 of the Section 7H of the North Carolina
6 Administrative Code. And specifically in
7 .0309, subpart (a), it specifically says that
8 swimming pools are an exception, and
9 Mr. Stirewalt under questioning indicated
10 that he believed he attempted to comply with
11 all the requirements, and I think even the
12 witnesses for CAMA indicated that he was very
13 cooperative, that he provided the
14 information, that he did everything he needed
15 to do to submit this application and address
16 all the issues with regard to this exception.
17 In Section---

18 THE COURT: Counsel, how do you respond
19 to the first paragraph under 15A NCAC 07H
20 .0309, under paren (9), "swimming pools," "In
21 all cases, this development shall be
22 permitted only if it is landward; involves no
23 alteration or removal of primary or frontal
24 dunes"?

25 I understood the testimony here that

1 this would involve removal of primary or
2 frontal dunes which would - I gather they're
3 saying that this would compromise the
4 integrity of the dune.

5 MR. HOPF: Well, I would submit to Your
6 Honor, from those photographs, it's evident
7 in my view that there's not a dune there. I
8 mean it's - if you look at the photographs -
9 for example, Number 6, which Mr. Tyndall
10 referred to, and you look to the left side to
11 the adjacent property owner, you can clearly
12 see a traditional dune, and I would
13 acknowledge that that looks like a dune.

14 When you look at the Overton property,
15 basically you have some sand at the bottom of
16 that fence which is part of his yard area.
17 There's not a traditional dune there. And,
18 in fact, I think what you would find is that
19 this structure is not going to damage any
20 dune, and you can see in Photograph 8 a
21 better closeup of that. There's no
22 traditional dune there. So it's not going to
23 compromise the integrity of any dune because
24 there is not a dune there.

25 And clearly, again, this is a swimming

1 pool as required under the North Carolina
2 Building Code, and if we take away all the
3 supporting structure, their witnesses have
4 said today that it won't last. It will go
5 away. So in order to comply with the
6 building code, it has to be built in this
7 way, and they've conceded that if you don't
8 build it this way, it's not going to last.

9 But setting that aside, just looking at
10 the building code requirements, that's what
11 the code requires.

12 THE COURT: Well, since this office
13 doesn't really look to the building code,
14 what - if you had submitted it not like that,
15 would they have approved it?

16 MR. HOPF: Well, the testimony was,
17 perhaps they would have. I don't think
18 they - when asked that questions this
19 morning, they said, "Maybe. It could have
20 been. We won't know unless it was submitted
21 that way." But I think, certainly, what I
22 glean from their testimony was, it was a
23 better chance that it would be. As
24 Mr. Stirewalt said, if it was a bathtub-like
25 pool just stuck in the ground, I got the

1 impression there would be a better chance
2 that it would be approved.

3 But, again, from our position,
4 Petitioner goes forward to put a swimming
5 pool in and comply with the code, they do
6 what they're required by the code, but then
7 when they comply with that, CAMA says, "No,
8 you can't do it." So it's - again, that's
9 why I say it's an inconsistency and a legal
10 impossibility for this to work.

11 And in the meantime, Mr. Overton has
12 spent over twelve thousand dollars to try to
13 comply with what is required under the law,
14 and yet, he can't go forward. And we believe
15 that Respondent in this instance is acting
16 improperly and have substantially prejudiced
17 his rights by virtue of their interpretation
18 which is inconsistent with the expressed
19 language of their provisions that says that
20 pools are accepted and that he should be
21 allowed to get a permit to put that pool in.

22 And failing that, at a minimum, he ought
23 to be able to get twelve thousand five
24 hundred dollars back because he did that
25 trying to follow the law, and if it's a legal

1 impossibility that he can't do it, if he
2 complies with the required code provisions
3 and he's never going to be able to satisfy
4 CAMA, you know, that puts him and others like
5 him in a position where he can't win.

6 So it's our position that it has to be
7 viewed in common sense. They may not like
8 the wording, but it clearly says that pools
9 are accepted. It is a pool - and I won't
10 read it, but their regulations clearly set
11 out what's an erosion control device, and
12 it's not a swimming pool. It's all those
13 other things that were mentioned, and they've
14 testified here today that a swimming pool is
15 not any of these things.

16 And if they need to flesh out their
17 regulations, they need to change them somehow
18 so there's no discrepancy here, but it's
19 just - from my perspective, it's not proper -
20 it's not fair to Petitioner for them to
21 accept pools and allow them in this area, but
22 then when he tries to comply with the legal
23 requirements under the building code, it's
24 impossible. He can never satisfy that.

25 So we would request that the Court grant

1 him a permit to go forward here, and
2 otherwise, if the Court feels that it was
3 properly denied, ask that he be returned or
4 that he be awarded twelve thousand five
5 hundred dollars to compensate him for
6 something that is legally impossible for him
7 to do.

8 THE COURT: Award him twelve thousand
9 five hundred from who?

10 MR. HOPF: From the Respondent. Thank
11 you.

12 THE COURT: Ms. Weese, you've brought me
13 down here to this beautiful southeast coast
14 to listen to a difficult case. You know they
15 say that - what is that saying? Difficult
16 cases make difficult law or---

17 MS. WEESE: I hope it's not difficult
18 cases make bad law, Your Honor.

19 THE COURT: Yeah, makes bad law or
20 something. All right. I'll hear you.

21 **CLOSING ARGUMENT BY MS. WEESE**

22 MS. WEESE: Thank you, Your Honor. Your
23 Honor, we are not dealing with inconsistency
24 here. We're dealing with selective reading
25 of regulations and maybe, in addition to

1 that, quite a bit of disappointment. We
2 would like to have a - I mean it would be
3 wonderful to have a pool in front of your
4 beach house; however, that is not the
5 standard that applies in this type of case.

6 When a Petitioner alleges that a state
7 agency has somehow prejudiced their rights -
8 first of all, they have to make that goal.
9 They have the burden of showing that
10 prejudice, and then they have to show that
11 one or more of the five reasons that are
12 articulated in 150B-23 have been met. And,
13 in this case, the Petitioner has done
14 neither.

15 Their rights were not prejudiced. There
16 is no right to swim in a lap pool on top of
17 sixteen feet of concrete which is sunk in the
18 sand on piers. They're not even prohibited
19 from swimming, albeit in the ocean. So they
20 haven't met that standard. No prejudice.

21 And, secondly, they say that the
22 decision was erroneous. Well, again, Your
23 Honor, the decision - the denial of this
24 permit was correct. The law - our law
25 forbids permanent erosion control structures

1 on the beach, and that's what - that's how
2 Mr. - we don't know what specifications
3 Mr. Stirewalt gave to his engineer, but he
4 certainly, in his letter, which I have
5 inconveniently misplaced - indicated in his
6 letter of March 25th that the swimming pool
7 is designed as a swim lane and structurally
8 designed to withstand any undermining of sand
9 from hurricanes and the subsequent collapse.

10 Now, Your Honor, that may not say
11 bulkhead, that may not say seawall, but as
12 Mr. Tyndall pointed out, the definition in
13 the statute says erosion control structure
14 means breakwater, bulkhead, groin, jetty,
15 revetment, seawall, or any similar structure.
16 And in Mr. Stirewalt's own words, that's
17 pretty similar to a seawall.

18 So, you know, as disappointing as it may
19 be to not be able to do this, as the
20 Division - the Division points out on their
21 own Web site, when you choose to build or buy
22 on the oceanfront, you take risks. But in
23 spite of those risks, many people want to
24 build along our beautiful ocean, but this is
25 part of it. And Mr. Overton himself has

1 testified to the changes he's seen since he
2 first bought this property and had his pier.

3 And so, in closing, there's no
4 inconsistency. There is no basis for the
5 Division of Coastal Management to pay John
6 Stirewalt twelve thousand five hundred
7 dollars for having a structural engineer to
8 design a seawall and all that was paid to DCM
9 was a hundred-dollar permit application fee.

10 But, nevertheless, the agency's actions
11 were proper. The Petitioner has not met
12 their burden. And I thank you very much,
13 Your Honor, for your time and consideration
14 of our case.

15 THE COURT: Those of you who practice
16 before our agency know that we - at the end
17 of these cases, we require the Petitioner and
18 the Respondent's attorneys to prepare a -
19 basically a proposed decision within thirty
20 days and submit those to us.

21 If you need to get a transcript, then
22 the thirty days begins to run after you
23 obtain the transcript, and so I'll need
24 either of the attorneys to contact my office
25 when you receive the transcript, if you

1 choose to do that. Otherwise, it's thirty
2 days from today, and the law requires me to
3 make a decision within forty-five days after
4 I receive your proposed findings. Does
5 anyone have any questions?

6 MR. HOPF: No questions, Your Honor. I
7 would like to, if I may - I have a copy of
8 the Supreme Court case, Swain versus Peeden
9 Steel that talks about the force and effect
10 of the North Carolina Building Code. I'd be
11 happy to hand up a copy of that for you.

12 THE COURT: All right. That will be
13 fine.

14 MR. HOPF: And, also, there's been
15 reference to the pertinent section in the
16 general statute, which is 113A-115.1. I
17 don't know that you ever got a copy of that.

18 THE COURT: I did not get a copy of
19 that.

20 MR. HOPF: I'll be glad to hand that up,
21 if that's all right.

22 THE COURT: Yes, you can hand that up.

23 MS. WEESE: Yes, please do. I had a
24 copy and never submitted it.

25 MR. HOPF: That's a copy of the case.

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MS. WEESE: Thank you.

MR. HOPF: We thank you, Your Honor.

THE COURT: And I suppose since we have these pretty color photos, I won't require you to submit - you only have - you only have two copies of that, is that right?

MS. WEESE: It's possible for me to submit two, Your Honor---

THE COURT: All right.

MS. WEESE: ---two copies, yes, indeed.

THE COURT: And counsel for the Petitioner, I'll need - if you have these - Petitioner's Exhibits 1 through 7---

MR. HOPF: I can label those.

THE COURT: ---label those, and then we'll have two copies from you.

All right. I thank everybody for participating and have a good weekend.

MS. WEESE: Thank you, Your Honor.

MR. HOPF: Thank you, Your Honor.

(Thereupon, at 1:15 p.m., the proceeding was adjourned.)

- - - - -

CERTIFICATE

1
2
3 I, REBECCA P. SCOTT, State-Certified
4 Verbatim Reporter, do hereby certify that the
5 foregoing pages numbered one (1) through one hundred
6 eighty-eight (188), inclusive, constitute a transcript
7 of a hearing that was tape-recorded; that I was not in
8 the courtroom at the time of the hearing; that I did
9 listen to the tape recording with diligence; and that
10 the transcript produced is a verbatim record of what
11 is on the tape recording, to the best of my knowledge
12 and belief.

13 I further certify that I am not of
14 counsel for, or in the employment of, either of the
15 parties in this action, nor am I interested in the
16 results of this action.

17 Certified this 28th day of September,
18 2008.

19
20
21
22
23 _____
REBECCA P. SCOTT

24 STATE-CERTIFIED VERBATIM REPORTER
25

**State of North Carolina
Office of Administrative Hearings**

Certification

I hereby certify the attached (152 sheets) to be a true copy of

the Official Record as required by G.S. 150B-37 of the proceedings in the Office of Administrative Hearings, in case 08 EHR 1090, "John S Stirewalt, Architect, Agent for V. Parker Overton, Landowner, Petitioner v. N.C. Dept of Environment and Natural Resources, Division of Coastal Management, Respondent."

Included separately is one (1) volume of transcript of the hearing held on August 15, 2008 in Bolivia, North Carolina.

The original of which is filed in this office in conformance with Chapter 150B of the General Statutes of the State of North Carolina.

In witness whereof, I authorize this certification and affix the official seal of the North Carolina Office of Administrative Hearings at Raleigh, This 2nd day of December 2008.

Julian Mann, III
Chief Administrative Law Judge, Director

By: *Maria G. ai*

DELIVERED BY: _____

RECEIVED BY: *Amanda Foster*

DATE: *12-4-08*

COUNTY OF NEW HANOVER

John S. Stirewalt, Architect, Agent for V. Parker)
Overton, Landowner)
Petitioner,)

v.)

N.C. Dept. of Environment and Natural)
Resources, Division of Coastal Management)
Respondent.)

OFFICIAL RECORD INDEX SHEET

**RECOMMENDED DECISION
DOCUMENTS**

Section I

- Petition (Article 3 Agencies only)
- Request for Designation of ALJ (Article 3A Boards Commissions only)
- Notice of Contested Case and Assignment
- Order(s) of Reassignment
- Order for Prehearing Statements
- Scheduling Orders
- Notice(s) of Representation
- Document Constituting Agency Action
- Hearing Assistant/Court Reporter Request Form
- Motion and Order of Consolidation

Section II

- Prehearing Statements
- Notice of Prehearing Conference
- Motions/Responses/Briefs/ Rulings
- Report of Mediator
- Report of Settlement Conference

Section III

- Notices of Hearings
- Return of Service on Subpoenas and Notices
- Motions and Orders of Continuance
- Prehearing Order

Section IV

- Parties' Proposed Decisions
- Other Post Hearing Submissions

Section V

- Exhibits
- Offers of Proof

Section VI

- Miscellaneous Documents
- Request for Transcript
- Transcript
- Hearing tapes (when necessary)

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

JOHN S. STIREWALT, ARCHITECT,
AGENT FOR B. PARKER OVERTON,
LANDOWNER,
Petitioner,
v.
N.C. DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES,
DIVISION OF COASTAL
MANAGEMENT,
Respondent.

DECISION

This contested case was heard on August 15, 2008, in Courtroom Number 6 of the Brunswick County Courthouse, Bolivia, North Carolina, before The Honorable Joe L. Webster, Administrative Law Judge, on a petition for contested case hearing regarding the Division of Coastal Management's (DCM's) denial of a Minor Development Permit under the Coastal Area Management Act (CAMA).

APPEARANCES

For Petitioner: James F. Hopf
Hopf and Higley, PA
1694 East Arlington Blvd., Suite E
Greenville, NC 27858

For Respondent: Elizabeth J. Weese
Assistant Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether the Division of Coastal Management, acting through its Local Permitting Officer for New Hanover County acted erroneously or otherwise substantially prejudiced Petitioner's rights in its denial of the Petitioner's application for a CAMA permit to construct a swimming pool on his property.

WITNESSES

B. Parker Overton, property owner
 John S. Stirewalt
 Robb Mairs, DCM Field Representative, Wilmington Region, Wilmington, NC
 Christine Bouffard, Zoning Enforcement Official and LPO, New Hanover County
 Ted Tyndall, DCM Asst. Director for Permits and Enforcement, Morehead City, NC

EXHIBITS

Petitioner's:

1. CAMA application
2. March 18, 2008 letter from Bouffard to Stirewalt
3. March 25, 2008 letter from Stirewalt to Bouffard
4. April 9, 2008 letter from Bouffard to Stirewalt
5. March 10, 2008 invoice from Stirewalt to Overton
6. Plan drawings for pool
7. Engineer drawing for pool

Respondent's:

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Photograph
6. Photograph
7. Photograph
8. Photograph
9. Photograph
10. Photograph
11. Photograph
12. Photograph
[numbers 13 through 18 intentionally left blank]
19. CAMA minor permit application #08-013
20. Site plan submitted with application
21. Structural drawing submitted with application
22. Notice to adjacent landowner
23. Notice to adjacent landowner
24. Notice to adjacent landowner certified receipts
25. Notice of filing of application for CAMA minor development permit
26. Affidavit of publication of notice of filing application for CAMA minor development permit
27. March 18, 2008 additional information letter
28. March 25, 2008 letter from Stirewalt

29. Site plan submitted by Stirewalt
30. March 31, 2008 notice to extend time to grant or deny CAMA permit
31. April 9, 2008 notice letter of denial of CAMA minor permit

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the North Carolina Coastal Resources Commission for a final decision.

FINDINGS OF FACT

1. The property in question in this is owned by V. Parker Overton ("Overton") and is located at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina. This Property is located directly on the oceanfront and is thereby in a Coastal High Hazard Area.
2. This Petitioner herein, John S. Stirewalt, is a licensed professional architect in the State of North Carolina, and was retained by Mr. Overton to act as his agent in the design and engineering of a swimming pool on said property, and in securing the appropriate permit(s) for the installation of such swimming pool. Petitioner's invoice for the design and engineering drawings for the swimming pool, which were submitted with the application for the CAMA minor development permit, was \$12,500.00, which was paid by Mr. Overton.
3. The New Hanover County Inspection Services office is authorized as the local permitting authority under CAMA for the issuance of CAMA minor development permits such as that sought by Petitioner. The New Hanover County Inspection Office denied Petitioner's application for a CAMA permit by letter dated April 9, 2008.
4. 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 rules adopted by the Coastal Resources Commission (CRC) for the administration of CAMA. (N.C.G.S. § 113A-107)
5. The CAMA is a "cooperative state and local program." (N.C.G.S. § 113A-101) The Local Permitting Officer Program is an example of this cooperative relationship.
6. CAMA requires permits for development in an Area of Environmental Concern (AEC). (N.C.G.S. § 113A-118)

7. The Overton property is located within the Ocean Erodible Zone Area of the Ocean Hazard Area of Environmental Concern (AEC). (15A N.C.A.C. 07H .0300 *et seq.*)

8. The CRC's Ocean Hazard rules, found at 15A N.C.A.C. 07H.0300 *et seq.*, govern development in the Ocean Hazard Area of Environmental Concern (AEC).

9. The fundamental premise of the Ocean Hazard AEC designation is that lands located therein are especially vulnerable to erosion. The introductory rule describing the Ocean Hazard AEC, which has been in effect since 1977, provides:

The next broad grouping is composed of those AECs that are considered natural hazard areas along the Atlantic Ocean shoreline where, because of their *special vulnerability to erosion* or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a *substantial possibility of excessive erosion* or flood damage. 15A NCAC 7H .0301

10. The CRC rules governing oceanfront erosion response activities are found at 15A NCAC 7M .0200 *et seq.*

11. The general policy provisions concerning shoreline erosion state that barring specific instances outlined in 15A NCAC 07H .0308, "efforts to permanently stabilize the location of the ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed." 7M .0202(f).

12. In its Shoreline Erosion Policies, the Commission has determined that "[T]emporary 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 threatened structures may 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." 15A NCAC 7M .0202(e).

13. Both the CAMA and the Commission's Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. Pursuant to N.C.G.S. § 113A-115.1:

(a) As used in this section:

(1) "Erosion control structure" means a breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure.

(2) "Ocean shoreline" means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term "ocean shoreline" includes an ocean inlet and lands adjacent to an ocean inlet but does not include that portion of any inlet and lands adjacent to the inlet that exhibits characteristics of estuarine shorelines.

(b) No person shall construct a permanent erosion control structure in an ocean shoreline. The Commission shall not permit the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline....

N.C.G.S. § 113A-115.1.

Rule 15A NCAC .0308, which addresses SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS, states the following:

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

(A) All oceanfront erosion response activities shall be consistent with the general policy statements in 15A NCAC 7M .0200.

(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 bulkheads, seawalls, revetments, jetties, groins and breakwaters.

(C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront properties without regard to the size of the structure on the property or the date of its construction....

15A NCAC 7H .0308.

14. The CRC's Ocean Hazard rules establish building setback lines for development in the Ocean Hazard Area of Environmental Concern. Generally, the first line of stable natural vegetation is used as the reference point for measuring oceanfront setbacks. 15A NCAC 7H .0306(a). Development is generally not allowed within the setback.

15. Rule 15A NCAC 07H .0309(a) provides some exceptions to the setback requirements of .0306(a). Swimming pools and decking are exceptions to the setback, however, such development "shall be permitted [only]... if all other provisions of [the Ocean Hazard Areas] and other state and local regulations are met . . . 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." (15A NCAC 07H .0309(a))

16. The proposed pool would be located within the oceanfront setback, immediately behind the first line of stable natural vegetation. (Exhibit R-20)
17. The development proposed in the CAMA minor application submitted by John Stirewalt to the LPO consisted of a 5 ft. wide by 55 ft. long 8 ft. deep (water-filled area) "lap" swimming pool. The supporting structure for the pool consisted of a 30 inch thick concrete base with heavy steel material top and bottom and 16 ft deep by 18 inch thick reinforced concrete walls on twenty-six 8 inch by 8 inch by 20 foot pilings. Much of this support structure is located below grade at the oceanward edge of the property. (Exhibits R-20 and R-21)
18. The application also proposed the construction of approximately 595 square feet of tile over concrete decking outside the drip line and inside the oceanfront setback. (Exhibit R-20)
19. Through the CAMA local permitting officer program, municipalities can designate employees as Local Permitting Officers (LPOs) to process Minor Permit Applications based on a contract between DENR and the municipalities. (N.C.G.S. § 113A-117 and 15A N.C.A.C. 07I *et seq.*) New Hanover County's local permitting officer program was under contract with DCM at the time the events in this case took place.
20. In this case, the LPO for New Hanover County is Christine Bouffard. Along with her role as an LPO for the County, she is a Zoning Enforcement Official with a primary duty to enforce local zoning ordinances and flood plain management. (T p. 76) Ms. Bouffard has worked for several municipalities as a zoning enforcement official. (T p. 92) In addition to LPO training from DCM, she is a certified floodplain manager. (T p. 93)
21. In February 2008, prior to receiving the CAMA permit application, Ms. Bouffard met on site with John Stirewalt. She asked Robb Mairs, a DCM field representative, to also attend the meeting. Ms. Bouffard's primary reason for including Mr. Mairs was that because of the significant amount of erosion on Figure Eight Island, she was uncomfortable staking an oceanfront setback line on her own. (T pp. 76-77)
22. During the on-site meeting, John Stirewalt asked questions of Ms. Bouffard and Mr. Mairs about several different potential projects. During the meeting, Mr. Mairs had the impression that the existing house was going to be moved landward, and in that event, Mr. Stirewalt wanted to know what structures could remain or be developed within the setback. (T p. 67) Placement of a swimming pool was discussed; however, no details with regard to design or specific location were covered at the on-site meeting. (T pp. 66-67, 71-72)
23. The site plans and drawings ultimately submitted with the CAMA minor application in March 2008 raised a "red flag" to Ms. Bouffard. (T p. 108) She immediately recognized that this was not a "garden variety pool." (T p. 108) The structural support component of the pool--its foundation--particularly the amount of concrete, was unique in her experience. (T pp. 82; 108) The pools she previously reviewed and permitted under CAMA did not have any type of concrete supports. (T p. 82)

24. Based on her opinion that the foundation of the pool constituted a hardened structure, Ms. Bouffard denied the application. (T pp. 79, 82; Exhibit R-31) Prior to doing so, she participated in a review of the application with her section chief in New Hanover County, Robb Mairs (DCM field representative), and Ted Tyndall (DCM Assistant Director). They agreed with her assessment and decision to deny the permit. (T pp. 82, 154)
25. Ms. Bouffard testified that she did not consider the requirements of the North Carolina State Building Code. She had not gotten that far and testified "if the pool would have been permitted, a CAMA permit, it would have been issued that would have gone through another review." (T p. 83)
26. Robb Mairs has been a Field Representative with DCM for five years. In this position his responsibilities include: assisting contractors and property owners with submitting applications for general permits; administrating biological field investigation reports that are circulated throughout different state and federal divisions on proposed major development; and assisting LPOs in New Hanover County, Wrightsville Beach, Carolina Beach, and Kure Beach. (T p. 61) In this instance, Mr. Mairs assisted Christine Bouffard with the review application process and in the marking of the setback line. (T pp. 62-67)
27. Mr. Mairs is very familiar with Figure Eight Island because his work for the past five years takes him there a least once a week; in the summer of 2008 he was on the island more frequently. (T p.124) He agreed with Ms. Bouffard's decision to deny the permit. (T p. 115) Mr. Mairs authenticated twelve photographs showing the property on which the proposed pool is to be located. (T pp. 116-128) Mr. Overton's oceanfront lot is located on the north end of Figure Eight Island, near Rich Inlet. (Exhibits R-1, R-2) The site of the proposed swimming pool is between Mr. Overton's house and the existing sandbag structure. It is proposed for the area where the existing wooden fence is, and landward from that point. (Exhibits R-3 through R-12; R-20, 21, 29)
28. Due to its location i.e., oceanfront, Mr. Mairs explained that the property was in a very dynamic environment. (T p. 136)
29. Mr. Mairs testified that the location of the pool and the components underneath it would be inconsistent with the AEC rules. Therefore, whether the design of the pool was consistent with the North Carolina Building Code did not factor in to the decision to deny the CAMA minor permit. (T p. 130-132)
30. Mr. Mairs explained that structures which may be permitted within the setback are considered expendable structures. (T p. 133)
31. Ted Tyndall is the Assistant Director for Permits and Enforcement and has been with DCM for approximately seventeen years, beginning first as a Field Representative in the Washington Regional Office, then as a Field Representative in the Morehead City Office, later as the District Manager of the Morehead City Regional Office, and finally as the Assistant Director for Permits and Enforcement for the Division. (T p. 147) In his current role his responsibilities include: ensuring the correct application of the State's CAMA and Dredge and Fill laws within

the twenty coastal counties of North Carolina. (T p. 147) In addition, Mr. Tyndall oversees DCM's four regional offices in Elizabeth City, Washington, Morehead City, and Wilmington. (T pp. 147-148)

32. Mr. Tyndall was qualified by the Court as an expert in the areas of coastal biology and estuarine waters and on the Coastal Area Management Act and its implementation via application of the state guidelines enacted by the CRC. (T p. 152)

33. Mr. Tyndall was asked to consult in this case because of the substantial foundation structure associated with the design of the proposed swimming pool. Mr. Tyndall described the design as having "unique characteristics." (T p. 153)

34. Mr. Tyndall indicated on Exhibit R-6 that the beginning of the frontal dune was located immediately behind the sandbag structure that was installed, in the area along the fence, and where the pool structure is proposed. (T p. 175)

35. Mr. Tyndall testified that structures such as swimming pools can be allowed within the oceanfront setback only if they meet the criteria in 15A NCAC 7H.0309, including that the proposed development involve "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..." (T p. 159)

36. Mr. Tyndall testified that he, Mr. Mairs and the LPO all agreed that the proposed swimming pool structure in this case, that is designed to go down into the dune "some sixteen, twenty-some feet", which Mr. Tyndall characterizes as "the massiveness of it," will diminish the value of the dune in its protective capacity, and the proposed structure with so much structure below the pool does not meet the guidelines of 15A NCAC 7H.0309(a), and that is why non-compliance with this rule was a basis for the LPO's denial. (T pp. 160, 172; Exhibit R-31)

37. Mr. Tyndall believes that the foundation of the proposed pool "is serving as a permanent erosion control structure. The design of it is such that it serves a similar function, similar structure as a bulkhead or retaining - a bulkhead or a seawall." As such, Mr. Tyndall believes the structure violates the rules and law against hardened structures. (T pp. 168-69) Mr. Tyndall believed the determination in this case that the proposed structure violates the rules and law against hardened structures is consistent with other calls made by DCM. (T p. 169)

38. Mr. Tyndall testified that the primary part of the proposed design which violates the rules and law against hardened structures is "how far down the foundation goes below grade" and how the structure at issue is designed to prevent the scouring away by the waves. (T p. 171)

39. Mr. Tyndall testified that the proposed pool structure acts in the same way as those types of hardened structures prohibited by the language of N.C.G.S. § 113A-115.1, even though swimming pools are not listed in this law, as it "prevents the waves from chewing away at the structure - the foundation." (T pp. 161-62)

40. Mr. Tyndall testified that “[t]he top of it certainly looks like a pool and it’s dressed up like a pool, but down below has other functions and values that serve a similar – a similar structure as that standard bulkhead or standard seawall.” (T p. 162)

41. While the design and engineering drawings submitted by Petitioner with the application for the CAMA minor development permit appear to comply with the North Carolina State Building Code, the design and engineering drawings violate the letter and spirit of the more restrictive CAMA regulations.

CONCLUSIONS OF LAW

1. In this administrative proceeding, Petitioner bears the burden of proof. *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998). 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. *Id.* In the present case, Petitioner alleged that the agency acted erroneously.
2. Pursuant to the Coastal Area Management Act, all development in an area of environmental concern (“AEC”) requires a permit. N.C.G.S. § 113A-118.
3. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated the ocean hazard area as an Area of Environmental Concern and has adopted use standards (also referred to as state guidelines or CRC rules) for development within this area. *See* 15A N.C.A.C. 07H.0300 *et seq.*
4. The pool proposed in this case requires a CAMA permit because it constitutes “development” within an AEC.
5. Both the CAMA and the Commission’s Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308. Both the statute and the regulation provide examples of types of permanent erosion control structures but neither list is exhaustive. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308.
6. The LPO’s basis for denial of the application for a CAMA minor development permit for the proposed swimming pool was that the swimming pool as designed was, in effect, a permanent erosion control structure and as such violated the CAMA as well as the rules enacted by the Coastal Resources Commission, specifically 15A N.C.A.C. 07H.0308(a)(1)(B) and 15A N.C.A.C. 07H.0309(a). The twenty-six 16 ft deep pilings and steel reinforced concrete base proposed to support the eight ft. deep “lap” pool is the type of permanent erosion control structure that is expressly prohibited due to the significant adverse impacts on the value and enjoyment of adjacent properties, or public access to and use of the ocean beach. 7H .0308(a)(1)(B). Furthermore, the swimming pool as designed would compromise the integrity of the dune in violation of 15A NCAC 7H .0309(a).

7. While the design and engineering drawings submitted by Petitioner with the application for the CAMA minor development permit appear to comply with North Carolina State Building Code, the design and engineering drawings violate the letter and spirit of the more restrictive CAMA regulations.
8. The on site meeting between Petitioner and Respondent's representatives to determine the vegetation and set back line did not, as a matter of law, constitute a binding Agreement or promise by Respondent upon which Petitioner could justifiably rely as to whether the Respondent would eventually approve the CAMA application upon receiving the written plans and drawings. Therefore, Petitioner is not entitled to a refund of the Invoice paid to his engineer.
9. In this decision, the undersigned ALJ has given "due 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.
10. In this case, Respondent did not err by concluding that the proposed swimming pool constituted a hardened erosion control structure and that its construction would compromise the integrity of the dune. If the agency's conclusions regarding the regulations are not plainly erroneous or inconsistent with the regulations, the agency's conclusions of law should be upheld. *Simonel v. N.C. School of the Arts*, 119 N.C. App., 775, 460 S.E.2d 194, 196 (1995).
11. By denying the permit, Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously and did not fail to act as required by law or rule. N.C.G.S. § 150B-23(a).
12. By denying the permit, the LPO, did not exceed her authority or jurisdiction, nor did she act erroneously, where N.C.G.S. § 113A-121(b) states, "In cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments shall be considered and determined by the designated local official of the city or county as the case may be."
13. Petitioners have failed to show that the agency substantially prejudiced Petitioner's rights because petitioners were not entitled to a permit for an erosion control structure, albeit one with a swimming pool on top of the structure.

DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to deny the application for a CAMA Minor Permit for a swimming pool with a large supporting structure, based on the Local Permitting Officer's determination that the support structure constituted a permanent erosion control structure and violated 15A NCAC 7H .0309(a) and .0308(a)(1)(B) is AFFIRMED. Petitioners have not demonstrated by a preponderance of the evidence that their rights have been substantially prejudiced, or that Respondent erred in its decision to deny the permit application.

ORDER

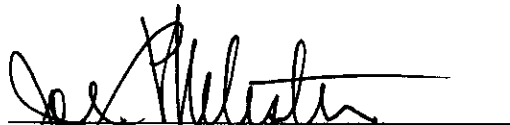
It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission 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.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 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.

This the 24th day of November, 2008.



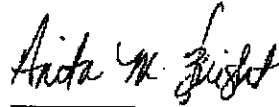
Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

James F Hopf
Attorney at Law
1694 E Arlington Blvd - Suite E
Greenville, NC 27858
ATTORNEY FOR PETITIONER

Elizabeth J. Weese
Assistant Attorney General
N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 25th day of November, 2008.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

SECTION I

John S. Stirewalt, Architect
458 Biscayne Drive
Wilmington, NC 28411
910-686-3131
johnstirewaltarchitect@gmail.com

FILED

00EHR1096

APR 29 AM 09

OFFICE OF
ADMINISTRATIVE
HEARINGS

April 28, 2008

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714

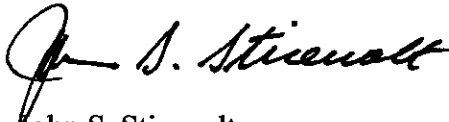
Office of Administrative Hearings
424 North Blount St.
Raleigh, NC 27601-2817

Dear Sirs:

Enclosed are original and one copy of the appeal for your review against NH County CAMA Enforcement. It is my contention that swimming pools are exempt in the ocean setback. See enclosure: Letter of March 25, 2008 to Ms. Christine R. Bouffard, LPO NH County CAMA Enforcement Officer.

Will you please let me know if additional information is required? And also of dates where I may be required in attendance. Thank you for your kind consideration of this matter.

Sincerely,



John S. Stirewalt

John S. Stirewalt, Architect**458 Biscayne Drive****Wilmington, NC 28411**

910-686-3131

johnstirewaltarchitect@gmail.com

FILED

MARCH 29 AM 11:09

OFFICE OF

ADMINISTRATIVE

March 25, 2008

Ms. Christine R. Bouffard, LPO
NH County CAMA
230 Government Center Drive, Suite 110
Wilmington, NC 28403

Re: CAMA Application # 08-013
Overton Residence
13 Comber Rd., Figure Eight Island

Dear Christine:

Enclosed are drawings reflecting the drawing changes you requested in your letter dated March 18, 2008. Items 1 thru 4 are noted on the plans.

In reference to additional items you noted, specifically; 113A-115.1, 15A NCAC 07H .0308(a) and 15A NCAC 07M .200, please note that my concern was noted at our on-site meeting on February 20, 2008 with you and Robb Mairs referencing these issues. My response to these issues is the same question I asked at that meeting, specifically that **"15A NCAC 07H .0309: Use Standards for Ocean Hazard Areas: Exceptions"** allows Swimming Pools excepted by all of the regulations you posed above. Additionally, I mentioned at our meeting that I could not just "place a bathtub out there", that I would have to at least meet the minimum requirements for Coastal Construction regarding piling depths, etc. and Robb Mairs concurred. The swimming pool is designed as a swim lane and structurally designed to withstand any undermining of sand from Hurricanes, and the subsequent collapse.

Please notify me if any of the items I have addressed are incorrect or if you require any further information. Thank you in advance for your kind consideration of this matter.

Sincerely,


John S. Stirewalt

Cc: Parker Overton, Owner
Robb Mairs, DCM

PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF (1) NEW HANOVER

08EHR 1090

(2) JOHN S. STIREWALT

ARCHITECT

(your name) PETITIONER,

v.

(3) N.H. COUNTY

CAMA ENFORCEMENT

RESPONDENT.

(The State agency or board about which you are complaining)

FILED

MAR 29 A 11:00

OFFICE OF ADMINISTRATIVE HEARINGS

PETITION FOR A CONTESTED CASE HEARING

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

DENIED APPLICATION TO CONSTRUCT A SWIMMING POOL WHICH IS EXCEPTED AS A USE WITHIN THE OCEAN SETBACK. BECAUSE OF LIMITED SPACE, POOL DESIGNED AS A SWIM LANE. STRUCTURE OF POOL DESIGNED BY STRUCTURAL ENGINEER TO WITHSTAND OCEAN FORCES & EROSION. PERVIOUS DECKING WILL REPLACE TILE DESIGN.

(If more space is needed, attach additional pages.)

(4) Because of these facts, the State agency or board has: (check at least one from each column)

- deprived me of property;
- ordered me to pay a fine or civil penalty; or
- otherwise substantially prejudiced my 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.

(5) Date: 4/27/08

(6) Your phone number: (910) 686-3131

(7) Print your full address: 458 BISCAYNE DR. WILMINGTON, NC 28411

(8) Print your name: JOHN S. STIREWALT

(9) Your signature: [Signature]

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) CHRISTINE R. BOUFFARD, LPO
(name of person served)

(11) N.H. CO. CAMA ENFORCEMENT
(State agency or board listed on line 3)

(12) 230 GOVERNMENTAL CENTER DR. STE 110 WILMINGTON, NC 28403
(street address/p.o. box) (city) (state) (zip code)

(13) This the 27TH day of APRIL, 2008

(14) [Signature]
(your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.



NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Dr., Suite 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118
FAX: (910) 798-7060

Ann S. Hines
Chief Zoning
Enforcement Official

April 9, 2008

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
APPLICATION NUMBER- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

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 to construct a swimming pool measuring 5-ft wide by 55-ft long and 8-ft deep (water-filled area) with a sand-filled support and wall structure in the oceanfront setback. This supporting structure would consist of a 30-in thick concrete base with heavy steel material top and bottom and 16-ft deep by 18-in thick reinforced concrete walls on twenty-six 8-in x 8-in x 20-ft wood pilings or concrete and/or steel piles. You also propose to construct approximately 595 sq ft of tile over concrete decking outside the drip line and inside the oceanfront setback. Therefore, as designed, this structure becomes an erosion control structure and is not allowed in accordance with NCGS 113A-115.1. In addition, your proposal is inconsistent with 15 NCAC 7H .0308 (a) and 15 NCAC 7H .0309 (a).

Should you wish to appeal my decision to the Coastal Resources Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. A petition must be filed within 20 days of the permit decision.

Respectfully yours,

Christine R. Bouffard, LPO
New Hanover County
230 Government Center Dr., Ste. 110
Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
Ann Hines, Chief Zoning Enforcement Official
Parker Overton

John S. Stirewalt, Architect
458 Biscayne Drive
Wilmington, NC 28411
910-686-3131
johnstirewaltarchitect@gmail.com

March 25, 2008

Ms. Christine R. Bouffard, LPO
NH County CAMA
230 Government Center Drive, Suite 110
Wilmington, NC 28403

Re: CAMA Application # 08-013
Overton Residence
13 Comber Rd., Figure Eight Island

Dear Christine:

Enclosed are drawings reflecting the drawing changes you requested in your letter dated March 18, 2008. Items 1 thru 4 are noted on the plans.

In reference to additional items you noted, specifically; 113A-115.1, 15A NCAC 07H .0308(a) and 15A NCAC 07M .200, please note that my concern was noted at our on-site meeting on February 20, 2008 with you and Robb Mairs referencing these issues. My response to these issues is the same question I asked at that meeting, specifically that **"15A NCAC 07H .0309: Use Standards for Ocean Hazard Areas: Exceptions"** allows Swimming Pools excepted by all of the regulations you posed above. Additionally, I mentioned at our meeting that I could not just "place a bathtub out there", that I would have to at least meet the minimum requirements for Coastal Construction regarding piling depths, etc. and Robb Mairs concurred. The swimming pool is designed as a swim lane and structurally designed to withstand any undermining of sand from Hurricanes, and the subsequent collapse.

Please notify me if any of the items I have addressed are incorrect or if you require any further information. Thank you in advance for your kind consideration of this matter.

Sincerely,


John S. Stirewalt

Cc: Parker Overton, Owner
Robb Mairs, DCM

May 02 11 17 AM 2008

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S Stirewalt)
Architect)
Petitioner,)
v.)
NH County CAMA Enforcement)
Respondent.)

**NOTICE OF CONTESTED CASE
AND ASSIGNMENT
G.S. 150B-23, 33(b)(4)**

NOTICE IS HEREBY GIVEN that a petition for a contested case hearing pursuant to G.S. 150B-23(a) was filed in and accepted by the Office of Administrative Hearings on April 29, 2008. In accordance with G.S. 150B-23(a) and 26 NCAC 3 .0103, Joe L. Webster, Administrative Law Judge, has been assigned to preside in this case. The administrative law judge may be contacted by mail at 6714 Mail Service Center, Raleigh, N.C. 27699-6714, or by telephone at (919) 733-2698.

The Respondent shall submit, within 30 days , a copy of the document constituting agency action, which caused the filing of the Petition.

A copy of any document or other pleading filed with the Office of Administrative Hearings must also be sent to the other party at the time of filing. If a party changes his or her mailing address, or if the address is incorrect, the Office of Administrative Hearings must be notified of the new or corrected address.

NOTE: You may receive an Order for Prehearing Statements to which you must respond within 30 days.

This the 2nd day of May, 2008.

Julian Mann, III
Chief Administrative Law Judge



Kim Hausen
Chief Hearings Clerk
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
919/733-0926

On this date mailed to:

John S Stirewalt
Architect
458 Biscayne Dr
Wilmington, NC 28411
PETITIONER

Ella Tarver
Department of Justice
Attorney General's Office
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
RESPONDENT

May 02 11 17 AM 2008

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF NEW HANOVER

08 EHR 1090

John S Stirewalt)

Architect)

Petitioner,)

v.)

NH County CAMA Enforcement)

Respondent.)

**ORDER FOR PREHEARING
STATEMENTS**

In order to permit the prompt preparation of this case for hearing,

IT IS HEREBY ORDERED, pursuant to 26 NCAC 03 .0104, that each party file with the Office of Administrative Hearings and serve upon the other parties a Prehearing Statement containing your present position with regard to the following:

1. The issues to be resolved, and the statutes, rules, and legal precedent involved;
2. A brief statement of the facts and reasons supporting the party's position on each issue in dispute;
3. A list of proposed witnesses;
4. Whether you wish to pursue discovery. If so, the length of time required if different from the time set in the Scheduling Order;
5. Requested location of hearing; if different from the location set in the Scheduling Order;
6. Estimated length of hearing;
7. If you do not have an attorney, your home and business addresses and telephone numbers;
8. The date by which you will be ready to have a hearing in this case if different from the date set in the Scheduling Order;
9. Other special considerations.

This Prehearing Statement must be filed and served within 30 days of the date of this ORDER.

This the 2nd day of May, 2008.



Joe J. Webster

Administrative Law Judge

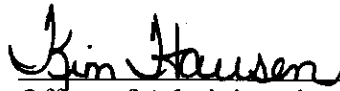
On this date mailed to:

John S Stirewalt
Architect
458 Biscayne Dr
Wilmington, NC 28411
PETITIONER

Ella Tarver
Department of Justice
Attorney General's Office
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
RESPONDENT

This the 2nd day of May, 2008.

Kim Hausen
Chief Hearings Clerk



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
919/733-0926

FILED
OFFICE OF
ADMINISTRATIVE HEARINGS

May 02 11 17 AM 2008

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF NEW HANOVER

08 EHR 1090

John S Stirewalt)
Architect)
Petitioner,)
)
v.)
)
NH County CAMA Enforcement)
Respondent.)


SCHEDULING ORDER

The undersigned has established the following Scheduling Order. This Scheduling Order may be later amended in the discretion of the Administrative Law Judge, based upon information provided in the parties' Prehearing Statements. The parties will be notified of any changes by way of an Amended Scheduling Order.

1. The hearing for this contested case will be in Wilmington, North Carolina, for the week beginning August 11, 2008. At least 15 days prior to the hearing the Administrative Law Judge will mail to the parties a more specific notice of the date, time and location of the hearing.
2. Discovery shall be completed on or before July 28, 2008.

IT IS SO ORDERED.

This the 2nd day of May, 2008.


 Joell Webster
 Administrative Law Judge

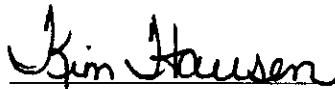
On this date mailed to:

John S Stirewalt
Architect
458 Biscayne Dr
Wilmington, NC 28411
PETITIONER

Ella Tarver
Department of Justice
Attorney General's Office
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
RESPONDENT

This the 2nd day of May, 2008.

Kim Hausen
Chief Hearings Clerk



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
919/733-0926

SECTION II

JLW

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S. Stirewalt, Architect, Agent for)
 V. Parker Overton, Landowner,)
 Petitioner,)
)
 vs.)
)
 N.C. DEPT. OF ENVIRONMENT)
 AND NATURAL RESOURCES,)
 DIVISION OF COASTAL)
 MANAGEMENT,)
 Respondents.)

RESPONDENT DENR-DCM'S
PREHEARING STATEMENT

OFFICE OF
ADMINISTRATIVE
HEARINGS

2008
MAY 15 A 11:30

FILED

NOW COMES the Respondent, N.C. Department of Environment and Natural Resources ("DENR"), Division of Coastal Management ("DCM"), by and through the undersigned counsel, pursuant to an Order entered by the Honorable Joe L. Webster, Administrative Law Judge.

1. Issues to be Resolved

This matter involves the denial of a Coastal Area Management Act ("CAMA"), N.C.G.S. § 113A-100 et. seq., Minor Development Permit by a Local Permit Official (LPO) to the landowner, Mr. Overton.

A copy of the letter denying the permit is attached hereto as the Document Constituting Agency Action.

2. Statement of the Facts

As designed, the proposed swimming pool has a support structure made up of a 30 inch concrete base reinforced with steel material, 16 foot deep by 18 inch thick reinforced concrete walls, on twenty-six 8 inch by 8 inch by 20 foot pilings. Much of this support structure is located below grade at the oceanward edge of the property. The support structure as designed violates

N.C. Gen. Stat. §113A-115.1 as well as rules enacted by the Coastal Resources Commission governing erosion control and deck size in ocean hazard areas.

3. Proposed Witnesses

Witnesses for the Respondent include, but are not limited to the following:

Ted Tyndall, DCM Asst. Director, Morehead City, NC
 Steve Everhart, DCM District Manager, Wilmington Region, Wilmington, NC
 Robb Mairs, DCM Field Representative, Wilmington Region, Wilmington, NC
 Christine Bouffard, Zoning Enforcement Official and LPO, New Hanover County

Additionally, Respondent may call as a witness any person named by Petitioner.

4. Discovery

Respondent objects to the continuation of the discovery period beyond the previously ordered date of July 28, 2008. .

5. Location of Hearing

The location of the hearing specified in the Scheduling Order, is acceptable to Respondent.

6. Estimated Length of hearing

Respondent estimates the hearing will take 1-2 days.

1. Notice of Appearance

PLEASE TAKE NOTICE that the undersigned attorney for the State of North Carolina will appear on behalf of Respondent-DCM. All pleadings, notices, calendars, or other documents should be directed to the attention of the undersigned.

2. Date for Hearing

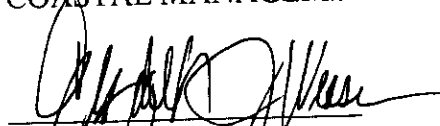
The date of the hearing specified in the Scheduling Order is acceptable

3. Special Matters

Respondent reserves the right to challenge OAH's subject matter jurisdiction over this case in all future proceedings.

Respectfully submitted, this 13th day of August, 2008.

FOR THE DIVISION OF
COASTAL MANAGEMENT



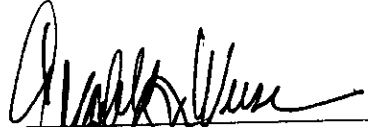
Elizabeth J. Weese
Assistant Attorney General
State Bar No. 16652
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
(919) 716-6600
(919) 716-6767 fax

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Respondent-DCM's Prehearing Statement upon the Petitioner, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows as well as by facsimile to the number appearing below:

James F. Hopf
1694 E. Arlington Boulevard, Suite E
Greenville, NC 27858
Facsimile: 252.756.1797

This the 13th day of August, 2008.


Elizabeth J. Weese
Assistant Attorney General

NEW HANOVER COUNTY**INSPECTION SERVICES**

230 Government Center Dr., Suite 110

WILMINGTON, NORTH CAROLINA 28403

TELEPHONE (910) 798-7118

FAX: (910) 798-7060

RECEIVED

APR 22 2008

DCM WILMINGTON, NC

Ann S. Hines
Chief Zoning
Enforcement Official

April 9, 2008

**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**

Mr. Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
APPLICATION NUMBER- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

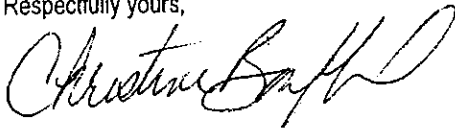
Dear Mr. Overton:

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 to construct a swimming pool measuring 5-ft wide by 55-ft long and 8-ft deep (water-filled area) with a sand-filled support and wall structure in the oceanfront setback. This supporting structure would consist of a 30-in thick concrete base with heavy steel material top and bottom and 16-ft deep by 18-in thick reinforced concrete walls on twenty-six 8-in x 8-in x 20-ft wood pilings or concrete and/or steel piles. You also propose to construct approximately 595 sq ft of tile over concrete decking outside the drip line and inside the oceanfront setback. Therefore, as designed, this structure becomes an erosion control structure and is not allowed in accordance with NCGS 113A-115.1. In addition, your proposal is inconsistent with 15 NCAC 7H .0308 (a) and 15 NCAC 7H .0309 (a).

Should you wish to appeal my decision to the Coastal Resources Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. A petition must be filed within 20 days of the permit decision.

Respectfully yours,



Christine R. Bouffard, LPO
New Hanover County
230 Government Center Dr., Ste. 110
Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
Ann Hines, Chief Zoning Enforcement Official
Parker Overton

✓
JLW

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY
FILED
2008 AUG 14 P 12:27

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S. Stirewalt, Architect, Agent for
V. Parker Overton, Landowner,
Petitioner,
v.
N.C. Dept. Of Environment and Natural
Resources, Division of Coastal Management,
Respondent.

**PREHEARING
STATEMENT OF
PETITIONER**

NOW COMES the Petitioner herein, John S. Stirewalt, as Agent for V. Parker Overton, by and through counsel, and files this Prehearing Statement pursuant to the Order for Prehearing Statements previously entered by the Honorable Joe L. Webster, Administrative Law Judge. The numbered paragraphs of this prehearing statement correspond to those of the Order. Petitioner reserves the right to amend this Prehearing Statement as this matter progresses.

1. The issues to be resolved, and the statutes, rules and legal precedent involved.

This matter involves the Petitioner's appeal from a letter dated April 9, 2008 from Christine R. Bouffard, local permitting official (LPO) for New Hanover County, to Petitioner denying Petitioner's request for a Coastal Area Management Act (CAMA) Minor Development Permit, Application Number 08-013, to construct a swimming pool on the property located at 13 Comber Road, Figure Eight Island. The issues involved in this appeal include whether the Respondent has wrongfully denied the Petitioner's request for a minor development permit and whether Respondent has:

- a. Acted erroneously, and
- b. Otherwise substantially prejudiced Petitioner's rights.

Relevant authorities for the purposes of this appeal include North Carolina General Statutes § 113A-115.1 and § 113A-120, Title 15A of the North Carolina Administrative Code ("NCAC") 7M .0200, 15A NCAC 7H .0306, 15A NCAC 7H .0308, 15A NCAC 7H .0309, Section 1624 of the North Carolina Building Code, and Section 9.5 of the American Society for Civil Engineers Standard 24 ("ASCE-24").

2. A brief statement of the facts and reasons supporting the party's position on each issue in dispute.

In her letter dated April 9, 2008, Christine Bouffard denied the CAMA Minor Development Permit for the proposed swimming pool requested by the Petitioner. Ms. Bouffard concluded that the foundation of this pool - specifically the 30 inch thick concrete base with heavy steel material top and bottom, and 16 foot deep by 18 inch thick reinforced concrete walls on twenty six 8 inch by 8 inch by 20 foot pilings, used as a support structure - would define it as a permanent erosion control structure, which is not allowed in accordance with N.C. Gen. Stat § 113A-115.1 and 15A NCAC 07H .0308(a).

Petitioner submits that the proposed pool is to be located on property that is within the boundaries of a Coastal High Hazard Area. Given that specific location, it was necessary to design the pool in accordance with the provisions of the North Carolina Building Code ("Code") relevant to such areas. Section 1624 of the Code states that all construction within Coastal High Hazard Areas shall comply with ASCE-24. Section 9.5 of ASCE-24 addresses swimming pools and states that "In-ground and above-ground pools shall be designed to withstand all flood related loads and load combinations." In order to meet this requirement, a pile-supported concrete structure (or

similar substantial structure) which can withstand buoyancy forces, lateral flood forces, and other natural considerations must be designed. Such a design in this specific location is also consistent with the Petitioner's previous statements to, and on-site discussions with, the CAMA representatives when he informed them that, as a design professional, he could not simply "place a bathtub out there" and that the Code specified certain specific design requirements.

Petitioner further submits that the standards of N.C. Gen. Stat § 113A-115.1 and 15A NCAC 07H .0308(a) defining erosion control structures work together to undermine the rules and regulations in place for the construction of swimming pools within Coastal High Hazard Areas. The design submitted by the Petitioner was in accordance with such rules and regulations, and any alterations of such design would result in structural deficiencies unable to withstand the buoyancy, flood, and additional natural forces taken into consideration by ASCE-24.

3. A list of proposed witnesses.

Petitioner may call one or more of the following persons to testify at witness in this case:

John Stirewalt, Architect
458 Biscayne Drive
Wilmington, North Carolina 28411

V. Parker Overton, Property Owner
3933 Mobleys Bridge Road
Grimesland, North Carolina 27837

Christine R. Bouffard, LPO
230 Government Center Drive, Suite 110
Wilmington, North Carolina 28403

Robb Mairs
North Carolina Division of Coastal Management
127 Cardinal Drive Ext.
Wilmington, North Carolina 28405-3845

Petitioner reserves the right to amend this list by naming additional witnesses that may be identified prior to the date of the hearing in this matter, including any witnesses identified or called by or on behalf of Respondent.

4. Discovery.

Petitioner reserves the right to seek the depositions of any of the foregoing witnesses or any witnesses identified by the Respondent, in the event that the hearing of this matter is not concluded on August 15, 2008. Otherwise, Petitioner does not anticipate the need to pursue discovery in this matter.

5. Hearing location.

Petitioner will appear at such hearing location as may be identified by the Office of Administrative Hearings. Petitioner's preference is that the hearing location be in Wilmington, North Carolina.

6. Estimated length of hearing.

Petitioner estimates that his portion of the hearing will take three (3) hours to complete.

7. Not applicable.

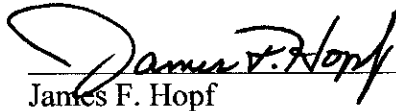
8. Date ready for hearing.

Petitioner will be ready for the hearing in this matter at the date set out in the Notice of Hearing, August 15, 2008, at 9:00 a.m. in Bolivia, North Carolina, or at such other time as may be determined and set by the Administrative Law Judge.

9. Not applicable.

Respectfully submitted, this the 13th day of August, 2008.

HOPF & HIGLEY, P.A.

A handwritten signature in black ink, appearing to read "James F. Hopf", is written over a horizontal line.

James F. Hopf

N.C. Bar No. 13551

1694 East Arlington Blvd., Suite E

Greenville, North Carolina 27858

Telephone: 252/756-1883

Facsimile: 252/756-1797

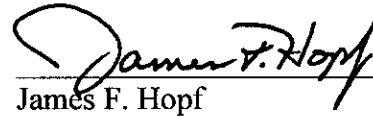
**ATTORNEYS FOR PETITIONER AND
V. PARKER OVERTON, LANDOWNER**

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **Prehearing Statement of Petitioner** was served this day upon counsel for Respondent by facsimile at the facsimile number listed below, and mailing a copy thereof, sealed in a secure envelope, postage prepaid and deposited in the United States Post Office, Greenville, North Carolina, addressed to the following:

Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, North Carolina 27699
Facsimile #: (919) 716-6767

This the 13th day of August, 2008.


James F. Hopf

Wester

STATE OF NORTH CAROLINA **FILED**
COUNTY OF NEW HANOVER **JUN -2 P 1:05**

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S Stirewalt
Architect
Petitioner,
v.
NH County CAMA Enforcement
Respondent.

OFFICE OF
ADMINISTRATIVE
HEARINGS

MOTION TO DISMISS

NOW COMES the undersigned, pursuant to N.C. Gen. Stat. §§150B-23 *et seq.* and 113A-121.1 and Rule 12 of the N.C. Rules of Civil Procedure, and moves the Court for an order dismissing the alleged Petition for a Contested Case Hearing. In support of this Motion, the undersigned shows the following:

1. On April 9, 2008, a Mr. Parker Overton was denied a Coastal Area Management Act (CAMA) minor development permit by Christine R. Bouffard. Ms. Bouffard is an employee of New Hanover County and one of her job responsibilities is to act as the local permitting official for CAMA minor development applications. *See* N.C. Gen. Stat. §113A-117. A copy of the Denial Letter dated April 9, 2008 is attached as Exhibit A. Exhibit A is also the document constituting agency action.

2. The alleged Petitioner is not the permit applicant; consequently he is not a person aggrieved by agency action. *See* Exhibit A, CAMA minor permit denial letter addressed to "Mr. Parker Overton"... "after reviewing your application...no permit may be granted for the project you propose..." (Emphasis added.)

3. It is well settled that the rights of a person aggrieved by agency action, including the

right to an administrative hearing, are established by the applicable organic statute. See N.C.Gen.Stat. § 150B-23(a) (2007) (Article 3, Chapter 150B describes the procedure for review of agency action; it does not establish the right to a hearing); *see also In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963). ("No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute.")

4. In the present matter, the Coastal Area Management Act (CAMA) found at N.C. Gen. Stat. §§113A-100 through 134.1 is the statute from which the right to appeal a CAMA permitting decision derives. Pursuant to N.C. Gen. Stat. § 113A-121.1(a) only "[a]n applicant for a minor ...[CAMA] development permit who is dissatisfied with the decision on his application may file a petition for a contested case hearing under N.C. Gen. Stat. §150B-23. N.C. Gen. Stat. §113A-121.1(a). The statute goes on to explain that "[a] person other than a permit applicant...who is dissatisfied with a decision to grant or deny a minor or major development permit" must first apply to the Coastal Resources Commission (CRC) for a determination concerning whether a contested case is appropriate. See N.C. Gen. Stat. §113A-121.1(a) and (b).

5. Upon information and belief, the alleged Petitioner, Mr. Stirewalt, has not made such application to the CRC.

6. The alleged "Petition for Contested Hearing" filed with the Office of Administrative Hearings which purports to contest the denial of a CAMA minor development permit was also improperly served and captioned. The designated agent for service of process for the Department of Environment and Natural Resources is its General Counsel, Ms. Mary Penny Thompson. The Division of Coastal Management, and not the "NH County CAMA Enforcement" is the proper

respondent in an action to contest CAMA permitting activities. *See e.g.*, N.C. Gen. Stat. §§113A-101; -116; -117; and 121.1.

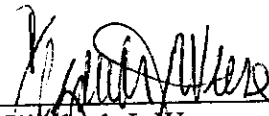
WHEREFORE, because Petitioner fails to meet the legal and statutory requirements for the right to file a contested case petition in this matter, the undersigned moves that the alleged Petition for Contested Case Hearing be **dismissed with prejudice** based on the grounds of lack of subject matter jurisdiction, lack of standing to challenge agency action, failure to name a necessary party, failure to serve a necessary party, and failure to state a claim upon which relief can be granted.

The undersigned requests that the time frame for the filing of its Prehearing Statement be continued until the Administrative Law Judge has ruled on this Motion.

Respectfully submitted, this the 20 day of June, 2008.

ROY COOPER
Attorney General

By

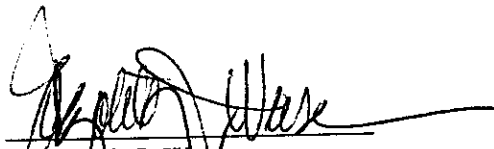

Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699
(919) 716-6600
State Bar No. 16652

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTION TO DISMISS AND TRANSMISSION OF DOCUMENT CONSTITUTING AGENCY ACTION** was served on the alleged Petitioner by depositing a copy of same on the date shown below with the United States Mail, first class, postage and addressed as follows:

John S. Stirewalt
Architect
458 Biscayne Dr.
Wilmington, NC 28411

This the 2nd day of June, 2008.


Elizabeth J. Weese
Assistant Attorney General



NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Dr., Suite 110

WILMINGTON, NORTH CAROLINA 28403

TELEPHONE (910) 798-7118

FAX: (910) 798-7060

RECEIVED

MAY 05 2008

Ann S. Hines
Chief Zoning
Enforcement Official

Morehead City DCM

April 9, 2008

**CERTIFIED MAIL -
RETURN RECEIPT REQUESTED**

Mr. Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
APPLICATION NUMBER- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

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.

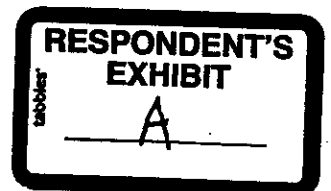
This decision is based on my findings that your request violates NCGS 113A-120(a)(8) which requires that all applications be denied which are inconsistent with CAMA guidelines. You have applied to construct a swimming pool measuring 5-ft wide by 55-ft long and 8-ft deep (water-filled area) with a sand-filled support and wall structure in the oceanfront setback. This supporting structure would consist of a 30-in thick concrete base with heavy steel material top and bottom and 16-ft deep by 18-in thick reinforced concrete walls on twenty-six 8-in x 8-in x 20-ft wood pilings or concrete and/or steel piles. You also propose to construct approximately 595 sq ft of tile over concrete decking outside the drip line and inside the oceanfront setback. Therefore, as designed, this structure becomes an erosion control structure and is not allowed in accordance with NCGS 113A-115.1. In addition, your proposal is inconsistent with 15 NCAC 7H .0308 (a) and 15 NCAC 7H .0309 (a).

Should you wish to appeal my decision to the Coastal Resources Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. A petition must be filed within 20 days of the permit decision.

Respectfully yours,

Christine R. Bouffard, LPO
New Hanover County
230 Government Center Dr., Ste. 110
Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
Ann Hines, Chief Zoning Enforcement Official
Parker Overton



HOPF & HIGLEY, P.A.

JAMES F. HOPF
jim@hopfhigley.com

ATTORNEYS AT LAW
1694 E. Arlington Boulevard, Suite E
Greenville, North Carolina 27858
Telephone: 252.756.1883
Facsimile: 252.756.1797
www.hopfhigley.com

DONALD S. HIGLEY, II
don@hopfhigley.com

July 16, 2008

VIA FACSIMILE AND U.S. MAIL

The Honorable Joseph Webster
North Carolina Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714

Re: *Stirewalt v. New Hanover County CAMA Enforcement*
New Hanover County, 08 EHR 1090

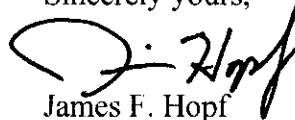
Dear Judge Webster:

At the hearing of this case in Wilmington last Friday, July 11, 2008, Respondent, through counsel, submitted for your consideration a Memorandum of Law in Support of Respondent's Motion to Dismiss. Pursuant to Rule 5(a1) of the North Carolina Rules of Civil Procedure, that memorandum was untimely in that it was not served on the opposing party in advance of the hearing. Frankly, I did not object at the time since everyone had traveled so far for the hearing, and I deemed it more efficient to proceed with the hearing than to continue it as contemplated by the Rule.

However, given that your Honor took the matter under advisement, I feel compelled to submit the enclosed Memorandum of Law in Opposition to Motion to Dismiss for your consideration on behalf of the Petitioner. By copy of this letter and the enclosure, I am providing notice to Ms. Weese.

Thank you for your continued consideration in this matter.

Sincerely yours,


James F. Hopf

cc: Elizabeth J. Weese (w/ enclosure)

OFFICE OF
ADMINISTRATIVE
HEARINGS

2008 JUL 17 A 10:51

FILED

STATE OF NORTH CAROLINA

NEW HANOVER COUNTY

JOHN S. STIREWALT, Architect

Petitioner,

v.

NH COUNTY CAMA ENFORCEMENT,

Respondent.

FILED

JUL 17 A 10:56

OFFICE OF ADMINISTRATIVE HEARINGS

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
FILE NO. 08 EHR 1090

**PETITIONER'S MEMORANDUM
OF LAW IN OPPOSITION TO
MOTION TO DISMISS**

NOW COMES the Petitioner herein, by and through the undersigned counsel, and submits this Memorandum of Law in opposition to the Respondent's motion to dismiss in this matter.

I. The Petitioner was acting as the land owner's agent.

It is uncontested that, on March 2, 2008, the Petitioner, as the "authorized agent" for the land owner, Parker Overton, submitted an application for the issuance of a CAMA minor development permit in order to construct a swimming pool at 13 Comber Road, Figure Eight Island. A copy of that application has been previously submitted to the Court as Respondent's Exhibit B. In addition to identifying the Petitioner as the land owner's "authorized agent", that application specifies on page two, under "Statement of Ownership", that the Petitioner was signing as "the undersigned *and applicant* for a CAMA minor development permit". Finally, the signature line executed by the Petitioner on that application is labeled as "landowner *or person authorized to act as his agent*" for purposes of the application.

The fact that Petitioner was acting as the land owner's agent was even recognized by the relevant permitting authorities when the permit was denied. In that regard, the denial letter was addressed to "Mr. Parker Overton *c/o John Stirewalt*" and was sent to the Petitioner's business

address. A copy of that denial letter was previously submitted to the Court as Respondent's Exhibit A. Clearly, the Petitioner was acting as Mr. Overton's agent in submitting the application seeking issuance of the permit, and arguably by the very terms of the application itself, Petitioner is the "applicant".

II. The Petitioner has standing to seek review of the permit denial.

The relevant enabling statute for review of the permit denial in this case is N.C.G.S. § 113A-121.1. That statute provides that "[a]n applicant for a minor or major development permit who is dissatisfied with the decision on his application may file a petition for a contested case hearing *under G.S. 150B-23* within 20 days after the decision is made." N.C. Gen. Stat. § 113A-121.1(a) (2007) (emphasis added). N.C.G.S. § 150B-23 then provides that "[a] contested case shall be commenced by filing a petition with the Office of Administrative Hearings and . . . [the] petition shall be signed by a party *or a representative of the party . . .*". N.C. Gen. Stat. § 150B-23(a) (2007) (emphasis added). The Petitioner complied with both of these provisions.

In *Allied Environmental Services v. North Carolina Department of Environment and Natural Resources*, ___ N.C. App. ___, 653 S.E.2d 11 (2007), *rev. denied* ___ N.C. ___, 661 S.E.2d 238 (2008), the Court considered the question of whether an agent of the land owner could seek review through a contested case petition of a challenged administrative decision. In *Allied*, an engineering firm sought review by a contested case petition of an administrative decision that was adverse to the land owner. The defendant State of North Carolina filed a motion to dismiss the contested case petition on the grounds that the Office of Administrative Hearings ("OAH") lacked subject matter jurisdiction because the engineering firm was not a proper party to represent the owner. The

Administrative Law Judge (“ALJ”) granted the motion and dismissed the contested case and that ruling was affirmed by the trial court upon judicial review. However, on appeal of those rulings, the Court of Appeals reversed the ALJ and trial court decisions and determined that it was error to dismiss the appeal by contested case for lack of subject matter jurisdiction. In reaching that conclusion, the Court interpreted N.C.G.S. § 150B-23, which sets forth the guidelines for a contested case petition, and specifically provides that a petition shall be signed by “a party or a representative of the party”. *Allied*, 653 S.E.2d at 12. According to the Court, that would include agents of the owner such as the engineering firm. The Court further examined the meaning of the term “representative” as used in G.S. § 150B-23 and noted that the Black’s Law Dictionary definition of that term is “[o]ne who stands for or acts on behalf of another. . .”. *Id.*

In the instant case, the Petitioner, as the architect and representative of the owner on the matter in dispute (namely the design of the swimming pool and denial of the development permit), was acting for and on behalf of the owner in the exact manner contemplated by and set out in the relevant statute, G.S. § 150B-23, in seeking review by a contested case petition of the permit denial. Such a course of action is specified in the statutes and supported by the *Allied* decision. Respondent’s motion to dismiss should be denied.

III. Petitioner was following contested case instructions.

In seeking to appeal from the permit denial, Petitioner sought out and followed the mandated instructions for the submission of a contested case petition. The format of a petition for a contested case hearing is contained in OAH Form H-06. The “Instructions for Form H-06” specifies in relevant part: “Fill in your county of residence (1), print *your name* on line (2), and *the name of the*

agency or board about which you are complaining on line (3). . . print your name on line (8), and sign your name on line (9).” (See Exhibit 1 attached hereto) (emphasis added). Examination of the contested case petition in this matter reveals that is exactly what the Petitioner did. As the owner’s agent, he followed the procedures set out in the relevant statutes, forms and instructions in seeking the review in question. Respondent should not be heard to complain about procedural or technical issues when Petitioner attempted to comply as the owner’s agent in good faith.

IV. The relevant rules permit amendment of the petition.

Rule .0101 of the Rules of the OAH provides that the Rules of Civil Procedure “shall apply in contested cases in the OAH unless another specific statute or rule of the OAH provides otherwise”. Rule 15(a) of the North Carolina Rules of Civil Procedure provides that pleadings may be amended by leave of court and that leave “shall be freely given when justice so requires”. N.C. Gen. Stat. § 1A-1, Rule 15 (2007). The amendment of pleadings has been amply considered by our appellate courts with the general conclusion that amendments should be freely allowed absent a showing of material prejudice to the other party, and that a judge’s decision on a request for amendment will not be reversed on appeal without a showing of abuse of discretion. *See generally Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972); *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986). Additionally, “[l]iberal amendment of pleadings is encouraged by the Rules of Civil Procedure.” *McGinnis v. Robinson*, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Petitioner submits that, under the circumstances presented in this matter, dismissal of the petition is a drastic and harsh result which would prevent a consideration of the underlying issues sought to be examined in the permit denial appeal. Further, Respondent has not demonstrated any prejudice which will result from an amendment of the petition in this matter. To the extent that the Court deems it necessary or appropriate, Petitioner requests that this Court exercise its discretion

under the foregoing rules to amend the petition to name Mr. Overton as the petitioner and the Division of Coastal Management as the respondent. Such a result will further the principles of fairness and justice in allowing the appeal of the permit denial to proceed on its merits and the underlying regulatory and code requirements to be properly considered.

Based on the foregoing, as well as the arguments of counsel at the July 11, 2008 hearing in Wilmington, Petitioner respectfully requests that the Respondent's motion to dismiss be denied.

This 16th day of July, 2008.

HOPF & HIGLEY, P.A.



James F. Hopf
N.C. Bar No. 13551
1694 East Arlington Blvd., Suite E
Greenville, North Carolina 27858
Telephone: 252/756-1883
Facsimile: 252/756-1797

CERTIFICATE OF SERVICE

I, James F. Hopf, hereby certify that a copy of the foregoing **Petitioner's Memorandum of Law in Opposition to Motion to Dismiss** was served on all parties entitled to receive a copy of same via facsimile, and also by depositing such copy in a postage paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the U.S. Postal Service on the date indicated below:

Elizabeth J. Weese
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Facsimile: 919/716-6750

This the 16th day of July, 2008.


JAMES F. HOPF

(4)

**INSTRUCTIONS FOR FORM H-06
"PETITION FOR A CONTESTED CASE" AND "CERTIFICATE OF SERVICE"**

PLEASE PRINT CLEARLY OR TYPE

FILL IN BLANKS:

Fill in your county of residence (1), print your name on line (2), and the name of the agency or board about which you are complaining on line (3). Be sure to briefly state the facts about your case. Check all of the items that apply in section (4). Enter the date on line (5), your telephone number on line (6), your address on line (7), print your name on line (8), and sign your name on line (9).

CERTIFICATE OF SERVICE:

You must mail or deliver a copy of your completed petition to the agency or board named on line (3) and complete the "certificate of service" section on your petition, entering the name of the person to whom you mailed or delivered the petition on line (10). You should contact the agency or board to determine the name of the person to be served. Print the name of the state agency involved on line (11), the address of the agency or board on line (12), the date on line (13), and sign your name on line (14).

FILING YOUR PETITION WITH THE OFFICE OF ADMINISTRATIVE HEARINGS:

Your contested case will commence as soon as you file your completed original petition, along with a copy, properly signed, with the Office of Administrative Hearings. Below are the mailing and physical addresses:

**Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714**

**Office of Administrative Hearings
424 North Blount St.
Raleigh, NC 27601-2817**

If you mail this form, the case commences when it is **received and filed** in this office.

You may file your petition by fax during normal business hours by faxing the petition to the Clerk's Office at (919) 733-3478.

You may file your petition by electronic mail by an attached file either in PDF format or a document that is compatible with or convertible to the most recent version of Word for Windows by sending the electronic transmission to oah.clerks@ncmail.net. Electronic mail without attached file shall not constitute a valid filing.

OAH must receive the **original signed document and one copy** within **seven business days** following the fax or electronic transmission for the petition to be deemed "filed" on the fax or electronic transmission date.



LOCALITY NHC PERMIT NUMBER 08-013

OCEAN HAZARD ESTUARINE SHORELINE ORW SHORELINE PUBLIC TRUST SHORELINE OTHER
(FOR OFFICIAL USE ONLY)

GENERAL INFORMATION

LAND OWNER:

NAME PARKER OVERTON
ADDRESS P.O. BOX 644
CITY GREENVILLE STATE NORTH CAROLINA ZIP 27835 PHONE 252-756-1771

AUTHORIZED AGENT:

NAME JOHN STIREWALT
ADDRESS 458 BISCAYNE DRIVE
CITY WILMINGTON STATE NORTH CAROLINA ZIP 28411 PHONE 910-686-3131

LOCATION OF PROJECT: (ADDRESS, STREET NAME AND/OR DIRECTIONS TO SITE. IF NOT OCEANFRONT, WHAT IS THE NAME OF THE ADJACENT WATERBODY?)
13 COMBER ROAD FIGURE EIGHT ISLAND, WILMINGTON NORTH CAROLINA

DESCRIPTION OF PROJECT: (LIST ALL PROPOSED CONSTRUCTION AND LAND DISTURBANCE.)
NEW POOL

SIZE OF LOT/PARCEL: 22.000 square feet _____ acres _____

PROPOSED USE: RESIDENTIAL (SINGLE-FAMILY MULTI-FAMILY) COMMERCIAL/INDUSTRIAL OTHER

TOTAL ENCLOSED FLOOR AREA IF A BUILDING IN THE OCEAN-HAZARD-AREA OF ENVIRONMENTAL CONCERN (AEC): 4.679 square feet (INCLUDES ALL FLOOR AND ROOF-COVERED DECKS)

FLOOR/DECK: 3.240
DRIVE/WALKS: 1.438
TOTAL: 4.679

SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OF BUILDING-UPON SURFACE IN THE COASTAL SHORELINE AREA OF ENVIRONMENTAL CONCERN (AEC): 4.679 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.)

$\frac{4.679}{22.000} = .21\%$

- 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

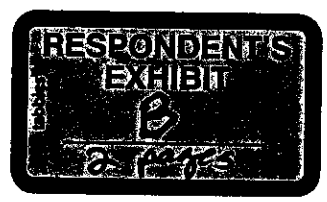
IF YES, LIST THE TOTAL BUILT-UPON AREA/IMPERVIOUS SURFACE ALLOWED FOR YOUR LOT OR PARCEL. _____ s.q. ft.

RECEIVED

MAR 05 2008

RECEIVED MAR 03 2008

DCM WILMINGTON, NC



08-013

OTHER PERMITS MAY BE REQUIRED: THE ACTIVITY YOU ARE PLANNING MAY REQUIRE PERMITS OTHER THAN THE CAMA MINOR DEVELOPEMENT 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 TRETMENT SYSTEM), BURNING, ELECTRICAL, PLUMBING, HEATING AND AIR CONDITIONING, INSULATION AND ENERGY CONSERVATION, FIA, CERTIFICATION, SAND DUNE, SEDIMENT CONTROL, SHBDIVISION APPROVAL, MOBILE HOME PARK APPROVAL, HIGHWAY, CONNECTION, AND OTHERS.

STATEMENT OF OWNERSHIP:

I, THE UNDERSIGNED, AND APPLICANT FOR A CAMA MINOR DEVELOPMENT PERMIT, BEING EITHER THE OWNER OF THE PROPERTY IN AN AEC OR A PERSON AUTHORIZED TO ACT AS AN AGENT FOR PURPOSES OF APPLYING FOR A CAMA MINOR DEVELOPEMENT 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 VANCE PARKER OVERTON, SEE DEED BOOK MAP 18 PAGE 89-90 IN THE NEW HANOVER 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)	MR. & MRS. NELSON	317 STONEY BROOK ROAD, ROCKY MOUNT NC 27804 - (12 COMBERS ROAD)
(2)	MR. & MRS. CAGNEY	403 SILVER CREEK TRAIL, CHAPEL HILL NC 27514 - (14 COMBERS ROAD)
(3)		
(4)		

FOR DEVELOPERS IN OCEAN HAZARD AN 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 ACTIONS.

THIS THE 2 DAY OF MARCH, 2008

[Signature]
LANDOWNER OR PERSON AUTHORIZED TO ACT AS HIS AGENT FOR PURPOSE OF FILLING A CAMA PERMIT APPLICATION.

RECEIVED MAR 03 2008

Jun 03 12 16 PM 2008

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF NEW HANOVER

08 EHR 1090

John S Stirewalt)	
Architect)	
Petitioner)	
)	
vs.)	REQUEST FOR RESPONSE
)	TO MOTION
)	
NH County CAMA Enforcement)	
Respondent)	

The Respondent filed a Motion to Dismiss on June 2, 2008. The Petitioner shall have 10 days from the date of this Request to file a written response setting forth the objections to the Motion.

It is therefore ORDERED that the Petitioner shall respond to the above-referenced motion on or before June 12, 2008.

If your motion has not been ruled on before the hearing, it will be heard in court prior to the hearing on the merits.

This the 3rd day of June, 2008.

JLW



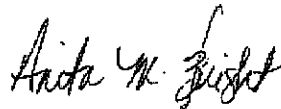
Joe L. Webster

A copy of the foregoing was mailed to:

John S Stirewalt
Architect
458 Biscayne Dr
Wilmington, NC 28411
PETITIONER

Ella Tarver
Department of Justice
Attorney General's Office
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001
RESPONDENT

This the 3rd day of June, 2008.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2698
Fax: (919) 733-3407



FILED

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

COUNTY OF NEW HANOVER

2008 JUN 13 A 11:00

John S. Stirewalt
Architect

OFFICE OF
ADMINISTRATIVE
HEARINGS

Petitioner,

v.

RESPONSE TO MOTION TO DISMISS

NH County CAMA Enforcement

Respondent.

NOW COMES the undersigned, John S. Stirewalt, and hereby submits the following Response to the Motion to Dismiss filed in this matter on June 2, 2008, and seeks to amend the Petition for Contested Case to substitute Mr. Parker Overton as the petitioner and the Division of Coastal Management as the respondent. In support whereof, the undersigned shows the following:

1. My name is John Stirewalt and I am employed as an architect in Wilmington, North Carolina.
2. I was retained by Mr. Parker Overton to design and secure the necessary permits for a swimming pool ("lap pool") on his property located at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina.
3. I did design such a swimming pool for Mr. Overton and applied for a CAMA Minor Development Permit with Ms. Christine R. Bouffard, LPO, New Hanover County Inspection Services department.
4. The Overton residence is in a Coastal High Hazard Area. The design of this pool required compliance with the relevant provisions of the North Carolina Building Code. Section 1624 of the Code requires designs to comply with ASCE 24 in Coastal High Hazard Areas. Section 9.5 of ASCE 24 addresses pools and states: "In-ground and above-ground pools shall be designed to withstand all flood related loads and load combinations." This requires a pile-supported concrete structure (or similar substantial structure) that can resist buoyance forces, lateral flood forces, and other considerations.
5. Subsequent to applying for such CAMA Minor Development Permit, I received a denial letter from Ms. Bouffard dated April 9, 2008, which stated that the swimming pool which I designed was being considered "an erosion control structure" which was not allowed and inconsistent with coastal management provisions.

6. As set forth above, the reason for this design is the requirements of the State Building Code.
7. Because of my involvement in the design and implementation of this project, I incorrectly personally appealed this denial on behalf of Mr. Overton and further mistakenly directed my appeal to Ms. Bouffard's office, which I believed to be the correct and proper mechanism for appealing the denial.
8. I earnestly believe that this matter merits due consideration by means of an appeal because the relevant regulations and requirements are inconsistent and in need of interpretation.
9. By virtue of this response, I hereby respectfully request that my appeal be amended to substitute my client and the property owner, Mr. Parker Overton, as the petitioner in this matter, and further that the petition be amended to substitute the Division of Coastal Management as the correct respondent.
10. Such amendments will further the principles of fairness and justice in allowing this matter to be considered on its merits and the confusion created by the applicable regulations, codes and requirements to be properly addressed.

WHEREFORE, the undersigned requests that Mr. Parker Overton be substituted as the petitioner and the Division of Coastal Management as the respondent on the petition for contested case in this matter.

This the 12th day of June, 2008.

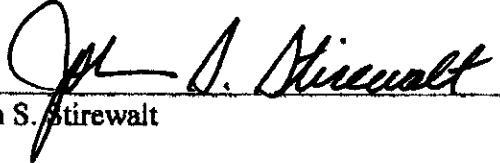

John P. Stirewalt

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **Response to Motion to Dismiss** was served this day upon the alleged Respondent by mailing a copy thereof, sealed in a secure envelope, postage prepaid and deposited in the United States Post Office, Greenville, North Carolina, addressed to the following:

Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, North Carolina 27699

This the 12th day of June, 2008.



John S. Stirewalt



John Stirewalt, Architect.

458 BISCAYNE DR.
WILMINGTON, NC 28411
PHONE: (910) 686-3131
FAX: (910) 686-6561

JSW

FAX FORM

DATE: JUNE 13, 2008

TO: THE OFFICE OF ADMINISTRATIVE HEARINGS

NUMBER OF PAGES: 4 (Including transmittal sheet)

COMMENTS: _____

HARD COPY TO FOLLOW IN MAIL

COPY MAILED TO: ELIZABETH J. WEESE, ASSISTANT ATTORNEY GENERAL

BEST REGARDS,

John Stirewalt

JOHN STIREWALT, ARCHITECT

PLEASE CONTACT US IF YOU DO NOT RECEIVE ALL PAGES

for copy 401

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

COUNTY OF NEW HANOVER

John S. Stirewalt)
 Architect)
 Petitioner,)
))
 v.)
))
 NH County CAMA Enforcement)
))
 Respondent.)

RESPONSE TO MOTION TO DISMISS

NOW COMES the undersigned, John S. Stirewalt, and hereby submits the following Response to the Motion to Dismiss filed in this matter on June 2, 2008, and seeks to amend the Petition for Contested Case to substitute Mr. Parker Overton as the petitioner and the Division of Coastal Management as the respondent. In support whereof, the undersigned shows the following:

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3. I did design such a swimming pool for Mr. Overton and applied for a CAMA Minor Development Permit with Ms. Christine R. Bouffard, LPO, New Hanover County Inspection Services department.
4. The Overton residence is in a Coastal High Hazard Area. The design of this pool required compliance with the relevant provisions of the North Carolina Building Code. Section 1624 of the Code requires designs to comply with ASCE 24 in Coastal High Hazard Areas. Section 9.5 of ASCE 24 addresses pools and states: "In-ground and above-ground pools shall be designed to withstand all flood related loads and load combinations." This requires a pile-supported concrete structure (or similar substantial structure) that can resist buoyance forces, lateral flood forces, and other considerations.
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10. Such amendments will further the principles of fairness and justice in allowing this matter to be considered on its merits and the confusion created by the applicable regulations, codes and requirements to be properly addressed.

WHEREFORE, the undersigned requests that Mr. Parker Overton be substituted as the petitioner and the Division of Coastal Management as the respondent on the petition for contested case in this matter.

This the 12th day of June, 2008.



John J. Stirewalt

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **Response to Motion to Dismiss** was served this day upon the alleged Respondent by mailing a copy thereof, sealed in a secure envelope, postage prepaid and deposited in the United States Post Office, Greenville, North Carolina, addressed to the following:

Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, North Carolina 27699

This the 12th day of June, 2008.



John S. Stirewalt

HOPF & HIGLEY, P.A.

08 EHR 1090

jlw

JAMES F HOPF
jim@hopfhigley.com

ATTORNEYS AT LAW
1694 E Arlington Boulevard, Suite E
Greenville, North Carolina 27858
Telephone 252 756 1883
Facsimile 252 756 1797
www.hopfhigley.com

DONALD S HIGLEY, II
don@hopfhigley.com

FACSIMILE TRANSMISSION

DATE: July 16, 2008

DELIVER TO: Judge Joseph Webster

COMPANY: Office of Administrative Hearings

FAX NUMBER: 919/733-3478

FROM: James F. Hopf

TELEPHONE: 252/756-1883

FAX NUMBER: 252/756-1797

NUMBER OF PAGES (including cover): 9

MATTER: *Stirewalt v. New Hanover County CAMA Enforcement
New Hanover County, 08 EHR 1090*

MESSAGE: Please see attached letter regarding submission of Petitioner's Memorandum of Law in Opposition to Motion to Dismiss in the above-referenced matter.

The information contained in this facsimile transmission is confidential and is intended only for the use of the above party. Any copying or distribution of this fax is prohibited. If you have received this transmission in error, please immediately notify us by telephone at (252) 756-1883 or (800) 326-1146. Thank you.

HOPF & HIGLEY, P.A.

JAMES F. HOPF
jim@hopfhigley.com

ATTORNEYS AT LAW
1694 E. Arlington Boulevard, Suite E
Greenville, North Carolina 27838
Telephone 252.756.1883
Facsimile 252.756.1797
www.hopfhigley.com

DONALD S. HIGLEY, II
don@hopfhigley.com

July 16, 2008

VIA FACSIMILE AND U.S. MAIL

The Honorable Joseph Webster
North Carolina Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714

Re: *Stirewalt v. New Hanover County CAMA Enforcement*
New Hanover County, 08 EHR 1090

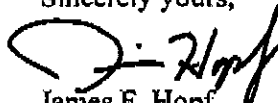
Dear Judge Webster:

At the hearing of this case in Wilmington last Friday, July 11, 2008, Respondent, through counsel, submitted for your consideration a Memorandum of Law in Support of Respondent's Motion to Dismiss. Pursuant to Rule 5(a) of the North Carolina Rules of Civil Procedure, that memorandum was untimely in that it was not served on the opposing party in advance of the hearing. Frankly, I did not object at the time since everyone had traveled so far for the hearing, and I deemed it more efficient to proceed with the hearing than to continue it as contemplated by the Rule.

However, given that your Honor took the matter under advisement, I feel compelled to submit the enclosed Memorandum of Law in Opposition to Motion to Dismiss for your consideration on behalf of the Petitioner. By copy of this letter and the enclosure, I am providing notice to Ms. Weese.

Thank you for your continued consideration in this matter.

Sincerely yours,


James F. Hopf

cc: Elizabeth J. Weese (w/ enclosure)

COPY

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
FILE NO. 08 EHR 1090

JOHN S. STIREWALT, Architect)
)
Petitioner,)
)
v.)
)
NH COUNTY CAMA ENFORCEMENT,)
)
Respondent.)
_____)

**PETITIONER'S MEMORANDUM
OF LAW IN OPPOSITION TO
MOTION TO DISMISS**

NOW COMES the Petitioner herein, by and through the undersigned counsel, and submits this Memorandum of Law in opposition to the Respondent's motion to dismiss in this matter.

I. The Petitioner was acting as the land owner's agent.

It is uncontested that, on March 2, 2008, the Petitioner, as the "authorized agent" for the land owner, Parker Overton, submitted an application for the issuance of a CAMA minor development permit in order to construct a swimming pool at 13 Comber Road, Figure Eight Island. A copy of that application has been previously submitted to the Court as Respondent's Exhibit B. In addition to identifying the Petitioner as the land owner's "authorized agent", that application specifies on page two, under "Statement of Ownership", that the Petitioner was signing as "the undersigned *and applicant* for a CAMA minor development permit". Finally, the signature line executed by the Petitioner on that application is labeled as "landowner *or person authorized to act as his agent*" for purposes of the application.

The fact that Petitioner was acting as the land owner's agent was even recognized by the relevant permitting authorities when the permit was denied. In that regard, the denial letter was addressed to "Mr. Parker Overton *c/o John Stirewalt*" and was sent to the Petitioner's business

address. A copy of that denial letter was previously submitted to the Court as Respondent's Exhibit A. Clearly, the Petitioner was acting as Mr. Overton's agent in submitting the application seeking issuance of the permit, and arguably by the very terms of the application itself, Petitioner is the "applicant".

II. The Petitioner has standing to seek review of the permit denial.

The relevant enabling statute for review of the permit denial in this case is N.C.G.S. § 113A-121.1. That statute provides that "[a]n applicant for a minor or major development permit who is dissatisfied with the decision on his application may file a petition for a contested case hearing *under G.S. 150B-23* within 20 days after the decision is made." N.C. Gen. Stat. § 113A-121.1(a) (2007) (emphasis added). N.C.G.S. § 150B-23 then provides that "[a] contested case shall be commenced by filing a petition with the Office of Administrative Hearings and . . . [the] petition shall be signed by a party *or a representative of the party . . .*". N.C. Gen. Stat. § 150B-23(a) (2007) (emphasis added). The Petitioner complied with both of these provisions.

In *Allied Environmental Services v. North Carolina Department of Environment and Natural Resources*, ___ N.C. App. ___, 653 S.E.2d 11 (2007), *rev. denied* ___ N.C. ___, 661 S.E.2d 238 (2008), the Court considered the question of whether an agent of the land owner could seek review through a contested case petition of a challenged administrative decision. In *Allied*, an engineering firm sought review by a contested case petition of an administrative decision that was adverse to the land owner. The defendant State of North Carolina filed a motion to dismiss the contested case petition on the grounds that the Office of Administrative Hearings ("OAH") lacked subject matter jurisdiction because the engineering firm was not a proper party to represent the owner. The

Administrative Law Judge ("ALJ") granted the motion and dismissed the contested case and that ruling was affirmed by the trial court upon judicial review. However, on appeal of those rulings, the Court of Appeals reversed the ALJ and trial court decisions and determined that it was error to dismiss the appeal by contested case for lack of subject matter jurisdiction. In reaching that conclusion, the Court interpreted N.C.G.S. § 150B-23, which sets forth the guidelines for a contested case petition, and specifically provides that a petition shall be signed by "a party or a representative of the party". *Allied*, 653 S.E.2d at 12. According to the Court, that would include agents of the owner such as the engineering firm. The Court further examined the meaning of the term "representative" as used in G.S. § 150B-23 and noted that the Black's Law Dictionary definition of that term is "[o]ne who stands for or acts on behalf of another. . .". *Id.*

In the instant case, the Petitioner, as the architect and representative of the owner on the matter in dispute (namely the design of the swimming pool and denial of the development permit), was acting for and on behalf of the owner in the exact manner contemplated by and set out in the relevant statute, G.S. § 150B-23, in seeking review by a contested case petition of the permit denial. Such a course of action is specified in the statutes and supported by the *Allied* decision. Respondent's motion to dismiss should be denied.

III. Petitioner was following contested case instructions.

In seeking to appeal from the permit denial, Petitioner sought out and followed the mandated instructions for the submission of a contested case petition. The format of a petition for a contested case hearing is contained in OAH Form H-06. The "Instructions for Form H-06" specifies in relevant part: "Fill in your county of residence (1), print *your name* on line (2), and *the name of the*

agency or board about which you are complaining on line (3). . . print your name on line (8), and sign your name on line (9)." (See Exhibit 1 attached hereto) (emphasis added). Examination of the contested case petition in this matter reveals that is exactly what the Petitioner did. As the owner's agent, he followed the procedures set out in the relevant statutes, forms and instructions in seeking the review in question. Respondent should not be heard to complain about procedural or technical issues when Petitioner attempted to comply as the owner's agent in good faith.

IV. The relevant rules permit amendment of the petition.

Rule .0101 of the Rules of the OAH provides that the Rules of Civil Procedure "shall apply in contested cases in the OAH unless another specific statute or rule of the OAH provides otherwise". Rule 15(a) of the North Carolina Rules of Civil Procedure provides that pleadings may be amended by leave of court and that leave "shall be freely given when justice so requires". N.C. Gen. Stat. § 1A-1, Rule 15 (2007). The amendment of pleadings has been amply considered by our appellate courts with the general conclusion that amendments should be freely allowed absent a showing of material prejudice to the other party, and that a judge's decision on a request for amendment will not be reversed on appeal without a showing of abuse of discretion. *See generally Mangum v. Surles*, 281 N.C. 91, 187 S.E.2d 697 (1972); *Mauney v. Morris*, 316 N.C. 67, 340 S.E.2d 397 (1986). Additionally, "[l]iberal amendment of pleadings is encouraged by the Rules of Civil Procedure." *McGinnis v. Robinson*, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Petitioner submits that, under the circumstances presented in this matter, dismissal of the petition is a drastic and harsh result which would prevent a consideration of the underlying issues sought to be examined in the permit denial appeal. Further, Respondent has not demonstrated any prejudice which will result from an amendment of the petition in this matter. To the extent that the Court deems it necessary or appropriate, Petitioner requests that this Court exercise its discretion

under the foregoing rules to amend the petition to name Mr. Overton as the petitioner and the Division of Coastal Management as the respondent. Such a result will further the principles of fairness and justice in allowing the appeal of the permit denial to proceed on its merits and the underlying regulatory and code requirements to be properly considered.

Based on the foregoing, as well as the arguments of counsel at the July 11, 2008 hearing in Wilmington, Petitioner respectfully requests that the Respondent's motion to dismiss be denied.

This 16th day of July, 2008.

HOPF & HIGLEY, P.A.



James F. Hopf

N.C. Bar No. 13551

1694 East Arlington Blvd., Suite E

Greenville, North Carolina 27858

Telephone: 252/756-1883

Facsimile: 252/756-1797

CERTIFICATE OF SERVICE

I, James F. Hopf, hereby certify that a copy of the foregoing **Petitioner's Memorandum of Law in Opposition to Motion to Dismiss** was served on all parties entitled to receive a copy of same via facsimile, and also by depositing such copy in a postage paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the U.S. Postal Service on the date indicated below:

Elizabeth J. Weese
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Facsimile: 919/716-6750

This the 16th day of July, 2008.



JAMES F. HOPF

MAY-1-2002 08:44A FROM:

TO:12527561797

P:3/8

(4)

**INSTRUCTIONS FOR FORM H-06
"PETITION FOR A CONTESTED CASE" AND "CERTIFICATE OF SERVICE"****PLEASE PRINT CLEARLY OR TYPE****FILL IN BLANKS:**

Fill in your county of residence (1), print your name on line (2), and the name of the agency or board about which you are complaining on line (3). Be sure to briefly state the facts about your case. Check all of the items that apply in section (4). Enter the date on line (5), your telephone number on line (6), your address on line (7), print your name on line (8), and sign your name on line (9).

CERTIFICATE OF SERVICE:

You must mail or deliver a copy of your completed petition to the agency or board named on line (3) and complete the "certificate of service" section on your petition, entering the name of the person to whom you mailed or delivered the petition on line (10). You should contact the agency or board to determine the name of the person to be served. Print the name of the state agency involved on line (11), the address of the agency or board on line (12), the date on line (13), and sign your name on line (14).

FILING YOUR PETITION WITH THE OFFICE OF ADMINISTRATIVE HEARINGS:

Your contested case will commence as soon as you file your completed original petition, along with a copy, properly signed, with the Office of Administrative Hearings. Below are the mailing and physical addresses:

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714

Office of Administrative Hearings
424 North Blount St.
Raleigh, NC 27601-2817

If you mail this form, the case commences when it is received and filed in this office.

You may file your petition by fax during normal business hours by faxing the petition to the Clerk's Office at (919) 733-3478.

You may file your petition by electronic mail by an attached file either in PDF format or a document that is compatible with or convertible to the most recent version of Word for Windows by sending the electronic transmission to oah.clerks@ncmail.net. Electronic mail without attached file shall not constitute a valid filing.

OAH must receive the original signed document and one copy within seven business days following the fax or electronic transmission for the petition to be deemed "filed" on the fax or electronic transmission date.



STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

FILED IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

JUL 30 P 1:19

John S. Stirewalt, Architect, Agent for
V. Parker Overton, Landowner
Petitioner,

OFFICE OF
ADMINISTRATIVE
HEARINGS

ORDER

v.

N.C. Dept. of Environment and Natural
Resources, Division of Coastal Management,
Respondent.

THIS MATTER having come on for hearing, and being heard, during the July 11, 2008 session of the Office of Administrative Hearings in Wilmington, North Carolina, before the Honorable Joe L. Webster, Judge Presiding, on the Respondent's Motion to Dismiss pursuant to N.C. Gen. Stat. §150B-23 *et seq.*, 113A-121.1, and Rule 12 of the North Carolina Rules of Civil Procedure, on the grounds of lack of subject matter jurisdiction, lack of standing to challenge agency action, failure to name a necessary party, failure to serve a necessary party, and failure to state a claim upon which relief can be granted; and

THE COURT having considered the pleadings, arguments and submissions of counsel; and

THE COURT having found that the Petitioner John S. Stirewalt may act as agent of the property owner, Mr. V. Parker Overton, and that Mr. Stirewalt is an "applicant" within the meaning of that term as used in the minor CAMA permit application and that, therefore, Mr. Stirewalt has standing to bring the Petition as filed herein; and

THE COURT having further found that it has subject matter jurisdiction to hear this case pursuant to N.C. Gen. Stat. § 150B-23 and *Allied Environmental Services v. North Carolina Department of Environment and Natural Resources*, ___ N.C. App. ___, 653 S.E.2d 11 (2007), *rev.*

denied ___ N.C. ___, 661 S.E.2d 238 (2008).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent's Motion to Dismiss is DENIED, that the Petition shall be amended pursuant to Rule 15 of the North Carolina Rules of Civil Procedure to reflect that Mr. Stirewalt has filed the Petition as agent of the landowner Mr. Overton, that the caption shall accordingly be changed to read as follows: "John S. Stirewalt, Architect, Agent for V. Parker Overton, Landowner, Petitioner, v. N.C. Dept. of Environment and Natural Resources, Division of Coastal Management, Respondent.", and that this case shall come on for hearing during the week of August 11, 2008.

This the 29th day of July, 2008.

A handwritten signature in black ink, appearing to read "Joe L. Webster", written over a horizontal line.

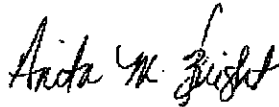
Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

James F Hopf
Attorney at Law
1694 E Arlington Blvd - Suite E
Greenville, NC 27858
ATTORNEY FOR PETITIONER

Elizabeth J. Weese
Assistant Attorney General
N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 30th day of July, 2008.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2698
Fax: (919) 733-3407

SECTION III

266

Webster

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

FILED

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

2008 JUN -2 P 1:05

John S Stirewalt
Architect

Petitioner,

v.

NH County CAMA Enforcement

Respondent.

OFFICE OF
ADMINISTRATIVE
HEARINGS

**REQUEST FOR HEARING ON
MOTION TO DISMISS**


NOW COMES the undersigned, pursuant to 15A NCAC 3 .0115(b) and requests that the Court schedule a hearing on the Motion to Dismiss filed in the above referenced matter prior to any contested case hearing on the merits. In support of this request, the undersigned shows the following:

1. The alleged Petition was filed in the Office of Administrative Hearings on April 29, 2008.
2. A Scheduling Order was entered by the Court on May 2, 2008 establishing a hearing date for sometime during the week of August 11, 2008.
3. The undersigned has filed simultaneously with this Request for a Hearing on Motion, a motion to dismiss, which if granted, will obviate the need for a contested case hearing.
4. This Request and the Motion to Dismiss are both filed in good faith and not for the purpose of delay. Rather, the undersigned submits that a ruling on its Motion to Dismiss made in advance of a hearing on the merits will serve the interests of judicial economy as well as the best use of limited state resources.

WHEREFORE, the undersigned respectfully requests that the Court schedule a hearing on its Motion to Dismiss at the Court's earliest convenience and in advance of any hearing on the merits.

Respectfully submitted, this the 2nd day of June, 2008.

ROY COOPER
Attorney General

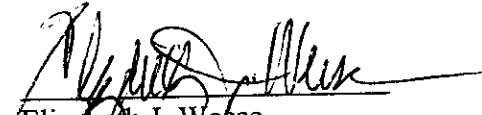
By 
Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, NC 27699
(919) 716-6600
State Bar No. 16652

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REQUEST FOR HEARING ON MOTION TO DISMISS** was served on the alleged Petitioner by depositing a copy of same on the date shown below with the United States Mail, first class, postage and addressed as follows:

John S. Stirewalt
Architect
458 Biscayne Dr.
Wilmington, NC 28411

This the 2nd day of June, 2008.



Elizabeth J. Weese
Assistant Attorney General

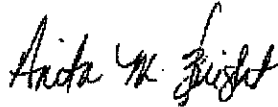
A copy of the foregoing was mailed to:

John S Stirewalt
Architect
458 Biscayne Dr
Wilmington, NC 28411
PETITIONER

Elizabeth J. Weese
Assistant Attorney General
N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

James Hops
Hops And Higley
1694 E Arlington Blvd
Suite E
Greenville, NC 27858

This the 1st day of July, 2008.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2698
Fax: (919) 733-3407

Jul 21 11 04 AM 2008

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S Stirewalt)
Architect)
Petitioner)
vs.)
NH County CAMA Enforcement)
Respondent)

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-captioned case will be brought on for hearing before the undersigned administrative law judge as follows:

DATE: Friday, August 15, 2008

TIME: 9:00 am

PLACE: Brunswick City Gov Complex
310 Government Center Drive
Courtroom 6
Bolivia, North Carolina

1. This hearing will be conducted in accordance with G.S. Chapter 150B and the Rules of Contested Case Hearings in the Office of Administrative Hearings, copies of which may be obtained at cost from Molly Masich, Director of APA Services or by accessing the OAH Web page at <http://www.oah.state.nc.us/hearings/#Chapter3>.
2. Unless otherwise determined by the administrative law judge, the hearing will proceed in the following sequence:
 - a. Call of the case
 - b. Motions and other preliminary matters
 - c. Stipulations, agreements, or consent orders entered into the record
 - d. Opening statements
 - e. Presentation of evidence; cross-examination
 - f. Final arguments
3. All parties are hereby notified to bring to the hearing all documents, records, and witnesses needed to present the party's case.

NOTE: IF SPECIAL EQUIPMENT IS REQUIRED FOR THE PRESENTATION

OF EVIDENCE, THE PARTIES ARE RESPONSIBLE FOR MAKING ARRANGEMENTS FOR THE EQUIPMENT.

4. Subpoenas may be available to the parties pursuant to 26 NCAC 3 .0113 to compel the attendance of witnesses or for the production of documents.
5. A party may represent himself or be represented by an attorney. A party who is represented by an attorney must file a Notice of Representation within 10 days of service of this Notice containing the name, address, and telephone number of the attorney, unless the attorney has already corresponded with this Office concerning this case.
6. Request for continuances shall be made in writing at least five (5) days prior to the beginning of the hearing session. No continuances will be granted after that time, except for extraordinary circumstances, as determined by the judge.
7. Cases for hearing cannot be continued unless an order is signed by the administrative law judge. Parties are encouraged to obtain the consent of the opposing party when requesting a continuance.
8. Motions such as Motions to Dismiss and Motions for Summary Judgment must be filed in sufficient time in order to allow opposing parties the opportunity to respond in a timely manner. Motions are placed on the calendar only by order of the administrative law judge.

TAKE NOTICE THAT A FAILURE TO APPEAR AT THE HEARING MAY RESULT IN:

1. A finding that the allegations of or the issues set out in this Notice may be taken as true or deemed proved without further evidence;
2. Dismissal of the case or allowance of the motion or petition;
3. Suppression of a claim or defense; or
4. Exclusion of evidence.

NOTICE OF CANCELLATION OF HEARING

THE PARTIES MUST NOTIFY THE OFFICE OF ADMINISTRATIVE HEARINGS AT LEAST 24 HOURS PRIOR TO THE CANCELLATION OF THE CONTESTED CASE HEARING. FAILURE TO GIVE TIMELY NOTICE OF CANCELLATION MAY RESULT IN A CHARGE TO THE PARTIES FOR THE COST OF THE COURT REPORTER OR HEARING ASSISTANT. SEE 26 NCAC 3 .0123(f).

This the 21st day of July, 2008.



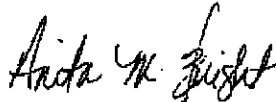
Joe L. Webster

A copy of the foregoing was mailed to:

James F Hopf
Attorney at Law
1694 E Arlington Blvd - Suite E
Greenville, NC 27858
ATTORNEY FOR PETITIONER

Elizabeth J. Weese
Assistant Attorney General
N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 21st day of July, 2008.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2698
Fax: (919) 733-3407

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: *08 EHR 1090 NDT-SW*

*James F. Hoff
 Attorney at Law
 1694 E. Arlington Blvd
 Suite E
 Greenville, NC 27858*

2. Article Number
(Transfer from service label)

7005 0390 0003 7848 6530

PS Form 3811, February 2004

Domestic Return Receipt

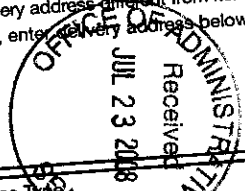
102595-02

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee
X Rhonda M. Congleton

B. Received by (Printed Name) *Rhonda M. Congleton*
 C. Date of Delivery *7-22-08*

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No



3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: *08 EHR 1090 NDT-ABE*

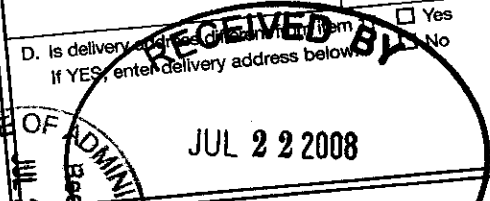
*Elizabeth J. Weese
 Asst. Attorney General
 NC Department of Justice
 901 Mail Service Center
 Raleigh, NC 27699-9001*

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee
X

B. Received by (Printed Name)
 C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No



3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7005 0390 0003 7848 6523

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

web

STATE OF NORTH CAROLINA

COUNTY OF New Hanover FILED

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
6714 MAIL SERVICE CENTER
RALEIGH, NC 27699-6714
FILE NO. 08 EHR 1080 90

1080 AUG -1 A 10: 20

SUBPOENA
(N.C. Gen. Stat. § 150B-27)

John S. Stirewalt, Architect
Petitioner,
v.
NH County CAMA Enforcement
Respondent.

To appear in person To produce document or object

Party requesting subpoena:
 Petitioner Respondent

[NOTE TO PARTIES NOT REPRESENTED BY COUNSEL:
Subpoenas may be produced at your request, but must be signed and
issued by the Office of Administrative Hearings]

TO:
Christine R. Bouffard
Name of person being served
230 Government Center Drive, Suite 110
Street address/post office box
Wilmington, North Carolina 28403 (910) 798-7118
City/State/Zip/Telephone

Alternate address
City/State/Zip/Telephone

YOU ARE COMMANDED TO: (check all that apply)

- Appear and testify in the above-entitled contested case at the place, date, and time indicated below.
- Appear and testify, in the above-entitled contested case, at a deposition at the place, date and time indicated below.
- Produce, permit inspection and copying of the following items at the place, date, and time indicated below.

Name and Location of Hearing:

Name of Person or Agency Requesting Subpoena:

August 15, 2008 9:00 A.M.
Date and Time to Appear/Produce

James F. Hopf Attorney
Name Title

7-24-08
Date

1694 E. Arlington Boulevard, Suite E
Street/Post Office Box

[Signature]
Signature of person issuing subpoena
 Chief Hearings Clerk Administrative Law Judge
 Assistant Hearings Clerk Attorney

Greenville, North Carolina 27858
City/State/Zip

(252) 756-1883
Telephone Number

DELIVER "RETURN OF SERVICE" TO
PARTY NAMED ABOVE

RETURN OF SERVICE

I certify that this subpoena was received and served as follows:

Date received by authorized server

By delivering a copy of this subpoena to the person named above

By telephone communication with the person named above (For use only by the Sheriff's office for witness subpoenaed to appear and testify)

This subpoena WAS NOT served for the following reasons:

By registered or certified mail, return receipt requested, on the party named above

Service Fee Paid Due | Date Served | Signature and Title of Authorized Server

NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party.

(Please See Reverse Side)

NOTE: Rule 45, North Carolina Rules of Civil Procedure, Parts (c) and (d).

(c) Protection Of Persons Subject To Subpoena

(1) Avoid undue burden or expense - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 844.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoena - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

- a. The subpoena fails to allow reasonable time for compliance.
- b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
- c. The subpoena subjects a person to an undue burden.
- d. The subpoena is otherwise unreasonable or oppressive.
- e. The subpoena is procedurally defective.

(4) Order of court required to override objection - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena

may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena - When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets, confidential information - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding To Subpoena

1) Form of response - A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

The subpoena is a legal order requiring you to appear on the day and at the time stated. You have been called (subpoenaed) to be a witness in a contested case.

DUTIES OF A WITNESS

- ? Unless you are a custodian of medical or public records, you must attend the hearing on the day and at the time stated in the subpoena.
- ? Unless otherwise directed by the administrative law judge, you must answer all questions asked when you are on the stand giving testimony.
- ? Your answers to questions must be truthful.
- ? If you are commanded to produce any items, you must bring them with you to the hearing.

If you have any questions about being subpoenaed as a witness, you should contact the person who requested the subpoena.

UNDERSTAND THE QUESTIONS AND SPEAK OUT

When you testify, listen carefully to all questions, and make sure that you understand the questions before you attempt to answer. If necessary, ask that a question be repeated before you try to answer. When you answer, speak clearly and loudly enough to be heard.

BRIBING OR THREATENING A WITNESS

It is a violation of state law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a contested case, you should promptly report the incident to the administrative law judge.

WITNESS FEE

A witness is entitled to a small daily fee and travel expense reimbursement (if it is necessary to travel from outside the county in order to testify). Fees for "expert witnesses" are set by the administrative law judge. After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the chief hearings clerk and certify your attendance as a witness so that you will be paid any amount due you.

Witness fees shall be paid by the party requesting the subpoena in accordance with N.C. Gen. Stat. § 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and shall not be required to take any annual leave for the days they serve as a witness. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in N.C. Gen. Stat. § 138-6

ATTACHMENT TO SUBPOENA

You are hereby commanded to produce, permit inspection and copying of the following items at the place, date and time indicated on the Subpoena:

- (1) All file materials related to the Petitioner's application for a CAMA minor development permit for the property at 13 Comber Road, Figure Eight Island, North Carolina.

web

STATE OF NORTH CAROLINA
COUNTY OF New Hanover

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
6714 MAIL SERVICE CENTER
RALEIGH, NC 27699-6714
FILE NO. 08 EHR 1080 10

10-1-10-21

SUBPOENA
(N.C. Gen. Stat. § 150B-27)

John S. Stirewalt, Architect
Petitioner,
v.
NH County CAMA Enforcement
Respondent.

To appear in person To produce document or object

Party requesting subpoena:
 Petitioner Respondent
[NOTE TO PARTIES NOT REPRESENTED BY COUNSEL:
Subpoenas may be produced at your request, but must be signed and issued by the Office of Administrative Hearings]

TO:
Robb Mairs
Name of person being served

127 Cardinal Drive Ext
Street address/post office box

Alternate address

Wilmington, North Carolina 28405-3845 (910) 796-7423
City/State/Zip/Telephone

City/State/Zip/Telephone

YOU ARE COMMANDED TO: (check all that apply)

- Appear and testify in the above-entitled contested case at the place, date, and time indicated below.
- Appear and testify, in the above-entitled contested case, at a deposition at the place, date and time indicated below.
- Produce, permit inspection and copying of the following items at the place, date, and time indicated below.

Name and Location of Hearing: August 15, 2008 9:00 A.M.
Date and Time to Appear/Produce
7-24-08
Date
James F. Hopf
Signature of person issuing subpoena
 Chief Hearings Clerk Administrative Law Judge
 Assistant Hearings Clerk Attorney

Name of Person or Agency Requesting Subpoena:
James F. Hopf Attorney
Name Title
1694 E. Arlington Boulevard, Suite E
Street/Post Office Box
Greenville, North Carolina 27858
City/State/Zip
(252) 756-1883
Telephone Number

DELIVER "RETURN OF SERVICE" TO
PARTY NAMED ABOVE

RETURN OF SERVICE

I certify that this subpoena was received and served as follows:

Date received by authorized server _____
 By delivering a copy of this subpoena to the person named above
 This subpoena WAS NOT served for the following reasons:

By telephone communication with the person named above (For use only by the Sheriff's office for witness subpoenaed to appear and testify)
 By registered or certified mail, return receipt requested, on the party named above

Service Fee \$ _____ Paid _____ Due _____
Date Served _____
Signature and Title of Authorized Server _____

NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party.

(Please See Reverse Side)

NOTE: Rule 45, North Carolina Rules of Civil Procedure, Parts (c) and (d).

(c) Protection Of Persons Subject To Subpoena

(1) Avoid undue burden or expense. - A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. - Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. §44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoena. - Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

- a. The subpoena fails to allow reasonable time for compliance.
- b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
- c. The subpoena subjects a person to an undue burden.
- d. The subpoena is otherwise unreasonable or oppressive.
- e. The subpoena is procedurally defective.

(4) Order of court required to override objection. - If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena

may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. - A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel: expenses to comply with subpoena. - When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets, confidential information. - When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash: expenses. - When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties In Responding To Subpoena

1) Form of response. - A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. - When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

INFORMATION FOR WITNESS

The subpoena is a legal order requiring you to appear on the day and at the time stated. You have been called (subpoenaed) to be a witness in a contested case.

DUTIES OF A WITNESS

- ? Unless you are a custodian of medical or public records, you must attend the hearing on the day and at the time stated in the subpoena.
- ? Unless otherwise directed by the administrative law judge, you must answer all questions asked when you are on the stand giving testimony.
- ? Your answers to questions must be truthful.
- ? If you are commanded to produce any items, you must bring them with you to the hearing.

If you have any questions about being subpoenaed as a witness, you should contact the person who requested the subpoena.

UNDERSTAND THE QUESTIONS AND SPEAK OUT

When you testify, listen carefully to all questions, and make sure that you understand the questions before you attempt to answer. If necessary, ask that a question be repeated before you try to answer. When you answer, speak clearly and loudly enough to be heard.

BRIBING OR THREATENING A WITNESS

It is a violation of state law for anyone to attempt to bribe, threaten, harass, or intimidate a witness. If anyone attempts to do any of these things concerning your involvement as a witness in a contested case, you should promptly report the incident to the administrative law judge.

WITNESS FEE

A witness is entitled to a small daily fee and travel expense reimbursement (if it is necessary to travel from outside the county in order to testify). Fees for "expert witnesses" are set by the administrative law judge. After you have been discharged as a witness, if you desire to collect the statutory fee, you should immediately contact the chief hearings clerk and certify your attendance as a witness so that you will be paid any amount due you.

Witness fees shall be paid by the party requesting the subpoena in accordance with N.C. Gen. Stat. § 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and shall not be required to take any annual leave for the days they serve as a witness. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in N.C. Gen. Stat. § 138-6

ATTACHMENT TO SUBPOENA

You are hereby commanded to produce, permit inspection and copying of the following items at the place, date and time indicated on the Subpoena:

- (1) All file materials related to the Petitioner's application for a CAMA minor development permit for the property at 13 Comber Road, Figure Eight Island, North Carolina.

SECTION IV

✓ JLW

FILED
HOPF & HIGLEY, P.A.
 2008 NOV -3 AM 11: 26

JAMES F. HOPF
 jim@hopfhigley.com

OFFICE OF ATTORNEYS AT LAW
 ADMIN HEARINGS
 1694 E. Arlington Boulevard, Suite E
 Greenville, North Carolina 27858
 Telephone: 252.756.1883
 Facsimile: 252.756.1797
 www.hopfhigley.com

DONALD S. HIGLEY, II
 don@hopfhigley.com

October 30, 2008

Anita Wright
 North Carolina Office of Administrative Hearings
 6714 Mail Service Center
 Raleigh, North Carolina 27699-6714

**Re: *Stirewalt v. North Carolina DENR, Division of Coastal Management
 New Hanover County, 08 EHR 1090***

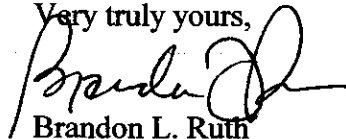
Dear Ms. Wright:

Per our conversation earlier today, enclosed for filing please find the original and one copy of the Recommended Decision with regard to the above referenced matter. Please file the original and return the file-stamped copy to me in the enclosed postage prepaid envelope.

Should you have any questions or concerns, please feel free to contact me at any time.

With best regards, I remain

Very truly yours,


 Brandon L. Ruth
 Paralegal to the Firm

Enclosures

cc: Ms. Elizabeth J. Weese, Esquire (w/ enclosure)

11-3-08
 NC

✓ JW

FILED

STATE OF NORTH CAROLINA

2008 NOV -3 AM 11: 26

NEW HANOVER COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

John S. Stirewalt, Architect, Agent for)
V. Parker Overton, Landowner,)
))
Petitioner,)
))
v.)
))
N.C. Dept. Of Environment and Natural)
Resources, Division of Coastal Management,)
))
Respondent.)
_____)

**RECOMMENDED
DECISION**

Pursuant to a Notice of Hearing filed July 21, 2008, this contested case was heard on August 15, 2008 in Bolivia, Brunswick County, North Carolina, before the Honorable Joe L. Webster, Administrative Law Judge.

APPEARANCES

Appearing for the Petitioner was James F. Hopf, Hopf & Higley, P.A., 1694 East Arlington Boulevard, Suite E, Greenville, North Carolina. Appearing for the Respondent was Elizabeth J. Weese, Assistant Attorney General, Environmental Division, 9001 Mail Service Center, Raleigh, North Carolina.

ISSUE

Whether the Respondent, in denying the Petitioner's request for a Coastal Area Management Act ("CAMA") minor development permit for a swimming pool, acted erroneously or otherwise substantially prejudiced Petitioner's rights.

EXHIBITS

The following exhibits offered by Petitioner were received in evidence:

- P1. Petitioner's Application for a CAMA minor development permit to construct a swimming pool at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina.
- P2. Correspondence dated March 18, 2008 from Ms. Christine Bouffard, New Hanover County Inspection Services, to Mr. Parker Overton c/o Petitioner.
- P3. Correspondence dated March 25, 2008 from Petitioner to Ms. Christine Bouffard.
- P4. Correspondence dated April 9, 2008 from Ms. Christine Bouffard, New Hanover County Inspection Services, to Mr. Parker Overton c/o Petitioner.
- P5. Invoice dated March 10, 2008 for Architectural Services in the amount of \$12,500.00 from Petitioner to Mr. Parker Overton.
- P6. Engineering Drawing #1 entitled "New Pool Wall Section".
- P7. Engineering Drawing #2 entitled "New Pool Wall Section".

Additionally, the following exhibits offered by Respondent were received in evidence:

- R1. Aerial photograph entitled "North End of Figure Eight Island May 2006 Photography, Overton Property".
- R2. Aerial photograph of the Figure Eight Island shoreline depicting the Overton property.
- R3. Aerial photograph entitled "View of Property of Interest from Aerial Photography on March 11, 2008".
- R4. Aerial photograph entitled "View of Property of Interest from Aerial Photography on March 11, 2008" (different angle).
- R5. Aerial photograph entitled "View of Property of Interest and Existing Sandbag Looking Southwest on March 6, 2008".
- R6. Aerial photograph entitled "View of Property of Interest and Existing Sandbag Looking Northwest on March 6, 2008".

- R7. Photograph of beachfront of Overton property.
- R8. Close up photograph of beachfront of Overton property.
- R9. Close up photograph of beachfront of Overton property.
- R10. Close up photograph of beachfront of Overton property.
- R11. Close up photograph of beachfront of Overton property.
- R12. Close up photograph of beachfront of Overton property.
- R19. Petitioner's Application for a CAMA minor development permit to construct a swimming pool at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina.
- R20. Copy of Overton Site Plan Drawing.
- R21. Overton Structural Drawings.
- R22. Notification letter for adjacent property owners.
- R23. Notification letter for adjacent property owners.
- R24. Certified mail, return receipts for notification letters.
- R25. Notice of publication in local newspaper.
- R26. Affidavit of publication in local newspaper.
- R27. Correspondence dated March 18, 2008 from Ms. Christine Bouffard, New Hanover County Inspection Services, to Mr. Parker Overton c/o Petitioner.
- R28. Correspondence dated March 25, 2008 from Petitioner to Ms. Christine Bouffard.
- R29. Copy of Overton Revised Site Plan Drawing.
- R30. Extension Notice dated March 30, 2008 for Review Period.
- R31. Correspondence dated April 9, 2008 from Ms. Christine Bouffard, New Hanover County Inspection Services, to Mr. Parker Overton c/o Petitioner.

Based upon the official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The property in question in this matter is owned by Mr. V. Parker Overton (“Overton”) and is located at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina.
2. This property is located directly on the oceanfront and is thereby in a Coastal High Hazard Area.
3. The petitioner herein, John S. Stirewalt, is a licensed professional architect in the State of North Carolina, and was retained by Overton to act as his agent in the design and engineering of a swimming pool on said property, and in securing the appropriate permit(s) for the installation of such swimming pool.
4. On behalf of Overton, Petitioner submitted an application to the New Hanover County Inspection Services seeking the issuance of a CAMA minor development permit for the installation and construction of said swimming pool.
5. The New Hanover County Inspection Services office is authorized as the local permitting authority under CAMA for the issuance of CAMA minor development permits such as that sought by Petitioner.
6. Ms. Christine R. Bouffard is a local permitting officer for the New Hanover Inspection Services under CAMA.
7. As part of the permit application process, Petitioner requested that an inspection be conducted of the subject property in order to establish the vegetation line, and the property was subsequently inspected by Ms. Bouffard and Mr. Rob Mairs, an employee of the North Carolina

Division of Coastal Management, and the vegetation line was established for the Overton property.

8. Petitioner submitted design and engineering drawings for the swimming pool on behalf of Overton with the application for the CAMA minor development permit.

9. Such drawings submitted by Petitioner complied with the North Carolina State Building Code for structures in a Coastal High Hazard Area.

10. Section 1624 of the North Carolina State Building Code requires that designs for swimming pools comply with ASCE 24 in Coastal High Hazard Areas, and Section 9.5 of ASCE 24 specifies that in-ground and above-ground pools shall be designed to withstand all flood-related loads and load combinations, which necessitates the use of a pile-supported concrete structure that can withstand buoyancy forces, lateral flood forces, and other considerations.

11. The design and engineering drawings submitted by Petitioner with the application for the CAMA minor development permit, in compliance with the North Carolina State Building Code, were consistent with Petitioner's on-site discussions with the CAMA representatives regarding the location for and design of a swimming pool on the subject property.

12. Petitioner's invoice for the design and engineering drawings for the swimming pool, which were submitted with the application for the CAMA minor development permit, was \$12,500.00, which was paid by Overton.

13. Petitioner's application for a CAMA minor development permit for the construction and installation of a swimming pool on the subject property was denied by the LPO in a letter dated April 9, 2008.

14. Petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings on April 29, 2008.

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The provisions of the North Carolina State Building Code are mandatory and have the force and effect of law.
2. Swimming pools designed and constructed in Coastal High Hazard Areas shall comply with the provisions of the North Carolina State Building Code.
3. 15A NCAC 07H .0309(a)(9) states that swimming pools are excepted from the general rule against construction or development in the oceanfront setback area, and are permitted seaward of the oceanfront setback requirements.
4. 15A NCAC 07H .0308(a)(1)(B) provides that permanent erosion control structures are prohibited in ocean hazard areas, and defines such structures as including bulkheads, seawalls, revetments, jetties, groins and breakwaters.
5. A swimming pool is not included in the definition of permanent erosion control structures in 15A NCAC 07H. 0308(a)(1)(B).
6. North Carolina General Statute § 113A-115.1(a)(1) defines “erosion control structure” as ~~“breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure”~~.
7. A swimming pool is not included in the definition of permanent erosion control structures in North Carolina General Statute § 113A-115.1(a)(1).
8. North Carolina General Statute § 113A-115.1(b) specifies that “[n]o person shall construct a permanent erosion control structure in an ocean shoreline”, and further provides that “[t]his section shall not apply to (i) any permanent erosion control structure that is approved pursuant to an exception set out in a rule adopted by the Commission prior to 1 July 2003 . . .”.

9. The exception allowing swimming pools in 15A NCAC 07H .0309(a)(9) has been in effect since adoption in 1981.

10. The Respondent acted erroneously in denying the Petitioner's application for a CAMA minor development permit, and such denial has substantially prejudiced Petitioner.

Based on the foregoing Conclusions of Law, the undersigned Administrative Law Judge makes the following:

RECOMMENDED DECISION

The North Carolina Division of Coastal Management will make the Final Decision in this contested case. It is recommended that the agency adopt the Findings of Fact and Conclusions of Law as set forth above and REVERSE the April 9, 2008 decision of the LPO of the New Hanover County Inspection Services which denied the issuance of a CAMA minor development permit to the Petitioner. In the alternative, the agency shall compensate Petitioner in the amount of \$12,500.00, which represents the costs incurred by Petitioner for the design and engineering of the swimming pool in question consistent with the requirements of the North Carolina State Building Code for swimming pools in Coastal High Hazard Areas.

ORDER

It is hereby ORDERED that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27669-6714 in accordance with North Carolina General Statute § 150B-36(b).

NOTICE

Before the North Carolina Division of Coastal Management makes the FINAL DECISION, it is required by North Carolina General Statute §150B-36(a) to give each party an opportunity to file exceptions to the RECOMMENDED DECISION, and to present written arguments to those in the

agency who will make the final decision.

The agency is required by North Carolina General Statute § 150B-36(b) to serve a copy of the FINAL DECISION on all parties and to furnish a copy to the parties' attorney of record.

This the ____ day of _____, 2008.

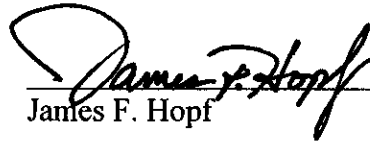
Honorable Joe L. Webster
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **Recommended Decision** was served this day upon counsel for Respondent by facsimile at the facsimile number listed below, and mailing a copy thereof, sealed in a secure envelope, postage prepaid and deposited in the United States Post Office, Greenville, North Carolina, addressed to the following:

Elizabeth J. Weese
Assistant Attorney General
Environmental Division
9001 Mail Service Center
Raleigh, North Carolina 27699
Facsimile #: (919) 716-6767

This the 30th day of October, 2008.


James F. Hopf

Jcw

FILED

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

JOHN S. STIREWALT, ARCHITECT,
AGENT FOR B. PARKER OVERTON,
LANDOWNER,

Petitioner,

v.

N.C. DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES,
DIVISION OF COASTAL
MANAGEMENT,

Respondent.

OFFICE OF
ADMINISTRATIVE HEARINGS

RESPONDENT'S
PROPOSED DECISION

This contested case was heard on August 15, 2008, in Courtroom Number 6 of the Brunswick County Courthouse, Bolivia, North Carolina, before The Honorable Joe L. Webster, Administrative Law Judge, on a petition for contested case hearing regarding the Division of Coastal Management's (DCM's) denial of a Minor Development Permit under the Coastal Area Management Act (CAMA).

APPEARANCES

For Petitioner:

James F. Hopf
Hopf and Higley, PA
1694 East Arlington Blvd., Suite E
Greenville, NC 27858

For Respondent:

Elizabeth J. Weese
Assistant Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether the Division of Coastal Management, acting through its Local Permitting Officer for New Hanover County, properly denied a Coastal Area Management Act (CAMA) Minor Permit for development of an 8 ft. deep, 5 ft. by 55 ft. swimming pool? The supporting structure for the pool consists of a 30 inch thick concrete base with heavy steel material top and bottom and 16 ft deep by 18 inch thick reinforced concrete walls on twenty-six 20 ft. pilings and would be located at the edge of the oceanfront setback on property owned by B. Parker Overton at 13 Comber Road on Figure Eight Island.

MOTIONS

Respondent filed a Motion to Dismiss based on John Stirewalt's lack of standing to file a contested case petition on behalf of the property owner. After a hearing held July 11, 2008, this motion was denied by the Court in an order dated July 30, 2008.

WITNESSES

B. Parker Overton, property owner

John S. Stirewalt

Robb Mairs, DCM Field Representative, Wilmington Region, Wilmington, NC

Christine Bouffard, Zoning Enforcement Official and LPO, New Hanover County

Ted Tyndall, DCM Asst. Director for Permits and Enforcement, Morehead City, NC

EXHIBITS

Petitioner's:

1. CAMA application
2. March 18, 2008 letter from Bouffard to Stirewalt
3. March 25, 2008 letter from Stirewalt to Bouffard
4. April 9, 2008 letter from Bouffard to Stirewalt
5. March 10, 2008 invoice from Stirewalt to Overton
6. Plan drawings for pool
7. Engineer drawing for pool

Respondent's:

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Photograph
6. Photograph

7. Photograph
8. Photograph
9. Photograph
10. Photograph
11. Photograph
12. Photograph
[numbers 13 through 18 intentionally left blank]
19. CAMA minor permit application #08-013
20. Site plan submitted with application
21. Structural drawing submitted with application
22. Notice to adjacent landowner
23. Notice to adjacent landowner
24. Notice to adjacent landowner certified receipts
25. Notice of filing of application for CAMA minor development permit
26. Affidavit of publication of notice of filing application for CAMA minor development permit
27. March 18, 2008 additional information letter
28. March 25, 2008 letter from Stirewalt
29. Site plan submitted by Stirewalt
30. March 31, 2008 notice to extend time to grant or deny CAMA permit
31. April 9, 2008 notice letter of denial of CAMA minor permit

Based 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, the undersigned makes the following:

FINDINGS OF FACT

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 rules adopted by the Coastal Resources Commission (CRC) for the administration of CAMA. (N.C.G.S. § 113A-107)
2. The CAMA is a "cooperative state and local program." (N.C.G.S. § 113A-101) The Local Permitting Officer Program is an example of this cooperative relationship.
3. CAMA requires permits for development in an Area of Environmental Concern (AEC). (N.C.G.S. § 113A-118)
4. The Overton property is located within the Ocean Erodible Zone Area of the Ocean Hazard Area of Environmental Concern (AEC). (15A N.C.A.C. 07H .0300 *et seq.*)

5. The CRC's Ocean Hazard rules, found at 15A N.C.A.C. 07H.0300 et seq., govern development in the Ocean Hazard Area of Environmental Concern (AEC).

6. The fundamental premise of the Ocean Hazard AEC designation is that lands located therein are especially vulnerable to erosion. The introductory rule describing the Ocean Hazard AEC, which has been in effect since 1977, provides:

The next broad grouping is composed of those AECs that are considered natural hazard areas along the Atlantic Ocean shoreline where, because of their *special vulnerability to erosion* or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a *substantial possibility of excessive erosion* or flood damage. 15A NCAC 7H .0301

7. The CRC rules governing oceanfront erosion response activities are found at 15A NCAC 7M .0200 et seq.

8. The general policy provisions concerning shoreline erosion state that barring specific instances outlined in 15A NCAC 07H .0308, "efforts to permanently stabilize the location of the ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed." 7M .0202(f).

9. In its Shoreline Erosion Policies, the Commission has determined that "[T]emporary 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 threatened structures may 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." 15A NCAC 7M .0202(e).

10. Both the CAMA and the Commission's Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. Pursuant to N.C.G.S. § 113A-115.1:

(a) As used in this section:

(1) "Erosion control structure" means a breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure.

(2) "Ocean shoreline" means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term "ocean shoreline" includes an ocean inlet and lands adjacent to an ocean inlet but does not include that portion of any inlet and lands adjacent to the inlet that exhibits characteristics of estuarine shorelines.

(b) No person shall construct a permanent erosion control structure in an ocean shoreline. The Commission shall not permit the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline....

N.C.G.S. § 113A-115.1.

Rule 15A NCAC .0308, which addresses SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS, states the following:

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

(A) All oceanfront erosion response activities shall be consistent with the general policy statements in 15A NCAC 7M .0200.

(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 bulkheads, seawalls, revetments, jetties, groins and breakwaters.

(C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront properties without regard to the size of the structure on the property or the date of its construction....

15A NCAC 7H .0308.

11. The CRC's Ocean Hazard rules establish building setback lines for development in the Ocean Hazard Area of Environmental Concern. Generally, the first line of stable natural vegetation is used as the reference point for measuring oceanfront setbacks. 15A NCAC 7H .0306(a). Development is generally not allowed within the setback.

12. Rule 15A NCAC 07H .0309(a) provides some exceptions to the setback requirements of .0306(a). Swimming pools and decking are exceptions to the setback, however, such development "shall be permitted [only]... if all other provisions of [the Ocean Hazard Areas] and other state and local regulations are met . . . 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." (15A NCAC 07H .0309(a))

13. The proposed pool would be located within the oceanfront setback., immediately behind the first line of stable natural vegetation. (Exhibit R-20)

14. The development proposed in the CAMA minor application submitted by John Stirewalt to the LPO consisted of a 5 ft. wide by 55 ft. long 8 ft. deep (water-filled area) "lap" swimming pool. The supporting structure for the pool consisted of a 30 inch thick concrete base with heavy steel material top and bottom and 16 ft deep by 18 inch thick reinforced concrete walls on twenty-six 8 inch by 8 inch by 20 foot pilings. Much of this support structure is located below grade at the oceanward edge of the property. (Exhibits R-20 and R-21)

15. The application also proposed the construction of approximately 595 square feet of tile over concrete decking outside the drip line and inside the oceanfront setback. (Exhibit R-20)

16. Through the CAMA local permitting officer program, municipalities can designate employees as Local Permitting Officers (LPOs) to process Minor Permit Applications based on a contract between DENR and the municipalities. (N.C.G.S. § 113A-117 and 15A N.C.A.C. 071 *et seq.*) New Hanover County's local permitting officer program was under contract with DCM at the time the events in this case took place.

17. In this case, the LPO for New Hanover County is Christine Bouffard. Along with her role as an LPO for the County, she is a Zoning Enforcement Official with a primary duty to enforce local zoning ordinances and flood plain management. (T p. 76) Ms. Bouffard has worked for several municipalities as a zoning enforcement official. (T p. 92) In addition to LPO training from DCM, she is a certified floodplain manager. (T p. 93)

18. In February 2008, prior to receiving the CAMA permit application, Ms. Bouffard met on site with John Stirewalt. She asked Robb Mairs, a DCM field representative, to also attend the meeting. Ms. Bouffard's primary reason for including Mr. Mairs was that because of the significant amount of erosion on Figure Eight Island, she was uncomfortable staking an oceanfront setback line on her own. (T pp. 76-77)

19. During the on-site meeting, John Stirewalt asked questions of Ms. Bouffard and Mr. Mairs about several different potential projects. During the meeting, Mr. Mairs had the impression that the existing house was going to be moved landward, and in that event, Mr. Stirewalt wanted to know what structures could remain or be developed within the setback. (T p. 67) Placement of a swimming pool was discussed; however, no details with regard to design or specific location were covered at the on-site meeting. (T pp. 66-67, 71-72)

20. The site plans and drawings ultimately submitted with the CAMA minor application in March 2008 raised a "red flag" to Ms. Bouffard. (T p. 108) She immediately recognized that this was not a "garden variety pool." (T p. 108) The

structural support component of the pool--its foundation--particularly the amount of concrete, was unique in her experience. (T pp. 82; 108) The pools she previously reviewed and permitted under CAMA did not have any type of concrete supports. (T p. 82)

21. Based on her opinion that the foundation of the pool constituted a hardened structure, Ms. Bouffard denied the application. (T pp. 79, 82; Exhibit R-31) Prior to doing so, she participated in a review of the application with her section chief in New Hanover County, Robb Mairs (DCM field representative), and Ted Tyndall (DCM Assistant Director). They agreed with her assessment and decision to deny the permit. (T pp. 82, 154)

22. Because the pool could not be permitted under the CAMA laws and regulations, Ms. Bouffard had no reason to evaluate whether or not the pool was designed in compliance with the North Carolina Building Code. (T p. 83)

23. Robb Mairs has been a Field Representative with DCM for five years. In this position his responsibilities include: assisting contractors and property owners with submitting applications for general permits; administrating biological field investigation reports that are circulated throughout different state and federal divisions on proposed major development; and assisting LPOs in New Hanover County, Wrightsville Beach, Carolina Beach, and Kure Beach. (T p. 61) In this instance, Mr. Mairs assisted Christine Bouffard with the review application process and in the marking of the setback line. (T pp. 62-67)

24. Mr. Mairs is very familiar with Figure Eight Island because his work for the past five years takes him there a least once a week; in the summer of 2008 he was on the island more frequently. (T p.124) He agreed with Ms. Bouffard's decision to deny the permit. (T p. 115) Mr. Mairs authenticated twelve photographs showing the property on which the proposed pool is to be located. (T pp. 116-128) Mr. Overton's oceanfront lot is located on the north end of Figure Eight Island, near Rich Inlet. (Exhibits R-1, R-2) The site of the proposed swimming pool is between Mr. Overton's house and the existing sandbag structure. It is proposed for the area where the existing wooden fence is, and landward from that point. (Exhibits R-3 through R-12; R-20, 21, 29)

25. Due to its location i.e., oceanfront, Mr. Mairs explained that the property was in a very dynamic environment. (T p. 136)

26. Mr. Mairs testified that the location of the pool and the components underneath it would be inconsistent with the AEC rules. Therefore, whether the design of the pool was consistent with the North Carolina Building Code did not factor in to the decision to deny the CAMA minor permit. (T p. 130-132)

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29. Mr. Tyndall was qualified by the Court as an expert in the areas of coastal biology and estuarine waters and on the Coastal Area Management Act and its implementation via application of the state guidelines enacted by the CRC. (T p. 152)

30. Mr. Tyndall was asked to consult in this case because of the substantial foundation structure associated with the design of the proposed swimming pool. Mr. Tyndall described the design as having "unique characteristics." (T p. 153)

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32. Mr. Tyndall testified that structures such as swimming pools can be allowed within the oceanfront setback only if they meet the criteria in 15A NCAC 7H.0309, including that the proposed development involve "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..." (T p. 159)

33. Mr. Tyndall testified that he, Mr. Mairs and the LPO all agreed that the proposed swimming pool structure in this case, that is designed to go down into the dune "some sixteen, twenty-some feet", which Mr. Tyndall characterizes as "the massiveness of it," will diminish the value of the dune in its protective capacity, and the proposed structure with so much structure below the pool does not meet the guidelines of 15A NCAC 7H.0309(a), and that is why non-compliance with this rule was a basis for the LPO's denial. (T pp. 160, 172; Exhibit R-31)

34. Mr. Tyndall believes that the foundation of the proposed pool "is serving as a permanent erosion control structure. The design of it is such that it serves a similar function, similar structure as a bulkhead or retaining – a bulkhead or a seawall." As such, Mr. Tyndall believes the structure violates the rules and law against hardened structures. (T pp. 168-69) Mr. Tyndall believed the determination in this case that the proposed structure violates the rules and law against hardened structures is consistent with other calls made by DCM. (T p. 169)

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grade” and how the structure at issue is designed to prevent the scouring away by the waves. (T p. 171)

36. Mr. Tyndall testified that the proposed pool structure acts in the same way as those types of hardened structures prohibited by the language of N.C.G.S. § 113A-115.1, even though swimming pools are not listed in this law, as it “prevents the waves from chewing away at the structure – the foundation.”(T pp. 161-62)

37. Mr. Tyndall testified that “[t]he top of it certainly looks like a pool and it’s dressed up like a pool, but down below has other functions and values that serve a similar – a similar structure as that standard bulkhead or standard seawall.” (T p. 162)

CONCLUSIONS OF LAW

1. In this administrative proceeding, Petitioner bears the burden of proof. *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998). 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. *Id.* In the present case, Petitioner alleged that the agency acted erroneously.

2. Pursuant to the Coastal Area Management Act, all development in an area of environmental concern (“AEC”) requires a permit. N.C.G.S. § 113A-118.

3. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated the ocean hazard area as an Area of Environmental Concern and has adopted use standards (also referred to as state guidelines or CRC rules) for development within this area. *See* 15A N.C.A.C. 07H.0300 *et seq.*

4. The pool proposed in this case requires a CAMA permit because it constitutes “development” within an AEC.

5. Both the CAMA and the Commission’s Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308. Both the statute and the regulation provide examples of types of permanent erosion control structures but neither list is exhaustive. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308.

6. The LPO’s basis for denial of the application for a CAMA minor development permit for the proposed swimming pool was that the swimming pool as designed was, in effect, a permanent erosion control structure and as such violated the CAMA as well as the rules enacted by the Coastal Resources Commission, specifically 15A N.C.A.C. 07H.0308(a)(1)(B) and 15A N.C.A.C. 07H.0309(a). The twenty-six 16 ft deep pilings and steel reinforced concrete base proposed to support the eight ft. deep “lap” pool is the

type of permanent erosion control structure that is expressly prohibited due to the significant adverse impacts on the value and enjoyment of adjacent properties, or public access to and use of the ocean beach. 7H .0308(a)(1)(B). Furthermore, the swimming pool as designed would compromise the integrity of the dune in violation of 15A NCAC 7H .0309(a).

7. In this decision, the undersigned ALJ has given “due 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.

8. In this case, Respondent did not err by concluding that the proposed swimming pool constituted a hardened erosion control structure and that its construction would compromise the integrity of the dune. If the agency’s conclusions regarding the regulations are not plainly erroneous or inconsistent with the regulations, the agency’s conclusions of law should be upheld. *Simonel v. N.C. School of the Arts*, 119 N.C. App., 775, 460 S.E.2d 194, 196 (1995).

9. By denying the permit, Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously and did not fail to act as required by law or rule. N.C.G.S. § 150B-23(a).

10. By denying the permit, the LPO, did not exceed her authority or jurisdiction, nor did she act erroneously, where N.C.G.S. § 113A-121(b) states, “In cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments shall be considered and determined by the designated local official of the city or county as the case may be.”

11. Petitioners have failed to show that the agency substantially prejudiced Petitioner’s rights because petitioners were not entitled to a permit for an erosion control structure, albeit one with a swimming pool on top of the structure.

DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent’s decision to deny the application for a CAMA Minor Permit for a swimming pool with a large supporting structure, based on the Local Permitting Officer’s determination that the support structure constituted a permanent erosion control structure and violated 15A NCAC 7H .0309(a) and .0308(a)(1)(B) is AFFIRMED. Petitioners have not demonstrated by a preponderance of the evidence that their rights have been substantially prejudiced, or that Respondent erred in its decision to deny the permit application.

ORDER

It is hereby ordered that the agency serve a copy of its final agency decision 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).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission 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.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 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.

This the _____ day of _____, 2008.

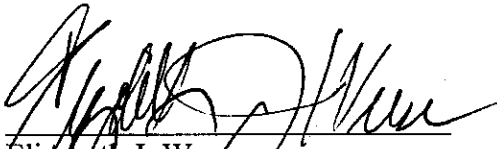
Joe L. Webster
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Proposed Decision upon the Petitioner, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows, as well as by facsimile, to the number appearing below:

James F. Hopf
1694 E. Arlington Boulevard, Suite E
Greenville, NC 27858
Facsimile: 252.756.1797

This the 30th day of October, 2008.



Elizabeth J. Weese
Assistant Attorney General

juw

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EHR 1090

COUNTY OF NEW HANOVER

JOHN S. STIREWALT, ARCHITECT,)
AGENT FOR B. PARKER OVERTON,)
LANDOWNER,)

Petitioner,)

v.)

N.C. DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES,)
DIVISION OF COASTAL)
MANAGEMENT,)

Respondent.)

RESPONDENT'S
PROPOSED DECISION

This contested case was heard on August 15, 2008, in Courtroom Number 6 of the Brunswick County Courthouse, Bolivia, North Carolina, before The Honorable Joe L. Webster, Administrative Law Judge, on a petition for contested case hearing regarding the Division of Coastal Management's (DCM's) denial of a Minor Development Permit under the Coastal Area Management Act (CAMA).

APPEARANCES

For Petitioner:

James F. Hopf
Hopf and Higley, PA
1694 East Arlington Blvd., Suite E
Greenville, NC 27858

For Respondent:

Elizabeth J. Weese
Assistant Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether the Division of Coastal Management, acting through its Local Permitting Officer for New Hanover County, properly denied a Coastal Area Management Act (CAMA) Minor Permit for development of an 8 ft. deep, 5 ft. by 55 ft. swimming pool? The supporting structure for the pool consists of a 30 inch thick concrete base with heavy steel material top and bottom and 16 ft deep by 18 inch thick reinforced concrete walls on twenty-six 20 ft. pilings and would be located at the edge of the oceanfront setback on property owned by B. Parker Overton at 13 Comber Road on Figure Eight Island.

MOTIONS

Respondent filed a Motion to Dismiss based on John Stirewalt's lack of standing to file a contested case petition on behalf of the property owner. After a hearing held July 11, 2008, this motion was denied by the Court in an order dated July 30, 2008.

WITNESSES

B. Parker Overton, property owner

John S. Stirewalt

Robb Mairs, DCM Field Representative, Wilmington Region, Wilmington, NC

Christine Bouffard, Zoning Enforcement Official and LPO, New Hanover County

Ted Tyndall, DCM Asst. Director for Permits and Enforcement, Morehead City, NC

EXHIBITS

Petitioner's:

1. CAMA application
2. March 18, 2008 letter from Bouffard to Stirewalt
3. March 25, 2008 letter from Stirewalt to Bouffard
4. April 9, 2008 letter from Bouffard to Stirewalt
5. March 10, 2008 invoice from Stirewalt to Overton
6. Plan drawings for pool
7. Engineer drawing for pool

Respondent's:

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Photograph
6. Photograph

7. Photograph
8. Photograph
9. Photograph
10. Photograph
11. Photograph
12. Photograph
[numbers 13 through 18 intentionally left blank]
19. CAMA minor permit application #08-013
20. Site plan submitted with application
21. Structural drawing submitted with application
22. Notice to adjacent landowner
23. Notice to adjacent landowner
24. Notice to adjacent landowner certified receipts
25. Notice of filing of application for CAMA minor development permit
26. Affidavit of publication of notice of filing application for CAMA minor development permit
27. March 18, 2008 additional information letter
28. March 25, 2008 letter from Stirewalt
29. Site plan submitted by Stirewalt
30. March 31, 2008 notice to extend time to grant or deny CAMA permit
31. April 9, 2008 notice letter of denial of CAMA minor permit

Based 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, the undersigned makes the following:

FINDINGS OF FACT

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 rules adopted by the Coastal Resources Commission (CRC) for the administration of CAMA. (N.C.G.S. § 113A-107)
2. The CAMA is a "cooperative state and local program." (N.C.G.S. § 113A-101) The Local Permitting Officer Program is an example of this cooperative relationship.
3. CAMA requires permits for development in an Area of Environmental Concern (AEC). (N.C.G.S. § 113A-118)
4. The Overton property is located within the Ocean Erodible Zone Area of the Ocean Hazard Area of Environmental Concern (AEC). (15A N.C.A.C. 07H .0300 *et seq.*)

5. The CRC's Ocean Hazard rules, found at 15A N.C.A.C. 07H.0300 et seq., govern development in the Ocean Hazard Area of Environmental Concern (AEC).

6. The fundamental premise of the Ocean Hazard AEC designation is that lands located therein are especially vulnerable to erosion. The introductory rule describing the Ocean Hazard AEC, which has been in effect since 1977, provides:

The next broad grouping is composed of those AECs that are considered natural hazard areas along the Atlantic Ocean shoreline where, because of their *special vulnerability to erosion* or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a *substantial possibility of excessive erosion* or flood damage. 15A NCAC 7H .0301

7. The CRC rules governing oceanfront erosion response activities are found at 15A NCAC 7M .0200 et seq.

8. The general policy provisions concerning shoreline erosion state that barring specific instances outlined in 15A NCAC 07H .0308, "efforts to permanently stabilize the location of the ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed." 7M .0202(f).

9. In its Shoreline Erosion Policies, the Commission has determined that "[T]emporary 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 threatened structures may 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." 15A NCAC 7M .0202(e).

10. Both the CAMA and the Commission's Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. Pursuant to N.C.G.S. § 113A-115.1:

(a) As used in this section:

(1) "Erosion control structure" means a breakwater, bulkhead, groin, jetty, revetment, seawall, or any similar structure.

(2) "Ocean shoreline" means the Atlantic Ocean, the oceanfront beaches, and frontal dunes. The term "ocean shoreline" includes an ocean inlet and lands adjacent to an ocean inlet but does not include that portion of any inlet and lands adjacent to the inlet that exhibits characteristics of estuarine shorelines.

(b) No person shall construct a permanent erosion control structure in an ocean shoreline. The Commission shall not permit the construction of a temporary erosion control structure that consists of anything other than sandbags in an ocean shoreline....

N.C.G.S. § 113A-115.1.

Rule 15A NCAC .0308, which addresses SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS, states the following:

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

(A) All oceanfront erosion response activities shall be consistent with the general policy statements in 15A NCAC 7M .0200.

(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 bulkheads, seawalls, revetments, jetties, groins and breakwaters.

(C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront properties without regard to the size of the structure on the property or the date of its construction....

15A NCAC 7H .0308.

11. The CRC's Ocean Hazard rules establish building setback lines for development in the Ocean Hazard Area of Environmental Concern. Generally, the first line of stable natural vegetation is used as the reference point for measuring oceanfront setbacks. 15A NCAC 7H .0306(a). Development is generally not allowed within the setback.

12. Rule 15A NCAC 07H .0309(a) provides some exceptions to the setback requirements of .0306(a). Swimming pools and decking are exceptions to the setback, however, such development "shall be permitted [only]... if all other provisions of [the Ocean Hazard Areas] and other state and local regulations are met . . . 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." (15A NCAC 07H .0309(a))

13. The proposed pool would be located within the oceanfront setback., immediately behind the first line of stable natural vegetation. (Exhibit R-20)
14. The development proposed in the CAMA minor application submitted by John Stirewalt to the LPO consisted of a 5 ft. wide by 55 ft. long 8 ft. deep (water-filled area) "lap" swimming pool. The supporting structure for the pool consisted of a 30 inch thick concrete base with heavy steel material top and bottom and 16 ft deep by 18 inch thick reinforced concrete walls on twenty-six 8 inch by 8 inch by 20 foot pilings. Much of this support structure is located below grade at the oceanward edge of the property. (Exhibits R-20 and R-21)
15. The application also proposed the construction of approximately 595 square feet of tile over concrete decking outside the drip line and inside the oceanfront setback. (Exhibit R-20)
16. Through the CAMA local permitting officer program, municipalities can designate employees as Local Permitting Officers (LPOs) to process Minor Permit Applications based on a contract between DENR and the municipalities. (N.C.G.S. § 113A-117 and 15A N.C.A.C. 071 *et seq.*) New Hanover County's local permitting officer program was under contract with DCM at the time the events in this case took place.
17. In this case, the LPO for New Hanover County is Christine Bouffard. Along with her role as an LPO for the County, she is a Zoning Enforcement Official with a primary duty to enforce local zoning ordinances and flood plain management. (T p. 76) Ms. Bouffard has worked for several municipalities as a zoning enforcement official. (T p. 92) In addition to LPO training from DCM, she is a certified floodplain manager. (T p. 93)
18. In February 2008, prior to receiving the CAMA permit application, Ms. Bouffard met on site with John Stirewalt. She asked Robb Mairs, a DCM field representative, to also attend the meeting. Ms. Bouffard's primary reason for including Mr. Mairs was that because of the significant amount of erosion on Figure Eight Island, she was uncomfortable staking an oceanfront setback line on her own. (T pp. 76-77)
19. During the on-site meeting, John Stirewalt asked questions of Ms. Bouffard and Mr. Mairs about several different potential projects. During the meeting, Mr. Mairs had the impression that the existing house was going to be moved landward, and in that event, Mr. Stirewalt wanted to know what structures could remain or be developed within the setback. (T p. 67) Placement of a swimming pool was discussed; however, no details with regard to design or specific location were covered at the on-site meeting. (T pp. 66-67, 71-72)
20. The site plans and drawings ultimately submitted with the CAMA minor application in March 2008 raised a "red flag" to Ms. Bouffard. (T p. 108) She immediately recognized that this was not a "garden variety pool." (T p. 108) The

structural support component of the pool--its foundation--particularly the amount of concrete, was unique in her experience. (T pp. 82; 108) The pools she previously reviewed and permitted under CAMA did not have any type of concrete supports. (T p. 82)

21. Based on her opinion that the foundation of the pool constituted a hardened structure, Ms. Bouffard denied the application. (T pp. 79, 82; Exhibit R-31) Prior to doing so, she participated in a review of the application with her section chief in New Hanover County, Robb Mairs (DCM field representative), and Ted Tyndall (DCM Assistant Director). They agreed with her assessment and decision to deny the permit. (T pp. 82, 154)

22. Because the pool could not be permitted under the CAMA laws and regulations, Ms. Bouffard had no reason to evaluate whether or not the pool was designed in compliance with the North Carolina Building Code. (T p. 83)

23. Robb Mairs has been a Field Representative with DCM for five years. In this position his responsibilities include: assisting contractors and property owners with submitting applications for general permits; administering biological field investigation reports that are circulated throughout different state and federal divisions on proposed major development; and assisting LPOs in New Hanover County, Wrightsville Beach, Carolina Beach, and Kure Beach. (T p. 61) In this instance, Mr. Mairs assisted Christine Bouffard with the review application process and in the marking of the setback line. (T pp. 62-67)

24. Mr. Mairs is very familiar with Figure Eight Island because his work for the past five years takes him there a least once a week; in the summer of 2008 he was on the island more frequently. (T p.124) He agreed with Ms. Bouffard's decision to deny the permit. (T p. 115) Mr. Mairs authenticated twelve photographs showing the property on which the proposed pool is to be located. (T pp. 116-128) Mr. Overton's oceanfront lot is located on the north end of Figure Eight Island, near Rich Inlet. (Exhibits R-1, R-2) The site of the proposed swimming pool is between Mr. Overton's house and the existing sandbag structure. It is proposed for the area where the existing wooden fence is, and landward from that point. (Exhibits R-3 through R-12; R-20, 21, 29)

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CONCLUSIONS OF LAW

1. In this administrative proceeding, Petitioner bears the burden of proof. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998). 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. *Id.* In the present case, Petitioner alleged that the agency acted erroneously.
2. Pursuant to the Coastal Area Management Act, all development in an area of environmental concern ("AEC") requires a permit. N.C.G.S. § 113A-118.
3. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated the ocean hazard area as an Area of Environmental Concern and has adopted use standards (also referred to as state guidelines or CRC rules) for development within this area. *See* 15A N.C.A.C. 07H.0300 *et seq.*
4. The pool proposed in this case requires a CAMA permit because it constitutes "development" within an AEC.
5. Both the CAMA and the Commission's Ocean Hazard rules explicitly prohibit permanent erosion control structures on oceanfront property. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308. Both the statute and the regulation provide examples of types of permanent erosion control structures but neither list is exhaustive. *See* N.C.G.S. § 113A-115.1(a)(2) and 15A NCAC 7H .0308.
6. The LPO's basis for denial of the application for a CAMA minor development permit for the proposed swimming pool was that the swimming pool as designed was, in effect, a permanent erosion control structure and as such violated the CAMA as well as the rules enacted by the Coastal Resources Commission, specifically 15A N.C.A.C. 07H.0308(a)(1)(B) and 15A N.C.A.C. 07H.0309(a). The twenty-six 16 ft deep pilings and steel reinforced concrete base proposed to support the eight ft. deep "lap" pool is the

type of permanent erosion control structure that is expressly prohibited due to the significant adverse impacts on the value and enjoyment of adjacent properties, or public access to and use of the ocean beach. 7H .0308(a)(1)(B). Furthermore, the swimming pool as designed would compromise the integrity of the dune in violation of 15A NCAC 7H .0309(a).

7. In this decision, the undersigned ALJ has given "due 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.

8. In this case, Respondent did not err by concluding that the proposed swimming pool constituted a hardened erosion control structure and that its construction would compromise the integrity of the dune. If the agency's conclusions regarding the regulations are not plainly erroneous or inconsistent with the regulations, the agency's conclusions of law should be upheld. *Simonel v. N.C. School of the Arts*, 119 N.C. App., 775, 460 S.E.2d 194, 196 (1995).

9. By denying the permit, Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously and did not fail to act as required by law or rule. N.C.G.S. § 150B-23(a).

10. By denying the permit, the LPO, did not exceed her authority or jurisdiction, nor did she act erroneously, where N.C.G.S. § 113A-121(b) states, "In cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments shall be considered and determined by the designated local official of the city or county as the case may be."

11. Petitioners have failed to show that the agency substantially prejudiced Petitioner's rights because petitioners were not entitled to a permit for an erosion control structure, albeit one with a swimming pool on top of the structure.

DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to deny the application for a CAMA Minor Permit for a swimming pool with a large supporting structure, based on the Local Permitting Officer's determination that the support structure constituted a permanent erosion control structure and violated 15A NCAC 7H .0309(a) and .0308(a)(1)(B) is AFFIRMED. Petitioners have not demonstrated by a preponderance of the evidence that their rights have been substantially prejudiced, or that Respondent erred in its decision to deny the permit application.

ORDER

It is hereby ordered that the agency serve a copy of its final agency decision 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).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission 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.G.S. § 150B-36(a).

The agency is required by N.C.G.S. § 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.

This the _____ day of _____, 2008.

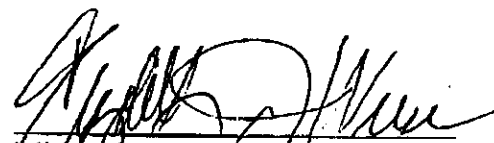
Joe L. Webster
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Proposed Decision upon the Petitioner, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows, as well as by facsimile, to the number appearing below:

James F. Hopf
1694 E. Arlington Boulevard, Suite E
Greenville, NC 27858
Facsimile: 252.756.1797

This the 30th day of October, 2008.



Elizabeth J. Weese
Assistant Attorney General

*** FAX RX REPORT ***

RECEPTION OK

JOB NO.	5930
DESTINATION ADDRESS	919 716 6767
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	10/30 15:05
USAGE T	03' 55
PGS.	12
RESULT	OK

SECTION V



LOCALITY _____ PERMIT NUMBER _____

OCEAN HAZARD _____ ESTUARINE SHORELINE _____ DRW SHORELINE _____ PUBLIC TRUST SHORELINE _____ OTHER _____
(FOR OFFICIAL USE ONLY)

GENERAL INFORMATION

LAND OWNER:

NAME PARKER OVERTON
ADDRESS P.O. BOX 644
CITY GREENVILLE STATE NORTH CAROLINA ZIP 27835 PHONE 252-756-1771

AUTHORIZED AGENT:

NAME JOHN STIREWALT
ADDRESS 458 BISCAYNE DRIVE
CITY WILMINGTON STATE NORTH CAROLINA ZIP 28411 PHONE 910-686-3131

LOCATION OF PROJECT: (ADDRESS, STREET NAME AND/OR DIRECTIONS TO SITE. IF NOT OCEANFRONT, WHAT IS THE NAME OF THE ADJACENT WATERBODY?)
13 COMBER ROAD FIGURE EIGHT ISLAND, WILMINGTON NORTH CAROLINA

DESCRIPTION OF PROJECT: (LIST ALL PROPOSED CONSTRUCTION AND LAND DISTURBANCE)
NEW POOL

SIZE OF LOT/PARCEL: 22.000 square feet _____ acres _____

PROPOSED USE: RESIDENTIAL (SINGLE-FAMILY MULTI-FAMILY _____) COMMERCIAL/INDUSTRIAL _____ OTHER _____

TOTAL ENCLOSED FLOOR AREA IF A BUILDING IN THE OCEAN HAZARD AREA OF ENVIRONMENTAL CONCERN (AEC): 4,679 square feet (INCLUDES ALL FLOOR AND ROOF-COVERED DECKS)

FLOOR/DECK: 3240
DRIVE/WALKS: 1438
TOTAL: 4679

SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OF BUILDING-UPON SURFACE IN THE COASTAL SHORELINE AREA OF ENVIRONMENTAL CONCERN (AEC): 4,679 sq. ft.
(CALCULATIONS INCLUDE THE AREA OF THE ROOF/D RIP 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.)

$$\frac{4.679}{22.000} = .21\%$$

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. _____ s.q. ft.



4

OTHER PERMITS MAY BE REQUIRED: THE ACTIVITY YOU ARE PLANNING MAY REQUIRE PERMITS OTHER THAN THE CAMA MINOR DEVELOPEMENT 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 TRETMENT SYSTEM), BURNING, 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, AND APPLICANT FOR A CAMA MINOR DEVELOPEMENT PERMIT, BEING EITHER THE OWNER OF THE PROPERTY IN AN AEC OR A PERSON AUTHORIZED TO ACT AS AN AGENT FOR PURPOSES OF APPLYING FOR A CAMA MINOR DEVELOPEMENT 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 VANCE PARKER OVERTON, SEE DEED BOOK MAP 18 PAGE 89-90 IN THE NEW HANOVER 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)	MR. & MRS. NELSON	317 STONEY BROOK ROAD, ROCKY MOUNT NC 27804 - (12 COMBERS ROAD)
(2)	MR. & MRS. CAGNEY	403 SILVER CREEK TRAIL, CHAPEL HILL NC 27514 - (14 COMBERS ROAD)
(3)		
(4)		

FOR DEVELOPERS IN OCEAN HAZARD AN ESTUARINE HAZARD AREAS:

I ACKNOWLEDGE THAT THE LAND OWNER IS AWARE THAT THE PROPOSED DEVELOPEMENT 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.

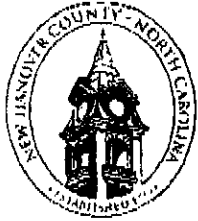
PERMISSION TO ENTER ON LAND:

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 ACTIONS.

THIS THE 2 DAY OF MARCH 2008

[Signature]
LANDOWNER OR PERSON AUTHORIZED TO ACT AS HIS AGENT FOR PURPOSE OF FILLING A CAMA PERMIT APPLICATION.



Ann S. Hines
Chief Zoning
Enforcement Official

NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Drive, Suite 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118
FAX: (910) 798-7060

March 18, 2008

Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

RE: INCOMPLETE APPLICATION ADDITIONAL INFORMATION REQUIRED
APPLICATION NUMBER-- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

We originally accepted your application under the impression that it was complete. On subsequent review, I have discovered that additional information is needed to complete the review process. Accordingly, I am requesting that you submit the following additional information to this office:

1. ✓ Please submit side elevations showing all sandbag locations, and lateral views of all existing and proposed decking;
2. Include calculations of existing decking and proposed decking on site plan;
3. Show all beach access steps, concrete walls and wood fences located on property on site plan; and
4. ✓ Show 60' setback from first stable line of vegetation on site plan;

Also, it is my determination that based on drawings submitted, specifically upon review of the proposed pool foundation, I would be unable to approve the proposed swimming pool based on inconsistencies with the following: §113A-115.1 Limitations on Erosion Control Structures; 15A NCAC 07H .0308(a) Specific Use Standards For Ocean Hazard Areas; and with 15A NCAC 07M .0200 Shoreline Erosion Policies.

In accordance with the Department of Environment and Natural Resources regulations, we note that a certain time has passed while the application has remained in our office. Upon resubmission of a complete application, a local decision will be made in 10 days, provided this period is not extended as provided by law.

Please contact me at (910) 798-7118 if you have any questions.

Respectfully yours,

Christine R. Bouffard, LPO
New Hanover County
230 Government Center Drive, Suite 110
Wilmington, NC 28403

cc: Robb Mairs, DCM
Ann S. Hines, Chief Zoning Enforcement Official
Parker Overton

EXHIBIT

2

John S. Stirewalt, Architect
458 Biscayne Drive
Wilmington, NC 28411
910-686-3131
johnstirewaltarchitect@gmail.com

March 25, 2008

Ms. Christine R. Bouffard, LPO
NH County CAMA
230 Government Center Drive, Suite 110
Wilmington, NC 28403

Re: CAMA Application # 08-013
Overton Residence
13 Comber Rd., Figure Eight Island

Dear Christine:

Enclosed are drawings reflecting the drawing changes you requested in your letter dated March 18, 2008. Items 1 thru 4 are noted on the plans.

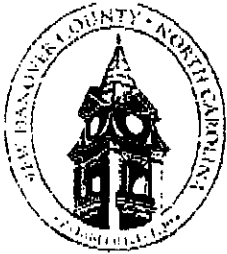
In reference to additional items you noted, specifically; 113A-115.1, 15A NCAC 07H .0308(a) and 15A NCAC 07M .200, please note that my concern was noted at our on-site meeting on February 20, 2008 with you and Robb Mairs referencing these issues. My response to these issues is the same question I asked at that meeting, specifically that **"15A NCAC 07H .0309: Use Standards for Ocean Hazard Areas: Exceptions"** allows Swimming Pools excepted by all of the regulations you posed above. Additionally, I mentioned at our meeting that I could not just "place a bathtub out there", that I would have to at least meet the minimum requirements for Coastal Construction regarding piling depths, etc. and Robb Mairs concurred. The swimming pool is designed as a swim lane and structurally designed to withstand any undermining of sand from Hurricanes, and the subsequent collapse.

Please notify me if any of the items I have addressed are incorrect or if you require any further information. Thank you in advance for your kind consideration of this matter.

Sincerely,

John S. Stirewalt

Cc: Parker Overton, Owner
Robb Mairs, DCM



NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Dr., Suite 110
 WILMINGTON, NORTH CAROLINA 28403
 TELEPHONE (910) 798-7118
 FAX: (910) 798-7060

Ann S. Hines
 Chief Zoning
 Enforcement Official

April 9, 2008

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. Parker Overton
 c/o John Stirewalt
 458 Biscayne Dr.
 Wilmington, NC 28411

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
 APPLICATION NUMBER- 08-013
 PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

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 to construct a swimming pool measuring 5-ft wide by 55-ft long and 8-ft deep (water-filled area) with a sand-filled support and wall structure in the oceanfront setback. This supporting structure would consist of a 30-in thick concrete base with heavy steel material top and bottom and 18-ft deep by 18-in thick reinforced concrete walls on twenty-six 8-in x 8-in x 20-ft wood pilings or concrete and/or steel piles. You also propose to construct approximately 595 sq ft of tile over concrete decking outside the drip line and inside the oceanfront setback. Therefore, as designed, this structure becomes an erosion control structure and is not allowed in accordance with NCGS 113A-115.1. In addition, your proposal is inconsistent with 15 NCAC 7H .0308 (a) and 15 NCAC 7H .0309 (a).

Should you wish to appeal my decision to the Coastal Resources Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. A petition must be filed within 20 days of the permit decision.

Respectfully yours,

Christine R. Bouffard, LPO
 New Hanover County
 230 Government Center Dr., Ste. 110
 Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
 Ann Hines, Chief Zoning Enforcement Official
 Parker Overton

Blumberg No. 519 EXHIBIT

4

John S. Stirewalt, Architect
458 Biscayne Drive
Wilmington, NC 28411
910-686-3131
johnstirewaltarchitect@gmail.com

March 10, 2008

M/M Parker Overton
3933 Mobley's Bridge Rd.
Grimesland, NC 27837

Invoice for Architectural Services – Swimming pool Design

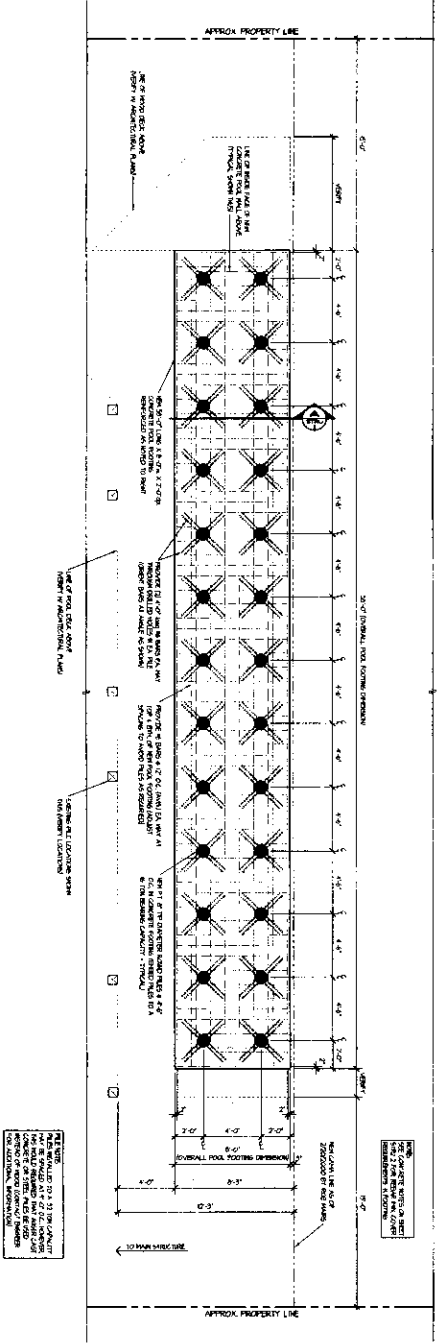
CAMA Permit applied for.
Drawings Complete (Mailed in separate envelope)

Per Contract Agreement:
Total Amount Due: \$ 12,500.00
Thank you

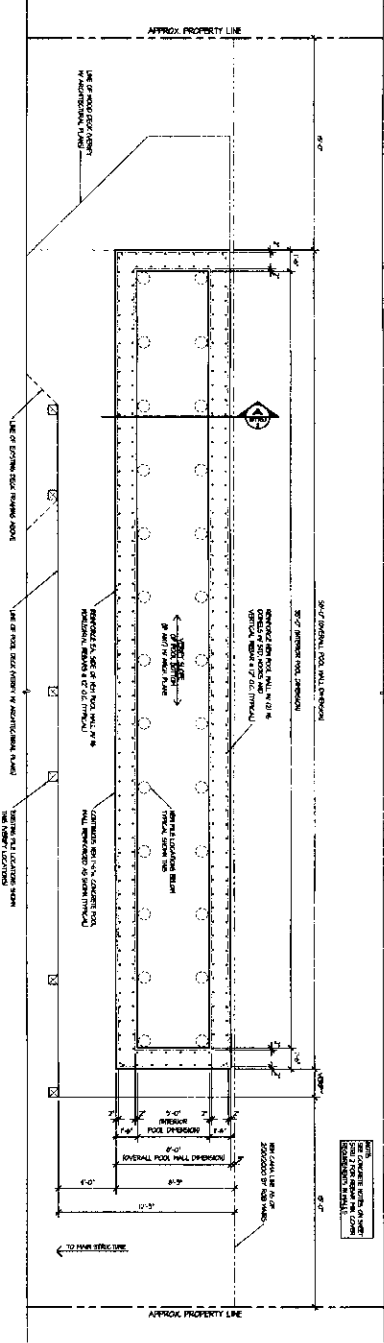
Parker, I will notify you immediately when I hear anything from the CAMA folks.
Keeping fingers crossed !



PILE AND CONCRETE FOOTING PLAN FOR NEW POOL • SCALE: 1/4" = 1'-0"
 (SHOWING NEW FOOTING REINFORCING)



CONCRETE WALL PLAN FOR NEW POOL • SCALE: 1/4" = 1'-0"
 (SHOWING NEW WALL REINFORCING)



STRU
 1

**CHRISTOPHER A. HOLMES, P.E.,
 CONSULTING ENGINEER, INC.**
 PHONE • 910 • 746 • 9988 • FAX • 910 • 746 • 9989
 OLEANDER OAKS • 5125 OLEANDER DRIVE • SUITE F-4 • WILMINGTON, NORTH CAROLINA 28403

PROJ. NO. **OVERTON RESIDENCE POOL**
 15 COMBER ROAD
 FIGURE EIGHT ISLAND, NORTH CAROLINA
 PROJECT DESCRIPTION: **NEW POOL WALL SECTION**
 DRAWN BY: **P.R.B.** DATE: **FEB 26th, 2008** PROJECT NO: **08086** DESIGNED BY: **W.D.J.**



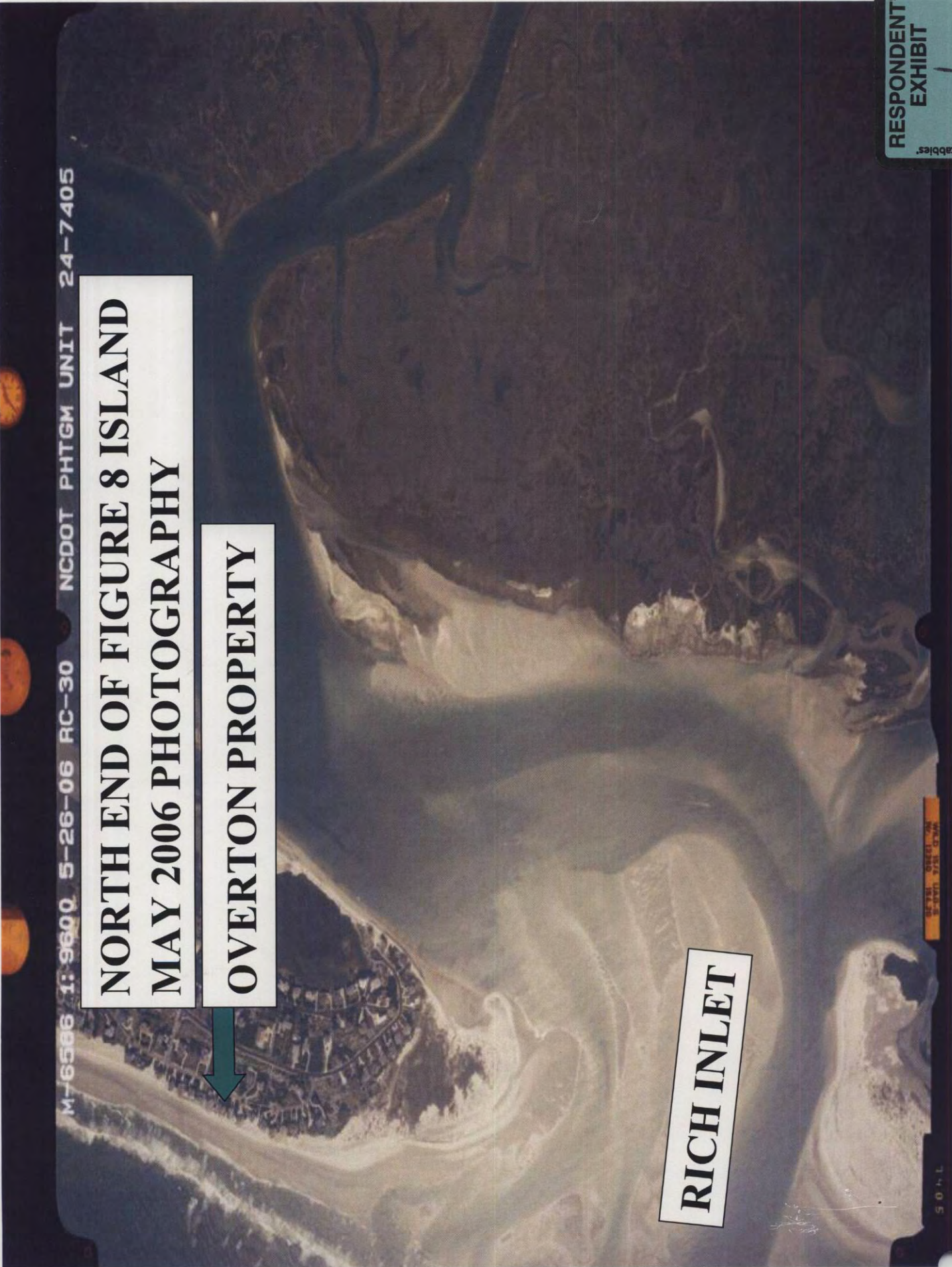
M-6586 1: 9600 5-26-06 RC-30 NCDOT PHTGM UNIT 24-7405

**NORTH END OF FIGURE 8 ISLAND
MAY 2006 PHOTOGRAPHY**

OVERTON PROPERTY



RICH INLET



RESPONDENT'S
EXHIBIT
1

50 ft
5-26-06 11:58 AM

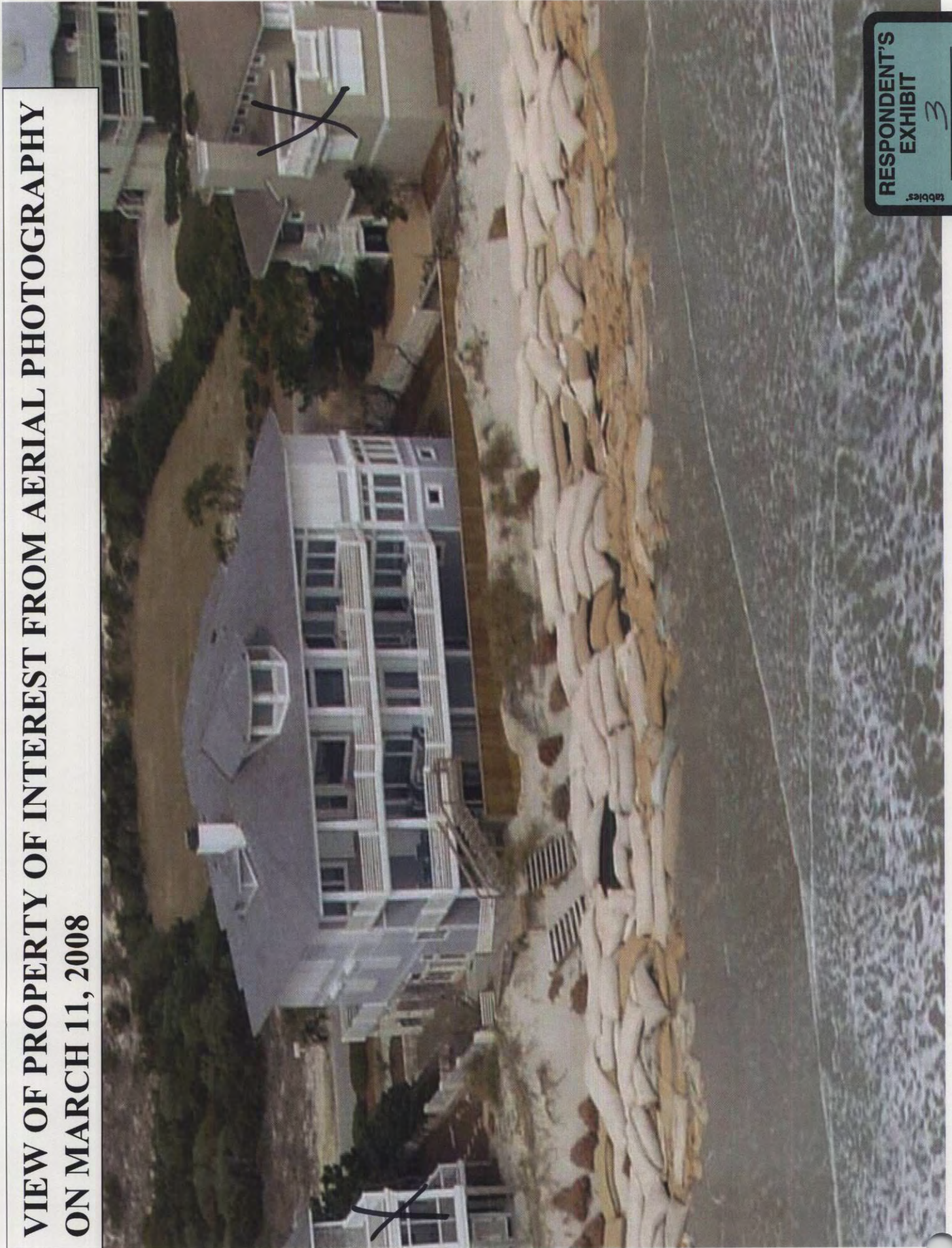
50 ft



Overton property

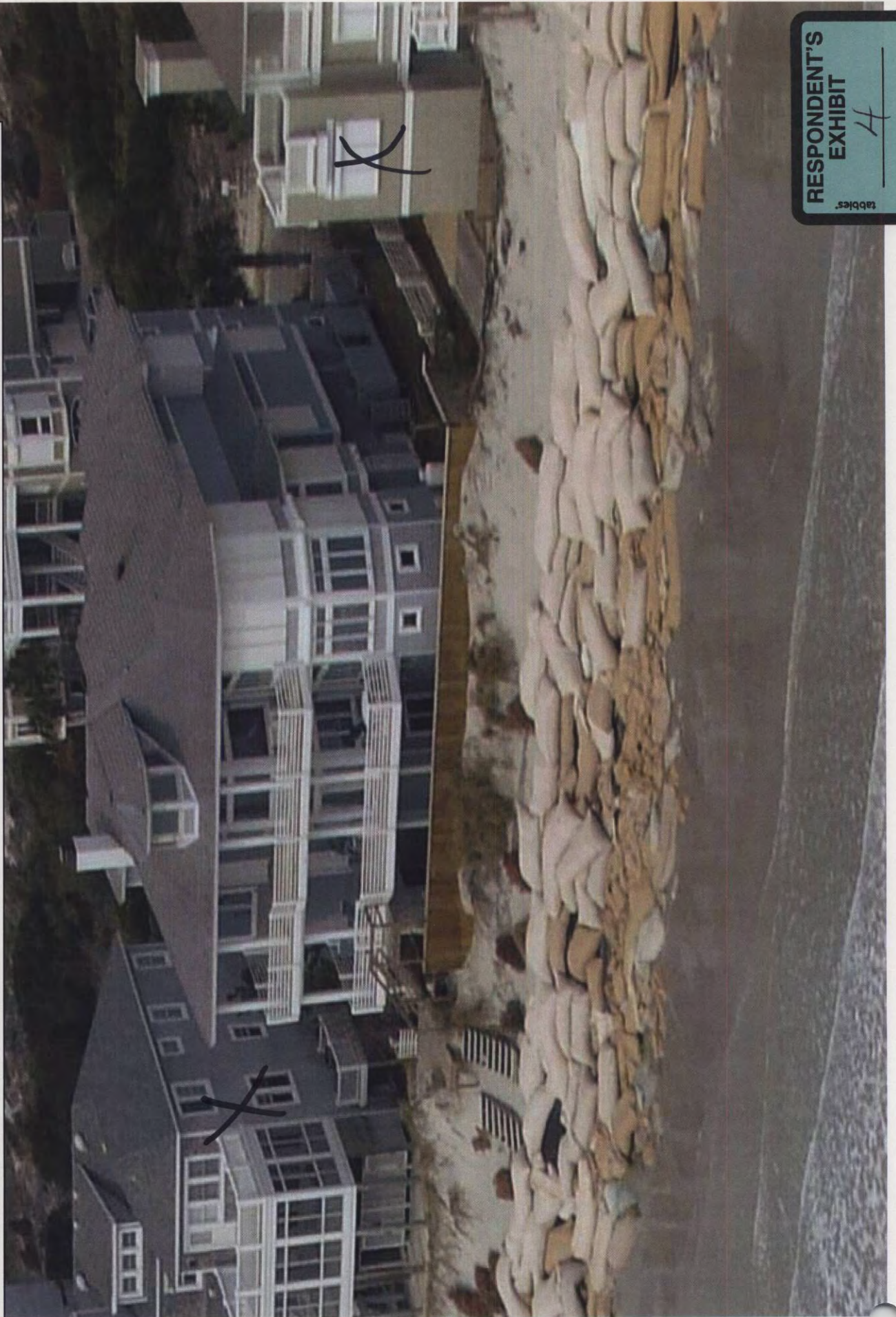
Atlantic Ocean

**VIEW OF PROPERTY OF INTEREST FROM AERIAL PHOTOGRAPHY
ON MARCH 11, 2008**



tabbles®
RESPONDENT'S
EXHIBIT
3

**VIEW OF PROPERTY OF INTEREST FROM AERIAL PHOTOGRAPHY
ON MARCH 11, 2008**



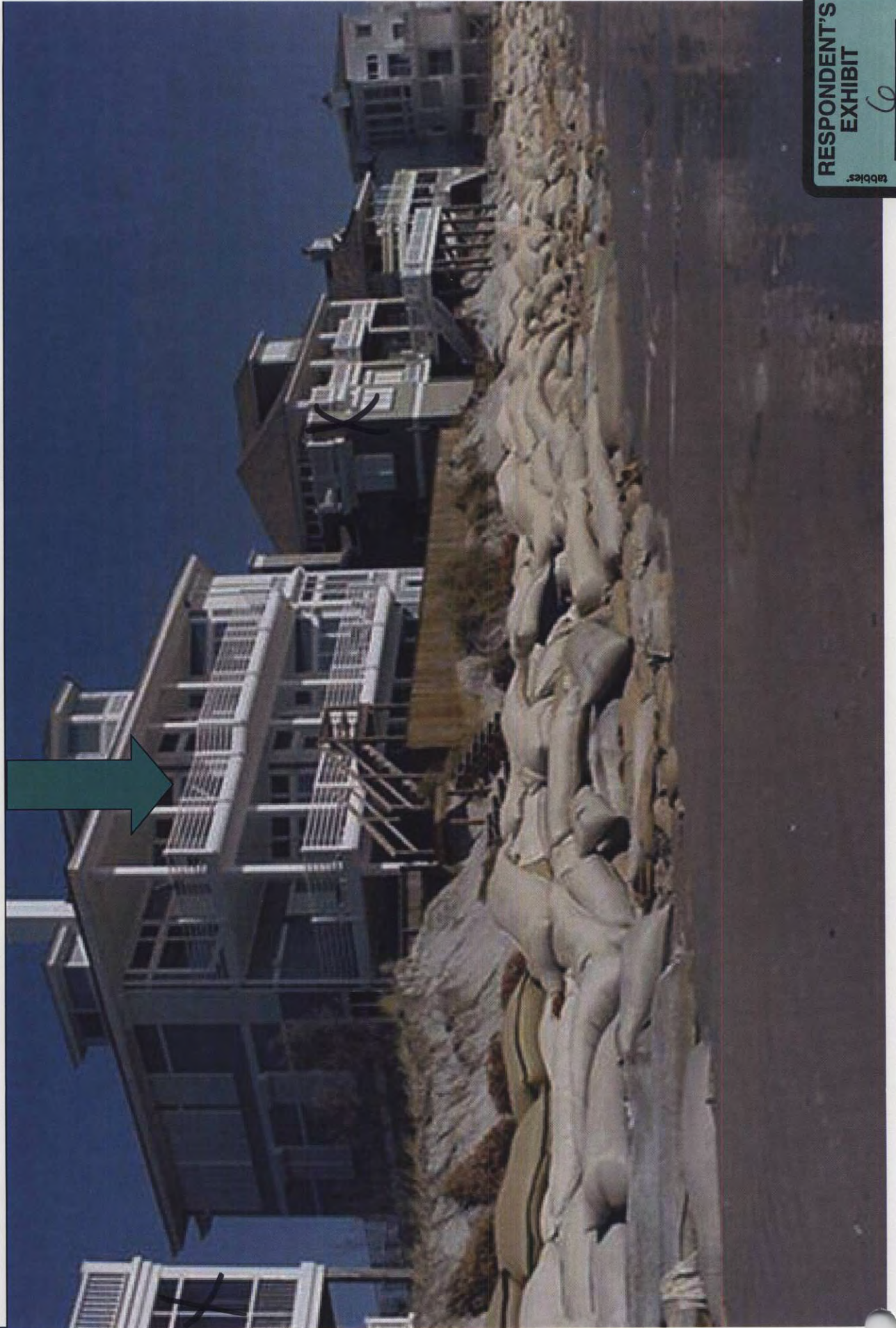
RESPONDENT'S
EXHIBIT
A

Tables

**VIEW OF PROPERTY OF INTEREST AND EXISTING SANDBAG
LOOKING SOUTHWEST ON MARCH 6, 2008**

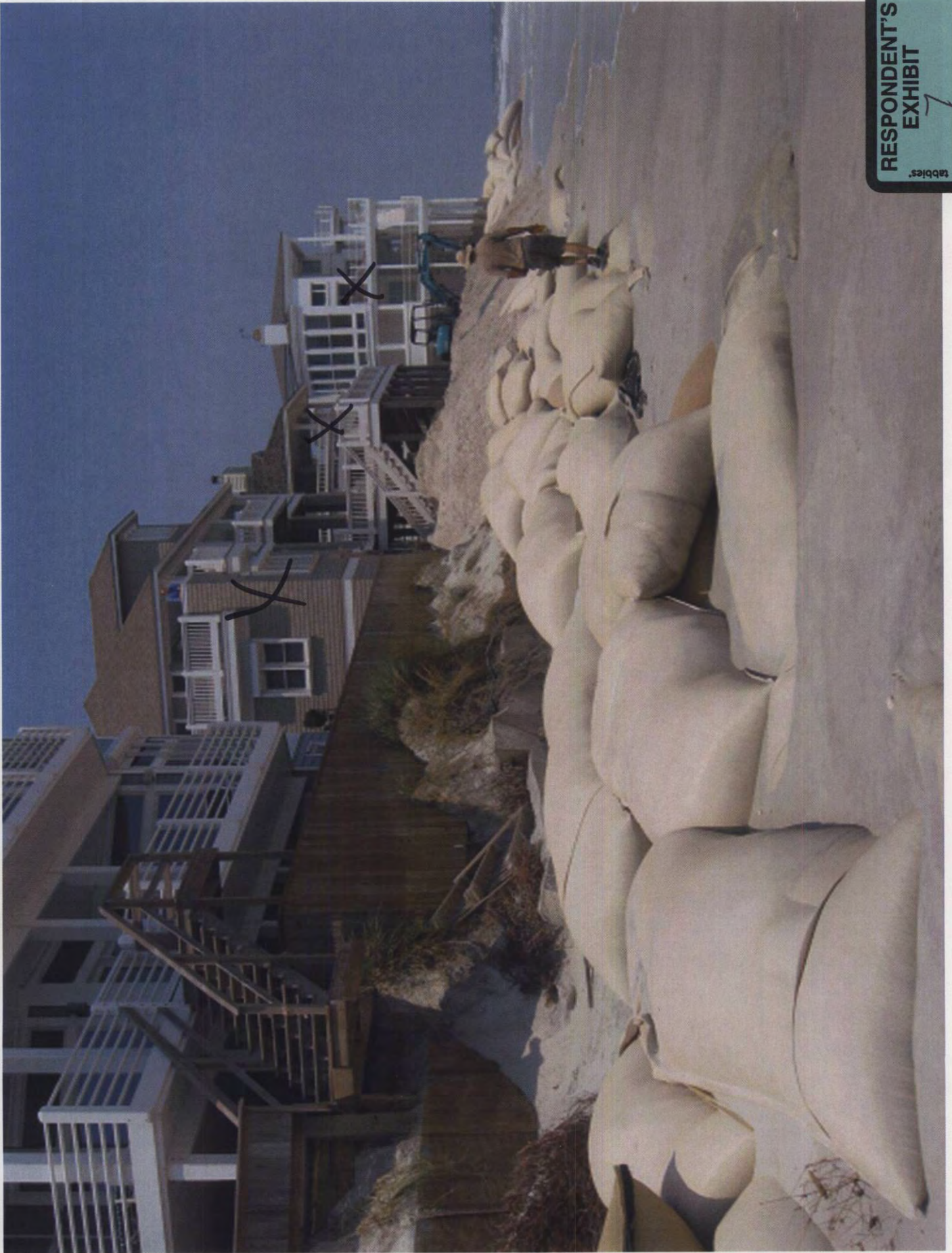


**VIEW OF PROPERTY OF INTEREST AND EXISTING SANDBAG
LOOKING NORTHWEST ON MARCH 6, 2008**



RESPONDENT'S
EXHIBIT
_____ *6*

tabbles



RESPONDENT'S EXHIBIT
7
tabbles®

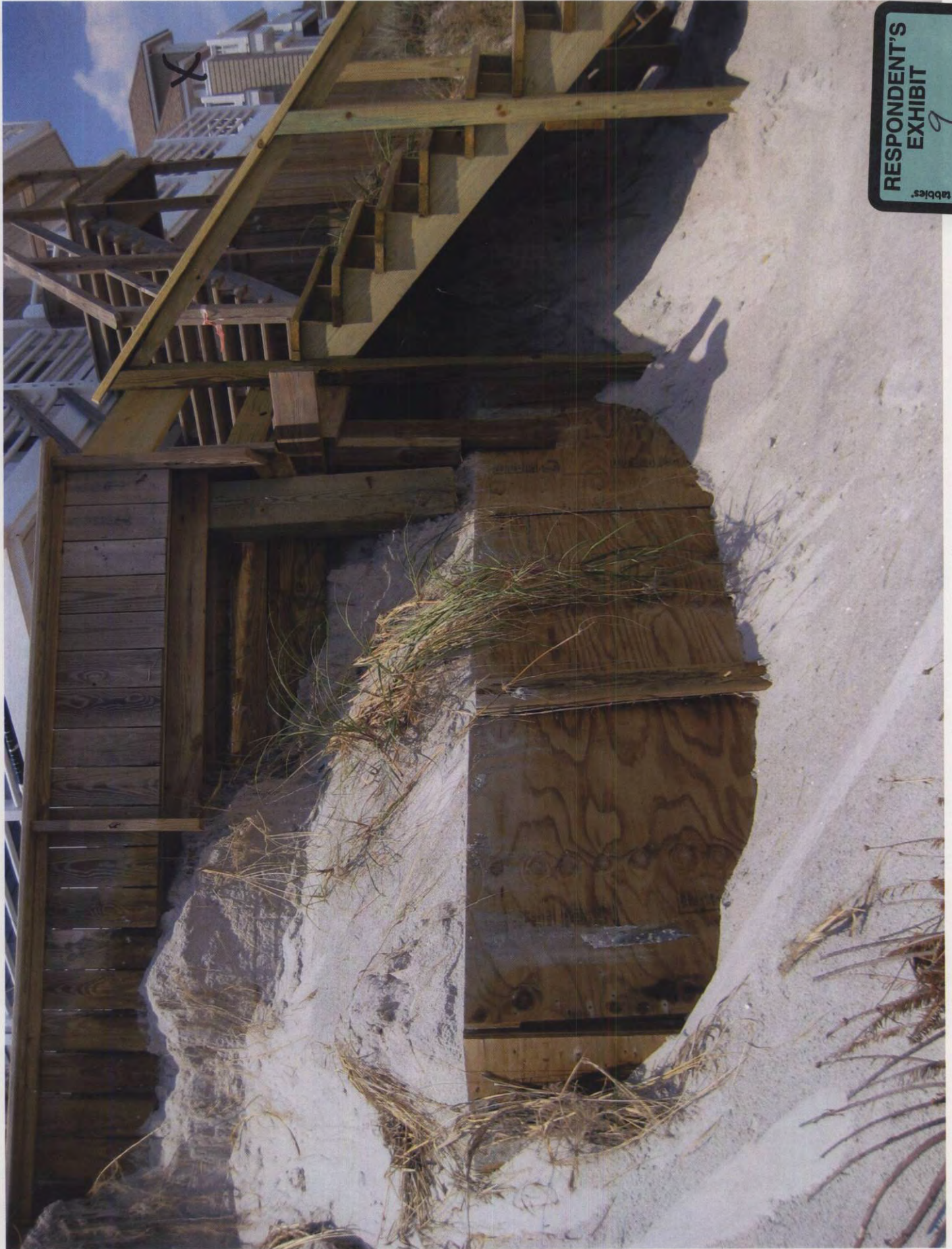
overton_1.JPG



overton_2.JPG

RESPONDENT'S
EXHIBIT

Tables



RESPONDENT'S
EXHIBIT
9

overton_5.jpg



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RESPONDENT'S
EXHIBIT
10

overton_6.jpg



overton_4.jpg

RESPONDENT'S
EXHIBIT
11
tabbles®



RESPONDENT'S
EXHIBIT
12

overton_3.jpg

LOCALITY NHC PERMIT NUMBER 08-013

OCEAN HAZARD ESTUARINE SHORELINE ORW SHORELINE PUBLIC TRUST SHORELINE OTHER
(FOR OFFICIAL USE ONLY)

GENERAL INFORMATION

LAND OWNER:

NAME PARKER OVERTON
ADDRESS P.O. BOX 644
CITY GREENVILLE STATE NORTH CAROLINA ZIP 27835 PHONE 252-756-1771

AUTHORIZED AGENT:

NAME JOHN STIREWALT
ADDRESS 458 BISCAYNE DRIVE
CITY WILMINGTON STATE NORTH CAROLINA ZIP 28411 PHONE 910-686-3131

LOCATION OF PROJECT: (ADDRESS, STREET NAME AND/OR DIRECTIONS TO SITE. IF NOT OCEANFRONT, WHAT IS THE NAME OF THE ADJACENT WATERBODY?)
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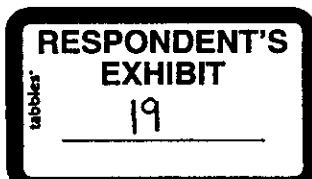
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YES NO

IF YES, LIST THE TOTAL BUILT-UPON AREA/IMPERVIOUS SURFACE ALLOWED FOR YOUR LOT OR PARCEL. _____ s.q. ft.

RECEIVED

MAR 05 2008

RECEIVED MAR 03 2008



DCM WILMINGTON, NC

0013

OTHER PERMITS MAY BE REQUIRED: THE ACTIVITY YOU ARE PLANNING MAY REQUIRE PERMITS OTHER THAN THE CAMA MINOR DEVELOPEMENT 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 TRETMENT SYSTEM), BURNING, 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.

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(3)	
(4)	

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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 ACTIONS.

THIS THE 2 DAY OF MARCH, 2008

[Signature]
LANDOWNER OR PERSON AUTHORIZED TO ACT AS HIS AGENT FOR PURPOSE OF FILLING A CAMA PERMIT APPLICATION.

RECEIVED MAR 03 2008

08-013

If mailing letter, please send as:
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Date: February 25, 2008

Dear Mr. and Mrs. Nelson:

This letter is to notify you, as an adjacent riparian landowner, that Mr./Mrs. Overton plans to construct New Pool on their property, located at 13 Comber Road in Figure Eight Island (The sketch on the reverse side accurately depicts the proposed construction)

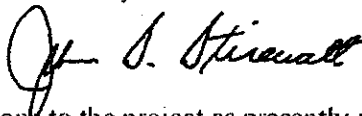
Should you have no objections to this proposal:
Please place a check (✓) at the appropriate statement below, sign and date this letter and return to: John Stirewalt, Architect (910)-686-3131 as soon as possible.

Should you have objections to this proposal, please send your written comments to:


CAMA Local Permit Officer
New Hanover County Inspections Department
Zoning Division
230 Market Place Drive, Suite 110
Wilmington, North Carolina, 28403

Comments will be considered up until the time of issuance of a permit.

Sincerely,



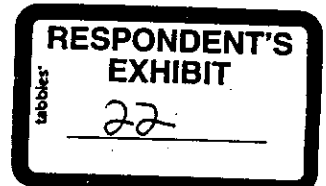
- I have *no* objections to the project as presently proposed.
- I have objections to the project as presently proposed and have enclosed comments.



 Signature

2/26/08

 Date



68-013

file overton

If mailing letter, please send as:
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Date: February 25, 2008

Dear Mr. and Mrs. Cagney:

This letter is to notify you, as an adjacent riparian landowner, that Mr./Mrs. Overton plans to construct New Pool on their property, located at 13 Comber Road in Figure Eight Island (The sketch on the reverse side accurately depicts the proposed construction)

Should you have no objections to this proposal:

Please place a check (✓) at the appropriate statement below, sign and date this letter and return to: John Stirewalt, Architect (910)-686-3131 as soon as possible.

Should you have objections to this proposal, please send your written comments to:

CAMA Local Permit Officer
New Hanover County Inspections Department
Zoning Division
230 Market Place Drive, Suite 110
Wilmington, North Carolina, 28403

Comments will be considered up until the time of issuance of a permit.

Sincerely,

John D. Stirewalt

- I have *no* objections to the project as presently proposed.
- I *have* objections to the project as presently proposed and have enclosed comments.

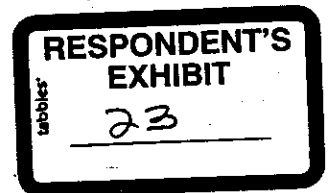
John D. Cagney

Signature

Feb. 25, 2008

Date

RECEIVED MAR 03 2008



08-013

SENDER: COMPLETE THIS SECTION

- Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

MR & MRS. NELSON
317 Stonybrook Road
Rocky Mount NC 27804

2. Article Number

(Transfer from service is

7007 0710 0001 7292 4984

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

Nancy D. Nelson

- Agent
- Addressee

B. Received by (Printed Name)

Nancy D. Nelson

C. Date of Delivery

2-26-08

D. Is delivery address different from Item 1? Yes

If YES, enter delivery address below: No

3. Service Type

- Certified Mail Express Mail
- Registered Return Receipt for Merchandise
- Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

SENDER: COMPLETE THIS SECTION

- Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

MR & MRS. COGNAY
403 Silver Creek Trail
Chapel Hill NC 27514

2. Article Number

(Transfer from service is

7007 0710 0001 7292 4991

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

COMPLETE THIS SECTION ON DELIVERY

A. Signature

W. S. Cognay

- Agent
- Addressee

B. Received by (Printed Name)

W. S. Cognay

C. Date of Delivery

2/26/08

D. Is delivery address different from Item 1? Yes

If YES, enter delivery address below: No

3. Service Type

- Certified Mail Express Mail
- Registered Return Receipt for Merchandise
- Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

RECEIVED MAR 3 2008

RESPONDENT'S EXHIBIT
tabbler
24

**NOTICE OF FILING
OF APPLICATION FOR
CAMA MINOR DEVELOPMENT PERMIT**


Pursuant to NCGS 113A-119(b), New Hanover County, a locality authorized to issue CAMA permits in Areas of Environmental Concern, hereby gives NOTICE that on March 3, 2008

Parker Overton applied for a CAMA permit to install a new swimming pool at 13 Comber Road, Figure Eight Island, in Wilmington, NC, New Hanover County. (08-013)

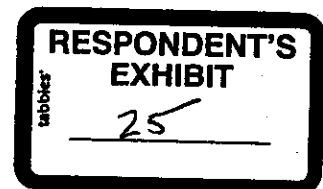
Herby Parham applied for a CAMA permit to remodel an existing residence at 8304 Bald Eagle Lane, in Wilmington, NC, New Hanover County. (08-14)

The application may be inspected at the address below. Public comments received by March 23, 2008 will be considered. Later comments will be accepted and considered up to the time of permit decision. Project modifications may occur based on further review and comments. Notice of the permit decision in this matter will be provided upon written request.

PLEASE PUBLISH ON:
Friday, March 8, 2008


Christine R. Bouffard

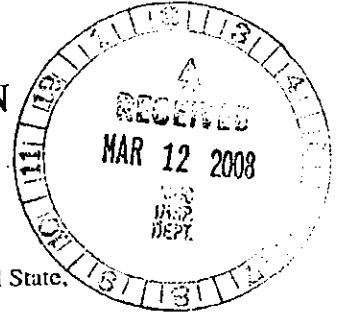
CAMA Local Permit Officer for
New Hanover County
230 Government Center Drive
Suite 110
Phone: (910) 798-7118



08-013

AFFIDAVIT OF PUBLICATION

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER



Before the undersigned, a Notary Public of Said County and State,

Terrie Millard

Who, being duly sworn or affirmed, according to the law, says that he/she is

Financial Services Manager

of THE STAR-NEWS, a corporation organized and doing business under the Laws of the State of North Carolina, and publishing a newspaper known as STAR-NEWS in the City of Wilmington

NOTICE OF FILING OF APPLICATION FOR CAMA MINOR DEVELOPMENT PERMIT Pursuant to NCGS 113A-119b, New Hanover County, a locality authorized to issue CAMA permits in Areas of Environmental Concern, hereby gives NOTICE that on March 3, 2008 Parker Overton app

was inserted in the aforesaid newspaper in space, and on dates as follows:

3/7 1x

And at the time of such publication Star-News was a newspaper meeting all the requirements and qualifications prescribed by Sec. No. 1-597 G.S. of N.C.

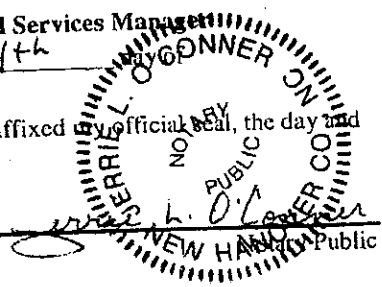
Terrie Millard

Title: Financial Services Manager

Sworn or affirmed to, and subscribed before me this 11th

MARCH, A.D., 2008

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.



My commission expires 12th day of Sep, 2012

Upon reading the foregoing affidavit with the advertisement thereto annexed it is adjudged by the Court that the said publication was duly and properly made and that the summons has been duly and legally served on the defendant(s).

This _____ day of _____

Clerk of Superior Court

MAIL TO:

RECEIVED

MAR 17 2008

DCM WILMINGTON, NC



NOTICE OF FILING OF APPLICATION FOR CAMA MINOR DEVELOPMENT PERMIT Pursuant to NCGS 113A-119(b), New Hanover County, a locality authorized to issue CAMA permits in Areas of Environmental Concern, hereby gives NOTICE that on March 3, 2008 Parker Overton applied for a CAMA permit to install a new swimming pool at 13 Comber Road, Figure Eight Island, in Wilmington, NC, New Hanover County. (08-013) Herby Parham applied for a CAMA permit to remodel an existing residence at 8304 Bald Eagle Lane, in Wilmington, NC, New Hanover County. (08-14) The application may be inspected at the address below. Public comments received by March 22, 2008 will be considered. Later comments will be accepted and considered up to the time of permit decision. Project modifications may occur based on further review and comments. Notice of the permit decision in this matter will be provided upon written request. Christine R. Bouffard CAMA Local Permit Officer for New Hanover County 230 Government Center Drive, Suite 110 Phone: (910) 798-7118



Ann S. Hines
Chief Zoning
Enforcement Official

NEW HANOVER COUNTY INSPECTION SERVICES

230 Government Center Drive, Suite 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118
FAX: (910) 798-7060

March 18, 2008

Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

RE: INCOMPLETE APPLICATION ADDITIONAL INFORMATION REQUIRED
APPLICATION NUMBER-- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

We originally accepted your application under the impression that it was complete. On subsequent review, I have discovered that additional information is needed to complete the review process. Accordingly, I am requesting that you submit the following additional information to this office:

1. Please submit side elevations showing all sandbag locations, and lateral views of all existing and proposed decking;
2. Include calculations of existing decking and proposed decking on site plan;
3. Show all beach access steps, concrete walls and wood fences located on property on site plan; and
4. Show 60' setback from first stable line of vegetation on site plan;

Also, it is my determination that based on drawings submitted, specifically upon review of the proposed pool foundation, I would be unable to approve the proposed swimming pool based on inconsistencies with the following: §113A-115.1 Limitations on Erosion Control Structures; 15A NCAC 07H .0308(a) Specific Use Standards For Ocean Hazard Areas; and with 15A NCAC 07M .0200 Shoreline Erosion Policies.

In accordance with the Department of Environment and Natural Resources regulations, we note that a certain time has passed while the application has remained in our office. Upon resubmission of a complete application, a local decision will be made in 10 days, provided this period is not extended as provided by law.

Please contact me at (910) 798-7118 if you have any questions.

Respectfully yours,

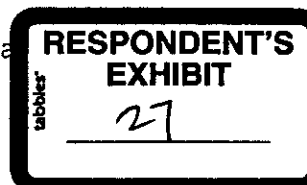
Christine R. Bouffard, LPO
New Hanover County
230 Government Center Drive, Suite 110
Wilmington, NC 28403

cc: Robb Mairs, DCM
Ann S. Hines, Chief Zoning Enforcement Official
Parker Overton

RECEIVED

MAR 25 2008

DCM WILMINGTON, NC



John S. Stirewalt, Architect
458 Biscayne Drive
Wilmington, NC 28411
 910-686-3131
johnstirewaltarchitect@gmail.com

RECEIVED
 MAY 05 2008

Morehead City DCM

March 25, 2008

Ms. Christine R. Bouffard, LPO
 NH County CAMA
 230 Government Center Drive, Suite 110
 Wilmington, NC 28403

Re: CAMA Application # 08-013
 Overton Residence
 13 Comber Rd., Figure Eight Island

Dear Christine:

Enclosed are drawings reflecting the drawing changes you requested in your letter dated March 18, 2008. Items 1 thru 4 are noted on the plans.

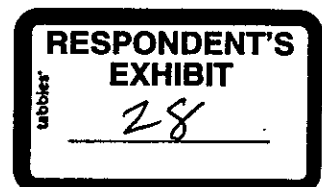
In reference to additional items you noted, specifically; 113A-115.1, 15A NCAC 07H .0308(a) and 15A NCAC 07M .200, please note that my concern was noted at our on-site meeting on February 20, 2008 with you and Robb Mairs referencing these issues. My response to these issues is the same question I asked at that meeting, specifically that **"15A NCAC 07H .0309: Use Standards for Ocean Hazard Areas: Exceptions"** allows Swimming Pools excepted by all of the regulations you posed above. Additionally, I mentioned at our meeting that I could not just "place a bathtub out there", that I would have to at least meet the minimum requirements for Coastal Construction regarding piling depths, etc. and Robb Mairs concurred. The swimming pool is designed as a swim lane and structurally designed to withstand any undermining of sand from Hurricanes, and the subsequent collapse.

Please notify me if any of the items I have addressed are incorrect or if you require any further information. Thank you in advance for your kind consideration of this matter.

Sincerely,

John S. Stirewalt

Cc: Parker Overton, Owner
 Robb Mairs, DCM





NEW HANOVER COUNTY INSPECTION SERVICES

230 GOVERNMENT CENTER DRIVE, SUITE 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118
FAX: (910) 798-7060

Ann S. Hines
Chief Zoning
Enforcement Official

March 31, 2008

**Certified
Return Receipt Requested**

Mr. Parker Overton
c/o John Stirewalt
458 Biscayne Drive
Wilmington, NC 28411

RE: NOTICE TO EXTEND TIME TO GRANT OR DENY CAMA PERMIT (MINOR)
PERMIT # 08-013

PROJECT ADDRESS: 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

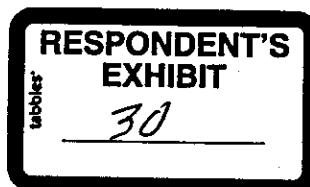
Pursuant to NCGS 113A-121(b), the undersigned hereby gives notice to the applicant that for good cause, and in order to properly consider all information necessary to making a decision on this permit application, the time period within which a final decision shall be made has been extended an additional twenty-five (25) days.

If you have any questions concerning this action, please contact me at 910-798-7118

Sincerely,

Christine R. Bouffard
CAMA Local Permit Officer

cc: Robb Mairs, NC Division of Coastal Management
Ann S. Hines, Chief Zoning Enforcement Official
Parker Overton, Property Owner



RECEIVED

APR 03 2008

DCM WILMINGTON, NC



NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Dr., Suite 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118

FAX: (910) 798-7060

RECEIVED

APR 22 2008

DCM WILMINGTON, NC

*Rel a sheet
3/26/08*

Ann S. Hines
Chief Zoning
Enforcement Official

April 9, 2008

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. Parker Overton
c/o John Stirewall
458 Biscayne Dr.
Wilmington, NC 28411

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
APPLICATION NUMBER- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

Dear Mr. Overton:

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 to construct a swimming pool measuring 5-ft wide by 55-ft long and 8-ft deep (water-filled area) with a sand-filled support and wall structure in the oceanfront setback. This supporting structure would consist of a 30-in thick concrete base with heavy steel material top and bottom and 16-ft deep by 18-in thick reinforced concrete walls on twenty-six 8-in x 8-in x 20-ft wood pilings or concrete and/or steel piles. You also propose to construct approximately 595 sq ft of tile over concrete decking outside the drip line and inside the oceanfront setback. Therefore, as designed, this structure becomes an erosion control structure and is not allowed in accordance with NCGS 113A-115.1. In addition, your proposal is inconsistent with 15 NCAC 7H .0308 (a) and 15 NCAC 7H .0309 (a).

Should you wish to appeal my decision to the Coastal Resources Commission or request a variance from that group, please contact me so I can provide you with the proper forms and any other information you may require. A petition must be filed within 20 days of the permit decision.

Respectfully yours,

Christine R. Bouffard, LPO
New Hanover County
230 Government Center Dr., Ste. 110
Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
Ann Hines, Chief Zoning Enforcement Official
Parker Overton

**RESPONDENT'S
EXHIBIT**

tabbles

31



NEW HANOVER COUNTY

INSPECTION SERVICES

230 Government Center Dr., Suite 110
WILMINGTON, NORTH CAROLINA 28403
TELEPHONE (910) 798-7118
FAX: (910) 798-7060

Ann S. Hines
Chief Zoning
Enforcement Official

April 9, 2008

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Mr. Parker Overton
c/o John Stirewalt
458 Biscayne Dr.
Wilmington, NC 28411

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APPLICATION NUMBER- 08-013
PROJECT ADDRESS- 13 Comber Road, Figure Eight Island

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Respectfully yours,

Christine R. Bouffard, LPO
New Hanover County
230 Government Center Dr., Ste. 110
Wilmington, NC 28403

cc: Robb Mairs, DCM Representative
Ann Hines, Chief Zoning Enforcement Official
Parker Overton

also was attached to motion



LOCALITY NHC PERMIT NUMBER 08-013

OCEAN HAZARD ___ ESTUARINE SHORELINE ___ ORW SHORELINE ___ PUBLIC TRUST SHORELINE ___ OTHER ___
(FOR OFFICIAL USE ONLY)

GENERAL INFORMATION

LAND OWNER:

NAME PARKER OVERTON
ADDRESS P.O. BOX 644
CITY GREENVILLE STATE NORTH CAROLINA ZIP 27835 PHONE 252-756-1771

AUTHORIZED AGENT:

NAME JOHN STIREWALT
ADDRESS 458 BISCAYNE DRIVE
CITY WILMINGTON STATE NORTH CAROLINA ZIP 28411 PHONE 910-686-3131

LOCATION OF PROJECT: (ADDRESS, STREET NAME AND/OR DIRECTIONS TO SITE. IF NOT OCEANFRONT, WHAT IS THE NAME OF THE ADJACENT WATERBODY?)
13 COMBER ROAD FIGURE EIGHT ISLAND, WILMINGTON NORTH CAROLINA

DESCRIPTION OF PROJECT: (LIST ALL PROPOSED CONSTRUCTION AND LAND DISTURBANCE.)
NEW POOL

SIZE OF LOT/PARCEL: 22,000 square feet _____ acres _____

PROPOSED USE: RESIDENTIAL (SINGLE-FAMILY MULTI-FAMILY) COMMERCIAL/INDUSTRIAL OTHER

TOTAL ENCLOSED FLOOR AREA IF A BUILDING IN THE OCEAN HAZARD AREA OF ENVIRONMENTAL CONCERN (AEC): 4,679 square feet (INCLUDES ALL FLOOR AND ROOF-COVERED DECKS)

FLOOR/DECK: 3,240
DRIVE/WALKS: 1,439
TOTAL: 4,679

SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OF BUILDING UPON SURFACE IN THE COASTAL SHORELINE AREA OF ENVIRONMENTAL CONCERN (AEC): 4,679 sq. ft.
(CALCULATIONS INCLUDE THE AREA OF THE ROOF/D RIP 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.)

$$\frac{4,679}{22,000} = .21\%$$

- 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. _____ sq. ft.

RECEIVED

MAR 05 2008

RECEIVED MAR 03 2008

DCM WILMINGTON, NC



08-013

OTHER PERMITS MAY BE REQUIRED: THE ACTIVITY YOU ARE PLANNING MAY REQUIRE PERMITS OTHER THAN THE CAMA MINOR DEVELOPEMENT 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 TRETMENT SYSTEM), BURNING, ELECTRICAL, PLUMBING, HEATING AND AIR CONDITIONING, INSULATION AND ENERGY CONSERVATION, FIA, CERTIFICATION, SAND DUNE, SEDIMENT CONTROL, SHBDIVISION APPROVAL, MOBILE HOME PARK APPROVAL, HIGHWAY, CONNECTION, AND OTHERS.

STATEMENT OF OWNERSHIP:

I, THE UNDERSIGNED, AND APPLICANT FOR A CAMA MINOR DEVELOPMENT PERMIT, BEING EITHER THE OWNER OF THE PROPERTY IN AN AEC OR A PERSON AUTHORIZED TO ACT AS AN AGENT FOR PURPOSES OF APPLYING FOR A CAMA MINOR DEVELOPEMENT 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 VANCE PARKER OVERTON, SEE DEED BOOK MAP 18 PAGE 89-90 IN THE NEW HANOVER 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)	MR. & MRS. NELSON	317 STONEY BROOK ROAD, ROCKY MOUNT NC 27804 - (12 COMBERS ROAD)
(2)	MR. & MRS. CAGNEY	403 SILVER CREEK TRAIL, CHAPEL HILL NC 27514 - (14 COMBERS ROAD)
(3)		
(4)		

FOR DEVELOPERS IN OCEAN HAZARD AN ESTUARINE HAZARD AREAS:

I ACKNOWLEDGE THAT THE LAND OWNER IS AWARE THAT THE PROPOSED DEVELOPMENT IS PLANNED FOR AN AREA WHICH MAY BE SUSCEPIBLE 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:

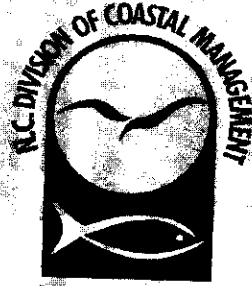
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THIS APPLICATION INCLUDES: GENERAL INFORMATION (THIS FORM), A SITE DRAWING AS DESCRIBED ON THE BACK OF THIS APPLICATION, THE OWNERSHIP STATEMENT, THE AEC HAZARD NOTICE WHERE NECESSARY, A CHECK FOR \$100.00 MADE PAYABLE TO THE LOCALITY, AND ANY INFORMATION 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 ACTIONS.

THIS THE 2 DAY OF MARCH, 2008

[Signature]
LANDOWNER OR PERSON AUTHORIZED TO ACT AS HIS AGENT FOR PURPOSE OF FILLING A CAMA PERMIT APPLICATION.

RECEIVED MAR 03 2008



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:

GENERAL INFORMATION

LAND OWNER

Name _____
Address _____
City _____ State _____ Zip _____ Phone _____

AUTHORIZED AGENT

Name _____
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?) _____

DESCRIPTION OF PROJECT: (List all proposed construction and land disturbance.) _____

SIZE OF LOT/PARCEL: _____ 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): _____ 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): _____ 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.

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

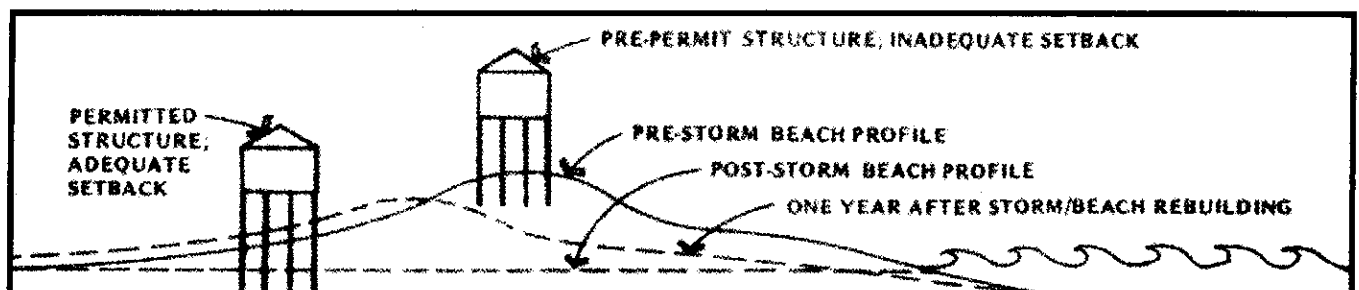
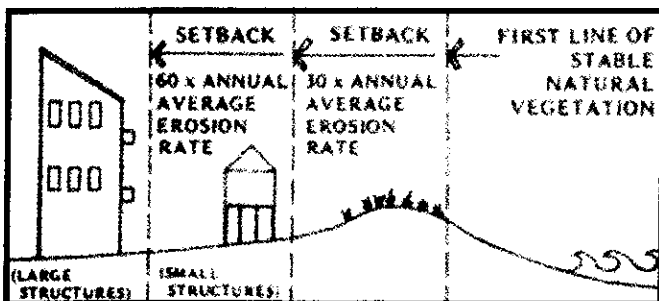
The Coastal Resources Commission recognized that these rules, initially passed in June 1979, might prove a hardship for some property owners. Therefore, they established an exception for lots that cannot meet the setback requirement. The exception allows buildings in front of the setback line if the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

- _____ 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.

Receipts for
Certified Mail
(Staple Here)

Date

Adjacent Property Owner

Mailing Address

City, State, Zip Code

Dear Adjacent Property Owner:

This letter is to inform you that I, _____ have applied for a CAMA Minor
Property Owner
Permit on my property at _____
in Pender County. Property Address

As required by CAMA regulations, I have enclosed a copy of my permit application and project drawing(s) as notification of my proposed project. No action is required from you or you may sign and return the enclosed no objection form. If you have any questions or comments about my proposed project, please contact me at _____, or by mail at the address listed below. If you wish to
Applicant's Telephone
file written comments or objections with the Pender County CAMA Minor Permit Program, you may submit them to:

James L Canady
Local Permit Officer for the Town of Topsail Beach
820 S Anderson Blvd.
Topsail Beach, NC 28445

Sincerely,

Property Owner

Mailing Address

City, State, Zip Code

ADJACENT RIPARIAN PROPERTY OWNER STATEMENT FOR CAMA MINOR PERMITS

I hereby certify that I own property adjacent to _____'s
(Name of Property Owner)

property located at _____,
(Address, Lot, Block, Road, etc.)

on _____, in _____, NC.
(Water body) (Town and/or County)

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

Print or Type Name

Telephone Number

Date

Receipts for
Certified Mail
(Staple Here)

Date

Adjacent Property Owner

Mailing Address

City, State, Zip Code

Dear Adjacent Property Owner:

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(APPLICATION AND DRAWING OF PROPOSED DEVELOPMENT ATTACHED)

Signature

Print or Type Name

Telephone Number

Date

Project Drawings

1. **All drawings** should be drawn to scale (i.e. 1"=20', 1"=30') and include the following information:
 - Name, project address, date and drawing scale (title box).
 - Property dimensions and names of adjacent property owners indicated
 - Dimensions and location of all existing and proposed structures, driveways, and sewage disposal system (attach Improvements Permit, if applicable). Decks labeled as covered or uncovered and dimensions shown.
 - Adjacent water body labeled and Normal High Water (NHW) or Normal Water Level (NWL) contour shown.
 - Marsh and/or wetland areas labeled (wetland delineation documentation from USACOE [Army Corps of Engineers] must be included with the application, if applicable).
 - All areas of ground disturbance and/or landscaping shown.

2. If your project is in the **Ocean Hazard Area**, your application must include an AEC Hazard Notice, **signed by the property owner**. Additional information for project drawings in the **Ocean Hazard Area AECs** includes:
 - Show all dunes and dune system contours, labeling the dune crest and both the landward and oceanward dune toes. Also, include spot elevations on the highest portion of the dunes.
 - The first line of stable, natural vegetation as flagged by the LPO and the applicable setback from the vegetation line. Contact the Local Permit Officer to stake the vegetation line for you if necessary.
 - Cross-sectional/Elevation drawings showing the number of floors and the roof and deck profiles of the proposed structure(s). Additional drawing(s) for each floor plan may be necessary.
 - List the **Total Enclosed Floor Area**. Total Enclosed Floor Area is the combined square-footage of all of the floors, plus any roof covered porches.

3. Additional information for project drawings in the **Coastal Shoreline AECs**:
 - Dimensions of the footprint/roofline of all structures (outside walls + roof overhang extended to the ground).
 - Dimensions of all decks, labeled either covered or open (all elevated decks with concrete below them at ground level are considered impervious).
 - Normal high water (NHW) or normal water level (NWL) contour.
 - Show the applicable Area of Environmental Concern (AEC); 75 feet landward of normal high water (NHW) or normal water level (NWL) for Estuarine Shoreline AEC (Coastal or Joint Waters); or 575 feet landward of normal high water (NHW) or normal water level (NWL), if adjacent to Outstanding Resource Waters; or 30 feet landward of normal high water (NHW) or normal water level (NWL), if adjacent to Public Trust Shoreline (Inland Waters).
 - List the total amount (sq ft) of impervious surface that will be created from your proposed development.
 - Show the 30-ft. buffer landward of normal high water (NHW) or normal water level (NWL)

FILLING OUT THE APPLICATION FORM

The shaded area at the top of the first page is completed by the Local Permit Officer. The LPO will assign a permit application number and check the AEC in which the property is located.

In the general information section, the applicant and future permittee is always the **Land Owner**, although an agent, such as a contractor or realtor, may obtain the permit for the property owner. The applicant's mailing address is entered here. If an agent is utilized to apply for the permit, their contact information is entered in the **Authorized Agent** section. **Location of Project** is the address of property where the work is to take place (the 911 address, subdivision and lot number, State or County road, etc.). **Description of Project** should include all land clearing, demolition, construction, and landscaping activities that are proposed to complete the project. It is better to go over-board here, than to omit something that would necessitate having to modify or re-apply for another permit to complete the development. **Size of Lot/Parcel** can be listed as square feet or acres, or both. Check the applicable **Proposed Use**, residential (single-family or multi-family), commercial, or other. The **Total Enclosed Floor Area of a Building in the Ocean Hazard AEC** section is only completed for those projects that are located in one or more of the Ocean Erodible, High Hazard Flood, Inlet Hazard or Unvegetated Beach AECs. Total Enclosed Floor Area is the combined square-footage of all of the floors, plus any roof covered porches. If the project is not in the Ocean Hazard Area, then insert N/A and go to the next section and determine in which Coastal Shoreline AEC the project is located. **The Size of Building Footprint and Other Impervious Surfaces/Built-Upon Surfaces in the Coastal Shoreline AEC** is calculated by totaling all of the impervious surfaces within the applicable distance (30 ft., 75 ft. or 575 ft.) from Normal High Water (NHW) or Normal Water Level (NWL). Sometimes the impervious surfaces that are allowed on an individual lot are further limited by the conditions of the subdivision's **State Stormwater Management Permit**. The applicant should insert the amount of impervious coverage that is allocated to their lot under their subdivision's State Stormwater Permit. This number is usually found on the property deed or subdivision covenants. Typically, any subdivision that was developed after January 1, 1988, will have a State Stormwater Plan.

On the second page of the application, the section entitled **Statement of Ownership** is completed by the applicant using information from the property deed. The applicant must check one of the three options and fill in the appropriate information. Make sure that adjacent riparian property owners have been listed in the **Notification of Adjacent Property Owners** section and that they have been contacted by the applicant, either in person or by certified mail. Copies of the completed letters and certified mail receipts, if required, should accompany the application. **Finally, the applicant/agent must sign and date the application at the bottom of the page.**

Directions For Filling Out A CAMA MINOR Permit

Please fill out the application completely including applicant's signature on the second page. Be sure to complete the "statement of ownership" and the "adjacent property owners". Your Local Permit Officer can assist you in preparing your application and project drawings. Once the application and drawing(s) are complete, follow the instructions below:

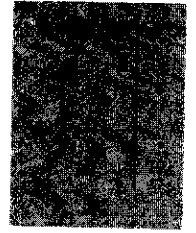
SEND THE FOLLOWING ITEMS TO THE ADJOINING PROPERTY OWNERS: CERTIFIED/RETURN RECIEPT MAIL IS RECOMMENDED

1. A letter stating you have applied for a CAMA permit and are required to notify them of your intended project. (Attached please find an example of this letter)
2. A copy of the application drawing(s) showing your project.
3. A copy of the completed application.

BRING THE FOLLOWING ITEMS TO YOUR LOCAL CAMA PERMIT OFFICER:

1. A \$100.00 check payable to TOPSAIL BEACH.
2. The completed, signed application.
3. The project drawing(s) showing your proposed development.
4. Copies of the letters mailed to the adjoining property owners.
5. The certified mail receipts from the post office showing that you have mailed the letters to adjoining property owners.
6. A copy of the property survey (if applicable).
7. A copy of your Zoning Certificate and/or Improvements Permit, for installation of your septic system (if applicable).

This process usually takes approximately two (2) weeks from the date that we receive your complete application. A review period of 25 days is provided by law and an additional 25-day period can be imposed when such time is necessary to complete the review of the proposed project. Under those circumstances, you will be notified of the need for an extended review period. If you have any questions about the Minor Permit application, your project drawing(s), or any other aspect of the NC Coastal Area Management Act (CAMA), please contact the Topsail Beach CAMA Local Permit Program Office.



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 _____, 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.

_____ at is the name of _____

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.

- (1) _____ (Name) _____ (Address)
- (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:

LOCALITY: _____

APPLICATION: _____

EA OF ENVI-
(f-covered decks)

URFACES IN
sq. ft.
or many patios,

364

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

_____	_____
_____	_____
_____	_____

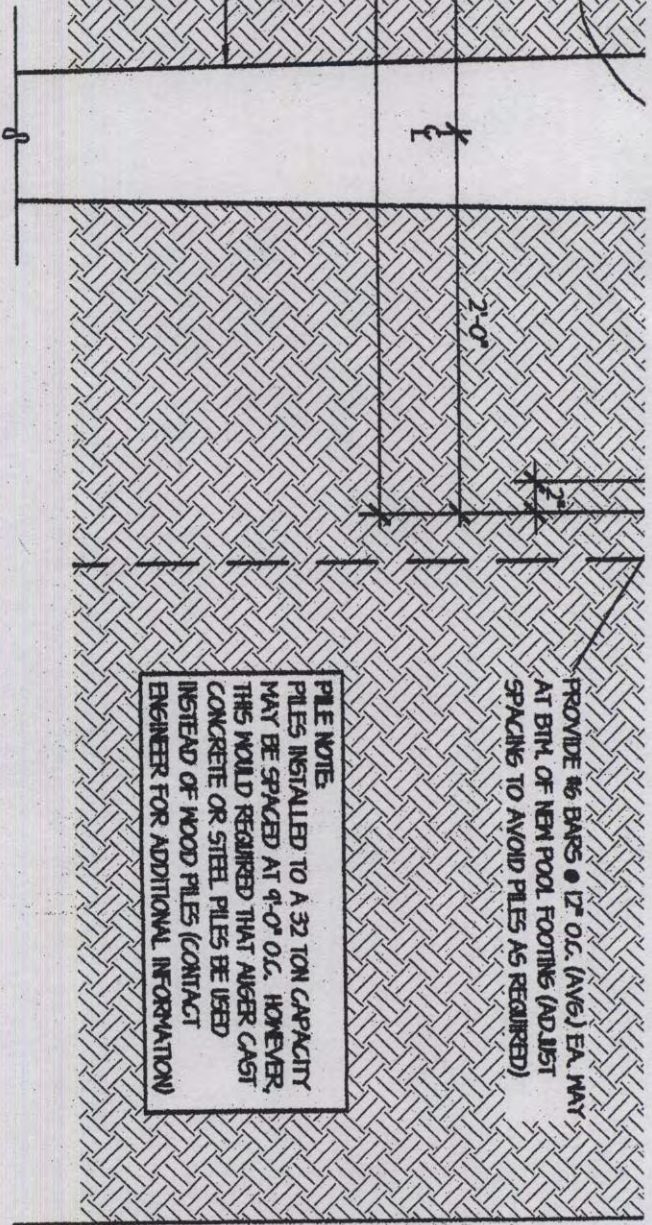
Date of Action: Issued _____ Exempted _____ Denied _____ Appeal Deadline (20 days) _____

Respondent's Oversized Exhibits 20, 21 and 29
will be made available by calling Beth Warren 919/716-6945
NCDOJ Environmental Division

4'-0" long #6 BARS EA. MAY
LEAD HOLES IN EA. NEW FILE

4'-0"
8'-0"

DIAMETER ROUND PILES @
CONCRETE FOOTINGS (REINFORCED
FOR BEARING CAPACITY)



PROVIDE #6 BARS @ 12" O.C. (AVG.) EA. WITH
AT MIN. OF 12" O.C. AT BOTTOM OF NEW POOL FOOTINGS (ADJUST
SPACING TO AVOID PILES AS REQUIRED)

FILE NOTE
PILES INSTALLED TO A 32 TON CAPACITY
MAY BE SPACED AT 4'-0" O.C. HOWEVER,
THIS WOULD REQUIRE THAT LARGER CAST
CONCRETE OR STEEL PILES BE USED
INSTEAD OF WOOD PILES (CONTACT
ENGINEER FOR ADDITIONAL INFORMATION)

ENGINEER RESPONSIBLE FOR ALL STRUCTURAL COMPONENTS
ON THIS DRAWING. ALL DIMENSIONS AND DETAILS MAY NOT
BE SHOWN AND ARE THE RESPONSIBILITY OF THE DESIGNER,
AND CONTRACTOR. CONTRACTOR TO VERIFY WITH ENGINEER
ANY ADDITIONAL DETAILS REQUIRED FOR CONSTRUCTION.

9
CUSH NEW POOL

RTON RESIDENCE POOL
BER ROAD
EIGHT ISLAND, NORTH CAROLINA

NEW POOL WALL SECTION

B. DATE: FEB 26th, 2008 PROJECT NO. 08086

NO.	REVISION DATE	INIT.
R1		

DESIGNED BY: W.D.J.

RESPONDENT'S
EXHIBIT
21

PENGAD-Bayonne, N. J.

08 EHL 1090

WHOLE OR IN ANY PART
THEREOF FOR THE ³⁶⁷
CONSTRUCTION OF ANY
OTHER BUILDING WITHOUT
WRITTEN PERMISSION OF THE
ARCHITECT.

OVERTON
RESIDENCE

13 COMBER RD.
FIRURE EIGHT ISLAND
WILMINGTON, NC

DATE 28 FEBRUARY 2008

REVISED

SHEET
NO. C1

OFFICE OF
ADMINISTRATIVE SERVICES

2008 NOV 19 PM 12:40

FILED

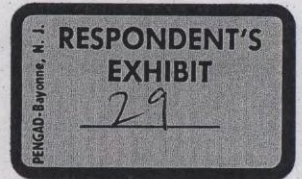
08 EHR 1090



AND AS SUCH ARE THE PROPERTY OF JOHN STIREWALT, ARCHITECT. THE ARE NOT TO BE USED IN WHOLE OR IN ANY PART THEREOF FOR THE CONSTRUCTION OF ANY OTHER BUILDING WITHOUT WRITTEN PERMISSION OF THE ARCHITECT.

08-013

08 EHR 1090



OVERTON RESIDENCE

13 COMBER RD.
FIRURE EIGHT ISLAND
WILMINGTON, NC

DATE 26 MARCH 2008

REVISED

SHEET NO. C1

CHART	
	QTY
	6
L	10

RECEIVED

MAR 27 2008

DCM WILMINGTON, NC

SECTION VI

HOPF & HIGLEY, P.A.

JAMES F. HOPF
jim@hopfhigley.com

ATTORNEYS AT LAW
1694 E. Arlington Boulevard, Suite E
Greenville, North Carolina 27858
Telephone: 252.756.1883
Facsimile: 252.756.1797
www.hopfhigley.com

DONALD S. HIGLEY, II
don@hopfhigley.com

March 11, 2009

Jennie W. Hauser
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

RECEIVED

MAR 13 2009

Morehead City DCM

James H. Gregson, Director
Division of Coastal Management
Morehead City Office
400 Commerce Avenue
Morehead City, North Carolina 28557

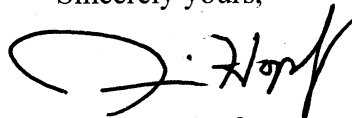
Re: *Stirewalt, V. Parker Overton v. DCM*
08 EHR 1080

Dear Ms. Hauser & Mr. Gregson:

On behalf of the Petitioner in the above referenced action, please be advised that we will not be submitting any exceptions or written arguments regarding the ALJ's decision in this matter. We further do not request any oral argument before the Commission, unless necessitated by any submissions which may be made to the Judge's decision by the Respondent.

Thank you for your assistance in this regard. Please feel free to contact me if you have any questions.

Sincerely yours,



James F. Hopf

cc: Ms. Elizabeth J. Weese
Mr. V. Parker Overton



RECEIVED

MAR 13 2009

State of North Carolina

Department of Justice
PO Box 629
Raleigh, North Carolina
27602

Morehead City DCM

Reply to: Elizabeth J. Weese
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Tel: 919-716-6600
Fax: 919-716-6767

ROY COOPER
ATTORNEY GENERAL

March 11, 2009

Mr. James H. Gregson
Executive Secretary to the CRC
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

BY FIRST CLASS MAIL and ELECTRONIC MAIL

Re: Stirewalt, agent for, Overton v. DENR, DCM; 08 EHR 1090

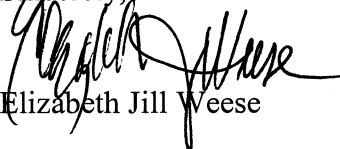
Dear Mr. Gregson:

Please find enclosed the Respondent's Memorandum concurring with the ALJ's Decision. This Memorandum is submitted in accordance with communications from CRC Counsel Jennie Wilhelm Hauser, asking that parties file any exceptions to the ALJ's Decision by March 13, 2009.

Although Respondent supports the decision of the Administrative Law Judge to uphold the denial of a CAMA minor permit in the above referenced matter, there are aspects of the decision to which exceptions are taken. I request time for oral argument before the Coastal Resources Commission only if the Commission wishes for me to address these exceptions or to rebut any exceptions or arguments that Petitioner may make.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Jill Weese

Enclosure

cc(w/enc.): James F. Hopt, Counsel for Petitioner
Jennie Wilhelm Hauser, Special Deputy Attorney General, electronically only

RECEIVED

MAR 13 2009

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE LAW JUDGE
Morehead City DCM
08 EHR 1090

JOHN S. STIREWALT, ARCHITECT,)
AGENT FOR B. PARKER OVERTON,)
LANDOWNER,)
Petitioners,)

v.)

NOTICE OF RESPONDENT'S
CONCURRENCE WITH
DECISION OF
ADMINISTRATIVE LAW JUDGE

NORTH CAROLINA DEPARTMENT)
OF ENVIRONMENT AND)
NATURAL RESOURCES, DIVISION)
OF COASTAL MANAGEMENT,)
Respondent)

RESPONDENT, the Division of Coastal Management of the N.C. Department of Environment and Natural Resources (Respondent), through counsel, files the following in accordance with the Coastal Resources Commission's (CRC or Commission) counsel's letter to the parties dated December 12, 2008.¹

Respondent concurs with the Administrative Law Judge's (ALJ) Decision filed in the above-captioned matter and requests that the Commission render a Final Agency Decision adopting the Decision to the extent that it AFFIRMED Respondent's decision to deny CAMA Minor Permit No. 08-013 because the swimming pool Petitioner proposed to build within the oceanfront setback required a large supporting structure which violated both 15A NCAC 7H .0309(a) and .0308(a)(1)(B). The Administrative Law judge concluded as a matter of law that Respondent's

¹Petitioner twice requested extensions of time to submit exceptions to the Administrative Law Judge's decision, neither of which Respondent opposed. The extensions were allowed by the Chairman thus extending the time for filing from January 29, 2009 until March 13, 2009.

actions were in all respects proper pursuant to N.C.G.S. §150B-23(a). The ALJ specifically concluded as a matter of law that Petitioner failed to show that the agency substantially prejudiced his rights because Petitioner were not entitled to a permit for an erosion control structure, albeit one with a swimming pool on top of the structure. (ALJ Decision, p. 10; conclusion of law number 13)

While Respondent concurs with the ALJ's decision that denial of the minor permit was in all respects proper, there are two findings of fact and one conclusion of law to which Respondent excepts.

EXCEPTIONS AND ARGUMENTS

A. EXCEPTIONS TO FINDINGS OF FACT

1. EXCEPTION: Respondent excepts to **Finding of Fact number 1** to the extent that it states that the "... [p]roperty is located directly on the oceanfront and is thereby in a *Coastal High Hazard Area*."² (Emphasis supplied)

ARGUMENT: The statement is correct in so far as the property is on the oceanfront; however, the term Coastal High Hazard Area is not a term which is used in the CAMA or its implementing regulations. For this reason, Respondent proposes that the CRC strike the reference to Coastal High Hazard Area and adopt as Finding of Fact number 1 the following: *The property in question in this case is owned by V. Parker Overton and is located at 13 Comber Road, Figure Eight Island, New Hanover County, North Carolina. This property is located on the Atlantic Ocean shoreline and is within the Ocean Hazard Areas of Areas of Environmental Concern (AECs). (15A*

²In addition, there appears to be a typographical error in the first sentence of Finding of Fact number 1, namely, the omission of the word "case."

NCAC 07H .0301)

2. EXCEPTION: Respondent excepts to **Finding of Fact number 3** to the extent that it states that the "... New Hanover County Inspection Services office is *authorized as the local permitting authority* under CAMA...[and]...The *New Hanover County Inspection Office* denied Petitioner's application for a CAMA permit by letter dated April 9, 2008. " (Emphasis supplied)

ARGUMENT: CAMA provisions allow any city or county within the coastal area to declare whether or not it chooses to act as a permit-letting agency. In those cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments are considered and determined by the designated local official. N.C. Gen. Stat. §§113-116 and 113A-121. Permit applications are issued or denied by local permit officials (LPO's), i.e., a person, rather than "an office." For these reasons, the Commission should strike the second sentence of Finding of Fact number 3 and replace it with the following: *Petitioner's application was denied by the LPO by letter dated April 9, 2008.*

3 EXCEPTION: Respondent excepts to **Conclusion of Law number 8** because CAMA does not require, or even authorize, reimbursement by the state agency or local permitting authority for work performed by the applicant or his agents in an attempt to obtain a CAMA minor permit.

ARGUMENT: This Conclusion of Law erroneously implies that reimbursement by the agency or local permitting authority is authorized, albeit not in the present case. This implication is contrary to existing law and is therefore unsupported in law or fact. Because there is no statutory authority for reimbursement by the agency or local permitting authority for work performed by the

applicant or his agents in an effort to obtain a CAMA permit, the CRC should strike Conclusion of Law number 8 in its entirety.

Counsel for the Respondent requests an opportunity for oral argument before the Commission only if Petitioner requests such opportunity, appears at the meeting, and presents oral argument.

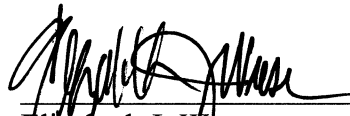
WHEREFORE, the Respondent respectfully requests that the Coastal Resources Commission enter a Final Decision:

1. Adopting the Administrative Law Judge's Decision upholding the Respondent's decision to deny CAMA Minor Permit No. 08-013 and,
2. Any other relief deemed just and proper by the Commission.

Respectfully submitted this the 11th day of March, 2009.

ROY COOPER
Attorney General

By:



Elizabeth J. Weese
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, N.C. 27602-0629
(919) 716-6600

CERTIFICATE OF SERVICE

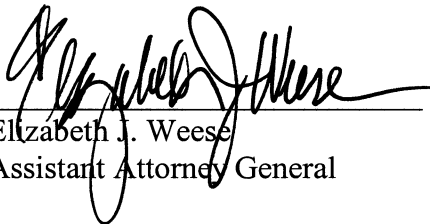
This is to certify that a copy of the foregoing **RESPONDENT'S CONCURRENCE WITH DECISION** was served on the Petitioners/Attorney for Petitioners, by depositing a copy in the United States Mail, first class, postage prepaid, addressed as follows:

James F. Hopf
Hopf & Higley, P.A.
1694 East Arlington Boulevard, Suite E
Greenville, NC 27858
ATTORNEY for PETITIONER

and served on the Coastal Resources Commission, by first class mail to:

Jim Gregson, Director
Division of Coastal Management
400 Commerce Way
Morehead City, NC 28557

This the 11th day of March, 2009.



Elizabeth J. Weese
Assistant Attorney General



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

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

CRC-09-12

April 3, 2009

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Review of Comment on Amendments to 15A NCAC 7H 0.0308(a)(2)
Temporary Erosion Control Structures

The CRC held a public hearing at the February 2009 meeting in Morehead City on amendments to 15A NCAC 7H .0308(a)(2) Temporary Erosion Control Structures. The primary purpose of the amendments are to create a provision for sandbags structures located in communities seeking inlet relocation projects analogous to those located in communities seeking beach nourishment projects. Specifically, the amendments allow an extended timeframe (eight years) for sandbags located in an Inlet Hazard Area if they are located in a community seeking an inlet relocation project with an additional eight year extension should the structure become threatened again and the community seeks another inlet relocation project.

The only comments received were heard at the February meeting from K&L Gates, L.L.P. of Raleigh (attached). The comments are summarized with Staff responses as follows. Staff recommends that the rule be adopted as proposed without further amendment.

Comment

The rule should re-define "temporary" and be amended to reflect the initial interpretation of temporary – relying on the ephemeral nature of the sandbags to ensure removal.

Staff Response

Initially, the material used for sand bags was of poor quality (cheap) and it was only in response to regulatory requirements of the CRC that improvements were made to both the materials and design of the sand bags. Sand bags are typically woven of polypropylene or polyester and incorporate a UV inhibitor. Over time, it has been found that the woven materials perform better than non-woven materials and have the tensile strength to withstand placement parallel to shore. These improvements make reliance on sandbag materials less practical in ensuring their eventual removal.

Comment

The amendments should reflect the unique erosion conditions of Inlet Hazard Areas by increasing the permitted dimensions of sandbag structures.

Staff Response

Staff believes that the current size limits on sandbag structures (6' high and 20' wide at the base) are sufficient in the majority of cases to achieve temporary erosion control. The limits on sandbag structure dimensions are supported by the CRC Science Panel in their 1999 Coastal Hazards recommendations to the Commission. In the report, the Science Panel expressed concern that the increasing size and longevity of the structures was causing them to function as permanent shoreline hardening structures. The Division also consulted with the Science Panel on the January 2000 permit extension, receiving a recommendation to grant an extension, but only to sandbag structures that currently conform to the size limits. Should other dimensions be justified, Staff believes a variance request is the appropriate mechanism.

Comment

The amendment should allow sandbags to be permitted more than once on property located in Inlet Hazard Areas.

Staff Response

As amended, 15A NCAC 7H .0308(a)(2)(M) allows sandbags to be permitted multiple times in IHAs on properties located in a community that is seeking an inlet relocation project provided that the structure on that property is imminently threatened.

Comment

Clarification of how DCM will interpret the identification of financial resources or funding bases necessary for a beach nourishment or inlet relocation project as having the money in hand, or only a mechanism of raising the money.

Staff Response

In order to be eligible for an extended time period, sandbag structures must be located in communities actively pursuing beach nourishment or inlet relocation projects. Actively pursuing is defined according to criteria in 15A NCAC 7H .0308(a)(2)(G)(i)-(iv), which includes a commitment of local funds or having an established mechanism for raising the necessary funding. This particular criteria was modeled after the funding requirements of long-term beach nourishment projects in order to be consistent with a similar funding provision for the setback exception. Staff does not interpret this provision to mean that the community has the funding "in hand", only that the community has established a means of raising the funds necessary for the project.

Comment

Clarification on how existing permits will be benefitted by the amendments.

Staff Response

The Division will interpret the rule amendments to allow temporary erosion control structures within Inlet Hazard Areas to remain in place for the extended time frames as outlined in the rule from the time of permit issuance, provided that the structures meet all the provisions of the rule. This will apply to active permits as well as permits subject to the May 2008 deadline.

Permit Expiration	Current IHA	Proposed IHA
Expired May 2008	26	34
Expire > May 2008	30	80
Totals	56	114

Paul, Mack

From: Mitchell, Charlotte
Sent: Tuesday, February 10, 2009 7:19 PM
To: Paul, Mack
Subject: Sandbag Talking Points

Attachments: Sandbag rules with CRC Changes Aug 6 2008.pdf



Sandbag rules with
CRC Changes...

1. The amendment should re-define "temporary."

- One of the most problematic issues related to the sandbag rules revolves around their use as "temporary" erosion control measures and the time frame implied. As indicated by DCM in a memo published in 2007, initially, the purpose of allowing the sandbags was to provide for the temporary protection of an imminently structure until the owner could make arrangements to move the structure or until the beach and dune system could naturally repair itself. The definition of "temporary" evolved from relying on the ephemeral nature of materials used for sandbags for ensuring their removal, to a defined limit of two years for structures less than 5,000 square feet and five years for larger structures. (CRC 07-02)
- History and experience has shown that the time limits do not reflect the reality of the time necessary to complete beach nourishment and inlet relocation projects and that property owners are forced to seek variances from the time limitations for this reason. Furthermore, as recent experience has shown, even when the time limit expires, no property owner is going to willingly remove the sandbags without first exhausting all administrative, and in some cases, judicial remedies, which is a drain on the State's scare resources and staff time.
- The rule should be amended to reflect the initial interpretation of "temporary," which is based on the ephemeral nature of the sandbags themselves. This could be done by removing the time limits and by limiting the permissible size of the sandbag structure. Given the ephemeral nature of sandbags, the tide will eventually remove them.

2. The amendment should reflect the unique erosion conditions of Inlet Hazard Areas.

- The permitted dimensions for sandbag structures in Inlet Hazard Areas should be increased to reflect the conditions caused by the severe and rapid erosion that is typical to Inlet Hazard Areas.
- Although property owners may seek a variance to increase the dimensions of sandbag structures, forcing property owners in Inlet Hazard Areas to resort to the variance is an inefficient use of the CRC's time and limited staff resources.

3. The amendment should allow property in Inlet Hazard Areas to be permitted more than once.

- Given the natural tendency of inlets to migrate, causing alternating periods of erosion and accretion, property located in Inlet Hazars Areas should be allowed to be permitted an indefinite number of times, to allow the property owner to ~~protect his or her property during periods of erosion, anticipating that when the period of accretion begins, the sandbags will no longer be necessary and will be subject to removal.~~
- Although the current proposed rule provides in Subsection G that a property may be protected once unless it is located in an Inlet Hazard Area and that a permit for property in an Inlet Hazard Area may receive, under certain conditions, an 8 year extension, the rule should be clarified to allow permitting during each period of erosion.

4. Clarification of the criteria for determining whether a community is actively pursuing a beach nourishment or inlet relocation project is necessary.

- One of the criteria set forth in the rule is whether the community:



North Carolina Department of Environment and Natural Resources

Division of Coastal Management

James H. Gregson

Director

Beverly Eaves Perdue
Governor

Dee Freeman
Secretary

CRC-09-16

April 7, 2009

MEMORANDUM

TO: Coastal Resources Commission
FROM: Tancred Miller
SUBJECT: Review of comments on proposed changes to 7H.1100, General Permit for Construction of Bulkheads and the Placement of Riprap for Shoreline Protection in Estuarine and Public Trust Waters

The Commission held a public hearing in February on proposed changes to its 7H.1100 rules, and received no comments at the meeting. DCM received three written comments (attached), from the following individuals:

1. Allyn Norton, Norton Engineering & Planning, Wilmington NC (p 3, Attachment 1)
2. Bill Price, The Land Alliance of NC, Morehead City, NC (p 6, Attachment 2)
3. Doug Brady, Beaufort, NC (p 8, Attachment 3)

The Division has reviewed the comments and responds as follows:

DCM Response Re: Norton

These comments are requesting that rock-filled gabion baskets be included under the general permit, and offer suggestions for construction standards. The comments also recognize that current construction standards do not adequately address issues of in-water and wetland placement, or backfill allowances that are important to the CRC and to the State of North Carolina. The Division can currently permit gabions through the major permit process, although applications for these structures are exceedingly rare because of the drawbacks associated with them from a cost, maintenance and permitting standpoint.

Gabions are generally more expensive per linear foot to install, when compared to standard riprap or bulkheads. Since gabions are typically metal cages, they are prone

to corrode over time in the marine environment. This corrosion leads to costly maintenance and/or noncompliant structures, and also creates a public safety hazard.

One of the Commission's standards for riprap is that it must be large enough to prevent its movement by wind or waves. Rocks used in gabions are not typically large enough to meet this standard, and will be subject to dispersion if the gabion baskets are not maintained or replaced as they corrode. Since the gabion baskets are stacked on top of each other, maintenance and replacement is more complicated and difficult for baskets at the bottom of the stack.

The Division believes that the demand for gabions is low because of their drawbacks, and gabion structures that have been installed have not performed to a level where they constitute a class of development meeting the statutory requirements for a general permit. The Division believes that the major permit process remains the appropriate vehicle for permitting these structures.

DCM Response Re: Price

These comments are directed primarily towards the proposed changes to the Commission's docks and piers rules. The comment directed towards the proposed 7H.1100 changes is that changing the term "riprap" to "riprap revetment" implies an engineered structure. The Division agrees with this comment. Riprap revetment is a more accurate term for a shoreline erosion control structure that is designed and installed according to sound engineering specifications. See Mike Lopazanski's memo CRC-09-13 for the Division's response to Mr. Price's comments on the proposed docks and piers rule changes.

DCM Response Re: Brady

These comments appear to be directed entirely towards proposed changes to the Commission's docks and piers rules. See Mike Lopazanski's memo CRC-09-13 for the Division's response to Mr. Brady's comments.

Staff Recommendation

After consideration of all public comments received, the Division recommends adoption of the 7H.1100 rules without additional changes (p 10, Attachment 4).

ATTACHMENT 1
Allyn Norton Comments

----- Original Message -----

Subject: Public Hearing/Comment on Feb. 11 CRC Planned Review of Proposed Rules
Date: Fri, 6 Feb 2009 16:10:39 -0500
From: Allyn Norton <anortonjr@ec.rr.com>
To: <jim.gregson@ncmail.net>
CC: <bonnie.bendell@ncmail.net>

To: Jim Gregson, Division of Coastal Management
From : Allyn S. Norton, PENC, Marine & other Applications
Norton Engineering & Planning
2235 South Live Oak Pkwy, Wilmington, NC, 28403-6112
910-762-3757 , Cell 252-943-5360 (Belhaven)
Subject: Public Comment for Recommended Inclusion of Gabion Baskets under Intent of Rock / Rip Rap Revetment Seawalls General Permit Rule CRC Review
Ref: (1) 15A NCAC 07H. 1105 Proposed Rules and other Pertinent
(2) B Bendell " Shoreline Stabilization Rule Changes " practitioner general email notification of 1/27/09 (see last item copy)

1. Per our telcom of this AM, this will provide an example of gabion clean Rip Rap applications here-to-fore interpreted by DCM as requiring a major permit but falling under the General Permit Guidelines proposed in Ref. (1) dated Jan 15, 2009. See item # 3, etc. for explanation and comment.

2. Ref. (2) type notification (attached at bottom) is immensely valuable and greatly appreciated and encouraged. Thanks.

3. The purpose here is to assure that stacks of clean rock/marl gabions are included under the rules as a General Permit seawall revetment type. Reference (1) does not currently read as inclusive or consistent with stacked gabions. I apologize in advance if I have missed something or a separate set of General Permit guidelines for clean rock gabions.

4. Consider the simple example:

A straight bank 6 feet high to the shore edge (same as normal water)with no wetland and not oceanfront (rather inland sea or river front). The bank is to be protected by clean rock filled gabions stacked two high. The stack has a first / lower straight row of 3'x3'x3' gabions. The second stack on top of the first is offset backwards by 1/2 gabion (1.5 feet). For this example, ignore toe and assume that the two high sloped stack comes to the top of the bank. The structure meets other revetment rules such as less than 500 feet in length. The lower gabion is in the water slightly below normal water to an extent of 5 feet with protective poly cloth in back to protect two feet of upland fill in back. The upper gabion is placed on top 1.5 feet back and overhanging the lower gabion with back cloth protection and 1/2 foot of upland backfill. This is a safe 1 foot horizontal by 2 foot vertical slope and even steeper slopes and higher stacks are supported by good engineering practice.

5. In prior DCM interpretations of Ref. (1) rules, the example in item 4 would require a Major Permit for any of several reasons including:

- a. If the gabion stack were only one high, the needed 2 foot back fill gap would not be allowed. The gabion would have to be against the bank because the bank base is at normal water.
- b. If the gabion stack were two high, both gabions would have to be against the vertical bank with no room for backfill because no gap would be allowed below normal water.
- c. In the two stack, the slope is much steeper than specified in the revetment rule for a safe slope range for open rock/marl. (Note: The proposed General Permit rules slope range for loose revetment rock is fine).

6. In the new Ref (1) proposed General Permit revetment rules, I observe:
- a. The intent to include gabion stacks as a revetment option is unclear.
 - b. Open rock slope rules should not necessarily apply in either low wave or storm wave protected locations for gabions.
 - c. Gabions, even vertical stacks subject to height/lateral stress design considerations are good practice. You referred to the allowance for proper gabion use as environmentally friendly and I completely agree. I could not find this reference in the rules or a separate set of rules for gabions.
 - d. If the rock revetment rules are intended to include gabion stacks, then the maximum distance into non-wetland waters of 10 feet for open rock should either apply to the lowest outer face of a gabion stack or the maximum in-water distance for the gabion stack face needs to be stated. For horizontal outer face distances of more than five feet, double or triple basket horizontal depths would be used if allowed (this latter sentence provides more of a bulk seawall against strong waveaction and might be deeper than NCDENR or USACE would intend under the definition of " rock revetment " .

7. Recommendations

- a. Clearly include gabion stacks in the General Permit seawall/ revetment rules; either as a part of the loose rock revetment rules or with separate qualification.
- b. Given that most gabions are 3 foot cubes, state the maximum in-water extent distance or maximum allowed upland earth backfill horizontal distance from shoreline. Note: a minimum of 2-3 feet of lowest level bank offset is needed to allow firm backfill.

Jim, it is a bit expensive to come to the CRC Meetings but I am more than willing to be a sounding board on this topic including a meeting in Morehead City at my expense. The design of gabions is now well quantified in both USACE and manufacturer / supplier literature. On the other hand, these sources do not cover considerations of in-water and wetland placement rules important to CRC and the environment. Further, gabions can be more expensive than loose rock revetments and the additional burden of Major Permits just about kills their use in most applications. Therefore, General Permit inclusion is a highly desirable construction and environmentally safe opportunity.

Advise if I may be helpful. Confirm receipt. Direct my attention to pertinent references as applicable.

Thanks your time.

Allyn (Al) Norton, PENC
Norton Engineering & Planning
2235 South Live Oak Pkwy
Wilmington, NC, 28403-6112
910-762-3757
Cell 252-943-5360 (Belhaven)

Bonnie Bendell General Notice Copy FYI .

This email is to inform you that the Coastal Resources Commission (CRC) is proceeding with rule making in order to make changes to the General Permit for the Construction of Bulkheads and Riprap (15A NCAC 07H Section .1100). The proposed amendments are available online at the Division of Coastal Management web site (www.nccoastalmanagement.net/Rules/proposed.htm) or by contacting Bonnie Bendell at (919) 733-2293 ext. 256 or bonnie.bendell@ncmail.net. Written comments on the proposed changes should be directed to Jim Gregson, Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557, phone (252) 808-2808, fax (252) 247-3330. Please note that the public comment period ends on March 16, 2009. A public hearing on the proposed amendments will be held during the CRC meeting at the Crystal Coast Civic Center in Morehead City at 5p.m. on February 11, 2009. If you intend to comment at this hearing, please sign up in the back of the room when you arrive. Additional information regarding the CRC meeting agenda, time, and location can be found at: <http://www.nccoastalmanagement.net/CRC/crc.htm>.

Amendments to Section .1100 include: an increase of permit fees from \$200 to \$400 for bulkheads landward of normal high water or normal water level; refining bulkhead alignment (two feet further landward than previously allowed for new bulkheads); refining riprap revetment alignment (five feet further waterward than previously allowed for new riprap on non-manmade shorelines, and three feet more landward than previously allowed for riprap on manmade shorelines); and increasing slope allowances for riprap revetments.

In addition, please be aware that changes have also been made to the following General Permits and will become effective February 1, 2009. More information regarding the specific rule language can be found on the DCM website at:

<http://www.nccoastalmanagement.net/Rules/proposed.htm> under ?Rules Taking Effect in 2009.?

- * 15A NCAC 07H Section .1400 ? General Permit for the Construction of Groins. Amendments will allow materials other than wood, clarify how structures are measured, and refine the allowable spacing/placement of groins.
- * 15A NCAC 07H Section .2100 ? General Permit for the Construction of Marsh Enhancement Breakwaters. Amendments will ensure consistency with other shoreline stabilization rules and change the term ?marsh enhancement breakwater? to ?sheetpile sill.?
- * 15A NCAC 07H Section .2400 ? General Permit for the Placement of Riprap for Wetland Protection. Amendments will increase the dimensions and clarify the slope of the structures.

If you have any questions, please feel free to contact me at 919-733-2293 ext 256 or bonnie.bendell@ncmail.net.

Yours truly,
Bonnie M. Bendell

ATTACHMENT 2
Bill Price Comments

DT: March 12, 2009
TO: COASTAL RESOURCES COMMISSION
FR: The LAND ALLIANCE of NORTH CAROLINA
RE: PUBLIC COMMENT
PIER DOCK AND BULKHEAD RULES CHANGES
www.oah.state.nc.us/rules/register/Volume23Issue14January152009.pdf



ABSTRACT :

The proposed Revetment, Pier and Dock rules unnecessarily restrict property rights to build same. LA-NC asserts that any environmental benefits of proposed rules when compared to Commercial Fishing practices of clam kicking, shallow and shrimp trawling, is miniscule and inconsequential.

- 1) Rewording of "Rip Rap" to "Rip Rap Revetments" implies engineered structure . This is excessive for installing rip rap. The method should be vested to the property owner, not the State.
- 2) Boat Houses prohibited from lots with less that 75' frontage. Why?
- 3) Require 2' Minimum Water at dock head at MLW , along with previous limitations on length, further and unreasonably reduces private property rights and the use and value of water front property , with insignificant environmental benefit.
- 4) Regulations regarding hand rails is hazardous and unnecessary .
- 5) The Pier and Dock rules lump canal front, high energy Sound/ River front, and low energy Sound / River front together. These conditions are widely variable and should have different rules. The Proposed Rules are further excessive takings of Private Property Rights. There needs to be better balance in the regulatory process.

=====
It is assumed that the environmental reasoning ostensibly supporting these rules to further restrict Pier and Dock installations, is to reduce impairment of live bottom. LA-NC asserts that :

- (a) any environmental benefits of proposed rules when compared with Commercial Fishing practices of clam kicking, scallop and shrimp trawling, is miniscule and inconsequential.
- (b) Observations indicate that piers / docks, and rip rap actually enhance sea-life by providing attachment points, even under cover; consequently, rip rap , piers and docks should be encouraged to enhance growth of sea life.
- (c) Requirement of 2' Minimum Water at dock head at MLW is unreasonably restrictive of use. We suggest that a valid comparative analysis be performed by out of state independent scientists before imposing these new restrictions.

The Pier and Dock rules lump Canal front, high energy Sound/ River front, and low energy Sound / River front property together. These conditions are widely variable and should have different rules.

CANAL FRONT: It is difficult to understand why there are any rules on Canal front lots other than rules to prevent blocking the channel or obstruction a neighbors use. 15' side setback is unnecessary .

HIGH ENERGY SOUND / RIVER FRONT: Rules to deal with damaged structures should be considered .

LOW ENERGY SOUND / RIVER FRONT: No observed reason for further restriction of piers or docks. Developers or owners of lots should be allowed to plan piers and docks with permit transferable to buyers.

These CRC (CAMA) Rules further extend the States authority to control and/ or take Rights of Private Property Owners. This process began in the 60's, and 70's with the States taking of lands below Sea level. The prime focus then pertained to Ocean Front property with rules to preclude bulkheads and jetties that obstruct walking along the Beach . Assertions were that the State was

better able to protect the beach. The Legal Premise for the “taking without compensation” was said to be based on English Common Law , where the State Environmental Agencies asserted Claims, that the King owned the waters and rivers, and the land beneath. They were right. In fact, the King effectively owned all the land, water, forests, and everything, and Granted use there of, or, could takeaway rights of use of all land and property in a manner limited by the Rights set in the Magna Carta. That’s why we fought a Revolution.

The American Revolution was fought, so the State (King) couldn’t take property without just compensation, a practice that Governor Lord Tryon had adopted in order to build his Palace. It is indeed ironic that our own State of North Carolina has rapidly and forcefully accelerated the takings of property rights in North Carolina, the Crown Colony that, in 1771 was the site of the Battle of Alamance which some Historians say was the First Battle of the American Revolution. Since the ‘70, State takings of Waters has been extended to restricting use of esturine areas, with bulkhead, jetty, pier and dock rules and regulations.

This is not to say that rules and regulations that benefit the common good are bad, but rather to observe that Policy in the North Carolina has been distorted to serve the Political Objectives of Environmental Agencies, and Organizations that deem they know better than anyone else what is good and proper.

The problem is that the Environmental Elites, have made a practice of misrepresenting and distorting facts and science in order to unreasonably determine how other people can to use their property, and far to often property owners don’t know what has happened until it is to late.

Bill Price 336-214-2676

Land Alliance of North Carolina

“ Seeking Valid Science for Valid Rules”

ATTACHMENT 3
Doug Brady Comments

----- Original Message -----

Subject: Section 15 ANCAC07H.1100
Date: Mon, 16 Mar 2009 19:33:25 -0400
From: Doug Brady <dougbrady@ec.rr.com>
To: Director - DCM Jim Gregson <Jim.Gregson@ncmail.net>

Mr. Gregson,

I submit these comments relative to Section 15ANCAC07H.1100.
For piers, docks and rip rap.

- A general point I would make is that these changes will delay the permitting process significantly. The majority of the piers which are authorized each year are for piers and they are for simple residential use. A significant portion of these piers will fall subject to the proposed changes, one of which requires coordination and specific approval from another agency. This will cause significant delay in the authorization process and will most assuredly require a significant number of property owners to go through a much longer CAMA major permitting process with the uncertainty if their pier project will be approved by individual staff with the Divisions of Marine Fisheries and the Wildlife Resources Commission. The rules do not contain any specific standards that these agencies will use in evaluating permit applications nor does it allow any flexibility for DCM. In fact, it requires that the approval process for simple residential piers be delegated to other agencies that are not within the purview of the CAMA and the CRC.

- Some of the existing CRC pier rules appear to be fundamentally in conflict with these proposed rules. In many cases, the CRC's existing rules limit the length of piers to the shallower water (has to be in line with adjacent pier structures, can not exceed 200' without obtaining additional 1' every 100') and thus encourages piers to be built closer to shore and in shallower water.

- Specific issues: - There are many areas designated primary nursery areas throughout the state and the majority of are shallow. In what cases will DMF and/or WRC not have concerns and what would those circumstances be?

- The specific MFC definition of submerged aquatic vegetation (sav) beds needs to be included in this rule since the MFC could change the definition without the CRC's approval. The ability for the property owner to know if they are developing in savs are unlikely given the ability of savs to move depending on the time of year and the frequency of storms.

- The same requirement for shellfish beds as savs since it relies on the MFC standards. How is a property owner or DCM to know which shorelines have "shellfish beds". Does this require DMF to review all pier sites to make this evaluation?

- There needs to be standards how DMF and WRC will determine if a pier and docking facility located in an area of sav or shellfish beds have been "minimized" (7H.1205(h)(2)).

- It would be helpful to define what is a pier and what is a docking facility.

I urge you to delay implementation of these rule and give the public more opportunity to comment. I do not think the individual landowner is aware of these changes and the impact that they will have on property rights.

Doug Brady
805 Front St.
Beaufort, N.C. 28516

ATTACHMENT 4
Draft Rules as Published in the NC Register

**SECTION .1100 - GENERAL PERMIT FOR CONSTRUCTION OF BULKHEADS AND THE
PLACEMENT OF RIPRAP REVETMENTS FOR SHORELINE PROTECTION IN ESTUARINE AND
PUBLIC TRUST WATERS AND OCEAN HAZARD AREAS**

15A NCAC 07H .1101 PURPOSE

A permit under this Section shall allow the construction of bulkheads and ~~the placement of riprap~~ revetments for shoreline protection in the public trust waters and estuarine waters AECs according to authority provided in Subchapter 07J .1100 and according to the Rules in this Section. This permit shall not apply to shoreline protection along the oceanfront or to waters and shorelines adjacent to the Ocean Hazard AEC with the exception of those shorelines that feature characteristics of the Estuarine Shoreline AEC. Such features include the presence of wetland vegetation, lower wave energy and lower erosion rates than the adjoining Ocean Erodible Area.

*History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124;
Eff. March 1, 1984;
Amended Eff. April 1, 2003.*

15A NCAC 07H .1102 APPROVAL PROCEDURES

(a) An applicant for a General Permit under this Subchapter shall contact the Division of Coastal Management and request approval for development. The applicant shall provide information on site location, dimensions of the project area, and ~~his~~ the applicant's name and address.

(b) The applicant shall provide:

- (1) confirmation that a written statement has been obtained signed by the adjacent riparian property owners indicating that they have no objections to the proposed work; or
- (2) confirmation that the adjacent riparian property owners have been notified by certified mail of the proposed work. The notice shall instruct adjacent property owners to provide written comments on the proposed development to the Division of Coastal Management within ten (10) days of receipt of the notice, and, indicate that no response shall be interpreted as no objection. The Division of Coastal Management ~~DCM staff~~ shall review all comments and determine, based on their relevance to the potential impacts of the proposed project, if the proposed project can be approved by a General Permit. If the Division of Coastal Management ~~DCM staff~~ determines that the project exceeds the guidelines established by the General Permit Process, DCM shall notify the applicant that ~~he must submit~~ an application for a major development permit shall be required.

(c) No work shall begin until an on-site meeting is held with the applicant and a Division of Coastal Management representative so that the proposed bulkhead alignment may be ~~appropriately~~ marked. Written authorization to proceed with the proposed development shall be issued if the Division representative finds that the application meets all the requirements of this Subchapter. Construction of the bulkhead or riprap revetment ~~structure~~ shall be completed within 120 days of the issuance of the general authorization or the authorization shall expire and it shall be necessary to re-examine the alignment to determine if the general authorization may be reissued.

*History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124;
Eff. March 1, 1984;
Amended Eff. October 1, 2007; September 1, 2006; January 1, 1990; December 1, 1987.*

15A NCAC 07H .1103 PERMIT FEE

The applicant shall pay a permit fee of two hundred dollars (\$200.00) for riprap revetments and bulkhead structures sited at or above normal high water or normal water level, or a permit fee of four hundred dollars (\$400.00) for ~~bulkhead and riprap~~ revetments ~~structures~~ sited below normal high water or normal water level. The applicant shall pay a permit fee of four hundred dollars (\$400.00) for bulkheads. Permit fees shall be paid by check or money order payable to the Department.

*History Note: Authority G.S. 113A-107; 113A-113(b); 113A-118.1; 113A-119; 113-119.1; 113A-124;
Eff. March 1, 1984; Amended Eff. September 1, 2006; August 1, 2000; March 1, 1991.*

15A NCAC 07H .1104 GENERAL CONDITIONS

- (a) This permit authorizes only the construction of bulkheads and the placement of riprap revetments conforming to the standards herein.
- (b) Individuals shall allow authorized representatives of the Department of Environment, Health, and Natural Resources to make periodic inspections at any time deemed necessary in order to ensure ~~be sure~~ that the activity being performed under authority of this general permit is in accordance with the terms and conditions prescribed herein.
- (c) There shall be no ~~significant~~ interference with ~~the navigation or~~ use of the waters by the public by the existence of the bulkhead or the riprap revetment authorized herein. Bulkheads and riprap revetments authorized in this Rule shall not interfere with the established or traditional rights of navigation of the waters by the public.
- (d) This permit ~~shall~~ will not be applicable to proposed construction where the ~~Department~~ Division of Coastal Management has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.
- (e) This permit ~~shall~~ does not eliminate the need to obtain any other required state, local, or federal authorization.
- (f) Development carried out under this permit ~~shall~~ must be consistent with all local requirements, AEC rules, and local land use plans current at the time of authorization.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124;
Eff. March 1, 1984;
Amended Eff. May 1, 1990; December 1, 1987;
RRC Objection due to ambiguity Eff. May 19, 1994;
Amended Eff. August 1, 1998; July 1, 1994.

15A NCAC 07H .1105 SPECIFIC CONDITIONS

- ~~(a) This general permit is applicable only along shorelines void of wetland vegetation including marsh grass and wooded swamp, or where all construction is to be accomplished landward of such vegetation.~~
- ~~(b) Bulkheads and riprap material shall be positioned as follows:~~
- ~~(1) Bulkheads shall be positioned so as not to exceed more than an average distance of 2 feet waterward of the normal high water mark, or the normal water level contour, whichever is applicable. In no case shall the bulkhead be positioned more than 5 feet waterward of the normal high water or normal water level contour at any point along its alignment.~~
 - ~~(2) Riprap shall be positioned so as not to exceed a maximum of 5 feet waterward of the mean high water mark or normal water level contour at any point along its alignment. Where there is an existing bulkhead structure, riprap shall be allowed to extend a maximum of 10 feet offshore. This location standard shall take into consideration the height of the area to be protected (i.e. bulkhead height, water depth) and the alignment shall allow for a slope no flatter than 2 feet horizontal per 1 foot vertical and no steeper than 1½ feet horizontal per 1 foot vertical.~~
- ~~(c) Along shorelines within upland basins, canals, and ditches, bulkheads or riprap material must be positioned so as not to exceed more than an average distance of 5 feet waterward of the normal high water mark or the normal water level contour, whichever is applicable. In no case shall the bulkhead or riprap be positioned more than 10 feet waterward of the normal high water or normal water level contour at any point along its alignment. For the purpose of these Rules, the Atlantic Intracoastal Waterway (AIWW) is considered a natural shoreline and development shall occur as described in 7H .1105(b).~~
- ~~(d) Construction authorized by this general permit shall be limited to a maximum shoreline length of 500 feet.~~
- ~~(e) All backfill material shall be obtained from an upland source.~~
- ~~(f) The bulkhead shall be constructed, or the riprap shall be in place prior to any backfilling activities.~~
- ~~(g) The bulkhead or riprap shall be structurally tight so as to prevent seepage of backfill materials through the structure.~~
- ~~(h) Riprap material shall be free from loose dirt or any other pollutant. It shall be of a size sufficient to prevent its movement from the site by wave or current action.~~
- ~~(i) Riprap material shall consist of clean rock or masonry materials such as but not limited to granite or broken concrete. Materials such as tires, car bodies, scrap metal, paper products, tree limbs, wood debris, organic material or similar material, are not considered riprap.~~

~~(j) The bulkhead shall be solid and constructed of treated wood, concrete slabs, metal sheet piles or other suitable materials approved by department personnel. No excavation is permitted except for that which may be required for the construction of the bulkhead wall, riprap, deadmen cables, etc. This permit does not authorize any excavation waterward of the approved alignment.~~

~~(k) Bulkheads or riprap shall not extend beyond established alignments nor restrict the original width of the canal or basin.~~

~~(l) If one contiguous acre or more of property is to be excavated or filled, an erosion and sedimentation control plan shall be filed with the Division of Land Resources, Land Quality Section, or appropriate local government having jurisdiction. This plan shall be approved prior to commencing the land-disturbing activity.~~

(a) Along shorelines void of wetland vegetation:

(1) New bulkheads shall have an average approximation of normal high water or normal water level. The bulkhead position shall not exceed a distance of 5 feet waterward of normal high water or normal water level at any point along its alignment.

(2) New bulkheads or riprap revetments on shorelines within manmade upland basins, canals, and ditches, shall be positioned so as not to exceed an average distance of two (2) feet and maximum distance of five (5) feet waterward of normal high water or normal water level.

(3) When replacing an existing bulkhead, the new alignment shall be positioned so as not to exceed a maximum distance of two (2) feet waterward of the current bulkhead alignment. To tie into a like structure on the adjacent property, replacement bulkhead position shall not exceed a maximum distance of five (5) feet waterward of the current bulkhead alignment. When replacing a bulkhead where lands landward of the bulkhead were lost in the last year, bulkheads shall be positioned a maximum of two (2) feet waterward of the original/existing alignment.

(4) Riprap revetments shall be positioned so as not to exceed a maximum distance of 10 feet waterward of the normal high water or normal water level at any point along its alignment

(b) Along shorelines with wetland vegetation, bulkheads and riprap revetments shall be positioned so that all construction is to be accomplished landward of such vegetation.

(c) Bulkheads shall be constructed of vinyl, or steel sheet pile, concrete, stone, timber, or other suitable materials approved by the Division of Coastal Management.

(d) Riprap revetments shall be constructed of granite, marl, concrete without exposed rebar, or other suitable materials approved by the Division of Coastal Management.

(e) Revetment material shall be free from loose dirt or other pollutants

(f) Revetment material shall be of sufficient size to prevent movement from the site by wave action or currents.

(g) Construction design for riprap revetments shall take into consideration the height of the area to be protected (i.e. bulkhead height, escarpment height, water depth) and the alignment shall allow for a slope no flatter than three (3) feet horizontal per one (1) foot vertical and no steeper than 1 ½ feet horizontal per one (1) foot vertical.

(h) All backfill material shall be obtained from an upland source pursuant to 15A NCAC 07H .0208. The bulkhead or riprap revetment shall be constructed prior to any backfilling activities and shall be structurally tight so as to prevent seepage of backfill materials through the structure.

(i) No excavation, grading or fill shall be permitted except for that which may be required for the construction of the bulkhead and/or riprap revetment. This permit shall not authorize any excavation waterward of the approved alignment.

(j) Runoff from construction shall not visibly increase the amount of suspended sediments in adjacent waters. Appropriate sedimentation and erosion control devices, measures or structures shall be implemented to ensure that eroded materials do not enter adjacent wetlands, watercourses and property (e.g. silt fence, diversion swales or berms, sand fence, etc.).

(k) If one contiguous acre or more of property is to be excavated or filled, an erosion and sedimentation control plan shall be filed with the Division of Land Resources, Land Quality Section, or appropriate local government having jurisdiction. This plan shall be approved prior to commencing the land-disturbing activity.

(l) For the purpose of these Rules, the Atlantic Intracoastal Waterway (AIWW) is considered a natural shoreline.

(m) Construction authorized by this general permit shall be limited to a maximum shoreline length of 500 feet.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124; Eff. March 1, 1984; Amended Eff. April 1, 2005; December 1, 1991; January 1, 1989; December 1, 1987.



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

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

CRC-09-13

April 3, 2009

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Review of Comment on Amendments to 15A NCAC 7H 0.1200 GP for Construction of Piers and Docking Facilities

The CRC held a public hearing at the February 2009 meeting in Morehead City on proposed amendments to 15A NCAC 7H .1200 GP for Construction of Piers and Docking Facilities. The overall intent of the amendments is to give riparian property owners flexibility to configure docking facilities to suit their needs while addressing shading and other impacts to submerged aquatic vegetation (SAV) and shellfish beds.

The current rule allows for a maximum of 400 square feet of docks and docking facilities, plus an additional 400 square feet for a boathouse. The amendments combine the structures to allow a maximum of 800 square feet of docks and docking facilities that can be used in any combination, except that under Part (f) no single component (e.g. a boathouse, finger pier, or floating dock) may be over 400 square feet. In addition, the maximum square footage of docks and docking facilities is calculated as eight square feet per linear foot of shoreline, up to the 800 square foot limit. For example, if a lot has 50 linear feet of shoreline, the allowable size of docking facilities will be (8 x 50 =) 400 square feet. Under both the current and proposed rule, boathouses will not be allowed on lots with less than 75 linear feet of shoreline.

The proposed amendments codify the existing protocol of consulting with the Division of Marine Fisheries (DMF) or the Wildlife Resources Commission (WRC) before permitting docking facilities in designated Primary Nursery Areas (PNAs) where the normal water depth is less than two feet.

The proposed amendments list the two conditions under which piers and docking facilities may be constructed over shellfish beds and submerged aquatic vegetation without prior consultation between DCM and DMF or WRC – water depth at the docking facility is equal to or greater than two feet at normal low or normal water level and the facility is located to minimize the area of SAV and shellfish beds under the structure.

The amendments also specify that floating piers and docking facilities shall not be eligible for a general permit if the structure would be over a PNA, shellfish bed, or SAV, and the normal low or normal water depth between the bottom of the floating structure and the substrate would be less than 18 inches. If the water depth is less than 18 inches the applicant will have to go through the major permit process. Currently, DCM consults with DMF and WRC if it has concerns about inadequate water depths in PNAs, or over shellfish beds or SAV.

The proposed amendments contain a new provision to allow shared piers and docking facilities to be reviewed under the general permit process. Currently, this option is only available via a Major Permit. The amendment allows for the same cumulative benefits available to each property owner individually to be combined into one structure so that they may share the costs and use while at the same time, decreasing the total number of structures along the shoreline.

The Division has received comments from the Division of Marine Fisheries, Marine Fisheries Commission, Wildlife Resources Commission, Division of Water Quality and two citizens. The comments (attached) with Staff responses are summarized below. While the comments from the state agencies are notable, the proposed amendments represent three years of work and negotiation on the part of the CRC, DCM, DWQ, WRC and DMF staff. DCM Staff believe a significant stride has been taken in protecting SAV, shellfish beds and bottom habitat through the incorporation of minimum water depths for projects to be eligible for the GP. These amendments, the new SAV definition adopted by the MFC and guidance provided to DCM field staff on when to consult with other agencies, will minimize impacts to SAV, PNA, shellfish and other priority habitat while not elevating the majority of GPs to Major Permit review. Staff therefore recommends that the rule be adopted as proposed without further amendment.

Comment

The Division of Marine Fisheries, Division of Water Quality, Marine Fisheries Commission and Wildlife Resources Commission are concerned with the impacts vessels may have on bottom habitats in waters less than 2 ½ feet deep.

Staff Response

The proposed amendments codify the existing protocol of consulting with the Division of Marine Fisheries (DMF) or the Wildlife Resources Commission (WRC) before permitting docking facilities in designated Primary Nursery Areas (PNAs) where the normal low or normal water depth is less than two feet. The proposed amendments also specify that floating piers and docking facilities shall not be eligible for a general permit if the structure would be over a PNA, shellfish bed, or SAV, and the normal low or normal water depth between the bottom of the floating structure and the substrate would be less than 18 inches. If the water depth is less than 18 inches, the applicant will need to go through the Major Permit process. Guidance is currently provided to DCM field staff to consult with the DMF and WRC if there are concerns regarding inadequate water depths in PNAs, over shellfish beds or SAV. DCM issues approximately 1,400 general

permits annually under 7H.1200 with approximately 900 of those for piers and docking facilities in PNA, SAV, or shellfish areas. Division records indicate that about 150 of these permits on average are for floating facilities in PNA, SAV, or shellfish areas, and approximately half of those (75) are in water that is less than two feet deep, representing ~8% of permits in sensitive areas. Staff believes that codification of agency practice, the first time inclusion of minimum water depths and the recently adopted MFC definition of SAV represent a significant benefit to shallow bottom communities. Although the amendments might not go quite as far as the other agencies would like, they have all acknowledged the increased benefit.

Comment – Doug Brady & Land Alliance of NC

The amendments will affect a significant portion of pier permits causing significant delays. Requirement of 2' minimum water depth at the dock is unreasonably restrictive.

Staff Response

The amendments represent a codification of agency practice and guidance given to field representatives on when DMF or WRC should be consulted. Updated flow charts make this decision easier and are intended to prevent the elevation of pier permits into Major Permits. Staff estimates that these amendments will on average, affect 75 of the roughly 1,400 General Permits issues annual under 7H .1200.

Comment – Doug Brady

Existing CRC pier rules are in conflict with the proposed amendments in that piers are encouraged to be in shallow water due to 200' and pier head alignment limitations. In what cases will DMF or WRC not have concerns with piers in PNAs.

Staff Response

The amendments establish a minimum criteria under which DMF and WRC are consulted regarding shallow water habitats and under what circumstances the project may need to be elevated to a Major Permit Review. The 200' and pier head alignment limitations are similar minimum criteria under which Major Permit review may be necessary and do not necessarily preclude placement of a structure.

Comment – Doug Brady

The specific MFC definition of SAV and shellfish beds needs to be included in the rule since the MFC could change the definition without the CRC's approval.

Staff Response

It is important for all the agencies to be working with the same definitions of aquatic resources when commenting on permitting decisions. As a coordinating agency, DCM staff rely on the input and expertise of 14 state and federal agencies to efficiently implement the NC Coastal Management Program. Some of the more common definitions included by reference are Primary Nursery Areas (PNAs), Shellfish Harvesting Areas and Outstanding Resource Waters. In these cases, the Division of Coastal Management relies on other agencies and their rule making authorities to propose specific areas to be subject to various regulatory activities or cite the conditions

under which a given situation exist. This is the case with Shellfish Harvesting Areas and Submerged Aquatic Vegetation.

Comment – Doug Brady

It would be helpful to define what a pier is and what is a docking facility.

Staff Response

While docks and piers are not specifically defined, the long-standing policy of the Division has been that docks generally are parallel to and attached at one or more points to the shore allowing for ingress and egress of vessels. Piers generally are structures perpendicular to shore that allow for access to formalized docking facilities. The structures are not specifically defined in order to facilitate flexibility in meeting the applicant's needs and site conditions.

Comment – Land Alliance of NC

Why are boat house prohibited from lots with less than 75' frontage.

Staff Response

The Coastal Area Management Act charges the CRC with not only managing the natural productivity, biological and economic values of State's coastal area, but also with its aesthetic values. During the last major revisions to the docks and piers rules in the mid 1990's, the Commission considered the visual impacts of piers and other structures on neighboring properties. The Commission determined that lots with 75' of frontage could accommodate a pier and boat house and not impede the view of adjoining riparian properties. Viewshed was also the reason the Commission eliminated second story use of boat houses.

Comment – Land Alliance of NC

Why do the rules address canal front lots? The 15' side setback is unnecessary.

Staff Response

Limitations on the extension of piers across water bodies, as well as property line setbacks prevent interference with navigation of the water body and access to riparian property. The minimum side setback can be waived by mutual agreement of adjoining property owners.



**NORTH CAROLINA MARINE FISHERIES COMMISSION
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

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March 12, 2009

Bob Emory, Chairman
N.C. Coastal Resources Commission
400 Commerce Avenue
Morehead City, NC 28557

RECEIVED
MAR 17 2009

Morehead City DCM

Dear Mr. Emory,

The N. C. Marine Fisheries Commission appreciates the opportunity to comment on the proposed dock rule changes (Section .1200, General Permit for construction of piers and docking facilities). Our commission is statutorily responsible for management of our state's coastal fisheries and the habitats that support those fisheries for the benefit of the public and we have the authority to review and comment on permit applications received by state agencies that may have an impact on the marine and estuarine resources of North Carolina.

First, I would like to thank the Coastal Resources Commission for proposing measures that will better protect critical fish habitats. Protection of critical fish habitats is a focus of the Coastal Habitat Protection Plan(CHPP). We support your efforts to protect those habitats.

Primary Nursery Areas, submerged aquatic vegetation, and shell bottom are ecologically valuable estuarine habitats that play a critical role in healthy survival and growth of juvenile fish and invertebrates. The structure of the grass and shell and the organic material composing the bottom in small shallow creeks provides refuge and foraging areas for juvenile fish and shellfish. North Carolina has an estimated 200,000 acres of submerged aquatic vegetation located near our higher salinity areas; our state's acreage is second only to that of Florida. The rich muddy substrate of Primary Nursery Areas supports the base of the estuarine food chain. Out of North Carolina's 2.3 million acres of estuarine habitat, the our commission has classified over 80,000 acres as Primary Nursery Areas. Yet, over 90 percent of commercially and recreationally important fishery species in North Carolina are dependent on this small amount of area for some portion of their life cycle.

Table 1. Number of registered recreational boats of different length categories in the 20 coastal counties of North Carolina, 2008 (WRC, unpub. data).

County	Number of boats per boat length interval (feet)							Total
	< 16 Ft	16 - 16.9 Ft	17 - 17.9 Ft	18 - 18.9 Ft	19 - 23.9 Ft	24 - 30 Ft	> 30 Ft	
New Hanover	5,784	1,965	2,090	1,588	4,606	1,613	347	17,993
Carteret	3,797	1,308	1,423	1,280	4,799	1,511	362	14,480
Brunswick	4,971	1,532	1,099	1,006	2,414	873	155	12,050
Onslow	3,972	1,212	1,254	958	2,176	586	109	10,287
Craven	3,472	866	932	806	2,383	714	190	9,363
Beaufort	2,926	829	717	766	1,853	647	164	7,902
Dare	2,075	592	502	586	1,951	736	116	6,538
Pender	2,851	944	682	484	1,163	325	65	6,513
Currituck	1,677	508	473	499	945	263	22	4,387
Pamlico	1,314	313	301	282	823	430	117	3,580
Pasquotank	1,047	262	264	235	614	188	19	2,629
Perquimans	898	177	165	170	469	174	23	2,076
Chowan	738	190	208	198	489	113	26	1,962
Bertie	743	280	251	166	330	52	9	1,831
Hertford	599	208	173	163	291	58	6	1,498
Washington	531	184	143	142	250	73	9	1,332
Camden	547	129	117	120	282	100	16	1,311
Gates	521	144	129	105	180	26	2	1,107
Hyde	253	97	70	81	176	53	17	747
Tyrrell	197	88	57	53	101	25	12	533
TOTAL	38,913	11,828	11,050	9,668	26,295	8,560	1,786	108,099

Table 2. Operational draft of DMF vessels of various styles and lengths.

Make	Boat			Draft ²		Engine			
	Type ¹	Hull	Length (ft)	Boat Draft (in)	Operational Draft (in)	Make	Type	Drive	HP
Jones Bros.	CC	Flat	19	11	13	Mercury	OB	Jet	80
Roughneck	Jon	Semi V	14	4.7	17.7	Evinrude	OB	Prop	25
Southern Skimmer	CC	Flat	17	9.8	18.1	Johnson	OB	Prop	50
Jon Boat	Jon	Semi V	13	10.6	18.9	Johnson	OB	Prop	30
Carolina Skiff	Jon	Flat	17	7.9	19.7	Yamaha	OB	Prop	40
Jones Bros.	CC	Flat	22	9.8	19.7	Yamaha	OB	Prop	100
Jones Bros.	CC	Flat	22	11.8	20.9	Yamaha	OB	Prop	115
Carolina Skiff	CC	Flat	24	8.3	21.3	Johnson	OB	Prop	115
Jones Bros.	CC	Flat	17	8.7	21.3	Johnson	OB	Prop	40
Sea Ark	SC	Semi V	20	7.9	21.7	Yamaha	OB	Prop	80
Jon Boat	Jon	Semi V	17	11.8	21.7	Johnson	OB	Prop	50
Jones Bros.	CC	Flat	22	7.9	22	Johnson	OB	Prop	115
Parker	CC	V	18	11.8	22.4	Mercury	OB	Prop	
Jones Bros.	CC	Flat	22	12.2	23.2	Yamaha	OB	Prop	100
Jones Bros.	CC	Flat	22	12.2	23.6	Mercury	OB	Prop	150
Jones Bros.	CC	Flat	21	12.6	23.6	Mercury	OB	Prop	115
Intruder	CC	Tunnel	20	13.8	23.6	Mercury	OB	Prop ³	115
Jones Bros.	CC	V	20	13.8	23.6	Johnson	OB	Prop ³	175
Jones Bros.	CC	Flat	22	11.8	24.4	Yamaha	OB	Prop	100
Priveteer	Cabin	V	22	15	26.8	Mariner	OB	Prop	225
Parker	CC	V	21	18.9	27.6	Mercury	OB	Prop	200
Jones Bros.	CC	Flat	25	15.7	28.7	Johnson	OB	Prop	150
Jones Bros.	CC	Flat	19	10.6	29.5	Johnson	OB	Prop	115
Parker	CC	V	23	17.7	29.5	Mercury	OB	Prop	225
Parker	CC	V	25	21.7	29.5	Johnson	OB	Prop	225 (x2)
Parker	WA	V	23	20.5	29.9	Mercury	OB	Prop	225
Albemarle	CC	V	26	25.6	32.7	Mercury	OB	Prop	225 (x2)
Parker	CC	V	18	14.6	34.3	Evinrude	OB	Prop	150
Jones Bros.	CC	Flat	20	19.7	34.6	Mercury	OB	Prop	
Parker	Cabin	V	25	24.4	35.4	Johnson	OB	Prop	200 (x2)
Parker	CC	V	24	22	39.3	Mercury	OB	Prop	225
Albemarle	WA	V	24	23.6	39.3		I/O	Prop	

¹Type codes: CC = center console, WA = walkaround, SC = side console

²Boat draft = water line to hull bottom; operational draft = water line to skeg bottom

³Mounted on jack plate



North Carolina Department of Environment and Natural Resources

Division of Marine Fisheries

Dr. Louis B. Daniel III

Director

Beverly Eaves Perdue
Governor



March 5, 2009

Bob Emory, Chairman
N.C. Coastal Resources Commission
C/o N.C. Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Morehead City DCM

Dear Mr. Emory,

The N.C. Division of Marine Fisheries (DMF) has reviewed the draft rules regarding general permits for docks and piers (15A NCAC 07H .1200 General Permit for Construction of Piers and Docking Facilities in Estuarine and Public Trust Waters and Ocean Hazard Areas). The DMF has been working with the Division of Coastal Management (DCM) and other DENR agencies to ensure that the revised dock rules allow access to public waters in a manner that minimizes impacts to submerged aquatic vegetation (SAV) habitat, Primary Nursery Areas (PNAs), shellfish resources, and other priority habitat areas.

The revised rules allow a General Permit (GP) to be issued without review by DMF or Wildlife Resource Commission (WRC) for docking facilities located in a PNA, or over SAV or shellfish beds if a minimum water depth of two feet (18" if a floating dock or pier) normal water level (NWL) or normal low water (NLW) exist (15A NCAC 07H .1205 (g) and (h)). A minimum water depth is critical for preventing bottom disturbance to PNAs and damage to living benthic resources such as SAV and oyster beds. Docks sited in shallow water can damage or destroy SAV and shellfish if the boat or floating dock sits directly on the bottom for portions of a tide cycle or if the water is so shallow that the boat disturbs the bottom with prop wash as it navigates to and from the dock (Figure 1). In PNAs, which generally consist of muddy substrate, prop scour and prop wash can easily resuspend fine sediments and increase turbidity, clogging the gills of larvae and juvenile fish, and altering their forage base. The DMF strongly agrees that a minimum water depth is needed to properly site a docking facility. While the revised rules allow for a GP to be issued for a dock in or over PNAs, SAV, or shellfish beds without review by resource agencies if there is at least two feet of water at NWL or NLW, DMF has concerns that this water depth is inadequate and would likely result in inappropriate siting of docking facilities.



Figure 1. Floating dock sitting on top of an oyster bed at low tide, Whiskey Creek, New Hanover Co, 2009.

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Bob Emory Letter, Page Two
March 5, 2009

In meetings conducted in 2007-2008 regarding the SAV definition and dock rules, the DENR workgroup discussed in great detail the minimum water depth needed to adequately motor without impacting bottom features. While three feet was initially agreed on as a conservative depth that would be suitable for almost all scenarios, the group agreed that under most circumstances, a minimum of 2.5 feet would suffice. The current draft rules however, call for a minimum water depth of two feet.

To assess the adequacy of a depth of two feet, DMF staff collected information on number of boats registered in the coastal counties and also measured the drafts of DMF vessels. This included 32 V-hull and flat bottom boats, ranging from 13 to 26 feet in length, with outboard engines ranging from 25 HP to twin 225 HP in size. Staff measured the boat draft (water line to bottom of boat) as well as the operational draft (water line to bottom of skeg). To motor from a slip, a boater would have to lower the skeg at least partially to submerge the propeller. Boat draft therefore represents an underestimate or minimum draft that a boat needs to operate, while operational draft represents the potential maximum draft of a boat needed to motor from the slip. The difference between the hull bottom and the skeg bottom averaged 10 inches. The survey data for boats of various sizes were then extrapolated to WRC data on the number of registered vessels of various size categories.

According to WRC records, there were approximately 108,100 vessels registered in the coastal counties in 2008 (see Table 1, attached). Counties with the greatest number of boats are in the tidally driven southern counties of New Hanover, Carteret, Brunswick, and Onslow counties. Craven, Beaufort, Dare and Pender counties also have a considerable number of registered vessels. While boats less than 16 feet comprise over one third of all vessels, they are more likely to be trailered and not moored at a dock. Boats 19 to 23.9 feet were the second most common boat size, accounting for 24% of all vessels.

The survey found that a boat of a given size and style can vary greatly in the operational draft of the vessel (see Table 2, attached). Boats less than 18 feet in length, in all but one case, drew less than two feet of water. Boats of this size class represent about 57% (61,790 vessels) of all registered recreational vessels in the 20 CAMA counties in 2008 (see Table 1, attached). However 43% of the boats (46,309 vessels) would draw more than this. Boats ranging from 19 to 25 feet in length, tended to draw two to 2.5 feet, although some drew more. The operational draft of boats 24 to 26 feet in length tended to range from 2.5 to 3.3 feet. Therefore, it appears that requiring a minimum of two feet water depth at NWL or NLW would be adequate for 57% of the registered boats in coastal counties. Requiring a minimum of 2.5 feet would be adequate for about 90% of the registered boats. While some of the boats in the 24 to 26 feet range draw 2.5 to three feet deep, others draw greater than three feet. The low number of larger boats in our survey makes it difficult to determine what percentage of the boats has an operational draft greater than three feet.

While the revised rules provide more protection for bottom habitat than currently exists, the data suggest that increasing the minimum water depth needed to receive a GP for a dock in a PNA or over shell bottom or SAV should be increased to at least 2.5 ft to account for docking of boats of all sizes. If the minimum water depth in section (g) and (h) is increased, the depth specified in (i) should be increased accordingly.

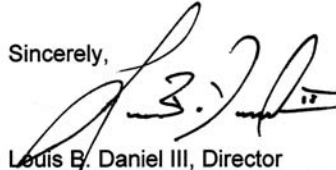
Rule 15A NCAC 07H .1205 (i) states that floating piers and floating docking facilities located in PNAs, over shellfish beds, or over SAV shall be allowed where there is at least 18" inches between the substrate and bottom of structure. Shading from dock structures can result in SAV loss below the dock. Impacts from shading can be minimized by narrowing the width of the dock, increasing the height above the water, and allowing space between plankings (Shafer et al. 2008). Because floating docks sit directly on the water

Bob Emory Letter, Page Three
March 5, 2009

surface and are a solid surface, the structure prevents light from reaching below it to a greater extent than elevated docks. Because of this, any SAV occurring below the floating dock would be completely shaded out and die. DMF therefore recommends that floating docks over SAV not be permitted through the GP process. Elevation to a major permit would allow greater review, possibly relocating the structure to avoid SAV or modifying the design to a fixed dock that allows some light penetration beneath it.

Thank you for the opportunity to comment on these draft rules.

Sincerely,



Louis B. Daniel III, Director
N.C. Division of Marine Fisheries

cc: Dee Lupton, DMF Deputy Director
Anne Deaton, DMF Habitat Protection Section Chief
DMF District Managers
DMF Biological Supervisors

Attachment

LBD/ad/cb

Table 1. Number of registered recreational boats of different length categories in the 20 coastal counties of North Carolina, 2008 (WRC, unpub. data).

County	Number of boats per boat length interval (feet)							Total
	< 16 Ft	16 - 16.9 Ft	17 - 17.9 Ft	18 - 18.9 Ft	19 - 23.9 Ft	24 - 30 Ft	> 30 Ft	
New Hanover	5,784	1,965	2,090	1,588	4,606	1,613	347	17,993
Carteret	3,797	1,308	1,423	1,280	4,799	1,511	362	14,480
Brunswick	4,971	1,532	1,099	1,006	2,414	873	155	12,050
Onslow	3,972	1,212	1,254	958	2,176	586	109	10,287
Craven	3,472	866	932	806	2,383	714	190	9,363
Beaufort	2,926	829	717	766	1,853	647	164	7,902
Dare	2,075	592	502	586	1,951	736	116	6,538
Pender	2,851	944	682	484	1,163	325	65	6,513
Currituck	1,677	508	473	499	945	263	22	4,387
Pamlico	1,314	313	301	282	823	430	117	3,580
Pasquotank	1,047	262	264	235	614	188	19	2,629
Perquimans	898	177	165	170	469	174	23	2,076
Chowan	738	190	208	198	489	113	26	1,962
Bertie	743	280	251	166	330	52	9	1,831
Hertford	599	208	173	163	291	58	6	1,498
Washington	531	184	143	142	250	73	9	1,332
Camden	547	129	117	120	282	100	16	1,311
Gates	521	144	129	105	180	26	2	1,107
Hyde	253	97	70	81	176	53	17	747
Tyrrell	197	88	57	53	101	25	12	533
TOTAL	38,913	11,828	11,050	9,668	26,295	8,560	1,786	108,099

Table 2. Operational draft of DMF vessels of various styles and lengths.

Make	Boat			Draft ²		Engine			
	Type ¹	Hull	Length (ft)	Boat Draft (in)	Operational Draft (in)	Make	Type	Drive	HP
Jones Bros.	CC	Flat	19	11	13	Mercury	OB	Jet	80
Roughneck	Jon	Semi V	14	4.7	17.7	Evinrude	OB	Prop	25
Southern Skimmer	CC	Flat	17	9.8	18.1	Johnson	OB	Prop	50
Jon Boat	Jon	Semi V	13	10.6	18.9	Johnson	OB	Prop	30
Carolina Skiff	Jon	Flat	17	7.9	19.7	Yamaha	OB	Prop	40
Jones Bros.	CC	Flat	22	9.8	19.7	Yamaha	OB	Prop	100
Jones Bros.	CC	Flat	22	11.8	20.9	Yamaha	OB	Prop	115
Carolina Skiff	CC	Flat	24	8.3	21.3	Johnson	OB	Prop	115
Jones Bros.	CC	Flat	17	8.7	21.3	Johnson	OB	Prop	40
Sea Ark	SC	Semi V	20	7.9	21.7	Yamaha	OB	Prop	80
Jon Boat	Jon	Semi V	17	11.8	21.7	Johnson	OB	Prop	50
Jones Bros.	CC	Flat	22	7.9	22	Johnson	OB	Prop	115
Parker	CC	V	18	11.8	22.4	Mercury	OB	Prop	
Jones Bros.	CC	Flat	22	12.2	23.2	Yamaha	OB	Prop	100
Jones Bros.	CC	Flat	22	12.2	23.6	Mercury	OB	Prop	150
Jones Bros.	CC	Flat	21	12.6	23.6	Mercury	OB	Prop	115
Intruder	CC	Tunnel	20	13.8	23.6	Mercury	OB	Prop ³	115
Jones Bros.	CC	V	20	13.8	23.6	Johnson	OB	Prop ³	175
Jones Bros.	CC	Flat	22	11.8	24.4	Yamaha	OB	Prop	100
Priveteer	Cabin	V	22	15	26.8	Mariner	OB	Prop	225
Parker	CC	V	21	18.9	27.6	Mercury	OB	Prop	200
Jones Bros.	CC	Flat	25	15.7	28.7	Johnson	OB	Prop	150
Jones Bros.	CC	Flat	19	10.6	29.5	Johnson	OB	Prop	115
Parker	CC	V	23	17.7	29.5	Mercury	OB	Prop	225
Parker	CC	V	25	21.7	29.5	Johnson	OB	Prop	225 (x2)
Parker	WA	V	23	20.5	29.9	Mercury	OB	Prop	225
Albemarle	CC	V	26	25.6	32.7	Mercury	OB	Prop	225 (x2)
Parker	CC	V	18	14.6	34.3	Evinrude	OB	Prop	150
Jones Bros.	CC	Flat	20	19.7	34.6	Mercury	OB	Prop	
Parker	Cabin	V	25	24.4	35.4	Johnson	OB	Prop	200 (x2)
Parker	CC	V	24	22	39.3	Mercury	OB	Prop	225
Albemarle	WA	V	24	23.6	39.3		I/O	Prop	

¹Type codes: CC = center console, WA = walkaround, SC = side console

² Boat draft = water line to hull bottom; operational draft = water line to skeg bottom

³ Mounted on jack plate



☒ North Carolina Wildlife Resources Commission ☒

Gordon Myers, Executive Director

March 13, 2009

Bob Emory, Chairman
N.C. Coastal Resources Commission
C/o NC Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Dear Mr. Emory,

The N.C. Wildlife Resources Commission (NCWRC) has reviewed the N.C. Division of Coastal Management's (NCDCM) draft rules for *15A NCAC 07H 1200 – General Permit For Construction of Piers and Docking Facilities in Estuarine and Public Trust Waters and Ocean Hazard Areas*. These rules outline the general permit process for piers and docking facilities and define the type of developments that qualify for a General Permit. Proposed developments with project scopes larger than defined in this Section are not necessarily denied, but must proceed through either the CAMA Minor or Major process. Since General Permits are issued by NCDCM without review by state and federal resources agencies, it is critical that wildlife and fishery resources are considered in the rule revisions.

The NCWRC appreciates the efforts by NCDCM to modify the general permit rules to include new structure definitions, modify allowable structure size, and incorporate consideration of important aquatic resources. The draft rules include provisions requiring resource agency consultation when projects are proposed within primary nursery areas (PNAs), submerged aquatic vegetation (SAV), or shellfish beds when site conditions do not meet certain qualifications. We concur with these proposed changes as they benefit aquatic resources and afford more protection than is currently provided.

The NCWRC does have concerns with 15A NCAC 07H .1205 (g) and (h) as proposed. Specific conditions in this section define a water depth of -2 feet at normal low water (NLW) or normal water level (NWL)(which ever is applicable) is required before a General Permit can be issued for docking facilities within PNAs or over SAV and shellfish beds. Resource agencies including NCDCM, NCWRC, the N.C. Division of Marine Fisheries (NCDMF), and the N.C. Division of Water Quality (NCDWQ) conducted interagency meetings to discuss proposed rule changes and identify potential impacts these changes may have to natural resources. The NCWRC was

Mailing Address: Division of Inland Fisheries • 1721 Mail Service Center • Raleigh, NC 27699-1721
Telephone: (919) 707-0220 • **Fax:** (919) 707-0028

Draft 15ANCAC 07H.1200

Page 2

March 13, 2009

concerned about docking facilities located in PNAs and over SAV with water depths less than -3 feet NLW / NWL. However, discussions within the group lead to a compromise recommendation of a minimum water depth of -2.5 feet NLW / NWL for docking facilities within PNAs, SAV, and shellfish beds. This minimum -2.5 feet water depth should allow vessel ingress and egress with minimal impacts to PNAs and SAV.

Our concerns with the -2 feet NLW / NWL rule proposal are linked to the direct and cumulative impact vessels may have on sensitive aquatic species and their habitats. Development within our state has migrated to smaller creeks and headwater systems. These smaller systems often provide important spawning and nursery habitats essential for fish and shellfish, including river herring. These critical habitats often include organic sediments, shallow water depths, and varying amounts of SAV that are used by several life stages of fish. Juvenile life stages are more sensitive to elevated turbidity caused by hull scraping and prop scour in shallow waters. These smaller systems maintain significant aquatic resources, and recover more slowly than deep water habitats or systems with sandy sediments.

NCWRC does not object to all docking facilities proposed in -2 feet NLW / NWL. However, we recommend the proposed water depth that triggers consultation with state resources agencies be changed to -2.5 feet NLW / NWL in PNAs and over SAV and shellfish beds. This minimal change will significantly reduce potential impacts anticipated with General Permits and is consistent with our agency's comments and recommendations provided through the Major Permit process. We acknowledge and appreciate the Coastal Resource Commission's and NCDCM's concern with the increased amount and processing time required for Minor and Major Permit applications resulting from this change. However, the benefit to aquatic resources is significant and we are committed to completing consultations and reviews in a timely manner.

We appreciate your efforts to incorporate fish and wildlife concerns into these draft rules. We value this opportunity to provide comments and we trust that you will vigorously review and consider our alternative.

Please don't hesitate to contact Maria Dunn at (252) 948-3916 if you have any questions or need additional information.

Sincerely,



Robert L. Curry, Chief
Division of Inland Fisheries



North Carolina Department of Environment and Natural Resources

Division of Water Quality

Beverly Eaves Perdue
Governor

Coleen H. Sullins
Director

Dee Freeman
Secretary

MEMORANDUM

To: Jim Gregson
Director, Division of Coastal Management

From: Matt Matthews *mm*
Wetlands and Stormwater Branch Chief

Date: March 16, 2009

Subject: Comments on proposed changes to Division of Coastal Management (DCM) Rule 15A NCAC 07H .1200 (General Permit for Construction of Piers, and Docking Facilities: In Estuarine and Public Trust Waters and Ocean Hazard Areas)

RECEIVED

MAR 20 2009

Morehead City DCM

This memo communicates the Division of Water Quality's comments on the proposed rule revisions for 15A NCAC .07H .1200, published in the North Carolina Register on January 15, 2009. Overall, the Division of Water Quality (DWQ) concurs with the proposed language in 15A NCAC 07H .1201 and .1204; however, we wish to register our concerns with regard to the proposed changes in 15A NCAC 07H .1205, Specific Conditions (g), (h), and (i). DWQ has concerns about the effects of turbidity caused by prop wash that occurs at the water levels specified in the proposed rule, given that DWQ will not have the opportunity to comment on individual projects per the general permit process. Turbidity can cause mortality to fish larvae, shellfish, and submerged aquatic vegetation (SAV). In addition, prop wash can disturb habitat and cause direct destruction of shellfish beds and SAV.

We appreciate the opportunity to comment on the proposed rule revisions. We would be happy to provide copies of site reports and other data gathered in the field to further illustrate our concerns. If you have any questions, do not hesitate to contact me at 919-807-6380.

cc: Coleen Sullins
Chuck Wakild
Cyndi Karoly
Al Hodge
Rick Shiver

1617 Mail Service Center, Raleigh, North Carolina 27699-1617
Location: 512 N. Salisbury St. Raleigh, North Carolina 27604
Phone: 919-807-6300 \ FAX: 919-807-6492 \ Customer Service: 1-877-623-6748
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Subject: [Fwd: Section 15 ANCAC07H.1100]
From: Jim Gregson <Jim.Gregson@ncmail.net>
Date: Tue, 17 Mar 2009 08:27:37 -0400
To: Angela Willis <Angela.Willis@ncmail.net>, 'Mike Lopazanski'
<Mike.Lopazanski@ncmail.net>, ted.tyndall@ncmail.net, David Moye
<David.Moye@ncmail.net>

----- Original Message -----
Subject: Section 15 ANCAC07H.1100
Date: Mon, 16 Mar 2009 19:33:25 -0400
From: Doug Brady <dougbrady@ec.rr.com>
To: Director - DCM Jim Gregson <Jim.Gregson@ncmail.net>

Mr. Gregson,

I submit these comments relative to Section 15ANCAC07H.1100.
For piers,docks and rip rap.

- A general point I would make is that these changes will delay the permitting process significantly. The majority of the gps which are authorized each year are for piers and they are for simple residential use. A significant portion of these piers will fall subject to the proposed changes, one of which requires coordination and specific approval from another agency. This will cause significant delay in the authorization process and will most assuringly require a significant number of property owners to go through a much longer CAMA major permitting process with the uncertainty if their pier project will be approved by individual staff with the Divisions of Marine Fisheries and the Wildlife Resources Commission. The rules do not contain any specific standards that these agencies will use in evaluating permit applications nor does it allow any flexibility for DCM. It in fact, it requires that the approval process for simple residential piers be delegated to other agencies that are not within the purview of the CAMA and the CRC.
 - Some of the existing CRC pier rules appear to be fundamentally in conflict with these proposed rules. In many cases, the CRC's existing rules limits the length of piers to the shallower water (has to be in line with adjacent pier structures, can not exceed 200' without obtaining additional 1' every 100') and thus encourages piers to be build closer to shore and in shallower water.
 - Specific issues: - There are many areas designated primary nursery areas throughout the state and the majority of are shallow. In what cases will DMF and/or WRC not have concerns and what would those circumstances be?
 - The specific MFC definition of submerged aquatic vegetation (sav) beds needs to be included in this rule since the MFC could change the definition without the CRC's approval. The ability for the property owner to know if they are developing in savs are unlikely given the ability of savs to move depending on the time of year and the frequency of storms.
 - The same requirement for shellfish beds as savs since it relies of the MFC standards. How is a property owner or DCM to know which shorelines have "shellfish beds". Does this require DMF to review all pier sites to make this evaluation?
 - There needs to be standards how DMF and WRC will determine if a pier and docking facility located in an area of sav or shellfish beds have been "mimimized" (7H.1205(h)(2)).
 - It would be helpful to define what is a pier and what is a docking facility.
- I urge you to delay implementation of these rule and give the public more opportunity to comment. I do not think the individual landowner is aware of these changes and the impact that they will have on property rights.

Doug Brady
805 Front St.
Beaufort,N.C. 28516

DT: March 12, 2009
TO: COASTAL RESOURCES COMMISSION
FR: The LAND ALLIANCE of NORTH CAROLINA
RE: PUBLIC COMMENT
PIER DOCK AND BULKHEAD RULES CHANGES
www.oah.state.nc.us/rules/register/Volume23Issue14January152009.pdf



ABSTRACT :

The proposed Revetment, Pier and Dock rules unnecessarily restrict property rights to build same. LA-NC asserts that any environmental benefits of proposed rules when compared to Commercial Fishing practices of clam kicking, shallow and shrimp trawling, is miniscule and inconsequential.

1) Rewording of "Rip Rap" to "Rip Rap Revetments" implies engineered structure .

This is excessive for installing rip rap. The method should be vested to the property owner, not the State.

2) Boat Houses prohibited from lots with less than 75' frontage. Why?

3) Require 2' Minimum Water at dock head at MLW , along with previous limitations on length, further and unreasonably reduces private property rights and the use and value of water front property , with insignificant environmental benefit.

4) Regulations regarding hand rails is hazardous and unnecessary .

5) The Pier and Dock rules lump canal front, high energy Sound/ River front, and low energy Sound / River front together. These conditions are widely variable and should have different rules.

The Proposed Rules are further excessive takings of Private Property Rights.

There needs to be better balance in the regulatory process.

=====

It is assumed that the environmental reasoning ostensibly supporting these rules to further restrict Pier and Dock installations, is to reduce impairment of live bottom. LA-NC asserts that :

(a) any environmental benefits of proposed rules when compared with Commercial Fishing practices of clam kicking, scallop and shrimp trawling, is miniscule and inconsequential.

(b) Observations indicate that piers / docks, and rip rap actually enhance sea-life by providing attachment points, even under cover; consequently, rip rap , piers and docks should be encouraged to enhance growth of sea life.

(c) Requirement of 2' Minimum Water at dock head at MLW is unreasonably restrictive of use.

We suggest that a valid comparative analysis be performed by out of state independent scientists before imposing these new restrictions.

The Pier and Dock rules lump Canal front, high energy Sound/ River front, and low energy Sound / River front property together. These conditions are widely variable and should have different rules.

CANAL FRONT: It is difficult to understand why there are any rules on Canal front lots other than rules to prevent blocking the channel or obstruction a neighbors use. 15' side setback is unnecessary .

HIGH ENERGY SOUND / RIVER FRONT: Rules to deal with damaged structures should be considered .

LOW ENERGY SOUND / RIVER FRONT: No observed reason for further restriction of piers or docks.

Developers or owners of lots should be allowed to plan piers and docks with permit transferable to buyers.

These CRC (CAMA) Rules further extend the States authority to control and/ or take Rights of Private Property Owners. This process began in the 60's, and 70's with the States taking of lands below Sea level. The prime focus then pertained to Ocean Front property with rules to preclude bulkheads and jetties that obstruct walking along the Beach . Assertions were that the State was better able to protect the beach.

The Legal Premise for the "taking without compensation" was said to be based on English Common Law , where the State Environmental Agencies asserted Claims, that the King owned the waters and rivers, and the land beneath. They were right.

In fact, the King effectively owned all the land, water, forests, and everything, and Granted use there of, or, could takeaway rights of use of all land and property in a manner limited by the Rights set in the Magna Carta.

That's why we fought a Revolution.

The American Revolution was fought, so the State (King) couldn't take property without just compensation, a practice that Governor Lord Tryon had adopted in order to build his Palace. It is indeed ironic that our own State of North Carolina has rapidly and forcefully accelerated the takings of property rights in North Carolina, the Crown Colony that, in 1771 was the site of the Battle of Alamance which some Historians say was the First Battle of the American Revolution.

Since the '70, State takings of Waters has been extended to restricting use of estuarine areas, with bulkhead, jetty, pier and dock rules and regulations.

This is not to say that rules and regulations that benefit the common good are bad, but rather to observe that Policy in the North Carolina has been distorted to serve the Political Objectives of Environmental Agencies, and Organizations that deem they know better than anyone else what is good and proper.

The problem is that the Environmental Elites, have made a practice of misrepresenting and distorting facts and science in order to unreasonably determine how other people can to use their property, and far to often property owners don't know what has happened until it is to late.

Bill Price 336-214-2676
Land Alliance of North Carolina
" Seeking Valid Science for Valid Rules"