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NORTH CAROLINA
Environmental Quality

CRC-23-14

April 14, 2023

MEMORANDUM

TO: Coastal Resources Commission

FROM: Daniel Govoni

SUBJECT: Comments and Consideration of Adoption of Amendments to 15A NCAC 7M .0600 Floating Structure Policy & 7H. 0208 Piers and Docking Facilities- Floating Upweller Systems

The Commission has had several discussions regarding the siting of Floating Upweller Systems (FLUPSYs), which are used to grow out shellfish and protect them from predation until they reach a specific size to survive within a shellfish lease. The Commission has proposed rule amendments that would address FLUPSYs as floating structures and require them to be sited in a permitted marina or at a private docking facility where they would be subject to the same platform area limitations that apply elsewhere in your rules. The proposed amendments to 15A NCAC 07H .0208 Piers and Docking Facilities and 7M .0600 Floating Structure Policies are as follows:

15A NCAC 7H .0208(b)(6)(B) - the amendment to this rule includes platforms in the calculation of square footage of shading impacts and clarifies that floating upweller systems are part of the allowance of shading impacts associated with docking facilities.

15A NCAC 7M .0603 – adds floating upweller systems definition and clarifies that FLUPSYs may be permitted as a platform at a private docking facility in accordance with 15A NCAC 7H .0208(b)(6) or at a permitted marina in accordance with 15A NCAC 7H .0208(b)(5).

Additional amendments are also proposed to the Floating Structure Policy due to recent Rules Review Commission responses to the Division's Periodic Review of Existing Rules, which includes striking language that already exists in the General Statutes (CAMA).

The fiscal analysis was approved at the November 2022 CRC meeting, and a public hearing was conducted on February 23, 2023. Comments were received from the North Carolina Shellfish



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Growers Association, North Carolina Farm Bureau Federation Inc., and a local shellfish grower. All comments received were opposed to the proposed rule amendments. Comments asserted that aquaculture is considered agriculture and the Coastal Area Management Act (CAMA) exempts agricultural activities from being considered “development.” The Commission’s counsel provided the Commission with a legal opinion regarding whether floating upweller systems are exempt from CAMA, concluding that the legislature has explicitly defined development to include *the placement of a floating structure* in the Public Trust Areas and Estuarine Waters AECs. N.C.G.S. § 113A-103(5)(a). The exceptions to this definition do not explicitly refer to aquaculture or floating upweller systems.

Public comments also suggested that the small size of FLUPSYs translates to minimal or no environmental impacts or conflicts with navigation when sited in an approved open water lease. While a typical FLUPSY may be approximately 8x20’ (160 sf), commenters did not suggest limiting the total number of FLUPSYs that could be placed in any specific region, or “rafted” together at a private dock, or that the size of any individual FLUPSY size should be restricted in some way. Absent a CAMA permit, the location, size, and density of FLUPSYs in approved leases would not be restricted under the Army Corps of Engineers Nationwide Permit 48 (unless impacting greater than ½ acre of submerged aquatic vegetation), and there are also no specific rules or standards pertaining to FLUPSYs in NC Marine Fisheries Commission (MFC) rules governing leases. The NC Division of Marine Fisheries has communicated that the MFC does not have plans to regulate floating structures and agreement that floating structures should require CAMA permitting.

Comments also raised concerns over the type of CAMA permits that might be needed for floating upweller systems, and specifically that CAMA Minor Permits should be used rather than Major Permits, as “most docks receive minor permits.” To clarify, most private docks receive CAMA General Permits, which are a streamlined version of CAMA Major Permits. CAMA Minor Permits are typically issued by local governments for small-scale, upland development. For FLUPSYs proposed to be moored at private docking facilities, a CAMA General Permit may be suitable at some point in the future, and this may be accomplished with modifications to 15A NCAC 07H.1200 et seq. However, DCM prefers that initial applications be reviewed through the CAMA Major Permit process to identify any federal or state resource agency concerns, which would then inform discussions regarding the potential use of General Permits in the future. Since marinas require CAMA Major Permits, the siting of a FLUPSY in a marina would likely involve a Minor Modification of the existing CAMA Major Permit.

Public comments received also suggest that the proposed rules would essentially “regulate the industry out of existence.” In fact, DCM’s involvement in shellfish aquaculture permitting is not out of line with other state coastal programs based on staff research. For example, applicants in South Carolina are required to obtain a shellfish lease from the SC Department of Natural Resources and an individual permit from the SC Office of Ocean and Coastal Resource Management (state coastal program), which includes the Coastal Zone Consistency Certification as well as the 401 Water Quality Certification. The SC coastal program requires operational plans and surveyed drawings of gear associated with water column leases (including oyster cages). Subsequent changes in aquaculture gear or infrastructure may require an amendment of the coastal permit. Georgia only issues leases in areas pre-approved by the State’s



Coastal Resources Division (GA CRD), which by rule must consider other uses of the State’s waters, including commercial and recreational fishing, boat traffic, riparian viewsheds, research sites, areas where property owners may exercise riparian rights, and other factors. In addition to a lease, GA CRD also requires a Shellfish Mariculture Permit, as well as “cage permits” in increments of 25 cages (which can include cages, bags, or baskets). To date, DCM has not required CAMA permits for any water column or bottom cage leases, except where a project would include platforms or floating structures (e.g. upwellers, enclosed processing facilities).

The General Policy in 15A NCAC 07M .0601 states “... that the general welfare and public interest require that floating structures to be used for residential or commercial purposes not infringe upon the public trust rights nor discharge into the public trust waters of the coastal area of North Carolina.” DCM staff believes the proposed rule amendments can accommodate FLUPSYs while limiting public trust impacts, and therefore recommends adoption.



15A NCAC 07H .0208 USE STANDARDS

(b) Specific Use Standards

(6) Piers and Docking Facilities.

- (A) Piers shall not exceed six feet in width. Piers greater than six feet in width shall be permitted only if the greater width is necessary for safe use, to improve public access, or to support a water dependent use that cannot otherwise occur;
- (B) The total square footage of shaded impact for ~~docks~~ docks, platforms and mooring facilities (excluding the pier) allowed shall be eight square feet per linear foot of shoreline with a maximum of 2,000 square feet. In calculating the shaded impact, uncovered open water slips shall not be counted in the total. Projects requiring dimensions greater than those stated in this Rule shall be permitted only if the greater dimensions are necessary for safe use, to improve public access, or to support a water dependent use that cannot otherwise occur. Size restrictions shall not apply to marinas;
- (C) Piers and docking facilities over coastal wetlands shall be no wider than six feet and shall be elevated at least three feet above any coastal wetland substrate as measured from the bottom of the decking;
- (D) A boathouse shall not exceed 400 square feet except to accommodate a documented need for a larger boathouse and shall have sides extending no farther than one-half the height of the walls as measured from the Normal Water Level or Normal High Water and covering only the top half of the walls. Measurements of square footage shall be taken of the greatest exterior dimensions. Boathouses shall not be allowed on lots with less than 75 linear feet of shoreline, except that structural boat covers utilizing a frame-supported fabric covering may be permitted on properties with less than 75 linear feet of shoreline when using screened fabric for side walls. Size restrictions do not apply to marinas;
- (E) The total area enclosed by an individual boat lift shall not exceed 400 square feet except to accommodate a documented need for a larger boat lift;
- (F) Piers and docking facilities shall be single story. They may be roofed but shall not be designed to allow second story use;
- (G) Pier and docking facility length shall be limited by:
 - (i) not extending beyond the established pier or docking facility length along the same shoreline for similar use. This restriction does not apply to piers 100 feet or less in length unless necessary to avoid unreasonable interference with navigation or other uses of the waters by the public;
 - (ii) not extending into the channel portion of the water body; and
 - (iii) not extending more than one-fourth the width of a natural water body, or human-made canal or basin. Measurements to determine widths of the water body, canals, or basins shall be made from the waterward edge of any coastal wetland vegetation that borders the water body. The one-fourth length limitation does not apply in areas where the U.S. Army Corps of Engineers, or a local government in consultation with the Corps of Engineers, has established an official pier-head line. The one-fourth length limitation shall not apply when the proposed pier is located between longer piers or docking facilities within 200 feet of the applicant's property. However, the proposed pier or docking facility shall not be longer than the pier head line established by the adjacent piers or docking facilities, nor longer than one-third the width of the water body.
- (H) Piers or docking facilities longer than 400 feet shall be permitted only if the proposed length gives access to deeper water at a rate of at least 1 foot each 100 foot increment of length longer than 400 feet, or, if the additional length is necessary to span some obstruction to navigation. Measurements to determine lengths shall be made from the waterward edge of any coastal wetland vegetation that borders the water body;
- (I) Piers and docking facilities shall not interfere with the access to any riparian property and shall have a minimum setback of 15 feet between any part of the pier or docking facility and the adjacent property owner's areas of riparian access. The line of division of areas of



riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. If the adjacent property is sold before construction of the pier or docking facility commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development of the pier. Application of this Rule may be aided by reference to the approved diagram in 15A NCAC 07H .1205(t) illustrating the rule as applied to various shoreline configurations. When shoreline configuration is such that a perpendicular alignment cannot be achieved, the pier shall be aligned to meet the intent of this Rule to the maximum extent practicable as determined by the Director of the Division of Coastal Management; and

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



Proposed Amendment to 15A NCAC 07M .0600 Floating Structure Policies - FLUPSYs

15A NCAC 07M .0601 DECLARATION OF GENERAL POLICY

It is hereby declared that the general welfare and public interest require that floating structures to be used for residential or commercial purposes not infringe upon the public trust rights nor discharge into the public trust waters of the coastal area of North Carolina.

History Note: Authority G.S. 113A-102; 113A-107; 113A-108; 113A-118; 113A-120(a)(8);
113A-124(c)(5);
Eff. July 1, 1983.

15A NCAC 07M .0602 DEFINITIONS

(a) A boat is a vessel or watercraft of any type or size specifically designed to be self propelled, whether by engine, sail, oar, or paddle or other means, which is used to travel from place to place by water.

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

History Note: Authority G.S. 113A-102; 113A-107; 113A-108; 113A-118; 113A-120(a)(8);
113A-124(c)(5);
Eff. July 1, 1983.

15A NCAC 07M .0603 POLICY STATEMENTS

(a) It is the policy of the State of North Carolina that floating structures shall not be allowed or permitted within the public trust waters of the coastal area except in permitted marinas.

(b) All floating structures shall be in conformance with local regulations for on-shore sewage treatment.

(c) A floating upweller system is a structure used in mariculture for the purpose of growing shellfish. For the purpose of this rule, floating upweller systems are considered floating structures.

(b) Floating upweller systems may be permitted as a platform at a private docking facility in accordance with 15A NCAC 7H .0208(b)(6) or at a permitted marina in accordance with 15A NCAC 7H .0208(b)(5)

History Note: Authority G.S. 113A-102; 113A-107; 113A-108; 113A-118; 113A-120(a)(8);
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