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TO: The Coastal Resources Commission

FROM: Christine A. Goebel, DEQ Assistant General Counsel 

DATE: April 11, 2019 (for the April 17-18, 2019 CRC Meeting)

RE: **Variance Request by the N.C. State Ports Authority (CRC-VR-19-04)**

Petitioner N.C. State Ports Authority (“NC Ports” or Petitioner) develops and administers the state port facility in Wilmington (“POW”), south of the Cape Fear Memorial Bridge on the Cape Fear River. On October 26, 2018, Petitioner sought a major modification to a long-existing CMAA major permit in order to install a 1,416 foot long vertical submerged toe wall, to enlarge the existing turning basin from 1,400 feet to 1,524 feet in diameter necessitating 17.76 ac of dredging including 1.4 ac of wetlands, and the removal of an existing wooden pier. This area of the Cape Fear River is designated as a Primary Nursery Area (“PNA”) by the Marine Fisheries Commission, and per 15A NCAC 7H .0208(b)(1), new dredging in a PNA is prohibited. Additionally, concerns were raised by DMF and DCM about significant adverse impacts to PNA and Coastal Wetlands resources. On March 19, 2019, DCM denied Petitioner’s modification request based on its incompatibility with those rules noted in the denial letter. Petitioner now seeks a variance to allow the proposed new dredging and other development proposed. Petitioner also proposes several mitigation measures in an attempt to offset the proposed impacts. Petitioner sought, and were granted special permission by the Chair to waive the usual variance procedure timeline rules and proceed in an expedited manner at your April meeting.

The following additional information is attached to this memorandum:

- Attachment A: Relevant Rules
- Attachment B: Stipulated Facts
- Attachment C: Petitioner’s Positions and Staff’s Responses to Variance Criteria
- Attachment D: Petitioner’s Variance Request Materials
- Attachment E: Stipulated Exhibits including powerpoint

cc(w/enc.): NC Ports through counsel Special Deputy AG Scott Slusser & Asst. AG Mollie Cozart, NCDOJ-Transportation Section, electronically
 Mary Lucasse, Special Deputy AG and CRC Counsel, electronically
 Linda Painter, New Hanover Co. CAMA LPO, electronically



RELEVANT STATUTES OR RULES**APPENDIX A****SECTION .0200 – THE ESTUARINE AND OCEAN SYSTEMS****15A NCAC 07H .0201 ESTUARINE AND OCEAN SYSTEM CATEGORIES**

Included within the estuarine and ocean system are the following AEC categories: estuarine waters, coastal wetlands, public trust areas, and estuarine and public trust shorelines. Each of the AECs is either geographically within the estuary or, because of its location and nature, may significantly affect the estuarine and ocean system.

15A NCAC 07H .0202 SIGNIFICANCE OF THE SYSTEMS APPROACH IN ESTUARIES

The management program must embrace all characteristics, processes, and features of the whole system and not characterize individually any one component of an estuary. The AECs are interdependent and ultimately require management as a unit. Any alteration, however slight, in a given component of the estuarine and ocean system may result in unforeseen consequences in what may appear as totally unrelated areas of the estuary. For example, destruction of wetlands may have harmful effects on estuarine waters which are also areas within the public trust. As a unified system, changes in one AEC category may affect the function and use within another category.

15A NCAC 07H .0203 MANAGEMENT OBJECTIVE OF THE ESTUARINE AND OCEAN SYSTEM

It is the objective of the Coastal Resources Commission to conserve and manage estuarine waters, coastal wetlands, public trust areas, and estuarine and public trust shorelines, as an interrelated group of AECs, so as to safeguard and perpetuate their biological, social, economic, and aesthetic values and to ensure that development occurring within these AECs is compatible with natural characteristics so as to minimize the likelihood of significant loss of private property and public resources. Furthermore, it is the objective of the Coastal Resources Commission to protect present common law and statutory public rights of access to the lands and waters of the coastal area.

15A NCAC 07H .0204 AECS WITHIN THE ESTUARINE AND OCEAN SYSTEM

The following regulations in this Section define each AEC within the estuarine and ocean system, describe its significance, articulate the policies regarding development, and state the standards for development within each AEC.

15A NCAC 07H .0205 COASTAL WETLANDS

(a) Description. Coastal wetlands are defined as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides, that reach the marshland areas through natural or artificial watercourses, provided this does not include hurricane or tropical storm tides. Regular or occasional flooding shall be established through field indicators, including the observation of tidal water on the site, changes in elevation, presence of periwinkle (*littoraria* spp.), presence of crab burrows, staining, or wrack lines. Coastal wetlands may contain one or more of the following marsh plant species:

- (1) Cord Grass (*Spartina alterniflora*);
- (2) Black Needlerush (*Juncus roemerianus*);
- (3) Glasswort (*Salicornia* spp.);
- (4) Salt Grass (*Distichlis spicata*);
- (5) Sea Lavender (*Limonium* spp.);
- (6) Bulrush (*Scirpus* spp.);
- (7) Saw Grass (*Cladium jamaicense*);
- (8) Cat-tail (*Typha* spp.);
- (9) Salt Meadow Grass (*Spartina patens*); or
- (10) Salt Reed Grass (*Spartina cynosuroides*).

The coastal wetlands AEC includes any contiguous lands designated by the Secretary of DEQ pursuant to G.S. 113-230(a).

(b) Significance. The unique productivity of the estuarine and ocean system is supported by detritus (decayed plant-material) and nutrients that are exported from the coastal wetlands. Without the wetlands, the high productivity levels and complex food chains typically found in the estuaries could not be maintained. Additionally, coastal wetlands serve as barriers against flood damage and control erosion between the estuary and the uplands.

(c) Management Objective. It is the objective of the Coastal Resources Commission to conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values, and to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource necessary to the functioning of the entire estuarine system.

(d) Use Standards. Suitable land uses are those consistent with the management objective in this Rule. First priority of use shall be allocated to the conservation of existing coastal wetlands. Secondary priority of coastal wetland use shall be given to those types of development activities that require water access and cannot function elsewhere.

Unacceptable land uses include restaurants, businesses, residences, apartments, motels, hotels, trailer parks, parking lots, private roads, highways, and factories. Acceptable land uses include utility easements, fishing piers, docks, wildlife habitat management activities, and agricultural uses such as farming and forestry drainage as permitted under North Carolina's Dredge and Fill Law, G.S. 113-229, or applicable local, state, and federal laws.

In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

(e) Alteration of Coastal Wetlands. Alteration of coastal wetlands includes mowing or cutting of coastal wetlands vegetation whether by mechanized equipment or manual means. Alteration of coastal wetlands by federal or state resource management agencies as a part of planned resource management activities is exempt from the requirements of this Paragraph. Alteration of coastal wetlands shall be governed according to the following provisions:

- (1) Alteration of coastal wetlands shall be exempt from the permit requirements of the Coastal Area Management Act (CAMA) when conducted in accordance with the following criteria:
 - (A) Coastal wetlands may be mowed or cut to a height of no less than two feet, as measured from the coastal wetland substrate, at any time and at any frequency throughout the year;

- (B) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, once between each December 1 and March 31;
 - (C) Alteration of the substrate is not allowed;
 - (D) All cuttings or clippings shall remain in place as they fall;
 - (E) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, to create an access path four feet wide or less on waterfront lots without a pier access; and
 - (F) Coastal wetlands may be mowed or cut by utility companies as necessary to maintain utility easements.
- (2) Coastal wetland alteration not meeting the exemption criteria of this Rule shall require a CAMA permit. CAMA permit applications for coastal wetland alterations are subject to review by the North Carolina Wildlife Commission, North Carolina Division of Marine Fisheries, U.S. Fish and Wildlife Service, and National Marine Fisheries Service in order to determine whether or not the proposed activity will have a significant adverse impact on the habitat or fisheries resources.

15A NCAC 07H .0206 ESTUARINE WATERS

(a) Description. Estuarine waters are defined in G.S. 113A-113(b)(2) to include all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters...

(b) Significance. Estuarine waters are the dominant component and bonding element of the entire estuarine and ocean system, integrating aquatic influences from both the land and the sea. Estuaries are among the most productive natural environments of North Carolina. They support the valuable commercial and sports fisheries of the coastal area which are comprised of estuarine dependent species such as menhaden, flounder, shrimp, crabs, and oysters. These species must spend all or some part of their life cycle within the estuarine waters to mature and reproduce. Of the 10 leading species in the commercial catch, all but one are dependent on the estuary.

This high productivity associated with the estuary results from its unique circulation patterns caused by tidal energy, fresh water flow, and shallow depth; nutrient trapping mechanisms; and protection to the many organisms. The circulation of estuarine waters transports nutrients, propels plankton, spreads seed stages of fish and shellfish, flushes wastes from animal and plant life, cleanses the system of pollutants, controls salinity, shifts sediments, and mixes the water to create a multitude of habitats. Some important features of the estuary include mud and sand flats, eel grass beds, salt marshes, submerged vegetation flats, clam and oyster beds, and important nursery areas.

Secondary benefits include the stimulation of the coastal economy from the spin off operations required to service commercial and sports fisheries, waterfowl hunting, marinas, boatyards, repairs and supplies, processing operations, and tourist related industries. In addition, there is considerable nonmonetary value associated with aesthetics, recreation, and education.

(c) Management Objective. To conserve and manage the important features of estuarine waters so as to safeguard and perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a management system capable of conserving and utilizing estuarine waters so as to maximize their benefits to man and the estuarine and ocean system.

(d) Use Standards. Suitable land/water uses shall be those consistent with the management objectives in this Rule. Highest priority of use shall be allocated to the conservation of estuarine waters and their vital components. Second priority of estuarine waters use shall be given to those types of development activities that require water access and use which cannot function elsewhere such as simple access channels; structures to prevent erosion; navigation channels; boat docks, marinas, piers, wharfs, and mooring pilings.

In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

15A NCAC 07H .0207 PUBLIC TRUST AREAS

(a) Description. Public trust areas are all waters of the Atlantic Ocean and the lands thereunder from the mean high water mark to the seaward limit of state jurisdiction; all natural bodies of water subject to measurable lunar tides and lands thereunder to the normal high water or normal water level; all navigable natural bodies of water and lands thereunder to the normal high water or normal water level as the case may be, except privately-owned lakes to which the public has no right of access; all water in artificially created bodies of water containing public fishing resources or other public resources which are accessible to the public by navigation from bodies of water in which the public has rights of navigation; and all waters in artificially created bodies of water in which the public has acquired rights by prescription, custom, usage, dedication, or any other means. In determining whether the public has acquired rights in artificially created bodies of water, the following factors shall be considered:

- (1) the use of the body of water by the public;
- (2) the length of time the public has used the area;
- (3) the value of public resources in the body of water;
- (4) whether the public resources in the body of water are mobile to the extent that they can move into natural bodies of water;
- (5) whether the creation of the artificial body of water required permission from the state; and
- (6) the value of the body of water to the public for navigation from one public area to another public area.

(b) Significance. The public has rights in these areas, including navigation and recreation. In addition, these areas support commercial and sports fisheries, have aesthetic value, and are important resources for economic development.

(c) Management Objective. To protect public rights for navigation and recreation and to conserve and manage the public trust areas so as to safeguard and perpetuate their biological, economic and aesthetic value.

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in Paragraph (c) of this Rule. In the absence of overriding public benefit, any use which jeopardizes the capability of the waters to be used by the public for navigation or other public trust rights which the public may be found to have in these areas shall not be allowed. The development of navigational channels or drainage ditches, the use of bulkheads to prevent erosion, and the building of piers, wharfs, or marinas are examples of uses that may be acceptable within public trust areas, provided that such uses shall not be detrimental to the public trust rights and the biological and physical functions of the estuary. Projects which would directly or indirectly block or impair existing navigation channels, increase shoreline erosion, deposit spoils below normal high water, cause adverse water circulation patterns, violate water quality standards, or cause degradation of shellfish waters are considered incompatible with the management policies of public trust areas. In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas.

15A NCAC 07H .0208 USE STANDARDS

(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 include: utility crossings, wind energy facilities, docks, wharves, boat ramps, dredging, bridges and bridge approaches, revetments, bulkheads, culverts, groins, navigational aids, mooring pilings, navigational channels, access channels and drainage ditches;

(2) Before being granted a permit, the CRC or local permitting authority shall find 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 management objective of the Estuarine and Ocean System AEC (Rule .0203 of this subchapter) and shall be sited and designed to avoid significant adverse impacts upon the productivity and biologic integrity of coastal wetlands, shellfish beds, submerged aquatic vegetation as defined by the Marine Fisheries Commission, and spawning and nursery areas;

(B) Development shall comply with state and federal water and air quality

(C) Development shall not cause irreversible damage to documented archaeological or historic resources as identified by the N.C. Department of Cultural resources;

(D) Development shall not increase siltation;

- (E) Development shall not create stagnant water bodies;
- (F) Development shall be timed to avoid significant adverse impacts on life cycles of estuarine and ocean resources; and**
- (G) Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust areas including estuarine waters.

(3) When the proposed development is in conflict with the general or specific use standards set forth in this Rule, the CRC may approve the development if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits outweigh the long range adverse effects of the project, that there is no reasonable alternate site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and shall be implemented at the applicant's expense. Measures taken to mitigate or minimize adverse impacts shall include actions that:

- (A) minimize or avoid adverse impacts by limiting the magnitude or degree of the action;**
- (B) restore the affected environment; or**
- (C) compensate for the adverse impacts by replacing or providing substitute resources.**

(4) Primary nursery areas are those areas in the estuarine and ocean system where initial post larval development of finfish and crustaceans takes place. They are usually located in the uppermost sections of a system where populations are uniformly early juvenile stages. They are designated and described by the N.C. Marine Fisheries Commission (MFC) and by the N.C. Wildlife Resources Commission (WRC);

(5) Outstanding Resource Waters are those estuarine waters and public trust areas classified by the N.C. Environmental Management Commission (EMC). In those estuarine waters and public trust areas classified as ORW by the EMC no permit required by the Coastal Area Management Act shall be approved for any project which would be inconsistent with applicable use standards adopted by the CRC, EMC, or MFC for estuarine waters, public trust areas, or coastal wetlands. For development activities not covered by specific use standards, no permit shall be issued if the activity would, based on site specific information, degrade the water quality or outstanding resource values; and

(6) Beds of submerged aquatic vegetation (SAV) are those habitats in public trust and estuarine waters vegetated with one or more species of submergent vegetation. These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed is defined by the Marine Fisheries Commission. Any rules relating to SAVs shall not apply to non-development control activities authorized by the Aquatic Weed Control Act of 1991 (G.S. 113A-220 et seq.).

(b) Specific Use Standards

(1) Navigation channels, canals, and boat basins shall be aligned or located so as to avoid primary nursery areas, shellfish beds, beds of submerged aquatic vegetation as defined by the MFC, or areas of coastal wetlands except as otherwise allowed within this Subchapter. Navigation channels, canals and boat basins shall also comply with the following standards:

(A) Navigation channels and canals may be allowed through fringes of regularly and irregularly flooded coastal wetlands if the loss of wetlands will have no significant adverse impacts on fishery resources, water quality or adjacent wetlands, and if there is no reasonable alternative that would avoid the wetland losses;

(B) All dredged material shall be confined landward of regularly and irregularly flooded coastal wetlands and stabilized to prevent entry of sediments into the adjacent water bodies or coastal wetlands;

(C) Dredged material from maintenance of channels and canals through irregularly flooded wetlands shall be placed on non wetland areas, remnant spoil piles, or disposed of by a method having no significant, long-term wetland impacts. Under no circumstances shall dredged material be placed on regularly flooded wetlands. New dredged material disposal areas shall not be located in the buffer area as outlined in 15A NCAC 07H .0209(d)(10);

(D) Widths of excavated canals and channels shall be the minimum required to meet the applicant's needs but not impair water circulation;

(E) Boat basin design shall maximize water exchange by having the widest possible opening and the shortest practical entrance canal. Depths of boat basins shall decrease from the waterward end inland;

(F) Any canal or boat basin shall be excavated no deeper than the depth of the connecting waters;

(G) Construction of finger canal systems are not allowed. Canals shall be either straight or meandering with no right angle corners;

(H) Canals shall be designed so as not to create an erosion hazard to adjoining property. Design may include shoreline stabilization, vegetative stabilization, or setbacks based on soil characteristics; and

(I) Maintenance excavation in canals, channels and boat basins within primary nursery areas and areas of submerged aquatic vegetation as defined by the MFC shall be avoided. However, when essential to maintain a traditional and established use, maintenance excavation may be approved if the applicant meets all of the following criteria:

(i) The applicant demonstrates and documents that a water dependent need exists for the excavation;

(ii) There exists a previously permitted channel that was constructed or maintained under permits issued by the State or Federal government. If a natural channel was in use, or if a human made channel was constructed before permitting was necessary, there shall be evidence that the channel was continuously used for a specific purpose;

(iii) Excavated material can be removed and placed in a disposal area in accordance with Part (b)(1)(B) of this Rule without impacting adjacent nursery areas and submerged aquatic vegetation as defined by the MFC; and

(iv) The original depth and width of a human made or natural channel shall not be increased to allow a new or expanded use of the channel.

This Part does not affect restrictions placed on permits issued after March 1, 1991.

STIPULATED FACTS**ATTACHMENT B****Overview of Project and Petitioner**

1. Petitioner, the North Carolina State Port Authority (“NC Ports”), is an instrumentality of the State of North Carolina, created within the Department of Transportation, which by law has been granted the “broad objective of developing to the utmost the port possibilities of the State of North Carolina.” N.C. Gen. Stat. § 136-261.
2. Pursuant to N.C. Gen. Stat. § 136-261, as a public entity NC Ports has several general purposes, including: (a) to develop and improve the harbors or seaports at Wilmington, Morehead City and Southport, North Carolina, (b) to foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the State of North Carolina, and (c) to increase the movement of waterborne commerce, foreign and domestic, to, through, and from such harbors and ports.
3. NC Ports operates the Port of Wilmington (“POW”), located on the Cape Fear River (“CFR”) in Wilmington, New Hanover County, approximately 25 miles north of the mouth of the river and about 1.2 miles south of the Cape Fear Memorial Bridge. A copy of the deed to the property is attached as a stipulated exhibit. The location of the Project is shown on several attached stipulated exhibits. The POW is also shown on an image of the New Hanover County GIS, with parcel lines overlain on recent 2016 aerial photographs. A powerpoint presentation will be included in the variance packet, and will include ground and aerial photographs of the site and surrounding area.
4. On October 26, 2018, NC Ports submitted to the North Carolina Division of Coastal Management (“DCM”) a CAMA major modification permit application, which was accepted as complete by DCM on October 29, 2018. The modification application was seeking approval of a project (“Project”) to accommodate larger ships by expanding the turning basin of the Port of Wilmington from an existing width of 1,400 feet to 1,524 feet by mechanically dredging the eastern and western sides of the present basin, widening and deepening approximately 17.76 acres of shallow and deep soft bottom habitat and 1.4 acres of wetland dredged to -45 feet MLLW. The depth would be maintained to -42 feet +2 MLLW. The Project would also require removal of the existing wooden structure (Chevron Pier) and installing a 1,416-foot-long vertical submerged toe wall along the eastern boundary of the basin to stabilize the shoreline and maintain the basin width and navigable depth.
5. NC Ports estimate the cost of the Project is about \$30 million dollars and the duration of construction is estimated to take approximately 7 months. NC Ports have open bids on a contract with a starting date of July 1, 2019 and a completion date of January 31, 2020, assuming this variance and other permits are approved. See Affidavit of Brian Clark (“Clark Affidavit”) ¶6 and selected pages of contract, which are attached as a stipulated exhibit.

Project Purpose and Need

6. NC Ports contend the Project is needed to allow the Port of Wilmington (“POW”) to accommodate larger cargo and container vessels known as 14,000 TEU ships (capable of carrying up to 14,000 “twenty equivalent units” (“TEU”) which is the size of a standard 20-foot x 8-foot shipping container). The 14,000 TEU ships are currently deployed in vessel services calling at other ports on the US East Coast, such as New York, New Jersey, Norfolk, Charleston, and Savannah, and projected to be used in other existing services that are currently deploying smaller vessels on the US East Coast. The 14,000 TEU ships are the maximum size vessel that can safely transit the new locks of the Panama Canal, which opened in June of 2016. These vessels can have a length over 1,200 feet long and a beam of up to 161 feet, and a capacity of up to 14,000 twenty foot equivalent units (TEUs). (Clark Affidavit ¶7)
7. POW is the only port facility in North Carolina that services container vessels. The Port of Morehead City does not. (Clark Affidavit ¶8)
8. A November 2018 study published by the Institute for Transportation Research and Education at North Carolina State University (“2018 NCSU Study”) found that the NC Ports had, in fiscal year 2017-2018, an annual economic contribution to our state’s economy of approximately \$15.4 billion. (2018 NCSU Study p. 9; Paul Cozza letter dated October 22, 2018) A copy of the 2018 NCSU Study and October 22, 2018 letter from Paul Cozza are attached as stipulated exhibits.
9. The annual actual to date and projected revenue for fiscal year 2018-2019 for the POW is approximately \$38.2 million. Container business accounts for 48% of that revenue. (Clark Affidavit ¶ 9)
10. To prepare for the initial opening of the new Panama Canal in 2016, NCSPA undertook a project to increase the size of the Wilmington channel turning basin to the current dimension of 1,400 feet. As part of that project, the NC Ports petitioned this Commission for a variance, which was granted. A copy of the Commission’s 2015 variance order is attached as a stipulated exhibit. Since July 2016 when the first Neo-Panamax vessel arrived at POW, several new container services began calling at the POW and several of those services are with Neo-Panamax vessels that have an 8,500 -12,000 TEU capacity.
11. 14,000 TEU ships existed in 2015 but they were not expected to safely navigate the new Panama Canal. The maximum safest vessel for the new Canal was thought to be 8500-12,000 TEU ships with lengths of about 1100 feet. In 2017, the Canal operators tried and were successful in navigating a 1200 foot, 13,092 TEU vessel, the COSCO Development, through the Canal (with just a few feet to spare) and now companies plan to use 14,000 TEU ships through the Canal. (Clark Affidavit ¶ 8)

12. After customers indicated their intent to use 14,000 TEU ships the Port conducted an Interim Turning Basin Expansion feasibility study (“Interim Expansion Study”) (delivered March 1, 2018), a copy of which is attached. This Interim Expansion Study was not provided to DCM as part of the CAMA Major Permit review process, and was first shared with DCM on April 1, 2019 as part of this variance process. This Interim Expansion Study reviewed five configurations for the turning basin expansion. These alternatives were not considered by DCM Staff in assessing practicable alternatives.

13. Following the Interim Expansion Study, NC Ports commissioned a ship turning simulations study (“Ship Simulation Study”) (delivered November 14, 2018) with a 14,000 TEU ship in the expanded turning basin. NC Ports concluded that the simulations showed that it was likely a 14,000 TEU ship would run aground even with near perfect conditions. (Ship Simulation Study, pp. 14, 27-28). Also, in order to turn the ship in the existing basin, tug boats were at 100% full power (with no power to accommodate an emergency). (Ship Simulation Study pp. 28-30). The Ship Simulation Study allowed experienced river pilots to test the ability of a 14,000 TEU ship to maneuver in the existing 1,400 foot turning basin and other alternative basin designs. As a result of the study, the River Pilots recommended the use of the Turning Basin 3 design for safe ingress and egress of a 14,000 TEU ship from the POW. See Ship Simulation Study, p. 41. The turning Basin 3 design represents the design of the proposed Project. See Ship Simulation Study p. 11. The Ship Simulation Study and Memo is attached as a stipulated exhibit.

14. NC Ports had projected for over 150 vessels calls in 2019 for vessels that require the 1,400 foot turning basin that could not have been accommodated without the 2015 dredging for the initial turning basin expansion project. However, two of the services with weekly vessel calls to the POW consolidated their services into a single weekly call using a larger ship since the 2016 turning basin expansion. Therefore, NC Ports expects over 100 vessels calls in 2019 with sizes of up to 12,000 TEU, which were larger than previously anticipated. (Clark Affidavit ¶s 10, 11)

15. NC Ports contends that revenue derived from the THEA EC2 Service and ZCP Service comprises approximately 62% of the Port’s total revenue from container business. These services originate in the Far East and currently use 12,000 TEU vessels to call on the POW. (Clark Affidavit ¶s 11, 12)

16. The THEA EC2 and ZCP Services have notified the POW that they intend to utilize 14,000 TEU ships beginning in the summer of 2019. In order to maintain consideration for the larger vessel services, the Port would need to complete the Project around January 2020. If the Port is not able to accommodate these ships after that time, they will bypass the Port for other ports on the East Coast. (Clark Affidavit ¶s 12, 18, and affidavit attachments including vessel size chart and customer notes)

17. NC Ports contends that for safety reasons, the turning basin would benefit by being larger than the length of the vessel. Vessels at the POW must be able to compensate for imperfect conditions and factors such as winds, tides, river currents and pilot abilities. These factors impact

the ability of a ship to turn in precise dimensions. (Moffat Nicol Memo and Ship Simulation Study) Therefore, to accommodate the largest vessels calling on the US East Coast, the turning basin would need to be approximately 1,524 feet wide with a 1,416-foot-long submerged toe wall along the eastern edge of the project to stabilize the shoreline and maintain the basin width and navigable depth. To achieve the necessary dimensions, NC Ports seeks to dredge the eastern and western sides of the present basin, deepening approximately 17.76 acres of shallow and deep soft bottom to a final depth of -42 feet +2 feet +1 overage MLLW. (Clark Affidavit ¶17)

18. The existing onshore facilities and infrastructure at the POW are adequate to accommodate the 14,000 TEU ships and their cargo. (Clark Affidavit ¶s 14, 15)

19. The present diameter of the turning basin stands as the only physical impediment to servicing a 14,000 TEU ship at the POW under less than ideal conditions. The current basin at 1,400 feet wide can accommodate the existing vessels calling the POW, however a ship simulation study showed that the basin should be widened to the proposed Project design to allow desirable ingress and egress from the POW. Ship Simulation Study p. 33. (Clark Affidavit ¶s14, 15, 16)

20. Through discussions with representatives of Maersk Line, MSC, ZIM Integrated Shipping, Hapag Lloyd, Yang Ming Lines, and Ocean Network Express (all calling on POW now, plus CMA-CGM which is not), NC Ports has been made aware that these leading container ship carriers intend to deploy larger capacity vessels in services calling the ports in the US East Coast. In all cases, these shipping lines remarked that a turning basin capable of handling a 14,000 TEU ship would be required if the Port wants to continue to serve these lines. (Clark Affidavit ¶s 18, and customer comments attachment)

21. The container shipping customers intend to deploy 14,000 TEU ships to the U.S. East Coast in the summer of 2019. In order for NC Ports to remain in consideration when the current vessel services are upgraded with these larger capacity vessels, the POW has provided the carriers with the expected completion of the turning basin project by January 2020. This does not meet the carrier's expectations of the summer of 2019, but it does meet the carrier's projected schedule of services for the first quarter of 2020. (Clark Affidavit ¶18)

Project Location and Environmental Factors

22. The City of Wilmington has zoned the POW as "Industrial," while the 2016 New Hanover County Land Use Plan classifies the area as Resource Protection, and the AECs are classified as Conservation/Developed. The property is developed as a major port facility that services ocean-going vessels. The Project location sits in a stretch of the Cape Fear River that is used by maritime traffic and is also adjacent to the federal channel which is dredged and maintained by the U.S. Army Corps of Engineers.

23. The proposed project (or portions of it) are located within the Public Trust Area, Coastal Wetlands, and Estuarine Waters Areas of Environmental Concern ("AECs") as described in 15A

NCAC 7H .0205, 7H .0206, and 7H .0207. Pursuant to N.C. Gen. Stat. § 113A-118, any proposed development within these AECs requires authorization pursuant to the Coastal Area Management Act (“CAMA”).

24. The POW proposed dredging is within an area designated by the North Carolina Marine Fisheries Commission as Primary Nursery Area (“PNA”) and is closed to the harvest of shellfish. The waters of the Cape Fear River at this site are classified as Secondary Recreation (SC) by the NC Environmental Management Commission.

25. PNAs in this part of the Cape Fear River are defined as all areas of the river with the exception of the maintained channel. 15A NCAC 3R. 0103(19)(a). PNAs are defined as those areas inhabited by the embryonic, larval or juvenile life stages of marine or estuarine fish or crustacean species due to favorable physical, chemical or biological factors. 15A N.C.A.C. 10C .0502. As stated in 15A NCAC 10C .0501, the purpose of defining PNAs is “to establish and protect those fragile inland waters which support embryonic, larval or juvenile populations of marine or estuarine fish or crustacean species.” 10C .0502 goes on to note that they “are necessary for the early growth and development of virtually all of North Carolina’s important marine or estuarine fish or crustacean species” and “need to be maintained, as much as possible, in their natural state, and the fish and crustacean populations within them must be permitted to develop in a normal matter with as little interference from man as possible.” The PNA areas near the POW are visually represented on a map attached as a stipulated exhibit. The waters of the Cape Fear River at this location have been designated as a PNA since 1977.

26. The project area encompasses salt and brackish marshes on the tidal floodplain of the Cape Fear River (“CFR”), including Coastal Wetlands and 404 wetlands. The wetlands are visually represented on a map attached as a stipulated exhibit.

27. The proposed project (or portions of it) are located within areas designated by NC DMF as an Anadromous Fish Spawning Area (“AFSA”) pursuant to 15A NCAC 03R .0115 and 15A NCAC 10C .0603.

28. The Shortnose Sturgeon and Atlantic Sturgeon are anadromous fish species found within the proposed project area which are protected under the Endangered Species Act (“ESA”).

29. For the Project, NC Ports has prepared an “Essential Fish Habitat Assessment” (“EFH Study”) pursuant to the federal Magnuson-Stevens Fishery Conservation and Management Act of 1976. The EFH Study is attached hereto as a stipulated exhibit. As of April 2, 2019, National Marine Fisheries Service (“NMFS”) has not provided a biological opinion regarding the impacts to species. The Corps has forwarded the EFH Study to National Marine Fisheries Service (“NMFS”) who, as of April 2, 2019, is reviewing it. NMFS can either issue a concurrence with the EFH Study or edit the report as it chooses, as provided in the Magnuson-Stevens Act.

30. For the Project, NC Ports has prepared a “Biological Assessment for Shortnose and Atlantic Sturgeons” (“BA”) pursuant to Section 7 of the Endangered Species Act. The BA is attached as a stipulated exhibit. As of April 2, 2019, NMFS has not issued a Biological Opinion regarding the impacts to species, as required by the Endangered Species Act, but NMFS is reviewing it as of April 2, 2019.

31. For the Project, NC Ports also prepared an Initial Compensatory Mitigation Plan (dated October 26, 2018) and a Revised Mitigation Plan (dated February 11, 2019 and revised on February 25, 2019), copies of which are attached as stipulated exhibits. As of April 2, 2019, the mitigation plan is under consideration by the Corps and DWR.

32. The Project entails the mechanical dredging of sediment on the eastern and western sides of the present basin within an approximate 17.76 acres of shallow unvegetated soft bottom PNA habitat and 1.4 acres of coastal and section 404 wetlands (1.01 acres of Coastal Wetlands and 0.39 acres of 404 Wetlands) EFH habitat, totaling approximately 19.16 acres of excavation. The estimated volume of dredged sediments is expected to be about 560,000 cubic yards (“CY”), which includes 370,000 CY on the east side and 190,000 CY on the west side. The existing wooden “Chevron” pier would be removed; however, the mooring dolphin for Berth 1 would remain. For the location of the proposed dredging on the west side of the CFR, a stability analysis performed by Catlin Engineering concluded there would be no adverse impacts to the existing slope on the US Army Corps of Engineers’ (“Corps”)-owned Eagle Island dredge disposal facility berm or the channel side-slope and fringing tidal marsh. The stability analysis is included at p.2 of the Interim Expansion Study, attached. NC Ports has committed to employing best management practices, such as turbidity barriers and maximizing dredging during falling tides to avoid and minimize impacts during dredging operations.

33. Material will be placed in water tight barges or scows and transported across the river, the sediments will be re-fluidized and hydraulically pumped to the Eagle Island Confined Disposal Facility. The Eagle Island facility is owned and operated by the Corps. NC Ports contends there will be no adverse impacts to the Eagle Island confined disposal facility.

34. On April 2, 2019, the Corps responded to a request of NC Ports related to the status of approval for the use of Eagle Island for the dredge spoil. Deputy District Engineer Christine Brayman indicated that the facility has capacity for the proposed disposal, that the review of NC Ports’ proposed permit is under review, and if permits are issued and the material is found to be acceptable, permission could be granted based on the existing partnership agreement. A copy of this letter is attached as a stipulated exhibit.

35. Prior to initiating dredging on the eastern project side, the existing wooden structure (Chevron Pier) would be removed. Containment booms would be installed around all structures to be removed and structure would be demolished using a barge-mounted crane and then loaded into barges or scows for recycling or disposal. Piles would be extracted to prevent any future hazards to navigation and loaded for disposal in scows or atop deck barges surrounded with sediment

barriers to minimize any adherent mud stuck to the pile from washing overboard into the waterway. Any remaining mounds of sediment beneath removed structure would be dredged and sediment transported to the Eagle Island facility.

36. A majority of the estimated dredging volume is due to dredging in 17.76 acres of sand/mud bottom PNA habitat, which ranges in depth of +2 feet MLLW to a construction depth of -42ft +2 ft, + 1 ft MLLW and 1.4 acres of coastal marsh, of which 1.01 acres is Coastal Wetland. The area will be dredged to a depth of 42ft + 2ft +1ft MLLW for construction then maintained to 42ft + 2ft MLLW.

37. Installation of the submerged toe wall is not likely to have any negative effect on the water column, unvegetated mud bottom PNA habitat, or tidal marsh present at this site. (EFH iii). The EFH Study has not been approved by NMFS to date.

38. While turbidity and dispersion of suspended sediment in the waterbody is a potential effect during 7 months of dredging, the EFH Study has found that the proposed method of clamshell dredging allows mobile species to quickly avoid plumes of elevated turbidity and the mechanical operations, even when migrating up river or foraging in shallow areas. Pile driving for the toe wall construction could disrupt migrating species such as sturgeon, but temporarily. (EFH Study p. 14; BA pp. 26-27) The potential indirect effects of turbidity on the estuarine/riverine water column, tidal marsh and unvegetated mud bottoms would be spatially and temporally minimized through use of turbidity barriers around all dredging and pumping operations. As noted in Fact 31 above, to date, a Biological Opinion has not been issued regarding the impacts to species.

39. The CFR supports a population of Atlantic and Shortnose sturgeons. Recent acoustic monitoring documented the occurrence of 46 Atlantic sturgeons and one Shortnose sturgeon. Past monitoring and collection efforts demonstrate sturgeon may occur in the harbor during their annual migrations up and down river. (BA p. 27) Only adult and juvenile life stages of the Shortnose and Atlantic sturgeon species may occur within affected areas as they migrate up and back down the river on their annual spawning run. Eggs and larvae would not be present due to high salinities and lack of appropriate spawning habitat. (BA p. 27, EFH pp. 12, 38) The BA and the EFH Study have not been approved by NMFS to date.

40. The dredging would result in the loss of shallow and deep water foraging habitat for juvenile and adult life-stages of sturgeon species. Indirect effects would be limited to altering fish movements during dredging, short-term effects due to generation of higher sediment loads and turbidity during dredging. (EFH pp. 38-39; BA pp. 27-28) The BA and the EFH Study have not been approved by NMFS to date.

41. The potential effects on anadromous fish including sturgeons would be minimized by delaying construction until after July 1, 2019 which is after the annual migration and before the next migratory period on February 1, 2020. The general DCM and WRC moratoria for in-water work for anadromous fish applicable to the POW location is February 1 to June 30.

42. There are no known effects on submerged aquatic vegetation, shellfish, oyster beds, or hard bottom habitat located within the footprint of the Project area. (EFH p. iii) The EFH Study has not been approved by NMFS to date.
43. The proposed expansion of the existing turning basin through dredging would permanently impact a total of 1.4 acres of Section 404 jurisdictional salt/brackish marsh wetlands on the tidal floodplain of the CFR, including 1.01 acres of CAMA coastal wetlands (smooth cordgrass marsh) and 0.39 acre of non-coastal wetlands (common reed marsh). The 1.4 acres of wetlands would be excavated and permanently converted to subtidal soft bottom.
44. To the knowledge of the current NCSPA personnel, the proposed loss of 1.4 acres of tidal wetlands is the only time the NCSPA has requested such authorization in at least the last 13 years, that is associated with proposed basin/channel improvements at the POW.
45. Loss of the 1.4 acres of coastal tidal marsh and associated wetland habitat within the project area will result in loss of habitat for prey species commonly foraged on by sturgeon. (BA p 17) However, 37,800 acres of shallow water soft bottom habitat and 188,549 acres of deeper soft bottom remain available for sturgeon foraging within the CFR southern estuary, though the dredging will result in the removal of benthic organisms in the sediment, degrading the habitat value to some extent for this regularly dredged area.
46. In order to offset potential impacts associated with the Project, NC Ports has offered the revised conservation/mitigation measures which follow. The Revised Mitigation Plan has not yet been officially approved by the Corps, DWR, DCM and DMF.

Delaying the proposed 7-month construction period until after July 01, 2019 in order to minimize the potential adverse effects on fish particularly sturgeon during their annual migration up river for spawning in late-winter and early-spring, as noted in the BA, attached. The general DCM and WRC moratoria for in-water work for anadromous fish applicable to the POW location is February 1 to June 30, and may be required by resource agencies anyway to avoid seasonal dredging restrictions related to threatened and endangered species.

NC Ports will convey a perpetual conservation easement of 30.2 acres of its 119-acre property comprised largely of wetlands, located on the Brunswick River, just south of the US 17/74/76 bridge, including existing wetlands that buffer the mitigation areas located on Eagle Island to an approved NGO. The site is bound by the Brunswick River to the west, Redmond Creek to the southeast, and US 74/76 to the north. The site is located entirely on the tidal floodplain of the Brunswick River. The site will serve as a buffer for the mitigation enhancement areas described below. The location of the donation and conservation easement site is shown on a map in the Revised Mitigation Plan, as is the 13.4 acres protected by a conservation

easement located 1.07 miles southwest of the 2019 site, as part of the 2015 turning basin expansion project.

Three tidal pools will be created from 6.75 acres of Phragmites dominated habitat located within the 30.2 acre proposed conservation easement to provide shallow soft bottom habitat with high marsh edge connectivity. The pools would also function as a refuge for juveniles during low tide conditions contrary to PNA habitats of the project area where refuge is lacking at low tide. The three pools would provide 4,000 linear feet of new marsh edge habitat. Water quality monitoring would be conducted as a component of the 7-year post construction monitoring plan.

On-site mitigation will be performed at an area contiguous with the southern boundary of the Kinder Morgan property, and shown on the February 11, 2019 Mitigation plan at p. 8. The proposed on-site mitigation area encompasses an existing smooth cordgrass marsh zone along the CFR channel, with broad common reed dominated marsh on fill material. 1.75 acres of Phragmites dominated habitat will be enhanced to tidal marsh creating new PNA tidal marsh habitat with water quality and marsh edge benefits and on NCSPA owned land on the Brunswick River, shown on the February 11, 2019 mitigation plan at p. 10, the enhancement of 2.25 acres of Phragmites dominated habitat to brackish tidal marsh.

NC Ports will donate \$800,000 towards construction and monitoring costs of the Lock and Dam #1 Fish Passage on the Cape Fear River. The contribution of NC Ports will fulfill the total cost required to move forward with construction in 2019. The project is intended to provide for the restoration of self-sustaining anadromous fish populations in the CFR system, which is considered essential the overall restoration of the entire CFR ecosystem. The restoration of anadromous fish populations will provide enhanced habitat function throughout the CFR system, inclusive of the PNA habitats in the lower estuary. The location of Lock and Dam #1 fish passage images are shown on the BA at p.9, attached as a stipulated exhibit. As mitigation for the 2015 basin expansion, the NC Ports donated \$750,000 towards the cost of creation of a fish passage at Lock and Dam # 2 in Bladen County and the County used the money for alternatives analysis, modeling, engineering and design of the fish passage.

Other conservation measures offered in the Revised Mitigation Plan include compliance monitoring such as wetland and tidal pool enhancement measures to be monitored for 7 years or more as needed with annual reporting, lock and dam fish passage monitoring for 5 years or more as needed with annual reporting, sturgeon monitoring during dredging, use of best management practices, good engineering practices, turbidity barriers, and project monitoring.

This Revised Mitigation Plan (February 11, 2019 and revised February 25, 2019) replaced the October 26, 2018 Initial Mitigation Plan. The Revised Mitigation Plan has not received any regulatory approvals as of April 2, 2019. The Revised Mitigation Plan is the result of multiple meetings and communications between NC Ports, DCM Staff, and other State and Federal permit and resource agencies in an attempt to bring decisions on the mitigation plan to a conclusion.

CAMA Major Permit Application

47. On October 26, 2018, NC Ports had a scoping meeting on this project with DCM and other state resource and permit agencies, as shown on the attached stipulated exhibit of meeting attendees.

48. NC Ports' CAMA major permit application for the Project was accepted as complete by DCM on October 29, 2018. On the same day, NC Ports submitted a separate application to the Corps for an individual federal permit. On October 29, 2018, a Corps representative confirmed to DCM that the Corps would process its federal permit separately from the CAMA Major Permit Review/Joint State-Federal permit process (also known as the "291 Process"), and coordinate with the other Federal agencies as required.

49. On October 23, 2018, the NC Ports submitted a CAMA Major Permit application proposing to develop 1500 and 1538 S. Front Street in Wilmington, located approximately 600' north of the turning basin area, and shown on a New Hanover County GIS image with parcel lines overlain on an aerial photograph. The proposed development included paved storage areas, one multi-use warehouse, a multi-use pier with land bridges, and associated new dredging in a designated PNA to a depth of -42ft + 2ft + 1ft at MLLW. A copy of the permit application, project narrative, and DCM field report are attached as stipulated exhibits. This application was placed on hold at the request of NC Ports on November 15, 2018.

50. The proposed Project is a Major Modification to CAMA Major Permit No. 47-87, originally issued on February 17, 1987 for hydraulic dredging of NC Ports' shipping berths and has undergone over 30 modifications and renewals. (See CAMA Permit Application p. 19. CAMA Field Investigation Report and file notes listing POW CAMA Major Permit action lists dated 4/4/19, attached as stipulated exhibits) One modification included an expansion of the turning basin area, which involved new dredging of 6.4 acres of PNA, was authorized by way of a variance from this Commission, which was granted on December 8, 2015, resulting in the issuance of a Major Modification on January 13, 2016, copies of which are attached as stipulated exhibits.

51. As part of the CAMA major permit review process, state resource agencies were given copies of the application and the field investigation report, copies of which are attached as a stipulated exhibit.

52. For this project, the Corps responded that this project may affect, and is likely to adversely affect or modify the Atlantic Sturgeon and Shortnose Sturgeon, and their critical habitat, protected

under the Endangered Species Act (ESA). A copy of their comments is attached as a stipulated exhibit.

53. The DCM Land Use Planner from the Wilmington office responded that the project is consistent and not in conflict with the 2016 New Hanover County Comprehensive Land Use Plan update. A copy of their response is attached as a stipulated exhibit.

54. The National Marine Fisheries Service (“NMFS”) provided comment related to the Initial Mitigation Plan prior to its revisions, a copy of which is attached as a stipulated exhibit. NMFS has not yet commented on the Revised Mitigation Plan, but any comments received before the variance hearing will be provided to the Commission.

55. The two comment letters of the Division of Marine Fisheries (“DMF”) dated November 29, 2018 and March 14/18, 2019 are attached as stipulated exhibits. The March 14/18, 2019 comments were based on the February 11, 2019 Revised Mitigation plan and the February 25, 2019 Revised Mitigation Summary. DMF concluded that there would be significant adverse impacts. The proposed project area occurs within Marine Fisheries Commission designated Primary Nursery Area (“PNA”) and Anadromous Fish Spawning Area (“AFSA”). Data from the DMF juvenile estuarine trawl survey and anadromous fish tagging data indicate that several important estuarine and anadromous fish species continue to utilize the nearby waters as a nursery, foraging grounds, and migratory corridor, including southern flounder, spot, croaker, blue crab, striped bass, and Atlantic sturgeon. Successful creation of PNA habitat through mitigation is difficult due to the complex characteristics that contribute to high fish habitat function. The DMF determined the project’s habitat alterations would have significant adverse impacts to the numerous species that utilize it. While the DMF has concerns that the proposed mitigation may not be sufficient in acreage or functional equivalency, they have verbally agreed to the proposed conceptual mitigation, conditional on review of the final mitigation plan, a minimum of seven years of monitoring of tidal pool and wetland enhancement, compliance with the AFSA moratorium on in-water work from 1 February to 30 June, and an observer posted during dredging operations.

56. The NC Wildlife Resources Commission commented on the Project, a copy of which is attached. WRC expressed concerns over the project and supported the ultimate position of DMF.

57. The Division of Water Resources (“DWR”) placed the review of the 401 application on hold on January 14, 2019, pending the submittal of additional information. A second DWR hold letter dated March 13, 2019 was sent following their receipt of the Revised Mitigation Plan. Copies of the DWR hold letters and initial comments on the Project are attached as a stipulated exhibit. Any updated comments or authorization actions received before the variance hearing will be provided to the Commission.

58. All other state agencies had either “no objection” or “no comment” on the Project.

59. As part of the CAMA major permit process, notice of this proposed project is to be given to the public by (1) publishing notice in the Star-News newspaper and (2) posting notice on site. Confirmation of the November 18, 2018 and February 16, 2019 (following the Revised Mitigation Plan) newspaper publications are attached as stipulated exhibits, as is a copy of the placard before it was posted. NC Ports state they posted the CAMA notice placard on January 4, 2019, after it was returned to DCM after confusion about the NC Ports' mailing address.

60. Comments to the project were received from Kerri Allen of the North Carolina Coastal Federation ("NCCF") on January 8, 2019, February 8, 2019, and March 12, 2019, copies of which are attached. NCCF's stated concerns included PNA dredging, fisheries and coastal wetlands impacts, the level of public involvement in the process, concerns with the Initial Mitigation Plan, the level of the Federal review, and cumulative impacts. As part of the variance process in 15A NCAC 7H .0701, NC Ports provided notice through certified mail, a copy of which is attached, to NCCF as someone who submitted written objections to the project during permit review. If NCCF submits written objections to this variance petition by the date of the Commission meeting, they will be shared with the Commission.

61. As part of the CAMA major permit process, notice was given to the adjacent riparian owners Apex Oil, Kinder-Morgan, and Buckeye Terminals, LLC. No comments or objections were received, as seen on the returned notice forms, attached as a stipulated exhibit. As part of the variance process in 15A NCAC 7H .0701, NC Ports provided notice through certified mail, a copy of which is attached, to the adjacent riparian owners. If any owner submits written objections to this variance petition by the date of the Commission meeting, they will be shared with the Commission.

62. On March 19, 2019, DCM denied the NC Ports' application through a letter, attached as a stipulated exhibit. DCM noted that its denial was based on the proposed project's inconsistency with the following rules:

- 15A NCAC 7H .0208(b)(1), which requires that new dredging projects avoid areas designated as PNAs,
- 15A NCAC 07H .0208(b)(1)(F), which requires a boat basin to be excavated no deeper than the depth of the connecting waters.
- 15A NCAC 07H .0208(a)(2)(A), which requires projects avoid significant adverse impacts upon coastal wetlands, spawning and nursery areas.
- 15A NCAC 07H .0203, which states the objective of the CRC "to conserve and manage [its AECs] so as to safeguard and perpetuate their biological, social, economic, and aesthetic values and to endure that development occurring within these AECs is compatible with the natural characteristics so as to minimize the likelihood of significant loss of private property and public resources."
- 15A NCAC 07H .0205(c), which states the objective of the CRC "to conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social and economic and aesthetic values, and to coordinate and establish a management system capable of conserving and

utilizing coastal wetlands as a natural resource necessary to the functioning of the entire estuarine system.”

Accordingly, DCM denied the permit application for inconsistency with state guidelines in accordance with N.C. Gen. Stat. § 113A-120(a)(8) and N.C. Gen. Stat § 113A-229.

63. Since the Corps is processing this Project application as an Individual Permit (Section 10, 404 and 408), Federal regulations at 33 CFR § 325.2. require that state approvals must first be granted before any Federal permits may be issued. Pursuant to S.L. 2015-90, no SEPA review is required where a CAMA Major Permit is issued. As of April 4, 2019, the Corps has not decided if they will require an EA or a full EIS for the NEPA review, but has initially indicated an EIS would not be required. A copy of the Corps’ November 15, 2018 Public Notice for the project is attached as a stipulated exhibit, as are portions of their guidance documents about permit approval order.

64. On March 25, 2019, Petitioner filed this variance petition seeking a variance from those rules listed in the denial letter in order to allow the Project dredging along with the Revised Mitigation plan. NC Ports stipulates that the proposed project is inconsistent with the rules listed in the denial letter, from which it is now seeking a variance, per 15A NCAC 7J .0701(c) (6).

65. Also on March 25, 2019, Petitioner filed a request to hear this variance in an expedited fashion. A copy of that letter is attached as a stipulated exhibit.

66. The parties will show site photographs as part of a powerpoint presentation, which is a stipulated exhibit.

Stipulated Exhibits

1. Deed for POW site
2. CAMA Major Permit Modification Application of October 26, 2018 with attachments
3. Brian E. Clark Affidavit, dated April 1, 2019 with attachments
4. 2018 NCSU Study prepared by Institute for Transportation Research and Education
5. Paula Cozza letter of October 22, 2018
6. 2015 CRC Variance Order
7. March 1, 2018 Interim Expansion Study
8. November 14, 2018 Ship Simulation Study by Maritime Inst. of Tech. and Grad. Studies
9. Full Mission Ship Simulations Memo- Moffit & Nichol
10. Comments of DCM Planner re: Consistency with LUP
11. PNA map showing the site
12. Wetlands Map
13. October 2018 Essential Fish Habitat (EFH) Study
14. October 2018 Biological Assessment for Shortnose and Atlantic Sturgeon
15. April 2, 2019 letter from Army Corps of Engineers to Ports re: use of Eagle Island
16. October 2018 Initial Mitigation Plan
17. February 11, 2019 Revised Mitigation Plan
18. February 26, 2019 Revision to Revised Mitigation Plan
19. Conservation Easement location maps (2015 and 2019)
20. Pre-application Meeting list of attendees
21. October 29, 2018 email from Corps to DCM confirming Corps to do Individual Permit
22. Ports' Multi-Use Terminal project- Application, project narrative, and DCM Field Report
23. DCM Field Investigation Report
24. April 4, 2019 DCM File Notes showing permit action history- POW CAMA Permits
25. December 8, 2015 CAMA Major Modification to No. 47-87 (for 2015 Expansion)
26. Comments of the Army Corps of Engineers
27. Comments of National Marine Fisheries Service (NMFS)
28. Comments of the NC Division of Marine Fisheries
29. Comments of the NC Wildlife Resources Commission
30. Comments of the Division of Water Resources and the Port's responses
31. Proof of publishing of notice in the Star News (twice)
32. Copy of on-site notice card
33. Comments from Kerri Allen of NC Coastal Federation, dated 1/8/19, 2/8,19, and 3/12/19
34. Notice of the permit (and revised mitigation plan) to adjacent riparian owners Apex Oil, Kinder Morgan, and Buckeye Terminals, LLC
35. March 19, 2019 CAMA Permit Denial Letter
36. Corps' 11/15/19 Public Notice and permit order guidance documents
37. Notice of the Variance Petition to Adjacent Riparian owners and NCCF
38. NC Ports Request to expedite hearing, DCM's Response, CRC's Decision to expedite
39. Powerpoint Slideshow with relevant maps, GIS images, diagrams, site photos

PETITIONER'S and STAFFS' POSITIONS**ATTACHMENT C**

To qualify for a variance, Petitioner must show all of the following:

- I. Will Unnecessary Hardships would result from strict application of the rules, standards, or orders? If so, Petitioner must identify the unnecessary hardships.**

Petitioner's Position: Yes.

The Port of Wilmington ("POW") is the only port in North Carolina that can accommodate container vessels. The POW receives and exports goods from across the globe, especially from Asian countries. Transporting goods to/from Asia is an expensive process and shipping companies, like any transportation business, seeks to transport the most goods for the cheapest price. This is done by using the largest ships that can practically move the most goods. POW customers intend to use 14,000 TEU¹ container ships which are the largest ships capable of navigating the Panama Canal. The existing turning basin at the POW needs to be expanded 124 feet to accommodate these vessels. If the turning basin is not expanded, those vessels will bypass the POW and call on other east coast ports, thereby causing significant economic impact to the POW and the North Carolina economy.

Container shipping is vital to the North Carolina economy. The annual revenue for the Wilmington Port is approximately \$38.2 million. Container business accounts for 48% of that revenue. While the annual revenue to the Port itself is significant, the economic benefit to citizens of North Carolina with access to global shipping operations is exponentially larger. A single Far East Service has a direct economic impact of \$3.8 billion per year.

Prior to 2016, the POW's customers notified it that the customers would be using larger ships capable of transporting 8,500-12,000 TEUs to transport container goods to the U.S. east coast upon completion of enlarged locks at the Panama Canal. As such, in 2016 the POW expanded the then existing turning basin to 1,400 feet to accommodate these new larger ships. While an 8,500-12,000 TEU ship is significant, shipping companies were also utilizing 14,000 TEU ships for non-Panama Canal trade routes. However, after the new Panama Canal opened, Canal operators tried and were able to safely navigate a 14,000 TEU through the Canal. A 14,000 TEU ship would be the largest ship capable of navigating the Canal.

Now that 14,000 TEU ships can navigate the new Panama Canal, the POW's customers now intend to utilize these ships to transport goods to/from the U.S. east coast. Other Ports on the East Coast such as Norfolk, Savannah, and New York are currently able or soon will be able to accommodate a 14,000 TEU ship. The POW has the existing infrastructure such as cranes, berths, storage, and transportation to accommodate a 14,000 TEU ship, with the exception of the turning basin. The insufficient turning basin is the only impediment to servicing a 14,000 TEU ship. While the turning basin was expanded in 2016, it needs to be expanded by another 124 feet to allow safe maneuverability of a 14,000 TEU ship. Without the expansion of the turning basin, the POW

¹ TEU stands for "twenty foot equivalent," which is equal to the size of one 20 x 8 foot shipping container. A 14,000 TEU vessel can carry 14,000 shipping containers.

would lose the ability for North Carolina to maintain presence in the global container shipping market.

The loss of this revenue would have a tremendous adverse effect on the Port's vitality and the North Carolina economy. Thus, the inability to enlarge the turning basin constitutes an unnecessary hardship to the Petitioner and to the economy of the State.

- **Conservation of Estuarine System (15A NCAC 07H.0203)**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The area has been used as an industrial port since 1945 and therefore has reduced estuarine value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. The land adjacent to the estuarine system is occupied by large chemical storage tanks and other industries. Arguably this area has no social or aesthetic values and has severely diminished natural characteristics. However, it does have great economic values to the economy of North Carolina. The strict application of the estuarine system rule, would neglect to consider the heavy industrial use of the area. Therefore the strict application will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts to the estuarine system.

- **Management of Coastal Wetlands (15A NCAC 07H.0205(c))**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The area has been used as an industrial port for decades and therefore has diminished the coastal wetlands in the area. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. The land adjacent to the wetlands is occupied by large chemical storage tanks and other industries. Arguably this area has no social or aesthetic values and has severely diminished function. However, it does have great economic values to the economy of North Carolina. The strict application of the coastal wetland rule, neglects to consider the heavy industrial use of the area. Therefore the strict application will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts to the coastal wetlands.

- **Development consistent with AEC and Fisheries (15A NCAC 07H.0208(a)(2)(A))**

As stated previously, the action area has diminished environmental function due to historic industrial uses. However, during construction impacts can be managed by use of mechanical dredging, use of turbidity curtains, containment booms, restricting dredging during certain times and other conditions determined necessary by the Commission. No known incidental takes of sturgeon species have occurred during prior dredging operations. Therefore the strict application of this rule will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts during development.

- **Primary Nursery Area (15A NCAC 07H.208(b)(1)).**

The area adjacent to the existing turning basin has been designated a PNA since 1977. This PNA designation exists because the PNA area extends from bank to bank of the Cape Fear River regardless of the historic use of the area. This area has been heavily dredged in the past to maintain

the navigation channel and has been used as an industrial port for decades and therefore has reduced fisheries value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. Under the strict application of the PNA rule, new dredging in any designated PNAs is prohibited by the rules of the Coastal Resources Commission.

A strict application of the PNA rules will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of dredging in a primary nursery area.

- **No excavation deeper than connecting waters (15A NCAC 07H.0208(b)(1(F))**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The current depth of the navigation channel is 42 feet and because dredging is imprecise, there are allowances for 2 feet overages. Benthic communities are less productive at these depths. Due to the imprecision of dredging, the POW is proposing a depth of the expanded turning basin at a maximum of 42' (+2' +1' to clear any rock or debris). Future maintenance dredging would be 42' +2'. The extra depth is necessary for the larger 14,000 TEU ships to safely maneuver the 180 degree turn so that they may head back to sea. However, dredging at those depths will have little to no different impacts that already exist at 42' +2'. A strict application of the excavation rules will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers.

Staffs' Position: Yes.

Petitioner's inability to dredge in order to expand and deepen the existing turning basin at the Wilmington port facility causes an unnecessary hardship. The proposed site is within an industrial port area which has been used in this manner for many decades. The proposed dredging for this water-dependent use is not allowed by the Commission's rules, in part because the area is within a designated Primary Nursery Area that extends from bank to bank of the Cape Fear River (with the exception of the federal channel) and has been in place since 1977. Additionally, the proposed dredging is not allowed because the proposed excavation depth is deeper than the Corps' navigation channel depth, and because significant adverse impacts upon fish spawning areas are likely. Petitioner will face unnecessary hardships including the likely loss of significant commercial shipping traffic if the Commission's rules prohibiting a) new dredging in a designated PNA and b) no deeper excavation than connecting waters are strictly applied. DCM's position is that the fisheries value of this site is already somewhat reduced due to the historic use of the area.

The proposed dredging is also not allowed because of significant adverse impacts to 1.01 acres of Coastal Wetlands and 0.39 acres of 404 wetlands, which is contrary to 7H .0203, 7H .0205(c), and 7H .0208(a)(2)(A). Petitioner will face unnecessary hardships of the likely loss of significant commercial shipping traffic if the Commission's rules prohibiting significant adverse impacts to coastal and 404 wetlands are strictly applied. Staff recognize the benefits of concentrating impacts at the existing POW site.

II. Do the hardships result from conditions that are peculiar to the property, such as the location, size, or topography of the property? Explain.

Petitioner's Position: Yes.

The POW is the only site in North Carolina that has an existing turning basin and infrastructure to accommodate container ships. The Cape Fear River at this location has been extensively dredged for the navigation channel and to accommodate large ships. The POW facility, the ship channel, and turning basin are the only facilities in North Carolina that can practically be used to accommodate container shipping. The POW currently has the infrastructure to accommodate 14,000 TEU container ships, with the exception of the turning basin. If the basin was extended 124 feet, it would be completely able to service a 14,000 TEU ship. No further expansion of the turning basin would be expected. There is no other property in North Carolina that can practically be used to create a wide enough and deep enough body of water to accommodate the largest container ships (14,000 TEU) that can navigate the Panama Canal.

As previously stated, this area has been heavily dredged in the past to maintain the navigation channel and has been used as an industrial port for decades and therefore has reduced environmental value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area.

Staffs' Position: Yes.

Staff agrees that this site on the Cape Fear River is unique as it is the only area within the state reasonably capable of handling the "Neopanamax" 14,000 TEU ships, given that the Port of Wilmington has both the existing, large turning basin and the necessary shore-based infrastructure to handle container offloading and distribution. Staff also agrees with Petitioner that this general area has been heavily dredged in the past to create and maintain the federal channel (deepened in 1996 from -38' to -42') and the existing turning basin (enlarged to 1,400 feet wide in 2016 pursuant to a 2015 variance of this Commission). Accordingly, while the dredging site is designated as a PNA, the site conditions and historical use of the site reduce the function of the site as a PNA. Accordingly, Staff believe that the physical characteristics peculiar to this site cause Petitioner's hardship.

III. Do the hardships result from actions taken by the petitioner? Explain.**Petitioner's Position: No.**

The POW is engaged in a global economy and therefore is just one part in a global machine. The global economy will continue to exist with or without the POW, but without the POW, North Carolina will suffer greatly. The Petitioner has no control over the size of the ships that are being used by its customers. The Petitioner has no control over the capabilities of the Panama Canal. Nor does the Petitioner have any practical alternative for enlarging the turning basin. The Project includes a vertical pile toe wall along the eastern extents of the basin to reduce the need for additional slope excavation. Petitioner has delayed proposed construction until after July 1, 2019 to avoid spring fish migration impacts. The Petitioner also intends to use mechanical dredging, turbidity curtains and other suggested means to reduce environmental impacts from the dredging operation. The hardships do not result from the actions taken by the Petitioner.

Staffs' Position: No.

Staff agrees with Petitioner's statements above regarding the importance of commerce generated from the POW, and that Petitioner has no control over the size ships being used by its current customers following the Panama Canal improvements. However, Staff notes that the POW has created some hardships by not openly engaging resource agency staff early in the planning process for the proposed turning basin expansion.

Following the 2017 navigation of the Panama Canal by a 13,092 TEU vessel and the POW's understanding for the need to prepare for 14,000 TEU vessels if possible, the POW commissioned an Interim Expansion Study (delivered to NC Ports on March 1, 2018), which evaluated five design options to accommodate a 12,400 TEU vessel. However, this study was not shared with DCM and other resource agencies until April 1, 2019 as part of this variance process. A pre-application meeting was requested and held on Friday, October 26, 2018, and then the permit application was received by DCM the following Monday, October 29, 2018, likely not allowing time to make any changes to the proposed design and proposed mitigation. The earlier alternatives analysis of the Interim Expansion Study was not disclosed during the pre-application meeting or in the permit application. The intended purpose of pre-application meetings is to engage with federal and state resource agency staff early in the process in order to modify the project design and/or mitigation plans to satisfy environmental and other concerns. That process was not followed in this case, and the full range of possible design alternatives was not evaluated by DCM or other resource agency staff.

Despite these concerns about Petitioner's lack of planning and engagement early in the process, on balance, and based on the assumption that Petitioner will abide by all mitigation measures put forth by the various resource agencies, Staff agrees that the hardships do not result from actions taken by Petitioner and that it makes sense to locate new impacts where the existing turning basin and heavily used port infrastructure are already located.

Staff note the NC Ports’ assertion made in their argument to Factor 2, above, that “no further expansion of the turning basin would be expected” and agree that there is very little room to further expand the basin without impacting Eagle Island, additional PNA resources, and other resources. While the proposed expansion is intended to handle 14,000 TEU ships, Staff note that there are existing ships which exceed that benchmark and have concerns about NC Ports trying to accommodate even larger ships in the future. Staff note that any future request for development in this area will have a high hurdle to overcome due to the incremental and cumulative impacts proposed and approved over time and encourage NC Ports to be aware that Staff believe an improved process is needed for project design, alternatives analysis, and mitigation proposals in the future.

IV. Is the requested variance (1) consistent with the spirit, purpose, and intent of the rules, standards, or orders, (2) will secure public safety and welfare; and (3) will preserve substantial justice? Explain.

Petitioner’s Position: Yes.

- **Consistent with the spirit, purpose and intent of rules.**

The Coastal Area Management Act states, in pertinent part, that a goal of the Act is “[t]o establish policies, guidelines and standards for... the economic development of the coastal area including . . . construction, location and design of. . . port facilities... [and] navigation channels and harbors....” N.C. Gen. Stat. § 113A-102(b)(4). The Port of Wilmington, navigation channel, and turning basin were already in existence at the time CAMA was enacted, and CAMA recognizes that such facilities are a part of the existing coastal area and should be taken into account when developing the CAMA program.

The Management Objective for Estuarine Waters found in 15A NCAC 7H.0206(c) states:

To conserve and manage the important features of estuarine waters so as to safeguard and perpetuate their biological, social, aesthetic and economic values; to coordinate and establish a management system capable of conserving and utilizing estuarine waters so as to maximize their benefits to man and the estuarine and ocean system.

In addition, the Use Standards for Estuarine Waters found in 15A NCAC 7H.0206(d) states:

Highest priority of use shall be allocated to the conservation of Estuarine Waters and their vital components. Second priority of Estuarine Waters use shall be given to those types of development activities that require water access and use which cannot function elsewhere such as simple access channels; structures to prevent erosion; navigation channels; boat docks, marinas, piers, wharfs and mooring pilings.

Thus, the CRC Rules clearly anticipate that water-dependent uses such as the POW are appropriate in certain circumstances. The CRC Rules also set out guidelines for approving projects that conflict with the use standards in the CRC Rules. In accordance with 15A NCAC 7H.0208(a)(3), a development can be approved,

if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits outweigh the long-range adverse effects of the project, that there is no reasonable alternative site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and shall be implemented at the applicant's expense.

For the reasons previously stated, the POW is vital to the North Carolina economy. There is no other reasonable alternative site available for the project. The POW is the only facility in the state that can accommodate a 14,000 TEU container ship, with the exception of the turning basin. The 124-foot expansion of the turning basin would allow the POW to accommodate these ships and maintain presence in the global market. All reasonable means and measures have been proposed to mitigate adverse impacts. A toe wall, mechanical dredging, turbidity curtains and limiting construction during fish migration are a few examples of these measures. In addition, the POW proposes a significant mitigation plan to accommodate for the impacts of the turning basin expansion.

For these reasons, the project is consistent with the spirit, purpose and intent of the CRC Rules and the need to balance the need for port facilities (public benefit) and the conservation and management of natural resources.

- **Secure the public safety and welfare.**

Port operations will be safer with a wider turning basin. Public welfare will be secured by allowing the Port to continue to provide significant economic benefits to the people of North Carolina.

- **Preserve substantial justice.**

The variance will allow the Port to continue to realize benefits from the substantial investment in the infrastructure used to service the container ship industry. If the Port were to lose a significant part or all of its container ship business, the investment made by the Port in the facilities used to service container ships will be wasted. The economy of North Carolina would suffer from the loss of this avenue for global trade. Allowing the variance will preserve justice by avoiding the loss of reasonably made and lawful investment in the existing port facilities and the development of this aspect of the North Carolina economy. The mitigation measures will protect the public interest in public natural resources.

MITIGATION MEASURES

Lastly, Petitioner commits to substantial on-site and off-site mitigation measures to compensate for the impacts to the project area. Specifically, Petitioner would generate a mitigation equivalent by delivering the following measures:

1. Creation of tidal pools from *Phragmites* habitat on 6.75 acres. The tidal pools would be created on property located on the POW Brunswick River property located near the project area.
2. Donation of \$800,000.00 to complete construction and monitoring of a fish passage at Lock and Dam # 1 in the upper Cape Fear River to help restore anadromous fish populations in the Cape Fear River.
3. Tidal marsh enhancement from *Phragmites* habitat on 1.75 acres of property located on-site of the POW property.
4. Creation of a perpetual conservation easement on 30.2 acres of POW property east of the Brunswick River. Most of the property is brackish tidal marsh and Section 404 wetlands and serves as habitat for a myriad of invertebrates, juvenile fish and birds.

Petitioner also commits to delay construction until July 1, 2019 so as to minimize potential adverse effects on fish during their annual migration up river for spawning.

Staffs' Position: Yes.

Petitioner has stipulated that it's proposed development is contrary to those rules listed in the March 19, 2019 CAMA Permit denial letter, including

- 15A NCAC 7H .0208(b)(1), which requires that new dredging projects avoid areas designated as PNAs,
- 15A NCAC 07H .0208(b)(1)(F), which requires a boat basin to be excavated no deeper than the depth of the connecting waters.
- 15A NCAC 07H .0208(a)(2)(A), which requires projects avoid significant adverse impacts upon coastal wetlands, spawning and nursery areas.
- 15A NCAC 07H .0203, which states the objective of the CRC "to conserve and manage [its AECs] so as to safeguard and perpetuate their biological, social, economic, and aesthetic values and to ensure that development occurring within these AECs is compatible with the natural characteristics so as to minimize the likelihood of significant loss of private property and public resources."
- 15A NCAC 07H .0205(c), which states the objective of the CRC "to conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social and economic and aesthetic values, and to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource necessary to the functioning of the entire estuarine system."

Staff believes the variance meets the spirit, purpose and intent of the Commission's prohibition against new dredging in designated PNAs and the Commission's prohibition against dredging boat basins deeper than connecting waters, where, as in this case, the PNA resources in the area of the POW have been impacted by the longstanding use of the site as an industrial port subject to regular dredging and propeller agitation in the existing turning basin and federal channel.

On balance, Staff believes the variance meets the spirit, purpose and intent of the Commission's rules where it considers 7H .0208(a)(2)(A) [significant impacts on coastal wetlands, spawning and nursery areas], 7H .0203 [conserve and manage AECs and ensure development is compatible to minimize likelihood of significant loss of resources], 7H .0205(c) [conserve and manage coastal wetlands] with the Commission's rule at 7H .0208(a)(3) which states:

if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits outweigh the long-range adverse effects of the project, that there is no reasonable alternative site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and shall be implemented at the applicant's expense.

Staff acknowledges the significant economic value of the POW and believes it is within the spirit of the rules to consolidate industrial port activities in the coastal area. While Staff would have

preferred to review the Interim Expansion Study so that NC Ports could have addressed Staff's and other resource agencies' concerns and suggestions before it chose an alternative and submitted its permit application, Staff believes that if the POW accepts the mitigation measures recommended by DCM (below) and those from other federal and state resource agencies still reviewing the federal permit application and the 401 Water Quality Certification, such measures will mitigate the long-range adverse effects of the project.

Public Safety and welfare will be secured by allowing ship traffic at the POW to have sufficient room to navigate, while addressing and offsetting long-term adverse impacts to coastal resources by completing the proposed (and any additional mitigation measures) required by the Commission and other federal and state resource agencies. Substantial justice will be preserved in that the proposed variance would result in public benefits resulting from improved commerce at the POW.

MITIGATION MEASURES

Finally, Staff notes that the proposed mitigation measures have not been approved by federal resource agencies as part of the Corps of Engineers Individual Permit process, or by the NCDEQ Division of Water Resources as part of the 401 Water Quality Certification process. Therefore, mitigation measures are subject to change during these ongoing permit review processes. To date, NC Ports' current mitigation proposal, developed in coordination with resource agencies following the initial October 26, 2018 Compensatory Wetland Mitigation Plan, has proposed the following mitigation measures for this project:

1. Creation of tidal pools within existing *Phragmites* habitat on 6.75 acres. The tidal pools would be created on property located on the POW Brunswick River property located near the project area.
2. Donation of \$800,000.00 to complete construction and monitoring of a fish passage at Lock and Dam # 1 in the upper Cape Fear River to help restore anadromous fish populations in the Cape Fear River.
3. Tidal marsh enhancement by removing invasive *Phragmites* vegetation on 1.75 acres of property located on-site of the POW property.
4. Creation of a perpetual conservation easement on 30.2 acres of POW property east of the Brunswick River. Most of the property is brackish tidal marsh and Section 404 wetlands and serves as habitat for a myriad of invertebrates, juvenile fish and birds.
5. NC Ports also commits to delay construction until July 1, 2019 so as to minimize potential adverse effects on anadromous fish during their annual migration up river for spawning.

Staff notes that the first three proposed mitigation measures include efforts to improve the fisheries resources of the Cape Fear River. These measures are intended to respond to the outlined impacts associated with the expansion of the turning basin. However, DCM has concerns with respect to characterizing the proposed conservation easement as a mitigation measure where the property is largely submerged lands with Coastal Wetlands species present, which is already subject to federal

and state development restrictions including rules of this Commission. Additionally, while NC Ports classifies the July 1, 2019 start date for construction as a mitigation measure, Staff notes that this is merely respecting the usual dredging moratorium for the site, and would likely be required regardless.

Given Staff's and DMF's concerns about significant cumulative adverse impacts over time with past and future projects at the POW, Staff suggest the following additional mitigation measures that might be added to the variance by the Commission as reasonable conditions allowed by N.C.G.S. § 113A-120.1(b):

6. A condition requiring a monitoring plan to be created in coordination with federal and state resource agencies and to be funded by NC Ports to evaluate the effects of improvements to Lock and Dam 1 and whether the intended improved fish passage was successful (in DMF comments top of p.4)
7. A condition requiring NC Ports and NC DEQ to negotiate and agree to an MOU outlining specific public and interagency engagement for any future plans, studies, and alternatives analyses related to expansion of Port facilities prior to permit application submittal and/or petitions for Commission variances, to include public hearings, appropriate stakeholder engagement, and a process for improved coordination of timelines for state and federal environmental reviews to encourage improved interagency reviews and discussions of potential impacts and mitigation measures.
8. A condition requiring that if NC Ports needs to seek moratorium relief for the proposed dredging associated with this project, that it be done through a minor modification of the CAMA Major Permit issued pursuant to this variance.

ATTACHMENT D:
PETITIONERS' VARIANCE REQUEST MATERIALS
(except exhibits mutually stipulated to and Petitioner's initial proposed facts)

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:

SCOTT T. SLUSSER
SPECIAL DEPUTY ATTORNEY GENERAL
TRANSPORTATION DIVISION
1505 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699
919-707-4480

March 25, 2019

Via E-Mail

Ms. Renee Cahoon, Chairman, North Carolina Coastal Resources Commission
c/o Mary Lucasse, Esq.
Special Deputy Attorney General
North Carolina Department of Justice
E-Mail: mlucasse@ncdoj.gov

Re: Request for Expedited Variance Hearing

Dear Ms. Cahoon:

Pursuant to 15A N.C.A.C. 7J.0701, we respectfully request on behalf of our client, the N.C. State Ports Authority ("NCSPA" or "Ports"), that the Coastal Resources Commission ("CRC") grant NCSPA an expedited hearing in connection with a variance petition. We would request that this matter be heard at the April 17-18, 2019 CRC meeting. The reason for the expedited request is because the Ports hope to start construction on July 1, (prior to the next available CRC meeting) to avoid spring fish migratory patterns. There is a short construction window (July 1 – Jan 31) available and any delay after July 1 will have a significant impact on construction and for reasons discussed below the Ports are at risk for losing significant business if construction is not timely.

The variance petition concerns the CAMA major permit application for a modification to the existing 47-87 permit (dated October 29, 2018) for the installation of a vertical submerged toe wall, removal of the wooden Chevron Pier, and dredging in the Cape Fear River to widen the

existing ship turning basin. The petition will seek a variance from CRC rules pertaining to the expansion of the existing ship turning into estuarine, wetlands and primary nursery areas.

The current turning basin is approximately 1,400 feet wide. The Ports' CAMA major modification permit application seeks to widen the turning basin an additional 124 feet to 1,524 feet and to a final project depth of -42' (+2' +1' to clear any rock or debris) MLLW by mechanical dredging. Maintenance dredging would be at -42' +2'. Expansion of the turning basin is needed to accommodate larger shipping vessels that are scheduled to call on the Port of Wilmington at the beginning of 2020. The opening of the new Panama Canal, over two years ago, resulted in an unprecedented advancement in the container shipping industry. Vessels transiting the canal have tripled in size due to its increased dimensions. For instance, the POW was prepared to accommodate ships of 8,500-12,000 TEU (i.e., able to carry 8,500 to 12,000 shipping containers, or 8,500 -12,000 "twenty foot equivalent" units). Now, POW customers intend to use 14,000 TEU ships for the U.S. east coast. As ships become larger, both their length and beam increase in size. Accordingly, the turning basin is in need to be expanded to accommodate these 14,000 TEU ships.

Container shipping is a major source of revenue and business for the POW with most major customers sailing to/from Asia through the Panama Canal. The Ports' current infrastructure (i.e., berths, cranes, storage, trucking, etc.) can accommodate a 14,000 TEU ship, but the existing turning basin cannot. Once the turning expansion is complete, the Port of Wilmington will be able to accommodate a 14,000 TEU ship.

The Port's largest container shipping customers have informed the Ports that if the Port of Wilmington cannot accommodate the new vessels, the shipping companies will rely on other ports, such as Savannah and Norfolk for their business needs. The loss of this business will have a severe

impact on the Ports and on the many North Carolina businesses and consumers that rely on the Port of Wilmington to ship and receive goods to/from Asia and around the world.

The goal of the NCSPA is to widen the turning basin as soon as possible so that it can accommodate these larger ships so as not to lose this vital part of the North Carolina economy. In an attempt to expedite the necessary permits and to further convey the urgent need for this development, the NCSPA has committed to extensive mitigation for this development, including delaying construction until July 1, 2019 to minimize potential adverse effects on fish during their annual migration for spawning, enhancement of 6.75 acres of Phragmites dominated wetland to brackish tidal marsh habitat on the Brunswick River/Eagle Island Property, onsite enhancement of 1.75 acres of phragmites dominated habitat to coastal tidal marsh, conveyance of a conservation easement on 30.2 acres of Port property on the Brunswick River, and payment of \$800,000.00 for the construction and monitoring of Lock and Dam # 1 Rock Ramp Fish Passage Modification on the Cape Fear River, which will greatly expand migratory fish habitat.

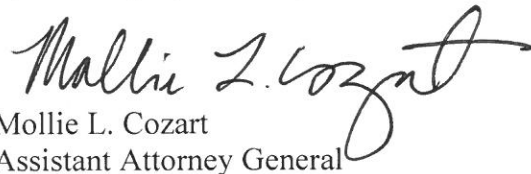
NCSPA businesses and consumers at large are facing generally unexpected circumstances that require immediate consideration by the CRC. The pressures of a competitive shipping industry, and the potential loss of important customers at the Port of Wilmington present a set of extenuating circumstances that warrant expeditious consideration of NCSPA's variance request. The variance will allow NCSPA to continue to serve container vessels for the benefit of businesses and consumers in North Carolina. Delay in the consideration of NCSPA's variance petition will affect its ability to accommodate these larger ships and will likely result in the loss of NCSPA's major customers and thereby have a direct impact on the Port's sustainability and its ability to serve the citizens and businesses of North Carolina.

It is our understanding that the CRC's next meeting is on April 17-18, 2019 and we respectfully ask that the CRC to hear the variance petition at that time. Please contact us with any questions or concerns. We appreciate your consideration.

Respectfully submitted,



Scott T. Slusser
Special Deputy Attorney General



Mollie L. Cozart
Assistant Attorney General

cc: **(via e-mail)**
Christine Goebel, Esq., NCDEQ
Mr. Brian Clark, NCSPA

CAMA VARIANCE REQUEST FORM

DCM FORM 11
DCM FILE No.: _____

PETITIONER'S NAME N.C. State Ports Authority

COUNTY WHERE THE DEVELOPMENT IS PROPOSED New Hanover

Pursuant to N.C.G.S. § 113A-120.1 and 15A N.C.A.C. 07J .0700 *et seq.*, the above named Petitioner hereby applies to the Coastal Resources Commission (CRC) for a variance.

VARIANCE HEARING PROCEDURES

A variance petition will be considered by the CRC at a regularly scheduled meeting, heard in chronological order based upon the date of receipt of a complete petition. 15A N.C.A.C. 07J .0701(e). A complete variance petition, as described below, must be *received* by the Division of Coastal Management (DCM) a minimum of six (6) weeks in advance of the first day of a regularly scheduled CRC meeting to be eligible for consideration by the CRC at that meeting. 15A N.C.A.C. 07J .0701(e). The final set of stipulated facts must be agreed to at least four (4) weeks prior to the first day of a regularly scheduled meeting. 15A N.C.A.C. 07J .0701(e). The dates of CRC meetings can be found at DCM's website: www.nccoastalmanagement.net

If there are controverted facts that are significant in determining the propriety of a variance, or if the Commission determines that more facts are necessary, the facts will be determined in an administrative hearing. 15A N.C.A.C. 07J .0701(b).

VARIANCE CRITERIA

The petitioner has the burden of convincing the CRC that it meets the following criteria:

- (a) Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.
- (b) Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.
- (c) Do the hardships result from actions taken by the petitioner? Explain.
- (d) 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.

Please make your written arguments that Petitioner meets these criteria on a separate piece of paper.

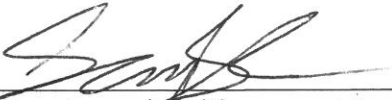
The Commission notes that there are some opinions of the State Bar which indicate that non-attorneys may not represent others at quasi-judicial proceedings such as a variance hearing before the Commission. These opinions note that the practice of professionals, such as engineers, surveyors or contractors, representing others in quasi-judicial proceedings through written or oral argument, may be considered the practice of law. Before you proceed with this variance request, you may wish to seek the advice of counsel before having a non-lawyer represent your interests through preparation of this Petition.

For this variance request to be complete, the petitioner must provide the information listed below. The undersigned petitioner verifies that this variance request is complete and includes:

- The name and location of the development as identified on the permit application;
- A copy of the permit decision for the development in question;
- A copy of the deed to the property on which the proposed development would be located;
- A complete description of the proposed development including a site plan;
- A stipulation that the proposed development is inconsistent with the rule at issue;
- Proof that notice was sent to adjacent owners and objectors*, as required by 15A N.C.A.C. 07J .0701(c)(7);
- N/A Proof that a variance was sought from the local government per 15A N.C.A.C. 07J .0701(a), if applicable;
- Petitioner's written reasons and arguments about why the Petitioner meets the four variance criteria, listed above;
- A draft set of proposed stipulated facts and stipulated exhibits. Please make these verifiable facts free from argument. Arguments or characterizations about the facts should be included in the written responses to the four variance criteria instead of being included in the facts.
- This form completed, dated, and signed by the Petitioner or Petitioner's Attorney.

**Please contact DCM or the local permit officer for a full list of comments received on your permit application. Please note, for CAMA Major Permits, the complete permit file is kept in the DCM Morehead City Office.*

Due to the above information and pursuant to statute, the undersigned hereby requests a variance.



Signature of Petitioner or Attorney

Date

3/25/19

Printed Name of Petitioner or Attorney

Email address of Petitioner or Attorney

1 South Wilmington Street

Telephone Number of Petitioner or Attorney

Mailing Address

(919) 707-4526

City State Zip

Fax Number of Petitioner or Attorney

Raleigh NC 27601

(919) 733-9329

DELIVERY OF THIS HEARING REQUEST

This variance petition must be **received by** the Division of Coastal Management at least six (6) weeks before the first day of the regularly scheduled Commission meeting at which it is heard. A copy of this request must also be sent to the Attorney General's Office, Environmental Division, 15A N.C.A.C. 07J .0701(e).

Contact Information for DCM:

By mail, express mail or hand delivery:

Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

By Fax:
(252) 247-3330

By Email:

Check DCM website for the email
address of the current DCM Director
www.nccoastalmanagement.net

Contact Information for Attorney General's Office:

By mail:

Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001

By express mail:

Environmental Division
114 W. Edenton Street
Raleigh, NC 27603

By Fax:

(919) 716-6767

PETITIONER'S POSITION

ON

VARIANCE CRITERIA

- (1) **Will unnecessary hardships result from strict application of the rules, standards, or orders?**

Petitioner's position: Yes.

Petitioner's argument: The Port of Wilmington ("POW") is the only port in North Carolina that can accommodate container vessels. The POW receives and exports goods from across the globe, especially from Asian countries. Transporting goods to/from Asia is an expensive process and shipping companies, like any transportation business, seeks to transport the most goods for the cheapest price. This is done by using the largest ships that can practically move the most goods. POW customers intend to use 14,000 TEU¹ container ships which are the largest ships capable of navigating the Panama Canal. The existing turning basin at the POW needs to be expanded 124 feet to accommodate these vessels. If the turning basin is not expanded, those vessels will bypass the POW and call on other east coast ports, thereby causing significant economic impact to the POW and the North Carolina economy.

Container shipping is vital to the North Carolina economy. The annual revenue for the Wilmington Port is approximately \$38.2 million. Container business accounts for 48% of that revenue. While the annual revenue to the Port itself is significant, the economic benefit to citizens of North Carolina with access to global shipping operations is exponentially larger. A single Far East Service has a direct economic impact of \$3.8 billion per year.

Prior to 2016, the POW's customers notified it that the customers would be using larger ships capable of transporting 8,500-12,000 TEUs to transport container goods to the U.S. east coast upon completion of enlarged locks at the Panama Canal. As such, in 2016 the POW expanded the then existing turning basin to 1,400 feet to accommodate these new larger ships. While an 8,500-12,000 TEU ship is significant, shipping companies were also utilizing 14,000 TEU ships for non-Panama Canal trade routes. However, after the new Panama Canal opened, Canal operators tried and were able to safely navigate a 14,000 TEU through the Canal. A 14,000 TEU ship would be the largest ship capable of navigating the Canal.

Now that 14,000 TEU ships can navigate the new Panama Canal, the POW's customers now intend to utilize these ships to transport goods to/from the U.S. east coast. Other Ports

¹ TEU stands for "twenty foot equivalent," which is equal to the size of one 20 x 8 foot shipping container. A 14,000 TEU vessel can carry 14,000 shipping containers.

on the East Coast such as Norfolk, Savannah, and New York are currently able or soon will be able to accommodate a 14,000 TEU ship. The POW has the existing infrastructure such as cranes, berths, storage, and transportation to accommodate a 14,000 TEU ship, with the exception of the turning basin. The insufficient turning basin is the only impediment to servicing a 14,000 TEU ship. While the turning basin was expanded in 2016, it needs to be expanded by another 124 feet to allow safe maneuverability of a 14,000 TEU ship. Without the expansion of the turning basin, the POW would lose the ability for North Carolina to maintain presence in the global container shipping market.

The loss of this revenue would have a tremendous adverse effect on the Port's vitality and the North Carolina economy. Thus, the inability to enlarge the turning basin constitutes an unnecessary hardship to the Petitioner and to the economy of the State.

- **Conservation of Estuarine System (15A NCAC 07H.0203)**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The area has been used as an industrial port since 1945 and therefore has reduced estuarine value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. The land adjacent to the estuarine system is occupied by large chemical storage tanks and other industries. Arguably this area has no social or aesthetic values and has severely diminished natural characteristics. However, it does have great economic values to the economy of North Carolina. The strict application of the estuarine system rule, would neglect to consider the heavy industrial use of the area. Therefore the strict application will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts to the estuarine system.

- **Management of Coastal Wetlands (15A NCAC 07H.0205(c))**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The area has been used as an industrial port for decades and therefore has diminished the coastal wetlands in the area. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. The land adjacent to the wetlands is occupied by large chemical storage tanks and other industries. Arguably this area has no social or aesthetic values and has severely diminished function. However, it does have great economic values to the economy of North Carolina. The strict application of the coastal wetland rule, neglects to consider the heavy industrial use of the area. Therefore the strict application will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts to the coastal wetlands.

- **Development consistent with AEC and Fisheries (15A NCAC 07H.0208(a)(2)(A))**

As stated previously, the action area has diminished environmental function due to historic industrial uses. However, during construction impacts can be managed by use of mechanical dredging, use of turbidity curtains, containment booms, restricting dredging during certain times and other conditions determined necessary by the Commission. No known incidental takes of sturgeon species have occurred during prior dredging operations. Therefore the strict application of this rule will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of impacts during development.

- **Primary Nursery Area (15A NCAC 07H.208(b)(1)).**

The area adjacent to the existing turning basin has been designated a PNA since 1977. This PNA designation exists because the PNA area extends from bank to bank of the Cape Fear River regardless of the historic use of the area. This area has been heavily dredged in the past to maintain the navigation channel and has been used as an industrial port for decades and therefore has reduced fisheries value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area. Under the strict application of the PNA rule, new dredging in any designated PNAs is prohibited by the rules of the Coastal Resources Commission.

A strict application of the PNA rules will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers. Moreover, the hardship is unnecessary in view of the measures that the Petitioner will implement to mitigate the adverse effects of dredging in a primary nursery area.

- **No excavation deeper than connecting waters (15A NCAC 07H.0208(b)(1)(F))**

This area has been heavily dredged in the past to maintain the navigation channel and turning basin. The current depth of the navigation channel is 42 feet and because dredging is imprecise, there are allowances for 2 feet overages. Benthic communities are less productive at these depths. Due to the imprecision of dredging, the POW is proposing a depth of the expanded turning basin at a maximum of 42' (+2' +1' to clear any rock or debris). Future maintenance dredging would be 42' +2'. The extra depth is necessary for the larger 14,000 TEU ships to safely maneuver the 180 degree turn so that they may head back to sea. However, dredging at those depths will have little to no different impacts that already exist at 42' +2'. A strict application of the excavation rules will prevent the enlargement of the turning basin and will result in a loss in the POW's container ship customers.

(2) **Do such hardships result from conditions peculiar to Petitioner's property such as the location, size, or topography of the property?**

Petitioner's position: Yes.

Petitioner's argument: The POW is the only site in North Carolina that has an existing turning basin and infrastructure to accommodate container ships. The Cape Fear River at this location has been extensively dredged for the navigation channel and to accommodate large ships. The POW facility, the ship channel, and turning basin are the only facilities in North Carolina that can practically be used to accommodate container shipping. The POW currently has the infrastructure to accommodate 14,000 TEU container ships, with the exception of the turning basin. If the basin was extended 124 feet, it would be completely able to service a 14,000 TEU ship. No further expansion of the turning basin would be expected. There is no other property in North Carolina that can practically be used to create a wide enough and deep enough body of water to accommodate the largest container ships (14,000 TEU) that can navigate the Panama Canal.

As previously stated, this area has been heavily dredged in the past to maintain the navigation channel and has been used as an industrial port for decades and therefore has reduced environmental value. There is no submerged aquatic vegetation, shellfish, or hard bottom habitat located within the proposed action area.

(3) **Do the hardships result from actions taken by the Petitioner?**

Petitioner's position: No.

Petitioner's argument: The POW is engaged in a global economy and therefore is just one part in a global machine. The global economy will continue to exist with or without the POW, but without the POW, North Carolina will suffer greatly. The Petitioner has no control over the size of the ships that are being used by its customers. The Petitioner has no control over the capabilities of the Panama Canal. Nor does the Petitioner have any practical alternative for enlarging the turning basin. The Project includes a vertical pile toe wall along the eastern extents of the basin to reduce the need for additional slope excavation. Petitioner has delayed proposed construction until after July 1, 2019 to avoid spring fish migration impacts. The Petitioner also intends to use mechanical dredging, turbidity curtains and other suggested means to reduce environmental impacts from the dredging operation. The hardships do not result from the actions taken by the Petitioner.

(4) **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?**

Petitioner's position: Yes.

Petitioner's argument:

- **Consistent with the spirit, purpose and intent of rules.**

The Coastal Area Management Act states, in pertinent part, that a goal of the Act is “[t]o establish policies, guidelines and standards for . . . the economic development of the coastal area including . . . construction, location and design of . . . port facilities . . . [and] navigation

channels and harbors....” N.C. Gen. Stat. § 113A-102(b)(4). The Port of Wilmington, navigation channel, and turning basin were already in existence at the time CAMA was enacted, and CAMA recognizes that such facilities are a part of the existing coastal area and should be taken into account when developing the CAMA program.

The Management Objective for Estuarine Waters found in 15A NCAC 7H.0206(c) states:

To conserve and manage the important features of estuarine waters so as to safeguard and perpetuate their biological, social, aesthetic and economic values; to coordinate and establish a management system capable of conserving and utilizing estuarine waters so as to maximize their benefits to man and the estuarine and ocean system.

In addition, the Use Standards for Estuarine Waters found in 15A NCAC 7H.0206(d) states:

Highest priority of use shall be allocated to the conservation of Estuarine Waters and their vital components. Second priority of Estuarine Waters use shall be given to those types of development activities that require water access and use which cannot function elsewhere such as simple access channels; structures to prevent erosion; navigation channels; boat docks, marinas, piers, wharfs and mooring pilings.

Thus, the CRC Rules clearly anticipate that water-dependent uses such as the POW are appropriate in certain circumstances. The CRC Rules also set out guidelines for approving projects that conflict with the use standards in the CRC Rules. In accordance with 15A NCAC 7H.0208(a)(3), a development can be approved,

if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits outweigh the long-range adverse effects of the project, that there is no reasonable alternative site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and shall be implemented at the applicant's expense.

For the reasons previously stated, the POW is vital to the North Carolina economy. There is no other reasonable alternative site available for the project. The POW is the only facility in the state that can accommodate a 14,000 TEU container ship, with the exception of the turning basin. The 124 foot expansion of the turning basin would allow the POW to accommodate these ships and maintain presence in the global market. All reasonable means and measures have been proposed to mitigate adverse impacts. A toe wall, mechanical dredging, turbidity curtains and limiting construction during fish migration are a few examples of these measures. In addition, the POW proposes a significant mitigation plan to accommodate for the impacts of the turning basin expansion.

For these reasons, the project is consistent with the spirit, purpose and intent of the CRC Rules and the need to balance the need for port facilities (public benefit) and the conservation and management of natural resources.

- **Secure the public safety and welfare.**

Port operations will be safer with a wider turning basin. Public welfare will be secured by allowing the Port to continue to provide significant economic benefits to the people of North Carolina.

- **Preserve substantial justice.**

The variance will allow the Port to continue to realize benefits from the substantial investment in the infrastructure used to service the container ship industry. If the Port were to lose a significant part or all of its container ship business, the investment made by the Port in the facilities used to service container ships will be wasted. The economy of North Carolina would suffer from the loss of this avenue for global trade. Allowing the variance will preserve justice by avoiding the loss of reasonably made and lawful investment in the existing port facilities and the development of this aspect of the North Carolina economy. The mitigation measures will protect the public interest in public natural resources.

MITIGATION MEASURES

Lastly, Petitioner commits to substantial on-site and off-site mitigation measures to compensate for the impacts to the project area. Specifically, Petitioner would generate a mitigation equivalents by delivering the following measures:

1. Creation of tidal pools from *Phragmites* habitat on 6.75 acres. The tidal pools would be created on property located on the POW Brunswick River property located near the project area.
2. Donation of \$800,000.00 to complete construction and monitoring of a fish passage at Lock and Dam # 1 in the upper Cape Fear River to help restore anadromous fish populations in the Cape Fear River.
3. Tidal marsh enhancement from *Phragmites* habitat on 1.75 acres of property located on-site of the POW property.
4. Creation of a perpetual conservation easement on 30.2 acres of POW property east of the Brunswick River. Most of the property is brackish tidal marsh and Section 404 wetlands and serves as habitat for a myriad of invertebrates, juvenile fish and birds.

Petitioner also commits to delay construction until July 1, 2019 so as to minimize potential adverse effects on fish during their annual migration up river for spawning.

CAMA VARIANCE PETITION
NORTH CAROLINA STATE PORTS AUTHORITY

Petitioner, North Carolina State Ports Authority, through its Attorney, Scott T. Slusser, Special Deputy Attorney General, stipulates that the proposed development that is subject of the Variance Petition is inconsistent with Coastal Resources Commission Rules 15A NCAC 7H.0203; 0205(c); .0208(a)(2)(A); .0208(b)(1); and .0208(b)(1)(F).

By:  _____

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ATTACHMENT E:
STIPULATED EXHIBITS INCLUDING POWERPOINT

1. Deed for POW site
2. CAMA Major Permit Modification Application of October 26, 2018 with attachments
3. Brian E. Clark Affidavit, dated April 1, 2019 with attachments
4. 2018 NCSU Study prepared by Institute for Transportation Research and Education
5. Paula Cozza letter of October 22, 2018
6. 2015 CRC Variance Order
7. March 1, 2018 Interim Expansion Study
8. November 14, 2018 Ship Simulation Study by Maritime Inst. of Tech. and Grad. Studies
9. Full Mission Ship Simulations Memo- Moffit & Nichol
10. Comments of DCM Planner re: Consistency with LUP
11. PNA map showing the site
12. Wetlands Map
13. October 2018 Essential Fish Habitat (EFH) Study
14. October 2018 Biological Assessment for Shortnose and Atlantic Sturgeon
15. April 2, 2019 letter from Army Corps of Engineers to Ports re: use of Eagle Island
16. October 2018 Initial Mitigation Plan
17. February 11, 2019 Revised Mitigation Plan
18. February 26, 2019 Revision to Revised Mitigation Plan
19. Conservation Easement location maps (2015 and 2019)
20. Pre-application Meeting list of attendees
21. October 29, 2018 email from Corps to DCM confirming Corps to do Individual Permit
22. Ports' Multi-Use Terminal project- Application, project narrative, and DCM Field Report
23. DCM Field Investigation Report
24. April 4, 2019 DCM File Notes showing permit action history- POW CAMA Permits
25. December 8, 2015 CAMA Major Modification to No. 47-87 (for 2015 Expansion)
26. Comments of the Army Corps of Engineers
27. Comments of National Marine Fisheries Service (NMFS)
28. Comments of the NC Division of Marine Fisheries, two sets of comments
29. Comments of the NC Wildlife Resources Commission
30. Comments of the Division of Water Resources and the Port's responses
31. Proof of publishing of notice in the Star News (twice)
32. Copy of on-site notice card
33. Comments from Kerri Allen of NC Coastal Federation, dated 1/8/19, 2/8,19, and 3/12/19
34. Notice of the permit (and revised mitigation plan) to adjacent riparian owners Apex Oil, Kinder Morgan, and Buckeye Terminals, LLC
35. March 19, 2019 CAMA Permit Denial Letter
36. Corps' 11/15/19 Public Notice and permit order guidance documents
37. Notice of the Variance Petition to Adjacent Riparian owners and NCCF
38. NC Ports Request to expedite hearing, DCM's Response, CRC's Decision to expedite
39. Powerpoint Slideshow with relevant maps, GIS images, diagrams, site photos