

# NC COASTAL RESOURCES COMMISSION

July 15, 2010

NOAA/NCNERR Administration Building

Beaufort, NC

The State Government Ethics Act (Chapter 138A of the General Statutes) mandates that the Chair (1) remind members of their duty to avoid conflicts of interest or appearances of conflict, and (2) inquire as to whether any member knows of any known conflict of interest or appearance of conflict with respect to matters before the Commission. If any member knows of a conflict of interest or appearance of conflict, please so state when requested by the Chairman.

## Thursday, July 15<sup>th</sup>

### 9:00 EXECUTIVE COMMITTEE MEETING

Bob Emory, Chair

### 10:00 COMMISSION CALL TO ORDER (Auditorium)

Bob Emory, Chair

- Roll Call
- Approval of May 19, 2010 Meeting Minutes
- Executive Secretary's Report
- Chairman's Comments

Jim Gregson  
Bob Emory

### CONTESTED CASES

- Donaghue v. DCM (09 EHR 0568), Carteret County, 50% Rule

Ward Zimmerman

### VARIANCES

- Overton - (CRC-VR-10-03) Figure Eight Island, Sandbag removal deadline

Christine Goebel

### ACTION ITEMS

#### Land Use Plan Certifications and Amendments

- Town of Sunset Beach LUP Certification (CRC-10-24)

Bob Emory, Chair  
John Thayer

### 12:00 PUBLIC INPUT AND COMMENT

### 12:15 LUNCH

### 1:00 PRESENTATIONS

- South Carolina Shoreline Change Advisory Committee Report (CRC-10-25)
- Inlet Hazard Area Discussion (CRC-10-28)
- Sandbag Overview/Update (CRC-10-29)
- Sandbags - Science Panel Recommendations
- Marinas, PNAs and Dredging
- OCS Update (CRC-10-22)
- Oil Spill Response
- Permitting Agricultural Drainage

Braxton Davis, Director  
Policy & Planning Division  
S.C. Ocean & Coastal Resource Mgmt  
Jeff Warren, Ken Richardson  
Mike Lopazanski  
Spencer Rogers  
David Taylor, DMF  
Mike Lopazanski  
Lt. Shannon Scaff, USCG  
David Moye

### OLD/NEW BUSINESS

- Future Meetings and Agenda Items

Bob Emory, Chair

### 5:00 ADJOURN



N.C. Division of Coastal Management

[www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)

Next Meeting:

September 16, 2010

NOAA/NCNERR Administration Building

Beaufort, NC

**NC COASTAL RESOURCES COMMISSION (CRC)**

**May 19, 2010**

**NOAA/NCNERR Auditorium**

**Beaufort, NC**

**Present CRC Members**

Bob Emory, Chairman

Joan Weld, Vice-Chair

Chuck Bissette

Renee Cahoon

Charles Elam

David Webster

Bill Peele

Jamin Simmons

Veronica Carter

Melvin Shepard

Ed Mitchell

Bob Wilson

Lee Wynns

Jerry Old (present at 10:10)

**Present Attorney General's Office Members**

Jennie Hauser

Christine Goebel

**CALL TO ORDER/ROLL CALL**

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

Angela Willis called the roll. Jim Leutze was absent. There were no conflicts or appearances of conflict declared by Commissioners. Based upon this roll call, Chairman Emory declared a quorum.

**MINUTES**

**Melvin Shepard made a motion to approve the minutes of the March 24-26 Coastal Resources Commission meeting. Renee Cahoon seconded the motion. The motion passed unanimously (Weld, Cahoon, Elam, Webster, Peele, Carter, Shepard, Mitchell, Wilson, Wynns, Simmons) (Bissette abstained) (Old absent for vote).**

**EXECUTIVE SECRETARY'S REPORT**

DCM Director Jim Gregson gave the following report.

**General Assembly/Budget**

The General Assembly reconvened for the short session last week, and is hard at work on the budget. Governor Perdue released her proposed adjustments to the biennial budget on April 20. Both the governor's budget and the May 14 Natural and Economic Resources Senate subcommittee draft money report recommended that one half of DCM's Washington district manager position be shifted to receipts. The governor's budget also recommended that the Division eliminate one vacant position, which would be the Washington district planner, and that various operating accounts be reduced by seven percent which is approximately \$85,000.00.



The Senate appropriations subcommittee has also recommended a reduction of one million dollars in Department Information and Technology funds, and consolidates some smaller DENR divisions into one. DENR is currently in the process of a reorganization that will enact the recommendations of these budget proposals.

### **CZM Program Changes**

As required by law, the Division has recently notified NOAA of a proposed routine program change to the state's Coastal Management Program. The notification is required by federal Coastal Zone Management Act regulations. The Coastal Zone Management Act requires state Coastal Zone Management Programs to formally incorporate changes made to the laws, rules and policies that are used for federal consistency purposes. These changes have already been made to each regulation, and the purpose of this action is to incorporate these changes into the N.C. Coastal Management Program.

The CRC has updated the following rules and considers this action a routine change to the state's approved coastal management program. The CRC is requesting concurrence with this finding from NOAA's Office of Ocean and Coastal Resource Management.

**1. 15A NCAC 7H.0306 General Use Standards for Ocean Hazard Areas**

*Ties oceanfront setbacks to the size of the structure and not the use of the structure. The revisions include graduated setback factors for buildings greater than 5,000 square feet and precludes oceanward cantilevering.*

**2. 15A NCAC 7J.1200 Static Vegetation Line Exception Procedures**

*Creates procedures for local jurisdictions to apply to the CRC for static line exceptions in conjunction with long-term beach fill projects.*

The public comment period for this change is between May 1 and May 21. Comments on these proposed changes should be submitted in writing directly to the National Oceanic and Atmospheric Administration by May 21, 2010. Contact information for public comments is available on DCM's website.

### **Hurricane Season**

Next week is National Hurricane preparedness week, and hurricane season officially begins June 1. N.C. State University researchers predict that this year's Atlantic hurricane season will be an unusually active one, with 15 to 18 named storms forming in the Atlantic basin and as many as 11 of them becoming hurricanes. The National Hurricane Center recently announced that it will begin issuing storm watches and warnings about half a day sooner than previously issued. When a storm is approaching land, forecasters will now send watches advising that tropical storm conditions can be expected in 48 hours, instead of 36 hours. Warnings of tropical storm or hurricane conditions will be issued 36 hours ahead, instead of 24 hours.

### **Rachel Carson Cleanup**

DCM staff and volunteers spent Earth Day cleaning up the Rachel Carson National Estuarine Research Reserve in Beaufort. Several hundred pounds of trash were collected and removed from the Reserve, including plastics, old nets, foam, glass bottles, cans and tires. Some unusual items found were an old wetsuit, radio speakers, a kayak paddle, and a homemade porta-potty. I'd like to thank all the staff and other volunteers who helped out.

### **Invasive Plants Workshop**

On May 22 in Wilmington, the Coastal Training Program will sponsor a workshop aimed at training resource managers on the Early Detection and Rapid Response System (EDRR) for invasive plants. This workshop, held in partnership with the N.C. Exotic Pest Plant Control Council and the Cape Fear Arch Coalition, will be the first step in developing a Coastal Early Detection and Reporting Network in North Carolina. Workshop presentations will include Rapid Response efforts already being conducted on witchweed, giant salvinia and beach vitex, as well as an overview of additional species that are targeted for early detection in North Carolina.

### **Summer Camps at Rachel Carson Reserve**

This summer the Rachel Carson Reserve will again host educational programs for students of all ages, in partnership with the North Carolina Maritime Museum. The Reserve will also be assisting the Museum with their Coastal Adventures program by offering nature hikes to the Rachel Carson Reserve, fish seining and plankton viewing.

Programs include:

- **Preschool Storytime and Crafts**, which includes a story, estuarine critter observation, and a related craft.
- **Seashore Life 1**, where students will investigate coastal marine life through field-based classes that will include a ferry ride, barrier island hiking, and animal identification.
- **Saltwater Science**, which includes investigating wildlife and water quality while exploring the coastal waters and ecosystems of the Rachel Carson Reserve.

For more information about these programs, please contact Lori Davis, Division Education Specialist, at the Reserve.

### **Staff News**

Robb Mairs has rejoined the Wilmington office as our field representative for New Hanover County. Robb left DCM in 2008 for a position in private industry, but lucky for us, he has since decided to return to the Division. David Moye is the new district manager in the Washington district. David joined the DCM Washington office in 1990, working as a field representative for 14 years, and then as the express permit coordinator for five years. He has been the acting district manager in Washington for the last eight months. While performing the duties of acting district manager he has continued to perform the duties of the express permit coordinator. He has agreed to do both of those jobs. Washington field rep Mike Thomas has left DCM for a position with

the Division of Water Quality. Reserve education specialist Lori Davis recently earned her Environmental Educator certification. To earn the certification, program participants are required to complete 200 hours of professional development, which includes instructional workshops, 50 hours of outdoor experiences, knowledge of environmental education resources and facilities, a teaching component, and a community environmental stewardship project. Finally, there is some very sad news to report within the Division. Our Minor Permits Coordinator, Ed Brooks, who had been with the Division for almost 23 years passed away at Duke Medical Center last month following a double lung transplant. He will be greatly missed by all of us.

### **CHAIRMAN'S COMMENTS**

Chairman Emory stated this is a short meeting. We have had several eventful meetings over the past eight to twelve months dealing with terminal groins, so a low-key meeting is due. You have received the schedule for our future meetings through February. They are all one-day meetings located at the NOAA/NCNERR Auditorium in Beaufort. This is in recognition of the budget situation in the state. In the Executive Committee meeting we talked about the need to make the most efficient use of that time and we will give this some thought as we plan our next meeting. We will also be thinking about the best way to make sure that the Coastal Resources Advisory Council is incorporated. We reported our terminal groin recommendations to the Environmental Review Commission of the Legislature as required by the House Bill. We were to make those recommendations by April 1 and we met that deadline. We submitted the report and it was also sent to the leadership in the Legislature. At this point we have not heard any response from the ERC.

### **CONTESTED CASES**

#### **McDaniel Kirchner v. DCM (09 EHR 4153) Morehead City, Water Depth**

Christine Goebel of the Attorney General's Office stated Mr. McDaniel and Ms. Kirchner are not present and did not indicate that they planned to be here. Ms. Goebel stated in this contested case we are asking the Commission to uphold and adopt the Administrative Law Judge's decision in this case. There was a one-day hearing back in February. At the conclusion of the hearing the ALJ, Beecher Gray, ruled from the bench in favor of DCM Staff.

There are two adjacent lots on Calico Creek in Morehead City. Calico Creek at this location is a primary nursery area. The field report in this case indicates that normal low water is between zero and negative six inches with a tidal range of about 2 ½ feet. Petitioners have proposed a 4'x194' pier that was a joint pier for these two lots. They also proposed a 10'x40' platform and two 13'x13' boatlifts. During the Major Permit process there were objections received from DCM field staff. They noted that the ingress and egress at these shallow depths has the potential to cause new excavation through prop dredging. Field staff recommended against granting the permit. The Division of Marine Fisheries also submitted their objections. They recommended denial due to significant adverse impacts to shallow bottom habitat and shell habitat by prop dredging. The Wildlife Resources Commission also had objected to the permit reiterating DMF's concerns. The Division of Water Quality indicated that they were headed toward a denial in their 401 permit process due to the significant impacts to the primary nursery area

habitat. Based on these comments, the Division of Coastal Management denied the permit application due to inconsistencies with two rules. The owners had also received a permit in 2008 for the pier and platform without the boatlift access. Potentially they could get a permit for that again. At the end of the hearing the ALJ found in favor of DCM's permit denial and the judge agreed that the proposed project would cause significant adverse impacts to the PNA habitat. We are asking the CRC to uphold the Administrative Law Judge's decision and DCM's denial of the permit.

**Melvin Shepard made a motion to adopt the Administrative Law Judge's decision in its entirety and find that DCM acted correctly. Jamin Simmons seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

### VARIANCES

#### **Bennett Brothers Yachts, Inc. (CRC-VR-10-01) Wilmington, Dredging depth**

Christine Goebel of the Attorney General's Office, representing the Division of Coastal Management, stated Petitioner owns an existing marina in Wilmington just north of the Isabelle Holmes Bridge crossing the Northeast Cape Fear River. Bennett Brothers Yachts, Inc. was issued a CAMA permit in 1997 for construction of a marina and the upland boat repair facility. Ms. Goebel reviewed some of the stipulated facts of this variance request. On June 10, 2009, Petitioners submitted an application for a major modification of the earlier permit proposing to dredge an area of about 87,000 square feet within the footprint of the existing docks to remove sediment that had accumulated since the marina was constructed without dredging in 1997. In December of 2009, DCM denied Petitioner's application for the Major Permit. The primary issue was the proposed new dredging in a primary nursery area which is prohibited by CRC rules. All of the area of the proposed dredging is within a primary nursery area and this area was designated a primary nursery area when the property was purchased. No dredging was proposed or authorized in the 1997 permit. Staff would note that stipulated fact #23 talks about the condition of the property in 1997, but a lot of time has passed since then.

Ms. Goebel reviewed the four statutory criteria that must be met in order to grant the variance. Staff and Petitioners disagree on all four criteria. Staff feels strict application of the rules will not cause the Petitioner unnecessary hardship. In fact, Staff believes that the rules cause hardships which are necessary for new dredging because this area is classified as a PNA. Staff does not believe that hardships result from conditions which are peculiar to the petitioner's property since siltation in marinas is common and a predictable occurrence. This site has long been designated as a PNA and this area has the characteristics of a PNA. Staff believe that Petitioners have caused their own hardships in this case. It has been a PNA for a long time, it is a functioning primary nursery area, siltation in a marina is a typical occurrence, and all of these things could have been anticipated and designed around in 1997. Staff finds it would not be consistent with the spirit of the rules to grant a variance in this case. A variance would allow new dredging at this location which was and continues to be a functioning PNA. Staff also notes that the mitigation measures that are now proposed by Petitioner were not evaluated by DCM and the other resource agencies during the permit process so Staff are not comfortable making any conclusions about mitigation measures at this time. To allow new dredging in a functioning,

designated primary nursery area over the specific objections of DMF would not help to secure the public's safety and welfare. Granting a variance would not preserve substantial justice. Dredging in this functioning primary nursery area was never allowed in the past and to allow dredging at this time would not preserve substantial justice as there is no fairness in changing the rules for one marina but not all the marinas located in a primary nursery area along the coast.

William Raney, Jr. of Wessell & Raney LLP, represented Petitioners. Mr. Raney stated Patricia Bennett, owner of Bennett Brothers, as well as Bruce Marek, consulting engineer of the project, are both present. Mr. Raney stated there was a misunderstanding with the permit application and the review by the agencies. You will note in the materials that you have been provided that the staff report for this project indicates that there would be dredging to minus twelve feet throughout the footprint of the proposed dredging. The actual application indicates that the dredging under the docks was to be to minus six feet tapered down to a natural contour at minus twelve feet as it gets out further into the marina. You will also note that some of the comments from the agencies indicated that they believed that the dredging requested was to minus twelve feet. In addition to that, the request that we are making today is to not go the full six feet that was originally requested, but just to the minus 4.5 feet. That will float the docks and will be more or less equivalent to the depths when the original construction occurred.

**Jerry Old made a motion that strict application of the rules cause the Petitioner unnecessary hardships. Renee Cahoon seconded the motion. The motion passed with twelve votes (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Veronica, Cahoon, Old, Wilson, Elam) (Shepard abstained).**

**Jerry Old made a motion that hardships result from conditions peculiar to the Petitioner's property. Renee Cahoon seconded the motion. The motion passed with nine votes in favor (Mitchell, Simmons, Wynns, Bissette, Peele, Weld, Old, Wilson, Elam) and four against (Webster, Shepard, Carter, Cahoon).**

**Bill Peele made a motion that the hardships do not result from actions taken by the Petitioner. Charles Elam seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

**Bob Wilson made a motion that the variance will be consistent with the spirit, purpose and intent of the rules; secure public safety and welfare; and preserve substantial justice. Bob Wilson added the condition that Petitioners be permitted to dredge to -4.5 MLW plus allow another half a foot to ensure they reach their 4.5 foot depth. Jerry Old seconded the motion. The motion passed with nine votes in favor (Mitchell, Simmons, Wynns, Bissette, Peele, Cahoon, Old, Wilson, Elam) and four against (Webster, Weld, Shepard, Carter).**

This variance was granted.

**Lawing (CRC-VR-10-02) Chowan County, Boathouse**

*\*\*Lee Wynns stated he has a business on the Chowan River, but it will in no way effect deliberations on this variance request.\*\**

Christine Goebel of the Attorney General's office represented Staff. Ms. Goebel stated Petitioner proposes to construct a 14' x 28' boathouse by building a roof over an existing boatlift attached to an existing pier and platform in Edenton, along the Chowan River in Chowan County. The Petitioner's property has approximately 50 linear feet of shoreline. DCM denied Petitioner's application based upon inconsistency between the requirements set forth in 15A NCAC 7H .0208(b)(6)(G) which states that boathouses shall not be allowed on lots with less than 75 linear feet of shoreline. Ms. Goebel reviewed the stipulated facts in this variance and addressed the four statutory criteria. Staff does not believe that strict application of the rules cause the Petitioner unnecessary hardship. From the existing pier, boatlift and platform Petitioners have been able to utilize their pontoon boat. Staff do not believe that hardships are a result of conditions peculiar to Petitioner's property as all of the lots within the subdivision also have 50 linear feet of shoreline. Staff and Petitioner agree that none of the hardships result from actions taken by the Petitioner. Staff does not believe that this variance request would be consistent with the spirit, purpose or intent of the rule. Petitioners raise some takings claims; however Staff does not believe that these claims are right. Staff feel that substantial justice is preserved if the variance is denied as 50 feet of shoreline is not close to 75 feet of shoreline. This policy is a statewide policy and the minimum shoreline requirement must be applied consistently.

Pierce Lawing, Petitioner, stated I am a scientist and an engineer and spent 36 years with NASA but I am not instructed in matters of law. This is an objective situation. This rule usurps the power of riparian neighbors who have already approved what I want to do. I am in tune with the environment, both preservation and intelligent use. I object to some of the verbiage used in Staff's position including the preservation of aesthetic value of our coastal resources by preventing clutter and excessive structures.

**Melvin Shepard made a motion to support Staff's position that strict application of the applicable development rules, standards or orders issued by the Commission will not cause the Petitioner unnecessary hardships. Joan Weld seconded the motion. The motion passed with twelve votes in favor (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Wilson, Elam) and one opposed (Old).**

**Veronica Carter made a motion to support Staff's position that hardships do not result from conditions peculiar to the Petitioner's property as all the lots are 50 feet in width. Lee Wynns seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

**Veronica Carter made a motion that hardships do not result from actions taken by the Petitioner. Lee Wynns seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

**Joan Weld made a motion to support Staff's position that the variance would not be consistent with the spirit, purpose, or intent of the rules; would not secure public safety; and would not preserve substantial justice. Melvin Shepard seconded the motion. The motion passed with twelve votes (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Elam) and one opposed (Wilson).**

This variance was denied.

### **SPECIAL PRESENTATION**

Jim Gregson stated Ed Brooks passed away last month after a double lung transplant at Duke University. Brenda McDonald, Ed's wife is present at the meeting today. Jim presented the Order of the Longleaf Pine for Ed Brooks to Brenda on behalf of Governor Perdue.

Bob Emory presented the Eure Gardner award for Ed Brooks to Brenda on behalf of the Coastal Resources Commission.

### **PUBLIC COMMENT**

There were no public comments.

### **PRESENTATIONS**

Legislative Advisory Subcommittee on Offshore Energy Exploration – Recommendations  
Doug Rader, Co-Chair Legislative Subcommittee

Doug Rader stated this is the first public presentation of the findings and recommendations of the Legislative Subcommittee on Offshore Energy Exploration following the presentation to the President Pro-Tem and the Speaker of the House. We spent a year after the initial authorization by Mr. Hackney and Mr. Basnight in exploring the implications, both cost and benefit, associated with oil and gas related exploration and development. After our charge was expanded in April 2009, it included other alternative energy opportunities in the coast and offshore waters of North Carolina. We presented an interim report in May 2009. In the intervening time we had a total of eleven meetings during twelve active months. We listed to more than 30 professional witnesses, held public hearings in each region of the coast and inland at most of our meetings. We also assembled a very large web-based information portal on both environmental, economic, and governance related material related to offshore energy exploration. The membership on the panel was 24 citizens. There was excellent work by Dr. Jeff Warren of the Division of Coastal Management as well as a wide array of other stakeholders.

We were asked initially to look at the way the federal governance mosaic interacts with North Carolina's and the opportunities that this created for North Carolina to engage in federal decision making related to the offshore waters off of North Carolina. We were asked to examine the relevant federal legal authority related to this area and the implications on the nation's energy supply including the best estimates available for what oil and natural gas lie there, the likely financial impacts including the cascading economic impacts of any development that might occur, the likely environmental impacts of exploration and development with a variety of specifics, and the likely impacts mediated through environmental impacts and the support infrastructure on the people and citizens of North Carolina. The charge was expanded to do all

of these things for other energy sources. We approved our final report on April 13. One week later the Deepwater Horizon drilling rig in the Gulf of Mexico blew out. This changed some of the premise on which we were working. One of the main tasks of the committee was to begin assembling the historical and current information that is available related to the task with which we were charged. The second thing that happened during the time that we were meeting was the UNC Consolidated Universities completed their wind study off coastal North Carolina with a spectacular amount of highly technical investigation and analysis to a strong recommendation for where and how North Carolina might consider moving forward with wind. Wind could provide most if not all of North Carolina's net power needs.

The first finding of the Subcommittee is that the energy resources offshore North Carolina are in fact significant, both in terms of both potential oil and gas and also alternative energy sources. With each of those there are significant risk and significant benefits. The ongoing federal activities in the outer continental shelf off of North Carolina have the potential to significantly affect North Carolina. North Carolina has a significant opportunity to shape the ways in which federal decision making goes forward. At the time the report was approved and as of today, the current revenue and royalty sharing programs in the United States do not allow for North Carolina to benefit directly from payments associated with offshore energy, although there are some limited opportunities for alternative energy development. The coast is in fact changing. The anticipated rise in mean sea levels and perhaps the increase in intensity or frequency of tropical cyclones and extra-tropical storms have to be built into the development patterns. There is significant opportunity for energy to be produced in coastal and offshore North Carolina should North Carolina be able to rise to the challenges from these obstacles.

The first recommendation is that it is time for North Carolina to begin investing in understanding in much more detail the outcomes and implications of each of these likely scenarios. The scenarios that are likely include (1) that nothing at all happens here; (2) that it happens but it happens because people in Virginia are far ahead of us and more progressive; (3) there is leasing off of North Carolina, but no exploration occurs; (4) that drilling occurs, but no commercial deposits are found; (5) development drilling occurs and a commercial resource is found, but existing shoreside support facilities in Virginia or South Carolina end up providing the servicing and landing the product; (6) production occurs in North Carolina, only gas comes ashore, and (7) commercial resource is found, the production occurs, both liquids and natural gas come ashore in North Carolina. All of the likely alternative energy alternatives should be analyzed. We believe strongly that any of these alternatives, including fossil fuel and wind, need to be accompanied by the development and implementation of strong and adequate programs and practices that protect North Carolina's environment, communities and people and the state's economic well being as we build a new energy industry. It remains a strong feeling of the Subcommittee, as was memorialized in our interim report, that revenue sharing and fair treatment for the state of North Carolina is a necessary condition for pursuing either renewable or nonrenewable energy industries in the state. We also suggested strongly that the General Assembly look for opportunities to compete with our neighbors, but also coordinate opportunities. North Carolina needs a mechanism to make choices between these alternatives. We believe that a comprehensive advisory body on marine, coastal, and estuarine issues ought to be reinstated to provide for coordination among different stakeholders and interest areas in terms of North Carolina's ocean future. We recommend strongly that these recommendations be taken seriously



and be adopted and handed off to the Governor's Scientific Advisory Panel on Offshore Energy so that the work that we were unable to get done can be continued. Funds should be made available from a variety of sources to be able to develop the information that is necessary to make reasonable choices among these opportunities. Finally, the State's agency staff be empowered by resources and staffing to be able to be a major player in representing all of us as citizens and the state of North Carolina in moving forward with this process.

By April 13, we were able to accommodate a variety of last minute changes including the fact that Secretary Salazar had abandoned his self imposed moratorium on offshore new oil and gas leasing in the outer continental shelf in the United States. He had proposed a focusing of effort in the western part of the eastern Gulf and in the U.S. southeast from Delaware down to north Florida as a new area for exploration. That hasn't changed. That is still the intent of that Department, but we were able to get this integrated into the report. A week later changes in policy are already beginning. MMS's job of managing the revenues and royalties from this asset and serving as the watchdog has already been announced to be ready to be adjusted. The report remains a solid foundation for North Carolina moving forward. But it makes the work of the Governor's Scientific Advisory Panel more imperative in ensuring the needs of North Carolina are fully protected moving forward.

#### Inlet Hazard Area Update (CRC 10-26)

Jeff Warren

Margery Overton

Jeff Warren stated the first rule is 7H .0304 which defines the boundaries of the inlet hazard areas. The development use standards inside of the boxes will also be discussed. These are the most studied pieces of sand and beach on the coast. There is nothing arbitrary about these boxes. In September 1978 the Priddy and Carraway inlet document, which is referenced in 7H .0304, came out. At the time the statistics that Priddy and Carraway used were the best that they could come up with. This report only projected ten years into the future. In 1988 the boxes, which are the current boxes, became inadequate. We have to develop some new methodologies to come up with new boundaries. This is a very scientific approach. This is well thought out and there are some really good methods that have gone to classify the hazard related inlet processes. This report that we are proposing is not saying that the inlets have greater hazards than the oceanfront; it just says that they have different hazards. These boxes are not exclusion zones for development, but they are zones inside of which it is a stand alone AEC. Inside of this box you can put use standards of what you will and will not allow when it comes to development. The current development standard is there is no commercial or multi-family greater than 5,000 square feet. No lots platted after 1981 can have a greater density of one unit per 15,000 square feet. There is no single family exception. The erosion rate in the current boxes uses the erosion rate in the adjacent ocean erodible area. We do have a new set of erosion rates and later this summer we are going to start with the erosion rate update for the entire oceanfront including the inlets. This inlet project is also working in tandem with what we are doing on the oceanfront and we expect to have actual inlet erosion rates and not the adjacent OEA rate. There is a need to update the inlet hazard areas. The report is out of date, we have new technology, we have new data, we have a new understanding, and we have new software that helps us get a better spatial feel for

what is happening. The report provided to you includes new methods and new analysis on our twelve developed inlets. It also includes the remaining inlets and keeps those boxes the same. That is not to say that those boxes should remain the same forever. If we do have the ability in the future with Staff and money to gather data, we should potentially look at those. However, they are the non-developed inlets and are the inlets that are a lower priority. We wanted to focus on the twelve developed inlets. We looked at shorelines and looked at what the shoreline was doing moving oceanward to landward and we also looked at what the shorelines were doing in the throat of the inlet and moving back and forth. We can say that for the most part, ten of the twelve inlets are oscillating inlets. As one side of the inlet erodes back, the other side has drumsticked out and is accreting. Dredging of the inlets and dredged disposal along there can overprint the natural signal. Two inlets are migrating inlets, Tubbs and New Topsail. There are two things we look at when we are dividing these inlet hazard boxes. One is the point along the shoreline as you step away from the inlet where the shoreline is no longer controlled by the inlet itself. The first part of the strategy was to walk along the shoreline figuratively and look in space and time and see at what point that you step away from the inlet do you start to move toward the oceanfront processes driving a majority of shoreline change. The first part of defining these boxes is the oceanward beach. Beach width was looked at also. Beach width is defined by mean high water and measured back to the first line of stable and natural vegetation. We also looked at things like historic inlet pathways, topography and geomorphology. There was a suite of data that we looked at and the Science Panel then used this information to decide how to draw the line. DCM was involved in crunching the numbers, but this report has the blessing of the Science Panel. We looked at bathymetry and the shoal system and how it affects the hydrodynamics. We also looked at where the inlet had been in its worst case scenario.

This is the first step in a two step process. The boundaries for each inlet were reviewed. This report has the boundaries from the Science Panel and are the Staff's recommendations for the new inlet hazard boundaries. This will be an expansion of the existing IHA AEC. This is considered a final report and a final set of recommendations. We also feel that this report and the change to 7H .0304 is only part of the issue. Now we have to talk about what you can do inside of the boxes. When we last looked at these boundaries, Staff came before the CRC with some draft policies to revise the existing language for development inside the new boxes. There were three major issues that the Science Panel was uncomfortable with. The first was the erosion rate. They did not want to use the adjacent ocean erodible area to determine the erosion rate for the inlets. DCM agrees. As we update the erosion rate for the entire oceanfront, it will include the inlets. The second issue was the setback. The Science Panel believed there was a better way to calculate setbacks in an inlet hazard area. Maybe the vegetation line is not the best point from which to measure the setback in an IHA. Maybe there is a better way to determine the setback.

Margery Overton stated the boxes are data driven and very scientific. The Science Panel strived to have consistency as we went through data analysis. There are a few places that other factors were used to modify the lines, but in most cases it is a straight mathematical projection. We calculated the rate and the standard error, multiplied by 30, and that gave us the 30-year risk line. This line shows the potential shoreline in thirty years. This line is an indicator of risk more than an absolute indicator of the shoreline in thirty years.

Spencer Rogers stated the Science Panel looked very hard at continuing to use the vegetation line as a measurement point but we couldn't come up with a way that would work on both sides of the inlet. What the Science Panel is trying to do with the inlet hazard area boxes is to identify an area where it is just as important to look at the inlet as it is to look at hurricanes and other ocean hazard definitions. The risk line is an attempt to give the CRC an equivalent of a 30-year setback based on the inlet oscillations not on hurricane oscillations. One distinct difference in the way those 30-year lines come out is in long-term erosion you expect the endpoint to be the worst point. That is not the case in the inlets. Margery Overton stated there are four things to keep in mind. The 30-factor is the same. A hybrid vegetation line is used instead of the vegetation line you would find on the lot today. Use a linear rate. There is an additional factor to improve the estimate of the projection of the linear rate. This would be the new setbacks and not the setbacks as they exist today.

Jeff Warren stated there are two things to consider. The first is the boxes. DCM and the Science Panel are very comfortable with the proposed inlet hazard area expansion. The next question is how to address development inside of those boxes. The Science Panel had some concerns about the erosion rate and using the actual updated rate. We agree and are going to incorporate that into the update. The other issues will be policy issues that we would like to get some direction from the Commission. How would the Commission like to see setbacks addressed inside of the inlet hazard area? Do you want to continue to use the first line of stable and natural vegetation, which can move very quickly? Do you want to use the current line of vegetation with a different setback factor? Do you want to incorporate where the adjacent structures are to make sure nothing goes further oceanward? Would you like to consider incorporating some of the risk lines? There are a couple of things you could do with a risk line. The first is it could be used as a static line which could be the setback. Another option would be to look at it as a zonation of the inlet hazard area. It is safe to say that not everything inside the box is at the same level of risk. The Science Panel has done an excellent job of identifying the areas of higher risk. Inside the boxes there could be two different risk zones that are identified by where the line is. Another way to apply this would be to put these maps on the website for public education. We are confident with the boxes but we need to wait to see what the Commission wants to do inside the boxes.

David Webster stated that he is concerned about using a street as a line. It seems arbitrary and may be hard to defend in a court of law.

Jeff Warren stated that Staff would come back with some GIS analysis, some lot counts, and try the zoned approach to begin discussion at the next meeting.

2010 Draft CHPP Recommendations (CRC 10-27)  
Jimmy Johnson, DENR

Jimmy Johnson stated the Coastal Habitat Protection Plan was voted upon in 2004 by the EMC, CRC, and MFC and approved. It was later signed by the three Commission chairs in the spring of 2005. As part of the enabling legislation, it is required that the CHPP be reviewed and updated at least once every five years. The DMF staff is the primary staff responsible for

revising and rewriting the CHPP with consultation from other DENR agencies, the CHPP team and the CHPP steering committee. Bob Emory and Joan Weld are the CRC's members of the steering committee. Mike Lopazanski, Scott Geis and Tancred Miller are on the CHPP team. These chapters of the CHPP have all been through review by the steering committee, the team, as well as a number of outside agencies. What I am seeking today is your authorization to go before the public in a series of public meetings to present this draft revised CHPP.

Back in the late 1980's or early 1990's it was observed that we were experiencing a decrease in our coastal fisheries recreational and commercial fisheries and notice of habitat issues. The CHPP came about as part of the Fisheries Reform Act of 1997. The Fisheries Reform Act completely changed the way that we manage North Carolina fisheries as well as the habitats that support the fisheries of North Carolina. Two of the primary changes are that we now manage fisheries through fisheries management plans and the CHPP. The goal of the CHPP is the long-term enhancement of coastal fisheries which are associated with each of the habitats. The CHPP is a document that we use as a reference and a guide for activities within the Department. It includes the latest scientific studies on requirements needed for the habitats as well as ecological value and threats to the specific habitats. It also includes scientific justification for recommended management changes. The recommendations you have before you have been agreed upon by the members of the CHPP team as well as the members of the steering committee. Every two years we will bring implementation plans before you. The CRC will vote on the implementation plans which are specific to the Division of Coastal Management. We have three public meetings set up for June 8, June 14 and June 17. We will incorporate the changes in July. We hope to have the final draft to the Commissions for their approval in September. This version of the CHPP has about fifty percent new and reorganized information. Some of the new issues that are included in this revision include sea level rise and climate change, invasive species information, pharmaceutical and chemical affects on habitats and fisheries, as well as updated mapping. As part of the Executive Summary we have included what we consider to be six major accomplishments over the past five years. The water column is the media where all fish live. It connects and it affects all other coastal habitats. All species utilize this significant habitat. Status and trends are new issues that are showing up in this revision of the CHPP. We need a comprehensive water quality monitoring coverage for our estuaries. You will see some of the accomplishments in the revised chapter. The oyster shell recycling program has been a tremendous accomplishment as well as the increase in the number and size of oyster sanctuaries. Submerged aquatic vegetation is often considered to be an indicator of healthy ecosystems. This is primarily due to its stringent water quality needs. We have seen a global and national decline in submerged aquatic vegetation. In North Carolina we have seen some increase in SAV, but how long we continue to see the increase will depend on the amount of rainfall over the next couple of years. We have had aerial imagery taken of the entire North Carolina Coast. We are still working to delineate those images. The adoption of the coastal stormwater rules has helped. The modified definition of submerged aquatic vegetation has been incorporated into the revised CHPP. Wetlands are the habitats that border the transition from water to land. Approximately 95% of our commercial and recreational fisheries are dependent on wetlands. We continue to track losses of wetlands and continue to work towards alternative shoreline stabilization techniques. Sediment criteria rules were an accomplishment. The modification of the CRC's dock and pier rules was another accomplishment. We need to continue to update our bathymetric maps. We need to continue to work to make alternatives to

hardened structures more attractive. We also need to continue to implement sand management strategies as that resource becomes more and more valuable. The hard bottom chapter has changed very little. This has to do with structures on our ocean floor such as coral colonies or wrecks in order to enhance fisheries or habitat in specific areas. It is a refuge for our fisheries and a secondary nursery area. A couple of new habitat areas of particular concern have been proposed off of Cape Lookout and Cape Fear. We need to continue to monitor these habitats and monitor the effect of beach nourishment on our fisheries. One of the chapters deals with ecosystem base management as well as strategic habitat areas. This chapter discusses the interaction among habitats and fisheries due to the diversity of the habitats here in coastal North Carolina. Many of the habitats overlap one another. One of the things that we see is that all habitats are affected by more than one threat. All threats affect more than one habitat. Also included in this chapter are strategic habitat areas. The CRC has been provided a chart of recommendations. These are the new recommendations that have been added to this final chapter. Each goal has a couple of new recommendations. One of the new issues the CHPP talks about is invasive species and we need to enhance control of these invasive species. Some of the habitat restoration activities and plans are a couple of new recommendations. An energy component has also been added. Another new recommendation was to be able to maintain adequate water quality for the support of present and future aquaculture activities. The state is on record in support of mariculture and aquaculture. We need to be sure that we have an adequate supply of good water and water quality to ensure that this activity maintains viability.

**Joan Weld made a motion to recommend sending the CHPP Update to public hearing. Bill Peele seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bisette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

## **ACTION ITEMS**

### **Land Use Plans**

John Thayer stated he wants to start with an update on the 7B Land Use Plan Review Committee. The Committee had its first meeting via conference call and the consensus was that Frank Rush would be the chairman of that committee and meetings would be held on the third Tuesday of the month in opposite months of CRC meetings. The committee scheduled four meetings. June will be the first face-to-face meeting and the committee will review the rules and the process. The members of the Committee are Charles Elam, Christine Mele, Ed Mitchell, Lee Padrick, Bill Peele, Dara Royal, and Tim Tabak. All committee meetings will take place in Morehead City. The meeting schedule is June 15, August 17, October 19, and December 14.

Mr. Thayer stated there are two plans for certification and one land use plan amendment. Staff has no issues with either of the two land use plan certifications. Staff also recommends certification as each land use plan has met the substantive requirements of the guidelines and there are no conflicts evident with state and federal laws.

Melvin Shepard stated he has not been receiving a copy of the land use plans in advance of the meetings. John Thayer stated the link to the full land use plan is provided in the Staff's report

that is provided in the mailout materials, but in the future will provide the link to the CRC members prior to the agenda packets being mailed.

Town of Caswell Beach LUP Certification (CRC 10-18)

**Charles Elam made a motion to certify the Town of Caswell Beach Land Use Plan. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Elam) (Wilson absent for vote).**

Town of Oak Island LUP Certification (CRC 10-19)

**Jerry Old made a motion to certify the Town of Oak Island Land Use Plan. Renee Cahoon seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Elam) (Wilson absent for vote).**

Town of Navassa LUP Amendment (CRC 10-20)

John Thayer stated this is an amendment to an existing land use plan for the Town of Navassa. The Town of Navassa's plan was certified in 1999. Per our guidelines, when a document that was certified prior to 2002 is amended, they are not required to meet the new rules unless they amend more than half of the document. The Town of Navassa is in the process of updating their land use plan. They are amending policy per the provisions in our guidelines under .0901 that does not require meeting the management topic requirements. Their amendment is to clarify their provisions related to marinas. Their existing policy prohibits marinas. Marinas are still prohibited, but upland marinas may be permissible provided the appropriate standards are met. Staff does recommend the certification of the amendment and that it meets the substantive requirements as outlined in the 2002 guidelines section 7B .0901(a)(1) and (4) of the land use plan amendment guidelines. There are no conflicts with either state or federal law.

**Jerry Old made a motion to certify the Town of Navassa Land Use Plan Amendment. Veronica Carter seconded the motion. The motion passed unanimously (Mitchell, Webster, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam).**

**Rule Adoptions**

NCAC 07H .0104 Application of Erosion Setback Factors (CRC 10-21)

Jeff Warren stated there are two grandfather clauses for oceanfront setbacks. There is a pre-CAMA, which is everything platted before June 1, 1979 falls under the exceptions under .0309(b). 7H .0104 is the post-CAMA grandfather that are any lots platted after June 1, 1979 to present can qualify for this exception. You have sent this rule to public hearing and there was one comment made at the last Commission meeting by Mr. Ferriss. He also submitted a comment in writing. The comment focused on the oceanfront setbacks regarding the static line specific to Oak Island. I spoke with Mr. Ferriss during the last meeting about some of his concerns and explained that his concerns were not related to this rule. There was also a set of comments that were sent to the Governor from the Town of Kill Devil Hills after the comment period closed that expressed concerns about 7H .0104. The Secretary's office asked Coastal

Management to respond to these comments. The comment was a misunderstanding of what this grandfather clause is. Staff recommends adoption of 7H .0104 which is a revision of the current rule. We are not adding or removing a grandfather clause. We are clarifying an existing rule. This rule revision says that if the erosion rate drops and the current rate is lower than the rate when the lot was platted, if platted after June 1, 1979, then you can use the lower rate. The current rule does not allow use of the lower rate if it is the most current rate. If you use the lower rate then you are limited in total floor area to 2,000 square feet and it can be no further oceanward than the landward most adjacent structure. The new rule says that if you can't meet the current rate, you can look at a lower rate in the past but we have some restrictions.

**Charles Elam made a motion to adopt 15A NCAC 07H .0104. Jerry Old seconded the motion. The motion passed unanimously (Mitchell, Simmons, Wynns, Bissette, Peele, Weld, Shepard, Carter, Cahoon, Old, Wilson, Elam) (Webster absent for vote).**

### **OLD/NEW Business**

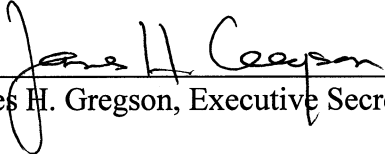
Chairman Emory stated he would like to talk about the reappointment process. There are seven Commissioners whose terms are expiring in June. Bob Wilson has indicated that he does not wish to be reappointed and this will be his last official meeting. Bob Wilson stated it has been his pleasure to serve the State and work with each of the Commission members over the past eight years. Jim Gregson stated the Governor's office has contacted the seven members whose terms are expiring and let them know who they need to contact if they wish to be reappointed. The Governor's office has also sent letters to the nominating Boards in the counties and the municipalities notifying them of the vacancies and the categories that need to be filled. The approach is a little different. The Statute says that the Governor decides which categories should be sent to each county and sends four of the vacancies to each of the counties for nomination. It looks like what they did this year is sent all the vacancies and told the Boards to nominate four people of their choosing. Joan Weld stated this year there is a nomination form that must be filled out by the Commissioner who wishes to be reappointed and this has not had to be done in the past. Chairman Emory stated nominations to the Governor's office are due by June 1.

Chairman Emory stated there are several items that have come up that need to be addressed at future meetings. The first is what to do when the sandbag moratorium expires. The groin Bill placed a moratorium on enforcement of sandbag removals. The moratorium will expire in September. Jim Gregson stated we should give a brief history of the sandbag rules and how we got to where we are with the extensions of sandbags and the Bill that extended the removal date. Mr. Gregson stated Spencer Rogers could give the history of past Science Panel recommendations as they relate to sandbags including the issue that came up about the potential for permitting larger tubes. Chairman Emory stated the second item is continuing the inlet hazard area discussion. We also need to talk about excavated marinas out of uplands and their interaction with primary nursery areas. There was also a desire to talk about marinas in primary nursery areas in general. It would also be helpful for the Commission to get an update on primary nursery areas and how they are designated and what criteria has to be met to be designated. Renee Cahoon stated she would like to see the Commission become more proactive. Our rules allow for innovative technologies and she would like to have the Science Panel take a look at things that are going on around the world and bring them to the Commission to look at.

Bill Peele stated he would like to form a subcommittee to meet with David Moyer at his office about agriculture drainage. Vernon Cox, CRAC Department of Agriculture, should be involved. Jamin Simmons stated some innovation in agriculture is happening in eastern North Carolina and staff could research tailwater recovery.

With no further business, the CRC adjourned.

Respectfully submitted,

  
James H. Gregson, Executive Secretary

  
Angela Willis, Recording Secretary



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v.  
DCM  
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STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

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HUGH AND DENISE DONAGHUE, )  
 )  
 )  
 Petitioners, )  
 )  
 vs. ) Case No. 09 EHR 0568  
 )  
 NC DEPARTMENT OF ENVIRONMENT )  
 AND NATURAL RESOURCES, DIVISION )  
 OF COASTAL MANAGEMENT, )  
 )  
 Respondent. )  

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Emerald Isle, North Carolina  
August 3, 2009  
10:15 a.m.

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**ADMINISTRATIVE HEARING  
TRANSCRIBED FROM AN OPEN-MICROPHONE RECORDING**

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The above-entitled matter came on for hearing before The Honorable Donald W. Overby, Administrative Law Judge Presiding, on the 3rd day of August, 2009, at the Emerald Isle Town Hall, Emerald Isle, North Carolina, commencing at 10:15 a.m.

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APPEARANCES

APPEARING ON BEHALF OF THE PETITIONERS:

Hugh A. Donaghue and Denise Donaghue, Pro se  
4 Pheasant Lane  
Chadds Ford, Pennsylvania 19317

APPEARING ON BEHALF OF THE RESPONDENT:

North Carolina Department of Justice, by  
Ward A. Zimmerman, Esq.  
Assistant Attorney General  
Post Office Box 629  
Raleigh, North Carolina 27602-0629

Reporter's Note: Quoted material is reproduced as read or  
quoted by the speaker. Proper names are spelled  
phonetically unless spelled into the record.

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1 Thereupon, the following proceeding was held:

2 THE COURT: Good morning, everyone.

3 This is the matter of Hugh and Denise  
4 Donaghue versus the North Carolina Department  
5 of Environment and Natural Resources,  
6 Division of Coastal Management. I'm Don  
7 Overby, Administrative Law Judge, assigned to  
8 preside over this hearing. Present is  
9 Mr. Hugh Donaghue, and also for the  
10 Respondent is Ward Zimmerman from the  
11 Attorney General's Office. It's File Number  
12 09 EHR 0568.

13 Any preliminary motions or any other  
14 matters to be disposed of prior to---

15 MR. ZIMMERMAN: Judge, Mr. Donaghue  
16 actually asked me when we were out at the  
17 site visit earlier about if you could clarify  
18 the burden of proof and which side has it, et  
19 cetera.

20 THE COURT: All right. Mr. Donaghue, on  
21 these types of hearings, the burden of proof  
22 would lie with the Petitioner.

23 MR. DONAGHUE: Yes, sir.

24 THE COURT: Oftentimes - and this will  
25 be, I guess, subject to some discussion, but

1 oftentimes, it's easier for presentation if  
2 the Respondent undertakes the burden of going  
3 forward which means they would put on their  
4 evidence first, of course, but then again,  
5 still the burden would remain with the  
6 Petitioner.

7 MR. DONAGHUE: Yes, sir.

8 THE COURT: Either way is all right with  
9 me. Do you want to go first or would you -  
10 do you have any objection to - assuming the  
11 duty of going forward but, again, recognizing  
12 that the burden will still lie with him?

13 MR. ZIMMERMAN: No, I don't, Judge.

14 THE COURT: All right. Either of you  
15 wish to be heard by way of an opening  
16 statement?

17 MR. ZIMMERMAN: Yes. Yes, Judge.

18 THE COURT: All right. Mr. Zimmerman?

19 MR. ZIMMERMAN: Would you like me to  
20 stand, Judge?

21 THE COURT: Yes.

22 **OPENING STATEMENT BY MR. ZIMMERMAN**

23 MR. ZIMMERMAN: Okay. Your Honor, North  
24 Carolina has a strong tradition of protecting  
25 its environmental resources, and in regard to



1 its coastal resources, the legislature has  
2 enacted the Coastal Area Management Act. And  
3 this act - commonly referred to as CAMA - was  
4 enacted over thirty years ago, and it deals  
5 with our coastal counties - the twenty  
6 coastal counties - and specifically within  
7 those counties areas of environmental  
8 concern, also referred to as AECs.

9 And this law and the rules promulgated  
10 under it have designated a few requirements  
11 that any individual or company would have to  
12 undertake if they want to develop in these  
13 areas of environmental concern. And some of  
14 these requirements - chiefly, among these  
15 requirements are that various state and  
16 federal agencies have both oversight  
17 authority in permitting responsibilities for  
18 a Petitioner or any individual to develop,  
19 and that's the general rule.

20 Now there are a number of exceptions,  
21 Your Honor. Chiefly, among these exceptions  
22 are what is known as the repair rule. And  
23 this simply states that if you have a piece  
24 of development already in existence and it  
25 was properly permitted previously or

1           grandfathered in prior to the enactment of  
2           CAMA, then you do not need to get a permit if  
3           you are going to simply repair what you  
4           already have.

5           Now this is a reasonable rule, but the  
6           problem was, is that a number of people began  
7           to use this as a loophole in building new  
8           development without seeking proper oversight  
9           or a permit from the Division of Coastal  
10          Management. Now the Division of Coastal  
11          Management is the chief agency designated  
12          within the Department of Environment and  
13          Natural Resources, by the law and the rules,  
14          to both - to give oversight and to permit.

15          And so if someone wants to repair a  
16          previous development that they have, what  
17          they do or what the requirements state is  
18          that they are allowed to repair if it entails  
19          less than fifty percent of the total  
20          structure - the total previous structure.  
21          And this is commonly known as the fifty  
22          percent rule.

23          Now the fifty percent rule states that  
24          if you have a structure and some sort of  
25          natural disaster or manmade event or just

1 normal deterioration occurs, you're allowed  
2 to fix your property or your development  
3 without seeking repair if less than fifty  
4 percent of the original structure is involved  
5 in your repair. Now an example of this is,  
6 let's say you have---

7 Well, actually, with this fifty percent  
8 rule - it's actually broken into two  
9 subcategories, and I'd like to talk just a  
10 brief moment about those. The two  
11 subcategories are nonwater-dependent  
12 structures and water-dependent structures.  
13 Now nonwater-dependent structures are like a  
14 house or a gazebo, anything you can  
15 essentially put in the middle of the state.

16 And if you have such a house and a  
17 hurricane comes by - and let's say your house  
18 was valued at a hundred thousand dollars  
19 before the hurricane - and forty thousand  
20 dollars' worth of damage occurred, you would  
21 be allowed to repair your house without  
22 getting a permit.

23 However, if more than fifty percent  
24 damage occurred to your house, you would have  
25 to seek a permit through DCM based upon the

1 fact this is not merely a replacement of  
2 development - not merely a repair of the  
3 development, but actually replacement at this  
4 point. And any sort of replacement is  
5 categorized under the rules as sort of new  
6 development, and new development requires  
7 permitting.

8 Now water-dependent structures - and  
9 these are, you know, as the name suggests,  
10 structures that are found on the water such  
11 as piers, docks, mooring pilings, platforms,  
12 et cetera. These are a simpler type of  
13 development structure. This is not based  
14 upon a market value analysis like in the case  
15 of nonwater-dependent structures like a  
16 house. This is based upon an actual  
17 structural analysis.

18 And this is simply because of the fact  
19 that most of water development structures are  
20 made of wood. They're simple. And the rules  
21 allowed for this by creating, in this  
22 particular case, an instance where you would  
23 take the whole structure and decide has fifty  
24 percent of that structure been rebuilt or  
25 not, and if it has, then it would be

1 considered replacement and thus require a  
2 permit by DCM.

3 And an example of this would be, let's  
4 say we have a dock and it's a hundred feet  
5 long and a hurricane comes along and wipes  
6 out the first forty feet of it. An  
7 individual would be allowed to repair the  
8 structure - their dock - without seeking a  
9 DCM CAMA permit. Now let's say the hurricane  
10 comes along and wipes out over fifty percent.  
11 Then, in fact, they would be required to seek  
12 a DCM CAMA permit in order to replace the  
13 structure that is no longer there.

14 Your Honor, that is essentially what  
15 happened here in this instance. The  
16 Petitioners bought a piece of property. It  
17 had a previous dock on it. The dock was  
18 deteriorated, and as is completely allowed by  
19 the rules, by this exception, they are  
20 allowed to try to fix their property. The  
21 problem is what they did is, they developed -  
22 they replaced well over fifty percent - as we  
23 saw on the site visit today and as you'll  
24 hear in evidence later today, well over fifty  
25 percent of the structure has been replaced,

1 and that is a violation of CAMA by the fact  
2 that they did not seek oversight or a permit  
3 from the advising agency, which is DCM in  
4 this matter.

5 And, Your Honor, if you - I just would  
6 like to go back to one instance - I guess  
7 kind of an overthought of why the rules allow  
8 for this. And I guess it makes sense because  
9 if you have a piece of property and you have  
10 an old dock out there, and let's say that  
11 that dock gets wiped away or it's just  
12 deteriorated and you want to just build a new  
13 dock. You want to build a brand-new, shiny  
14 dock.

15 Then you aren't allowed to do that on -  
16 and subvert the rules, not get a permit, just  
17 because you happen to be on the same  
18 footprint of the previously existing  
19 structure. And that's essentially the  
20 purpose and intent of this rule.

21 Your Honor, at the end of this hearing,  
22 we're going to ask for you to find that  
23 Petitioner has not met his burden of proof,  
24 that the State - the Respondent - has  
25 substantially prejudiced Petitioners' rights

1 and that they have committed errors - and  
2 that we have committed errors that set forth  
3 in rules - in North Carolina General Statute  
4 150B-23(a), and that's the standard of proof  
5 that you know they have to meet.

6 We would also ask you to find that  
7 Petitioners in this instance had a piece of -  
8 had a dock on their property. They rebuilt  
9 it. They essentially replaced it. They were  
10 well over the fifty percent threshold  
11 required by our laws and by our rules, and  
12 they did this without seeking a permit.

13 And, Your Honor, then we would ask you  
14 to finally conclude that since this is the  
15 case, DCM - or Petitioners should be required  
16 to utilize the restoration agreement that DCM  
17 has offered them, which is to return the  
18 structure to predevelopment conditions.  
19 Thank you, Your Honor.

20 THE COURT: Thank you, sir. Do you wish  
21 to be heard by an opening?

22 MR. DONAGHUE: No, sir.

23 THE COURT: All right. You may call  
24 your first witness.

25 MR. ZIMMERMAN: Yes, sir. I'd like to

1 call Jonathan Howell to the stand, please.

2 THE COURT: All right. Come around,  
3 please, sir. Left hand on the Bible and  
4 raise your right.

5 - - - - -

6 JONATHAN HOWELL,  
7 a witness called on behalf of the Respondent, being  
8 first duly sworn in the above-entitled matter, was  
9 examined and testified on his oath as follows:

10 THE COURT: Thank you, sir. If you  
11 would, please have a seat, and for the  
12 record, please state your name.

13 THE WITNESS: My name is Jonathan  
14 Howell.

15 THE COURT: Thank you, sir. Questions?

16 MR. ZIMMERMAN: Thank you, Your Honor.

17 **DIRECT EXAMINATION**

18 **BY MR. ZIMMERMAN:**

19 Q. So Mr. Howell, where do you work?

20 A. I work with the Division of Coastal Management in  
21 Morehead City.

22 Q. And how long have you been with the Division of  
23 Coastal Management?

24 A. I've been with the Division for five years.

25 Q. What do you do there?



1 A. Presently, I'm an assistant major permits  
2 coordinator and review CAMA major permits.

3 Q. Can you explain to the Court a little bit of what  
4 that involves?

5 A. My present job as an assistant major permits  
6 coordinator is, when a major permit is applied  
7 for, I review all the comments that come in from  
8 various state and federal agencies and make a  
9 permit determination once we get all of the  
10 information.

11 Q. And have you been in this same - in this same role  
12 for the entire time with DCM?

13 A. No, sir. I have - prior to assistant major  
14 permits coordinator, I was a field representative.  
15 Worked Carteret County some, Onslow County,  
16 Pamlico County. And prior to that, I was a land  
17 use planner for the Division.

18 Q. And what did that involve?

19 A. Then I reviewed CAMA land use plans that were  
20 written by counties and local governments.

21 Q. Mr. Howell, could you tell the Court a little bit  
22 about your educational background?

23 A. I have a graduate degree in environmental planning  
24 from East Carolina University.

25 Q. And what is involved in that?

1 A. In the environmental planning degree?

2 Q. Yes.

3 A. Learned some about CAMA, just various  
4 environmental regulations, geographic information  
5 systems, just environment in general.

6 Q. Mr. Howell, do you know the Petitioner in this  
7 case?

8 A. Yes. Mr. Donaghue. I have done some - written a  
9 permit on his property and been on his property  
10 multiple times.

11 Q. Can you tell the Court about the first time that  
12 you came into contact with either him or his  
13 property.

14 A. The first time I had went there was to write a  
15 sandbag permit out at the point, and---

16 Q. And when was that?

17 A. That was in November, I believe.

18 Q. Of?

19 A. November of 2008.

20 Q. So just last November?

21 A. Yes.

22 Q. And what did you do then?

23 A. I went out there to do my fieldwork to look at the  
24 erosion escarpment, make sure that a sandbag  
25 permit was required on this oceanfront lot, and as

1 soon as I turned the corner, I saw what had  
2 previously been pilings, now was covered with  
3 decking and was a pier.

4 Q. Let's see.

5 MR. ZIMMERMAN: Your Honor, may I  
6 approach the witness?

7 THE COURT: Yes, sir.

8 MR. DONAGHUE: What are you marking  
9 these?

10 MR. ZIMMERMAN: What's that?

11 MR. DONAGHUE: What are you marking  
12 these?

13 MR. ZIMMERMAN: 1, 2, 3, 4.

14 MR. DONAGHUE: 1, 2, 3, 4. Okay.

15 Q. Mr. Howell, I'm going to hand you a series of  
16 photographs marked Respondent's Exhibits 1, 2, 3,  
17 and 4.

18 (RESPONDENT'S EXHIBIT NOS. 1-4

19 (MARKED FOR IDENTIFICATION

20 MR. DONAGHUE: And these - if I may,  
21 sir, these exhibits were taken November of  
22 '08?

23 THE WITNESS: As I recall.

24 MR. ZIMMERMAN: We'll get into all that.

25 THE COURT: We'll let him identify them

1 and tell when they were taken.

2 (Thereupon, Mr. Zimmerman conferred with  
3 Mr. Donaghue.)

4 Q. Mr. Howell, could you please identify the first  
5 picture marked Respondent's Exhibit 1.

6 A. That first picture is of the pilings that were at  
7 Mr. Donaghue's property.

8 Q. Okay. Could you turn and show the Judge and show  
9 everyone involved here? That's going to be  
10 Number 1.

11 MR. ZIMMERMAN: Judge, would you like me  
12 to hand you a copy and we'll just have that  
13 one in the formal evidence.

14 THE COURT: Yeah.

15 Q. And did you take that picture?

16 A. Yes, sir, I did.

17 Q. And when did you take that picture again?

18 A. The exact date, I cannot recall. It was early  
19 November, late October of 2008.

20 Q. Okay. And what does that show?

21 A. That shows Mr. Donaghue's property and the  
22 existing pilings that were at his property.

23 Q. And is that a fair and accurate representation of  
24 how the property looked when you were out there in  
25 November of last year?

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A. Yes, sir.

MR. DONAGHUE: I'll also stipulate, sir.

THE COURT: All right. Thank you.

MR. ZIMMERMAN: Thank you, Your Honor.  
We'd like to move this into evidence.

(RESPONDENT'S EXHIBIT NO. 1

OFFERED INTO EVIDENCE

MR. DONAGHUE: No objection.

THE COURT: All right. Admitted.

(RESPONDENT'S EXHIBIT NO. 1

RECEIVED INTO EVIDENCE

Q. And let's see. So is that the property---

MR. ZIMMERMAN: And, Your Honor, I have  
a procedural question on this. Since we did  
the site visit this morning, how would you  
like me to refer to that, or would you like  
me to refer to that?

THE COURT: You can refer to it maybe, I  
guess, clarifying as much as you can for the  
record---

MR. ZIMMERMAN: Okay. Yes, sir.

THE COURT: ---since somebody is going  
to have to transcribe this at some point, I  
suppose.

MR. ZIMMERMAN: Yes, sir.

1 Q. So, Mr. Howell, just for the record, the Judge,  
2 the Petitioner as well as the Respondents and our  
3 witnesses were out at the site earlier this  
4 morning. When we were on the dock, are those the  
5 pilings of the dock on which we were standing  
6 earlier today?

7 A. Yes, sir.

8 Q. I'm going to ask you to turn to Respondent's  
9 Exhibit Number 2. And what does this show?

10 A. This is a picture I took when I was on  
11 Mr. Donaghue's property that shows the wave energy  
12 at the site as well as the erosion escarpment and  
13 a few of the remnant pilings.

14 Q. So next to that blue beach chair, is that one of  
15 the pilings that was in the previous picture---

16 A. Yes, sir.

17 Q. ---on Mr. Donaghue's property?

18 A. Correct.

19 MR. DONAGHUE: Could we get a date?

20 MR. ZIMMERMAN: Yeah. Sorry.

21 Q. And did you take this picture as well?

22 A. I did, yes, sir.

23 Q. And when did you take this picture?

24 A. At approximately the same time, late October or  
25 early November.

1 Q. Were these series of photographs - were they all  
2 taken at the same outing?

3 A. No, sir. This was two different site visits.

4 Q. Okay. And when were these two different site  
5 visits?

6 A. These were around the time that I was doing the  
7 fieldwork for his sandbag permit in early November  
8 or late October.

9 Q. Okay.

10 MR. ZIMMERMAN: And, Your Honor, if I  
11 may, and Mr. Donaghue, I would just state  
12 that this entire packet were taken at the  
13 same two site visits, either in early  
14 November or late November of last year.  
15 Would you consent to that?

16 MR. DONAGHUE: I will consent to that.

17 THE COURT: All right.

18 MR. ZIMMERMAN: Okay. Thank you, Your  
19 Honor.

20 Q. And, Mr. Howell, can you please turn to the third  
21 picture. What's categorized as Respondent's  
22 Picture 3? And was this picture also taken at the  
23 same time of the site visits?

24 A. That is correct, yes, sir.

25 Q. And what does this picture depict?

1 A. This picture was taken to justify the need for  
2 sandbags along the shoreline of Mr. Donaghue's  
3 property. I was trying to show the erosion  
4 escarpment as it continued down the shoreline, and  
5 this is also taken for the purpose of Mr. Angel's  
6 property who was requesting sandbags as well. So  
7 as on the next-door neighbor's property looking  
8 down the shoreline.

9 Q. Okay. And is that Mr. Donaghue's house in the  
10 background there?

11 A. It is, yes, sir.

12 MR. DONAGHUE: So stipulate.

13 THE COURT: All right.

14 Q. And the water - if I may just draw your attention  
15 to that, how far does the water go up to the  
16 pilings there?

17 A. Can you rephrase?

18 Q. Sure. I just would you like to describe for the  
19 record where the water is on this picture.

20 A. It is up to the pilings in close proximity to the  
21 house erosion escarpment.

22 MR. DONAGHUE: If I may clarify to  
23 something so - for the record because I think  
24 we're - the November '08 date - I think we  
25 can agree that this is August of '09, and for



1 purposes of this hearing, the decking was put  
2 in, in August of '08. So I believe these  
3 photographs would have been taken in '07.

4 And I have no problem with that, but I  
5 just - I think we're all speaking here in  
6 terms of '08, and that would be erroneous.

7 THE WITNESS: That could be true,  
8 Mr. Donaghue. Time flies.

9 MR. DONAGHUE: And I just want to try to  
10 be accurate. That's fine.

11 MR. ZIMMERMAN: Well, that is a good  
12 point.

13 Q. Then, Mr. Howell, when - could you take a moment,  
14 if you'd like, and just kind of recollect - when  
15 did you take these pictures because I mean I think  
16 that does have relevance here?

17 A. And I wish I had an exact date for you. I was - I  
18 took my present job in December 31st of '08, which  
19 was around the time that I believe I had written  
20 Mr. Donaghue's violation. So it could have been  
21 that August of '07 time frame. It may have just -  
22 time just drug by. I wish I could give you an  
23 exact date, but---

24 MR. DONAGHUE: And I'm not suggesting  
25 that he didn't take the photographs or---

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THE WITNESS: Right.

MR. DONAGHUE: I'm agreeing to the area and I'm agreeing to the photographs. I'm just trying to make sure I have the right date here.

MR. ZIMMERMAN: Fair enough.

Q. Could you now turn to the next photograph there? It's going to be Respondent's 4. And what is this picture of, Mr. Howell?

A. This is a picture of Mr. Donaghue's property and the remnant pilings.

Q. Okay. So that's his house in the background there?

A. That's correct.

Q. And those are the pilings in the foreground?

A. Correct.

Q. Okay.

MR. ZIMMERMAN: Your Honor, at this time, I would move that Respondent's Exhibits 1, 2, 3, and 4 be admitted into evidence.

(RESPONDENT'S EXHIBIT NOS. 1-4

(OFFERED INTO EVIDENCE

MR. DONAGHUE: No objection.

THE COURT: All right. They're all admitted.

1 (RESPONDENT'S EXHIBIT NOS. 1-4

2 (RECEIVED INTO EVIDENCE

3 MR. ZIMMERMAN: Thank you, Your Honor.

4 Q. Okay. So you took these pictures of  
5 Mr. Donaghue's house, is that right, at some point  
6 either last year or the year before?

7 A. Yes, sir, correct.

8 Q. And you took them of a piece of property without  
9 any sort of planking above the pilings, is that  
10 correct?

11 A. Correct.

12 Q. Okay. Does Mr. Donaghue's property fall within a  
13 particular area of environmental concern?

14 A. Yes. It is within the ocean hazard area of  
15 environmental concern.

16 Q. Okay. And can you describe to the Court what the  
17 ocean hazard area of environmental concern is?

18 A. It just has characteristics such as vulnerability  
19 to erosion, excessive shoreline fluctuations,  
20 characteristics of that nature.

21 Q. Okay. How do you know that Mr. Donoaghue's  
22 property is considered an ocean hazard area of  
23 environmental concern?

24 A. Well, actually, it's actually in an inlet hazard  
25 area of environmental concern as well which is a

1 subset of the ocean hazard area of environmental  
2 concern, but due to the characteristics of the  
3 site, the frontal dune, like I said, the erosion  
4 escarpment, the excessive shoreline fluctuations  
5 over time---

6 MR. DONAGHUE: I'm going to have to  
7 object, and the basis of the objection will  
8 be, is the witness suggesting that they're  
9 both one and the same?

10 THE WITNESS: The inlet hazard AEC and  
11 the ocean hazard AEC? Yeah, they're both -  
12 that property is both of those - in both of  
13 those AECs.

14 MR. ZIMMERMAN: Your Honor, this might  
15 be able to help clarify Mr. Donaghue's  
16 question.

17 MR. DONAGHUE: I'm not trying to be  
18 difficult.

19 MR. ZIMMERMAN: Sure. Sure.

20 MR. DONAGHUE: I'm trying to be  
21 difficult. It wasn't the question. I was  
22 just asking for the witness on the record -  
23 clarification of his statement.

24 THE COURT: All right. We'll let him  
25 clarify.

1 MR. ZIMMERMAN: I'm going to hand that  
2 up, if that's all right.

3 Q. Can you describe to the Court what that is?

4 A. This is a list of our areas of environmental  
5 concern under the Coastal Area Management Act.

6 Q. And who made this list or who typed up this  
7 document?

8 A. These are designated by the Coastal Resources  
9 Commission.

10 Q. Okay. And---

11 MR. ZIMMERMAN: Judge, if I may  
12 approach?

13 THE COURT: Yes, sir.

14 MR. ZIMMERMAN: I'm going to mark this  
15 Respondent's Exhibit 5.

16 (RESPONDENT'S EXHIBIT NO. 5

17 (MARKED FOR IDENTIFICATION

18 THE COURT: All right.

19 Q. And so is this an essential breakdown of how the -  
20 both the statute and the rules differentiate areas  
21 of environmental concern in North Carolina?

22 A. Yes, sir, that is correct.

23 Q. Okay. And so just to kind of hopefully answer  
24 Mr. Donaghue's question, so you were referring to  
25 the second section---

1 MR. DONAGHUE: Objection. And, again,  
2 it wasn't a question. And I'm not trying to  
3 be difficult, but the witness made a  
4 statement that the two areas were one and the  
5 same. And I'm just asked him to clarify. So  
6 I don't have a question in that regard.

7 THE COURT: I don't think he said the  
8 two are the same. I think he said that this  
9 particular property qualified under both  
10 definitions. So if you can qualify - or help  
11 us understand that concept.

12 MR. ZIMMERMAN: Yes, sir.

13 Q. And, Mr. Howell, can a particular property, as the  
14 Judge just alluded to - can it fall within  
15 multiple subcategories?

16 A. Yes, sir, it can.

17 Q. And is that the case in this instance?

18 A. That's correct.

19 Q. And what are the category - four categories that  
20 this particular property falls under?

21 A. In the inlet hazard area, the ocean erodible area,  
22 and the high hazard flood area.

23 Q. Okay. And so that's all within the second  
24 category, is that right---

25 A. Correct.

1 Q. ---on that piece of paper?

2 A. Yes, sir.

3 Q. Okay. Mr. Howell, what did I just hand you?

4 (RESPONDENT'S EXHIBIT NO. 6

5 (MARKED FOR IDENTIFICATION

6 A. This is the permit I wrote Mr. Donaghue for  
7 sandbags at his property.

8 Q. Okay. And what is the date on this permit?

9 A. The date on this permit is November 10th, 2008.

10 Q. Okay. And in order to get a sandbag permit, what  
11 are the requirements under CAMA?

12 A. You have to have - it has to be an imminently  
13 threatened structure at which time - of course,  
14 that's saying the erosion escarpment of the  
15 property is within twenty feet of either the  
16 foundation of the home or the septic system, drain  
17 lines and such.

18 Q. Does it have to be in a particular AEC?

19 A. It does. For the sandbag, it has to be in the  
20 ocean hazard AEC.

21 Q. Okay. And is there any way to tell on this  
22 particular permit form which AEC Petitioners'  
23 property was categorized under back in November of  
24 2008?

25 A. It is in the - on the left-hand side towards the

1 top. The affected AECs - I checked the ocean  
2 erodible area, the high hazard flood area, and the  
3 inlet hazard area.

4 Q. Okay. And those are the subcategories that you  
5 just described to the Court awhile ago---

6 A. That is correct.

7 Q. ---is that right?

8 And it's all within that second category of  
9 ocean hazard AEC?

10 A. Yes, sir.

11 Q. And you were out with us - with the rest of the  
12 court at Petitioners' property earlier this  
13 morning, is that right?

14 A. Yes, sir.

15 Q. And you walked out on that dock just like the rest  
16 of us, is that right?

17 A. I did, yes, sir.

18 Q. And how would you categorize that particular  
19 development for the Court? As either a  
20 water-dependent or a nonwater-dependent structure?

21 A. I would consider it a water-dependent structure.

22 Q. And what is that based upon?

23 A. It is a dock. It has - you know, it relies on  
24 water for its principal use, is one of the  
25 definitions that we use as water-dependent.



1 THE COURT: I'm sorry. Were you  
2 objecting? Okay. Go ahead.

3 Q. And what are the--- I'm going to jump back just a  
4 little bit to the ocean hazard AECs and mainly the  
5 broad categories of how that is determined. You  
6 went into a little bit about what categorizes  
7 something as an ocean hazard AEC.

8 Could you go into a little more detail for  
9 the Court on what your requirements are?

10 MR. DONAGHUE: Objection. And the basis  
11 of the objection is, the State of North  
12 Carolina requires that areas be designated by  
13 this department from time to time and notice  
14 be provided therewith. This is strictly an  
15 opinion being offered by this witness.

16 To my knowledge, I have never been  
17 provided a notice nor am I aware of any such  
18 designation that's been provided by the State  
19 of North Carolina with respect to this area  
20 over the course of the last five years that's  
21 been documented.

22 MR. ZIMMERMAN: Your Honor, I would  
23 directly object - directly argue against what  
24 Mr. Donaghue just said, just by the simple  
25 fact of the most recent article offered into

1 evidence - actually, we haven't offered into  
2 evidence yet, but---

3 MR. DONAGHUE: Counsel has - that  
4 exhibit is nothing more than a form that is  
5 filled out by this witness. That is  
6 opinion - that is his opinion. The issue  
7 here is, how is that area designated by the  
8 State of North Carolina.

9 And there will be evidence in this case  
10 to indicate that the area in this area and  
11 how it's been designated changes from time to  
12 time and fluctuates, but the State of North  
13 Carolina pursuant to statute is required to  
14 designate and set forth and provide notice  
15 how the areas are designated.

16 Now I will not object if you're going to  
17 provide me with documentation to that effect.  
18 This is certainly not documentation - a  
19 permit.

20 MR. ZIMMERMAN: Your Honor, I believe  
21 that is notice - the type of notice that is  
22 required by the rules. This was given to  
23 Petitioner just last November. It  
24 specifically has three boxes checked,  
25 designating ocean hazard under three

1 subcategories.

2 Moreover, if I will go a bit further  
3 into this, this - I would say that Mr. Howell  
4 is someone who is qualified to tell how his  
5 department who he works for designates this  
6 particular piece of property, and that's what  
7 I'm asking for, Your Honor.

8 MR. DONAGHUE: But that is not the basis  
9 of the objection. I'll stop if this----

10 THE COURT: You would agree with  
11 Mr. Donaghue that the State has an obligation  
12 to designate each piece of property---

13 MR. ZIMMERMAN: Yes, sir.

14 THE COURT: ---and the areas that they  
15 are encompassing?

16 MR. ZIMMERMAN: And, Your Honor, that's  
17 what I specifically asked him is, what has  
18 DCM designated this, and that's what he's  
19 answering.

20 THE COURT: All right. Okay. He can  
21 tell me what DCM has designated this property  
22 as and which category, but so far I'm  
23 agreeing with what Mr. Donaghue is saying,  
24 unless there is something more to give me a  
25 little bit better understanding of it. The

1 permit does not constitute a designation.

2 MR. ZIMMERMAN: Yes, sir.

3 Q. Mr. Howell, has DCM designated this particular  
4 property any of the various AECs?

5 MR. DONAGHUE: Objection.

6 THE COURT: Overruled.

7 A. The ocean hazard AEC.

8 Q. Okay. And when did they do this last?

9 A. When I wrote this property for Mr. Donaghue [sic].

10 Q. And how did you know that this was an ocean hazard  
11 AEC?

12 A. I've been on-site with our assistant director. We  
13 wrote this sandbag permit and due to site  
14 conditions.

15 MR. DONAGHUE: Objection. I ask that  
16 that be stricken from the record, sir.

17 MR. ZIMMERMAN: What's---

18 MR. DONAGHUE: Again, this is all---

19 THE COURT: Objection overruled, but  
20 subject to corroboration. Again, since I  
21 don't have all the rules in front of me,  
22 which may be a blessing, the designation  
23 would not come from site inspection and a  
24 designation - from these folks unless there  
25 is something put in writing to make it an

1 official designation.

2 I'm assuming that you can't just go to  
3 any piece of property and walk up to it and  
4 say, "Okay. This is what it is," and that  
5 becomes the official designation. So I need  
6 more.

7 (Thereupon, Mr. Zimmerman conferred with  
8 Mr. Donaghue.)

9 MR. ZIMMERMAN: Which number are we on?

10 THE HEARING ASSISTANT: 7.

11 MR. ZIMMERMAN: 7. Your Honor, I  
12 apologize. I only have one copy of this.

13 THE COURT: All right.

14 MR. ZIMMERMAN: I'm going to hand this  
15 to the witness first.

16 Q. Mr. Howell, can you please describe what I just  
17 handed to you.

18 (RESPONDENT'S EXHIBIT NO. 7

19 (MARKED FOR IDENTIFICATION

20 A. This is a map that shows long-term average annual  
21 erosion, shoreline change, [inaudible] and setback  
22 factors for Bogue Banks, Emerald Isle.

23 Q. Who produced that map?

24 A. This map is produced by Division of Coastal  
25 Management.

1 Q. And is it public record?

2 A. It is public record, yes, sir.

3 Q. And how was it published to the public?

4 A. You can - this map is available on our Web site.

5 Q. Okay. So any citizen of North Carolina or anyone  
6 could pull up the DCM Web site and look at that  
7 map?

8 A. That's correct.

9 Q. And what is that - is Mr. Donaghue's property on  
10 that map?

11 A. It is, yes, sir.

12 Q. And for the record - for the Court, could you  
13 please---

14 MR. DONAGHUE: Do you have a copy of  
15 that?

16 MR. ZIMMERMAN: What's that?

17 MR. DONAGHUE: Do you have a copy of  
18 that for me?

19 MR. ZIMMERMAN: Actually, I think that's  
20 my only copy, so I'm going to have to just  
21 reference that. Do we have more copies  
22 over---

23 THE WITNESS: Ward, we've got some right  
24 over here.

25 MR. ZIMMERMAN: Okay. We do have more

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copies.

MR. DONAGHUE: Thank you.

Q. And is there a certain way to designate various areas of environmental concern on the legend of that map?

A. There is, yes, sir.

Q. And how is that done?

A. In the pink, it shows the inlet hazard area.

Q. Okay. And is Mr. Donaghue's property within any particular area of environmental concern based on that map that is published on the Web site?

A. It is in the inlet hazard area.

Q. Okay.

MR. ZIMMERMAN: Your Honor, I'd like to move that into evidence.

(RESPONDENT'S EXHIBIT NO. 7

(OFFERED INTO EVIDENCE

MR. DONAGHUE: No objection.

MR. ZIMMERMAN: And at this point, I'd also like to move the previous permit letter into evidence as well.

(RESPONDENT'S EXHIBIT NO. 6

(OFFERED INTO EVIDENCE

MR. DONAGHUE: Objection.

THE COURT: Overruled.

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THE HEARING ASSISTANT: Which exhibit was that?

THE COURT: 6 and 7. I've got 1, 2, 3, 4, and 6 and 7 as having been admitted.

(RESPONDENT'S EXHIBIT NOS. 6-7  
(RECEIVED INTO EVIDENCE

MR. ZIMMERMAN: Your Honor, I'm going to hand Mr. Donaghue a copy of our - the North Carolina Administrative Code, so I would ask the Court to take judicial notice of it.

THE COURT: All right.

Q. Mr. Howell, could you please tell the Court what that is and what section that refers to in the North Carolina Administrative Code.

A. This is our Section .0300, "Ocean Hazard Areas."

Q. And is that one of the - is this one of the rules under CAMA that guides DCM's practice?

A. That is correct.

Q. And so this rule particularly deals with ocean hazard categories, is that right?

A. Yes, sir.

Q. Could you please read---

MR. DONAGHUE: Objection. The basis of the objection is, Counsel, you've already handed up a document which has indicated that



1           this is an inlet hazard area in the previous  
2           exhibit, not the ocean hazard area. So this  
3           would have no---

4           MR. ZIMMERMAN: Your Honor, if I may, if  
5           you will turn - if you will turn to the  
6           second-to-last page, Your Honor. This is  
7           15A NCAC 07H .0310. This is "Use Standards  
8           for Inlet Hazard Areas," and as we discussed  
9           earlier, the inlet hazard is one of the  
10          subcategories of the ocean hazard AEC. So  
11          this actually is referring to the inlet  
12          hazard AEC subcategory.

13          THE COURT: Objection overruled.

14          MR. ZIMMERMAN: Thank you, Your Honor.

15          Q. Okay. Now back to ocean hazard AECs, the more  
16          general category, you described them earlier as  
17          being dynamic and fluid, is that right?

18          A. That's correct.

19          Q. And could you please read into the record the  
20          first description of the ocean hazard categories,  
21          which is NCAC 07H .0301.

22          A. It states, "The next broad grouping is composed of  
23          those AECs that are considered natural hazard  
24          areas along the Atlantic Ocean shoreline where,  
25          because of their special vulnerability to erosion

1 and other adverse effects of sand, wind, and  
2 water, uncontrolled or incompatible  
3 development---"

4 MR. DONAGHUE: Where are you reading  
5 from?

6 MR. ZIMMERMAN: The very first page.  
7 This is .0301 - the very first page of the  
8 packet.

9 MR. DONAGHUE: Of the packet?

10 MR. ZIMMERMAN: That's right.

11 THE COURT: First page of the  
12 administrative code - very first page?

13 MR. ZIMMERMAN: Just turn back to the  
14 first page.

15 MR. DONAGHUE: Okay. Objection. And  
16 the basis of the objection is, he's reading  
17 from - the document speaks for itself. I'm  
18 not going to belabor the point. But counsel  
19 you're completely ignoring the document and  
20 germane portion of the document, which would  
21 be Section NCAC 07H .0310, "Use Standards for  
22 Inlet Hazard Areas," and specifically  
23 referring to that entire - that entire  
24 section.

25 MR. ZIMMERMAN: Your Honor---

1 THE COURT: Overruled so far.

2 MR. ZIMMERMAN: Thank you, Your Honor.

3 Q. Please go ahead, Mr. Howell.

4 A. I'll pick up at "or incompatible development could  
5 unreasonably endanger life or property. Ocean  
6 hazard areas include beaches, frontal dunes, inlet  
7 lands, and other areas in which geologic,  
8 vegetative, and soil conditions indicate a  
9 substantial possibility of excessive erosion or  
10 flood damage."

11 Q. So these are--- Okay. Could you now turn to the  
12 section Mr. Donaghue was just referring to, which  
13 is .0310, which refers to the inlet hazard  
14 subcategory of this category. And can you please  
15 read into the record section (a) there.

16 A. "Inlet areas, as defined by Rule .0304 of this  
17 section, are subject to inlet migration, rapid and  
18 severe changes in water courses, flooding, and  
19 strong tides. Due to the extremely hazardous  
20 nature of the inlet hazard area, all development  
21 within these areas shall be permitted in  
22 accordance with the following standards."

23 MR. ZIMMERMAN: Your Honor, at this  
24 time, I'm going to hand Mr. Howell a series  
25 of---

1 MR. DONAGHUE: Objection. And the basis  
2 of the objection would be that the witness  
3 has not read the entire section in and  
4 specifically section (c).

5 MR. ZIMMERMAN: I'd be happy to have him  
6 read the entire section.

7 THE COURT: Well, that's all right. I  
8 can read, but also probably more appropriate  
9 for your cross-examination.

10 MR. DONAGHUE: Fair enough.

11 (Thereupon, there was a pause in the  
12 proceeding.)

13 MR. ZIMMERMAN: I'm going to have  
14 Mr. Howell describe what they are.

15 MR. DONAGHUE: Well, I'm going to  
16 object, Your Honor. The basis of the  
17 objection would be these, I'm assuming, are  
18 taken off of Google, which are overhead shots  
19 from a high altitude and my---

20 THE COURT: Let him identify what each  
21 is, and then we'll deal with them  
22 individually as to whether or not they're  
23 admissible.

24 MR. ZIMMERMAN: Thank you, Your Honor.

25 Q. Mr. Howell, would you please describe what I've

1 just handed you.

2 A. These are aerial photographs that are taken every  
3 I believe six or so years for our Division for use  
4 of enforcement and just historic history of the  
5 shoreline.

6 Q. And how were they taken?

7 A. By plane.

8 Q. So by a DCM plane?

9 A. By a DCM plane but not exactly. We contract with  
10 somebody. It could be the Division of Marine  
11 Fisheries. It's been, I believe, a private  
12 contractor once or twice, but it's always somebody  
13 that's contracted through our division; yes,  
14 that's correct.

15 Q. Okay. And why do you need to take these pictures  
16 periodically?

17 A. Just to show the historical shorelines, past  
18 development.

19 Q. Okay. And the first one in that pile, what is the  
20 Respondent's number - what is that?

21 THE COURT: Any objection - excuse me -  
22 any idea as to when these photos were taken?

23 THE WITNESS: We actually have the years  
24 on them, and back at the office, the photos  
25 actually have a date. But due to having to

1           blow these up, we could not - they do not  
2           have dates on them.

3 Q. Do you have - it's look like Post-it notes on your  
4 copies, is that right?

5 A. That's correct.

6 Q. And do you have dates on those Post-it notes on  
7 those copies?

8 A. We do. That's correct.

9 Q. How did you get those Post-it notes and the dates  
10 on those?

11 A. We took the date that was on the original photo  
12 and put it on a Post-it note.

13 Q. Okay. Did you do that?

14 A. Actually, Mr. Brownlow did that.

15 Q. Okay. And were you in his presence when the dates  
16 were marked on there?

17 A. I was, yes.

18 Q. And are those - to the best of your knowledge, are  
19 those accurate dates for the photographs that they  
20 correlate to?

21 A. Yes, sir.

22 Q. Okay. Could you please describe the first one  
23 there - that's Respondent's Exhibit what?

24    (RESPONDENT'S EXHIBIT NO. 8

25    (MARKED FOR IDENTIFICATION

1 A. Exhibit 8.

2 Q. Okay.

3 MR. DONAGHUE: Objection, Your Honor.

4 THE COURT: Overruled.

5 Q. Could you please describe for the Court what that  
6 Exhibit 8 is.

7 A. This is an aerial photograph of Bogue Inlet in  
8 1984.

9 MR. DONAGHUE: Could I just look at it  
10 because I don't know which date is which,  
11 sir?

12 THE COURT: Okay.

13 Q. Sir, can you please describe that for the Court.

14 A. That is an aerial photograph of Bogue Inlet at the  
15 point in 1984.

16 Q. Okay. And is Mr. Donaghue's property on there?

17 A. Yes, it is.

18 Q. And could you show the Judge where on that aerial  
19 photograph Mr. Donaghue's property is?

20 THE WITNESS: Right here, sir.

21 THE COURT: All right.

22 Q. And if you could turn to the next photograph,  
23 please. And what's the date on this photograph?

24 (RESPONDENT'S EXHIBIT NO. 9

25 (MARKED FOR IDENTIFICATION

1 A. This is 1989.

2 Q. Okay. And is this also an aerial photograph taken  
3 in the process of the periodic survey essentially  
4 of the coast land?

5 A. That's correct.

6 Q. Okay.

7 THE COURT: For purposes of the record,  
8 if you could use some sort of marker on  
9 Exhibit Number 8 to circle or somehow  
10 indicate where the Petitioners' property is  
11 located.

12 MR. ZIMMERMAN: That's a good idea, sir.

13 MR. DONAGHUE: And I don't think I - if  
14 I may - I don't think I have all of the  
15 exhibits.

16 MR. ZIMMERMAN: Which one are you  
17 missing?

18 MR. DONAGHUE: I don't have eighty -  
19 this one you told me was '84. I don't think  
20 I have '89.

21 MR. ZIMMERMAN: I think that's '89 right  
22 there. That's that one turned upside down.

23 MR. DONAGHUE: This is '89?

24 MR. ZIMMERMAN: Yeah.

25 MR. DONAGHUE: Okay. And which one was



1 '84, then?

2 MR. ZIMMERMAN: '84 is that one.

3 MR. DONAGHUE: Is this one? Okay.

4 Q. And, yes, Mr. Howell, could you please mark on -  
5 I've got a red pen here - please mark on the first  
6 1984 one we've discussed where exactly  
7 Mr. Donaghue's property is. And could you hand  
8 that copy to the Judge, and we'll have that be the  
9 official record copy.

10 Now if you'd turn to the next one of  
11 Respondent's Exhibit Number 9.

12 THE COURT: I see where it's located, so  
13 if you want to just hold on to that one.  
14 That pile will become - I need two copies  
15 anyway, so at the end of the hearing, that  
16 pile will be introduced and accepted into  
17 evidence.

18 MR. DONAGHUE: May I ask for an offer of  
19 proof as to where we're going with this? Are  
20 you - may I ask the question just to move the  
21 hearing along?

22 THE COURT: Sure.

23 MR. DONAGHUE: So I'm understanding?

24 MR. ZIMMERMAN: Yes.

25 MR. DONAGHUE: Are you suggesting that

1 the dock, pier, walkway, whatever you want to  
2 call it, was not there in this photograph?

3 MR. ZIMMERMAN: That's actually not  
4 where I'm going with, with this. I'm showing  
5 the dynamic nature of the coastline which  
6 gives further evidence that this is an area  
7 of environmental concern categorized as ocean  
8 hazard. That's the purpose of this time  
9 elapsed view of the varying dynamic nature of  
10 the coastline.

11 MR. DONAGHUE: Well, I will stipulate to  
12 the fact that there is dynamics located on  
13 any shoreline, but if you're trying to  
14 somehow suggest that these photographs would  
15 replace designations made by the State of  
16 North Carolina, then I would object to the  
17 photos.

18 MR. ZIMMERMAN: Your Honor, I would  
19 suggest that this offers further evidence to  
20 show that this is an area that is within the  
21 category of ocean hazard as set forth by the  
22 rules by the fact that this is a series of  
23 elapsed photographs that are part of the  
24 standard of how DCM categorizes a particular  
25 area of environmental concern.

1 MR. DONAGHUE: Objection.

2 THE COURT: I believe what Mr. Donaghue  
3 is saying - and I'm not trying to put words  
4 in your mouth, Mr. Donaghue - but that there  
5 has to be some official designation by the  
6 State. Now if all of this demonstrates that  
7 it meets definitions, then if it meets the  
8 definitions, that's one thing, but is there  
9 something that officially designates this  
10 as---

11 MR. ZIMMERMAN: Yes, Your Honor. And  
12 that was in that previous map that we showed  
13 you. That's the official designation. That  
14 shows how DCM has categorized this.

15 MR. DONAGHUE: Which was inlet hazard  
16 area.

17 MR. ZIMMERMAN: I was offering this as  
18 further corroboration to show that there was  
19 a basis behind the agency's determination.

20 MR. DONAGHUE: Objection.

21 THE COURT: Okay. But this map, Exhibit  
22 Number 7, designates it as an inlet hazard  
23 area?

24 MR. ZIMMERMAN: That's correct, sir.  
25 And one of the subcategories of ocean hazard

1 is inlet hazard, as you'll remember.

2 THE COURT: All right.

3 MR. ZIMMERMAN: So that's - I was just  
4 further showing that there is basis behind  
5 the agency's determination.

6 THE COURT: Okay.

7 MR. ZIMMERMAN: If you'd like me to move  
8 forward, if the Court is satisfied, I'd be  
9 happy to move past these time photographs.

10 THE COURT: Well, go ahead and let's put  
11 the time photographs in.

12 MR. ZIMMERMAN: Okay.

13 Q. Can you go to Respondent's Exhibit Number 9 again?  
14 And is Mr. Donaghue's property on that map?

15 A. It is.

16 Q. And can you mark for the Court where his property  
17 is on that with that red pen?

18 A. (No audible response from witness.)

19 Q. And at that particular point in time in 1989, is  
20 it, is his property on water?

21 A. '89, no, sir.

22 Q. Okay. And can you please describe for the Court  
23 what that picture shows.

24 A. This picture shows the Coast Guard channel. It  
25 shows Mr. Donaghue's property with some vegetation

1 in front and a large sand spit.

2 Q. Okay. Would you turn to the next Respondent's  
3 exhibit, please. And is Mr. Donaghue's property  
4 on that photo?

5 (RESPONDENT'S EXHIBIT NO. 10  
6 (MARKED FOR IDENTIFICATION

7 A. It is.

8 Q. And could you please mark that for the Court.

9 A. (No audible response from witness.)

10 Q. And at this point in time, what is the date?

11 A. 1995.

12 Q. And in 1995, where was this property - or how was  
13 it - was it on water? Was it on sand? Where was  
14 it?

15 A. In this---

16 MR. DONAGHUE: I will stipulate for the  
17 record those photographs accurately depict  
18 the area at the time the photographs were  
19 taken and that they accurately depict the  
20 location of my property, and the fact-finder  
21 can determine where the water is or  
22 vegetation is or whatever.

23 MR. ZIMMERMAN: Fair enough. Thank you,  
24 Your Honor.

25 THE COURT: All right. Mark where

1 Mr. Donaghue's property is located on each of  
2 those.

3 THE WITNESS: Sure.

4 THE COURT: And, Mr. Donaghue, if you  
5 want to check and verify and make sure you're  
6 agreeing with that.

7 MR. DONAGHUE: Agreed. Agreed. Agreed.  
8 Agreed.

9 THE COURT: Let me see each of those.

10 MR. DONAGHUE: When I'm saying  
11 "agreed---"

12 THE COURT: You agree that it's  
13 designated where those---

14 MR. DONAGHUE: Where the house is. Now  
15 in terms of year, I can't agree necessarily  
16 to the year, but I agree that they represent  
17 what they represent when they were taken.

18 THE COURT: For the record, we're  
19 looking at Respondent's Exhibits 8 through  
20 12. Any objection to me just stating what  
21 the years are that are indicated by the  
22 Post-it notes, although again recognizing  
23 that we don't have any verification, but  
24 that's what they're contending the  
25 information at the office shows.

1 MR. DONAGHUE: I have no objection in  
2 that regard, sir.

3 THE COURT: All right. Number 8, again,  
4 shows 1984. Number 9 shows the photo was  
5 taken in 1989. Number 10 shows that the  
6 photo was taken in 1995. Number 11 shows  
7 that the photo was taken in the year 2000,  
8 and Number 12 shows that the photo was taken  
9 in 2006. And each of them have a red circle  
10 as to indicate where Mr. Donaghue's property  
11 is located.

12 All right. Any other questions about  
13 the photos?

14 MR. ZIMMERMAN: No, Your Honor.

15 THE COURT: Any objection to me  
16 accepting those into evidence with the  
17 reservations?

18 MR. DONAGHUE: No. No, Your Honor.

19 THE COURT: All right. Then, they're  
20 all admitted.

21 (RESPONDENT'S EXHIBIT NOS. 8-12

22 (RECEIVED INTO EVIDENCE

23 Q. Mr. Howell, what's the normal process for someone  
24 who wants to develop in an AEC?

25 A. The normal process is, initially, we'll receive a

1 phone call requesting a site visit. We'll go over  
2 the requirements to receive a permit and then go  
3 through the necessary procedures of adjacent  
4 property owner notification, fees paid, making  
5 sure the property is consistent with allowable  
6 development.

7 Q. Was that ever done here?

8 A. Not for this dock, no, sir.

9 Q. When were you first contacted by Petitioners in  
10 this case in regard to the dock?

11 A. I couldn't give you a date. I believe my first  
12 contact with Mr. Donaghue regarding this property  
13 was, when I had actually found the dock, I called  
14 him to make him aware that the development he  
15 undertook was not allowable.

16 Q. And what happened then?

17 A. He said he actually - this was repair of a  
18 structure, that he disagreed with my determination  
19 on this docking facility, and said that - you  
20 know, that was pretty much it. So I involved my  
21 supervisor and we went up, and she agreed that I  
22 was correct that it is replacement of a structure.  
23 And we wrote Mr. Donaghue a violation, and now  
24 we've gotten to this point.

25 MR. ZIMMERMAN: This is the NOV.



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MR. DONAGHUE: Yes, sir. No objection.

THE COURT: All right.

MR. ZIMMERMAN: There's the CNOV,  
continuing---

MR. DONAGHUE: No objection.

Q. Mr. Howell, what I am handing you?

(RESPONDENT'S EXHIBIT NO. 13

(MARKED FOR IDENTIFICATION

A. This is the notice of violation written to  
Mr. Donaghue.

MR. DONAGHUE: I'll stip that the  
notices were sent - stipulate - and I will  
stipulate that they were received.

THE COURT: All right. Stipulate to  
their admittance?

Q. And Mr.---

THE COURT: Excuse me. That will be  
Number 13 and 14. 13 would be the notice of  
violation, and 14 will be the notice of  
continuing violation. Both are admitted into  
evidence.

(RESPONDENT'S EXHIBIT NOS. 13-14

(RECEIVED INTO EVIDENCE

Q. Mr. Howell, are these the notices of violation  
that you referred to just a second ago?

1 A. Yes, sir.

2 Q. Okay. And did you send out---

3 A. I did, yes, sir.

4 Q. And what do these notices entail? What do they -  
5 what do they say to Mr. Donaghue and do they  
6 require anything of him?

7 A. They show Mr. Donaghue - or they entail what  
8 exactly we found on the site, what general  
9 statutes are concerned in writing this violation,  
10 and what we expect the remediation to be in terms  
11 of the restoration plan for this property.

12 Q. What is the restoration plan for this particular  
13 property?

14 MR. DONAGHUE: The document speaks for  
15 itself and I'll agree.

16 THE COURT: I'll let him testify to it  
17 just briefly.

18 A. The restoration plan is to remove the constructed  
19 pier.

20 Q. Okay. Before I go here, did Mr. Donaghue ever  
21 respond to these notices?

22 A. I can't recall, to tell you the truth,  
23 Mr. Zimmerman.

24 MR. DONAGHUE: If you want to, I'll  
25 stipulate that I did, and I think you have

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the letters.

MR. ZIMMERMAN: I do.

MR. DONAGHUE: I'll agree to those.

THE WITNESS: That is correct. I apologize.

MR. DONAGHUE: That's all right.

Q. I believe this is Respondent's Exhibit Number 15. What is this?

(RESPONDENT'S EXHIBIT NO. 15

(MARKED FOR IDENTIFICATION

A. This was Mr. Donaghue's response to our notice of violation.

Q. Okay. And, if I may, turn your attention - in this letter, does Mr. Donaghue describe a water-dependent structure?

MR. DONAGHUE: The letter speaks for itself, and I think I do on page 2. I agree.

MR. ZIMMERMAN: Your Honor, if I may---

THE COURT: Let him answer the question.

Q. Okay. If I may actually divert your attention or focus your attention on the first page, actually, in that - the second-to-the-last paragraph without the statute, the paragraph that starts "I repaired only the decking." Could you repeat that - or could you state that sentence for the record?

1 A. "I repaired only the decking on the dock and, in  
2 fact, placed decking only as far as the undamaged  
3 pilings; i.e., the four former pilings were not  
4 covered with decking."

5 Q. Is that what you found to be the case?

6 A. No, sir. Actually, the deck was replaced as well  
7 as the stringers and other supporting structures  
8 for this facility.

9 Q. So everything except for the pilings?

10 A. Everything except for the pilings, that's correct.

11 Q. And that's - what do you base that on?

12 A. A site visit. Beams, stringers, joists, all the  
13 necessary components for a docking facility were  
14 replaced except for the pilings.

15 MR. DONAGHUE: And we will so stipulate.

16 THE COURT: All right.

17 MR. ZIMMERMAN: Your Honor, I'm going to  
18 hand up now 7J .0209. This is also a rule,  
19 and I would ask that judicial notice be taken  
20 on this as well.

21 THE COURT: All right.

22 Q. Mr. Howell, could you tell the Court what Section  
23 .0200, "Application Process -" excuse me - I'm  
24 sorry - excuse me - NCAC 7J .0210, "Replacement of  
25 Existing Structures---"

1 MR. DONAGHUE: What are we - which one,  
2 sir?

3 MR. ZIMMERMAN: This is---

4 THE COURT: .0210.

5 MR. ZIMMERMAN: This is .0210.

6 MR. DONAGHUE: Okay.

7 Q. Mr. Howell, could you please tell the Court what  
8 this section of the rule involves.

9 A. This is how we determine whether a structure is  
10 repair or replacement.

11 Q. Okay. And just for the record, could I also have  
12 you read that - just the first paragraph of this  
13 rule?

14 A. "Replacement of structures damaged or destroyed by  
15 natural elements, fire, or normal deterioration is  
16 considered development and requires CAMA permits.  
17 Replacement of structures shall be permitted if  
18 the replacement is consistent with current CRC  
19 rules. Repair of structures damaged by natural  
20 elements, fire, or normal deterioration is not  
21 considered development and shall not require CAMA  
22 permits. The CRC shall use the following criteria  
23 to determine whether proposed work is considered  
24 repair or replacement."

25 Q. Okay. So, essentially, if it's repair, you don't

1 need a permit, and if it's replacement, you do?

2 A. Correct.

3 Q. And could---

4 MR. DONAGHUE: Objection to this  
5 witness' opinion. That's for the fact-finder  
6 to determine or the Court to determine.

7 THE COURT: Overruled.

8 Q. May I turn your attention to section (2) of this  
9 rule, the section entitled, "Water-Dependent  
10 Structures"? And could you read that section into  
11 the record?

12 A. "Water-Dependent Structures. The proposed work is  
13 considered replacement if it enlarges the existing  
14 structure. The proposed work is also considered  
15 replacement if: in the case of fixed docks,  
16 piers, platforms, boathouses, boat lifts, and  
17 freestanding moorings, more than fifty percent of  
18 the framing and structural components - beams,  
19 girders, joists, stringers, or pilings - must be  
20 rebuilt in order to restore the structure to its  
21 predamage condition. Water-dependent structures  
22 that are structurally independent from a principal  
23 pier or dock, such as boat lifts or boathouses,  
24 are considered separate structures for the  
25 purposes of this rule."

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Q. Okay.

MR. ZIMMERMAN: And unless Mr. Donaghue objects, I'll just have him stop there. If you'd like, he can read section (b) and (c), whichever you---

MR. DONAGHUE: No. That's fine.

MR. ZIMMERMAN: Okay. Just to clean some house here, I'd like to make sure that the NOV and the CNOV were entered into evidence. That's the notice of violation and the continuing notice of violation.

THE COURT: Any objection?

MR. DONAGHUE: No objection.

THE COURT: All right.

MR. ZIMMERMAN: As well as the letter from Mr. Donaghue?

(RESPONDENT'S EXHIBIT NO. 15)

(OFFERED INTO EVIDENCE)

MR. DONAGHUE: No objection.

THE COURT: All right. I have 1 through 15 with the exclusion of Number 5.

(RESPONDENT'S EXHIBIT NO. 15)

(RECEIVED INTO EVIDENCE)

MR. ZIMMERMAN: That's right, Your Honor.

1 Q. Did Mr. Donaghue follow .0210, section (2)?

2 MR. DONAGHUE: Objection.

3 THE COURT: Overruled.

4 A. No, sir.

5 Q. And how is that?

6 A. He replaced more than fifty percent of his dock -  
7 the structural components - without a permit.

8 Q. And what do you base that upon?

9 A. Ten existing pilings on the property, no decking  
10 or other structural components, and the entire  
11 rest of the pier needed to be replaced.

12 MR. ZIMMERMAN: No further questions,  
13 Your Honor.

14 THE COURT: Before we get into cross-  
15 examination, why don't we take about a  
16 ten-minute recess.

17 (Thereupon, a brief recess was taken.)

18 MR. ZIMMERMAN: (Tape begins mid  
19 sentence.) ---introduce one more photograph  
20 which is - this is actually a---

21 MR. DONAGHUE: I have no objection, Your  
22 Honor.

23 THE COURT: All right.

24 MR. ZIMMERMAN: And this is just a  
25 focused picture of that larger map that we



1 had.

2 THE COURT: All right.

3 Q. (by Mr. Zimmerman) And, Mr. Howell, if you will  
4 just go ahead and mark on that map where  
5 Petitioners' property is.

6 A. (No audible response from witness.)

7 Q. And just one other question on that, so if you  
8 will pull back up the original map, which that is  
9 blowup of. And, for the record, what is that  
10 original map's Respondent's number again?

11 A. 7.

12 Q. Okay. And so just to maybe clear this up a little  
13 bit, so everything with the green on this map - so  
14 basically, essentially, the whole land there -  
15 what is that categorized as?

16 A. That is ocean hazard area.

17 Q. Okay. And then the pink is then the subcategory  
18 breakout of what?

19 MR. DONAGHUE: Objection. Objection to  
20 the categorization of sub-breakout. I will  
21 agree that green is ocean hazard and the  
22 pink, as indicated in the legend, is inlet  
23 hazard.

24 THE COURT: All right.

25 MR. ZIMMERMAN: Your Honor, I would say

1           that just a clear reading of the statute  
2           shows that that is how the rules are broken  
3           out. It is broken out into  
4           subcategorizations.

5           MR. DONAGHUE: Again, that's, I think,  
6           for this Judge to determine what the rules  
7           say, but these exhibits that you're putting  
8           in clearly demonstrate that green is ocean  
9           hazard and the pink is the inlet hazard.

10          THE COURT: All right. We'll stick with  
11          that stipulation.

12          MR. ZIMMERMAN: Okay. Your Honor, if I  
13          may, can I have the Court turn to 15A NCAC 7H  
14          .0304.

15          MR. DONAGHUE: Again, we're getting into  
16          argument. I'm not saying - I'm not arguing  
17          what the statutes say. I'm merely indicating  
18          and objecting to your characterization based  
19          upon what these exhibits say, and the  
20          exhibits speak for themselves, and I'm not  
21          objecting to those exhibits.

22          MR. ZIMMERMAN: Is .0304 on there?

23          THE WITNESS: Uh-huh.

24          MR. ZIMMERMAN: Yes. Okay. So, Your  
25          Honor, if I could just have you turn to that

1 as well.

2 Q. So, Mr. Howell, could you describe what this  
3 section is?

4 A. This is 15A NCAC 07H .0304, "Areas of  
5 Environmental Concern within Ocean Hazard Areas."

6 Q. Okay. And does it break out four different  
7 categories of what the various subcategories of  
8 AECs are for ocean hazard?

9 A. Yes, it does.

10 Q. Okay. And could you read those for the Court?

11 A. The ocean erodible area, high hazard flood area,  
12 inlet hazard area, and the unvegetated beach area.

13 Q. So are those the four categories that we're  
14 talking about - the subcategories, as I've  
15 categorized them - of ocean hazard areas?

16 A. That's correct.

17 Q. And now turning back to those maps, on the blowup  
18 map, the most recent one entered---

19 MR. ZIMMERMAN: We would actually like  
20 to move to enter this into evidence at this  
21 time, Your Honor.

22 (RESPONDENT'S EXHIBIT NO. 16

23 (OFFERED INTO EVIDENCE

24 THE COURT: 16?

25 MR. DONAGHUE: No objection.

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THE COURT: All right. That's R-16 -  
Respondent's Exhibit Number 16 admitted.

(RESPONDENT'S EXHIBIT NO. 16  
(RECEIVED INTO EVIDENCE

Q. Now Petitioners' property is on this map, is that  
right?

MR. DONAGHUE: Already agreed to,  
already stipulated to.

THE COURT: All right.

Q. Okay. And Petitioners' property is within what  
single or multiple areas of environmental concern?

MR. DONAGHUE: Objection. The exhibit  
speaks for itself.

THE COURT: Sustained.

MR. DONAGHUE: Thank you.

THE COURT: And I think if we're doing  
that, we're arguing summary judgment. That's  
where we would be.

MR. ZIMMERMAN: And, Your Honor, I---  
Okay. Yes, Your Honor. No further  
questions, Your Honor.

THE COURT: I guess, for the record,  
where Mr. Donaghue's property would be on  
R-16 would be under where it's printed "Bogue  
Court"?

1 THE WITNESS: Yes, sir, right close to  
2 the "T," I presume.

3 THE COURT: Okay. All right.

4 MR. ZIMMERMAN: Thank you, Your Honor.  
5 That's all.

6 MR. DONAGHUE: Thank you.

7 **CROSS-EXAMINATION**

8 **BY MR. DONAGHUE:**

9 Q. Jonathan, good morning.

10 A. Good morning.

11 Q. Almost afternoon.

12 A. Correct.

13 Q. Now we had a site visit this morning?

14 A. We did.

15 Q. And I believe that you made a representation or  
16 statement while we were there to the effect that  
17 this dock, pier, walkway, whatever you want to  
18 call it, was originally how long did you say?

19 A. One hundred feet.

20 Q. A hundred feet. And how did you come to the  
21 determination that it was one hundred feet?

22 A. I used our aerial photographs that are at  
23 one-to-eight-hundred scale and scaled it off to  
24 one hundred feet.

25 Q. Can you provide for me that particular photograph?

1 A. If we wanted to recess, yes, I could.

2 Q. Okay. Is it going to take you a long time?

3 A. It's at the office.

4 Q. Okay. We're not going to let you go back to the  
5 office. I don't want to waste your time and the  
6 Court's time.

7 Okay. Now you said it was at least a hundred  
8 feet. How do you know it wasn't more than a  
9 hundred feet?

10 A. It scaled off to a hundred feet.

11 Q. It scaled off to a hundred feet?

12 A. Correct.

13 Q. Okay. And the dock, as presently measured, is how  
14 long?

15 A. From the measurements I took on-site, sixty-two  
16 foot.

17 Q. Sixty-two foot. So we can agree, can we not, that  
18 the whole one hundred feet was not repaired?

19 A. Correct.

20 Q. Only sixty-four feet were repaired?

21 A. Or sixty-two, correct.

22 Q. Sixty-two feet were repaired. Okay. So in a  
23 sense, a little bit more than half of a hundred  
24 feet - sixty - I guess, to be precise, sixty-two  
25 percent, assuming you're correct, of the decking

1 was replaced?

2 A. Correct. Decking and other structural components,  
3 correct.

4 Q. Okay. So when was the deck - when was this  
5 walkway or structure first built?

6 A. I do not have a date for that.

7 Q. And was it approved?

8 A. I could not find a permit history on this dock,  
9 no, sir.

10 Q. So you cannot determine whether this structure  
11 was - I mean you can't indicate or prove that it  
12 was an illegal structure in any way?

13 A. I don't understand---

14 MR. ZIMMERMAN: Your Honor, if I may---

15 MR. DONAGHUE: I'll withdraw - strike  
16 it. I'll withdraw the question.

17 MR. ZIMMERMAN: If I may just say one  
18 piece on this.

19 MR. DONAGHUE: I'm going to withdraw the  
20 question.

21 MR. ZIMMERMAN: Okay.

22 MR. DONAGHUE: May I continue, sir?

23 THE COURT: Yes, sir.

24 Q. Sir, you did research on this matter?

25 A. I did.

1 Q. You went back through all the records?

2 A. Correct.

3 Q. Did you ever see any citation issued to either  
4 myself or another homeowner prior to '08?

5 A. No, sir.

6 Q. Now what photographs do you have for this Court  
7 which were taken at any point in time prior to the  
8 earliest one that you showed, which I believe was,  
9 what, '84?

10 A. Correct.

11 Q. Do you have any photographs earlier than that?

12 A. No, sir.

13 Q. Did you ever see any earlier than that?

14 A. No, sir.

15 Q. Do you know what it looked prior to that?

16 A. No, sir.

17 Q. Now I want to show you a photograph that was taken  
18 by Mr. Townsend here in the room, okay? I'm going  
19 to represent to you that this photograph was taken  
20 on or about 1982.

21 Do you have any reason to believe that that  
22 is not an accurate photograph?

23 MR. ZIMMERMAN: Your Honor, I would  
24 object at this point. There is no way that  
25 he can verify a particular time and date



1 before he ever knew---

2 MR. DONAGHUE: That's fair enough. I'll  
3 withdraw the question. I'll withdraw the  
4 question.

5 THE COURT: All right.

6 Q. Do you see the walkway or the dock or whatever it  
7 is that is depicted in this particular photograph?

8 A. Yes.

9 Q. Can you tell by looking at that particular  
10 photograph - and you can hold it in your hands -  
11 whether that photograph represents where the  
12 existing structure is located today?

13 A. I cannot make that determination.

14 Q. Now you were there today for the site inspection?

15 A. Correct.

16 Q. The water area and the beach area looks somewhat  
17 similar, doesn't it?

18 MR. ZIMMERMAN: Your Honor, objection at  
19 this point. Mr. Howell has already told the  
20 Court that he cannot verify that that's even  
21 the structure that we're referring to.

22 THE COURT: He can answer as best he  
23 can.

24 A. That does not look like the site.

25 Q. Thank you, sir. Now can we agree, can we not,

1           that in the exhibit that you had previously  
2           identified - I think it was the last one which is  
3           either 18 or - if I may, 16? The pink area is  
4           inlet area, is it not - inlet hazard area?

5           A. It is inlet hazard area.

6           Q. And do you have any other representations wherein  
7           the State of North Carolina has designated the  
8           inlet hazard area or the area in question to be  
9           any different than what we provided?

10          A. I don't follow the question. Can you repeat it  
11          again?

12          Q. Sure. This area that we have on Exhibit 16 - the  
13          pink area - okay? - how long has the State of  
14          North Carolina designated that area to be the  
15          inlet hazard area?

16          A. I do not know.

17          Q. You have no idea?

18          A. No, sir.

19          Q. Do you have any reason to believe that it hasn't  
20          been the same since nineteen seventy---

21                       MR. DONAGHUE: When was CAMA - when was  
22                       the legislation put into effect? 1978, I  
23                       believe? Can we agree on that, Counsel?

24                       MR. ZIMMERMAN: It was the late '70s.

25                       THE COURT: It was '77, I think.

1 MR. DONAGHUE: '77. Thank you, sir.

2 THE COURT: I may be wrong on that.

3 MR. DONAGHUE: I think you're close.

4 Q. But do you have any reason to believe that it  
5 hasn't been the same since 1977 up until today?

6 A. I could not make a determination that.

7 Q. Who can?

8 A. I'm sure you can go through records and find out  
9 what this was designated in the past.

10 Q. When you did your research on this particular  
11 property, did you make a determination that it had  
12 changed in any way - officially recognized by the  
13 State of North Carolina?

14 A. One way or the other, no, sir.

15 Q. Thank you. So as far as you know, it's the same  
16 inlet hazard area today as it was before?

17 MR. ZIMMERMAN: Objection, Your Honor.

18 Mr. Howell has already stated that he does  
19 not know, so he cannot make a determination.

20 THE COURT: Sustained.

21 Q. Now, sir, counsel - you heard counsel's opening  
22 statement. You were here?

23 A. Correct.

24 Q. And he said - sort of like a, quote, a nonwater-  
25 dependent structure in his opening statement was

1           like - something like building a structure in the  
2           middle of the state?

3           A.    Correct.

4           Q.    Okay.  We can agree that when we're talking about  
5           nonwater-dependent structures in this legislation,  
6           they're not talking about homes in the middle of  
7           the state; they're talking about nonwater-  
8           dependent structures along the coastline?

9           A.    Correct.

10          Q.    Okay.  Now how do you define nonwater-dependent  
11          structure?

12          A.    A structure that is not dependent on the water for  
13          its primary use.

14          Q.    Okay.  Now what about this particular structure is  
15          dependent upon the water for its particular use?

16          I mean - let me ask you this:  It's not a  
17          bulkhead?

18          A.    Correct.

19          Q.    You can't dock a boat or put a boat in there?

20          A.    If it was below high tide, I would assume you  
21          could.

22          Q.    Pardon?

23          A.    The structure is below the high water line, so I  
24          would assume it could be used to dock a kayak,  
25          dock a small vessel.

1 Q. Do you know - do you know whether - are you  
2 suggesting that if one would put a kayak on top of  
3 that, it would become a water-dependent structure?

4 A. It could be usable, yes, correct.

5 Q. How much water is under that at the high water  
6 level - mark?

7 A. Accurately, I do not know. As a guess, I would  
8 say from the stain on the pilings today, it looks  
9 like approximately two feet.

10 Q. Do you know if it is eighteen inches or less?

11 A. I do not.

12 Q. Did you ever go out and measure it?

13 A. The depth at the edge of the structure? No, I did  
14 not.

15 Q. Okay. Well, we can agree that a fixed dock - a  
16 dock is normally something you tie a boat up to,  
17 is it not?

18 MR. ZIMMERMAN: Objection, Your Honor.

19 That's - you don't have to tie - I mean  
20 that's a miscategorization of what a dock is.  
21 Even though that might be a primary use, you  
22 don't have to.

23 THE COURT: How would you define a dock?

24 THE WITNESS: A walkway to the water.

25 Q. Where did you come up with that definition?

1 A. The definition of water-dependent use is a  
2 structure that relies on the water for its primary  
3 function.

4 Q. What about this structure makes it dependent upon  
5 the water?

6 A. I'm seeing somebody fishing off of it.

7 Q. So a rock - you can fish off a rock?

8 A. I don't understand what the question is.

9 Q. The question is, what makes this structure that we  
10 saw today a water-dependent structure?

11 A. In my opinion, it's located below the waterline  
12 and through definition, it states a structure that  
13 is dependent on the water for its primary  
14 function.

15 Q. Now these pictures that I'm going to represent and  
16 show you was taken in 1982. Does that appear to  
17 be a water-dependent structure?

18 MR. ZIMMERMAN: Your objection at this  
19 point. If the Petitioner would further  
20 describe to the Court what this picture is.

21 MR. DONAGHUE: Sure.

22 MR. ZIMMERMAN: And if I could see it as  
23 well first.

24 MR. DONAGHUE: Absolutely. I'll  
25 represent as an offer of proof that this was

1 a photograph that was taken by a witness in  
2 this room, Mr. Robert Townsend, who has the  
3 adjoining property and will indicate - and  
4 he'll correct me if I'm wrong - that he took  
5 this photograph in 1982 from his home which  
6 is immediately next door to my home, and it  
7 shows the structure as it existed in 1982.

8 Q. And my question to you is, are you indicating - is  
9 that a water-dependent structure, in your opinion,  
10 sir?

11 A. I can't make a determination if this is high tide,  
12 low tide, if water is under this structure on a  
13 high tide. This is a snapshot time. I just can't  
14 make that type of determination off of one photo.

15 Q. Now counsel, in his opening statement, said the  
16 State of North Carolina - and rightfully so - is  
17 very sensitive to the environmental concerns,  
18 isn't that correct?

19 A. He said that there are areas of environmental  
20 concern.

21 Q. Fair enough. And we can agree that there was no  
22 earth disturbance, sand disturbance, beach  
23 disturbance, any disturbance whatsoever with  
24 respect to this structure when it was repaired?

25 A. I cannot agree with that.

1 Q. How can you not agree with that, sir?

2 A. Well, one of the photos I show shows one piling in  
3 one spot where I'm assuming another piling had to  
4 be placed for the dock to be level, so I would  
5 assume you put it one piling. So that's ground  
6 disturbance.

7 Q. Sir, you assume I put in a piling?

8 A. I mean I don't know - I wasn't there when you  
9 built it. I'm not aware of whether it was  
10 ground-disturbing or not ground-disturbing.

11 Q. My question is simple. Are you aware of any  
12 ground disturbance with the repair of this  
13 particular facility?

14 A. No.

15 Q. Okay. Is there any electric in this facility?

16 A. Not that I'm aware of.

17 Q. Is there any plumbing in this facility?

18 A. Not that I'm aware of.

19 Q. And, in fact, the repairs that were made did not  
20 extend out all one hundred feet?

21 A. That's correct.

22 Q. Now you showed photographs which indicated - which  
23 showed there was no decking?

24 A. Correct.

25 Q. Do you know how the decking was removed?



1 A. No, I do not.

2 Q. Do you know who removed the decking?

3 A. No, I do not.

4 Q. When you went and took those photographs, be it in  
5 '07 or '08, did you ever walk out on my property  
6 to see why I stacked the decking that I had  
7 removed from this?

8 A. No, I did not.

9 Q. Did you check out to see if, in fact, that was the  
10 case?

11 A. No, I did not.

12 Q. Did you make any investigation to determine how  
13 much decking or all the decking that I had taken  
14 off of those existing structures?

15 A. No, sir.

16 Q. And as far as you know, every one of the pilings  
17 is an original piling?

18 A. As far as I know.

19 Q. Now do you know - and counsel talked to you about  
20 the beach and how the beach had changed in that  
21 particular area. Do you know what the height of  
22 the sand was when you - prior to you taking those  
23 photographs showing the pilings?

24 A. No, I do not.

25 Q. Are you aware of what the Army Corps of Engineers

1 did on behalf of the Town of Emerald Isle in that  
2 particular area during the years of 2006 and 2007?

3 A. Not factually, no, I do not.

4 Q. Did you make any investigation in that regard?

5 A. No, I did not.

6 Q. Are you aware of the fact that the Army Corps of  
7 Engineers, in fact, tied their barge to the end of  
8 the then exposed pilings?

9 MR. ZIMMERMAN: Your Honor, objection at  
10 this point. Mr. Howell has already answered  
11 that he does not know about any of this.

12 THE COURT: He can answer that question  
13 if he knows.

14 A. No, I do not.

15 Q. Do you know how much sand the Army Corps of  
16 Engineers pumped into that particular area?

17 MR. ZIMMERMAN: Again, objection, Your  
18 Honor. Asked and answered.

19 THE COURT: Sustained.

20 Q. Do you know - a number of exhibits were showed to  
21 His Honor, and those exhibits---

22 THE COURT: He still has the ones that  
23 are marked if that's what you're looking for.

24 Q. Let's look at what has previously been marked as  
25 Exhibit 9. Do you have Exhibit 9?

1 A. I do, yes, sir.

2 Q. All I'm trying to demonstrate, sir, is, we can  
3 agree that - you're familiar with the term "Coast  
4 Guard channel"?

5 A. Correct.

6 Q. Okay. And we can agree that at least - and  
7 Exhibit 9 was taken when, sir, according to you?

8 A. 1989.

9 Q. In 1989, that Coast Guard Chanel was completely  
10 closed off, was it not?

11 A. Correct.

12 Q. Now we can agree that what was the Coast Guard  
13 channel in 1982 - was the Coast Guard channel open  
14 or closed in 1982, if you know?

15 A. It appears closed in - I'm not positive.

16 Q. Okay. How about in 1984?

17 A. In 1984, it appears closed.

18 Q. Okay. Now we can agree that in 1989, it was a lot  
19 more closed than it was in 1984?

20 A. Correct.

21 Q. In fact, sir, but isn't it true that in 1984, it  
22 isn't completely closed? It comes out?

23 A. It comes out farther than it does in '89.

24 Q. Well, that was actually a channel of water. You  
25 don't know where that channel of water - I mean

1           it's not completely closed off, is it?

2           A.    I'm not sure.  You know, there's - it could be  
3           closed here.  I don't know.

4           Q.    So from time to time, that Coast Guard channel  
5           opens up and closes?

6           A.    It's very dynamic.

7           Q.    It's very dynamic.  Okay.  And during the course -  
8           and when this dock was originally - or walkway was  
9           originally built, can you tell the Court whether  
10          it was open or closed?

11          A.    I'm not sure when the dock was originally built.

12          Q.    Well, let's assume it was built in the 1970s for a  
13          moment.  Do you have any photographs which  
14          indicate to the Court what that channel looked  
15          like in the 1970s?

16          A.    No, I do not.

17          Q.    If I provide testimony to the effect that in the  
18          early '80s, late '70s, that Coast Guard channel  
19          was open, would you dispute that?

20          A.    No, sir.

21                        THE COURT:  Mr. Donaghue?

22                        MR. DONAGHUE:  Yes, sir.

23                        THE COURT:  Let me have those back.

24                        MR. DONAGHUE:  Oh, I'm sorry.  I'm  
25                        sorry.

1 THE COURT: I don't want to get him too  
2 confused.

3 MR. DONAGHUE: I have a tendency---

4 THE COURT: It doesn't take much for me  
5 to get confused, so let's try to simply it.

6 MR. DONAGHUE: Nor I.

7 Q. And, sir, we can agree that you - again, with the  
8 exhibits that you sent me, notifications, correct?

9 A. Correct.

10 Q. And I responded to your notifications?

11 A. Correct.

12 Q. This North Carolina 5 - this exhibit here - which  
13 just sets forth the categories of environmental  
14 concern. That applies to the entire state, does  
15 it not?

16 A. Yes, it does.

17 Q. Not to this particular area?

18 A. Correct.

19 Q. Now you would agree with me, would you not, that  
20 the property that is located two doors down from  
21 me - Wilma Nelson's property---

22 A. That---

23 Q. Where the existing pier is.

24 A. Which side? Okay. I know where you're talking  
25 about.

1 Q. You know where that is?

2 A. Yes, sir.

3 Q. Okay. You're familiar with that?

4 MR. ZIMMERMAN: Your Honor, if I may,  
5 I'm actually not familiar with this. Which  
6 direction are we going? Is this the "No Wake  
7 Pier"?

8 THE WITNESS: The "No Wake" sign.

9 MR. DONAGHUE: That's the "No Wake  
10 Pier."

11 MR. ZIMMERMAN: Got you. Okay.

12 Q. Okay. Now and you've been with - how long have  
13 you been in charge of this area?

14 A. I was in charge for two years.

15 Q. Starting when?

16 THE COURT: Mr. Donaghue, in North  
17 Carolina we let the lawyers sit.

18 MR. DONAGHUE: I'm sorry.

19 THE COURT: It saves on the shoe  
20 leather.

21 MR. DONAGHUE: I'm sorry. I'm used  
22 to---

23 THE COURT: I understand.

24 A. I believe '07 would be my guess.

25 Q. '07. And that pier was repaired, was it not?

1 A. The one with the "No Wake" sign on it?

2 Q. Yes, sir.

3 A. Not that I'm aware of.

4 Q. Did you make an investigation in that regard?

5 A. No, sir.

6 Q. Do you know - didn't anyone ever tell you - your  
7 superior tell you - who is your superior?

8 A. Ms. Tere Barrett.

9 Q. Who was the gentleman that was in charge of the  
10 permits in this area before you?

11 A. Ryan Davenport.

12 Q. And how about Mr. Tyndall?

13 A. Mr. Tyndall is our assistant director.

14 Q. Okay. Are you aware that that pier has been - a  
15 portion of that pier---

16 MR. ZIMMERMAN: Objection. Asked and  
17 answered on this---

18 THE COURT: Overruled. Wait a minute.

19 Q. Are you aware of the fact that a large section of  
20 that particular structure had been damaged and it  
21 was repaired?

22 A. No, I am not.

23 Q. In fact, it was repaired about a year---

24 MR. ZIMMERMAN: Objection, Your Honor.  
25 Asked and answered. He doesn't know this.

1 THE COURT: Sustained.

2 Q. Now let's go in the other direction, okay? Two  
3 properties down in the opposite direction where  
4 the bulkhead is, do you know who that person is?

5 A. I did not write that permit. I've never been on  
6 that property.

7 Q. Okay. We can agree that the photographs that you  
8 supplied to this Court indicate that there was a  
9 structure prior to the bulkhead located there, was  
10 there not?

11 A. Meaning a pier or a dock---

12 Q. Yes, sir.

13 A. ---was there prior to the bulkhead?

14 Q. Do you know one way or the other?

15 A. Not definitively, no, I do not.

16 Q. Did you check to see if that was the case?

17 A. I would have no reason to do that.

18 Q. Okay. How about the property next to that; is  
19 there a dock or a pier located there?

20 A. I have no idea.

21 Q. And we can agree that that property - you know  
22 where the Coast Guard Station is, right?

23 A. Correct.

24 Q. So at the Coast Guard Station - we certainly agree  
25 they have a pier or a dock?



1 A. I would think so, yes.

2 Q. Okay. Heading towards my house, the next private  
3 residence, they also have a pier or a dock?

4 A. It's not very apparent on this photo - in our '06  
5 photos. So I'm not sure if there's a pier or dock  
6 there or not.

7 Q. Sir, you walked the area. Right now as we speak,  
8 isn't there a dock or pier in that area?

9 A. Sir, I don't go on every property unless called.  
10 I've never been on that property.

11 Q. Okay. If you don't know, that's fine.

12 A. I do not know.

13 Q. Okay. And then we have the bulkhead?

14 A. Correct. I have seen the bulkhead.

15 Q. It's pretty tough to miss?

16 A. Yes.

17 Q. Okay. And all those properties I've just  
18 described are all in the inlet hazard area,  
19 according to your map?

20 MR. ZIMMERMAN: If I may ask for  
21 clarification on inlet hazard area,  
22 presently? Not historically, but presently?  
23 That's what we're---

24 Q. What's been marked as 16 - all of them are in that  
25 area that's been marked on 16 as the inlet hazard

1 area - the pink area?

2 A. Correct.

3 Q. As far as you know, it's been that way forever -  
4 as far as you know?

5 A. Yes, sir.

6 Q. Thank you. Now this - and we're almost to the end  
7 here. This document - whose handwriting is this  
8 on the document? Do you know?

9 A. Which portion? All over?

10 Q. Is any of it yours?

11 A. Yes.

12 Q. What part is yours?

13 A. I wrote your name. I wrote this drawing, this  
14 information here. I signed it, dated it, wrote  
15 this at the bottom.

16 Q. Uh-huh. Who put this information here?

17 A. I did.

18 Q. You did. So it was you who, on that document,  
19 indicated what areas it was?

20 A. Correct.

21 MR. DONAGHUE: Did I steal yours, Your  
22 Honor?

23 THE COURT: No. I've got mine still.

24 Q. Standard maintenance or repair activities, is  
25 there a section 15A, that you're aware of, NCAC

1 01C .0407, "Standard Maintenance and Repair"?

2 A. State that again.

3 Q. I'm sorry. I'm not intimately familiar with all  
4 the codes and how you classify them.

5 A. "Standard Maintenance and Repair," 01C .0407.

6 THE COURT: What's the number again?

7 MR. DONAGHUE: It's 15 NCAC 01C .0407.

8 Q. Are you familiar with that?

9 A. I'm not, no, sir.

10 MR. ZIMMERMAN: I'm sorry. Just a  
11 second. Could I see what you're referring  
12 to? I can't seem to find---

13 MR. DONAGHUE: Sure.

14 Q. This section here, NCAC 07K .0202, are you  
15 familiar with this?

16 A. "Exemption -" correct, yes.

17 Q. You are?

18 A. I am.

19 Q. What does that talk about?

20 A. I'd have to read it.

21 THE COURT: Give me that - 07K---

22 MR. DONAGHUE: Sure. 15A NCAC 07K  
23 .0202.

24 Q. It says, "Exemption," colon, "Projects Requiring  
25 Dredge," colon, "Fill," colon, "State Easement."

1 Did I read that correctly?

2 A. Yes.

3 Q. Okay. What does that pertain to?

4 A. I'd have to read it. I don't know the rules by  
5 heart.

6 Q. We can agree, can we not, that this modification  
7 is not within a hundred and fifty feet of a  
8 federally-maintained channel?

9 MR. ZIMMERMAN: I'm going to object at  
10 this point. This particular section deals  
11 with fill. I don't think that's at issue  
12 here.

13 MR. DONAGHUE: Also a state easement. I  
14 just want to---

15 MR. ZIMMERMAN: Your Honor, again, we're  
16 dealing with---

17 THE COURT: Well, I'll take official  
18 notice of any relevant sections of the  
19 administrative code.

20 MR. ZIMMERMAN: Okay. And, Your Honor,  
21 if I just may have a second?

22 (Thereupon, there was a pause in the  
23 proceeding.)

24 MR. ZIMMERMAN: Can I see which one  
25 you're referring to?

1 MR. DONAGHUE: Sure.

2 (Thereupon, there was a pause in the  
3 proceeding.)

4 MR. ZIMMERMAN: Your Honor, I just renew  
5 my objection that for relevance in this  
6 regard.

7 THE COURT: Okay.

8 Q. We can agree that it's not within a hundred and  
9 fifty feet of a federally-maintained channel?

10 A. Definitively, no, I cannot.

11 Q. Okay. And it's less than two hundred feet?

12 A. The entire structure?

13 Q. Yes, sir.

14 A. Correct.

15 Q. It does not - it does not extend past the four  
16 feet mean low water contour?

17 A. I do not know the water depth as in - it would be  
18 a presumption to say that it was not.

19 Q. Okay. Now under the definition of develop, are  
20 you familiar with that?

21 A. I am, but not verbatim.

22 Q. Okay. We can agree that we did not lengthen the  
23 dock, the pier, the walkway, whatever you want to  
24 call it?

25 A. From what was existing there, I believe so. There

1 was no length there and now there's sixty-two  
2 feet, so I'd say you lengthened it be sixty feet.

3 Q. When you say to me there was no length there, what  
4 do you mean by that?

5 A. There was - those pilings had nothing on them, so  
6 I would assume that was zero.

7 Q. When did you take that photograph that suggested  
8 there was nothing - which shows there's nothing on  
9 the pilings?

10 A. The day I had given you earlier, August or  
11 September, October.

12 Q. When was the decking last there?

13 A. I do not know.

14 Q. Who removed the decking?

15 A. I do not know.

16 Q. Do you know whether or not all the decking or most  
17 of that decking had been removed the year prior?

18 A. No, I do not.

19 Q. Do you know what decking had been removed in  
20 association with the Army Corps of Engineers  
21 activity?

22 A. No, I do not.

23 Q. And as a general principle, you would agree - the  
24 property owner of that - if the decking was in bad  
25 repair, it would be prudent for me as a homeowner

1 to repair the decking?

2 A. I agree it would be prudent to call the---

3 MR. ZIMMERMAN: Objection, Your Honor.

4 Just due the opinion of this question - the  
5 opinion nature.

6 THE COURT: Overruled. He can answer as  
7 best he can.

8 A. (continuing) As a property owner, my first  
9 assumption would be to call CAMA to see what I  
10 could and could not do - would be my first step as  
11 a property owner in that area.

12 Q. Well, we can agree I wouldn't have to call the  
13 Town of Emerald Isle to repair the decking?

14 A. I cannot agree with that.

15 Q. What provision in the Town of Emerald Isle would  
16 suggest that I could not repair decking on the  
17 existing pilings?

18 A. I don't know their building code. I believe it  
19 requires a building permit to build a dock.

20 Q. On what do you base that opinion?

21 A. Well, some - some municipalities and counties do;  
22 some don't. So---

23 Q. I'm talking about Emerald Isle, sir.

24 A. I don't know for sure.

25 Q. Okay. And there was no - there was no excavation

- 1           involved with this project?
- 2       A.    No, sir.
- 3       Q.    There was no dredging involved with this project?
- 4       A.    No, sir.
- 5       Q.    There was no filling involved with this project?
- 6       A.    No, sir.
- 7       Q.    There was no dumping involved with this project?
- 8       A.    No, sir.
- 9       Q.    There was no removal of clay, silt, sand, gravel,  
10           or minerals, is that correct?
- 11      A.    I'm not positive on that.
- 12      Q.    There was no - you don't have any knowledge to  
13           suggest that there was, do you?
- 14      A.    No, I do not.
- 15      Q.    There was no bulkhead?
- 16      A.    Correct.
- 17      Q.    There was no driving of pilings?
- 18      A.    I'm not aware.
- 19      Q.    There was no clearing or alteration of land as ad  
20           adjunct of construction?
- 21      A.    Possibly. I'm not sure. I wasn't there when it  
22           was built.
- 23      Q.    Was there any alteration or removal of sand dunes?
- 24      A.    I was not there when it was built.
- 25      Q.    Was there any alteration of the shore, bank, or



1 bottom of the Atlantic Ocean, any sound, bay,  
2 river, or stream?

3 A. Possibly. I do not know for sure.

4 Q. How would that have been possible?

5 A. I don't know if you had to drive a piling. I just  
6 don't know.

7 MR. DONAGHUE: That's all I have.

8 THE COURT: Redirect?

9 MR. ZIMMERMAN: Yes, Your Honor. Just  
10 very briefly.

11 **REDIRECT EXAMINATION**

12 **BY MR. ZIMMERMAN:**

13 Q. Mr. Howell, could you put your attention back on  
14 15A NCAC 7J .012 [sic], "Replacement of Existing  
15 Structures," the fifty percent rule that we talked  
16 about earlier.

17 A. Okay.

18 Q. And could you go ahead and read section (2)(a),  
19 that first sentence?

20 A. "In the case of fixed docks, piers, platforms,  
21 boathouses, boat lifts, freestanding moorings,  
22 more than fifty percent of the framing and  
23 structural components - beams, girders, joists,  
24 stringers, or pilings - must be rebuilt in order  
25 to restore the structure to its predamage

1 condition."

2 Q. So predamage condition - could you explain what  
3 that means?

4 A. That is the structure predamage when it was first  
5 built - the original structure.

6 Q. So in this case, if the original dock was a  
7 hundred feet, you can't just build a fraction of  
8 the original hundred feet and call it less than  
9 fifty percent; you have to build up to the hundred  
10 feet---

11 MR. DONAGHUE: Objection.

12 THE COURT: Overruled.

13 A. Correct.

14 Q. Did that happen here?

15 A. No, sir. Mr. Donaghue built sixty foot of an  
16 original one-hundred-foot pier.

17 Q. So, essentially, the only way to meet this  
18 standard given by this rule would be if the  
19 original pier was a hundred feet, he could only  
20 replace forty-nine feet of it and have a pier -  
21 and if the pier - the dock was back wasn't back to  
22 the original hundred feet, is that right?

23 A. Well, he couldn't replace up to forty-nine because  
24 you have to replace the structure in its entirety,  
25 and then base your fifty percent determination off

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of that structure.

MR. ZIMMERMAN: That's all, Your Honor.

**REXCROSS-EXAMINATION**

**BY MR. DONAGHUE:**

Q. How did you come to that conclusion?

A. "Restore the structure to its predamage condition." Predamage is---

Q. How much would it cost to restore the structure to its predamage condition?

MR. ZIMMERMAN: Objection, Your Honor.

Cost is not relevant here.

MR. DONAGHUE: I disagree.

THE COURT: Overruled so far.

A. I'm not a contractor. I do not know.

Q. Did you make any investigation in that regard?

A. No, sir. I believe the rule does not allude to that fact, and I did not.

MR. DONAGHUE: No further questions.

THE COURT: Thank you, sir. You can step down.

THE WITNESS: Thank you.

MR. ZIMMERMAN: Your Honor, the State does have one more witness. Would you like us to break for lunch or try to---

THE COURT: Yeah. Why don't we go ahead

1 and start. I've got - I'm going to meet  
2 someone at twelve-thirty, so---

3 MR. ZIMMERMAN: Okay.

4 MR. DONAGHUE: I may be able to agree or  
5 stipulate to what - an offer of proof as to  
6 what he's going to testify to.

7 MR. ZIMMERMAN: Your Honor, Mr. Brownlow  
8 is Mr. Howell's - is higher up in the DCM  
9 food chain. He actually played a significant  
10 part in the writing of this statute and can  
11 give further evidence to the Court as to what  
12 the intent of how to read this particular  
13 rule is.

14 MR. DONAGHUE: I would object.

15 THE COURT: I wouldn't allow that.

16 MR. ZIMMERMAN: Based upon his personal  
17 knowledge, Your Honor?

18 THE COURT: Unless we had the whole  
19 commission.

20 MR. ZIMMERMAN: Fair enough, Your Honor.

21 THE COURT: Don't look behind them  
22 unless there is some written intent stated  
23 specifically---

24 MR. ZIMMERMAN: Yes, Your Honor.

25 THE COURT: ---but to go behind it, I

1 think gets into some dangerous territory.

2 MR. ZIMMERMAN: Your Honor, I also  
3 have - he did take a number of pictures, I  
4 believe, late last week that I would like to  
5 enter into evidence that he can---

6 THE COURT: All right. Do you want to  
7 show those to Mr. Donaghue?

8 MR. DONAGHUE: Okay. What's your offer  
9 of proof? Just to show---

10 MR. ZIMMERMAN: Yeah, to show how it is  
11 right now.

12 MR. DONAGHUE: (Tape begins mid  
13 sentence.) ---put them in.

14 THE COURT: All right.

15 MR. ZIMMERMAN: Would you like me to  
16 call Mr. Brownlow, then?

17 MR. DONAGHUE: I'll agree - if you  
18 authenticate them, they show what they show,  
19 and they were taken when they were taken.

20 THE COURT: Okay. What numbers are we  
21 going to have on these?

22 MR. ZIMMERMAN: What numbers are these,  
23 sir?

24 THE COURT: Starting with 17.

25 MR. ZIMMERMAN: Would you like a copy of

1           these?

2                   MR. DONAGHUE: Sure. Are we off the  
3 record or - it doesn't matter.

4                   (Thereupon, there was a pause in the  
5 proceeding.)

6                   MR. ZIMMERMAN: (Tape begins mid  
7 sentence.) ---photographs, and just for the  
8 record, those are photographs that were taken  
9 I believe last Thursday or Friday, whatever  
10 it says on there. And that is---

11                   THE COURT: July 30th, which would have  
12 been Thursday, I believe.

13                   MR. ZIMMERMAN: Thursday.

14                   THE COURT: All right. So for the  
15 record we've got Respondent's 17, 18, and 19,  
16 which are three photographs taken of -  
17 Mr. Brownlow's photographs taken of the pier,  
18 dock, or walkway, whatever we designate it to  
19 be.

20                                   (RESPONDENT'S EXHIBIT NOS. 17-19

21                                   (RECEIVED INTO EVIDENCE

22                   MR. ZIMMERMAN: Your Honor, if I may  
23 just have a second.

24                   (Thereupon, there was a pause in the  
25 proceeding.)

1 MR. DONAGHUE: No objection.

2 THE COURT: All right.

3 MR. ZIMMERMAN: Your Honor, if I may, I  
4 would ask for a bit of guidance from the  
5 Court on this. Mr. Brownlow is also - along  
6 with being in DCM currently, he's a previous  
7 building inspector. I believe he still has  
8 certifications - some outstanding, some that  
9 he previously had. And I was going to also  
10 have him testify to what was actually  
11 developed.

12 If the Court will take notice - and  
13 that's based upon looking at new wood, old  
14 wood - but I guess if the Court would take  
15 notice based upon the photographs that were  
16 previously entered into evidence, that there  
17 was essentially all horizontal wood newly put  
18 in on top of pilings that did not have that,  
19 then I will - I have no need to put him on  
20 the stand, Your Honor.

21 THE COURT: I think basically we can  
22 agree from a site inspection this morning -  
23 and correct me if I'm wrong, Mr. Donaghue -  
24 but that all of the structural support and  
25 the cross members, or whatever proper name

1           they might be called, along with the decking  
2           was replaced. The only thing that was not  
3           replaced would have been the pilings---

4           MR. DONAGHUE: Correct.

5           THE COURT: ---is that fair to say?

6           MR. DONAGHUE: Fair to say.

7           THE COURT: Okay. And that's what

8           Mr. Brownlow---

9           MR. ZIMMERMAN: Yes, that's right, sir.

10          THE COURT: ---Brownlow would have  
11          testified to?

12          MR. ZIMMERMAN: And so with that said,  
13          Your Honor, the State concludes its evidence.

14          THE COURT: All right.

15          MR. DONAGHUE: I can move pretty  
16          quickly, and the only reason I would ask -  
17          and I know - I'll do whatever you want, but  
18          these two gentlemen are---

19          THE COURT: Sort of my own little  
20          logistical thing is that I agreed to meet my  
21          former law partner at twelve-thirty.

22          MR. DONAGHUE: No problem.

23          THE COURT: So we can get started and  
24          have eleven minutes of testimony and - ever  
25          what you-all want to do.



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Left hand on the Good Book and raise  
your right, please.

- - - - -  
RICK GOODNIGHT,

a witness called on behalf of the Petitioners, being  
first duly sworn in the above-entitled matter, was  
examined and testified on his oath as follows:

THE COURT: Thank you, sir. Have a  
seat. And if you would, please, for the  
record, tell us your name.

THE WITNESS: My name is Rick Goodnight.

THE COURT: Thank you.

**DIRECT EXAMINATION**

**BY MR. DONAGHUE:**

Q. Mr. Goodnight, where do you reside?

A. 808 Sandridge Road, Hubert, North Carolina.

Q. And what business are you in?

A. Home repair service. I maintain four - or six  
properties out on the island, maintenancewise on  
everything, mowing to lawn care. You name it, I  
pretty much do it all.

Q. And that's Goodnight's Home Service?

A. Goodnight's Home Improvement, yes.

Q. Let's go back in time about six, seven years ago.  
You were a foreman on the job for Estes Builders,

1           were you not---

2           A.    Yes, sir.

3           Q.    ---where you built my particular home here on  
4           Bogue Court?

5           A.    Yes, sir.

6           Q.    And was there a walkway on the property when you  
7           were constructing the home at that time?

8           A.    Yes.

9           Q.    After the home was built, did you come back from  
10          time to time and make repairs at the home or  
11          perform various services that I requested?

12          A.    Yes.

13          Q.    Did there come a time over the course of the last  
14          two years where I began to dismantle the existing  
15          structure?

16          A.    Yes, sir.

17          Q.    And did I pile the wood from the decking and  
18          timbers - did I pile that in the back of the  
19          house?

20          A.    Yes, sir.

21          Q.    And it's true, is it not, that last year, I  
22          believe it was, or last summer, you, I, and my two  
23          sons and my nephew made certain repairs?

24          A.    Yes, sir.

25          Q.    And you, in fact, helped us in that regard?

1 A. Yes.

2 Q. You would agree none of us were mechanics? I  
3 said, you would agree that neither myself, my  
4 sons, or my nephew were very good mechanics?

5 A. You-all did a good job - very good job.

6 Q. Now all the pilings were original pilings?

7 A. Yes, sir.

8 Q. And, essentially, what I did is, I went to Lowe's  
9 and you gave me the requirements, what I was to  
10 buy, and I bought decking, did I not?

11 A. Yes, sir.

12 Q. And then I bought the stringers - the supporting  
13 thing - whatever you call them, is that correct?

14 A. Yes.

15 Q. And what was the approximate amount of the decking  
16 and the material I bought at Lowe's?

17 A. Around eight hundred dollars.

18 Q. And we repaired this over the course of two days,  
19 did we not?

20 A. Yes, sir.

21 Q. And even during the course of the repair, we still  
22 continued to pull off decking, did we not?

23 A. Yes.

24 Q. And how much did I pay you?

25 A. When it was all said and done, I made eight

1 hundred dollars.

2 Q. Okay. So the total cost of the job was  
3 approximately sixteen hundred dollars?

4 A. Yes.

5 Q. And, in fact, you hauled away, did you not, all  
6 the previous decking that I ripped off over the  
7 course of the prior years?

8 A. Yes, sir. I believe there was probably two -  
9 maybe two and a half loads.

10 Q. Now prior to me going into this, quote, "self-help  
11 project," did I ask you to give me an estimate for  
12 you doing this with your own people on your own?

13 A. Yes, sir.

14 Q. And what was the price that you quoted me?

15 A. It was around - around fifty-seven hundred  
16 dollars.

17 Q. And, in fact, we did not repair this walkway to  
18 its original - what's the term I want to use - to  
19 its original point? In other words, this thing  
20 was shortened, was it not?

21 A. Yes. Yes, it was shortened.

22 MR. DONAGHUE: Cross-examine.

23 THE COURT: Questions?

24 MR. ZIMMERMAN: Yes, Your Honor. Your  
25 Honor, if I may, I'm going to hand to the

1 witness this particular photograph - which  
2 one is this marked as?

3 THE COURT: I don't remember.

4 MR. ZIMMERMAN: Do you mind if I---

5 THE COURT: No. Fumbling through.

6 MR. ZIMMERMAN: I can't seem to find it.

7 Did we enter this one in already?

8 MR. DONAGHUE: You did.

9 MR. ZIMMERMAN: We did?

10 MR. DONAGHUE: You did.

11 MR. ZIMMERMAN: Okay. Well, let me just  
12 hand this copy to the witness.

13 **CROSS-EXAMINATION**

14 **BY MR. ZIMMERMAN:**

15 Q. And if you can---

16 (Thereupon, Mr. Zimmerman conferred with  
17 Mr. Donaghue.)

18 MR. ZIMMERMAN: I'll enter this one in.

19 MR. DONAGHUE: No objection.

20 THE COURT: I don't think that one is  
21 in.

22 Q. Okay. So Mr. Goodnight---

23 A. Yes, sir.

24 Q. ---can you please describe what you're looking at  
25 there.

1 (RESPONDENT'S EXHIBIT NO. 20

2 (MARKED FOR IDENTIFICATION

3 A. The existing posts from the walkway.

4 Q. Okay. And is that what it looked like before  
5 you-all started building?

6 A. Yes.

7 Q. Okay. And if you can just - did you say you put  
8 any pilings into the water---

9 A. No, sir.

10 Q. ---I mean into the land?

11 A. No, sir.

12 Q. Then can you explain to the Court - and maybe this  
13 is just a simple explanation - if you only had one  
14 piling, but if you look - I guess count from the  
15 left and count the first tier, second tier, third  
16 tier.

17 A. Right.

18 Q. Just count the shadows there. It looks like there  
19 is only one piling there.

20 A. Yeah, it sure does.

21 Q. Is that how it is?

22 A. Yeah.

23 Q. Is that how it is presently?

24 A. No.

25 Q. How did the new piling get in there?

1 A. I do not know. It actually looks like by this - I  
2 don't know - it kind of looks like there was two.

3 Q. Okay. And this one---

4 MR. ZIMMERMAN: Your Honor, if I may  
5 approach?

6 Q. Yeah. If I may hand you this now---

7 A. Let me ask you this: Is this shadow from---

8 Q. Yeah. I think there's one behind it. That's the  
9 why you can see two shadows.

10 A. Okay. Got you.

11 Q. Now if I turn your attention to what's been marked  
12 as Respondent's Exhibit 18. So, again, just kind  
13 of counting back from those two, it looks like you  
14 see two, two, two?

15 A. Yeah.

16 Q. It looks like there is kind of a white - kind of a  
17 shinier piling in there. How did that one get  
18 there?

19 A. Now the thing - that's the---

20 Q. And maybe there's a simple explanation. I'm not  
21 trying to be tricky here.

22 A. Well, no. And what I'm looking at - to me, it  
23 looks like it's the existing one that's there  
24 because this one is on - if you look at them,  
25 they're on the same side.

1 Q. Then, how did the one behind it get in?

2 A. Well, now that, I do not know.

3 Q. Okay. Okay.

4 MR. ZIMMERMAN: That's all I have, Your  
5 Honor.

6 THE COURT: Further questions?

7 MR. DONAGHUE: Yes. Just briefly.

8 **REDIRECT EXAMINATION**

9 **BY MR. DONAGHUE:**

10 Q. Counsel has brought up this issue of the  
11 pilings---

12 A. Yes, sir.

13 Q. ---and claiming that there's a piling missing. We  
14 can agree, can we not, that when you first built  
15 the home---

16 A. Yes, sir.

17 Q. All right. ---that beach - if you sort of look at  
18 the end of the walkway - the end that's closest to  
19 the home - we can agree before all the erosion  
20 took place and before the hurricane came through  
21 and before the dredging operation, et cetera, that  
22 beach extended out on a perfectly level plane? In  
23 other words, most of that decking was, in fact,  
24 covered by sand?

25 A. Yes, sir.



1 Q. And all the pilings were covered by sand?

2 A. Yes, sir.

3 Q. And isn't it true that, after the hurricane and  
4 after the dredging by the Army Corps of Engineers,  
5 certain pilings then became exposed?

6 A. Yes, sir.

7 MR. DONAGHUE: That's all I have.

8 MR. ZIMMERMAN: Nothing, Your Honor.

9 THE COURT: All right. Thank you, sir.

10 You can step down.

11 MR. DONAGHUE: Oh. I know what I

12 [inaudible].

13 Q. (by Mr. Donaghue) Isn't it also true, sir, that  
14 during the course of our repairing this, you  
15 actually - as some of the pilings became exposed,  
16 in order to even it up, you had to cut some of the  
17 pilings; in other words, you actually reduced the  
18 height of some of the pilings---

19 A. Yes, sir.

20 Q. ---to match them up with the ones that had been  
21 exposed by the erosion?

22 A. Yes, sir.

23 MR. DONAGHUE: That's all.

24 THE COURT: Thank you, sir. All right.

25 According to my watch, we have twelve

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twenty-eight. Why don't we take our lunch recess and come back at two o'clock.

(Thereupon, 12:28 p.m., a luncheon recess was taken.)

**AFTERNOON SESSION**

**2:00 P.M.**

THE COURT: All right. Ready to call another witness?

MR. DONAGHUE: If I may, sir. Robert Townsend.

THE COURT: All right. Mr. Townsend, if you would, come around, please. Left hand on the Bible and raise your right, please.

- - - - -

ROBERT TOWNSEND,  
a witness called on behalf of the Petitioners, being first duly sworn in the above-entitled matter, was examined and testified on his oath as follows:

THE COURT: Thank you, sir. Have a seat, and if you would, for the record, please state your name.

THE WITNESS: Robert Townsend.

THE COURT: Thank you, sir.

MR. DONAGHUE: May I proceed, sir?

THE COURT: Yes, sir.

## DIRECT EXAMINATION

1  
2 BY MR. DONAGHUE:

3 Q. Mr. Townsend, where do you reside?

4 A. 11115 Inlet Drive, Emerald Isle.

5 Q. And is that an area known as the point?

6 A. The point, yes.

7 Q. And how long have you resided in the point of  
8 Emerald Isle?

9 A. In the point of Emerald Isle since 1984.

10 Q. In fact, it's true, is it not, that you own two  
11 properties, one on Channel Drive and also one  
12 Bogue Court?

13 A. That's correct.

14 Q. And the property on Bogue Court is right next to  
15 my property, is it not?

16 A. It is adjacent to you, yes, sir.

17 Q. Now let's talk a little bit about your background.  
18 Have you been involved in the construction trades?

19 A. Yeah. I've been involved in the construction of  
20 about ten houses in the point area over the last  
21 ten years. I was a charter boat captain during  
22 the summer, and during the winter, I usually acted  
23 as a superintendent on construction jobs where  
24 individuals built their own houses.

25 Q. And would that be in the area, again, of the

1 point - did you build or you were involved in the  
2 construction of any homes in the point itself?

3 A. Yeah. There's two houses on Bogue Court that are  
4 adjacent to you that I built in addition to the  
5 house that I own.

6 Q. And would one of them have been Wilma Nelson's  
7 property?

8 A. That's correct.

9 Q. And you've also been involved in the construction  
10 or oversight of construction for homes along  
11 Channel Drive?

12 A. That's correct.

13 Q. Now at my request, you collected certain  
14 photographs, did you not?

15 A. Yes.

16 Q. Sir, I'm going to show you a photograph that was  
17 taken in 1975.

18 MR. DONAGHUE: And with the Court's  
19 permission, I'm going to mark on the back of  
20 this as A-1, if I may.

21 (PETITIONERS' EXHIBIT NO. A-1

22 (MARKED FOR IDENTIFICATION

23 THE COURT: I think we actually have  
24 some stickers.

25 MR. DONAGHUE: Sure.

1 Q. So I'll show you what's been marked as A-1 and  
2 would you please identify what that picture  
3 represents.

4 A. This is the area of Bogue Court and Inlet Drive.  
5 It's commonly known as the point to most of the  
6 people here.

7 Q. Now the lot where my home is presently located -  
8 was there another structure on that lot in the  
9 1970s?

10 A. This structure depicted right here is the land  
11 that your home is currently on. The land just to  
12 the northwest of that or the north actually,  
13 toward the Coast Guard Station, is the lot that my  
14 house is on.

15 Q. And so I'm going to point to the Court that - and  
16 counsel at the same time, this home here would be  
17 the home in question, is it not?

18 A. Yes.

19 Q. And that shows a walkway, dock, pier, whatever you  
20 want to call it, extending from that house onto  
21 the inlet, does it not?

22 A. That's correct.

23 Q. And that's as of 1975?

24 A. Yes, sir.

25 Q. Sir, I'm going to show you another photograph

1 taken in 1990 - showing opposing counsel - A-2.

2 Sir, again, would you indicate for the record what

3 this---

4 (PETITIONERS' EXHIBIT NO. A-2

5 (MARKED FOR IDENTIFICATION

6 A. This depicts the same area except from a westerly  
7 view from the aircraft that took it, and this  
8 depicts the house that your lot is currently  
9 located before it was damaged by the storm, and it  
10 depicts the dock leading out from your house.

11 Q. Thank you, sir.

12 MR. ZIMMERMAN: And, just again, what  
13 date was that?

14 MR. DONAGHUE: That was '90 - '90.

15 THE WITNESS: That was 1990.

16 Q. And, sir, I'm going to show you now - which is a  
17 cover to a book, I believe, you indicated to me?

18 A. This is the cover from---

19 THE COURT: Let me interrupt you just a  
20 second. If you could show me where the  
21 property is on this photo. And I don't know  
22 the age or significance of these pictures,  
23 but can we mark on them with a red---

24 THE WITNESS: If it absolutely has to  
25 be. The picture - the house in question that

1 his property is on is this one right here.

2 This is my house.

3 THE COURT: So this is---

4 THE WITNESS: This is the walkway.

5 MR. DONAGHUE: That's the former house  
6 right there.

7 THE COURT: The former house---

8 THE WITNESS: This was damaged.

9 THE COURT: ---damaged in storm and  
10 ultimately torn down which led to your house  
11 being built?

12 MR. DONAGHUE: That's correct, sir.

13 THE COURT: All right.

14 Q. Again, this is one taken in 1992?

15 A. No. This is early '70s. I'm not sure - '71 or  
16 two. This is the book cover from Orrin Pilkey's  
17 book that regarded having to do with beach  
18 nourishment and beach erosion and all that.

19 Q. Fair enough. And that depicts the same area, the  
20 point?

21 A. Yeah. A little bit more to the south looking  
22 north, but this is your property right here in  
23 question and the pier extending out.

24 Q. In fact, there are a number of piers, are there  
25 not? There are one, two, three along that area?

1 A. Yeah. There's one oceanward of yours, and there's  
2 one to the southside of your house.

3 Q. Could you point that out to His Honor?

4 THE WITNESS: Did you see it, Ward?

5 MR. ZIMMERMAN: I have seen that one.  
6 Thank you.

7 THE WITNESS: This is the oceanward pier  
8 and this is the property in question right  
9 here - the pier that's in question, and  
10 that's the pier that was to the Coast Guard  
11 Station sign.

12 THE COURT: And, again, let me make sure  
13 I understand. This is the house that  
14 ultimately was torn down?

15 THE WITNESS: This was torn down. This  
16 is where his house was replaced.

17 THE COURT: And this is the pier---

18 THE WITNESS: That's the pier that's in  
19 question.

20 THE COURT: All right. Got it.

21 THE WITNESS: This is the one toward the  
22 Coast Guard Station from his and this is  
23 oceanward of his.

24 THE COURT: All right. Got you.

25 THE WITNESS: Both of these houses are



1 no longer there.

2 Q. Mr. Townsend, we know that the former house was  
3 torn down after a storm, but the pier remained,  
4 did it not?

5 A. Yes.

6 Q. And the pier remained, did it not, essentially, up  
7 until the time that I dismantled the decking from  
8 the pier?

9 A. Yes.

10 Q. Now I want you to refocus your attention now to  
11 this area and how that area is designated. When  
12 you built your home, how was the area designated?  
13 When I say "your home," I'm talking about the home  
14 on Bogue Court next to my structure.

15 A. When we signed for - my home fell into the time of  
16 CAMA permits, and when you got your CAMA permit,  
17 by way of instruction to you and I guess as a  
18 warning, they designated the areas that you were  
19 asking for a permit in. And mine was designated  
20 as inlet hazard area, and there was a cover letter  
21 with that that kind of told you, you requested to  
22 buy to get a permit in an area that's known to be  
23 hazardous, et cetera, et cetera. And it was  
24 almost like when you sign for the permit, you  
25 were, more or less, saying, "I know what I'm doing

1           here."

2           Q.    And have you ever been provided with any official  
3           designation from the State of North Carolina which  
4           indicates that your house resided in any other  
5           area than an inlet hazard area?

6           A.    There's been no official talk about that.  My  
7           insurance base ratings have been the same since  
8           1984 when I built that house.  An inlet hazard  
9           area is the rating that it was given at that time.

10                   MR. ZIMMERMAN:  Your Honor, I would  
11           object to just part of that statement about  
12           insurance rates.  I don't know the relevance  
13           of insurance rates with actually determining  
14           what the State considers a particular AEC.

15                   THE WITNESS:  Could I say something to  
16           that or not?

17                   THE COURT:  Go ahead and explain your  
18           answer.

19                   THE WITNESS:  I have an oceanfront house  
20           also, and my oceanfront house for insurance  
21           purposes is rated as oceanfront.  And there's  
22           different categories within oceanfront which  
23           Jonathan can tell you:  V zones, A zones, B  
24           zones, C zones, what have you.  Those are  
25           subject to change.

1 MR. ZIMMERMAN: Again, Your Honor, just  
2 renewing the objection on that.

3 THE COURT: Overruled.

4 Q. And, in fact, your oceanfront home is located, is  
5 it not, right around the point - in other words,  
6 physically speaking, your home is around the  
7 corner maybe, what, twelve homes away?

8 A. Yeah. No more than four hundred yards.

9 Q. Now, sir, I'm going to show you what has been  
10 marked as A-3 and A-4.

11 (PETITIONERS' EXHIBIT NOS. A-3 AND  
12 (A-4 MARKED FOR IDENTIFICATION

13 THE COURT: Was this one not marked -  
14 the cover?

15 MR. DONAGHUE: You know what? Your  
16 Honor, you're correct. That cover is not  
17 marked, and I want to mark that now as A-5.

18 (PETITIONERS' EXHIBIT NO. A-5  
19 (MARKED FOR IDENTIFICATION

20 Q. Mr. Townsend, let me show you what's been marked  
21 as A-3, and that particular photograph shows my  
22 structure, shows your inlet front property, and  
23 also shows the property where the bulkhead is  
24 located, is that correct?

25 A. Yes.

- 1 Q. What is the--- My address I believe is 115. What  
2 is your address on Bogue Court?
- 3 A. 117, and then the property - it goes bigger as it  
4 goes to the north.
- 5 Q. So 119 would be the property with the bulkhead?
- 6 A. That's correct.
- 7 Q. Okay. Now the property with the bulkhead, prior  
8 to the bulkhead being constructed or erected, was  
9 there a dock, pier, or walkway, whatever, located  
10 on that property?
- 11 A. There was both, a pier and a walkway.
- 12 Q. Okay. And then at some point, CAMA permitted the  
13 erection of a bulkhead, did they not?
- 14 A. That's correct.
- 15 Q. Would you indicate to His Honor with the  
16 construction of that bulkhead how far out would  
17 that property have extended?
- 18 A. As I told the group this morning down there, the  
19 farthest water - the waterway extension was that  
20 existing dune that lies at the base of your  
21 walkway right now and goes down to the base of  
22 that bulkhead. That was the existing dune. The  
23 rest of it was, in that particular case, very deep  
24 water, more than twenty feet, necessitating that  
25 that sheet pile was put in the ground thirty-five

1 feet. So there was very deep water there.

2 As it moved towards your house, it became  
3 shallower and shallower. There was a berm there.  
4 But there was very deep water there, and the toe  
5 of that existing dune was the beginning of that  
6 deep water.

7 Q. And how far out was that property backfilled or  
8 extended into the inlet?

9 A. A guess would be thirty-five feet.

10 Q. And that was in an inlet hazard area?

11 A. Yes.

12 Q. Now were you present when the CAMA representatives  
13 had a conversation with you concerning the  
14 building of this bulkhead?

15 A. Yes. I was notified because of being an adjacent  
16 property owner that this permit had been applied  
17 for and because I knew that by hardening that  
18 bulkhead there, there was going to be some  
19 problems caused for my adjacent land because of  
20 the setting up of a rotation in the water when it  
21 hits the bulkhead. I wanted to be there, and so I  
22 met with them that day down there.

23 I also had the situation where that was a  
24 neighbor of mine, and I didn't want that neighbor  
25 to lose her lot, so I was open to listening, you

1 know. Jonathan would tell you the same thing,  
2 when we talked about sandbags that - when Jonathan  
3 issued your permits for sandbags, I requested to  
4 him and he was very agreeable to the fact that,  
5 even though I didn't qualify for the sixty feet  
6 quite yet, that he wouldn't issue [inaudible]  
7 because he knew it would damage me.

8 Q. Fair enough. Now what was your understanding  
9 based upon the conversations that you had that day  
10 with the CAMA officials as to what line of  
11 demarcation then existed between my home at 117 -  
12 excuse me - my home at 115 Bogue Court and the  
13 home on the other side of me, Mr. Angel's at 113  
14 Bogue Court.

15 MR. ZIMMERMAN: Your Honor, before he  
16 answers that, could I ask for a clarification  
17 on what the date is that we're asking for?

18 MR. DONAGHUE: This would be the time  
19 when the bulkhead was built, which was about  
20 two years ago - two, maybe three years ago.

21 THE WITNESS: Yeah. When the permit was  
22 applied for, nineteen - 2006 was probably  
23 when the permit - that would be a matter of  
24 record when that application was made.

25 MR. ZIMMERMAN: Thank you.

1 A. (continuing) There was a lot of discussion  
2 amongst the CAMA representatives at that time.  
3 The questions were where oceanfront stopped and  
4 where estuarine started. There was a lot of  
5 discussion between them. The consensus at that  
6 time was that oceanfront property, who could not  
7 have a bulkhead, would end between Mr. Angel's  
8 property---

9 MR. ZIMMERMAN: Your Honor, I'm going to  
10 object at this time on the basis of hearsay.  
11 This is him essentially telling what a DMC  
12 official demarcated, and I---

13 THE WITNESS: I believe that lady that's  
14 here was there at the time.

15 MR. ZIMMERMAN: All right. But, again,  
16 I believe this is hearsay in this instance,  
17 Your Honor.

18 THE COURT: Overruled so far. Let me  
19 ask a question, though. Is this pier - the  
20 one in this picture - is this Mr. Donaghue's  
21 pier or is that the next property?

22 THE WITNESS: Yeah. That's only a few  
23 days old - that picture. The bulkhead is the  
24 one in the background.

25 THE COURT: So is this - then, this is a

1 recent---

2 THE WITNESS: Very recent.

3 THE COURT: Oh, okay. This doesn't date  
4 back a couple of years, then?

5 THE WITNESS: No, no, no, no, sir.

6 MR. ZIMMERMAN: Your Honor, if that's  
7 the one we admitted, I believe that was taken  
8 on Thursday, or is this---

9 THE WITNESS: Yeah, that's probably -  
10 it's real recent.

11 MR. ZIMMERMAN: Oh, yeah. This is a  
12 recent - we'll stipulate to the fact that  
13 it's a recent photograph, Your Honor.

14 THE COURT: I just wanted to make sure I  
15 was on the right time frame on that one. I  
16 didn't know if it was an old picture or a new  
17 picture. Okay.

18 Q. So you were continuing - the Judge said you  
19 could - your understanding---

20 A. I believe the lady that was in the courtroom  
21 earlier was not the issuer of the permit at that  
22 time. It was another lady, but I think she was  
23 there and was privy to that conversation. And  
24 there was a question - and when Jonathan first  
25 came to me, he would tell you that there was a



1 question at that time - because I had applied for  
2 permit for a dock, there was a question about  
3 where that ended, where the oceanfront started,  
4 where the estuarine started.

5 So there was some - there was some things  
6 that needed to be decided before either yea or nay  
7 on any of the permits. And it was decided, when  
8 that permit was issued, that she still fell within  
9 the estuarine.

10 Q. It was your understanding that you also fell in  
11 that same area?

12 A. Yes.

13 Q. And was I---

14 A. At that time, I was.

15 Q. At that time. And also my property at that time?

16 A. At that time, yes, sir.

17 Q. Now going back - take a step back for a moment,  
18 and previously, an exhibit's been provided which  
19 was the State 16, and you see the area that is  
20 marked in pink as being the inlet hazard area?

21 A. Yes.

22 Q. Do you see that, sir?

23 A. Yes.

24 Q. Has it been your understanding, to the best of  
25 your knowledge, that as long as you lived at the

1 point and in that area, that that, in fact, has  
2 been the, quote, "designated inlet hazard area"?

3 A. Yes.

4 Q. And you've not been provided with any other  
5 official written information that has changed  
6 [inaudible]?

7 A. No.

8 Q. Thank you, Judge. Now previously counsel for the  
9 State entered an Exhibit Number 2. I'm now going  
10 to mark it as my A-4. And would you describe the  
11 structure that's depicted in that photograph?

12 A. This is a walkway originally tended as a  
13 walkway/pier that's oceanward of the dock that's  
14 in question at the home of Ms. Wilma Nelson, who I  
15 was responsible for the construction of that house  
16 and that pier.

17 Q. So you actually built that pier?

18 A. I actually built that pier except for the steps  
19 that come to the north that have been added. They  
20 were not there when I built it.

21 Q. Now when did you build that pier? Do you have a  
22 time frame? Can you tell us when you built that  
23 pier?

24 A. 1999 or 2000.

25 Q. So that pier was built in 1999 or 2000, and it was

1 built into an inlet hazard area?

2 A. Yes.

3 Q. Now since the time that you built - how big was  
4 that pier?

5 A. I think if you'll look on that picture really  
6 closely, I think you'll see the end of it - part  
7 of it still sticking out of the water. It's  
8 pretty hard to see, but it was another hundred  
9 feet at least with the sitting area on the end and  
10 a set of steps that went down from there.

11 Q. And that address would have been at 111 Bogue  
12 Court?

13 A. Correct.

14 Q. Thank you. Sir, I want to show you a photograph -  
15 I'm going to mark this as A-6. I'm marking this  
16 photograph as A-6, and would you please indicate  
17 to the Court who took that photograph and when  
18 that photograph was taken.

19 (PETITIONERS' EXHIBIT NO. A-6

20 (MARKED FOR IDENTIFICATION

21 A. I took this photograph personally from the upper  
22 deck of my house that's adjacent on the north side  
23 to your property in 1984 late or 1985 early. It  
24 was during the winter.

25 Q. And how - why does that stick out in your mind?

1 Any event in your life took place at that time?

2 A. Well, yeah. I finished this house and got the  
3 C of O on July 7th, 1984, and my daughter was born  
4 that day.

5 Q. And that photograph shows the dock, walkway, or  
6 whatever, as it appeared as of that time. That  
7 would have been the one that was located on my  
8 property, correct?

9 A. Absolutely.

10 Q. And would it be fair to say that from a - I guess,  
11 a geographical standpoint or topographical  
12 standpoint, that the area sort of today resembles  
13 that to a great extent?

14 A. It's very similar to that.

15 Q. Thank you.

16 MR. ZIMMERMAN: I'm sorry. What was  
17 your last question? That that picture  
18 essentially depicts what's out there today?  
19 Is that your question?

20 THE WITNESS: Geographically.

21 MR. DONAGHUE: Topographically,  
22 geographically, the area, the sand, the  
23 water, that kind of thing.

24 MR. ZIMMERMAN: And just for  
25 clarification, your answer was?

1 THE WITNESS: I'm not saying about the  
2 deck - the dock. I'm saying that the sand  
3 and water is in a similar situation as it was  
4 when I built my house in 1984.

5 MR. ZIMMERMAN: All right.

6 Q. Now I want you to focus your attention on  
7 construction of docks, piers, walkways, et cetera.  
8 And for purposes of our discussion today, the  
9 photograph clearly establishes that, in 1975, the  
10 walkway, dock, pier, et cetera, extended into the  
11 water. Now have you ever constructed these types  
12 of structures?

13 A. I've been involved in the supervision of the  
14 construction of them. I've never actually been  
15 the one setting pilings in one.

16 Q. Okay. Now when you estimate the job, what portion  
17 of the job is the most important portion of the  
18 job in terms of setting up your pier or dock?

19 A. When it comes to decks or piers or walkways, the  
20 major labor work - and usually material work - is  
21 involved in the piling.

22 Q. On a percentage basis, what would you calculate or  
23 what would be the percentage basis of that -  
24 taking a hundred percent, what percent of a  
25 hundred percent would be just the pilings

1 themselves?

2 MR. ZIMMERMAN: I'm going to object at  
3 this point as far as relevance. I don't know  
4 where this fits into this puzzle.

5 THE COURT: Overruled. I'm going to  
6 allow it and to give it the appropriate  
7 weight. Go ahead.

8 A. I would say somewhere between sixty and sixty-five  
9 percent is the actual labor and material of  
10 getting the pilings in, including the piling  
11 itself is more expensive because it has to be - it  
12 has be used underwater and underground. Where the  
13 above - aboveground material is less strongly  
14 treated so it's much less expensive than the  
15 pilings that you'd have to use underwater.

16 Q. And the same goes for the labor involved in the  
17 setting of the pilings?

18 A. Most of the docks have to be done also off of a  
19 barge of some type.

20 Q. Using relatively recent standards, what is the  
21 rule of thumb per square foot for the erection of  
22 a dock or a deck, that type of thing?

23 A. A wooden dock now is approximately twenty dollars  
24 per square foot, total job.

25 Q. So if we took six foot by sixty-two feet and

1           whatever that number is we would multiply that by  
2           twenty dollars?

3           A.    Yeah, three hundred and something square foot  
4           times twenty dollars would be, what, seven  
5           thousand and something.

6           Q.    And we could agree that - well - and there came a  
7           period of time, did there not, where this area -  
8           this particular area, our two properties, Wilma  
9           Nelson's, Bruce Angel's, and the property where  
10          the bulkhead is located - there came a period of  
11          time where there were some drastic changes in that  
12          area, were there not?

13          A.    Yes.

14          Q.    And that would have - that took place over the  
15          course of the last three to four years?

16          A.    Yeah. The history of the area down there is that  
17          with the inlet migrating as it does, there's been  
18          somewhere in the twenty-to-thirty-year cycle of  
19          east and west movement. So the point being eroded  
20          to the point that it is now is not unprecedented  
21          and it's really not necessarily the result of a  
22          storm.

23          Q.    Did there become a period - and you're familiar  
24          with that - I mean you're down there on a regular  
25          basis? I mean you're down there at least once a

1 week?

2 A. Yes.

3 Q. There was a period of time, was there not, within  
4 the last, shall we say, three years or so wherein  
5 the structure that we're talking about - the  
6 structure on my property - where the pilings were  
7 almost all completely covered with sand, and  
8 within a short period of time, they became  
9 exposed.

10 A. Yes.

11 Q. And then there became a period of time shortly  
12 thereafter where there was material that was  
13 thrown back in there, is that correct?

14 A. I remember when you were stripping the pilings of  
15 the existing stringers and joists and decking.

16 Q. Thank you. That's what I was getting at. Did  
17 there come a period of time, when they became  
18 exposed, that I stripped the old decking off and  
19 stored it under my steps?

20 A. That's correct.

21 Q. And you saw me do that over a course of a year?

22 A. Yeah, over a period of time, yeah.

23 Q. And did there come a point in time where you  
24 noticed my sons, I, and Rick Goodnight putting up  
25 the new decking?



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A. Yes.

MR. DONAGHUE: Cross-examine.

THE COURT: Questions?

MR. ZIMMERMAN: Yes, Your Honor.

**CROSS-EXAMINATION**

**BY MR. ZIMMERMAN:**

Q. So you've lived in this area for a long time, is that right?

A. I built that house in 1984, the one that's adjacent to Mr. Donaghue's.

Q. And you knew of this area even before that?

A. Yes. Five or six years before that.

Q. And, as you've testified, there's been a lot of fluctuation with both erosion and then sand accretion and then back and forth, as you said, over a period of time?

A. Yeah. About two cycles in the thirty years that I've been here.

Q. Okay. And I think I even wrote this down. You said the point - at this point in time, it's not unprecedented to be as it is right now in your history?

A. It was that way when I built the house.

MR. DONAGHUE: Meaning the way it appears today is the way it was when you

1 built the house?

2 THE WITNESS: Very similar.

3 Q. And did you ever apply for a bulkhead?

4 A. No, sir. I applied for a - I talked to Jonathan  
5 about the possibility of having a pier. I never  
6 did apply for a bulkhead.

7 Q. Okay. And what did he say at that point?

8 A. He was very - I'm trying to be as - remembering -  
9 because it was not just Jonathan---

10 THE WITNESS: And forgive me, Jonathan.

11 I think you pretty new then and I think Ted  
12 was with you once when you were down there.

13 A. (continuing) And he asked me if I would be  
14 patient with them, that there was possibly some  
15 issues about that and that he wanted to go back  
16 and research it a little bit and talk to Ted and  
17 what have you. And he stated to me at that time -  
18 because I had asked him about a bulkhead also and  
19 later when he called me back, he said, within the  
20 law, if you can get a pier, you can get a  
21 bulkhead.

22 So he was hesitant to issue me a permit, and  
23 I think Jonathan would agree that at that time I  
24 just backed off and we never really - he never  
25 actually turned me down nor approved me.

1 Q. Why did you back off?

2 A. At that time, the sand was building up and it  
3 looked like that it was going to be necessary for  
4 me to build a pier further than the money that I  
5 had allocated to do that.

6 Q. Did anyone at DCM at that point--- Okay.  
7 Actually---

8 MR. ZIMMERMAN: May I approach the  
9 witness, Your Honor?

10 THE COURT: Yes, sir.

11 Q. So let me direct your attention to this - this is  
12 the small map - the blowup map entitled  
13 Respondent's 16. And on that map, can you  
14 identify for the Court the bulkhead of your  
15 neighbor? Is it on that map?

16 A. It would be, but I think that the - it's covered  
17 with the Bogue Court lining, and I can't really  
18 see - I can identify the Coast Guard Station and -  
19 I can't really see clear enough there to tell you  
20 if I can see the bulkhead.

21 Q. Can you identify your property on there?

22 A. Not really because it's so - I know about where it  
23 is. It's about at the edge of where that white  
24 line is or that white "Bogue Court" sign. I  
25 could - there are some other areas that I could

1 show you very easily from, but from this right  
2 here, I can't tell.

3 Q. And can you identify the Petitioner, Mr. Hugh  
4 Donaghue's property on there?

5 A. Not really.

6 Q. Is it also---

7 A. It's within - I think it's right where the "T" is  
8 in "Bogue Court," but---

9 Q. So regardless of all of that, you can identify for  
10 the Court that within pink property, the inlet  
11 hazard area as defined by DCM, Mr. Donaghue's  
12 property is within that, right?

13 A. Yes.

14 MR. DONAGHUE: We will stipulate that  
15 the bulkhead property, my property,  
16 Mr. Townsend's property, Mr. Angel's  
17 property, and Wilma Nelson's property are all  
18 located in that area---

19 MR. ZIMMERMAN: All right.

20 MR. DONAGHUE: ---as well as the Coast  
21 Guard Station.

22 THE WITNESS: Yeah.

23 MR. ZIMMERMAN: Just a second, Your  
24 Honor.

25 (Thereupon, there was a pause in the

1 proceeding.)

2 Q. (Tape begins mid sentence.) ---got sandbags on  
3 your property, Mr. Townsend?

4 A. Yes.

5 Q. And when did you request those?

6 A. At the same time that Mr. Donaghue and Mr. Angel  
7 did. It was after the bulkhead was in place.

8 Q. Do you know about what the date was on that or  
9 just the year?

10 A. It would have been late '07.

11 Q. Late '07.

12 A. I had a conversation with Jonathan when I received  
13 notification that they were applying for sandbags,  
14 and I asked Jonathan if he knew if I had a  
15 bulkhead on one side of me and sandbags on the  
16 other side of me - I asked him if he knew what  
17 would happen to my property if that was allowed.

18 Q. And what did he say?

19 A. And he said that it - it was all bad.

20 Q. Yeah.

21 A. So he said, "I would never issue them a permit  
22 unless I also allow you to."

23 Q. Okay.

24 A. So that was my main - I wouldn't probably have  
25 gotten at the time had it not been for the other

1 two situations.

2 Q. So when Mr. Donaghue received his sandbags back in  
3 2007, you said, that's when you received it, and  
4 at that point, did---

5 MR. DONAGHUE: Objection. He said we  
6 got them together.

7 THE WITNESS: Well, the application was  
8 made together. I didn't do mine at the same  
9 time you did.

10 Q. Okay. At that point, the area of both your  
11 property and Mr. Donaghue's property was  
12 designated ocean hazard for the purpose of getting  
13 the sandbags, is that right?

14 MR. DONAGHUE: Objection.

15 THE COURT: Overruled.

16 Q. Please go ahead and answer.

17 A. I never understood it to be designated anything  
18 but inlet hazard. In other words, I've always  
19 been of the opinion, that if I was down on Channel  
20 Drive and I didn't want a bulkhead, that I could  
21 put sandbags down there. There is nothing in the  
22 rules that I know of that stipulates you to use  
23 sandbags only on ocean.

24 Q. Okay.

25 MR. ZIMMERMAN: Again, Your Honor, I

1 would - I would ask to strike that from the  
2 record based upon the fact that this is his  
3 opinion.

4 THE COURT: He's offering his opinion.  
5 Overruled.

6 MR. ZIMMERMAN: Okay. Thank you, Your  
7 Honor. That's all. Thank you.

8 MR. DONAGHUE: Just---

9 THE COURT: Let me ask a question or two  
10 and then get back to you.

11 MR. DONAGHUE: Sure.

12 THE COURT: This picture was taken late  
13 '84 to early '85?

14 THE WITNESS: Yes, sir. That handrail  
15 that you see in the foreground is my upper  
16 deck.

17 THE COURT: Right. That's the house  
18 that you had just gotten a certificate of  
19 occupancy on---

20 THE WITNESS: Yeah, within a year or  
21 so - within six months or a year of that.

22 THE COURT: All right. Did the  
23 waterline come up to that pier, dock at the  
24 time?

25 THE WITNESS: You can see that picture

1           there where there's wet sand---

2                   THE COURT:  Yeah.

3                   THE WITNESS:  ---and it would come up  
4           there on high tide.

5                   THE COURT:  Okay.

6                   THE WITNESS:  Yeah.  Sometimes on an off  
7           moon tide, it would not, but on a high tide  
8           or on a lunar - a new moon or a full moon,  
9           you'd have water to the edge of that  
10          vegetation.

11                   THE COURT:  All right.  Further  
12          questions?

13                   MR. DONAGHUE:  Please.

14                                   **REDIRECT EXAMINATION**

15                   **BY MR. DONAGHUE:**

16           Q.  We can agree that the area - I'm going to start  
17           with the Coast Guard Station, and we can agree  
18           that it has both a bulkhead and a dock, correct?

19           A.  Yes.

20           Q.  And now going towards our properties, the property  
21           next to that has a dock?

22           A.  Yes.

23           Q.  The property next to that has a bulkhead?

24           A.  That's correct.

25           Q.  Then there's your property?



1 A. Yes.

2 Q. My property, Angel's property, and Wilma Nelson's  
3 property, which also has a dock?

4 A. That's correct.

5 Q. All of them are in a hazard inlet areas?

6 A. Yes.

7 Q. Now we can also agree, can we not, that when CAMA  
8 permitted the building of the bulkhead on your  
9 neighbor's property - and when I say "your  
10 neighbor's," I mean the property at 119 - that, in  
11 the course of things, created an escarpment both  
12 on your property and my property, didn't it?

13 A. That's correct.

14 Q. And also led to the moving of sand and exposing of  
15 some of these additional pilings in the back, did  
16 it not?

17 A. Say that again. I'm sorry.

18 Q. Sure. The pilings - some of the pilings closest  
19 to the property that also became exposed because  
20 of that escarpment, early on, they were---

21 A. Oh, yes. That's correct?

22 Q. And, finally, have you repaired in the past docks  
23 that have destroyed or - by hurricane, storms, or  
24 just deterioration in general?

25 A. Only houses. Never docks.

1 Q. Okay. Were you ever involved in docks at all in  
2 that regard in terms of any rules or what would be  
3 needed?

4 A. I've only been involved in repair of houses with  
5 the fifty percent rule, if that's what the  
6 question is.

7 Q. Fair enough.

8 MR. DONAGHUE: No further questions,  
9 sir.

10 THE COURT: Further questions?

11 MR. ZIMMERMAN: No, Your Honor.

12 THE COURT: Okay. Let me ask you a  
13 couple more. You said that you and  
14 Mr. Donaghue got the sandbags after the  
15 bulkhead was put in?

16 THE WITNESS: Absolutely.

17 THE COURT: Which makes sense.

18 THE WITNESS: I really didn't have a  
19 need for sandbags, Your Honor, until---

20 THE COURT: Until the bulkhead---

21 THE WITNESS: ---the bulkhead was put  
22 in.

23 THE COURT: Right.

24 THE WITNESS: What would happen is, the  
25 tidal water would hit that bulkhead and it

1 would swirl and---

2 THE COURT: I understand. I understand.  
3 Mr. Pilkey would have had a lot to say about  
4 how that all worked - a lot to say.

5 THE WITNESS: I knew that when I---

6 THE COURT: You got the sandbags in late  
7 2007, right?

8 THE WITNESS: Yeah. I did - the permit  
9 was issued then. I did not do the sandbags  
10 until January, February of this year.

11 THE COURT: Of which year?

12 THE WITNESS: I'm sorry. Yeah. '09.

13 THE COURT: Okay. So you got the permit  
14 in late '07.

15 THE WITNESS: No. '08 would have been  
16 right. '08 would have been right.

17 THE COURT: Oh, okay.

18 THE WITNESS: In other words, it was  
19 about three months after I got the permit -  
20 possibly two months - when Mr. Donaghue got  
21 done doing his, and then I did mine.

22 MR. ZIMMERMAN: And, Your Honor, if I  
23 may just - what's already entered into  
24 evidence, that permit has a date of November  
25 '08.

1 THE WITNESS: Okay. That's right.

2 That's correct. Yeah.

3 THE COURT: Okay.

4 THE WITNESS: But January '09 is when I  
5 put my---

6 THE COURT: But that still just gets  
7 back to where I was going with all of this.  
8 Mr. Donaghue has asked questions that  
9 indicated that he and his sons have started  
10 removing the decking from the exposed pier,  
11 dock, walkway, whatever we're going to call  
12 this, roughly two years ago. So that would  
13 have been the summer of '07?

14 THE WITNESS: Yeah. When the erosion  
15 started, there was - a great portion of that  
16 walkway had been covered in sand. And then  
17 by the bulkhead being put in, the erosion  
18 started, and there was one photo that showed  
19 that pretty descriptively where a foot or two  
20 of piling was sticking out, and there's a  
21 definite escarpment with a lot of debris  
22 lying there.

23 When that started, the decking and the  
24 stringers and stuff were being knocked off  
25 sometimes, and it was kind of a danger---

1           That's not it there.  Someone showed me  
2           a photo earlier of it.  There was a definite  
3           drop-off escarpment---

4           THE COURT:  Is that it?

5           THE WITNESS:  No.  There's a - that's  
6           one similar.  But what happened was this  
7           started eroding in, in this escarpment,  
8           exposing these poles, and he started - they  
9           were floating off in the water and hanging on  
10          and stuff, and he started taking them off at  
11          that time.

12          The one you showed me, I think, was from  
13          the other direction, but I didn't see  
14          [inaudible].

15          THE COURT:  Was it this one?

16          THE WITNESS:  That's it.

17          THE COURT:  Okay.  All right.

18          THE WITNESS:  That's taken like from my  
19          lot looking back---

20          THE COURT:  Right.  I think both of them  
21          may have been taken at the same time because  
22          of that beat up old chair---

23          THE WITNESS:  Yeah.  The man in that  
24          picture is the dock man.

25          THE COURT:  All right.  So when would

1           these pictures have been taken?

2           THE WITNESS: I don't know. I didn't  
3           take those. That would have been after the  
4           bulkhead was in, which was '07. They would  
5           have been sometime in '07 or '08.

6           MR. DONAGHUE: I'll clarify that, sir,  
7           if you want me to.

8           THE COURT: Well, hold on just one  
9           second. My question is, again, there's been  
10          some insinuation that he started with the  
11          removal of the planking in roughly the summer  
12          of 2007.

13          THE WITNESS: Uh-huh.

14          THE COURT: And then finished 2008 - I  
15          think he said August 2008 was when it was  
16          completed - it was completely put back. What  
17          is your recollection of how long did it take  
18          he and his boys to remove all of the planking  
19          and the decking?

20          THE WITNESS: It was - they were not  
21          here very much, and they rent their house  
22          out. And it was done over several visits. I  
23          could only give you a recollection of like  
24          six months or something.

25          THE COURT: Okay. So if it started

1 in---

2 THE WITNESS: A little extended period  
3 of time.

4 THE COURT: Right. So it may have  
5 started in mid to late '07 and even going  
6 into '08?

7 THE WITNESS: Yeah. He's almost never  
8 here in the summer because he rents his  
9 house. He usually selects out a week in  
10 August and blocks it, and then he comes back  
11 sometime around Halloween or Thanksgiving  
12 usually. It was in that time period.

13 THE COURT: So would it be your  
14 recollection, then, that from the time he  
15 started removing the decking and everything,  
16 all the structure from around, leaving just  
17 the pilings exposed to completely replacing  
18 it, roughly a year?

19 THE WITNESS: I would think that maybe  
20 he started in August of the year prior to the  
21 August that it was finished - would be my -  
22 and that's really a recollection more than a  
23 fact.

24 THE COURT: Okay.

25 THE WITNESS: It seems like to me that

1           when then boys and he worked on the  
2           reinstallation of the decking and joists,  
3           that it was in August of last year.

4           THE COURT: Mr. Donaghue, do you have  
5           any questions based solely on the questions I  
6           just asked?

7           MR. DONAGHUE: Absolutely. Just solely  
8           based on that.

9                           **FURTHER REDIRECT EXAMINATION**

10          **BY MR. DONAGHUE:**

11          Q. Sir, I'm going to show you this photograph, and  
12          this shows that the photograph--- Leading up to  
13          this, we can agree that all the escarpment and  
14          erosion that took place actually in front of both  
15          of our properties happened really at different  
16          times for different reasons, isn't that true? In  
17          other words, there was a period of time when---  
18          Let me withdraw that question completely.

19                 If I show you Number A-7, it's true, is it  
20          not, that the sand that extended out from my  
21          property before any of this erosion began, as  
22          shown here, extended all the way out and covered  
23          all the poles except for maybe the last two sets  
24          and they were extended up into the air a couple of  
25          feet?



1 (PETITIONERS' EXHIBIT NO. A-7

2 (MARKED FOR IDENTIFICATION

3 A. Yeah, that's correct.

4 Q. And as the erosion came through over those two  
5 years - as it exposed more of the planking, I  
6 would then remove it, is what I'm getting at?

7 A. Yeah, more and more of the dock became exposed.

8 Q. And initially - and do you recall the Army Corps  
9 of Engineers coming in with the barge and doing  
10 the work and setting the pipes up---

11 A. Yes.

12 Q. ---to nourish the beach front?

13 A. Yes.

14 Q. And they, in fact, attached their barge to the  
15 front of my pilings there, did they not?

16 A. Yeah. There was probably three feet of water  
17 there then at the tide, and the escarpment was -  
18 directly dropped off probably, you know, really  
19 quickly.

20 Q. And I know you cannot remember specific days and  
21 specific times necessarily, but it's true, is it  
22 not, during this period of time with the erosion,  
23 I would remove the planking and those materials as  
24 the erosion took place up towards the property?

25 A. Yeah. You couldn't have gotten stuff up if it was

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under sand still.

Q. Thank you.

MR. DONAGHUE: That's all I have, sir.

THE COURT: Further questions?

MR. ZIMMERMAN: Nothing, Your Honor.

THE COURT: All right. Thank you, sir.

Further evidence?

MR. DONAGHUE: No further evidence.

THE COURT: All right. Arguments.

MR. DONAGHUE: I'm going to save my  
argument---

THE COURT: One logistical thing. Are  
you moving to introduce 1 through 7?

MR. DONAGHUE: I'm sorry, yes, sir.

(PETITIONERS' EXHIBIT NOS. A-1

(THROUGH A-7 OFFERED INTO EVIDENCE

THE COURT: All right. Any objection?

MR. ZIMMERMAN: No objection, Your  
Honor.

THE COURT: All admitted.

(PETITIONERS' EXHIBIT NOS. A-1

(THROUGH A-7 RECEIVED INTO EVIDENCE

MR. DONAGHUE: Thank you.

THE COURT: And I have Respondent's 1  
through 20 with the exception of 5 having

1           been admitted.

2                           (RESPONDENT'S EXHIBIT NOS. 1-4

3                           (AND 6-20 RECEIVED INTO EVIDENCE

4           MR. ZIMMERMAN: That's right. Thank  
5           you.

6           THE COURT: All right. Yes, sir? I  
7           guess I should ask first, any rebuttal  
8           evidence?

9           MR. ZIMMERMAN: No, Your Honor.

10          THE COURT: All right. Yes, sir?

11          MR. DONAGHUE: A matter of housekeeping,  
12          Mr. Townsend's - they're really his - they're  
13          my exhibits, but they're on loan, so to  
14          speak. Would I be permitted to get them  
15          reduced in size and make it a part of the  
16          record, or do you want to keep the originals?

17          THE COURT: Any objection to them doing  
18          that?

19          MR. ZIMMERMAN: Not at all, Your Honor.

20          THE COURT: All right. Why don't we do  
21          that, then. I'll return Number 6, which is a  
22          small photograph and Number 3, which is the  
23          book cover from Dr. Pilkeys Jr. and Sr., and  
24          large photo Number 2 on the point and large  
25          photo Number A-1, which is also the point,

1 but in a more magnified version.

2 MR. DONAGHUE: Thank you, sir.

3 THE COURT: And also, Mr. Donaghue, we  
4 require two copies of each exhibit, so - if  
5 you want to just give me - present me  
6 copies - send me more copies, along with when  
7 you reproduce those, will be fine.

8 MR. DONAGHUE: So do you want me to make  
9 an extra copy of all these?

10 THE COURT: Are these the only copies  
11 that you have?

12 MR. DONAGHUE: Yes.

13 THE COURT: Okay.

14 MR. ZIMMERMAN: Your Honor, I believe  
15 those are copies that we brought with us  
16 today so there should be a second copy. If  
17 the Court doesn't mind just using mine and  
18 his as the two copies, that's fine.

19 THE COURT: Some of these are different.  
20 This one---

21 MR. DONAGHUE: That's the same.

22 THE COURT: That's the same. A-4 and  
23 Respondent's Number 2, I think, are the same.  
24 And the rest of them, I think are different.  
25 7, 1, 2, 3 over there, and there's one more

1           somewhere that I'm missing.

2                     (Thereupon, there was a pause in the  
3 proceeding.)

4           MR. DONAGHUE: Where do you want me to  
5 send the copies?

6           THE COURT: To the Office of  
7 Administrative Hearings.

8           MR. DONAGHUE: Okay.

9           THE COURT: Okay. Again, just to make  
10 sure we're clear, you'll be giving me two  
11 copies of 1, 2, 3, 5, 6, and 7, and Number 4  
12 is the same as Respondent's Number 2.

13          MR. DONAGHUE: 1, 2, 3---

14          THE COURT: ---5, 6, 7.

15          MR. DONAGHUE: ---7, 6, 3 - 1, 2, 3---

16          THE COURT: I think 5 was a small  
17 picture.

18          MR. DONAGHUE: Actually, the small  
19 picture is 6.

20          THE COURT: Okay.

21          MR. DONAGHUE: So I have here Number A-1  
22 is the large photograph taken in '75; A-2 is  
23 the '90 photograph; A-3 is the cover to the  
24 book - I know one of the problems is, I have  
25 two A-3s.

1 THE COURT: One of them we changed to  
2 make the small one, I think. That becomes 6.

3 MR. DONAGHUE: The small one is A-6.

4 THE COURT: 3 is the bulkhead.

5 MR. DONAGHUE: 3 is the bulkhead.

6 THE COURT: That should be 7 - the last  
7 one.

8 MR. DONAGHUE: It is 7, correct.

9 THE COURT: Okay. And 4 is the one  
10 that's the same as Respondent's 2.

11 MR. DONAGHUE: Okay.

12 THE COURT: Anything else?

13 MR. DONAGHUE: In terms of briefing,  
14 findings of fact, or conclusions of law?

15 THE COURT: Did you want to be heard by  
16 way of a closing statement?

17 MR. DONAGHUE: No.

18 THE COURT: All right. Do you wish  
19 to---

20 MR. ZIMMERMAN: Yes, Your Honor.

21 THE COURT: All right.

22 **CLOSING ARGUMENT BY MR. ZIMMERMAN**

23 MR. ZIMMERMAN: And I'll try to be  
24 brief. I just wanted to bring up a few final  
25 points, Your Honor.

1 MR. ZIMMERMAN: Again, the burden of  
2 proof in this matter is on the Petitioner,  
3 and I would like to read exactly what is  
4 before the Court in regard to his burden of  
5 proof. And that's in NCGS 150B-23(a). And  
6 that's - the burden is that the Respondent -  
7 us - the DCM has substantially prejudiced  
8 Petitioners' rights and that the agency  
9 committed one of the errors set forth in this  
10 statute.

11 And then it breaks down four - excuse  
12 me - five categories: One, exceeded its  
13 authority; two, acted erroneously; three,  
14 failed to use proper procedure; four, acted  
15 arbitrarily or capriciously; or, five, failed  
16 to act as required by law or rule."

17 Your Honor, there has been no real  
18 evidence to meet any of those particular  
19 burden requirements.

20 Your Honor, I would also like to, at  
21 this point, reference two recent Court of  
22 Appeals cases, and I do have copies of the  
23 cases if counsel would like them or if you  
24 would like them. But they are Hilliard  
25 versus North Carolina Department of

1           Correction in 2005 and then Craven County  
2           Regional Medical Center versus North Carolina  
3           Department of Health and Human Services in  
4           2006.

5           And what they do say - and these are  
6           quotes - in Hilliard, it says that "On  
7           judicial review," which is where we are  
8           today, "an agency's interpretation of its own  
9           administrative rules will be enforced unless  
10          clearly erroneous or inconsistent with the  
11          rule's plain language."

12          And then in Craven County, it says,  
13          "Deference must be given to the agency's  
14          decision where it chooses between two  
15          reasonable alternatives, and a Court may not  
16          substitute its decision for the agency's  
17          decision when there is substantial evidence  
18          in the record to support the agency's  
19          findings."

20          Your Honor, what we have before the  
21          Court today is, the agency - in this case,  
22          the Division of Coastal Management - making a  
23          reasonable interpretation of the rules that  
24          it is supposed to follow. Your Honor,  
25          there's been a lot of talk and a lot of



1 pictures put into evidence that shows that  
2 this area where a Petitioners' property is,  
3 is a highly dynamic, highly changing piece of  
4 property. Sand - at certain points in time,  
5 there's sand to fall out, and at other points  
6 in time, there's water all the way in, and it  
7 goes back and forth.

8 And, Your Honor, if I may just turn your  
9 attention again to the definitions that are  
10 given in the rules for ocean hazard systems,  
11 and then again, this is where it breaks down  
12 the four subdivisions. (1) "Ocean Erodible  
13 Area," and I'm quoting here, "This is the  
14 area in which there exists a substantial  
15 possibility of excessive erosion and  
16 significant shoreline fluctuation. The  
17 seaward boundary of the area is the mean low  
18 waterline and the landward extent to the area  
19 is determined as follows," and it goes  
20 through and breaks it down.

21 Now inlet hazard area is the third  
22 subcategory of this. This is even more  
23 telling. And the way that the rules define  
24 an inlet hazard area is "The inlet hazard  
25 areas are natural hazard areas that are

1 especially vulnerable to erosion, flooding,  
2 and other adverse effects of sand, wind, and  
3 water because of their proximity to dynamic  
4 ocean inlets." Again, what we have here.  
5 "This area shall extend," and then it goes  
6 through to give the breakdown.

7 Your Honor, those are the rules the  
8 agency DCM has been asked to interpret. They  
9 have done that. They have published on the  
10 Internet, for all to see, where they  
11 differentiate certain ocean hazard areas,  
12 specifically inlet hazards and other  
13 subcategories. We presented those to you  
14 before the Court today. There has been no  
15 real evidence to argue against that fact.  
16 This property is within an ocean hazard area  
17 of environmental concern.

18 Now that being said, CAMA applies. CAMA  
19 requires that there is oversight authority  
20 and permitting authority given to the  
21 Division of Coastal Management, and that  
22 authority and the permitting requirement was  
23 not met here by Petitioners. Petitioners -  
24 they had a dock on their property and instead  
25 of going through the normal permitting

1 process of contacting DCM and reseeking the  
2 proper requirements - they didn't do that.

3 They - essentially, as has been fully  
4 admitted by Petitioners in this case, they  
5 tore down their old dock, stripped it down to  
6 its mooring pilings, and built an entirely  
7 new structure. And, again, that hasn't been  
8 argued. Those are the facts that are before  
9 the Court. And, Your Honor, that is in clear  
10 direct violation of the statutes and the  
11 rules of this state.

12 Your Honor, there is one exception that  
13 has in the crux of this case, and that is the  
14 repair exception, and that repair exception,  
15 otherwise known as the fifty percent rule, as  
16 we've also said, deals - is applicable in  
17 this case, specifically the water-dependent  
18 structure subsection of part (2) of 7J .0210.

19 And, Your Honor, I know this has been  
20 read a number of times into Court, but I  
21 would like to just put it in your head as one  
22 last parting notion, and it says, "The  
23 proposed work is considered replacement if it  
24 enlarges the existing structure." Well, he  
25 didn't. That's never been argued. But then

1 the second way that it could be considered  
2 replacement and thus need a permit is "The  
3 proposed work is also considered replacement  
4 if: (a) in the case of fixed docks, piers,  
5 platforms, boathouses, boat lifts, and free  
6 standing moorings---" I would say that's  
7 directly applicable here. That's what we're  
8 talking about. ---"more than fifty percent  
9 of the framing and structural components,"  
10 and it's in parentheses here, "beams,  
11 girders, joists, stringers, and pilings, must  
12 be rebuilt in order to restore the structure  
13 to its predamage condition."

14 Your Honor, here we have well above  
15 fifty percent being rebuilt that was done  
16 without a permit, and that's in violation of  
17 CAMA. Your Honor, I would close with simply  
18 stating to the Court that the Petitioners  
19 here have not met their burden of proof.

20 In fact, they have built - rebuilt and  
21 replaced, essentially, a dock in violation of  
22 CAMA, and based upon that, Your Honor, we ask  
23 that the Court finds that Petitioners must  
24 adhere to the restoration, the plan, and  
25 agreement offered by DCM which requires

1 moving the development back to the  
2 predevelopment conditions. And on that, Your  
3 Honor, I'd like to close the case. Thank  
4 you.

5 THE COURT: Thank you, sir. Anything  
6 else?

7 MR. DONAGHUE: No comment at this time.  
8 I'll rely on my brief.

9 THE COURT: All right. Yes, sir. And  
10 you were going - wanted to be heard about the  
11 time limits because of your trial schedule?

12 MR. DONAGHUE: Yes, sir. I am scheduled  
13 for trial in a medical malpractice case - it  
14 looks like it's going on the first two weeks  
15 of September, so if I could get a date at  
16 some point in time after that.

17 THE COURT: This is probably going to  
18 take - three to four weeks has been the  
19 turnaround time on the tapes, I think. So it  
20 will probably - that would put us right into  
21 mid September. By October 1st?

22 MR. DONAGHUE: That should be fine.

23 THE COURT: All right.

24 MR. DONAGHUE: Thank you, sir.

25 THE COURT: Which works for me, since

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I'm going to be on vacation for two weeks at  
the end of September anyway, so---

MR. DONAGHUE: Enough yourself.

(Thereupon, at 3:00 p.m., the proceeding  
was adjourned.)

- - - - -

CERTIFICATE

1  
2  
3 I, REBECCA P. SCOTT, State-Certified  
4 Verbatim Reporter, do hereby certify that the  
5 foregoing pages numbered one (1) through one hundred  
6 sixty-five (165), inclusive, constitute a transcript  
7 of a hearing that was recorded; that I was not in the  
8 courtroom at the time of the hearing; that I did  
9 listen to the recording with diligence; and that the  
10 transcript produced is a verbatim record of what is on  
11 the recording, to the best of my knowledge and belief.

12 I further certify that I am not of  
13 counsel for, or in the employment of, either of the  
14 parties in this action, nor am I interested in the  
15 results of this action.

16 Certified this 4th day of September,  
17 2009.

18  
19  
20  
21 \_\_\_\_\_  
22 REBECCA P. SCOTT

23 STATE-CERTIFIED VERBATIM REPORTER  
24  
25

**State of North Carolina  
Office of Administrative Hearings**

**Certification**

***I hereby certify the attached (137 sheets) to be a true copy of***

***the Official Record as required by G.S. 150B-37 of the proceedings in the Office of Administrative Hearings, in case 09 EHR 0568, "Hugh and Denise Donaghue, Petitioner v. NC Department of Environment and Natural Resources Div of Coastal Management, Respondent."***

***Included separately is one (1) volume of transcript of the hearing held on August 3, 2009 in Emerald Isle, North Carolina.***

***The original of which is filed in this office in conformance with Chapter 150B of the General Statutes of the State of North Carolina.***

***In witness whereof, I authorize this certification and affix the official seal of the North Carolina Office of Administrative Hearings at Raleigh, This 24<sup>th</sup> day of November 2009.***

***Julian Mann, III  
Chief Administrative Law Judge, Director***

By: *Maia G. au*

**DELIVERED BY:** \_\_\_\_\_

**RECEIVED BY:** *Amanda Foster*

**DATE:** *12-2-09*



COUNTY OF CARTERET

Hugh and Denise Donaghue )  
 Petitioner, )  
 )  
 v. )  
 )  
 N. C. Department of Environment and )  
 Natural Resources, Div of Coastal Management )  
 Respondent. )

**OFFICIAL RECORD INDEX SHEET**

**RECOMMENDED DECISION  
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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

COUNTY OF CARTERET

2009 NOV -5 AM 8:30

Office of  
Administrative Hearings

HUGH AND DENISE DONAGHUE,  
Petitioners

vs.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL:  
MANAGEMENT

Respondent

DECISION

The above-captioned matter was heard on August 3, 2009, at the Emerald Isle Town Hall, Emerald Isle, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on petition for Contested Case Hearing regarding the Division of Coastal Management's issuance of a Notice of Violation and Continuing Notice of Violation under the Coastal Area Management Act for unpermitted development on the property of Petitioners Hugh and Denise Donaghue in Carteret County, North Carolina. This hearing was directly preceded by a site visit to Petitioners' property at 115 Bogue Court, Emerald Isle, North Carolina, which included Judge Overby, Petitioners, Respondent staff, and Respondent's counsel.

APPEARANCES

For Petitioners: Hugh A. Donaghue, Esquire (pro se)  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, PA 19063

For Respondent: Ward Zimmerman, Esquire  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

ISSUE

Did Respondent exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C. Gen. Stat. § 113A-118 and Coastal Resources Commission Rule 15A

NCAC 07J .0201 by issuing a Notice of Violation and a Continuing Notice of Violation to Petitioners as a result of work by Petitioners to an existing pier/dock/ walkway without a permit from the Department of Environmental and Natural Resources.

#### TESTIFYING WITNESSES

Jonathan Howell, Assistant Major Permits Coordinator, DCM, Morehead City, NC  
 Rick Goodnight, Goodnight's Home Improvement, Hubert, NC  
 Robert Townsend, 117 Bogue Court, Emerald Isle, NC

#### PETITIONER EXHIBITS

- A-1. Photograph
- A-2. Photograph
- A-3. Photograph
- A-4. Photograph
- A-5. Photograph--Cover of Orrin H. Pilkey's Book
- A-6. Photograph
- A-7. Photograph

#### RESPONDENT'S EXHIBITS

- 1. Photograph
- 2. Photograph
- 3. Photograph
- 4. Photograph
- 5. List of AECs
- 6. 11/10/08 Permit
- 7. Map
- 8. 1984 Aerial Photograph
- 9. 1989 Aerial Photograph
- 10. 1995 Aerial Photograph
- 11. 2000 Aerial Photograph
- 12. 2006 Aerial Photograph
- 13. Notice of Violation
- 14. Notice of Continuing Violation
- 15. Petitioners' Response to Notice of Violation
- 16. Blowup of Map
- 17. Photograph
- 18. Photograph
- 19. Photograph
- 20. Photograph

Based upon consideration and review of the applicable law, testimony, and evidence received during the contested case hearing as well as review of the entire record of this proceeding, the undersigned makes the following:

### FINDINGS OF FACT

#### Applicable Statutes and Regulations

1. Respondent is the North Carolina Department of Environmental and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113 A, Article 7 of the North Carolina General Statutes and the regulations promulgated pursuant to the Act by the Coastal Resources Commission (CRC) which are codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.
2. The CRC may "designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof." N.C. Gen. Stat. § 113A-113. Pursuant to N.C. Gen. Stat. § 113A-113(a) and (b)(6), the CRC has designated the Ocean Hazard area as an Area of Environmental Concern (AEC) and has adopted use standards or state guidelines for development within them, located at 15A NCAC 07H .0300 *et seq.*
3. 15A NCAC 07H .0304 provides that the ocean hazard system of AECs contains ocean erodible areas, high hazard flood areas, inlet hazard areas and unvegetated beach areas, and defines each such area.
4. Under CAMA, "development" in any AEC requires a permit. N.C. Gen. Stat. §113A-118. Section 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern . . . involving, requiring, or consisting of the construction or enlargement of a structure . . . ."
5. N. C. Gen. Stat. §113A-103(5)(b)(5) further provides that activities in an AEC, including the subcategory of the Inlet Hazard Area at issue, that are merely "maintenance or repairs" rather than "replaces" an existing structure, then the work is not considered "development" and, thus, does not require a CAMA permit. 15A NCAC 7J .0210 is consistent with the language with the statute.
6. Conversely, 15A NCAC 7J .0210(2) provides "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits."

The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes replacement is:

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition. 15A NCAC 7J .0210(2)(a) [emphasis added].

### The Property

7. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound, an area commonly referred to as "the point".
8. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC, as set forth in 15A NCAC 07H .0300 *et seq.*
9. The pier/dock/walkway which was the subject of the notices of violation sent to Petitioners was originally erected on Petitioners' property prior to 1975 and the enactment of CAMA.
10. Petitioners' pier/dock/walkway is a water dependent structure under the authority of 15A NCAC 7J .0210(2).
11. Respondent's uncontroverted evidence is that the pier/dock/walkway was originally 100 feet in length.
12. The "point" area is a dynamic area. There have been times when there has been an extraordinary amount of sand build up. The entire channel has been closed off at times. The violent storms and hurricanes that buffet the North Carolina coast have a tremendous impact on the area. Hurricane Katrina reopened the channel and removed a tremendous amount of sand on and around Petitioner's property.
13. Sometime after 1984, the Coast Guard Channel adjacent to Petitioners' property began to fill with sand, which eventually covered the entire walkway/dock, leaving only a foot or two of the pilings showing above the sand.
14. The North Carolina Department of Environment and Natural Resources, Division of Coastal Management, issued a permit in 2006-2007, to the owner of 119 Bogue Court to erect a bulkhead, the construction of which involved the placing of fill 35 feet out into the Coast Guard Channel in an

area where the water was more than 20 feet deep, and the installation of sheet piling going into the ground in excess of 30 feet down.

15. Representatives of the Division of Coastal Management met with Mr. Robert Townsend, the owner of 117 Bogue Court, on his property prior to the issuance of the permit for the bulkhead due to their concern about the erosive effect the construction of the bulkhead at 119 Bogue Court would have on Mr. Townsend's adjacent property.
16. As anticipated, the effect of the bulkhead approved and permitted by the Division of Coastal Management was to erode the rear of Mr. Townsend's property at 117 Bogue Court as well as Petitioners' property at 115 Bogue Court, creating a need for sandbags on those two properties.
17. The pier/dock/walkway at issue remained structurally intact while covered with sand. As the sand which had been covering the decking slowly eroded away, exposing the decking, Petitioner began to remove pieces of the decking from the pier.
18. As the boards slowly became uncovered by the erosion occasioned by the adjacent bulkhead, Petitioner continued to remove the deck boards, joists and stringers on the walkway as a safety measure.
19. Although it took approximately one year, from August of 2007 until August of 2008 for Petitioner to finish removing the decking of the pier/dock/walkway, the length of time was solely the result of the rate at which the sand covering the walkway was being removed by erosion caused, at least in substantial part, by the installation of the adjacent bulkhead.
20. Petitioner undertook to remove the exposed stringers, joists and decking. As the sand eroded from the structure, it did not simply expose the pilings. Respondent's contention that only the pilings from the former structure existed prior to the Petitioner's work is not supported by the evidence.
21. There were as many as thirteen pilings exposed, and possibly more. Respondent's Exhibit 4 shows some decking and pilings that go under the sand to the erosion fence, but it cannot be determined how much decking there is nor whether that decking was replaced.
22. The work to attach the new stringers, joists and decking to the pier/dock/walkway at issue took only two days. Some of the original decking, stringers and joists still remained on the pilings at the beginning of the work.

23. The Respondent and Petitioner agreed that the Petitioner replaced approximately 60 feet of the deck boards, stringers and joists and none of the pilings.
24. The exposed pilings were never removed or replaced by Petitioner.
25. Pursuant to 15A NCAC 07J .0210, costs to repair water dependent structures are not considered as with the non-water dependent structures; however, it is clear that the amount of money spend by Petitioner on the pier/dock/walkway was significantly less than 50 percent of the cost to replace the entire structure, primarily because he did not replace the pilings.
26. Respondent served Petitioners with a Notice of Violation (NOV) dated December 31, 2008, and subsequently served Petitioners with a Notice of Continuing Violation dated March 2, 2009. Both of the Notices provide that Petitioners had constructed an entire pier:

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA).

\* \* \* \* \*

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6.5' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this Notice of Violation for violation of the Coastal Area Management Act."

27. Additionally, the March 2, 2009, Notice of Continuing Violation, provided, inter alia:

"Please be advised that as of this date, site inspections indicate corrective actions have not been taken to complete the restoration requested in the December 31, 2008 Notice of Violation."
28. The "restoration" requested in the December 31, 2008 Notice of Violation was to remove the pier.

29. Petitioner has consistently contended from the outset that his work was "repair" and not "replacement" and communicated that to Mr. Howell when he first approached Petitioner.
30. There is no question that Petitioner did not seek a permit from Respondent, and Respondent did not issue a permit for the work.
31. The work done by Petitioner on the structure consisted of the six spans, each with two stringers and one joist, covered by decking. The only structural or framing members replaced by Petitioners being the 12 stringers and 12 joists. (Exhibits A-4, A-7, Respondent's Exhibits 17, 18 and 19)
32. The Exhibits, including A-4 and A-7, as well as Respondent's Exhibits 17, 18, and 19, establish that Petitioners replaced only 2 stringers along the sides of each set of pilings and one joist between each pair of pilings. The decking was then laid perpendicular to the stringers, and was supported by the stringers.
33. Petitioners' evidence established that they replaced substantially less than 50 percent of the "framing and structural components".

#### CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearing for consideration, and OAH has both subject matter and personal jurisdiction.
2. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998).
3. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).
4. "On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005) (citation omitted)
5. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations



promulgated there under.

6. Petitioners' property is subject to CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard Area, and more specifically as the subset of Inlet Hazard Area as set forth by 15A NCAC 07H .0300 *et seq.*
7. The structure at issue in the instant case is a "water dependent structure".
8. Under CAMA, "development" in an Ocean Hazard Area requires a permit. N.C. Gen. Stat. § 113A-118.
9. N.C. Gen. Stat. Section 113A-118. Section 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern. . . involving, requiring, or consisting of the construction or enlargement of a structure. . . ."
10. N. C. Gen. Stat. Section 113A-103(5)(b)(5) further provides that activities in an AEC, including the subcategory of the Inlet Hazard Area at issue, that are merely "maintenance or repairs" rather than "replaces" an existing structure, then the work is not considered "development" and, thus, does not require a CAMA permit. 15A NCAC 7J .0210 is consistent with the language with the statute.
11. The Commission, pursuant to the authority delegated to it by the legislature in Section 113A-103(5)(c), has promulgated regulations.
12. Pursuant to the authority granted by CAMA, the Commission has enacted 15A NCAC 07K .0101 which provides:
 

"No permit shall be required for those activities set out in G.S. 113A-103(5)(b)(1)-(9) as exclusions from the definition of development."
13. 15A NCAC 7J .0210(2) provides "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits."
14. The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes "replacement," and thus requires a permit, is:
 

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition. 15A NCAC 7J.

0210(2)(a) [emphasis added].

15. The language of 15A NCAC 7J .0210(2)(a) is clear and unambiguous. It requires more than 50 percent of "framing and structural components" to be rebuilt. Framing and structural components are specifically listed as "beams, girders, joists, stringers or pilings." "Framing and structural" components are terms that have usual and customary understanding within the building and construction industry, as well as common English definition. By definition and usage, neither framing nor structural components would include any form of decking. The regulation goes further by stating specifically what is meant by "framing and structural components," and decking is not included. If decking was meant to be included, the drafters of the rule could have used any number of other methods and/or terminology including, but not limited to, the terminology in 15A NCAC 7J .0210(2)(b) which specifies use of square footage. It is also clear and unambiguous that pilings are to be considered in making a determination of the "50 percent rule."
16. By using the word "and" between "framing" and "structural" it is clear that any combination of either framing and/or structural components which in total comprise more than 50 percent of only those components of that structure comprises "replacement." It would defy logic and common sense to say that the language would mean 50 percent of the beams, or 50 percent of the girders or 50 percent of the joists, and so on, standing alone would be in violation of the "50 percent rule." Common sense and logic command that it be any combination that comprises 50 percent of those structural components, including the pilings.
17. In this case, the work did not involve any portion of the pilings, which constituted well in excess of 50 percent of the framing and structural components of this structure.
18. The lumber used in the decking may not, under the plain language of 15A NCAC 07J .0210(2)(a), be considered in determining whether the work constitutes, meets or exceeds the 50 percent rule.
21. By the clear and unambiguous language of 15A NCAC 07J .0210(2)(a), the piling have to be considered in application of the 50 percent rule. Therefore, even if the decking is considered, the 50 percent rule is not exceeded or violated in this case.
22. As evidenced by the Exhibits offered, Petitioners here removed and replaced one stringer on each side of the span between the pilings, placed one joist between each pair of pilings, and laid new decking and/or planking on the stringers, clearly repairing less than 50 percent of the "framing and structural components", which includes the pilings but does not include the decking.

19. The Petitioner did not build a 62 foot long pier by applying structural supports to existing pilings, but rather repaired a portion of a 100 foot long pier by removing the existing decking and structural supports from the existing pilings and replacing it. At the very best, Petitioner replaced 62 percent of the decking, but when the pilings are factored in, the 50 percent rule is not violated or exceeded.
20. Respondent's contention that Petitioners, in essence, built a 62 foot long pier by replacing all of the framing and structural components, except for the original support pilings and thus greatly exceeded the 'more than 50 percent' standard that constitutes 'replacement' as set forth in 15A NCAC 07J .0210(2)(a)." is not supported by the evidence of record.
21. This case is not controlled by Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division, 80 NC App. 201, 341 SE. 2d 108 (1986) in that the facts and applicable law are so significantly different from those at issue herein as to be inapplicable.
23. In the absence of any evidence refuting Petitioners' evidence establishing that less than 50 percent of the framing and structural components were replaced, Petitioners have established that the Notice of Violation and Notice of Continuing Violation were improperly issued, both as to the claim that a new pier was constructed and as to the claim that more than 50 percent of the framing and structural components were replaced.
24. Respondent acted erroneously and failed to act as required by law or rule in issuing to Petitioners an NOV and a subsequent CNOV based upon the erroneous conclusions that Petitioners did not qualify for a permit exemption under 15A NCAC 07J .0210 and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118.
25. Based upon the forgoing findings of fact and conclusions of law, the Court specifically does not reach the reasonableness of the directive to remove the structure in absence of a permit, nor the potential for civil penalty
26. Any law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 NC 715, 158 SE.2d 887 (1968)".

DECISION

Based on the foregoing findings of fact and conclusions of law, Petitioners have met their burden of establishing that they replaced less than 50 percent of the framing and structural components of the existing dock/walkway. Thus, the Notice of Violation and subsequent Notice of Continuing Violation were erroneously issued to Petitioners as they were not required under North Carolina law to obtain a permit prior to undertaking repairs to their dock/walkway. The decision of Respondent is **REVERSED**.

ORDER

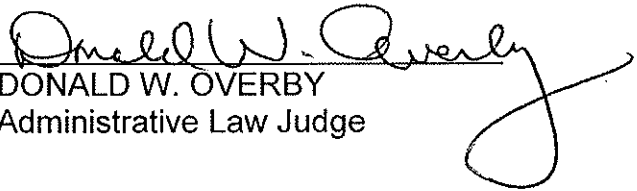
It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the 4<sup>th</sup> day of November, 2009.

  
DONALD W. OVERBY  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Ward A. Zimmerman  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 5th day of November, 2009.



---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

***SECTION I***

LAW OFFICES

**DONAGHUE & LABRUM, LLP**  
13 WEST THIRD STREET  
MEDIA, PENNSYLVANIA 19063-2820

8

HUGH A. DONAGHUE  
KATHRYN LABRUM  
MICHAEL B. EGAN

PH: (610) 565-9120  
FX: (610) 565-3037  
Info@donaghuelabrum.com

January 28, 2009

via fax: 919-431-3100


Clerk  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

**Re: Notice of Violation and Request to Cease Unauthorized Development  
CAMA Violation #09-02**

Dear Sir or Madam:

Enclosed please find a fax of Petition for a Contested Case Hearing. The original and one copy are following, via U.S. First Class Mail.

Very truly yours,

  
HUGH A. DONAGHUE

HAD:md  
encl.

M  
DWO  
5-18  
New Bern

PLEASE PRINT CLEARLY OR TYPE

STATE OF NORTH CAROLINA

COUNTY OF (1) CARTERET

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

09EHRO5168

(2) HUGH and DENISE

DONAGHUE  
(your name) PETITIONER,

v.

(3) NORTH CAROLINA DEPARTMENT OF ENVIRONMENT and NATURAL RESOURCES - DIV. RESPONDENT OF COASTAL management  
(The State agency or board about which you are complaining)

RE: NOTICE OF VIOLATION and REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT PETITION FOR A CONTESTED CASE HEARING

CAMA VIOLATION # 09-02

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

The repairs were made to pre-existing dock + were NOT "unauthorized development of a pier" as cited - only decking was replaced. No pilings were replaced and/or added + the length was shortened. No portion of the beach was touched. I believe, pursuant to N.C. law, such repairs were permitted + no permit required.

(If more space is needed, attach additional pages.)

(4) Because of these facts, the State agency or board has: (check at least one from each column)

- deprived me of property;
- ordered me to pay a fine or civil penalty; or
- otherwise substantially prejudiced my rights;

AND

- exceeded its authority or jurisdiction;
- acted erroneously;
- failed to use proper procedure;
- acted arbitrarily or capriciously; or
- failed to act as required by law or rule.

(5) Date: 1/28/09

(6) Your phone number: (610) 565-9120

(7) Print your full address: location address: 115 Boque Court, Emerald Isle, N.C.  
(street address/p.o. box) (city) (state) (zip)

(8) Print your name: \* mailing address: 4 Pheasant Lane, Chadds Ford, PA 19317  
HUGH A. DONAGHUE and DENISE G. DONAGHUE

(9) Your signature: Hugh A. Donaghue Denise G. Donaghue

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) Angela Willis / Jonathan Howell  
(name of person served)

(11) N.C. Dept. Environment + Natural Resources  
DIV. OF COASTAL MANAGEMENT  
(State agency or board listed on line 3)

(12) 400 Commerce Ave., Morehead City, N.C. 28557  
(street address/p.o. box) (city) (state) (zip code)

(13) This the 28 day of January, 2009

(14) Hugh A. Donaghue Denise G. Donaghue  
(your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.



\*\*\*\*\*  
\*\*\* FAX RX REPORT \*\*\*  
\*\*\*\*\*

RECEPTION OK

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RESULT	OK

STATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF (1) CARTERET

09ENR 0568

(2) HUGH and DENISE DONAGHUE  
(your name) PETITIONER,

RE: NOTICE OF VIOLATION and REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT PETITION FOR A CONTESTED CASE HEARING

(3) NORTH CAROLINA DEPARTMENT OF ENVIRONMENT and NATURAL RESOURCES - DIV. RESPONDENT OF COASTAL management  
(The State agency or board about which you are complaining)

CAMA VIOLATION # 09-02

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

The repairs were made to pre-existing dock + were NOT "unauthorized development of a pier" as cited - only decking was replaced. No pilings were replaced and/or added + the length was shortened. No portion of the beach was touched. I believe, pursuant to N.C. law, such repairs were permitted + no permit required.

(If more space is needed, attach additional pages.)

- (4) Because of these facts, the State agency or board has: (check at least one from each column)
  - deprived me of property;
  - ordered me to pay a fine or civil penalty; or
  - otherwise substantially prejudiced my rights;
  - exceeded its authority or jurisdiction;
  - acted erroneously;
  - failed to use proper procedure;
  - acted arbitrarily or capriciously; or
  - failed to act as required by law or rule.

(5) Date: 1/28/09 (6) Your phone number: (610) 565-9120

(7) Print your full address: location address: 115 Boque Court, Emerald Isle, N.C.

(8) Print your name: \* mailing address: 4 Pheasant Lane, Chadds Ford, PA 19317  
HUGH A. DONAGHUE and DENISE G. DONAGHUE

(9) Your signature: [Signatures]

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) Angela Willis / Jonathan Howell (name of person served) (11) N.C. Dept. Environment + Natural Resources  
Div. OF COASTAL MANAGEMENT (State agency or board listed on line 3)  
(12) 400 Commerce Ave., Morehead City, N.C. 28557 (street address/p.o. box) (city) (state) (zip code)

(13) This the 28 day of January, 2009.

(14) [Signatures] (your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

PLEASE PRINT CLEARLY OR TYPE

overly

STATE OF NORTH CAROLINA

COUNTY OF (1) CARTERET

186  
IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EAR 0568

file  
1/28/09  
OAH

(2) HUGH and DENISE  
DONAGHUE  
(your name) PETITIONER,

RE: NOTICE OF VIOLATION  
and REQUEST TO CEASE  
UNAUTHORIZED DEVELOPMENT  
PETITION  
FOR A  
CONTESTED CASE HEARING

(3) NORTH CAROLINA DEPARTMENT  
OF ENVIRONMENT and NATURAL  
RESOURCES - DIV. RESPONDENT OF COASTAL  
(The State agency or board about which you are complaining)  
MANAGEMENT

CAMA VIOLATION # 09-02

I hereby ask for a contested case hearing as provided for by North Carolina General Statute § 150B-23 because the Respondent has:

(Briefly state facts showing how you believe you have been harmed by the State agency or board.)

The repairs were made to pre-existing dock + were NOT "unauthorized development of a pier," as cited - only decking was replaced. No pilings were replaced and/or added + the length was shortened. No portion of the beach was touched. I believe, pursuant to N.C. law, such repairs were permitted + no permit required.

(If more space is needed, attach additional pages.)

(4) Because of these facts, the State agency or board has: (check at least one from each column)

- deprived me of property;
  - ordered me to pay a fine or civil penalty; or
  - otherwise substantially prejudiced my rights;
- AND

- exceeded its authority or jurisdiction;
- acted erroneously;
- failed to use proper procedure;
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(5) Date: 1/28/09

(6) Your phone number: (610) 565-9120

(7) Print your full address: location address: 115 Bogue Court, Emerald Isle, N.C.  
(street address/p.o. box) (city) (state) (zip)

(8) Print your name: \* mailing address: 4 Pheasant Lane, Chadds Ford, PA 19317  
HUGH A. DONAGHUE and DENISE G. DONAGHUE

(9) Your signature: Hugh A. Donaghue Denise G. Donaghue

You must mail or deliver a COPY of this Petition to the State agency or board named on line (3) of this form. You should contact the agency or board to determine the name of the person to be served.

**CERTIFICATE OF SERVICE**

I certify that this Petition has been served on the State agency or board named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed OR by delivering it to the named agency or board:

(10) Angela Willis / Jonathan Howell (name of person served)  
(11) N.C. Dept. Environment + Natural Resources  
DIV. OF COASTAL MANAGEMENT  
(State agency or board listed on line 3)

(12) 400 Commerce Ave., Morehead City, N.C. 28557  
(street address/p.o. box) (city) (state) (zip code)

(13) This the 28 day of January, 2009

(14) Hugh A. Donaghue Denise G. Donaghue  
(your signature)

When you have completed this form, you MUST mail or deliver the ORIGINAL AND ONE COPY to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

H-06 (12/08)

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\*\*\* FAX RX REPORT \*\*\*  
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187

RECEPTION OK

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***SECTION II***



STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

Hugh and Denise Donaghue	)	
Petitioner,	)	
	)	
v.	)	<b>NOTICE OF CONTESTED CASE</b>
	)	<b>AND ASSIGNMENT</b>
	)	<b>G.S. 150B-23, 33(b)(4)</b>
N. C. Department of Environment and	)	
Natural Resources, Div of Coastal Management	)	
Respondent.	)	

NOTICE IS HEREBY GIVEN that a petition for a contested case hearing pursuant to G.S. 150B-23(a) was filed in and accepted by the Office of Administrative Hearings on January 28, 2009. In accordance with G.S. 150B-23(a) and 26 NCAC 3 .0103, Donald W. Overby, Administrative Law Judge, has been assigned to preside in this case. The administrative law judge may be contacted by mail at 6714 Mail Service Center, Raleigh, N.C. 27699-6714, or by telephone at (919) 431-3000.

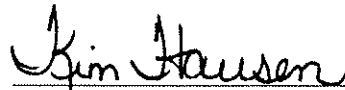
The Respondent shall submit, within 30 days , a copy of the document constituting agency action, which caused the filing of the Petition.

A copy of any document or other pleading filed with the Office of Administrative Hearings must also be sent to the other party at the time of filing. If a party changes his or her mailing address, or if the address is incorrect, the Office of Administrative Hearings must be notified of the new or corrected address.

NOTE: You may receive an Order for Prehearing Statements to which you must respond within 30 days.

This the 4th day of February, 2009.

Julian Mann, III  
Chief Administrative Law Judge



\_\_\_\_\_  
Kim Hausen  
Chief Hearings Clerk  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919/431-3000

On this date mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Amanda Foster  
Department of Justice  
Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
RESPONDENT



STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

Hugh and Denise Donaghue  
Petitioner,

v.

N. C. Department of Environment and  
Natural Resources, Div of Coastal Management  
Respondent.

**ORDER FOR PREHEARING  
STATEMENTS**

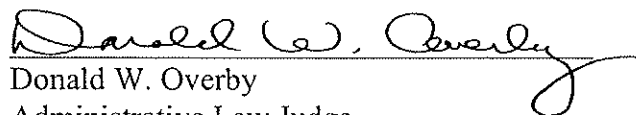
In order to permit the prompt preparation of this case for hearing,

IT IS HEREBY ORDERED, pursuant to 26 NCAC 03 .0104, that each party file with the Office of Administrative Hearings and serve upon the other parties a Prehearing Statement containing your present position with regard to the following:

1. The issues to be resolved, and the statutes, rules, and legal precedent involved;
2. A brief statement of the facts and reasons supporting the party's position on each issue in dispute;
3. A list of proposed witnesses;
4. Whether you wish to pursue discovery. If so, the length of time required if different from the time set in the Scheduling Order;
5. Requested location of hearing; if different from the location set in the Scheduling Order;
6. Estimated length of hearing;
7. If you do not have an attorney, your home and business addresses and telephone numbers;
8. The date by which you will be ready to have a hearing in this case if different from the date set in the Scheduling Order;
9. Other special considerations.

This Prehearing Statement must be filed and served within 30 days of the date of this ORDER.

This the 4th day of February, 2009.

  
Donald W. Overby  
Administrative Law Judge

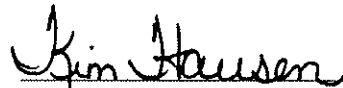
On this date mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Amanda Foster  
Department of Justice  
Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
RESPONDENT

This the 4th day of February, 2009.

Kim Hausen  
Chief Hearings Clerk



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Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919/431-3000

FILED  
OFFICE OF  
ADMINISTRATIVE HEARINGS

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STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

Hugh and Denise Donaghue )  
Petitioner, )

v. )

**SCHEDULING ORDER**

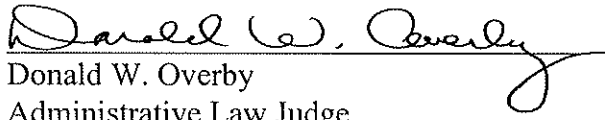
N. C. Department of Environment and )  
Natural Resources, Div of Coastal Management )  
Respondent. )

The undersigned has established the following Scheduling Order. This Scheduling Order may be later amended in the discretion of the Administrative Law Judge, based upon information provided in the parties' Prehearing Statements. The parties will be notified of any changes by way of an Amended Scheduling Order.

1. The hearing for this contested case will be in New Bern, North Carolina, for the week beginning May 18, 2009. At least 15 days prior to the hearing the Administrative Law Judge will mail to the parties a more specific notice of the date, time and location of the hearing.
2. Discovery shall be completed on or before May 04, 2009.

IT IS SO ORDERED.

This the 4th day of February, 2009.

  
Donald W. Overby  
Administrative Law Judge

On this date mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Amanda Foster  
Department of Justice  
Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
RESPONDENT

This the 4th day of February, 2009.

Kim Hausen  
Chief Hearings Clerk



---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919/431-3000

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STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09EHR 0568

HUGH and DENISE DONAGHUE  
Petitioners,

vs.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT

Respondent.

.....

OFFICE OF  
ADMIN HEARINGS

2009 MAR 20 PM 1:10

FILED

Petitioners, Hugh and Denise Donaghue, file this Prehearing Statement in the above captioned matter pursuant to 26 NCAC 3.0104 and an Order signed by the Honorable Donald W. Overby, Administrative Law Judge dated February 4, 2009.

1. Factual Background

This matter involves the renovation and repair of a walkway/dock on Petitioners' property. The walkway/dock in question has been in existence for approximately twenty (20) years. From 2000 through 2005, the majority of the walkway was covered with sand as a result of shifts in the channel behind Emerald Isle. In October of 2005, Hurricane Wilma re-opened the old Coast Guard channel, causing this area to erode precipitously, there exposing the entire walkway. The town of Emerald Isle then began a dredging and sand pumping operation at the Point (this area includes Petitioners' property), during which the outermost four feet of the walkway was destroyed by a barge engaged in the dredging operation.

This past Summer, Petitioner and his two sons then removed the remaining old

planking. At no time were any of the original pilings removed and no new pilings were ever added. The pilings are the same ones that have existed on the property for the past twenty (20) years. The decking was then repaired by Petitioner, his two sons, a nephew and Rick Goodnight.

2. Issues to be Resolved

The Division of Coastal Management issued a notice of violation suggesting that the repairs made to the walkway "constituted a major development in an ocean hazard and inlet hazard area". To suggest that Petitioners violated any statute by virtue of replacing the decking on the dock is absurd. Moreover, it should be noted that the same agency allowed the properties on either side of Petitioners' property to either repair and/or construct entirely new structures on their properties. (See photo attached as Exhibit A.)

It is Petitioners' understanding that their property was not located in an ocean hazard area and that the Division of Coastal Management had designated their property as the dividing line - between the ocean and inlet area, hence the construction of the original walkway. Apparently, the Division of Coastal Management has now changed the line without providing notice to the Petitioners. (The change resulted from the hurricane in 2005. Presently the beach is being restored naturally to its pre-hurricane condition.)

Additionally, the Restoration Plan submitted with the Notice of Violation is inaccurate. The reality is that the previously eroded area is presently filling in to the extent that the area is being restored by natural forces to the conditions that existed in 1985. (See attached photograph, Exhibit B attached.) The normal high water mark

barely reaches the walkway and at low tide there is nothing but sand for 30 yards extending beyond the end of the walkway. There is no development in the ocean hazard area, as the ocean is more than 200 yards away. Finally, at no time during the seven years that Petitioners have owned the property have they ever been requested to remove the pilings. The only portion of the walkway that has been replaced is the decking. There was and is no disturbance of either sand or water.

The cost of erecting a new structure would have been in excess of \$ 10,000. The instant decking repairs were made at a cost of less than \$ 2,000, which is 20% of the cost of a new walkway. Additionally, no heavy equipment was utilized, as would have been necessary if new pilings were set, thereby foregoing any beach disturbance.

Any way you cut it, the repairs made to the deck of the walkway do not constitute development.

The activity that the Division of Coastal Management is trying to prohibit is encroachment into the sand area. There was no encroachment here - none of the pilings were replaced. Query: Is it better to have 16 piling sticking out of the sand?

Finally, the Petitioners find it to be unfair, discriminatory and a violation of the Ninth Amendment to be issued a citation for a "construction of a pier in an inlet hazard area" when, in fact, the same agency allowed/permitted the construction of a 200 foot bulkhead costing \$ 300,000 within 35 yards of the north side of the subject property by a North Carolina resident and the repair/replacement of a 150 foot walkway 35 yards to the south of the existing property, also by a North Carolina resident.

### 3. Proposed Witnesses

Hugh and Denise Donaghue  
Robert Townsend  
Frank Rush  
Charles Jones  
Rick Goodnight  
Wilma Nelson  
Nell Johnson

Petitioners reserve the right to call as a witness any person named as a witness by Respondent or any other party.

Petitioners reserve the right to supplement this list.

4. Discovery

The length of time set forth in the Scheduling Order is acceptable.

5. Location of Hearing

The location of the hearing specified in the Scheduled Order -New Bern, NC - is acceptable to Petitioners.

6. Estimated Length of Hearing

Petitioners estimate the hearing will take two days (1 day for their case).

7. Notice of Appearance

Please take notice that the undersigned attorney, who is also a Petitioner herein, will appear on behalf of Petitioners.

All pleadings, notices, calendars or other documents should be directed to the attention of:

Hugh A. Donaghue, Esq.  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, PA 19063

8. Date for Hearing

Counsel have agreed that the week of August 10, 2009 should be set for the



hearing.

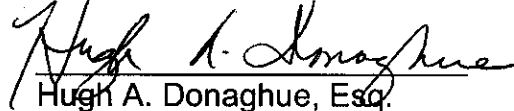
9. Special Matters

Both parties request that the Administrative Law Judge that hears this case visit the site in question one week before the hearing.

Petitioner reserves the right to amend this Prehearing Statement.

Respectfully submitted, this 17<sup>th</sup> day of March, 2009.

FOR THE PETITIONERS



Hugh A. Donaghue, Esq.

Donaghue & Labrum, LLP

13 West Third Street

Media, PA 19063

610/565-9120

610/565-3037 fax

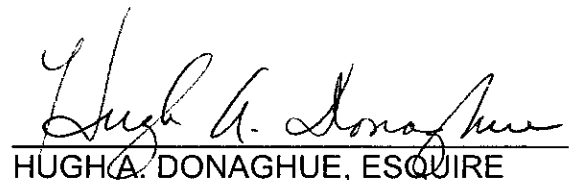
[info@donaghuelabrum.com](mailto:info@donaghuelabrum.com)

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Petitioners' Prehearing Statement upon the Respondent's counsel, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows:

Ward Zimmerman, Esquire  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This 17<sup>th</sup> day of March, 2009.



HUGH A. DONAGHUE, ESQUIRE



EXHIBIT A South side Neighbor's Pier





EXHIBIT A North Side Neighbor's Bullhead



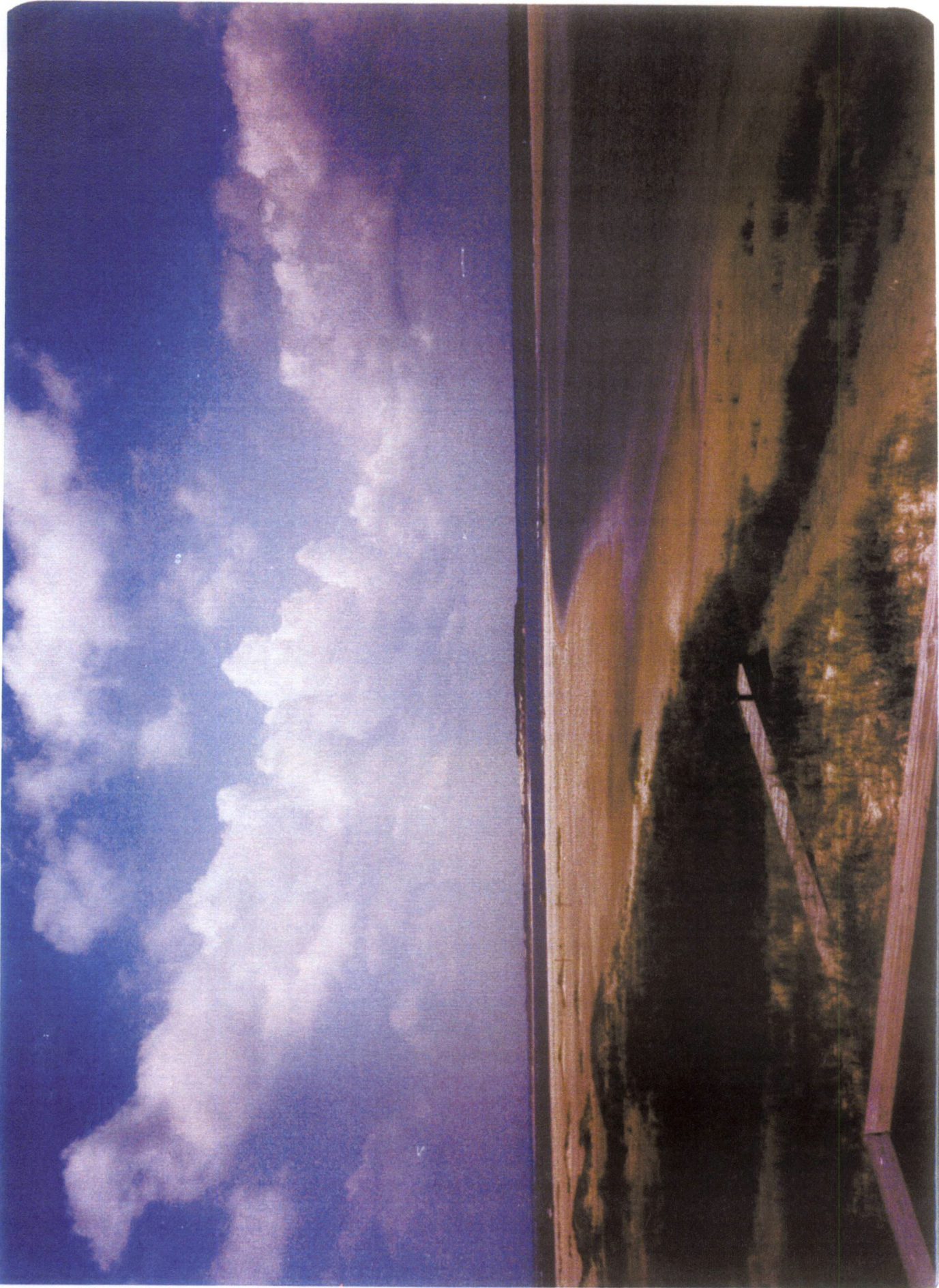


EXHIBIT B SUBJECT WALKWAY 1985





EXHIBIT B SUBJECT WALKWAY TO DAY



69 EHR 0568  
205  
✓  
DWU

# FAX TRANSMISSION

State of North Carolina, Department of Justice  
Office of the Attorney General, Environmental Division  
9001 Mail Service Center, Raleigh, NC 27699-9001  
919-716-6600 Fax: 919-716-6767

**To:** Ms. Kim Hausen  
Chief Hearings Clerk

**Date:** March 5, 2009

**Fax #:** 431-3100

**Pages:** 2 including this cover sheet.

**From:** Pamela Jones, NCCP  
Paralegal for  
Ward Zimmerman  
Assistant Attorney General

**Subject** DONAGHUE, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL MANAGEMENT,  
09 EHR 0568, CARTERET County

## COMMENTS:

Regarding the captioned case, please file the attached Respondent's Prehearing Statement.. Original to follow via the Mail Service Center. Thank you for your assistance.

↓  
DWC

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

HUGH AND DENISE DONAGHUE,  
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT,

Respondent.

**RESPONDENT'S PREHEARING  
STATEMENT**

RECEIVED  
MAR 5 2009

NOW COMES the Respondent, N.C. Department of Environment and Natural Resources (DENR), Division of Coastal Management (DCM), by and through its undersigned counsel, Ward Zimmerman, and files this Prehearing Statement in the above-captioned matter pursuant to 26 NCAC 3 .0104 and an Order signed by the Honorable Donald W. Overby, Administrative Law Judge, dated February 4, 2009.

1. Issues to be Resolved.

This matter involves the unauthorized development of the pier of Hugh and Denise Donaghue ("Petitioner"), in violation of the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.* The development consisted of the construction of a 62' X 6 ½' pier in Ocean Hazard and Inlet Hazard Areas of Environmental Concern (AEC). No CAMA permit was issued to the Petitioner to complete work in these areas. A copy of the Notice of Violation letter is attached hereto as the Document Constituting Agency Action.

In addition to CAMA (N.C.G.S. § 113A-100 *et seq.*), the controlling statutes and regulations include the Administrative Procedure Act (APA), N.C.G.S. § 150B-1 *et seq.*, and the

rules promulgated thereunder, and the rules of the Coastal Resources Commission implementing CAMA, primarily found in Title 15A, Subchapter 7H of the North Carolina Administrative Code.

2. Statement of Facts and Reasons.

At issue is whether DCM properly issued a Notice of Violation against Petitioner under CAMA and the rules promulgated thereunder. Specifically at issue are those reasons for violation outlined in the December 31, 2008 Notice of Violation letter, including whether the Petitioner's construction of the pier constituted a major development in an Ocean Hazard and Inlet Hazard AEC that was not consistent with 15A NCAC 7H.0306. This statute prohibits structures located seaward of the oceanfront setback requirements unless such activity is consistent with 15A NCAC 7H.0309. Petitioner alleges that the construction done to the pier was not in violation of 15A NCAC 7H.0306 and .0309 because his activities constituted repairs as set forth in 15A NCAC 7J.0210, and therefore not considered a development requiring a CAMA permit.

3. Proposed Witnesses.

Witnesses for the Respondent include, but are not limited to the following:

Jim Gregson, Director, DCM, Morehead City, NC  
Ted Tyndall, Asst. Director, DCM, Morehead City, NC  
Doug Huggett, Major Permits Coordinator, DCM, Morehead City, NC  
Tere Barrett, District Manager, DCM, Morehead City, NC  
Barry Guthrie, Field Rep., DCM, Morehead City, NC  
Ryan Davenport, Compliance and Enforcement Rep., DCM, Morehead City, NC  
Jonathan Howell, Coastal Management Representative, DCM, Morehead City, NC  
Petitioner Hugh A. Donaghue  
NC Division of Marine Fisheries staff, TBD  
Shellfish Sanitation staff, TBD  
Wildlife Resources staff, TBD  
Division of Water Quality staff, TBD

Additionally, Respondent may call as a witness any person named as a witness by



Petitioner or any other party. Respondent reserves the right to supplement this list as it prepares for hearing.

4. Discovery.

The length of time set forth in the Scheduling Order is acceptable.

5. Location of Hearing.

The location of the hearing specified in the Scheduling Order, New Bern, NC, is acceptable to Respondent.

6. Estimated Length of Hearing.

Respondent estimates the hearing will take two days.

7. Notice of Appearance.

PLEASE TAKE NOTICE that the undersigned attorney for the State of North Carolina will appear on behalf of Respondent-DCM. All pleadings, notices, calendars, or other documents should be directed to the attention of the undersigned.

8. Date for Hearing.

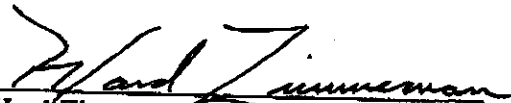
The date of the hearing, being the week of May 18, 2009, is acceptable to Respondent.

9. Special Matters.

Respondent requests that the Administrative Law Judge that hears this case make a visit to the site. The issues in the contested case are site specific, and Respondent contends that such a visit will be very helpful to the parties and the Judge hearing this case, especially if done just before the hearing begins. If the hearing is held in New Bern, the site will be approximately one hour away. Also, Respondent reserves the right to amend this Prehearing Statement.

Respectfully submitted, this the 5 day of March, 2009.

FOR THE DIVISION OF  
COASTAL MANAGEMENT



Ward Zimmerman  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
(919) 716-6600  
(919) 716-6767 fax  
wzimmerman@ncdoj.gov

### CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Respondent's Prehearing Statement upon the Petitioners' counsel, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows:

Hugh A. Donaghue  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, PA 19063-2820

This the 5 day of March, 2009.



Ward Zimmerman  
Assistant Attorney General



PDS

210

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

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

NOTICE OF VIOLATION  
December 31, 2008

CERTIFIED MAIL 70042890000380419724  
RETURN RECEIPT REQUESTED

Hugh Donahue  
4 Pheasant Lane  
Chadds Ford, PA 19317

RE: NOTICE OF VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT  
CAMA VIOLATION #09-02 C

Dear Mr. Donahue:

This letter confirms that on September 29<sup>th</sup>, 2008, Jonathan Howell, Field Representative, was onsite at your property located at 115 Bogue Court adjacent to the Atlantic Ocean located in or near the Town of Emerald Isle, off Bogue Court, Carteret County, North Carolina. The purpose of the visit was to investigate unauthorized development of a pier in the Ocean Hazard AEC within the Atlantic Ocean.

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA). No person may undertake Major Development in a designated Area of Environmental Concern (AEC) without first obtaining a permit from the North Carolina Department of Environment and Natural Resources. This requirement is imposed by North Carolina General Statute (N.C.G.S.) 113A-118.

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6 ½' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this *Notice of Violation* for violation of the Coastal Area Management Act.

I request that you immediately **CEASE AND DESIST** any further development and contact me about this matter. A civil assessment of up to \$10,000 plus investigative costs may be assessed against any violator. Each day that the development described in this Notice is continued or repeated may constitute a separate violation that is subject to an additional assessment of \$10,000. An injunction or criminal penalty may also be sought to enforce any violation in accordance with N.C.G.S. 113A-126.

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

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Hugh Donahue  
December 31, 2008  
Page 2 of 2

It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. This is done to recoup some of the costs of investigating the violation and/or to compensate the public for any damage to its natural resources. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them.

Based upon the North Carolina Administrative Code, Title 15A, Subchapter 07H. State Guidelines for Areas of Environmental Concern, the activity you have undertaken, constructing a pier in the Ocean Hazard and Inlet Hazard AEC(s), is not consistent with Section 15A NCAC 07H .0306, which prohibits structures to be located seaward of the oceanfront setback requirements unless they are consistent with 15A NCAC 07H .0309 . Therefore, I am requesting that the constructed pier be removed. Please refer to the enclosed Restoration Agreement.

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

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

Thank you for your time and cooperation in resolving this important matter. If you have any questions about this or related matters, please call me at (252) 808-2808. Upon completion of the restoration as requested in the Restoration Plan Agreement to the satisfaction of the Division of Coastal Management, you will be notified as to the amount of the civil assessment for undertaking development without first obtaining the proper permit(s) and development that is inconsistent with Coastal Resources Commission rules.

Sincerely,



Jonathan Howell  
Coastal Management Representative

Cc: [REDACTED] Assistant Director, DCM  
Tere Barrett, District Manager, DCM  
[REDACTED] Compliance Coordinator, DCM  
Barry Guthrie, Field Representative, DCM

ENCLOSURE

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

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Hugh Donahue  
December 31, 2008  
Page 3 of 3

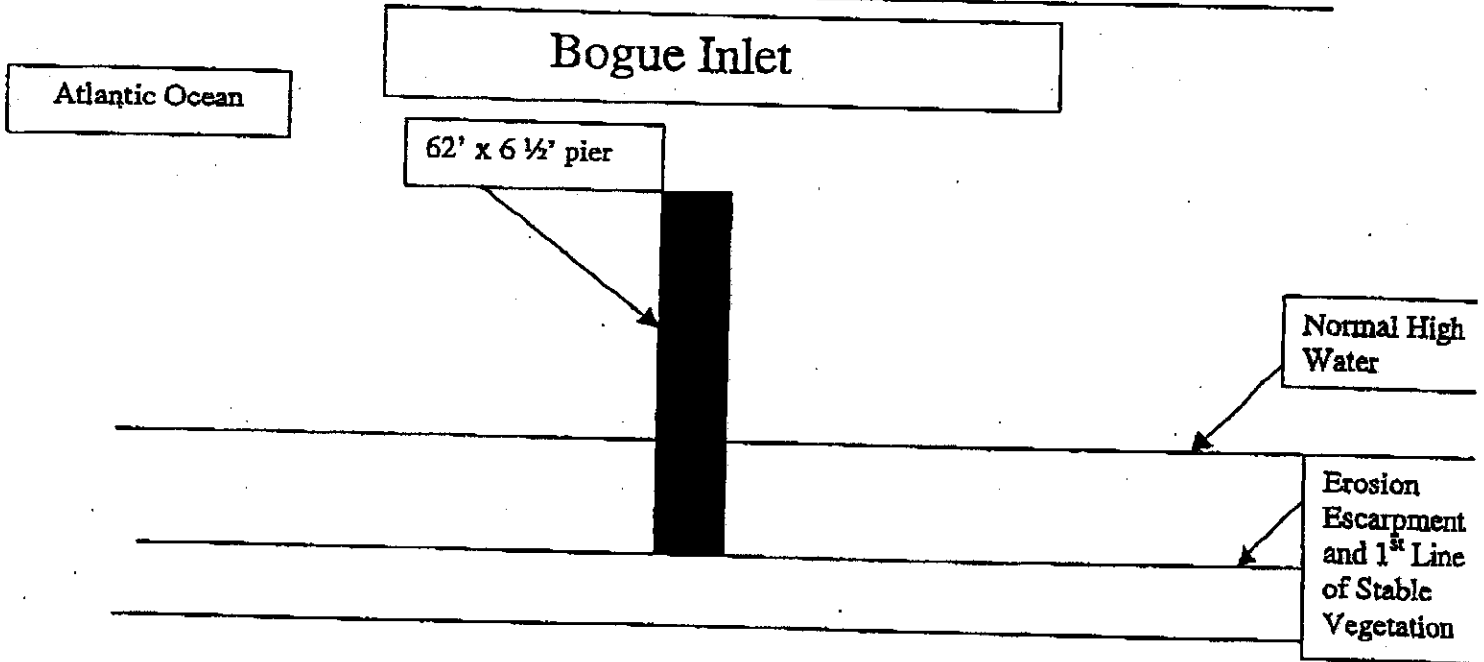
**RESTORATION PLAN**

For

Donahue Property

CAMA Violation No. ENTER CASE NO. **09-020**

Property located at 115 Bogue Court, Carteret County



I, Hugh Donahue, agree to remove the pier constructed on my property.

I agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by January 31, 2009, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

*It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.*

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\*\*\*\*\*  
\*\*\* FAX RX REPORT \*\*\*  
\*\*\*\*\*

RECEPTION OK

JOB NO.	8243
DESTINATION ADDRESS	919 716 6767
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	03/05 16:15
USAGE T	02'18
PGS.	8
RESULT	OK



State of North Carolina  
Department of Justice

ROY COOPER  
Attorney General

114 W. Edenton Street  
9001 Mail Service Center  
Raleigh, NC 27699-9001

pajones@ncdoj.gov  
Phone: (919) 716-6600  
Fax: (919) 716-6767

March 5, 2009

Ms. Kim Hausen  
Chief Hearings Clerk  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

COPY

Re: DONAGHUE, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL MANAGEMENT,  
09 EHR 0568, CARTERET County

Dear Ms. Hausen:

Enclosed please find an original and two copies of Respondent's Prehearing Statement for the above captioned case. Please file the same and return the file-stamped copy to my attention in the enclosed, self-addressed envelope.

Thank you for your attention to this matter. Should you have any questions, do not hesitate to call. Thank you for your assistance in this regard.

Sincerely,

Pamela A. Jones

North Carolina State Bar Certified Paralegal

Enclosures

cc: Counsel for Petitioner

**\*\* Transmit Conf. Report \*\***

P.1

Mar 5 '09 16:40

Telephone Number	Mode	Start	Time	Pages	Result	Note
94313100	NORMAL	5,16:37	2'14"	8	* O K	

**COPY**

# FAX TRANSMISSION

State of North Carolina, Department of Justice  
Office of the Attorney General, Environmental Division  
9001 Mail Service Center, Raleigh, NC 27699-9001  
919-716-6600 Fax: 919-716-6767

**To:** Ms. Kim Hausen  
Chief Hearings Clerk

**Date:** March 5, 2009

**Fax #:** 431-3100

**Pages:** 8 including this cover sheet.

**From:** Pamela Jones, NCCP  
Paralegal for  
Ward Zimmerman  
Assistant Attorney General

**Subject** DONAGHUE, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL MANAGEMENT,  
09 EHR 0568, CARTERET County

**COMMENTS:**

Regarding the captioned case, please file the attached Respondent's Prehearing Statement.. Original to follow via the Mail Service Center. Thank you for your assistance.



STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

HUGH AND DENISE DONAGHUE,  
  
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT,

Respondent.

**RESPONDENT'S PREHEARING  
STATEMENT**

NOW COMES the Respondent, N.C. Department of Environment and Natural Resources (DENR), Division of Coastal Management (DCM), by and through its undersigned counsel, Ward Zimmerman, and files this Prehearing Statement in the above-captioned matter pursuant to 26 NCAC 3 .0104 and an Order signed by the Honorable Donald W. Overby, Administrative Law Judge, dated February 4, 2009.

1. Issues to be Resolved.

This matter involves the unauthorized development of the pier of Hugh and Denise Donaghue ("Petitioner"), in violation of the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.* The development consisted of the construction of a 62' X 6 ½' pier in Ocean Hazard and Inlet Hazard Areas of Environmental Concern (AEC). No CAMA permit was issued to the Petitioner to complete work in these areas. A copy of the Notice of Violation letter is attached hereto as the **Document Constituting Agency Action.**

In addition to CAMA (N.C.G.S. § 113A-100 *et seq.*), the controlling statutes and regulations include the Administrative Procedure Act (APA), N.C.G.S. § 150B-1 *et seq.*, and the

rules promulgated thereunder, and the rules of the Coastal Resources Commission implementing CAMA, primarily found in Title 15A, Subchapter 7H of the North Carolina Administrative Code.

2. Statement of Facts and Reasons.

At issue is whether DCM properly issued a Notice of Violation against Petitioner under CAMA and the rules promulgated thereunder. Specifically at issue are those reasons for violation outlined in the December 31, 2008 Notice of Violation letter, including whether the Petitioner's construction of the pier constituted a major development in an Ocean Hazard and Inlet Hazard AEC that was not consistent with 15A NCAC 7H.0306. This statute prohibits structures located seaward of the oceanfront setback requirements unless such activity is consistent with 15A NCAC 7H.0309. Petitioner alleges that the construction done to the pier was not in violation of 15A NCAC 7H.0306 and .0309 because his activities constituted repairs as set forth in 15A NCAC 7J.0210, and therefore not considered a development requiring a CAMA permit.

3. Proposed Witnesses.

Witnesses for the Respondent include, but are not limited to the following:

Jim Gregson, Director, DCM, Morehead City, NC  
Ted Tyndall, Asst. Director, DCM, Morehead City, NC  
Doug Huggett, Major Permits Coordinator, DCM, Morehead City, NC  
Tere Barrett, District Manager, DCM, Morehead City, NC  
Barry Guthrie, Field Rep., DCM, Morehead City, NC  
Ryan Davenport, Compliance and Enforcement Rep., DCM, Morehead City, NC  
Jonathan Howell, Coastal Management Representative, DCM, Morehead City, NC  
Petitioner Hugh A. Donaghue  
NC Division of Marine Fisheries staff, TBD  
Shellfish Sanitation staff, TBD  
Wildlife Resources staff, TBD  
Division of Water Quality staff, TBD

Additionally, Respondent may call as a witness any person named as a witness by

Petitioner or any other party. Respondent reserves the right to supplement this list as it prepares for hearing.

4. Discovery.

The length of time set forth in the Scheduling Order is acceptable.

5. Location of Hearing.

The location of the hearing specified in the Scheduling Order, New Bern, NC, is acceptable to Respondent.

6. Estimated Length of Hearing.

Respondent estimates the hearing will take two days.

7. Notice of Appearance.

PLEASE TAKE NOTICE that the undersigned attorney for the State of North Carolina will appear on behalf of Respondent-DCM. All pleadings, notices, calendars, or other documents should be directed to the attention of the undersigned.

8. Date for Hearing.

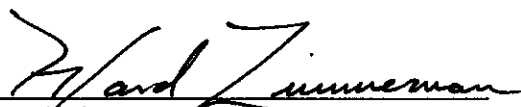
The date of the hearing, being the week of May 18, 2009, is acceptable to Respondent.

9. Special Matters.

Respondent requests that the Administrative Law Judge that hears this case make a visit to the site. The issues in the contested case are site specific, and Respondent contends that such a visit will be very helpful to the parties and the Judge hearing this case, especially if done just before the hearing begins. If the hearing is held in New Bern, the site will be approximately one hour away. Also, Respondent reserves the right to amend this Prehearing Statement.

Respectfully submitted, this the 5 day of March, 2009.

FOR THE DIVISION OF  
COASTAL MANAGEMENT



Ward Zimmerman  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
(919) 716-6600  
(919) 716-6767 fax  
wzimmerman@ncdoj.gov

#### CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Respondent's Prehearing Statement upon the Petitioners' counsel, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows:

Hugh A. Donaghue  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, PA 19063-2820

This the 5 day of March, 2009.



Ward Zimmerman  
Assistant Attorney General



205

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

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

**NOTICE OF VIOLATION**  
December 31, 2008

**CERTIFIED MAIL 70042890000380419724**  
**RETURN RECEIPT REQUESTED**

Hugh Donahue  
4 Pheasant Lane  
Chadds Ford, PA 19317

**RE: NOTICE OF VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT**  
**CAMA VIOLATION #09-02 C**

Dear Mr. Donahue:

This letter confirms that on September 29<sup>th</sup>, 2008, Jonathan Howell, Field Representative, was onsite at your property located at 115 Bogue Court adjacent to the Atlantic Ocean located in or near the Town of Emerald Isle, off Bogue Court, Carteret County, North Carolina. The purpose of the visit was to investigate unauthorized development of a pier in the Ocean Hazard AEC within the Atlantic Ocean.

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA). No person may undertake Major Development in a designated Area of Environmental Concern (AEC) without first obtaining a permit from the North Carolina Department of Environment and Natural Resources. This requirement is imposed by North Carolina General Statute (N.C.G.S.) 113A-118.

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6 1/2' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this **Notice of Violation** for violation of the Coastal Area Management Act.

I request that you immediately **CEASE AND DESIST** any further development and contact me about this matter. A civil assessment of up to \$10,000 plus investigative costs may be assessed against any violator. Each day that the development described in this Notice is continued or repeated may constitute a separate violation that is subject to an additional assessment of \$10,000. An injunction or criminal penalty may also be sought to enforce any violation in accordance with N.C.G.S. 113A-126.

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

It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. This is done to recoup some of the costs of investigating the violation and/or to compensate the public for any damage to its natural resources. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them.

Based upon the North Carolina Administrative Code, Title 15A, Subchapter 07H. State Guidelines for Areas of Environmental Concern, the activity you have undertaken, constructing a pier in the Ocean Hazard and Inlet Hazard AEC(s), is not consistent with Section 15A NCAC 07H .0306, which prohibits structures to be located seaward of the oceanfront setback requirements unless they are consistent with 15A NCAC 07H .0309 . Therefore, I am requesting that the constructed pier be removed. Please refer to the enclosed Restoration Agreement.

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

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

Thank you for your time and cooperation in resolving this important matter. If you have any questions about this or related matters, please call me at (252) 808-2808. Upon completion of the restoration as requested in the Restoration Plan Agreement to the satisfaction of the Division of Coastal Management, you will be notified as to the amount of the civil assessment for undertaking development without first obtaining the proper permit(s) and development that is inconsistent with Coastal Resources Commission rules.

Sincerely,



Jonathan Howell  
Coastal Management Representative

Cc: [Redacted] Assistant Director, DCM  
Tere Barrett, District Manager, DCM  
[Redacted] Compliance Coordinator, DCM  
Barry Guthrie, Field Representative, DCM

ENCLOSURE

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

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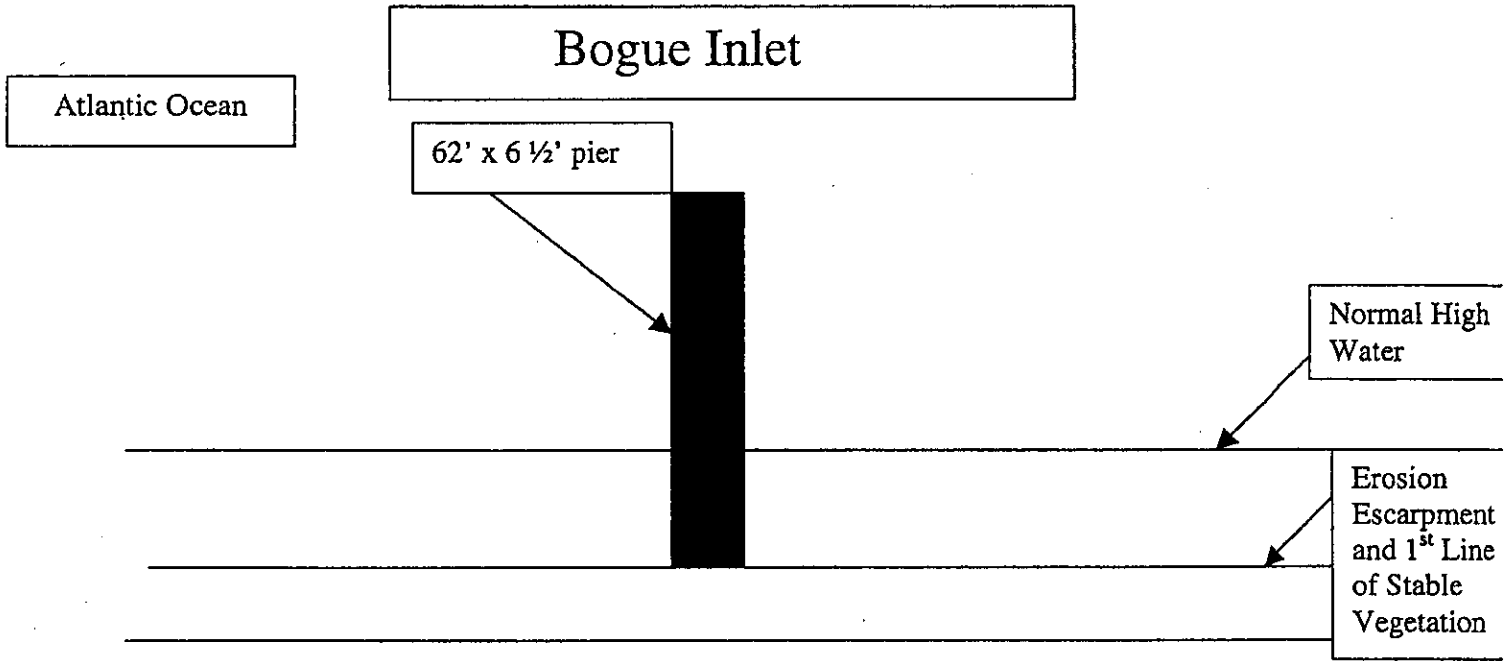
**RESTORATION PLAN**

For

Donahue Property

CAMA Violation No. ENTER CASE NO. **09-02c**

Property located at 115 Bogue Court, Carteret County



I, Hugh Donahue, agree to remove the pier constructed on my property.

I agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by January 31, 2009, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

*It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.*

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

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STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

2009 JUL 23 11:01 AM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

OFFICE OF  
ADMINISTRATIVE HEARINGS

HUGH AND DENISE DONAGHUE,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT,

Respondent.

**RESPONDENT'S MOTION TO  
DISMISS**

NOW COMES the Respondent, N.C. Department of Environment and Natural Resources (DENR), Division of Coastal Management (DCM), by and through its undersigned counsel and moves to dismiss Petitioners' Petition for a Contested Case Hearing in the above-captioned matter pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) of the N.C. Rules of Civil Procedure for lack of subject matter jurisdiction. The Office of Administrative Hearings (OAH) has adopted the N.C. Rules of Civil Procedure in handling contested cases. 26 NCAC 03 .0101(a). Lack of subject matter jurisdiction may be raised at anytime by a party, or by the court on its own initiative. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971); Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E.2d 145 (1985), rev'd in part on other grounds, 319 N.C. 52, 352 S.E.2d 413, cert. denied, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987).

**STATEMENT OF THE CASE**

This matter involves the unauthorized construction of a pier on the property of Hugh and Denise Donaghue ("Petitioners"), in violation of the Coastal Area Management Act (CAMA),



N.C.G.S. § 113A-100 *et seq.* The unauthorized development consists of a 62-foot by 6 ½-foot pier in the Ocean Hazard and Inlet Hazard Areas of Environmental Concern (AECs). A CAMA permit has been neither sought by, nor issued to Petitioners to complete work in these areas, as required by N.C.G.S. § 113A-118. Upon becoming aware of this unpermitted development, DCM issued a Notice of Violation (NOV) and a subsequent Continuing Notice of Violation (CNOV) against Petitioners under CAMA, and the rules promulgated thereunder.

### ARGUMENT

**Petitioners' claim should be dismissed because it is not founded upon requisite agency action, pursuant to Rule 12(b)(1).**

1. Petitioners' Petition for a Contested Case Hearing should be dismissed by OAH under N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction. The provisions of N.C.G.S. § 150B-23(a) and (f) are prerequisites for the exercise of subject matter jurisdiction by OAH. See House of Raeford Farms, Inc. v. State ex rel. Env'tl Mgmt. Comm'n, 338 N.C. 262, 449 S.E.2d 453 (1994). According to N.C.G.S. § 150B-23(a), OAH only has jurisdiction over instances where an agency action "has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights . . ." Without such agency action, OAH lacks subject matter jurisdiction. Here, there has been no such agency action, merely the issuance of notices of violation.

2. Petitioners contend that the requisite "agency action" can be found in either the December 31, 2008 NOV letter from DCM to Petitioners (Attachment 1) or the March 2, 2009 CNOV letter from DCM to Petitioners (Attachment 2). An examination of these letters, however, clearly shows that they do not create any dispute whereby DCM has deprived Petitioners of property, has ordered Petitioners to pay a fine or civil penalty, or has otherwise

substantially prejudiced Petitioners' rights so as to give rise to a contested case hearing under N.C.G.S. § 150B-23.

3. At this time, no Civil Penalty Assessment (CPA) has been assessed against Petitioners. If or when DCM issues a CPA, the necessary agency action will exist and Petitioners can then challenge the civil penalty at that time.

4. Moreover, it is well-established that neither NOV's nor CNOV's, without a CPA, constitute "agency action" from which Petitioners can appeal to OAH.

Notice of violation and method to comply does present the petitioner with a choice – to comply or to be penalized. However, this choice does not substantially prejudice the petitioner's rights. If it chooses not to comply and a penalty is imposed, the petitioner may then appeal to the Office of Administrative Hearings.

Hamilton Beach/Proctor-Silex, Inc. v. DEHNR, 93 EHR 0477, unpublished Final Decision by Administrative Law Judge Robert R. Reilly, Jr., 29 June 1993 (Final Decision attached); See Johnson County Board of Education v. NCDHR, 87 DHR 1030, unpublished Final Decision by Administrative Law Judge Robert R. Reilly, Jr., 25 May 1989 (Final Decision attached); Ashland Chemical Company v. NRCD, 88 NRC 0645, unpublished Final Decision by Administrative Law Judge Robert R. Reilly, Jr., 2 March 1989 (Final Decision attached); See also 5 Inlet Hook (08EHR 2800), Cagney (08 EHR 2791), Courtney (08 EHR 2798), Farbolin (08EHR 2794), Hobbs (08 EHR 2797), Kenefick (08 EHR 2795), Mann (08 EHR 2799), Phillips (08 EHR 2792), Smith (08 EHR 2793), Taylor (08 EHR 2796), Hardesty (08 EHR 2383), Budnick (08 EHR 2779), Klaus (08 EHR 2784), Rickabaugh (08 EHR 2785), Sansotta (08 EHR 2786-2790), Scott (08 EHR 2783), Tison (08 EHR 2782), Toloczko (08 EHR 2780) v. DCM, unpublished Order by Administrative Law Judge Donald W. Overby, 28 January 2009 (various cases involving notification letters from DCM to coastal property owners demanding removal of non-

permitted sandbags; found by this Court to be “not ripe in that there has been no ‘agency action’ from which the Petitioners to appeal, that, therefore, the Office of Administrative Hearings lacks jurisdiction...” (Order attached)


5. Without the requisite agency action, OAH lacks subject matter jurisdiction and Petitioners’ claim should be dismissed pursuant to Rule 12(b)(1).

### CONCLUSION

WHEREFORE, for the reasons stated herein, Petitioners’ case lacks the requisite agency action necessary to trigger jurisdiction in OAH, and should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Respondent requests that the presiding ALJ enter an Order and Final Decision dismissing this contested case on the grounds that OAH lacks subject matter jurisdiction over these matters. **Respondent respectfully also requests oral argument on this motion should the presiding ALJ deem it necessary. Due to the fact that Petitioners reside in Pennsylvania, Respondent proposes a phone hearing via conference call.**

Respectfully submitted, this the 22<sup>nd</sup> day of July, 2009.

FOR THE DIVISION OF  
COASTAL MANAGEMENT


  
 \_\_\_\_\_  
 Ward Zimmerman  
 Assistant Attorney General  
 N.C. Department of Justice  
 9001 Mail Service Center  
 Raleigh, NC 27699-9001  
 (919) 716-6600  
 (919) 716-6767 fax  
 wzimmerman@ncdoj.gov

**CERTIFICATE OF SERVICE**

This is to certify that I have served the foregoing Respondent's Motion to Dismiss upon Petitioners, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows:

Hugh A. Donaghue  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, PA 19063-2820

This the 22<sup>nd</sup> day of July, 2009.

  
\_\_\_\_\_  
Ward Zimmerman  
Assistant Attorney General

**ATTACHMENT A**

**Orders Dismissing Contested Cases for Lack of Subject Matter Jurisdiction**

STATE OF NORTH CAROLINA  
 COUNTY OF BEAUFORT

JUN 23 3 27 PM '93  
 IN THE OFFICE OF  
 ADMINISTRATIVE HEARINGS  
 93 EHR 0477

HAMILTON BEACH/PROCTOR-SILEX, INC., )  
 Petitioner. )

v. )

DEPARTMENT OF ENVIRONMENT, HEALTH )  
 AND NATURAL RESOURCES, )  
 Respondent )

) FINAL DECISION

This matter came on for hearing before the undersigned administrative law judge upon the respondent's Motion to Dismiss filed June 10, 1993. The petitioner filed a Response, Brief and Affidavit on June 23, 1993.

Mr. Brad A. De Vore and Ms. Yvonne C. Bailey represented the petitioner. Mr. Donald W. Laton represented the respondent.

**DISCUSSION**

The Petitioner alleges that the "Notice of Violation substantially prejudiced (the petitioner's) rights by imposing requirements concerning certain contamination detected at the Washington Facility that is not (the petitioner's) responsibility under (the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978.)"

The Motion to Dismiss contends that "the issuance of a Notice of Violation does not yet create any dispute whereby (the respondent) has deprived (the petitioner) of any property, ordered (the petitioner) to pay a fine or civil penalty, or has otherwise substantially prejudiced (the petitioner's) rights." See 150B-23(a).

The petitioner relies upon Metropolitan Sewerage District of Buncombe County v. North Carolina Wildlife Resources Commission, 100 NC App 171, 174, 394 SE 2d 668, 669 (1990) which stated:

In the present case there is clearly a dispute between respondent agency and petitioner concerning the minimum streamflow requirement for petitioner's hydroelectric power project. The dispute involves a determination of petitioner's "rights, duties or privileges," because

petitioner's option pursuant to the clause in its license exemption to use an alternate streamflow in the operation of its power plant was foreclosed by respondent's refusal to approve the alternate flows.

In the above case, the respondent's refusal to grant approval foreclosed the petitioner's operation of the power plant at an alternate streamflow. In this case, the respondent advised the petitioner to correct the alleged violations, conduct a Comprehensive Site Assessment, and submit a Corrective Action Plan. "Failure to respond . . . may result in the issuance of a proposed penalty assessment." Foreclosure to operate the power plant at an alternate streamflow directly affected the petitioner's hydroelectric power project. Notice of a violation and method to comply does present the petitioner with a choice - to comply or to be penalized. However, this choice does not substantially prejudice the petitioner's rights. If it chooses not to comply and a penalty is imposed, the petitioner may then appeal to the Office of Administrative Hearings. For further discussion, see the attached Final Decisions in Ashland Chemical Company v. NRC (88 NRC 0645) and Johnston County Board of Education v. DHR (87 DHR 1030).

#### ORDER

The Office of Administrative Hearings lacks subject matter jurisdiction over this contested case. The Petition is therefore DISMISSED. This is a FINAL DECISION pursuant to GS 150B-36(c).

#### NOTICE

In order to appeal a final decision, the person seeking judicial review must file a Petition in the Superior Court of Wake County or in the superior court of the county where the person resides. The Petition for Judicial Review must be filed within thirty days after the person is served with a copy of the final decision. GS 150B-46 describes the contents of the Petition and requires service of a copy of the Petition on all parties.

This the 29<sup>th</sup> day of JUNE, 1993.

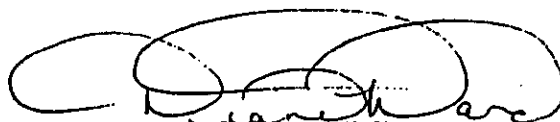
Robert Roosevelt Reilly, Jr.  
Robert Roosevelt Reilly, Jr.  
Administrative Law Judge

A copy of the foregoing was mailed to:

Brad A. De Vore  
Yvonne C. Bailey  
P. O. Box 831  
Raleigh, NC 27602  
ATTORNEYS FOR PETITIONER

Donald W. Laton  
P. O. Box 629  
Raleigh, NC 27602  
ATTORNEY FOR RESPONDENT

This the 29<sup>th</sup> day of June 1993.



Office of Administrative Hearings  
Post Office Drawer 27447  
Raleigh, North Carolina 27611-7447  
919/733-2698

RECEIVED

JUL - 1 1993

N. C. ATTORNEY GENERAL  
Environmental Protection Section

ADMINISTRATIVE  
 STATE OF NORTH CAROLINA  
 COUNTY OF JOHNSTON  
 MAY 25 11 49 AM '89  
 IN THE OFFICE OF  
 ADMINISTRATIVE HEARINGS  
 87 DHR 1030

JOHNSTON COUNTY BOARD  
 OF EDUCATION,  
 Petitioner )  
 )  
 v. )  
 )  
 N. C. DEPARTMENT OF HUMAN )  
 RESOURCES, DIVISION OF HEALTH )  
 SERVICES, SOLID AND HAZARDOUS )  
 WASTE MANAGEMENT, )  
 Respondent )

FINAL DECISION  
 ORDER OF DISMISSAL  
 GS 150B-36(c)

#### CASE HISTORY

A Petition was filed by the Johnston County Board of Education on October 30, 1987. The Petition contested a Compliance Order issued by the Department of Human Resources concerning the disposal of certain wastes by the Board. The petitioner's Prehearing Statement acknowledged that the Board purchased "chemicals to be used for stripping paint and shellac from furniture and floors. . . . After stripping the floor at Benson Elementary School gym, the residue of shellac and other stripping materials on the floor, including residue of the floor stripping chemicals, was scooped up and returned to the barrels and taken to Short Journey School site and poured in trenches which had been dug."

The undersigned administrative law judge entered a Scheduling Order on December 29, 1987. A Notice of Hearing set the hearing for April 4, 1988, in Johnston County. A Prehearing Order was entered on the day of the hearing. The issues were: (1) whether the law and rules applied to the alleged acts, (2) whether good faith is a defense, and (3) whether the Department had exceeded its authority, acted arbitrarily or capriciously or failed to act as required by law.

The Compliance Order was introduced as Respondent's Exhibit #6. It contains a Preliminary Statement, Statements of Fact and Law, Conditions for Continued Operation, Potential Consequences of Failure to Comply, Opportunity to Request a Hearing, and Informal Conference. The Conditions for Continued Operation imposed five requirements: A. closure and post-closure, B. implementation of groundwater monitoring; C. submission of closure plan, D. submission of post-closure plan, and E. submission of Part A



permit application. The Potential Consequences of Failure to Comply noted that "pursuant to NCGS 130A-22, each day of continued violation of any requirement of the Act or the Rules constitutes a separate violation for which up to \$10,000 per day may be imposed."

During the afternoon of the hearing, the undersigned realized that the petitioner had submitted documentation to the respondent concerning A, B, C, and D and that the respondent had not completed its review. The undersigned observed: "The proper procedure I believe would have been to notify me and we would have continued the date of the hearing in order to permit time for the Branch to complete the review of A, B, C, and D." (T p 145)

An Order was issued on April 7, 1988, requiring respondent to complete its review within thirty days, the parties to confer within twenty days, and report to the undersigned within ten days. Respondent completed its review on April 27, 1988. The petitioner responded by letter dated June 2, 1988. On July 19, 1988, the undersigned rescheduled the hearing for August 15, 1988. The petitioner asked for a continuance; the undersigned scheduled a status conference for August 9, 1988. After the status conference, the hearing was continued. The petitioner also filed a Memorandum on August 9, 1988. Stipulation of Facts was filed on October 12, 1988. A conference call was held on December 9, 1988, and again on January 20, 1989. A Prehearing Conference was scheduled for April 4, 1989. At the conference, the undersigned raised the issue whether the Office of Administrative Hearings had jurisdiction in this contested case and gave the attorneys a copy of the Final Decision in Ashland Chemical Company v. NRCD, 88 NRC 645. Another conference call was held on May 1, 1989, and the undersigned ordered the parties to brief the issue, if they wished, by May 19, 1989. The undersigned stated that a decision on the issue would be made after May 19, 1989. The respondent filed a Notice on May 18, 1989, that it would not take a position on the jurisdictional issue. The petitioner believes that this is not a contested case within the meaning of GS 150B-2(2).

#### DISCUSSION

In Ashland Chemical Company v. NRCD, 88 NRC 645, the Department filed a Motion to Dismiss. The Department cited the definition of "contested case" and contended that there was no dispute between the parties. The Notice of Noncompliance required the petitioner to develop and implement certain investigative and remedial activities and advised that failure to respond will result in a penalty. The petitioner contended that this requirement deprived it of property and prejudiced its rights within the meaning of GS 150B-23. The position of petitioner in this contested

case is similar to that of Ashland Chemical Company in 88 NRC 645.

To the extent that the petitioner complied with the Compliance Order, the issue is moot. The petitioner, although confronted with a difficult choice, cannot contest a cost which it chose to spend. To the extent that the petitioner has not complied with the Compliance Order, a controversy suitable for a declaratory judgment may exist under GS 1-253. See Sharp v. Park Newspapers, 317 NC 579, 347 SE 2d 25 (1986). The Supreme Court noted that the North Carolina Declaratory Judgment Act does not require allegations of "the completed act or event" but rather of the "imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform." (Id. at 590, 32) (Emphasis in original) The language of GS 150B-23 that "respondent has deprived the petitioner of property" suggests, however, a limitation in GS 150B-23 to a "completed act or event." A specific administrative penalty or one capable of being computed must have been imposed in order for a contested case to arise under GS 150B-2(2) and -23. A possibility of administrative penalties does not constitute a deprivation of property.

The question remains whether a possibility of administrative penalties prejudiced the petitioner's rights. A Notice of Noncompliance issued in 88 NRC 645 or a Compliance Order issued in this contested case is a mechanism to advise a person that his activity is not in compliance with applicable law and that he may be subject to administrative penalties or other remedies. Due to the complexity of government today, the Compliance Order has an aura of formality; but, it is nothing more than an inspector saying, "Mr. Smith, you are not in compliance with the law. If you don't comply, I will . . . ." Mr. Smith has a choice to make. The making of that choice does not prejudice his rights. In fact, commencement of settlement negotiations is usually predicated upon the issuance of a Compliance Order. If negotiations fail, an agency may impose a penalty or seek injunctive relief. If a penalty is imposed, a Petition may be filed and a contested case commenced.

Practical considerations also support the conclusion that jurisdiction is lacking under GS 150B-2(2) and -23. A contested case on the potentiality of an administrative penalty leaves both petitioner and respondent uncertain concerning the appropriate amount of resources that should be devoted to the contested case. A penalty of a dollar a day or \$10,000 a day affects the preparation for a case. Furthermore, ultimately in issue is not only whether there is a violation but also whether the amount of the penalty is

appropriate. By proceeding to hearing on only the violation issue, it is inevitable that the parties, witnesses and judge will return on a future date to decide the penalty phase of the case. GS Chapter 150B does not mandate such waste of resources.

ORDER

The Office of Administrative Hearings lacks subject matter jurisdiction in this contested case. Therefore, it is ordered that this contested case be dismissed.

This the 25<sup>th</sup> day of May, 1989.

  
\_\_\_\_\_  
Robert Roosevelt Reilly Jr.  
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
88 NRC 0545ASHLAND CHEMICAL COMPANY,  
Petitioner

v.

NORTH CAROLINA DEPARTMENT OF  
NATURAL RESOURCES AND  
COMMUNITY DEVELOPMENT,  
DIVISION OF ENVIRONMENTAL  
MANAGEMENT,  
Respondent.

and

ECOFLO, INC.,  
Intervenor-RespondentFINAL DECISION  
ORDER OF DISMISSAL  
GS 150B-36(C)PROCEDURAL HISTORY

A Petition, entitled "Request for Hearing," was filed by Ashland Chemical Company in the Office of Administrative Hearings on June 8, 1988. The Department of Natural Resources and Community Development was named as respondent. Ecoflo, Inc. filed a Motion to Intervene on August 8, 1988. The Motion was allowed on October 11, 1988, and Ecoflo, Inc. was designated as intervenor-respondent.

The Petition was filed "in response to the Notice of Noncompliance" dated April 25, 1988 (received by petitioner on May 10, 1988) and attached as Exhibit A. The Notice stated that the petitioner's report of March 30, 1988, "contained analyses of groundwater samples collected from monitor wells installed" at the petitioner's 2802 Patterson Street site in Greensboro. Petitioner's analyses indicated the presence of certain compounds in the groundwater which are prohibited by 15 NCAC 2L. The Notice requested the petitioner to submit a written response within 15 days of receipt and to determine the extent of contamination and submit a proposed remedial plan by August 25, 1988. The Notice concluded that "(f)ailure to respond within the time specified will result in issuance of a proposed penalty assessment by the Director under authority of GS 143-215.6

### DISCUSSION

The respondent's Motion to Dismiss cited GS 150B-2(2), the definition of "contested case", and GS 150B-23, the requirements for the contents of a petition, in support of its argument that the Office of Administrative Hearings lacks subject matter jurisdiction because there is no dispute between the parties.

A contested case is a proceeding to resolve a dispute between an agency and a person concerning the person's rights, duties or privileges. Rights, duties and privileges include licensing and the levying of a penalty. A petition, therefore, must contain allegations that the named agency, i.e., the respondent, has deprived the person, i.e., the petitioner, of property, has ordered him or her to pay a penalty, or has substantially prejudiced the person's rights. The petition must describe how the agency deprived the person of rights, duties or privileges. The agency must have exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law.

The Motion phrased the question as whether there is a dispute concerning the levying of a penalty. The Notice did not say that "failure to respond may result in a penalty" or that "the Ashland Chemical Company may be subject to a penalty" but rather declared that "failure to respond ... will result in" a penalty. The Notice clearly stated that there will be a penalty, even though the amount of the penalty is not specified. However, there will only be a penalty if the two deadlines, contained in the Notice, are not met. The Petition did not reveal whether the deadlines were met.

The petitioner's Prehearing Statement, filed November 7, 1988, indicated that the petitioner agreed to submit a supplemental hydrologic investigative program to comply with the Notice. The petitioner submitted the plan and stated that it would initiate the plan to meet other deadlines in the Notice. The plan included the installation of monitoring wells on adjoining property. Despite its efforts, the petitioner contends, consent from all landowners has not been obtained. Therefore, the plan has not been completely implemented.

The petitioner's contention in its Petition is that the Notice of Noncompliance requires petitioner to develop and implement certain investigative and remedial activities at the site. As such,

respondent has deprived the petitioner of property within the meaning of GS 150B-23, has substantially prejudiced the petitioner's rights within the meaning of GS 150B-23, and threatens to continue those deprivations in the future.

Although the undersigned administrative law judge appreciates the difficult choice that the petitioner confronted when it received the Notice, it appears that the petitioner, by choosing to comply with the Notice, has rendered any dispute moot. The petitioner cannot contest a cost which it chose to spend. If it is submitted that noncompletion of the plan leaves the petitioner subject to the involuntary expenditure of further funds, the question becomes whether a contested case, under these circumstances, exist under GS Chapter 150B.

A controversy suitable for a declaratory judgment under GS 1-253 may exist. See Sharp v. Park Newspapers, 317 NC 579, 347 SE 2d 25 (1986). The Supreme Court noted that the North Carolina Declaratory Judgment Act does not require allegations of "the completed act or event" but rather of the "imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform." (Id. at 590, 32) (Emphasis in original). The language of GS 150B-23 that "respondent has deprived the petitioner of property" suggests, however, a limitation in GS 150B-23 to a "completed act or event." (Id. at 590, 32). Therefore, the undersigned concludes that jurisdiction is lacking in this Office under GS 150B-2(2) and -23. The petitioner may request a declaratory ruling from the agency under GS 150B-17.

#### ORDER

The Office of Administrative Hearings lacks subject matter jurisdiction because, under any construction of the allegations, the controversy either lacks ripeness or is moot. Therefore, it is ordered that this contested case be dismissed.

This the 2nd day of March, 1989.

Robert Roosevelt Reilly Jr.  
Robert Roosevelt Reilly Jr.  
Administrative Law Judge

A copy of the foregoing was mailed to:

William D. Dannelly  
Elizabeth M. Powell  
Moore & Van Allen  
Attorneys at Law  
P.O. Box 26507  
Raleigh, NC 27611  
ATTORNEYS FOR PETITIONER

Yvonne C. Bailey  
Agency Legal Specialist  
N.C. NRCD  
P.O. Box 27687  
Raleigh, NC 27611-7687  
ATTORNEY FOR RESPONDENT

William G. Ross Jr.  
Brooks Pierce & McLendon  
Attorneys at Law  
P.O. Drawer U  
Greensboro, NC 27402  
ATTORNEY FOR INTERVENOR

This the 20<sup>th</sup> day of March, 1989.

Dean C. Farrar  
Chief Hearings Clerk

Erin O. McKinnis  
Office of Administrative Hearings  
Post Office Drawer 11666  
Raleigh, North Carolina 27604  
919/733-2698

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF DARE

5 Inlet Hook, NCR, LLC (08 EHR 2800)  
 Cagney (08 EHR 2791)  
 Courtney (08 EHR 2798)  
 Farbolin (08 EHR 2794)  
 Hobbs (08 EHR 2797)  
 Kenefick (08 EHR 2795)  
 Mann (08 EHR 2799)  
 Phillips (08 EHR 2792)  
 Smith (08 EHR 2793)  
 Taylor (08 EHR 2796)  
 Samuel Hardesty (08 EHR 2383)  
 Robert & Cherlyn Budnick (08 EHR 2779)  
 Joseph Klaus (08 EHR 2784)  
 Robert Rickabaugh (08 EHR 2785)  
 Roc Sansotta (08 EHR 2786, 08 EHR 2787, 08  
 EHR 2788, 08 EHR 2789, 08 EHR 2790)  
 James & Patricia Scott (08 EHR 2783)  
 Ursula Tison (08 EHR 2782)  
 Matthew & Lynn Toloczko (08 EHR 2780),

Petitioners,

v.

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

Respondent.

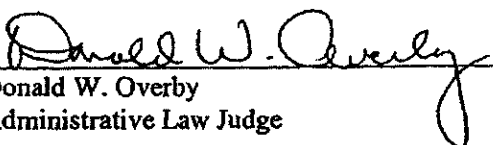
ORDER

THIS MATTER comes on before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of Petitioners' Motions for Stay of Contested Action and Interim Relief and the Court having heard oral arguments on December 19, 2008 and having considered written submissions of the parties to the oral arguments and the matters of record finds as fact and concludes as a matter of law that these petitions were consolidated solely for the convenience of these Motions only and the cases have not been consolidated for any other purpose, that these petitions are not ripe in that there has been no "agency action" from which the Petitioners to appeal, that, therefore, the Office of Administrative Hearings lack jurisdiction, and the Motions should be denied. This ruling obviates the necessity of ruling on the remaining arguments of the parties.



IT IS THEREFORE ORDERED, that the Petitioners Motions for Stay and Interim Relief are DENIED.

This the 28th day of January, 2009.


  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Eric M. Braun  
K & L Gates, LLP  
P.O. Box 17047  
Raleigh, NC 27619-7047  
ATTORNEY FOR PETITIONER

Christine A. Goebel  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 28th day of January, 2009.

  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431-3000  
Fax: (919) 431-3100

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

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Hugh and Denise Donaghue  
Petitioner

)  
)

vs.

)  
)

**ORDER DENYING MOTION**

N. C. Department of Environment and  
Natural Resources, Div of Coastal Management  
Respondent

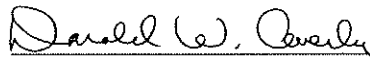
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Upon consideration of Respondent's Motion to Dismiss, without good cause shown, the Motion is DENIED.

IT IS SO ORDERED.

This the 29th day of July, 2009.

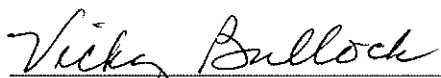
  
\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Ward A. Zimmerman  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 29th day of July, 2009.



---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

***SECTION III***

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

FILED

2009 APR 27 PM 13:31

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09EHR 0568

*2009*

OFFICE  
ADMIN HEARINGS

HUGH and DENISE DONAGHUE  
Petitioners.

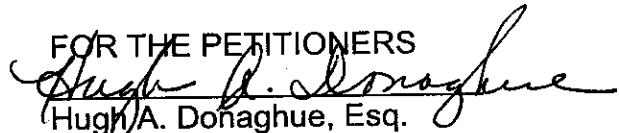
vs.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT  
Respondent.

:  
:  
: PETITIONERS' MOTION  
: TO HEAR MATTER  
: DURING WEEK OF 8/10/09  
:  
:  
:

1. Petitioners in this matter are Hugh and Denise Donaghue.
2. Petitioners will be in North Carolina during the period August 2 through August 16, 2009. Counsel for Respondent has advised Petitioners that he will be on vacation during the week of August 24, 2009.
3. Accordingly, both counsel agree and respectfully request that this matter be heard during the week of August 2 or August 10, 2009.

Respectfully submitted, this 22 day of April, 2009.

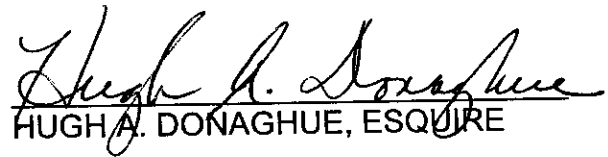
FOR THE PETITIONERS  
  
 Hugh A. Donaghue, Esq.  
 Donaghue & Labrum, LLP  
 13 West Third Street  
 Media, PA 19063  
 610/565-9120 telephone  
 610/565-3037 fax  
[info@donaghuelabrum.com](mailto:info@donaghuelabrum.com)

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing Motion to Hear the Matter upon the Respondent's counsel, by causing a copy thereof to be placed in the U.S. Postal Service with sufficient postage for delivery by first class mail and addressed as follows:

Ward Zimmerman, Esquire  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This 22 day of April, 2009.

  
HUGH A. DONAGHUE, ESQUIRE

May 01 10 07 AM 2009

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

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Hugh and Denise Donaghue )  
Petitioner )  
 )  
vs. )  
 )  
N. C. Department of Environment and )  
Natural Resources, Div of Coastal Management )  
Respondent )

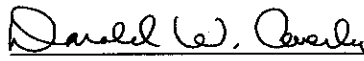
**ORDER CONTINUING  
HEARING**

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Upon consideration of Petitioner's Motion to Continue this contested case, with agreement of Respondent and for good cause shown, the hearing in this contested case is hereby CONTINUED to August 3, 2009. A more specific Notice of Hearing will follow.

IT IS SO ORDERED.

This the 1st day of May, 2009.

  
\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge



***SECTION IV***

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FILED

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

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IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

OFFICE OF  
ADMINISTRATIVE HEARINGS

HUGH AND DENISE DONAGHUE,	:	
Petitioners	:	
	:	
vs.	:	PETITIONERS' PROPOSED
	:	DECISION
	:	
NORTH CAROLINA DEPARTMENT OF	:	
ENVIRONMENT AND NATURAL	:	
RESOURCES, DIVISION OF COASTAL	:	
MANAGEMENT	:	
	:	
Respondent	:	

The above-captioned matter was heard on August 3, 2009, at the Emerald Island Town Hall, Emerald Island, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on petition for Contested Case Hearing regarding the Division of Coastal Management's issuance of a Notice of Violation and Continuing Notice of Violation under the Coastal Area Management Act for unpermitted development on the property of Petitioners Hugh and Denise Donaghue in Carteret County, North Carolina. This hearing was directly preceded by a site visit to Petitioners' property at 115 Bogue Court, Emerald Isle, North Carolina, which included Judge Overby, Petitioners, Respondent staff, and Respondent's counsel.

APPEARANCES

For Petitioners: Hugh and Denise Donaghue  
115 Bogue Court  
Emerald Isle, North Carolina

Hugh A. Donaghue, Esquire (pro se)  
13 West Third Street  
Media, PA 19063

For Respondent: Ward Zimmerman, Esquire  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

## ISSUE

Did Respondent exceed its authority or jurisdiction, commit an error of law, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C. Gen. Stat. Section 113A-118 and Coastal Resources Commission Rule 15A N.C. Admin. Code 07J.0201 by issuing a citation charging Petitioners with "constructing a 62' X 6.5' pier" as a result of repairs made by Petitioners to their more than 30 year old dock/ walkway without a permit from the Department of Environmental and Natural Resources.

## TESTIFYING WITNESSES

Jonathan Howell, Assistant Major Permits Coordinator, DCM, Morehead City, NC  
 Rick Goodnight, Goodnight's Home Improvement, Hubert, NC  
 Robert Townsend, 117 Bogue Court, Emerald Isle, NC

## PETITIONER EXHIBITS

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- A-2. Photograph
- A-3. Photograph
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- A-5. Cover of Orrin H. Pilkey's Book
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## RESPONDENT'S EXHIBITS

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- 6. 11/10/08 Permit
- 7. Map
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- 13. Notice of Violation
- 14. Notice of Continuing Violation
- 15. Petitioners' Response to Notice of Violation
- 16. Blowup of Map
- 17. Photograph

- 18. Photograph
- 19. Photograph
- 20. Photograph

Based upon consideration and review of the applicable law, testimony, and evidence received during the contested case hearing as well as review of the entire record of this proceeding, the undersigned makes the following:

### FINDINGS OF FACT

#### Applicable Statutes and Regulations

1. Respondent is the North Carolina Department of Environmental and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113 A, Article 7 of the North Carolina General Statutes and the regulations promulgated pursuant to the Act which are codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.
2. Under CAMA, development in any AEC requires a permit. N.C. Gen. Stat. Section 113A-118. Section 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern. . . involving, requiring, or consisting of the **construction** or **enlargement** of a structure. . .[emphasis supplied]."
3. However, if construction in an AEC such as the Inlet Hazard Area at issue, merely "repairs" rather than "replaces" an existing structure, then the work is not considered "development" and, thus, does not require a CAMA permit. N.C. Gen. Stat. Section 113A-103(5)(b)(5) and 15A N.C. Admin. Code 7J.0210(2) Conversely, "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits." 15A N.C. Admin. Code 7J.0210(2). The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes replacement is:

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, MORE THAN 50 PERCENT OF THE FRAMING AND STRUCTURAL COMPONENTS (BEAMS, GIRDERS, JOISTS, STRINGERS, OR PILINGS) must be rebuilt in order to restore the structure to its pre-damage condition. 15A N.C. Admin. Code 7J.0210(2)(a) [emphasis supplied].

The Property

4. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound. (NT pp. 30, 56)
5. Petitioners' property is in an Inlet Hazard Area, subject to the CAMA. N.C. Gen. Stat. Section 113A-100 et seq. (Respondent's Exhibit #7)
6. The dock/walkway which was the subject of the notices was erected on Petitioners' property prior to 1975. (NT pp. 116; 132; Exhibit "A-1")
7. Mr. Howell, however, acting of behalf of Respondent, served Petitioners with a Notice of Violation (NOV) dated December 31, 2008, and subsequently served Petitioners with a Notice of Continuing Violation dated March 2, 2009, both of which Notices incorrectly claimed that Petitioners had constructed an entire pier:

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation fo the Coastal Area Management Act (CAMA).

\* \* \* \*

I have information that indicates **you have undertaken or are legally responsible for constructing a 62' X 6.5' pier on the aforementioned property.** This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this **Notice of Violation** for violation of the Coastal Area Management Act."*[emphasis supplied]*

8. Additionally, the March 2, 2009, Notice of Continuing Violation, provided, inter alia:

"Please be advised that as of this date, site inspections indicate corrective actions have not been taken to complete the restoration requested in the December 31, 2008 Notice of Violation."

The "restoration requested in the December 31, 2008 Notice of Violation"

was "Remove 62' X 6.5' Unauthorized Pier."

9. Sometime after 1984, the Coast Guard Channel adjacent to Petitioners' property began to fill with sand, which eventually covered the entire walkway/dock, leaving only a foot or two of the pilings showing above the sand. (NT p. 147).
10. The North Carolina Department of Environment and Natural Resources, Division of Coastal Management, issued a permit in 2006-2007, to the owner of 119 Bogue Court to erect a bulkhead, the construction of which involved the placing of fill 35 feet out into the Coast Guard Channel in an area where the water was more than 20 feet deep, and the installation of sheet piling going into the ground in excess of 30 feet down. (NT pp. 123-125).
11. Mr. Townsend, the owner of 117 Bogue Court, testified that representatives of the Division of Coastal Management met with him on his property prior to the issuance of the permit for the bulkhead due to their concern about the erosive effect the construction of the bulkhead at 119 Bogue Court would have on Mr. Townsend's adjacent property (NT pp. 123-128).
12. As anticipated, the effect of the bulkhead approved and permitted by the Division of Coastal Management was to erode the rear of Petitioners' property at 115 Bogue Court as well as Mr. Townsend's property at 117 Bogue Court. (NT pp. 134, 135, 140, 144, 146-148).
13. The dock/walkway at issue remained structurally intact while covered with sand, until Petitioner began to remove pieces of the decking from the pier as the sand which had been covering the decking slowly eroded away, exposing the decking. (NT pp. 120; 151-152).
14. As the boards slowly became uncovered by the erosion occasioned by the adjacent bulkhead, Petitioner continued to remove the deck boards, joists and stringers on the walkway as a safety measure. (NT pp. 147; 152-153).
15. Mr. Goodnight testified that the repairs to the dock/walkway at issue took only two days and that some of the original decking, stringers and joists still remained on the pilings at the beginning of the work. (NT pp. 106-107).
16. The Respondent and Petitioner agreed that the Petitioner replaced approximately 60 feet of the deck boards, stringers and joists and none of the pilings. (NT pp. 68-69).

17. All parties agreed that the pilings were never removed or replaced by Petitioner. (NT pp. 59;111-112).
18. No permit was required by the Town of Emerald Isle to repair the dock/walkway. (NT p. 94).
19. Mr. Townsend testified that he has been a contractor/developer in the off-season on Emerald Isle for "the last ten years". (NT p. 114).
20. Mr. Townsend's uncontradicted testimony established that approximately sixty five percent of the cost of a dock must be allocated solely to the pilings, both as to material and the labor (NT p. 133).
21. Mr. Goodnight testified that Petitioners' repair costs for the dock/walkway for labor and material were \$ 1,600.00. (NT p. 106).
22. Although the testimony correctly indicated that it took approximately one year, from August of 2007 until August of 2008 for Petitioner to finish removing the decking of the dock/walkway, the length of time was solely the result of the rate at which the sand covering the walkway was being removed by erosion caused, at least in substantial part, by the installation of the adjacent bulkhead (NT pp. 147; 152-153), as the repairs were completed in 2 days. (NT pp. 106-107).
23. Mr. Howell, of the Division of Coastal Management testified inconsistently with the Notice of Violation issued, as well as the Notice of Continuing Violation issued, that he issued a citation to Petitioners based on his conclusion that "he [Petitioner] replaced more than 50% of his dock, the structural components, without a permit.... Ten existing pilings on the property, no decking or other structural components, and the entire rest of the pier needed to be replaced". (NT p. 63).
24. The relief requested in Mr. Howell's Notices was also inconsistent with his sworn testimony in that the Notices issued by Mr. Howell demanded that Petitioners "Remove 62' X 6.5' unauthorized pier."
25. Mr. Howell testified that when he first approached Petitioner, Petitioner "said he actually, this was repair of a structure, that he disagreed with my determination on this docking facility." (NT p. 55).
26. Mr. Howell's belief that there were only ten existing pilings when he visited the site is demonstrably incorrect as there were and continue to be 15 pilings, as shown in Exhibits A-4 and A-7 (although 4 are again under cover of sand).

27. The dock as repaired by Petitioner consisted of the six spans, each with two stringers and one joist, covered by decking, the **only** structural or framing members replaced by Petitioners being the 12 stringers and 12 joists. (NT p. 97; Exhibits A-4, A-7, Respondent's Exhibits 17, 18 and 19)
28. The Exhibits, including A-4 and A-7, as well as Respondent's Exhibits 17, 18, and 19, establish that Petitioners replaced only 2 stringers along the sides of each set of pilings and one joist between each pair of pilings. The decking was then laid perpendicular to the stringers, and was supported by the stringers (Exhibit A-4, A-7) (NT pp. 135; 68-69).
29. Petitioners' evidence established that they replaced substantially less than 50 percent of the "framing and structural components".

#### CONCLUSIONS OF LAW

1. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (hereinafter CAMA), N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations promulgated thereunder.
2. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Inlet Hazard Area as set forth by 15A N.C. Admin. Code 07H.0300 *et seq.*
3. The structure at issue in the instant case is a "water dependent structure".
4. Under CAMA, "Development" in an Inlet Hazard Area requires a permit. N.C. Gen. Stat. § 113A-118.
5. "Development" is defined by statute as follows:
  - (5)a. 'Development' means any activity in a duly designated area of environmental concern (except as provided in paragraph b. of this subdivision) involving, requiring, or consisting of the **construction or enlargement** of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal; or placement of a



floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).

N.C. G.S.A. § 113A-103(5)a (emphasis supplied).

6. "Maintenance" and "repairs" were **specifically excluded** from the definition of "Development" by the legislature:

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

\* \* \* \*

5. Maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements or to prevent damage to imminently threatened structures by the creation of protective sand dunes.

N.C. G.S.A. § 1113A-103(5)b(emphasis supplied).

7. The Commission, pursuant to the authority delegated to it by the legislature in Section 113A-103(5)(c), has promulgated regulations.
8. Pursuant to the authority granted by CAMA, the Commission has enacted 15A N.C. Admin. Code 07J.0210(2)(a) which provides:

"No permit shall be required for those activities set out in G.S. 113A-103(5)(b)(1)-(9) as exclusions from the definition of development."  
15A NCAC 07K.0101.

9. The Commission by regulation has defined what constitutes "repair" of a water-dependent structure:

(2) WATER DEPENDENT STRUCTURES.  
The proposed work is considered replacement *if it enlarges* the existing structure. The proposed work is also considered replacement if:

(a) in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, **more than 50 percent of the framing and structural components** (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition." 15A NCAC 07J.0210 (emphasis supplied)

10. The repairs did not involve any portion of the pilings, which constituted 65 percent of the structure, both in terms of size as well as cost.
11. This case is not controlled by Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division, 80 NC App. 201, 341 SE. 2d 108 (1986) as in that case:
  - (a) The pilings had not had any decking stringers or joist for more than ten years. Id. at 203, 341 SE.2d at 110;
  - (b) "The decking had been destroyed prior to the enactment of CAMA. Reconstruction of the decking was undertaken well after the law was in place." Id. at 204, 341 SE.2d at 111;
  - (c) "Petitioner had to obtain a new building permit from the Town of Bath". Id. at 203, 341 SE.2d at 110; and
12. The exception at issue in the instant case was inapplicable in Pamlico because: "The rule exempting repairs and replacements specifically refers to 'existing' structures. This language clearly limits the exemption to the repair or replacement of structures **existing** at the time the Act was enacted. The decking was not 'existing' at that time and thus, the replacement of it cannot come within the exception of Section .0304." Id. at 205, 341 SE.2d at 111
13. The dock/walkway at issue in the instant case **was** existing at the time of the enactment of the Act and no building permit was required by the Town of Emerald Isle.
14. "Any law, ordinance or regulation adopted pursuant to the police power of

the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 NC 715, 158 SE.2d 887 (1968)". ***Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division***, supra. at 206, 341 SE.2d at 112.

15. Respondent's claim that "Petitioners replaced all of the framing and structural components, except for the original support pilings and thus greatly exceeded the 'more than 50 percent' standard that constitutes 'replacement' as set forth in 15A NC Admin. Code 07J.0210(2)(a)." is not supported by the uncontradicted evidence of record that 65 percent of the **cost** of the materials as well as 65 percent of the **labor** involved in the construction of a dock/walkway is the materials as well as the setting of the pilings.
16. As evidenced by the Exhibits offered, Petitioners here removed and replaced one stringer on each side of the span between the pilings, placed one joist between each pair of pilings, and laid new decking and/or planking on the stringers, clearly repairing less than 50 percent of the "framing and structural components", which does not include the decking.
17. The lumber used in the decking may not, under Section 07J.0210(2)(a), to be considered in determining whether the repair constitutes, meets or exceeds the 50 percent rule.
18. In the absence of any evidence refuting Petitioners' evidence establishing that less than 50 percent of the framing and structural components were replaced, Petitioners have established that the Notice of Violation and Notice of Continuing Violation were improperly issued, both as to the claim that a new pier was constructed and as to the claim that more than 50 percent of the framing and structural components were replaced.

#### STANDARD OF REVIEW

1. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E. 2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E. 2d 745 (1995).

2. Any law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 NC 715, 158 SE.2d 887 (1968)". *Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division*, supra. at 206, 341 SE.2d at 112.

#### DECISION

Based on the foregoing findings of fact and conclusions of law, Petitioners have met their burden of establishing that they replaced less than 50 percent of the framing and structural components of the existing dock/walkway. Thus, the Notice of Violation and subsequent Notice of Continuing Violation were erroneously issued to Petitioners as they were not required under North Carolina law to obtain a permit prior to undertaking repairs to their dock/walkway.

#### ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

#### NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the \_\_\_\_\_ day of November, 2009.

---

DONALD W. OVERBY  
Administrative Law Judge

## CERTIFICATE OF SERVICE


Hugh A. Donaghue, Esquire, hereby certifies that a true and correct copy of the within Brief of Petitioners was forwarded via fax and U.S. First Class Mail on October 23, 2009 to the following:

*via fax: 919-431-3100 and First Class Mail*

Hon. Donald W. Overby  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

*via First Class Mail*

Ward Zimmerman, Esquire  
Office of Attorney General  
P.O. Box 629  
Raleigh, NC 27602

  
HUGH A. DONAGHUE, ESQ.

\*\*\*\*\*  
\*\*\* FAX RX REPORT \*\*\*  
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LAW OFFICES  
DONAGHUE & LABRUM, LLP  
13 WEST THIRD STREET  
MEDIA, PENNSYLVANIA 19063-2820

HUGH A. DONAGHUE  
KATHRYN LABRUM  
MICHAEL B. EGAN

PH: (610) 565-9120  
FX: (610) 565-3037  
info@donoghuelabrum.com

October 23, 2009

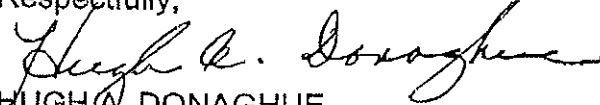
*via fax: 919-431-3100 and First Class Mail*  
Hon. Donald W. Overby  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Re: Donaghue vs. N.C. Dept. of Environment and Natural Resources  
County of Carteret  
09 EHR 0568

Dear Judge Overby:

Enclosed please find Petitioners' Brief in connection with the above captioned matter for your kind consideration.

Respectfully,

  
HUGH A. DONAGHUE

HAD:md  
encl.

cc: *via First Class Mail*  
Ward Zimmerman, Esquire (w/encl.)

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2009 OCT 23 PM 4:53  
OFFICE OF  
ADMIN HEARINGS

09 EHR 0568

DWU 263

LAW OFFICES  
DONAGHUE & LABRUM, LLP  
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HUGH A. DONAGHUE  
KATHRYN LABRUM  
MICHAEL B. EGAN

PH: (610) 565-9120  
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info@donaghuelabrum.com

October 23, 2009

via fax: 919-431-3100 and First Class Mail  
Hon. Donald W. Overby  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

FILED  
2009 OCT 26 AM 11:08  
OFFICE OF  
ADMINISTRATIVE  
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County of Carteret  
09 EHR 0568

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HAD:md  
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STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

HUGH AND DENISE DONAGHUE,  
Petitioners

vs.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT

Respondent

PETITIONERS' PROPOSED  
DECISION

FILED  
2009 OCT 26 AM 11:08  
OFFICE OF  
ADMINISTRATIVE HEARINGS

The above-captioned matter was heard on August 3, 2009, at the Emerald Island Town Hall, Emerald Island, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on petition for Contested Case Hearing regarding the Division of Coastal Management's issuance of a Notice of Violation and Continuing Notice of Violation under the Coastal Area Management Act for unpermitted development on the property of Petitioners Hugh and Denise Donaghue in Carteret County, North Carolina. This hearing was directly preceded by a site visit to Petitioners' property at 115 Bogue Court, Emerald Isle, North Carolina, which included Judge Overby, Petitioners, Respondent staff, and Respondent's counsel.

APPEARANCES

For Petitioners: Hugh and Denise Donaghue  
115 Bogue Court  
Emerald Isle, North Carolina

Hugh A. Donaghue, Esquire (pro se)  
13 West Third Street  
Media, PA 19063

For Respondent: Ward Zimmerman, Esquire  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

## ISSUE

Did Respondent exceed its authority or jurisdiction, commit an error of law, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C. Gen. Stat. Section 113A-118 and Coastal Resources Commission Rule 15A N.C. Admin. Code 07J.0201 by issuing a citation charging Petitioners with "constructing a 62' X 6.5' pier" as a result of repairs made by Petitioners to their more than 30 year old dock/ walkway without a permit from the Department of Environmental and Natural Resources.

## TESTIFYING WITNESSES

Jonathan Howell, Assistant Major Permits Coordinator, DCM, Morehead City, NC  
 Rick Goodnight, Goodnight's Home Improvement, Hubert, NC  
 Robert Townsend, 117 Bogue Court, Emerald Isle, NC

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Based upon consideration and review of the applicable law, testimony, and evidence received during the contested case hearing as well as review of the entire record of this proceeding, the undersigned makes the following:

### FINDINGS OF FACT

#### Applicable Statutes and Regulations

1. Respondent is the North Carolina Department of Environmental and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113 A, Article 7 of the North Carolina General Statutes and the regulations promulgated pursuant to the Act which are codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.
2. Under CAMA, development in any AEC requires a permit. N.C. Gen. Stat. Section 113A-118. Section 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern. . . involving, requiring, or consisting of the **construction** or **enlargement** of a structure. . .[emphasis supplied].
3. However, if construction in an AEC such as the Inlet Hazard Area at issue, merely "repairs" rather than "replaces" an existing structure, then the work is not considered "development" and, thus, does not require a CAMA permit. N.C. Gen. Stat. Section 113A-103(5)(b)(5) and 15A N.C. Admin. Code 7J.0210(2) Conversely, "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits." 15A N.C. Admin. Code 7J.0210(2). The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes replacement is:

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, MORE THAN 50 PERCENT OF THE FRAMING AND STRUCTURAL COMPONENTS (BEAMS, GIRDERS, JOISTS, STRINGERS, OR PILINGS) must be rebuilt in order to restore the structure to its pre-damage condition. 15A N.C. Admin. Code 7J.0210(2)(a) [emphasis supplied].

### The Property

4. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound. (NT pp. 30, 56)
5. Petitioners' property is in an Inlet Hazard Area, subject to the CAMA. N.C. Gen. Stat. Section 113A-100 et seq. (Respondent's Exhibit #7)
6. The dock/walkway which was the subject of the notices was erected on Petitioners' property prior to 1975. (NT pp. 116; 132; Exhibit "A-1")
7. Mr. Howell, however, acting of behalf of Respondent, served Petitioners with a Notice of Violation (NOV) dated December 31, 2008, and subsequently served Petitioners with a Notice of Continuing Violation dated March 2, 2009, both of which Notices incorrectly claimed that Petitioners had constructed an entire pier:

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation fo the Coastal Area Management Act (CAMA).

\* \* \* \* \*

I have information that indicates **you have undertaken or are legally responsible for constructing a 62' X 6.5' pier on the aforementioned property**. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this **Notice of Violation** for violation of the Coastal Area Management Act."[emphasis supplied]

8. Additionally, the March 2, 2009, Notice of Continuing Violation, provided, inter alia:

"Please be advised that as of this date, site inspections indicate corrective actions have not been taken to complete the restoration requested in the December 31, 2008 Notice of Violation."

The "restoration requested in the December 31, 2008 Notice of Violation"

was **“Remove 62' X 6.5' Unauthorized Pier.”**

9. Sometime after 1984, the Coast Guard Channel adjacent to Petitioners' property began to fill with sand, which eventually covered the entire walkway/dock, leaving only a foot or two of the pilings showing above the sand. (NT p. 147).
10. The North Carolina Department of Environment and Natural Resources, Division of Coastal Management, issued a permit in 2006-2007, to the owner of 119 Bogue Court to erect a bulkhead, the construction of which involved the placing of fill 35 feet out into the Coast Guard Channel in an area where the water was more than 20 feet deep, and the installation of sheet piling going into the ground in excess of 30 feet down. (NT pp. 123-125).
11. Mr. Townsend, the owner of 117 Bogue Court, testified that representatives of the Division of Coastal Management met with him on his property prior to the issuance of the permit for the bulkhead due to their concern about the erosive effect the construction of the bulkhead at 119 Bogue Court would have on Mr. Townsend's adjacent property (NT pp. 123-128).
12. As anticipated, the effect of the bulkhead approved and permitted by the Division of Coastal Management was to erode the rear of Petitioners' property at 115 Bogue Court as well as Mr. Townsend's property at 117 Bogue Court. (NT pp. 134, 135, 140, 144, 146-148).
13. The dock/walkway at issue remained structurally intact while covered with sand, until Petitioner began to remove pieces of the decking from the pier as the sand which had been covering the decking slowly eroded away, exposing the decking. (NT pp. 120; 151-152).
14. As the boards slowly became uncovered by the erosion occasioned by the adjacent bulkhead, Petitioner continued to remove the deck boards, joists and stringers on the walkway as a safety measure. (NT pp. 147; 152-153).
15. Mr. Goodnight testified that the repairs to the dock/walkway at issue took only two days and that some of the original decking, stringers and joists still remained on the pilings at the beginning of the work. (NT pp. 106-107).
16. The Respondent and Petitioner agreed that the Petitioner replaced approximately 60 feet of the deck boards, stringers and joists and none of the pilings. (NT pp. 68-69).

17. All parties agreed that the pilings were never removed or replaced by Petitioner. (NT pp. 59;111-112).
18. No permit was required by the Town of Emerald Isle to repair the dock/walkway. (NT p. 94).
19. Mr. Townsend testified that he has been a contractor/developer in the off-season on Emerald Isle for "the last ten years". (NT p. 114).
20. Mr. Townsend's uncontradicted testimony established that approximately sixty five percent of the cost of a dock must be allocated solely to the pilings, both as to material and the labor (NT p. 133).
21. Mr. Goodnight testified that Petitioners' repair costs for the dock/walkway for labor and material were \$ 1,600.00. (NT p. 106).
22. Although the testimony correctly indicated that it took approximately one year, from August of 2007 until August of 2008 for Petitioner to finish removing the decking of the dock/walkway, the length of time was solely the result of the rate at which the sand covering the walkway was being removed by erosion caused, at least in substantial part, by the installation of the adjacent bulkhead (NT pp. 147; 152-153), as the repairs were completed in 2 days. (NT pp. 106-107).
23. Mr. Howell, of the Division of Coastal Management testified inconsistently with the Notice of Violation issued, as well as the Notice of Continuing Violation issued, that he issued a citation to Petitioners based on his conclusion that "he [Petitioner] replaced more than 50% of his dock, the structural components, without a permit.... Ten existing pilings on the property, no decking or other structural components, and the entire rest of the pier needed to be replaced". (NT p. 63).
24. The relief requested in Mr. Howell's Notices was also inconsistent with his sworn testimony in that the Notices issued by Mr. Howell demanded that Petitioners "Remove 62' X 6.5' unauthorized pier."
25. Mr. Howell testified that when he first approached Petitioner, Petitioner "said he actually, this was repair of a structure, that he disagreed with my determination on this docking facility." (NT p. 55).
26. Mr. Howell's belief that there were only ten existing pilings when he visited the site is demonstrably incorrect as there were and continue to be 15 pilings, as shown in Exhibits A-4 and A-7 (although 4 are again under cover of sand).

27. The dock as repaired by Petitioner consisted of the six spans, each with two stringers and one joist, covered by decking, the **only** structural or framing members replaced by Petitioners being the 12 stringers and 12 joists. (NT p. 97; Exhibits A-4, A-7, Respondent's Exhibits 17, 18 and 19)
28. The Exhibits, including A-4 and A-7, as well as Respondent's Exhibits 17, 18, and 19, establish that Petitioners replaced only 2 stringers along the sides of each set of pilings and one joist between each pair of pilings. The decking was then laid perpendicular to the stringers, and was supported by the stringers (Exhibit A-4, A-7) (NT pp. 135; 68-69).
29. Petitioners' evidence established that they replaced substantially less than 50 percent of the "framing and structural components".

#### CONCLUSIONS OF LAW

1. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (hereinafter CAMA), N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations promulgated thereunder.
2. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Inlet Hazard Area as set forth by 15A N.C. Admin. Code 07H.0300 *et seq.*
3. The structure at issue in the instant case is a "water dependent structure".
4. Under CAMA, "Development" in an Inlet Hazard Area requires a permit. N.C. Gen. Stat. § 113A-118.
5. "Development" is defined by statute as follows:
  - (5)a. 'Development' means any activity in a duly designated area of environmental concern (except as provided in paragraph b. of this subdivision) involving, requiring, or consisting of the **construction or enlargement** of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal; or placement of a

floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).

N.C. G.S.A. § 113A-103(5)a (emphasis supplied).

6. "Maintenance" and "repairs" were **specifically excluded** from the definition of "Development" by the legislature:

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

\* \* \* \*

5. Maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements or to prevent damage to imminently threatened structures by the creation of protective sand dunes.

N.C. G.S.A. § 1113A-103(5)b(emphasis supplied).

7. The Commission, pursuant to the authority delegated to it by the legislature in Section 113A-103(5)(c), has promulgated regulations.
8. Pursuant to the authority granted by CAMA, the Commission has enacted 15A N.C. Admin. Code 07J.0210(2)(a) which provides:

"No permit shall be required for those activities set out in G.S. 113A-103(5)(b)(1)-(9) as exclusions from the definition of development."  
15A NCAC 07K.0101.

9. The Commission by regulation has defined what constitutes "repair" of a water-dependent structure:

(2) WATER DEPENDENT STRUCTURES.  
The proposed work is considered replacement *if it enlarges* the existing structure. The proposed work is also considered replacement if:



(a) in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, **more than 50 percent of the framing and structural components** (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition.” 15A NCAC 07J.0210 (emphasis supplied)

10. The repairs did not involve **any** portion of the pilings, which constituted 65 percent of the structure, both in terms of size as well as cost.
11. This case is not controlled by Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division, 80 NC App. 201, 341 SE. 2d 108 (1986) as in that case:
  - (a) The pilings had not had any decking stringers or joist for more than ten years. Id. at 203, 341 SE.2d at 110;
  - (b) “The decking had been destroyed **prior** to the enactment of CAMA. Reconstruction of the decking was undertaken well after the law was in place.” Id. at 204, 341 SE.2d at 111;
  - (c) “Petitioner had to obtain a new building permit from the Town of Bath”. Id. at 203, 341 SE.2d at 110; and
12. The exception at issue in the instant case was inapplicable in Pamlico because: “The rule exempting repairs and replacements specifically refers to ‘existing’ structures. This language clearly limits the exemption to the repair or replacement of structures **existing** at the time the Act was enacted. The decking was not ‘existing’ at that time and thus, the replacement of it cannot come within the exception of Section .0304.” Id. at 205, 341 SE.2d at 111
13. The dock/walkway at issue in the instant case **was** existing at the time of the enactment of the Act and no building permit was required by the Town of Emerald Isle.
14. “Any law, ordinance or regulation adopted pursuant to the police power of

the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 NC 715, 158 SE.2d 887 (1968)". ***Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division***, supra. at 206, 341 SE.2d at 112.

15. Respondent's claim that "Petitioners replaced all of the framing and structural components, except for the original support pilings and thus greatly exceeded the 'more than 50 percent' standard that constitutes 'replacement' as set forth in 15A NC Admin. Code 07J.0210(2)(a)." is not supported by the uncontradicted evidence of record that 65 percent of the **cost** of the materials as well as 65 percent of the **labor** involved in the construction of a dock/walkway is the materials as well as the setting of the pilings.
16. As evidenced by the Exhibits offered, Petitioners here removed and replaced one stringer on each side of the span between the pilings, placed one joist between each pair of pilings, and laid new decking and/or planking on the stringers, clearly repairing less than 50 percent of the "framing and structural components", which does not include the decking.
17. The lumber used in the decking may not, under Section 07J.0210(2)(a), to be considered in determining whether the repair constitutes, meets or exceeds the 50 percent rule.
18. In the absence of any evidence refuting Petitioners' evidence establishing that less than 50 percent of the framing and structural components were replaced, Petitioners have established that the Notice of Violation and Notice of Continuing Violation were improperly issued, both as to the claim that a new pier was constructed and as to the claim that more than 50 percent of the framing and structural components were replaced.

#### STANDARD OF REVIEW

1. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E. 2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E. 2d 745 (1995).

2. Any law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 NC 715, 158 SE.2d 887 (1968)". ***Pamlico Marine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division***, supra. at 206, 341 SE.2d at 112.

#### DECISION

Based on the foregoing findings of fact and conclusions of law, Petitioners have met their burden of establishing that they replaced less than 50 percent of the framing and structural components of the existing dock/walkway. Thus, the Notice of Violation and subsequent Notice of Continuing Violation were erroneously issued to Petitioners as they were not required under North Carolina law to obtain a permit prior to undertaking repairs to their dock/walkway.

#### ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

#### NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the \_\_\_\_\_ day of November, 2009.

---

DONALD W. OVERBY  
Administrative Law Judge

## CERTIFICATE OF SERVICE


Hugh A. Donaghue, Esquire, hereby certifies that a true and correct copy of the within Brief of Petitioners was forwarded via fax and U.S. First Class Mail on October 23, 2009 to the following:

*via fax: 919-431-3100 and First Class Mail*

Hon. Donald W. Overby  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

*via First Class Mail*

Ward Zimmerman, Esquire  
Office of Attorney General  
P.O. Box 629  
Raleigh, NC 27602

  
HUGH A. DONAGHUE, ESQ.



STATE OF NORTH CAROLINA  
 COUNTY OF CARTERET

FILED  
 2009 OCT 20 AM 10:27

IN THE OFFICE OF  
 ADMINISTRATIVE HEARINGS  
 09 EHR 0568

DD

HUGH AND DENISE DONAGHUE,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
 ENVIRONMENT AND NATURAL  
 RESOURCES, DIVISION OF COASTAL  
 MANAGEMENT,

Respondent.

**RESPONDENT'S PROPOSED  
 DECISION**

The above captioned matter was heard on August 3, 2009, at the Emerald Island Town Hall, Emerald Island, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on petition for Contested Case Hearing regarding the Division of Coastal Management's issuance of a Notice of Violation and Continuing Notice of Violation under the Coastal Area Management Act for unpermitted development on the property of Petitioners Hugh and Denise Donaghue in Carteret County, North Carolina. This hearing was directly preceded by a site visit to Petitioners' property at 115 Bogue Court, Emerald Isle, North Carolina, which included Judge Overby, Petitioners, Respondent's staff, and Respondent's counsel.

**APPEARANCES**

For Petitioners:

Hugh Donaghue, Esq. (appearing *pro se*)  
 Donaghue & Labrum, LLP  
 13 West Third Street  
 Media, Pennsylvania 19063

For Respondent:

Ward Zimmerman, Esq.  
 Assistant Attorney General  
 North Carolina Department of Justice  
 114 West Edenton Street  
 Raleigh, North Carolina 27602

**ISSUE**

Did Respondent exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C.

Gen. Stat. § 113A-118 and Coastal Resources Commission Rule 15A N.C. Admin. Code 07J .0201 to the unpermitted development of Petitioners?

**TESTIFYING WITNESSES**

Jonathan Howell, Assistant Major Permits Coordinator, DCM, Morehead City, NC  
 Rick Goodnight, Goodnight's Home Improvement, Hubert, NC  
 Robert Townsend, neighbor to Mr. Donaghue, Emerald Isle, NC

**PETITIONERS' EXHIBITS**

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Cover of Pilkey's Book
6. Photograph
7. Photograph

**RESPONDENT'S EXHIBITS**

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. List of AECs
6. 11/10/08 Permit
7. Map
8. 1984 Aerial Photograph
9. 1989 Aerial Photograph
10. 1995 Aerial Photograph
11. 2000 Aerial Photograph
12. 2006 Aerial Photograph
13. Notice of Violation
14. Notice of Continuing Violation
15. Petitioners' Response to Notice of Violation
16. Blowup of Map
17. Photograph
18. Photograph
19. Photograph
20. Photograph

Based upon careful consideration of the applicable law, testimony, and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

### FINDINGS OF FACT

#### Applicable Statutes and Regulations

1. Respondent is the North Carolina Department of Environment and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113A, Article 7 of the North Carolina General Statutes and various regulations promulgated thereunder by the Coastal Resources Commission (CRC), and codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.

2. The CRC may “designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof.” N.C. Gen. Stat. § 113A-113 Pursuant to N.C. Gen. Stat. § 113A-113(a) and (b)(6), the CRC has designated the Ocean Hazard area as an Area of Environmental Concern (AEC) and has adopted use standards or state guidelines for development within them, located at 15A N.C. Admin. Code 07H.0300 *et seq.* The CRC has defined Ocean Hazard AECs as:

natural hazard areas along the Atlantic Ocean shoreline where, because of their special vulnerability to erosion or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage. 15A N.C. Admin. Code 07H.0301

3. Under CAMA, all development in an AEC requires a permit. N.C. Gen. Stat. § 113A-118 N.C. Gen. Stat. § 113A-103(5) defines “development” as “any activity in a duly designated area of environmental concern . . . involving, requiring, or consisting of the construction or enlargement of a structure . . .”

4. However, if construction in an AEC merely “repairs,” rather than “replaces,” an existing structure, then the work is not considered “development” and, thus, does not require a CAMA permit. N.C. Gen. Stat. § 113A-103(5)(b)(5) and 15A N.C. Admin. Code 7J.0210(2) Conversely, “[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits.” 15A N.C. Admin. Code 7J.0210(2) The method set forth in the rules for determining whether a water dependent structure constitutes *replacement* is:

in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order



to restore the structure to its pre-damage condition. 15A N.C. Admin. Code 7J.0210(2)(a)

### The Property

5. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound. (T pp. 30, 56)

6. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC, as set forth in 15A N.C. Admin. Code 07H.0300 *et seq.* (T pp. 26-38, 66)

7. On or around August 2008, Petitioners completed work on a 62-foot by 6 ½-foot pier that extends perpendicular from the shoreline towards Bogue Sound. (T pp. 24, 69, 105)

8. Prior to completing work on Petitioners' pier, only support pilings from a former structure existed on Petitioners' property with no additional structural material. (T pp. 24-5, 106)

9. Petitioners' completed pier utilizes many of the support pilings of a previously existing structure. (T pp. 59, 106-7)

10. At the completion of Petitioners' construction, the only remaining wood from the original pier was that of the support pilings. All other components to the resulting pier, including beams, girders, joists, and stringers, consisted of new material installed by Petitioners and those under their direction during the period of construction. (T pp. 58-9, 105-7)

11. Petitioners' pier is a water dependent structure under the authority of 15A N.C. Admin. Code 7J.0210(2). (T p. 31)

12. A CAMA permit has been neither sought by, nor issued to, Petitioners for the development of the pier at issue in this matter. (T p. 55)

13. Upon notification of the existence of Petitioners' constructed pier, DCM issued Petitioners a Notice of Violation (NOV) on December 31, 2008 and a subsequent Continuing Notice of Violation (CNOV) on March 2, 2009 under CAMA, and the rules promulgated thereunder. In each of these notices, DCM included a Restoration Plan that required the removal of the constructed pier. (T pp. 55-57, 62)

### CONCLUSIONS OF LAW

1. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations promulgated thereunder.

2. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC as set forth by 15A N.C. Admin. Code 07H.0300 *et seq.*

3. Petitioners' pier is a water dependent structure under the authority of 15A N.C. Admin. Code 7J.0210(2).

4. In constructing their pier, Petitioners replaced all of the framing and structural components, except for the original support pilings, and thus greatly exceeded the "more than 50 percent" standard that constitutes "replacement," as set forth in 15A N.C. Admin. Code 7J.0210(2)(a).

5. As "replacement," Petitioners' construction of their pier is considered "development," as set forth N.C. Gen. Stat. § 113A-103(5).

6. Under CAMA, all development in an AEC requires a permit. N.C. Gen. Stat. § 113A-118

7. A CAMA permit has been neither sought by, nor issued to, Petitioners for the development of the pier at issue in this matter, in contravention of N.C. Gen. Stat. § 113A-118.

8. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule in issuing to Petitioners an NOV and a subsequent CNOV based upon the duly formed determination that Petitioners did not qualify for a permit exemption under 15A N.C. Admin. Code 07J.0210 and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118.

#### Standard of Review

9. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998).

10. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).

11. "On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005) (citation omitted) Moreover, deference must be given to the agency's decision where it chooses between two reasonable alternatives, and a court may not substitute its decision for the agency's decision where there is substantial evidence in the record to support the agency's findings. Craven County Reg'l Med. Ctr. v. N.C. Dep't of Health and Human Services, 176 N.C. App. 46, 59, 625 S.E. 2d 837, 845 (2006).

**DECISION**

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to issue to Petitioners an NOV and a subsequent CNOV based upon the duly formed determination that Petitioners did not qualify for a permit exemption under N.C. Gen. Stat. § 113A-103(5)(b)(5) or 15A N.C. Admin. Code 07J.0210, and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118, is AFFIRMED. Petitioners have not met their burden of proof in showing that Respondent substantially prejudiced Petitioners' rights or deprived them of property, and that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, as alleged in Petitioners' petitions for a contested case hearing. N.C. Gen. Stat. § 150B-23(a).

**ORDER**

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

**NOTICE**

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the \_\_\_ day of October, 2009.

---

Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh Donaghue, Esq.  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, Pennsylvania 19063

Ward Zimmerman, Esq.  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

This the \_\_\_ day of October, 2009.

---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, North Carolina 27699-6714  
(919) 733-2698  
Fax: (919) 733-3407



State of North Carolina

Department of Justice

ROY COOPER  
Attorney General

9001 Mail Service Center  
Raleigh, North Carolina  
27699-9001

Pamela A. Jones  
Phone: (919) 716-6600  
Fax: (919) 716-6767

October 19, 2009

Kim Hausen  
Chief Hearings Clerk  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Re: *Hugh and Denise Donaghue, v. NCDENR, 09 EHR 0568, Carteret County*

Dear Ms. Hausen:

Please find enclosed two copies of Respondent's Proposed Decision in the above referenced case. The Respondent's Proposed Decision was filed this day via facsimile. If you have any questions, do not hesitate to call.

Thank you for your assistance in this regard.

Very Truly Yours,

Pamela A. Jones  
North Carolina State Bar Certified Paralegal

2009 OCT 20 AM 10:29

Enclosures

cc: Petitioner



STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
ATTORNEY GENERAL

P.O. BOX 629  
RALEIGH, NC 27602

REPLY TO:  
WARD ZIMMERMAN  
TEL: (919) 716-6600  
FAX: (919) 716-6767  
wzimmerman@ncdoj.gov

October 19, 2009

The Honorable Donald W. Overby  
Administrative Law Judge  
6714 Mail Service Center  
Raleigh, NC 27699-6714


Re: *Hugh and Denise Donaghue v. NCDENR, DCM (09 EHR 0568)*

Dear Judge Overby:

At your request, Respondent North Carolina Department of Environment and Natural Resources, Division of Coastal Management respectfully submits the attached Proposed Decision. This Proposed Decision has also been electronically sent to the Office of Administrative Hearings in Microsoft Word format. I am also serving this Proposed Decision on Petitioner by copy of this letter.

Please contact me for any reason, and thank you for your continued attention to this matter.

Sincerely,

  
Ward Zimmerman  
Assistant Attorney General

2009 OCT 20 AM 10:29  
16349 10/19/09

cc: Hugh Donaghue, 13 West Third Street, Media, PA 19063-2820

Attachment (1)

FILED

D<sup>o</sup>

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

2009 OCT 19 PM 1:53

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
09 EHR 0568

ADMINISTRATIVE HEARINGS

HUGH AND DENISE DONAGHUE,  
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT,

Respondent.

RESPONDENT'S PROPOSED  
DECISION

The above captioned matter was heard on August 3, 2009, at the Emerald Island Town Hall, Emerald Island, North Carolina, before the Honorable Donald W. Overby, Administrative Law Judge, on petition for Contested Case Hearing regarding the Division of Coastal Management's issuance of a Notice of Violation and Continuing Notice of Violation under the Coastal Area Management Act for unpermitted development on the property of Petitioners Hugh and Denise Donaghue in Carteret County, North Carolina. This hearing was directly preceded by a site visit to Petitioners' property at 115 Bogue Court, Emerald Isle, North Carolina, which included Judge Overby, Petitioners, Respondent's staff, and Respondent's counsel.

APPEARANCES

For Petitioners:

Hugh Donaghue, Esq. (appearing *pro se*)  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, Pennsylvania 19063

For Respondent:

Ward Zimmerman, Esq.  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

ISSUE

Did Respondent exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C.

Gen. Stat. § 113A-118 and Coastal Resources Commission Rule 15A N.C. Admin. Code 07J .0201 to the unpermitted development of Petitioners?

**TESTIFYING WITNESSES**

Jonathan Howell, Assistant Major Permits Coordinator, DCM, Morehead City, NC  
Rick Goodnight, Goodnight's Home Improvement, Hubert, NC  
Robert Townsend, neighbor to Mr. Donaghue, Emerald Isle, NC

**PETITIONERS' EXHIBITS**

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. Cover of Pilkey's Book
6. Photograph
7. Photograph

**RESPONDENT'S EXHIBITS**

1. Photograph
2. Photograph
3. Photograph
4. Photograph
5. List of AECs
6. 11/10/08 Permit
7. Map
8. 1984 Aerial Photograph
9. 1989 Aerial Photograph
10. 1995 Aerial Photograph
11. 2000 Aerial Photograph
12. 2006 Aerial Photograph
13. Notice of Violation
14. Notice of Continuing Violation
15. Petitioners' Response to Notice of Violation
16. Blowup of Map
17. Photograph
18. Photograph
19. Photograph
20. Photograph



Based upon careful consideration of the applicable law, testimony, and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

### FINDINGS OF FACT

#### Applicable Statutes and Regulations

1. Respondent is the North Carolina Department of Environment and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113A, Article 7 of the North Carolina General Statutes and various regulations promulgated thereunder by the Coastal Resources Commission (CRC), and codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.

2. The CRC may "designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof." N.C. Gen. Stat. § 113A-113 Pursuant to N.C. Gen. Stat. § 113A-113(a) and (b)(6), the CRC has designated the Ocean Hazard area as an Area of Environmental Concern (AEC) and has adopted use standards or state guidelines for development within them, located at 15A N.C. Admin. Code 07H.0300 *et seq.* The CRC has defined Ocean Hazard AECs as:

natural hazard areas along the Atlantic Ocean shoreline where, because of their special vulnerability to erosion or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage. 15A N.C. Admin. Code 07H.0301

3. Under CAMA, all development in an AEC requires a permit. N.C. Gen. Stat. § 113A-118 N.C. Gen. Stat. § 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern . . . involving, requiring, or consisting of the construction or enlargement of a structure . . ."

4. However, if construction in an AEC merely "repairs," rather than "replaces," an existing structure, then the work is not considered "development" and, thus, does not require a CAMA permit. N.C. Gen. Stat. § 113A-103(5)(b)(5) and 15A N.C. Admin. Code 7J.0210(2) Conversely, "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits." 15A N.C. Admin. Code 7J.0210(2) The method set forth in the rules for determining whether a water dependent structure constitutes *replacement* is:

in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order

to restore the structure to its pre-damage condition. 15A N.C. Admin. Code 7J.0210(2)(a)

### The Property

5. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound. (T pp. 30, 56)
6. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC, as set forth in 15A N.C. Admin. Code 07H.0300 *et seq.* (T pp. 26-38, 66)
7. On or around August 2008, Petitioners completed work on a 62-foot by 6 ½-foot pier that extends perpendicular from the shoreline towards Bogue Sound. (T pp. 24, 69, 105)
8. Prior to completing work on Petitioners' pier, only support pilings from a former structure existed on Petitioners' property with no additional structural material. (T pp. 24-5, 106)
9. Petitioners' completed pier utilizes many of the support pilings of a previously existing structure. (T pp. 59, 106-7)
10. At the completion of Petitioners' construction, the only remaining wood from the original pier was that of the support pilings. All other components to the resulting pier, including beams, girders, joists, and stringers, consisted of new material installed by Petitioners and those under their direction during the period of construction. (T pp. 58-9, 105-7)
11. Petitioners' pier is a water dependent structure under the authority of 15A N.C. Admin. Code 7J.0210(2). (T p. 31)
12. A CAMA permit has been neither sought by, nor issued to, Petitioners for the development of the pier at issue in this matter. (T p. 55)
13. Upon notification of the existence of Petitioners' constructed pier, DCM issued Petitioners a Notice of Violation (NOV) on December 31, 2008 and a subsequent Continuing Notice of Violation (CNOV) on March 2, 2009 under CAMA, and the rules promulgated thereunder. In each of these notices, DCM included a Restoration Plan that required the removal of the constructed pier. (T pp. 55-57, 62)

### CONCLUSIONS OF LAW

1. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations promulgated thereunder.
2. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC as set forth by 15A N.C. Admin. Code 07H.0300 *et seq.*

3. Petitioners' pier is a water dependent structure under the authority of 15A N.C. Admin. Code 7J.0210(2).

4. In constructing their pier, Petitioners replaced all of the framing and structural components, except for the original support pilings, and thus greatly exceeded the "more than 50 percent" standard that constitutes "replacement," as set forth in 15A N.C. Admin. Code 7J.0210(2)(a).

5. As "replacement," Petitioners' construction of their pier is considered "development," as set forth N.C. Gen. Stat. § 113A-103(5).

6. Under CAMA, all development in an AEC requires a permit. N.C. Gen. Stat. § 113A-118

7. A CAMA permit has been neither sought by, nor issued to, Petitioners for the development of the pier at issue in this matter, in contravention of N.C. Gen. Stat. § 113A-118.

8. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule in issuing to Petitioners an NOV and a subsequent CNOV based upon the duly formed determination that Petitioners did not qualify for a permit exemption under 15A N.C. Admin. Code 07J.0210 and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118.

#### Standard of Review

9. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998).

10. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Brithaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).

11. "On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005) (citation omitted) Moreover, deference must be given to the agency's decision where it chooses between two reasonable alternatives, and a court may not substitute its decision for the agency's decision where there is substantial evidence in the record to support the agency's findings. Craven County Reg'l Med. Ctr. v. N.C. Dep't of Health and Human Services, 176 N.C. App. 46, 59, 625 S.E. 2d 837, 845 (2006).

### DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to issue to Petitioners an NOV and a subsequent CNOV based upon the duly formed determination that Petitioners did not qualify for a permit exemption under N.C. Gen. Stat. § 113A-103(5)(b)(5) or 15A N.C. Admin. Code 07J.0210, and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118, is AFFIRMED. Petitioners have not met their burden of proof in showing that Respondent substantially prejudiced Petitioners' rights or deprived them of property, and that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, as alleged in Petitioners' petitions for a contested case hearing. N.C. Gen. Stat. § 150B-23(a).

### ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b)(3).

### NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the \_\_\_ day of October, 2009.

\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh Donaghue, Esq.  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, Pennsylvania 19063

Ward Zimmerman, Esq.  
Assistant Attorney General  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, North Carolina 27602

This the \_\_\_ day of October, 2009.

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, North Carolina 27699-6714  
(919) 733-2698  
Fax: (919) 733-3407



STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
ATTORNEY GENERAL

P.O. Box 629  
RALEIGH, NC 27602

REPLY TO:  
WARD ZIMMERMAN  
TEL: (919) 716-6600  
FAX: (919) 716-6767  
wzimmerman@ncdoj.gov

October 19, 2009

The Honorable Donald W. Overby  
Administrative Law Judge  
6714 Mail Service Center  
Raleigh, NC 27699-6714


Re: *Hugh and Denise Donaghue v. NCDENR, DCM (09 EHR 0568)*

Dear Judge Overby:

At your request, Respondent North Carolina Department of Environment and Natural Resources, Division of Coastal Management respectfully submits the attached Proposed Decision. This Proposed Decision has also been electronically sent to the Office of Administrative Hearings in Microsoft Word format. I am also serving this Proposed Decision on Petitioner by copy of this letter.

Please contact me for any reason, and thank you for your continued attention to this matter.

Sincerely,

  
Ward Zimmerman  
Assistant Attorney General

2009 OCT 19 PM 1:51  
ADMIN HEARINGS  
FILED

cc: Hugh Donaghue, 13 West Third Street, Media, PA 19063-2820

Attachment (1)

\*\*\*\*\*  
\*\*\* FAX RX REPORT \*\*\*  
\*\*\*\*\*

294

RECEPTION OK

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RESULT	OK



295  
JW

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
ATTORNEY GENERAL

P.O. Box 629  
RALEIGH, NC 27602

REPLY TO:  
WARD ZIMMERMAN  
TEL: (919) 716-6600  
FAX: (919) 716-6767  
wzimmerman@ncdoj.gov

October 26, 2009

The Honorable Donald W. Overby  
Administrative Law Judge  
6714 Mail Service Center  
Raleigh, NC 27699-6714

FILED  
2009 OCT 27 AM 10:56  
OFFICE OF  
ADMINISTRATIVE SERVICES

Re: *Hugh and Denise Donaghue v. NCDENR, DCM (09 EHR 0568)*

Dear Judge Overby:

On October 2, 2009, you issued an Order requiring both parties in the above captioned matter to submit proposed decisions to you on or before October 19, 2009. On October 19, 2009, Respondent complied with this Order and submitted its proposed decision. However, Petitioners submitted a proposed decision on October 23, 2009: four days after your ordered submission date. Based upon Petitioners' failure to comply with your Order, Respondent respectfully requests that your Honor disregard Petitioners' proposed decision in reaching your decision in this matter.

Please contact me for any reason, and thank you for your continued attention.

Sincerely,

Ward Zimmerman  
Assistant Attorney General

cc: Mr. Hugh Donaghue, Esq.



09 EHR 0568 296

✓  
DWD

LAW OFFICES  
**DONAGHUE & LABRUM, LLP**  
13 WEST THIRD STREET  
MEDIA, PENNSYLVANIA 19063-2620

HUGH A. DONAGHUE  
KATHRYN LABRUM  
MICHAEL B. EGAN

PH: (610) 565-9120  
FX: (610) 565-3037  
info@donaghuelabrum.com

October 29, 2009

*via fax: 919-431-3100 and First Class Mail*  
Hon. Donald W. Overby  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Received  
OCT 29 2009

Re: Donaghue vs. N.C. Dept. of Environment and Natural Resources  
County of Carteret  
09 EHR 0568

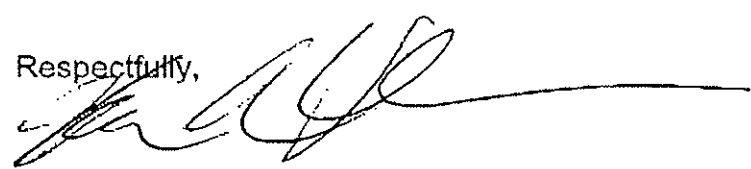
Dear Judge Overby:

This letter will acknowledge receipt of a copy of a letter to Your Honor dated October 26, 2009, from Mr. Zimmerman in connection with the above captioned matter. While I do not want to burden the Court, I feel it is necessary for me to respond to the letter.

It was the State of North Carolina that initially contacted my office with regard to requesting an extension of time in which to submit Findings of Fact and Conclusions of Law to the Court due to Mr. Zimmerman's busy work schedule. I readily agreed to the request for an extension, realizing I was in the same predicament and would have granted Mr. Zimmerman the extension as a matter of professional courtesy in any event.

I apologize that, due to unforeseen developments in both my practice and as a public official (I am the Register of Wills of Delaware County), together with illness of two secretaries, I could not submit my brief until October 23<sup>rd</sup>, four days after it was due. Pursuant to the Administrative Procedure Act, I would respectfully request Your Honor's indulgence in the grant of an enlargement of time.

Thank you for your courtesies.

Respectfully,  
  
HUGH A. DONAGHUE

\*\*\*\*\*  
\*\*\* FAX RX REPORT \*\*\*  
\*\*\*\*\*

297

RECEPTION OK

JOB NO.	9620
DESTINATION ADDRESS	UNKNOWN
PSWD/SUBADDRESS	
DESTINATION ID	
ST. TIME	10/29 16:02
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PGS.	1
RESULT	OK

Oct 28 1 40 PM 2009

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

---

Hugh and Denise Donaghue )  
Petitioner )

vs. )

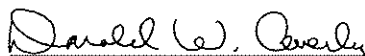
N. C. Department of Environment and )  
Natural Resources, Div of Coastal Management )  
Respondent )

**ORDER**

---

Having considered Respondent's request to disregard Petitioner's proposed decision, the undersigned DENIES the request.

This the 28th day of October, 2009.



---

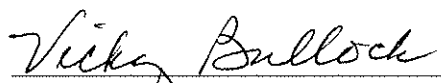
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Ward A. Zimmerman  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 28th day of October, 2009.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

***SECTION V***







A-1





A-2



PENGAD-Bayonne, N. J.  
PETITIONER'S  
EXHIBIT  
*No. A-3*





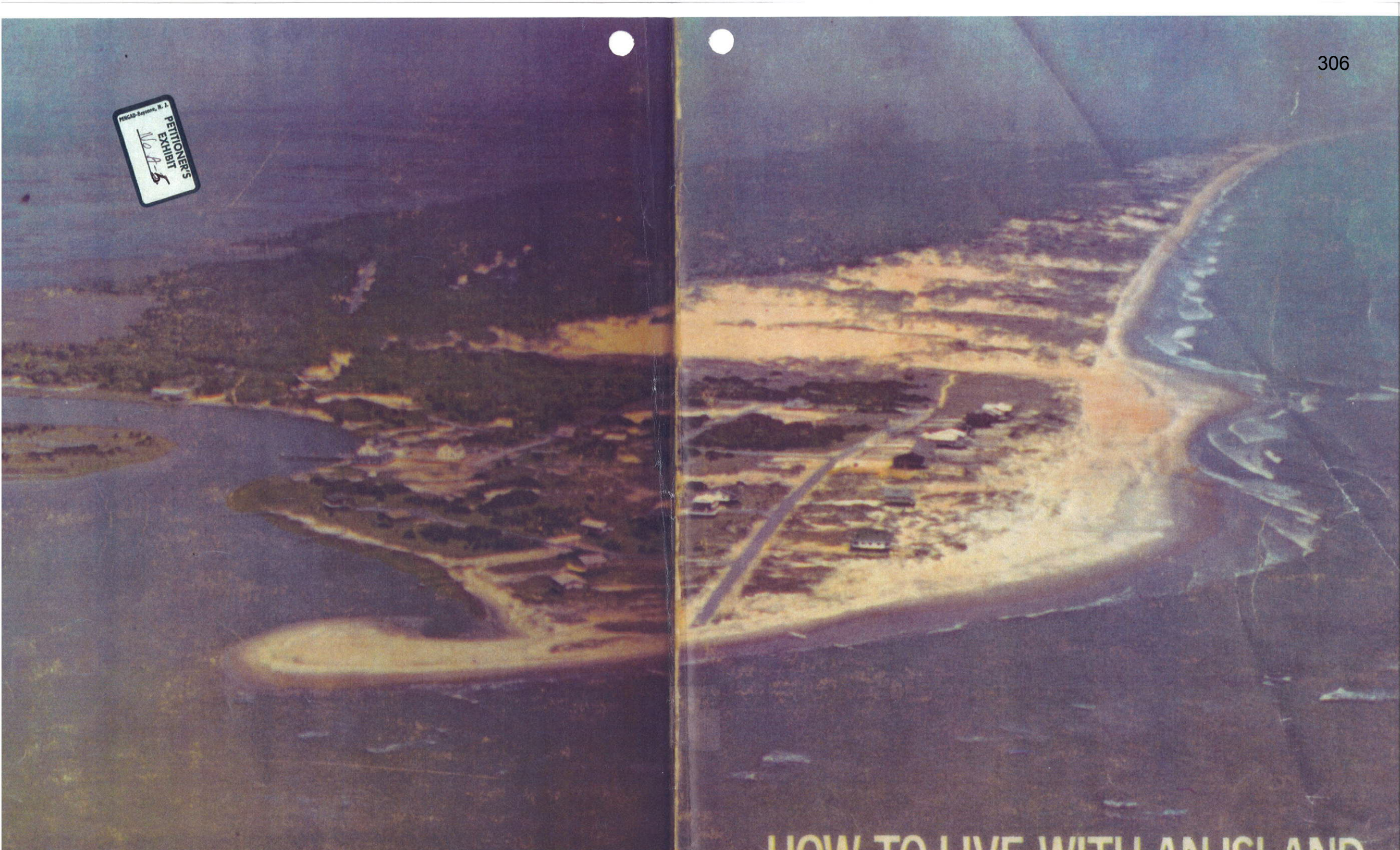
PENCAB-Boyonne, N. J.  
**PETITIONER'S  
EXHIBIT**  
No A-4

NC-2  
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708





PENGAD-Boyer, R. J.  
PETITIONER'S  
EXHIBIT  
*W.A.S.*



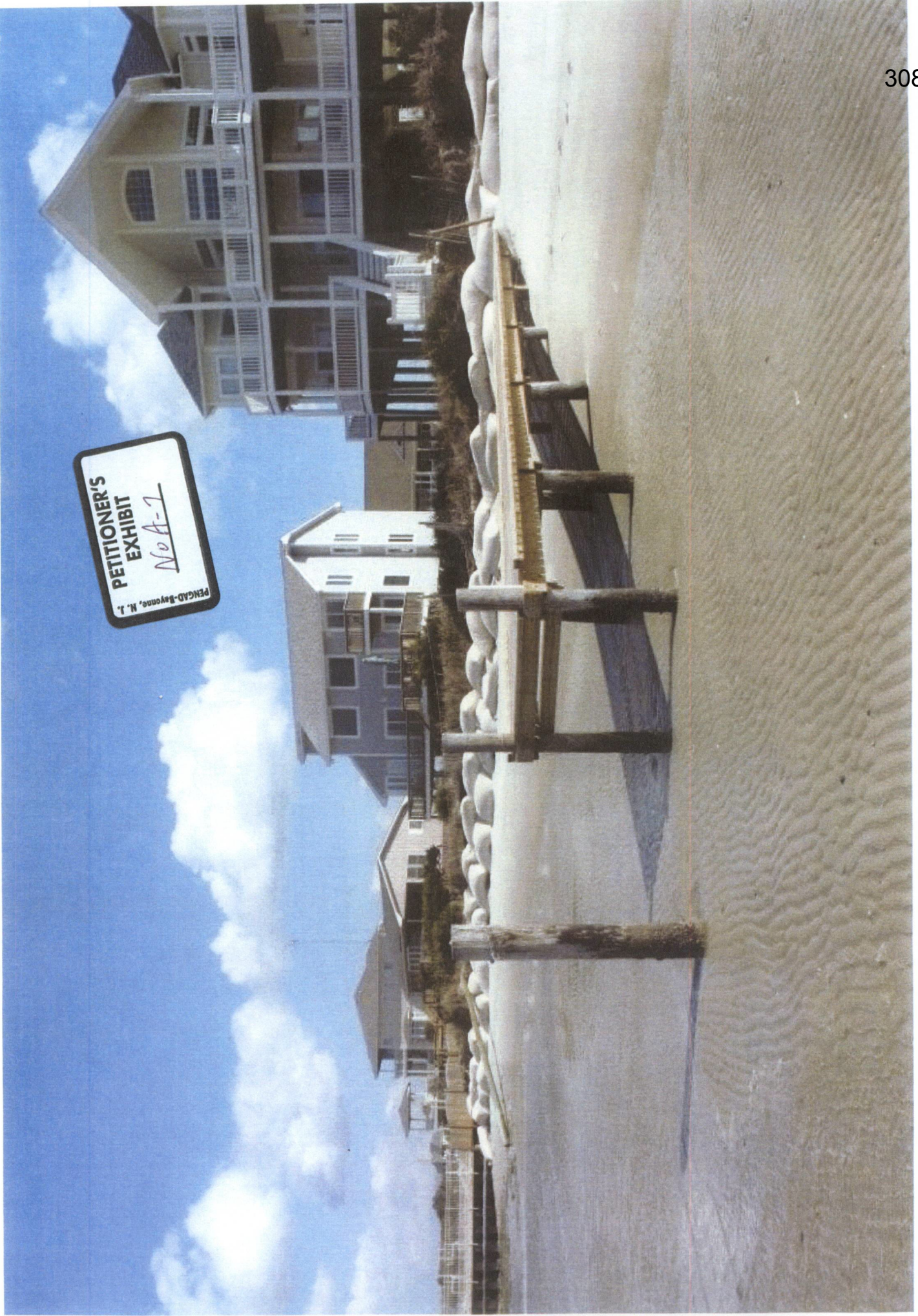
HOW TO LIVE WITH AN ISLAND



A-6







PETITIONER'S  
EXHIBIT  
*No A-1*  
PENGAD-Bayonne, N. J.





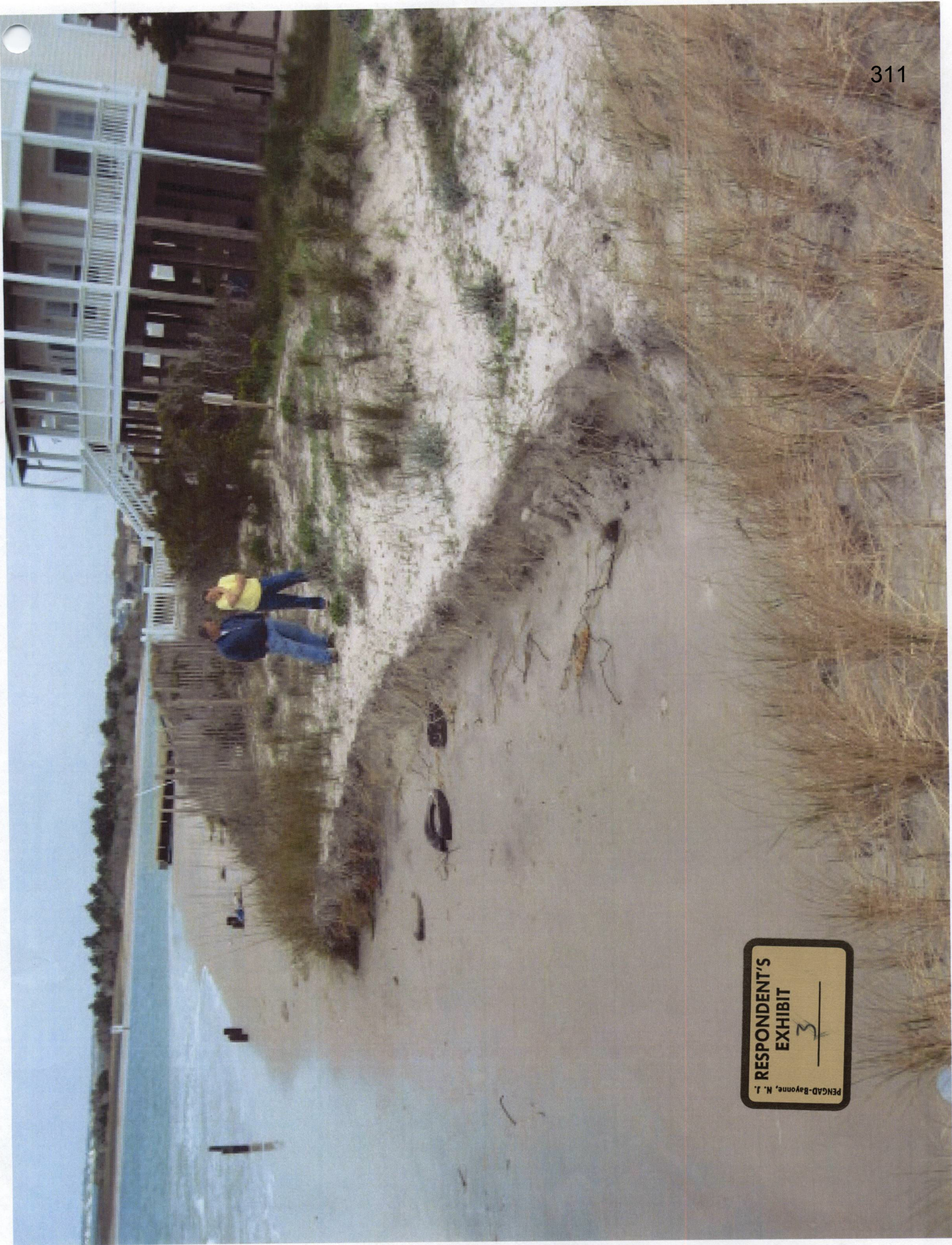
PENCAID-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT



PENGAD-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT  
2







PENGAD-Boyone, M. J.  
RESPONDENT'S  
EXHIBIT  
3





RESPONDENT'S  
EXHIBIT  
4  
PENGAD-Bayonne, N. J.



# CHART 1: AREAS OF ENVIRONMENTAL CONCERN UNDER THE COASTAL AREA MANAGEMENT ACT

## 1. THE ESTUARINE and OCEAN SYSTEM CATAGORIES

- (a) Coastal Wetlands \*
- (b) Estuarine Waters \*
- (c) Public Trust Areas \*
- (d) Coastal Shoreline \*

## 2. OCEAN HAZARD AREAS AECs

- (a) Ocean Erodible Area \*
- (b) High Hazard Flood Area \*
- (c) Inlet Hazard Area \*
- (d) Unvegetated Beach \*

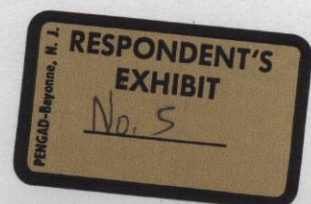
## 3. PUBLIC WATER SUPPLIES

- (a) Small Surface Supply Watersheds
  - Pond between Kill Devil Hills and Nags Head \*
  - Toomers Creek Watershed in Wilmington \*
- (b) Public Water Supply Well Field
  - Cape Hatteras Well Field \*

## 4. NATURAL AND CULTURAL RESOURCE AREAS

- (a) Areas that Sustain Remnant Species
- (b) Complex Natural Areas
- (c) Unique Geological Formations
  - Jockey's Ridge \*
- (d) Significant Archaeological Resources
  - Permuda Island \*
- (e) Significant Historic Architectural Resources

\* AECs that have been designated by the Coastal Resources Commission





CAMA /  DREDGE & FILL  
**GENERAL PERMIT**  
 New  Modification  Complete Reissue  Partial Reissue

11-1108 120  
 Previous permit # \_\_\_\_\_  
 Date previous permit issued \_\_\_\_\_

As authorized by the State of North Carolina, Department of Environment and Natural Resources and the Coastal Resources Commission in an area of environmental concern pursuant to 15A NCAC 7A 1700  Rules attached.

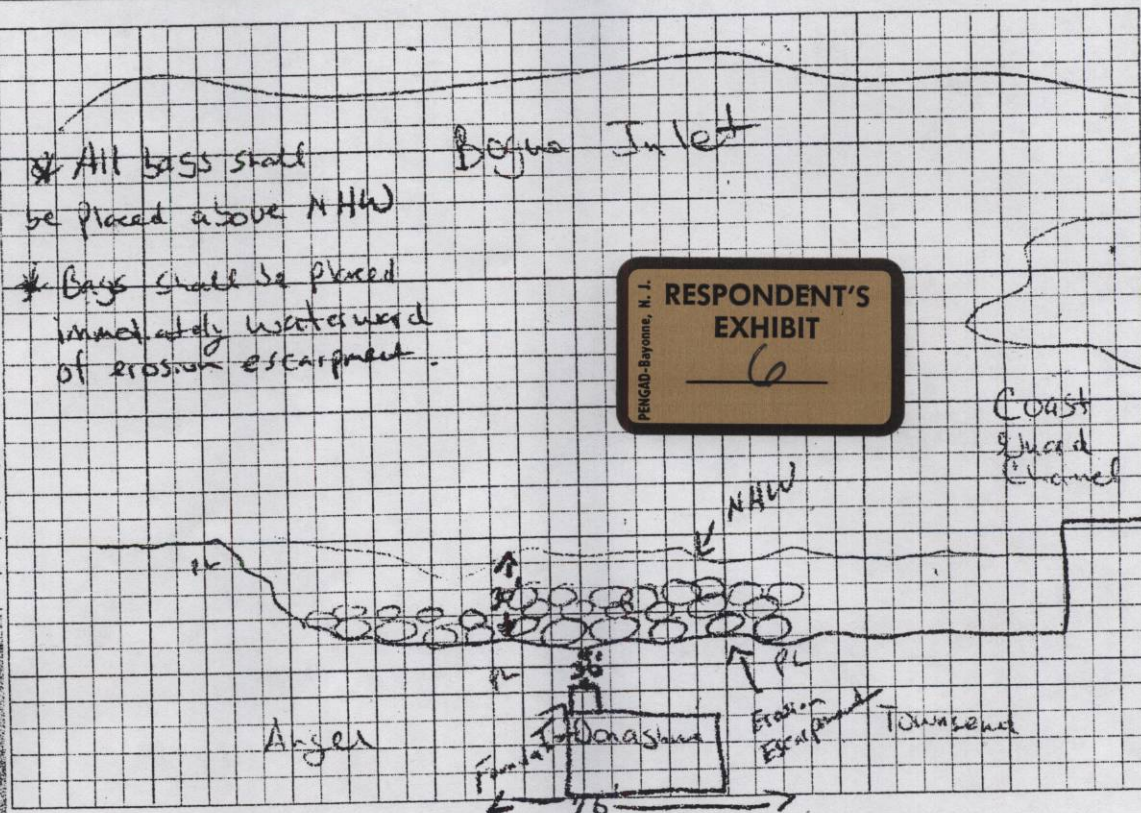
Applicant Name Hugh Danahue  
 Address 4 Pheasant Lane  
 City Chadds Ford State PA ZIP 19317  
 Phone # ( ) Fax # ( )  
 Authorized Agent \_\_\_\_\_

Project Location: County Carteret  
 Street Address/ State Road/ Lot #(s) 115 Bogue Court  
 Subdivision \_\_\_\_\_  
 City Emerald Isle ZIP \_\_\_\_\_  
 Phone # ( ) River Basin White Oak  
 Adj. Wtr. Body Atlantic Ocean (nat./man./unkn)  
 Closest Maj. Wtr. Body Atlantic Ocean

Affected AEC(s):  CW  EW  PTA  ES  PTS  
 OEA  HHF  IH  UBA  N/A  
 PWS: \_\_\_\_\_  FC: \_\_\_\_\_  
 ORW: (yes) no PNA yes / (no) Crit.Hab. yes / no

Type of Project/ Activity Install Sandbags (Scale: MTS )

- Pier (dock) length \_\_\_\_\_
- Platform(s) \_\_\_\_\_
- Finger pier(s) \_\_\_\_\_
- Groin length \_\_\_\_\_  
number \_\_\_\_\_
- Bulkhead/ Riprap length \_\_\_\_\_  
avg distance offshore \_\_\_\_\_  
max distance offshore \_\_\_\_\_
- Basin, channel \_\_\_\_\_  
cubic yards \_\_\_\_\_
- Boat ramp \_\_\_\_\_
- Boathouse/ Boatlift \_\_\_\_\_
- Beach Bulldozing \_\_\_\_\_
- Other Sandbags  
76'-L 20'-W  
6'-H
- Shoreline Length 76'
- SAV: not sure yes (no)
- Sandbags: not sure (yes) no
- Moratorium: n/a yes (no)
- Photos: yes (no)
- Waiver Attached: yes (no)



A building permit may be required by: Emerald Isle  See note on back regarding River Basin rules.

Notes/ Special Conditions 1) No sandbag shall be placed more than 20' from the erosion escarpment. 2) The height of the sandbags shall not exceed 6' as measured from the base of any sandbag. 3) Sandbags may remain until 11/10/10 unless allowed to remain by rule.

Agent or Applicant Printed Name Robert S. Townsend  
 Signature [Signature] \*\* Please read compliance statement on back of permit \*\*  
 Application Fee(s) 400 Check # 1706

Permit Officer's Signature [Signature]  
 Issuing Date 11-10-08 Expiration Date 3-10-09  
 Local Planning Jurisdiction Emerald Isle River File Name L092914B



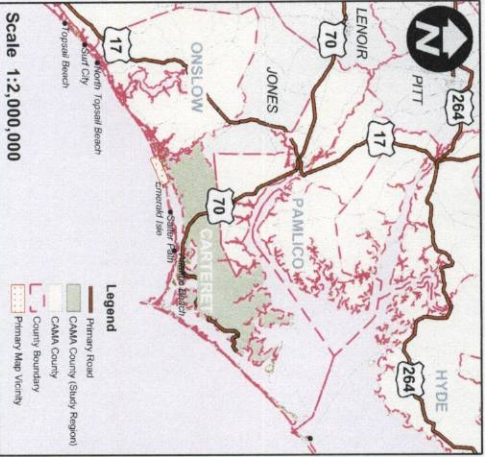


# Bogue Banks at Emerald Isle

## Long-Term Average Annual Shoreline Change Study & Setback Factors

Updated Through 1998

### REGIONAL MAP



North Carolina  
Division of Coastal Management

This map is for general information only. The map illustrates average rates of shoreline change over approximately 50 years. The information presented here is not predictive nor does it reflect the short-term erosion that occurs during storms. This map may not be suitable for property-specific determination of erosion rate factors due to its small scale. For a site-specific determination contact your CAMA Local Permit Officer or the regional field office of the North Carolina Division of Coastal Management.

**Funding for this project was provided by:**  
National Oceanic and Atmospheric Administration, Federal Emergency Management Agency, and North Carolina Division of Emergency Management

**1998 Long-term average annual shoreline change rate developed by:**  
NC State University's Kenan Natural Hazards Mapping Program and North Carolina Division of Coastal Management

**For more information contact:**

NC Division of Coastal Management:

1638 Mail Service Center  
Raleigh, NC 27689-1638  
(919) 733 - 2293

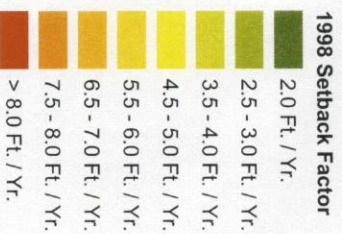
Or visit:

[www.nccoastalmanagement.net](http://www.nccoastalmanagement.net)



#### How to read Setback Factors

2.0 → "2.0" Indicates a 1998 Setback (Erosion) Factor of 2.0 Feet / Year



#### Legend

- Inlet Hazard Area (Slight color transparency)
- Inlet Hazard Area Boundary
- Setback Factor Boundary
- Roads

This general area has been influenced by beach nourishment either for beach protection or dredge disposal. This action artificially lowers the erosion rate in this area.



1984

PENCAD-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT





PENGAD-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT  
9

317

1989







1995

RESPONDENT'S  
EXHIBIT  
10  
PENGA-D-Boyone, N. I.



PENGAD-Beyonne, N. J.  
RESPONDENT'S  
EXHIBIT  
VI

2000

6





PENGAD-Beyonne, N. J.  
RESPONDENT'S  
EXHIBIT  
12

2006



8-8064





205

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

Michael F. Easley, Governor

James H. Gregson, Director

William G. Ross Jr., Secretary

**NOTICE OF VIOLATION**

December 31, 2008

**CERTIFIED MAIL 70042890000380419724**  
**RETURN RECEIPT REQUESTED**



Hugh Donahue  
4 Pheasant Lane  
Chadds Ford, PA 19317

**RE: NOTICE OF VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT**  
**CAMA VIOLATION #09-02 C**

Dear Mr. Donahue:

This letter confirms that on September 29<sup>th</sup>, 2008, Jonathan Howell, Field Representative, was onsite at your property located at 115 Bogue Court adjacent to the Atlantic Ocean located in or near the Town of Emerald Isle, off Bogue Court, Carteret County, North Carolina. The purpose of the visit was to investigate unauthorized development of a pier in the Ocean Hazard AEC within the Atlantic Ocean.

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA). No person may undertake Major Development in a designated Area of Environmental Concern (AEC) without first obtaining a permit from the North Carolina Department of Environment and Natural Resources. This requirement is imposed by North Carolina General Statute (N.C.G.S.) 113A-118.

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6 1/2' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this **Notice of Violation** for violation of the Coastal Area Management Act.

I request that you immediately **CEASE AND DESIST** any further development and contact me about this matter. A civil assessment of up to \$10,000 plus investigative costs may be assessed against any violator. Each day that the development described in this Notice is continued or repeated may constitute a separate violation that is subject to an additional assessment of \$10,000. An injunction or criminal penalty may also be sought to enforce any violation in accordance with N.C.G.S. 113A-126.

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

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It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. This is done to recoup some of the costs of investigating the violation and/or to compensate the public for any damage to its natural resources. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them.

Based upon the North Carolina Administrative Code, Title 15A, Subchapter 07H. State Guidelines for Areas of Environmental Concern, the activity you have undertaken, constructing a pier in the Ocean Hazard and Inlet Hazard AEC(s), is not consistent with Section 15A NCAC 07H .0306, which prohibits structures to be located seaward of the oceanfront setback requirements unless they are consistent with 15A NCAC 07H .0309 . Therefore, I am requesting that the constructed pier be removed. Please refer to the enclosed Restoration Agreement.

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

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

Thank you for your time and cooperation in resolving this important matter. If you have any questions about this or related matters, please call me at (252) 808-2808. Upon completion of the restoration as requested in the Restoration Plan Agreement to the satisfaction of the Division of Coastal Management, you will be notified as to the amount of the civil assessment for undertaking development without first obtaining the proper permit(s) and development that is inconsistent with Coastal Resources Commission rules.

Sincerely,



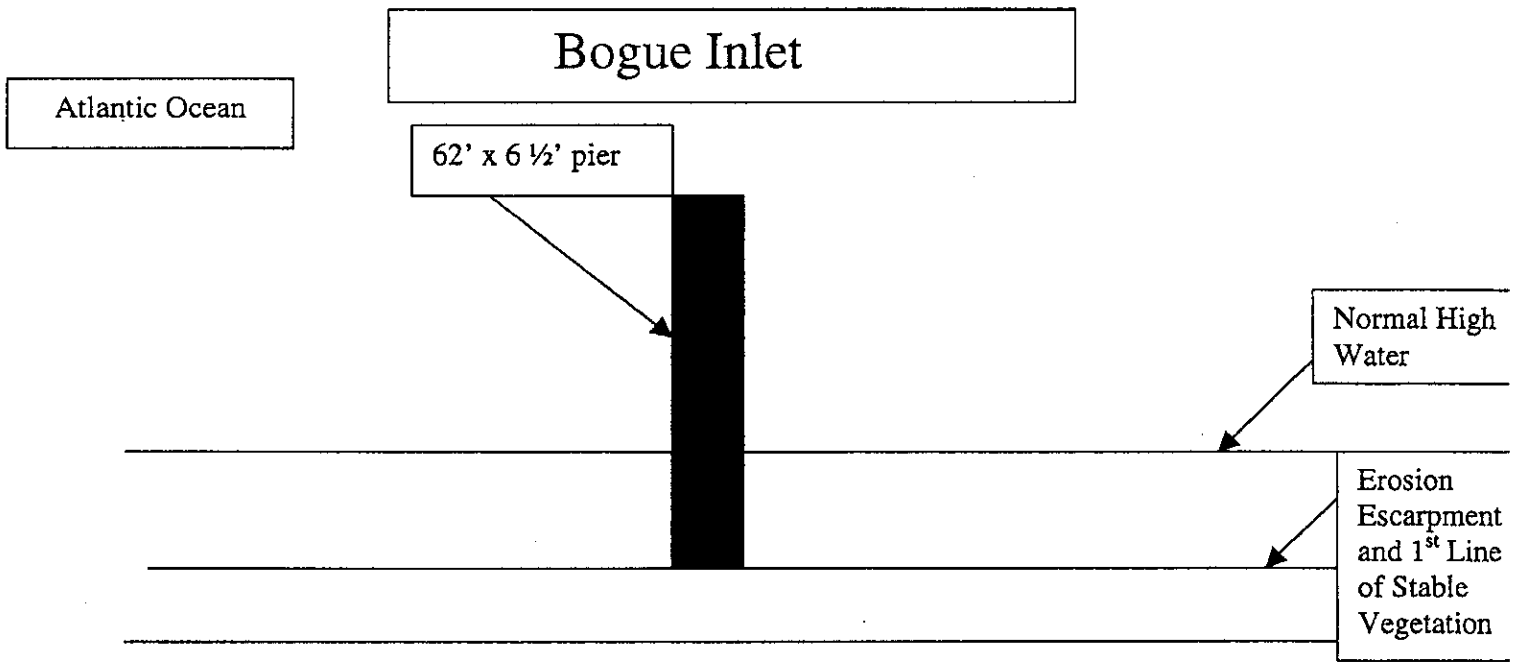
Jonathan Howell  
Coastal Management Representative

Cc: [REDACTED] Assistant Director, DCM  
Tere Barrett, District Manager, DCM  
[REDACTED] Compliance Coordinator, DCM  
Barry Guthrie, Field Representative, DCM

ENCLOSURE

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

**RESTORATION PLAN**  
For  
Donahue Property  
CAMA Violation No. ENTER CASE NO. 09-020  
Property located at 115 Bogue Court, Carteret County



I, Hugh Donahue, agree to remove the pier constructed on my property.

I agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by January 31, 2009, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

*It is the policy of the Coastal Resources Commission to assess a civil penalty plus investigative costs against all violations. The amount assessed will depend upon several factors, including the nature and area of the resources that were affected and the extent of the damage to them. If restoration is not undertaken or satisfactorily completed, a substantially higher civil assessment will be levied and an injunction sought to require restoration.*

400 Commerce Avenue, Morehead City, North Carolina 28557  
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North Carolina Department of Environment and Natural Resources  
Division of Coastal Management

Beverly Eaves Purdue, Governor

James H. Gregson, Director

Dee Freeman, Secretary

NOTICE OF CONTINUING VIOLATION  
March 2, 2009

CERTIFIED MAIL 7007 3020 0001 9679 6050  
RETURN RECEIPT REQUESTED

Hugh Donahue  
4 Pheasant Lane  
Chadds Ford, PA 19317



**RE: NOTICE OF CONTINUING VIOLATION AND REQUEST TO CEASE UNAUTHORIZED DEVELOPMENT - CAMA VIOLATION #09-02C**

Dear Mr. Donaghue:

This letter is in reference to the Notice of Violation that was issued to you on December 31, 2008 by the North Carolina Division of Coastal Management for unauthorized development in violation of the Coastal Area Management Act (CAMA). The violation occurred onsite your property located at 115 Bogue Court, in the community of Emerald Isle, Carteret County, North Carolina.

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA). No person may undertake Major Development in a designated Area of Environmental Concern (AEC) without first obtaining a permit from the North Carolina Department of Environment and Natural Resources. This requirement is imposed by North Carolina General Statute (herein abbreviated N.C.G.S.) 113A-118.

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6.5' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this **Notice of Violation** for violation of the Coastal Area Management Act.

I request that you immediately **CEASE AND DESIST** any further unauthorized activities within designated Areas of Environmental Concern. A civil assessment of up to \$10,000 may be assessed against any violator. Each day that the development described in this notice is continued or repeated may constitute a separate violation that is subject to an additional assessment of up to \$10,000. An injunction or criminal penalty may also be sought to enforce any violation (N.C.G.S. 113A-126).

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


It is the policy of the Coastal Resources Commission to levy a civil assessment not to exceed \$10,000 plus investigative costs against all violations. This is done to recoup some of the costs of investigating violations and/or to compensate the public for any damage to its natural resources. Whether a higher amount will be assessed depends on several factors, including the nature and area of the resources that were affected and the extent of the damage to them.

Please be advised that as of this date, site inspections indicate corrective actions have not been taken to complete the restoration requested in the December 31, 2008 Notice of Violation. Based upon the following, I conclude this matter to be a continuing violation of the Coastal Area Management Act.

In accordance with the N.C. Administrative Code, Subchapter 7J.0409(g)(4)(F)(ii), you may be subject to an additional daily penalty starting from the date specified in the Notice of Violation and continue until the Division's order is satisfied; or you enter into good faith negotiations with the Division; or you contest the Division's order in a judicial proceeding by raising a justiciable issue of law or fact. A court order may also be sought for an injunction to require restoration as described above.

Please call me at (252) 808-2808 should you decide to enter into good faith negotiations in resolving this matter. I am available to meet with you onsite to discuss the requested restoration measures. Upon completion of the restoration order, you will be notified as to the amount of a civil assessment for the activity described herein.

Sincerely,



Jonathan Howell  
Coastal Management Representative

Cc: [REDACTED] Assistant Director, DCM  
Tere Barrett, District Manager, DCM  
[REDACTED] Compliance Coordinator, DCM  
Barry Guthrie, Field Representative, DCM

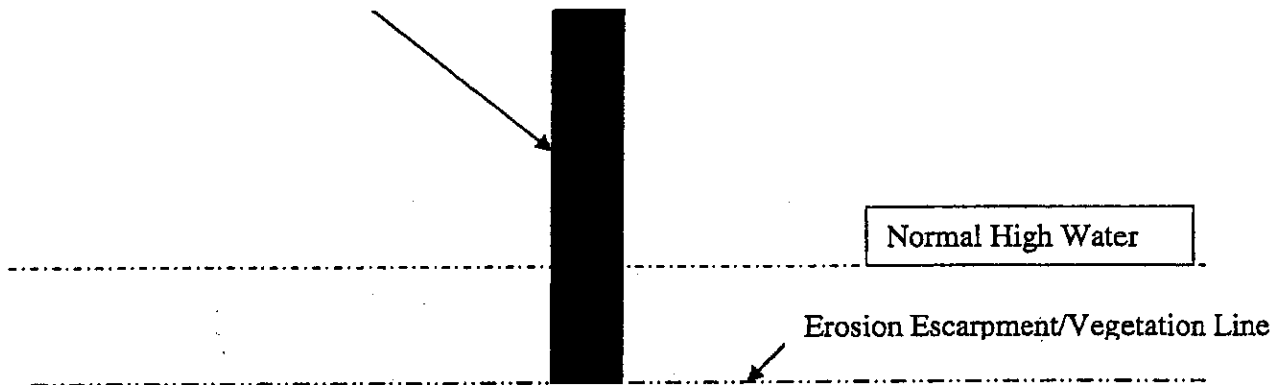
ENCLOSURE

**RESTORATION PLAN**  
For  
Mr. Hugh Donaghue Property  
CASE NUMBER: 09-02C  
Property located at 115 Bogue Court, Emerald Isle, Carteret County

Bogue Inlet /Atlantic Ocean

Not to Scale

Remove 62' x 6.5' unauthorized pier



I, Hugh Donaghue, agree to remove the unauthorized pier constructed on my property.

I agree to complete this restoration to the satisfaction of the Division of Coastal Management (DCM) by March 23, 2009, or provide an explanation for non-compliance and a reasonable request for time extension. When corrective actions are complete, I will notify the DCM so the work can be inspected.

SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

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

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LAW OFFICES  
DONAGHUE & LABRUM, LLP  
13 WEST THIRD STREET  
MEDIA, PENNSYLVANIA 19063-2820

HUGH A. DONAGHUE  
KATHRYN LABRUM  
MICHAEL B. EGAN

PH: (610) 565-9120  
FX: (610) 565-3037  
info@donaghuelabrum.com

January 14, 2009

SENT CERTIFIED MAIL #70081140000439809774  
RETURN RECEIPT REQUESTED

Mr. Jonathan Howell  
Coastal Management Representative  
NCDENR  
400 Commerce Avenue  
Morehead City, NC 28557



RECEIVED

JAN 20 2009

Morehead City DCM

**Re: Notice of Violation and Request to Cease Unauthorized Development  
CAMA Violation #09-02**

Dear Mr. Howell:

Thank you for your letter dated December 31, 2008, which I received on January 10, 2009, and have just finished reviewing. I believe that you have not been provided with certain facts essential to your conclusion that I undertook "unauthorized development of a pier" ... by "constructing a 62' x 6 1/2' pier on the aforementioned property."

As state and federal records, including aerial photographs, will demonstrate, the dock on my property was constructed years ago by a prior owner. When I purchased the property, the dock was a walkway, over sand and almost level with the sand for its entire length (see pre-Wilma Google photographs attached hereto). Hurricane Wilma opened a channel behind my house near the end of the old pier, and then the Army Corp of Engineers damaged the decking as well as destroyed or damaged the farthest three pilings, while dredging the new channel.

I repaired ONLY the decking on the dock, and, in fact, placed decking only as far as the undamaged pilings (i.e., four former pilings were not covered with decking).

15A NCAC 07J. 0210 provides that:

"Repair of structures damaged by natural element ... or normal deterioration is not considered development and shall not require CAMA permits."

As you aware, Subsection 2, which controls the determination for water dependent structures such as a dock provides:



Mr. Jonathan Howell  
January 14, 2009

Page 2

“WATER DEPENDENT STRUCTURES. The proposed work is considered replacement if it enlarges the existing structure. The proposed work is also considered replacement if:

(a) in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition. Water dependent structures that are structurally independent from the principal pier or dock, such as boatlifts or boathouses, are considered as separate structures for the purpose of this Rule;

(b) in the case of boat ramps and floating structures such as docks, piers, platforms, and modular floating systems, more than 50 percent of the square feet area of the structure must be rebuilt in order to restore the structure to its pre-damage condition;

(c) in the case of bulkheads, seawalls, groins, breakwaters, and revetments, more than 50 percent of the linear footage of the structure must be rebuilt in order to restore the structure to its pre-damage condition.”

My repairs cannot be considered “replacement” as no pilings were replaced and the deck was shortened. Nor do my repairs fall under Subsection (a) since I replaced NONE of the framing or structural components.

Similarly, my repairs do not fall under Subsection (b) since the dock was not a boat ramp or floating structure.

Subsection (c) is also inapplicable since my dock was not a bulkhead, seawall, groin or similar structure.

Moreover, pursuant to your enabling statute, a permit is required for “**development**”, whether minor or major, under the Act, §113-A-118(a). “Development”, however, is defined by §113a-103(5) as:

“any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision) involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any

Mr. Jonathan Howell  
January 14, 2009

Page 3

sound, bay, river, creek, stream, lake, or canal; or placement of a floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5)."

See also: §113A-128.

Hopefully, the enclosed pictures (I apologize for the poor quality, but it is the best I could print) and above references are sufficient to establish that I simply undertook minor repairs (decking) to a pre-existing dock and thus did not require a permit and did not violate NCGS 113A-118.

I would be pleased to discuss this with you at your convenience, but would respectfully request that you withdraw CAMA Violation #09-02 immediately. In the alternative, if the violation notice is not withdrawn, I would request that you immediately forward by facsimile to (610) 565-3037 an explanation of my appeal rights and all necessary forms and addresses.

Very truly yours,



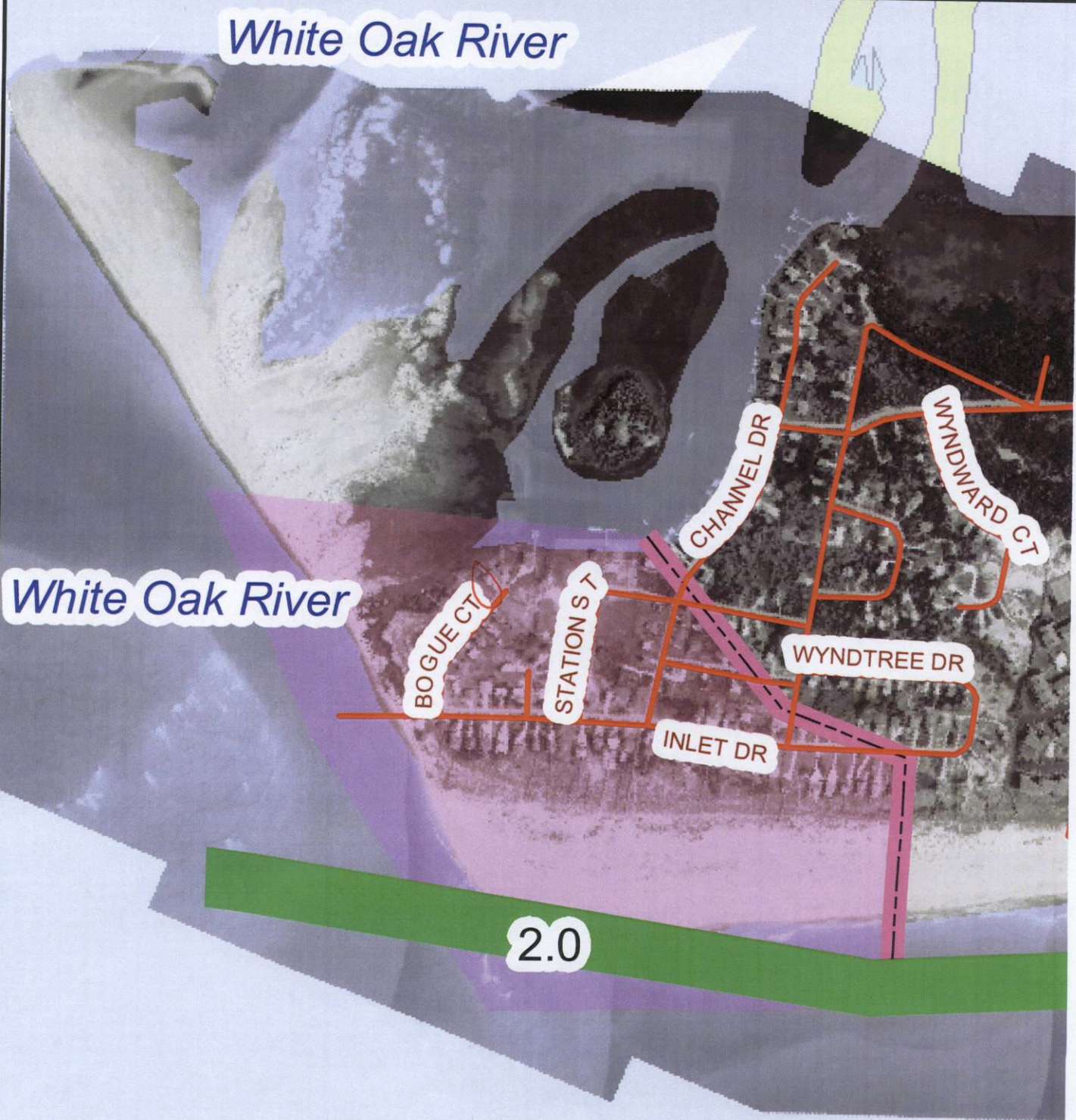
HUGH A. DONAGHUE

HAD/mc  
Enclosures

Google  
Maps



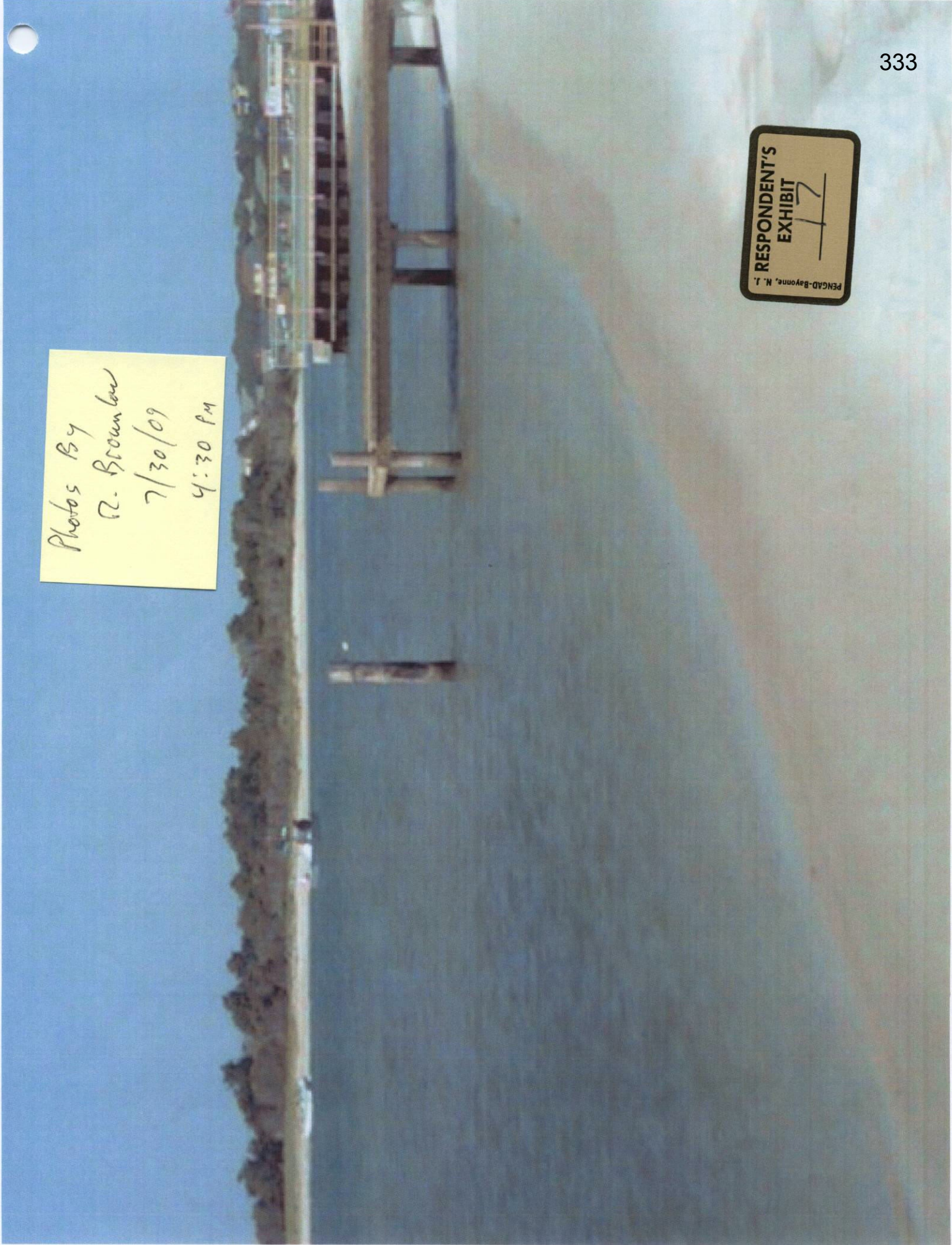




PENGAD-Bayonne, N. J. RESPONDENT'S EXHIBIT  
16



Photos By  
R. Brownlow  
7/30/09  
4:30 PM

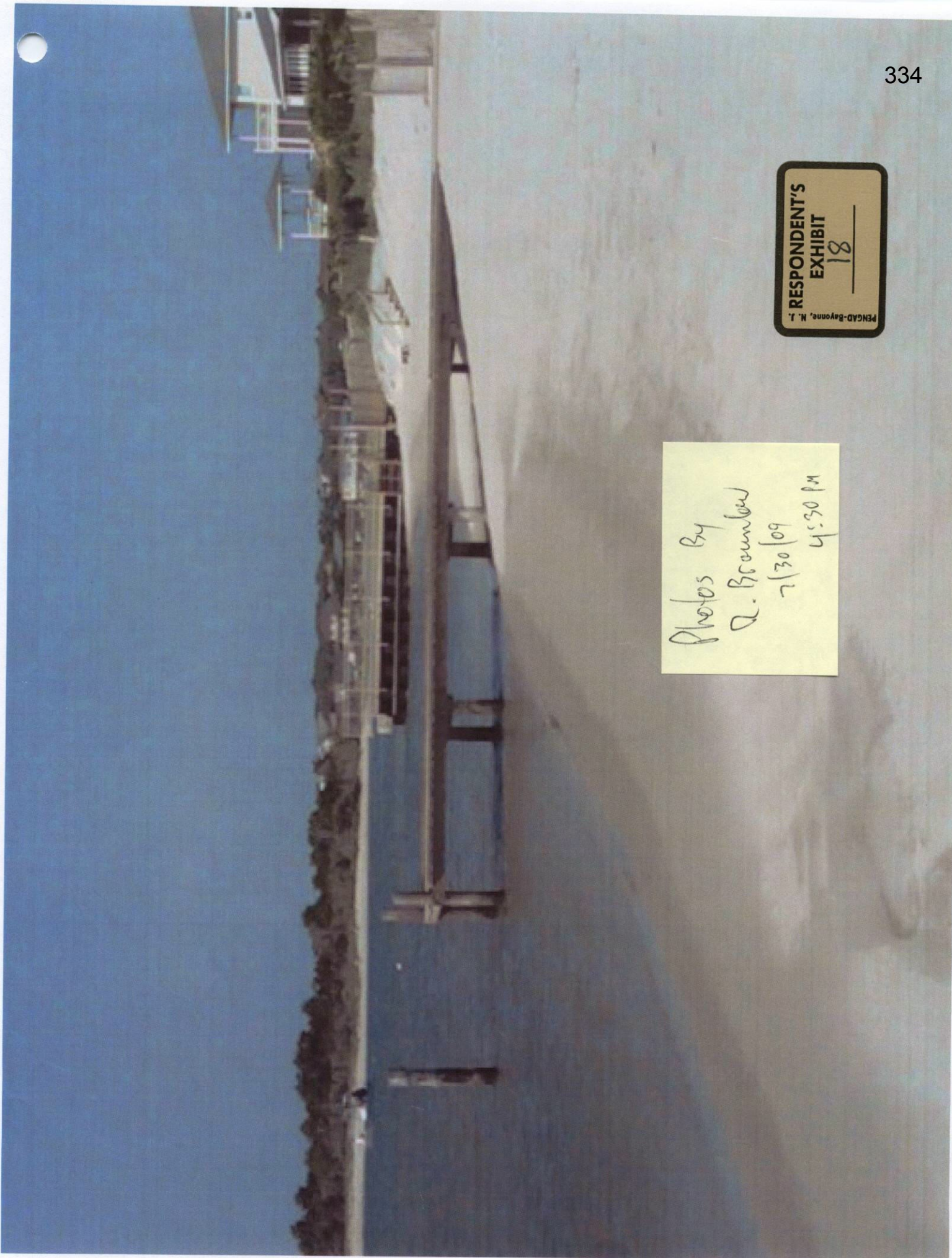


PENGAD-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT  
17

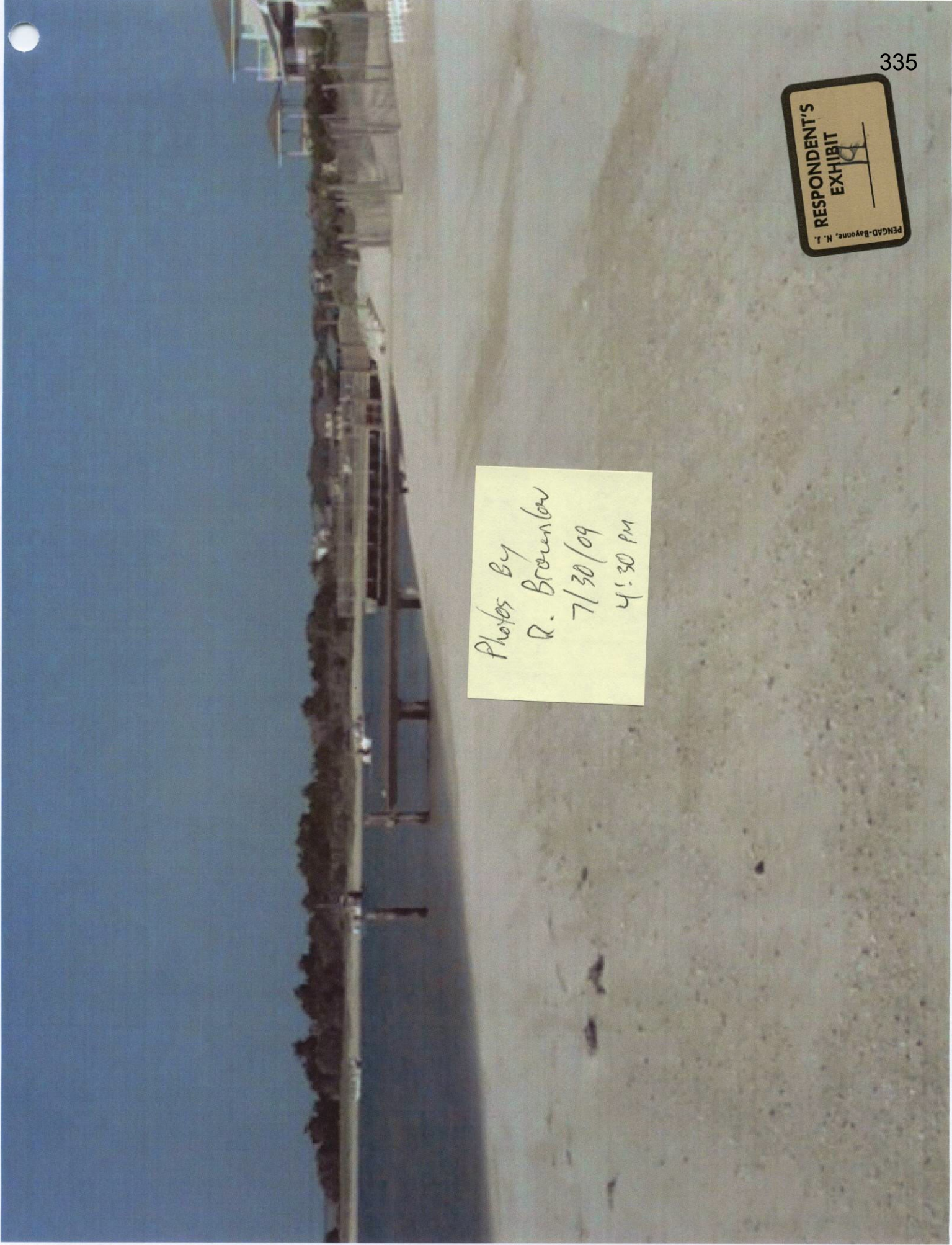


PENGLAD-BAYONNE, N. J.  
RESPONDENT'S  
EXHIBIT  
18

Photos by  
A. Brantley  
7/30/09  
4:50 PM





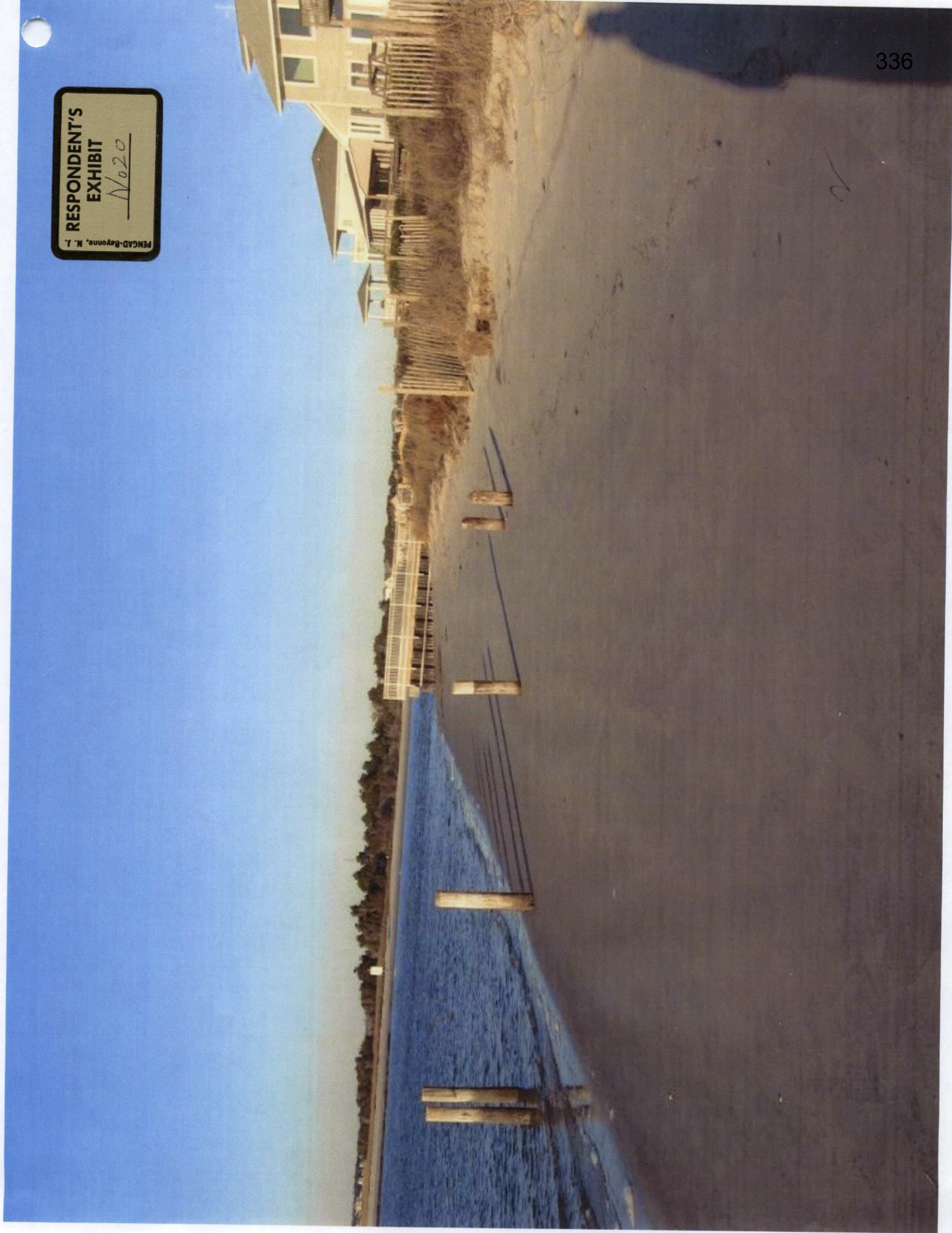


Photos by  
R. Brownlow  
7/30/09  
4:30 PM

PENGAD-Bayonne, N. J.  
RESPONDENT'S  
EXHIBIT  
8



RESPONDENT'S  
EXHIBIT  
No 20  
FENGAD-Byonne, M. I.



***SECTION VI***

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

---

Hugh and Denise Donaghue )  
 Petitioner, )  
 )  
 v. )  
 )  
 N. C. Department of Environment and )  
 Natural Resources, Div of Coastal Management )  
 Respondent. )

---

**ORDER FOR MEDIATED  
 SETTLEMENT CONFERENCE  
 G.S. 150B-23.1  
 26 NCAC 03.0200**

IT IS ORDERED that this contested case be referred to a mediated settlement conference, which shall be completed on or before May 4, 2009.

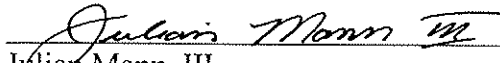
Within 21 days after the date of this Order, the parties may, by agreement, select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Within 21 days after the date of this Order, the Petitioner or Petitioner's attorney shall notify the presiding Administrative Law Judge of the selection of a certified mediator or the nomination of a non-certified mediator, or the failure of the parties to agree on a mediator as set out in 26 NCAC 03 .0202 (a) and (b). Notice shall be given on OAH form DESIGNATION OF MEDIATOR, H-08 (copy enclosed).

A Mediator selected by agreement of the parties shall be compensated at a rate agreed upon between the mediator and the parties. A mediator selected by the presiding Administrative Law Judge shall be compensated at the rate of \$125 per hour for time spent in the mediated settlement conference, to be billed in quarter hour segments. In addition, a \$125 preparation fee shall be paid unless a settlement agreement has been finalized and the conference is canceled by the parties, and the mediator is notified thereof, more than seven (7) calendar days before the conference date.

Unless otherwise agreed to by the parties or ordered by the presiding Administrative Law Judge, all mediator fees shall be paid directly to the mediator at the conclusion of the settlement conference. The fee shall be paid as follows: one equal share by the Petitioner, one equal share by the Respondent, and one equal share by any Intervenor. Parties obligated to pay a share of the costs shall pay them equally.

The following persons shall physically attend the mediated settlement conference: (1) All individual parties; (2) For a corporate party, an officer, director or employee having authority to settle the contested case claim; (3) For a governmental party or agency, a representative of that governmental party or agency with full authority to negotiate on behalf of the party agency and to recommend settlement to the appropriate decision making body of the agency; and (4) The parties' counsel of record, if any.

This the 4th day of February, 2009.

  
 Julian Mann, III  
 Chief Administrative Law Judge

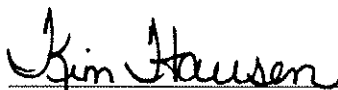
On this date mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Amanda Foster  
Department of Justice  
Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
RESPONDENT

This the 4th day of February, 2009.

Kim Hausen  
Chief Hearings Clerk



---

Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919/431-3000

Sep 17 10 27 AM 2009

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

---

Hugh and Denise Donaghue  
Petitioner

vs.

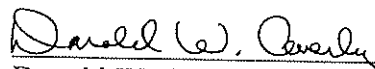
N. C. Department of Environment and  
Natural Resources, Div of Coastal Management  
Respondent

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
**ORDER**

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The parties in the above captioned case are ordered to submit proposed decisions to the undersigned on or before October 2, 2009.

This the 17th day of September, 2009.

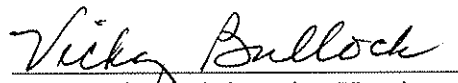
  
\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Ward A. Zimmerman  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 17th day of September, 2009.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

Oct 02 8 33 AM 2009

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CARTERET

09 EHR 0568

Hugh and Denise Donaghue  
Petitioner

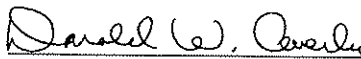
vs.

N. C. Department of Environment and  
Natural Resources, Div of Coastal Management  
Respondent

**ORDER**

At the parties' request, with good cause shown, the deadline to file proposed decisions in this matter is extended to and including October 19, 2009.

This the 2nd day of October, 2009.



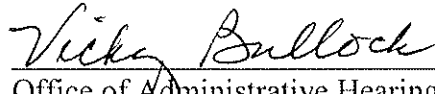
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Hugh and Denise Donaghue  
4 Pheasant Lane  
Chadds Ford, PA 19317  
PETITIONER

Ward A. Zimmerman  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 2nd day of October, 2009.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100



FEB 16 2010

Morehead City DCM

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICEROY COOPER  
ATTORNEY GENERALP.O. BOX 629  
RALEIGH, NC 27602REPLY TO:  
WARD ZIMMERMAN  
TEL: (919) 716-6600  
FAX: (919) 716-6767  
wzimmerman@ncdoj.gov

February 12, 2010

Mr. James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557Re: *Hugh and Denise Donaghue v. NCDENR, DCM* (09 EHR 0568)

Dear Mr. Gregson:

Please find enclosed Respondent's Objections and Exceptions to the ALJ Decision, which is respectfully submitted in accordance with the letter of CRC Counsel Jennie Wilhelm Hauser dated January 20, 2010, asking that parties file any exceptions to the ALJ's Decision by February 12, 2010. In addition, Respondent requests oral argument.

If you have any questions, or need anything further, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Ward Zimmerman".

Ward Zimmerman  
Assistant Attorney Generalcc: Hugh and Denise Donaghue, Petitioners  
Jennie Hauser, Special Deputy Attorney General & CRC Counsel  
DCM Staff

Attachment (1)

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

BEFORE THE COASTAL  
RESOURCES COMMISSION  
09 EHR 0568

RECEIVED  
FEB 16 2010  
Morehead City DCM

HUGH AND DENISE DONAGHUE,  
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF COASTAL  
MANAGEMENT,

Respondent.

**RESPONDENT'S OBJECTIONS  
AND EXCEPTIONS TO  
THE ALJ DECISION**

NOW COMES the Respondent, the North Carolina Department of Environment and Natural Resources (DENR), Division of Coastal Management (DCM), by and through the undersigned, pursuant to N.C. Gen. Stat. § 150B-36, and files these objections and exceptions to the Decision by the Administrative Law Judge (ALJ) in the above-captioned matter.

**SUMMARY OF ISSUES BEFORE THE CRC**

This is a contested case about the unpermitted development of a pier on a residential property adjacent to Bogue Inlet. This property is classified as an Ocean Hazard AEC and is, thus, regulated by CAMA. Any development in this AEC requires a CAMA permit. Petitioners neither sought, nor were issued or denied, a CAMA permit. Upon becoming aware of this unpermitted development, DCM issued Petitioners a Notice of Violation (NOV) and a subsequent Continuing Notice of Violation (CNOV) for violating CAMA.

Petitioners made the claim that the reconstructed 62-foot long pier was merely "repair" of the previously-existing 100-foot long pier, rather than "replacement" as defined under 15A

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NCAC 7J.0210. This is an important distinction. For “replacement” requires a CAMA permit; “repair” does not. 15A NCAC 7J.0210(2)(a) sets forth a method for determining classification:

[Construction of water dependent structures is considered replacement] if in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition.

In the present case it is clear that more than 50 percent of the framing and structural components of a previously-existing pier were replaced. First, there is undisputed evidence that the original pier was 100 feet in length. (T pp. 68-69) Second, there is undisputed evidence that nearly all of the horizontal framing and structural components of the original pier were removed by Petitioner. (T pp. 102-103; Exhibits 1 – 4) Third, there is undisputed evidence that the current rebuilt pier is 62 feet in length. (T pp. 62, 92)

Moreover, the length of the original structure is the gauge upon which to measure the “50 percent” rule set forth in 15A NCAC 7J.0210(2)(a). This rule is explicit in that the structure be “rebuilt in order to restore the structure to its pre-damaged condition.” As DCM’s Assistant Major Permits Coordinator Jonathan Howell explained at the hearing: in the instance of an original 100 foot-long pier, “he couldn’t replace up to forty-nine [feet] because you have to replace the structure in its entirety, and then base your fifty percent determination off of that structure.” (T pp. 97-98) The policy behind such a rule is to ensure against the hypothetical situation of someone wanting a new dock, but not wanting to seek a CAMA permit; tearing down an old dock that, for example, measured 100 feet in length; and building a new dock on the footprint of the old dock that measures 49 feet in length, claiming protection under the “50 percent” rule. Such an example is a clear subversion of the intent of 15A NCAC 7J.0210. Here, Petitioners replaced 62 feet of an original 100 foot-long pier, without seeking a CAMA permit,

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and are thus in violation of CAMA for conducting unpermitted development.

Another underlying issue concerns the claim that the examples of possible “framing and structural components” set forth in 15A NCAC 7J.0210(2)(a)—“beams, girders, joists, stringers, or pilings”—are an exhaustive list. Petitioners and the ALJ argue that all other framing and structural components not on this list, such as decking, should be excluded in making the “50 percent” determination. Respondent argues that such a reading is illogical. For 15A NCAC 7J.0210(2)(a) deals with “fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings.” Among this list of potential water dependant structures, there is great variance as to what is physically needed to build these structures. The “framing and structural components” for, say, a simple platform are very different from those needed to construct a boathouse or boatlift. In regard to these latter two water dependant structures, “framing and structural components” such as walls, bracing (including decking), roofs, and the machinery of a boatlift are necessary, yet not included in the enumerated list. To limit the building components to those specifically listed in the rule, would make the rule unworkable. Therefore, this list of five potential framing and structural components must be taken as a list of potential examples, and nothing more.

Therefore, based upon the fact that a CAMA permit has been neither sought by, nor issued or denied to Petitioners for the development of the pier at issue in this matter, the NOV and CNOV were properly issued by Respondent. More than 50 percent of the original structure was replaced.

***THE FOLLOWING IS POINT BY POINT ANALYSIS OF THE ALJ DECISION. Those paragraphs accepted are indicated by “No objection.” Those paragraphs to which an objection and exception is entered are indicated with an explanation for the objection in boldface type.***

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**ISSUE**

Did Respondent exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in applying N.C. Gen. Stat. § 113A-118 and Coastal Resources Commission Rule 15A NCAC 07J .0201 by issuing a Notice of Violation and a Continuing Notice of Violation to Petitioners as a result of work by Petitioners to an existing pier/dock/walkway without a permit from the Department of Environment and Natural Resources?

**No objection.**

**FINDINGS OF FACT**

**Applicable Statutes and Regulations**

1. Respondent is the North Carolina Department of Environment and Natural Resources, Division of Coastal Management (DCM). DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), which is found in Chapter 113A, Article 7 of the North Carolina General Statutes and various regulations promulgated pursuant to the Act by the Coastal Resources Commission (CRC) which are codified at Title 15A, Chapter 7 of the North Carolina Administrative Code.

**No objection.**

2. The CRC may “designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof.” N.C. Gen. Stat. § 113A-113 Pursuant to N.C. Gen. Stat. § 113A-113(a) and (b)(6), the CRC has designated the Ocean Hazard area as an Area of Environmental Concern (AEC) and has adopted use standards or state guidelines for development within them, located at 15A NCAC 07H.0300 *et seq.*

**No objection.**

3. 15A NCAC 07H.0304 provides that the ocean hazard system of AECs contains ocean erodible areas, high hazard flood areas, inlet hazard areas and unvegetated beach areas, and defines such area.

**No objection.**

4. Under CAMA, “development” in any AEC requires a permit. N.C. Gen. Stat. § 113A-118 N.C. Gen. Stat. § 113A-103(5) defines “development” as “any activity in a duly designated area of environmental concern . . . involving, requiring, or consisting of the construction or enlargement of a structure. . . .”

**No objection.**

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5. N.C. Gen. Stat. § 113A-103(5)(b)(5) further provides that activities in an AEC, including the subcategory of the Inlet Hazard Area at issue, that are merely “maintenance or repairs” rather than “replaces” an existing structure, then the work is not considered “development” and, thus, does not require a CAMA permit. 15A NCAC 7J.0210 is consistent with the language with the statute.

**No objection.**

6. Conversely, 15A NCAC 7J.0210(2) provides “[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits.” The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes replacement is:

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition. 15A NCAC 7J.0210(2)(a) [emphasis added].

**No objection.**

The Property

7. Petitioners own waterfront property at 115 Bogue Court, Emerald Isle, Carteret County, North Carolina, on the southwestern tip of the island facing Bogue Sound, an area commonly referred to as “the point.”

**No objection.**

8. Petitioners’ property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard AEC, as set forth in 15A NCAC 07H.0300 *et seq.*

**No objection.**

9. The pier/dock/walkway which is the subject of the notices of violation sent to Petitioners was originally erected on Petitioners’ property prior to 1975 and the enactment of CAMA.

**No objection.**

- 9a. **Respondent respectfully requests the insertion of the following Finding of Fact as follows: On or around August 2008, Petitioners completed work on a 62-foot by 6 ½-foot pier that extends perpendicular from the shoreline towards Bogue Sound. (T pp. 24, 69, 105)**

10. Petitioners’ pier/dock/walkway is a water dependent structure under the authority of 15A

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NCAC 7J.0210(2).

**No objection.** (T p. 31)

11. Respondent's uncontroverted evidence is that the pier/dock/walkway was originally 100 feet in length.

**No objection.**

12. The "point" area is a dynamic area. There have been times when there has been an extraordinary amount of sand build up. The entire channel has been closed off at times. The violent storms and hurricanes that buffet the North Carolina coast have a tremendous impact on the area. Hurricane Katrina reopened the channel and removed a tremendous amount of sand on and around Petitioners' property.

**Respondent agrees with the characterization of the property as dynamic in nature. However, Respondent objects and takes exception to any suggestion that past fluctuations in "sand build up" have been "extraordinary." Natural events such as "violent storms and hurricanes" are regular occurrences on the North Carolina coast. Such natural events are inherent conditions within Ocean Hazard AECs that possess "special vulnerability to erosion or other adverse effects of sand, wind, and water." 15A N.C. Admin. Code 07H.0301. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage. Id. Inlet hazard areas are natural hazard areas that are especially vulnerable to erosion, flooding, and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. The "point" fits this categorization and is classified as such.**

**Respondent also respectfully requests deletion of the final sentence regarding Hurricane Katrina due to relevancy.**

13. Sometime after 1984, the Coast Guard Channel adjacent to Petitioners' property began to fill with sand, which eventually covered the entire walkway/dock, leaving only a foot or two of the pilings showing above the sand.

**No objection.**

14. The North Carolina Department of Environment and Natural Resources, Division of Coastal Management, issued a permit in 2006-2007, to the owner of 119 Bogue Court to erect a bulkhead, the construction of which involved the placing of fill 35 feet out into the Coast Guard Channel in an area where the water was more than 20 feet deep, and the installation of sheet piling going into the ground in excess of 30 feet down.

**Respondent objects and excepts to this Finding of Fact and respectfully requests deletion of this Finding of Fact because of the following: DCM issued CAMA**

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**General Permit #47366 C for 260 feet of bulkhead at 119 Bogue Court, in Emerald Isle, North Carolina; the bulkhead was permitted at the normal high water line and was constructed along this alignment; and any subsequent erosion at the end along the wingwalls since construction was completed has not been measured.**

15. Representatives of the Division of Coastal Management met with Mr. Robert Townsend, the owner of 117 Bogue Court, on his property prior to the issuance of the permit for the bulkhead due to their concern about the erosive effect the construction of the bulkhead at 119 Bogue Court would have on Mr. Townsend's adjacent property.

**Respondent respectfully contends that this conclusion read:**

**Representatives of the Division of Coastal Management met with Mr. Robert Townsend, the owner of 117 Bogue Court, on his property prior to the issuance of the permit for the bulkhead due to Mr. Townsend's concern about the erosive effect the construction of the bulkhead at 119 Bogue Court would have on Mr. Townsend's property.**

16. As anticipated, the effect of the bulkhead approved and permitted by the Division of Coastal Management was to erode the rear of Mr. Townsend's property at 117 Bogue Court, creating a need for sandbags on those two properties.

**Respondent objects and excepts to this Finding of Fact and respectfully requests deletion of this Finding of Fact because of the following: there was no reliable evidence at the hearing or in the record to support such conjecture as any "anticipated" occurrence. Moreover, any causal relationship between a bulkhead and sandbags is mere speculation upon which no coastal expert testified.**

17. The pier/dock/walkway at issue remained structurally intact while covered with sand. As the sand which had been covering the decking slowly eroded away, exposing the decking, Petitioner began to remove pieces of the decking from the pier.

**Respondent objects to this Finding of Fact and respectfully submits the following exception in that there is no evidence in the record to support the notion that "[t]he pier/dock/walkway at issue remained structurally intact while covered with sand." While buried in the sand, there was no way to make this determination, short of excavation. There is no evidence in the record to suggest that such an excavation ever occurred.**

**Respondent does not object to the second sentence of this Finding of Fact.**

18. As the boards slowly became uncovered by the erosion occasioned by the adjacent bulkhead, Petitioner continued to remove the deck boards, joists and stringers on the walkway as a safety measure.



Respondent objects to this Finding of Fact and respectfully submits the following exception in that there is no evidence in the record to support this claim. The exception made above in Finding of Fact 17, as to the method in which the structural components were removed, is again renewed in this exception. Moreover, there is no evidence in the record to lead one to a conclusion as to the motivation for removing the structural components of the pier/dock/walkway. Making the claim that such removal was made as a "safety measure" is unfounded. Petitioners never testified or offered such evidence through a witness. Additionally, as stated above in Finding of Fact 16, any causal relationship between a bulkhead and sandbags is mere speculation upon which no expert testified and, thus, should be stricken.

19. Although it took approximately one year, from August 2007 until August 2008 for Petitioner to finish removing the decking of the pier/dock/walkway, the length of time was solely the result of the rate at which the sand covering the walkway was being removed by erosion caused, at least in substantial part, by the installation of the adjacent bulkhead.

Respondent objects to this Finding of Fact and respectfully submits the following exception in that such a statement is merely conjecture. The duration of time in which it took Petitioners to remove the decking was not causally dependant on the duration in time that the sand eroded from the previously-existing pier/dock/walkway. Such a statement is merely unproved speculation. Such a causal effect is, at best, opinion and should not be asserted as a Fact. For the additional reasons stated above in Findings of Fact 16 and 18, this Finding of Fact should be deleted.

20. Petitioner undertook to remove the exposed stringers, joists and decking. As the sand eroded from the structure, it did not simply expose the pilings. Respondent's contention that only the pilings from the former structure existed prior to the Petitioner's work is not supported by the evidence.

Respondent does not object to the statements that "Petitioner undertook to remove the exposed stringers, joists and decking" or that "[a]s the sand eroded from the structure, it did not simply expose the pilings."

Respondent does object to the last sentence in this Finding of Fact and respectfully submits the following exception in that, contrary to this claim, the evidence before the Court showed that, with the exception of the decking atop the pilings that go under the sand to the erosion fence (as depicted in Respondent's Exhibit 4), all of the horizontal framing and structural components of the previously-existing pier/dock/walkway had been removed and that the remaining pilings stood barren prior to Petitioner's replacement of the pier/dock/walkway. With the minimal exception noted above, Respondent's Exhibits 1 through 4 clearly show the pier/dock/walkway with nothing but the pilings remaining. In addition, the judge agreed to this fact during the hearing. In response to Respondent's request for Judicial Notice that:

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based upon looking at new wood, old wood...[and]...based upon the photographs that were previously entered into evidence, that there was essentially all horizontal wood newly put in on top of pilings that did not have that...

the Court responded:

I think basically we can agree from a site inspection this morning – and correct me if I’m wrong, Mr. Donaghue – but that all of the structural support and the cross members, or whatever proper name they might be called, along with the decking was replaced. The only thing that was not replaced would have been the pilings...

to which Petitioner responded: “Correct.” (T pp. 102-103) Therefore, this Finding of Fact runs directly counter to the evidence presented at the hearing and the Judicial Notice taken by the Court.

21. There were as many as thirteen pilings exposed, and possibly more. Respondent’s Exhibit 4 shows some decking and pilings that go under the sand to the erosion fence, but it cannot be determined how much decking there is nor whether that decking was replaced.

Respondent does not object to this Finding of Fact in as much as it relates only to the decking atop the “pilings that go[es] under the sand to the erosion fence” as depicted in Respondent’s Exhibit 4.

22. The work to attach the new stringers, joists and decking to the pier/dock/walkway at issue took only two days. Some of the original decking, stringers and joists still remained on the pilings at the beginning of the work.

Respondent does not object to the statement regarding the duration of time that it took Petitioners to complete construction of the pier/dock/walkway.

Respondent does not object to the second sentence in this Finding of Fact in as much as it relates only to the decking atop the “pilings that go[es] under the sand to the erosion fence” as depicted in Respondent’s Exhibit 4. Other than this minimal exception, the evidence is clear that all of the horizontal framing and structural components of the previously-existing pier/dock/walkway had been removed and that the remaining pilings stood barren prior to Petitioner’s replacement of the pier/dock/walkway. With the minimal exception noted above, Respondent’s Exhibits 1 through 4 clearly show the pier/dock/walkway with nothing but the pilings remaining.

23. The Respondent and Petitioner agreed that the Petitioner replaced approximately 60 feet of the deck boards, stringers and joists and none of the pilings.

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Respondent does not object to the portion of this Finding of Fact in as much as it relates to deck boards, stringers and joists.

Respondent does object to this Finding of Fact and respectfully submits the following exception as to replacement of pilings. While Petitioners' witness Rick Goodnight testified that all of the pilings were original pilings (T p. 106), there is contradictory evidence that at least one of the pilings in the completed structure was replaced. Respondent's witness, DCM's Assistant Major Permits Coordinator Jonathan Howell, did not agree with this conclusion. (T p. 95) In fact, evidence that at least one new piling was inserted can clearly be seen in Respondent's Exhibits 1 and 20, that by simply counting the shadows of the barren pilings, it becomes clear that the second row from the left (in Exhibit 1) and the third row from the left (in Exhibit 20) of the respective photographs have only one remaining piling. When confronted with this fact at the hearing, Mr. Goodnight responded to the statement "It looks like there is only one piling there" with the answer: "Yeah, it sure does." (T p. 109). When followed up with the question "Is that how it is presently?," Mr. Goodnight answered "No." Id. Respondent's Exhibit 18 shows the addition of a piling in the place where there was previously none. As asked to Mr. Goodnight at the hearing, "It looks like there is kind of a white – kind of a shinier piling in there. How did that one get there?," to which Mr. Goodnight eventually answered, "Well, now that, I do not know."

Therefore, it is not certain that "none of the pilings" were replaced, as is claimed by this Finding of Fact. Rather, the photographic evidence and witness testimony lead one to find the contrary: that Petitioner replaced deck boards, stringers, joists, and pilings. At the completion of Petitioners' construction, the only remaining wood from the original pier was that of the majority of the original support pilings and the minimal decking atop the landward pilings depicted in Respondent's Exhibit 4. All other components to the resulting pier, including beams, girders, joists, and stringers, consisted of replacement material installed by Petitioners during the period of construction. (T pp. 58-9, 105-7)

A more accurate Finding of Fact would read: "Petitioner reconstructed approximately 62 feet of the previously-existing pier/dock/walkway by replacing deck boards, stringers, joists, and one or more of the pilings."

24. The exposed pilings were never removed or replaced by Petitioner.

Respondent objects to this Finding of Fact and respectfully submits the following exception in that the evidence in the record does not support this claim. The exception made above in Finding of Fact 23 is again renewed in this exception.

25. Pursuant to 15A NCAC 07J.0210, costs to repair water dependent structures are not considered as with the non-water dependent structures; however, it is clear that the amount of money spent by Petitioner on the pier/dock/walkway was significantly less

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than 50 percent of the cost to replace the entire structure, primarily because he did not replace the pilings.

**Respondent objects to this Finding of Fact and respectfully submits the following exception in that the matter of cost of construction is irrelevant, and not to be considered, in regard to water dependent structures under 15A NCAC 7J.0210(2).**

- 26. Respondent served Petitioners with a Notice of Violation (NOV) dated December 31, 2008, and subsequently served Petitioners with a Notice of Continuing Violation dated March 2, 2009. Both of the Notices provide that Petitioners had constructed an entire pier:

Information gathered by me for the Division of Coastal Management indicates that you have undertaken major development in violation of the Coastal Area Management Act (CAMA).

I have information that indicates you have undertaken or are legally responsible for constructing a 62' X 6.5' pier on the aforementioned property. This activity took place in the Ocean Hazard AEC and Inlet Hazard AEC that are contiguous with the Atlantic Ocean. Ocean Hazard and Inlet Hazard areas are designated as Areas of Environmental Concern (AEC). No CAMA permit was issued to you for work in these areas. Based on these findings, I am initiating an enforcement action by issuing this Notice of Violation for violation of the Coastal Area Management Act.

**No objection.**

- 27. Additionally, the March 2, 2009, Notice of Continuing Violation, provided, inter alia:

Please be advised that as of this date, site inspections indicate corrective actions have not been taken to complete the restoration requested in the December 31, 2008 Notice of Violation.

**No objection.**

- 28. The "restoration" requested in the December 31, 2008 Notice of Violation was to remove the pier.

**No objection.**

- 28a. **Respondent respectfully requests the insertion of the following Finding of Fact as follows: Respondent filed a Motion to Dismiss filed on July 22, 2009, in which Respondent argued that the OAH does not, in fact, have subject matter jurisdiction over the present case. According to N.C. Gen. Stat. § 150B-23(a), OAH only has jurisdiction over instances where an agency action "has deprived the petitioner of**

**property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights. . . ." Here, there has been no such agency action, merely the issuance of notices of violation.**

29. Petitioner has consistently contended from the outset that his work was "repair" and not "replacement" and communicated that to Mr. Howell when he first approached Petitioner.

**No objection.**

30. There is no question that Petitioner did not seek a permit from Respondent, and Respondent did not issue a permit for the work.

**No objection.** (T p. 55)

31. The work done by Petitioner on the structure consisted of the six spans, each with two stringers and one joist, covered by decking. The only structural or framing members replaced by Petitioners being the 12 stringers and 12 joists. (Exhibits A-4, A-7, Respondent's Exhibits 17, 18 and 19)

**Respondent objects to this Finding of Fact and respectfully submits the following exception in that Respondent disagrees with the exclusion of replaced decking from the list of components which make up "structural and framing members." Decking is a necessary framing and structural member. Common sense dictates that one cannot reasonably use the structure without decking. A more accurate Finding of Fact would not only include the addition of collar beams and "one or more pilings" to the list of structural replacements in the first sentence, but also include a second sentence that reads: "The only structural or framing members replaced by Petitioners being the 16 stringers/joists, 18 collar beams, one or more pilings, and the decking. (Exhibits A-4, A-7, Respondent's Exhibits 17, 18 and 19)."**

32. Exhibits A-4, A-7, as well as Respondent's Exhibits 17, 18, and 19, establish that Petitioners replaced only 2 stringers along the sides of each set of pilings and one joist between each pair of pilings. The decking was then laid perpendicular to the stringers, and was supported by the stringers.

**Respondent objects to this Finding of Fact and respectfully submits the following exception in as much as this statement is seen as an exhaustive list of all material that Petitioners replaced. The exception made above in Finding of Fact 31 is again renewed in this exception.**

33. Petitioners' evidence established that they replaced substantially less than 50 percent of the "framing and structural components."

**Respondent objects to this Finding of Fact and respectfully submits the following exception based upon a three-step logical analysis which is uncontroverted by the**

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evidence. First, based upon an earlier aerial photograph of the pier/dock/walkway that showed the original extent of the structure, there is undisputed evidence that the original structure was 100 feet in length. (T pp. 68-69) Second, based upon the photographic evidence of Exhibits 1 through 4, there is undisputed evidence that with the exception of the minimal exception of decking on a few landward pilings as depicted in Respondent's Exhibit 4, there is undisputed evidence that all of the horizontal framing and structural components of the previously-existing pier/dock/walkway had been removed and that the remaining pilings stood barren prior to Petitioner's replacement of the pier/dock/walkway. Third, there is undisputed evidence that the current pier/dock/walkway extends 62 feet in length. (T pp. 62, 92)

The length of the original structure is the gauge upon which to measure the "50 percent" rule set forth in 15A NCAC 7J.0210(2)(a). This rule is explicit in that the structure be "rebuilt in order to restore the structure to its pre-damaged condition." As DCM's Assistant Major Permits Coordinator Jonathan Howell explained at the hearing: in the instance of an original 100 foot-long pier, "he couldn't replace up to forty-nine [feet] because you have to replace the structure in its entirety, and then base your fifty percent determination off of that structure." (T pp. 97-98) The policy behind such a rule is to ensure against the hypothetical situation of someone wanting a new dock, but not wanting to seek a CAMA permit; tearing down an old dock that, for example, measured 100 feet in length; and building a new dock on the footprint of the old dock that measures 49 feet in length, claiming protection under the 50 percent rule. Such an example is a clear subversion of the intent of 15A NCAC 7J.0210. Here, Petitioners replaced 62 feet of an original 100 foot-long pier, without seeking a CAMA permit, and are thus in violation of CAMA for conducting unpermitted development.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearing for consideration, and OAH has both subject matter and personal jurisdiction.

**Respondent objects to this Finding of Fact and respectfully submits the following exception in regard to Respondent's Motion to Dismiss filed on July 22, 2009, in which Respondent argued that the OAH does not, in fact, have subject matter jurisdiction over the present case. This argument, and Motion, is renewed herein.**

2. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E.2d 272 (1998).

**No objection.**

3. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its

authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).

**No objection.**

4. "On judicial review, an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." Hilliard v. N.C. Dep't of Corr., 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005) (citation omitted).

**No objection.**

5. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the Coastal Area Management Act of 1974 (CAMA), N.C. Gen. Stat. § 113A-100 *et seq.*, and various regulations promulgated there under.

**No objection.**

6. Petitioners' property is subject to the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and is within the Ocean Hazard Area, and more specifically as the subset of Inlet Hazard Area as set forth by 15A N.C. Admin. Code 07H.0300 *et seq.*

**No objection.**

7. The structure at issue in the instant case is a "water dependent structure."

**No objection.**

8. Under CAMA, "development" in an Ocean Hazard Area requires a permit. N.C. Gen. Stat. § 113A-118.

**No objection.**

9. N.C. Gen. Stat. Section 113A-118. Section 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern. . . involving, requiring, or consisting of the construction or enlargement of a structure. . . ."

**Respondent respectfully contends that this conclusion read:**

**N.C. Gen. Stat. § 113A-103(5) defines "development" as "any activity in a duly designated area of environmental concern. . . involving, requiring, or consisting of the construction or enlargement of a structure. . . ."**

10. N.C. Gen. Stat. § 113A-103(5)(b)(5) further provides that activities in an AEC, including

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the subcategory of the Inlet Hazard Area at issue, that are merely “maintenance or repairs” rather than “replaces” an existing structure, then the work is not considered “development” and, thus, does not require a CAMA permit. 15A NCAC 7J.0210 is consistent with the language with the statute.

**No objection.**

11. The Commission, pursuant to the authority delegated to it by the legislature in Section 113A-103(5)(c), has promulgated regulations.

**No objection.**

12. Pursuant to the authority granted by CAMA, the Commission has enacted 15A NCAC 07K.0101 which provides”

No permit shall be required for those activities set out in G.S. 113A-103(5)(b)(1)-(9) as exclusions from the definition of development.

**No objection.**

13. 15A NCAC 7J.0210(2) provides “[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits.”

**Respondent respectfully contends that the correct citation is 15A NCAC 7J.0210 and that this conclusion read:**

**15A NCAC 7J.0210 provides “[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered development and requires CAMA permits.”**

14. The method set forth in the administrative rules for determining whether repair of a water dependent structure constitutes “replacement,” and thus requires a permit, is:

In the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings, more than 50 percent of the framing and structural components (beams, girders, joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage condition. 15A NCAC 7J.0210(2)(a) [emphasis added].

**No objection.**

15. The language of 15A NCAC 7J.0210(2)(a) is clear and unambiguous. It requires more than 50 percent of “framing and structural components” to be rebuilt. Framing and structural components are specifically listed as “beams, girders, joists, stringers, or pilings.” “Framing and structural” components are terms that have usual and customary



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understanding within the building and construction industry, as well as common English definition. By definition and usage, neither framing nor structural components would include any form of decking. The regulation goes further by stating specifically what is meant by “framing and structural components,” and decking is not included. If decking was meant to be included, the drafters of the rule could have used any number of other methods and/or terminology including, but not limited to, the terminology in 15A NCAC 7J.0210(2)(b) which specifies use of square footage. It is also clear and unambiguous that pilings are to be considered in making a determination of the “50 percent rule.”

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that Respondent contends that the list of “beams, girders, joists, stringers, or pilings” is not an exhaustive list of what may constitute “framing and structural components” under 15A NCAC 7J.0210(2)(a). Such an exhaustive list is illogical. For 15A NCAC 7J.0210(2)(a) deals with “fixed docks, piers, platforms, boathouses, boatlifts, and free standing moorings.” Among this list of potential water dependant structures, there is great variance as to what is physically needed to build these structures. The “framing and structural components” for, say, a simple platform are very different from those needed to construct a boathouse or boatlift. In regard to these latter two water dependant structures, “framing and structural components” such as walls, bracing (including decking), roofs, and the machinery of a boatlift are necessary, yet not included in the enumerated list. To limit the building components to those specifically listed in the rule, would make the rule unreasonable and unworkable. Therefore, this list of five potential framing and structural components must be taken as a list of potential examples, and nothing more.**

**Based upon this more inclusive reading of 15A NCAC 7J.0210(2)(a), Respondent respectfully disagrees with the exclusion of replaced decking from the list of components which make up “structural and framing components.” A more accurate Conclusion of Law would include decking in this category.**

16. By using the word “and” between “framing” and “structural” it is clear that any combination of either framing and/or structural components which in total comprise more than 50 percent of only those components of that structure comprises “replacement.” It would defy logic and common sense to say that the language would mean 50 percent of the beams, or 50 percent of the girders or 50 percent of the joists, and so on, standing alone would be in violation of the “50 percent rule.” Common sense and logic command that it be any combination that comprises 50 percent of those structural components including the pilings.

**No objection.**

17. In this case, the work did not involve any portion of the pilings, which constituted well in excess of 50 percent of the framing and structural components of this structure.

**Respondent objects to this Conclusion of Law and respectfully submits the following**

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exception in that the evidence in the record does not support the claim that the work did not involve any portion of the pilings.” The exception made above in Findings of Fact 23 and 24 is again renewed in this exception.

Additionally, Respondent also objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support the claim that the pilings, alone, constituted “well in excess of 50 percent of the framing and structural components of this structure.” For the reasons stated above in Finding of Fact 33, this Conclusion of Law should be stricken: the length of the original structure is the gauge upon which to measure the “50 percent” rule set forth in 15A NCAC 7J.0210(2)(a). This rule is explicit in that the structure be “rebuilt in order to restore the structure to its pre-damaged condition.” As DCM’s Assistant Major Permits Coordinator Jonathan Howell explained at the hearing: in the instance of an original 100 foot-long pier, “he couldn’t replace up to forty-nine [feet] because you have to replace the structure in its entirety, and then base your fifty percent determination off of that structure.” (T pp. 97-98) The policy behind such a rule is to ensure against the hypothetical situation of someone wanting a new dock, but not wanting to seek a CAMA permit; tearing down an old dock that, for example, measured 100 feet in length; and building a new dock on the footprint of the old dock that measures 49 feet in length, claiming protection under the 50 percent rule. Such an example is a clear subversion of the intent of 15A NCAC 7J.0210. Here, Petitioners replaced 62 feet of an original 100 foot-long pier, without seeking a CAMA permit, and are thus in violation of CAMA for conducting unpermitted development

18. The lumber used in decking may not, under the plain language of 15A NCAC 07J.0210(2)(a), be considered in determining whether the work constitutes, meets or exceeds the 50 percent rule.

Respondent objects to this Conclusion of Law and respectfully submits the following exception based upon the reasoning set forth above in Conclusion of Law 15, and is again renewed in this exception.

**The remaining Conclusions of Law are misnumbered in the ALJ’s Decision and Respondent respectfully asks that they be renumbered into chronological order. The following renumbered conclusions will be set forth with the original designation given by the ALJ in parenthesis.**

19. (Decision’s 21.) By the clear and unambiguous language of 15A NCAC 07J.0210(2)(a), the pilings have to be considered in application of the 50 percent rule. Therefore, even if the decking is considered, the 50 percent rule is not exceeded or violated in this case.

Respondent does not object to the first sentence of this Conclusion of Law.

Respondent does object to this the second sentence of this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does

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not support the claim that “the 50 percent rule is not exceeded or violated in this case.” For the reasons stated above in Finding of Fact 33 and Conclusion of Law 17, **this Conclusion of Law should be stricken.**

20. (Decision’s 22.) As evidenced by the Exhibits offered, Petitioners here removed and replaced one stringer on each side of the span between the pilings, placed one joist between each pair of pilings, and laid new decking and/or planking on the stringers, clearly repairing less than 50 percent of the “framing and structural components,” which includes the pilings but does not include the decking.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support the claim that Petitioners repaired “less than 50 percent of the ‘framing and structural components’” of the previously-existing structure. For the reasons stated above in Finding of Fact 33 and Conclusions of Law 17 and 18, this Conclusion of Law should be stricken.**

21. (Decision’s 19.) The Petitioner did not build a 62 foot long pier by applying structural supports to existing pilings, but rather repaired a portion of a 100 foot long pier by removing the existing decking and structural supports from the existing pilings and replacing it. At the very best, Petitioner replaced 62 percent of the decking, but when the pilings are factored in, the 50 percent rule is not violated or exceeded.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support the claim that Petitioners repaired less than 50 percent of the “framing and structural components” of the previously-existing structure. For the reasons stated above in Finding of Fact 33 and Conclusions of Law 17, 18, and 20, this Conclusion of Law should be stricken.**

22. (Decision’s 20.) Respondent’s contention that Petitioners, in essence, build a 62 foot long pier by replacing all of the framing and structural components, except for the original support pilings and thus greatly exceeded the “more than 50 percent” standard that constitutes “replacement,” as set forth in 15A NCAC 07J.0210(2)(a), is not supported by the evidence of record.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support the claim that Petitioners repaired less than 50 percent of the “framing and structural components” of the previously-existing structure. For the reasons stated above in Finding of Fact 33 and Conclusions of Law 17, 18, 20, and 21, this Conclusion of Law should be stricken.**

- 22a. Respondent respectfully requests the insertion of the following Conclusion of Law as follows: As “replacement,” Petitioners’ construction of their pier is considered “development,” as set forth N.C. Gen. Stat. § 113A-103(5).

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23. (Decision's Second 21.) This case is not controlled by Pamlico Maine Company, Inc. v. North Carolina Department of Natural Resources and Coastal Development, Coastal Review Commission Division, 80 N.C. App. 201, 341 S.E.2d 108 (1986) in that the facts and applicable law are so significantly different from those at issue herein as to be inapplicable.

**No objection.**

24. (Decision's 23.) In the absence of any evidence refuting Petitioners' evidence establishing that less than 50 percent of the framing and structural components were replaced, Petitioners have established that the Notice of Violation and Notice of Continuing Violation were improperly issued, both as to the claim that a new pier was constructed and as to the claim that more than 50 percent of the framing and structural components were replaced.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support the claim that Petitioners repaired less than 50 percent of the "framing and structural components" of the previously-existing structure. For the reasons stated above in Finding of Fact 33 and Conclusions of Law 17, 18, 20, 21, and 22, this Conclusion of Law should be stricken. A more accurate Conclusion of Law would read:**

**Based upon the fact that a CAMA permit has been neither sought by, nor issued to, Petitioners for the development of the pier at issue in this matter, in contravention of N.C. Gen. Stat. § 113A-118, the Notice of Violation and Notice of Continuing Violation were properly issued by Respondent, both as to the claim that a new pier was constructed and as to the claim that more than 50 percent of the framing and structural components were replaced.**

25. (Decision's 24.) Respondent acted erroneously and failed to act as required by law or rule in issuing to Petitioners an NOV and a subsequent CNOV based upon the erroneous conclusions that Petitioners did not qualify for a permit exemption under 15A NCAC 07J.0210 and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support this claim. A more accurate Conclusion of Law would read:**

**Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, and did not fail to act as required by law or rule in issuing to Petitioners an NOV and a subsequent CNOV based upon the duly formed determination that Petitioners did not**

**qualify for a permit exemption under 15A N.C. Admin. Code 07J.0210 and engaged in the development of a pier in an AEC without a CAMA permit, as required by N.C. Gen. Stat. § 113A-118.**

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26. (Decision's 25.) Based upon the foregoing findings of fact and conclusions of law, the Court specifically does not reach the reasonableness of the directive to remove the structure in absence of a permit, nor the potential for civil penalty.

**Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the evidence in the record does not support this conclusion. Moreover, public policy requires adherence to the restoration plan set forth in the NOV and CNOV, in that a willful violator of CAMA should not be rewarded for subverting the law by first building a structure that is then allowed to remain intact after that structure has been found to be in violation of the governing statute and rules. Such a response would set a harmful precedent. A more accurate Conclusion of Law would read:**

**Based upon the foregoing findings of fact and conclusions of law, the Court concludes that Petitioners are in violation of CAMA and must comply with the restoration plan set forth in the NOV and CNOV.**

27. (Decision's 26.) Any law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the Courts strictly in favor of the free use of that property. In re Application of Rea Construction Co., 272 N.C. 715, 158 S.E.2d 887 (1968).

**While this general statement is true, Respondent objects to this Conclusion of Law and respectfully submits the following exception in that the inclusion of such a ruling is superfluous and ignores the overarching goals set forth by the environmental laws and regulations of the State of North Carolina. CAMA, and the rules promulgated thereunder, establishes environmental objectives that the legislature has set forth and includes valid restrictions on the rights of property owners. Therefore, this Conclusion of Law should be stricken.**

### **DECISION**

Based on the foregoing findings of fact and conclusions of law, Petitioners have met their burden of establishing that they replaced less than 50 percent of the framing and structural components of the existing dock/walkway. Thus, the Notice of Violation and subsequent Notice of Continuing Violation were erroneously issued to Petitioners as they were not required under North Carolina law to obtain a permit prior to undertaking repairs to their dock/walkway. The decision of Respondent is **REVERSED**.

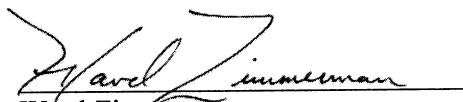
**Respondent objects to this Decision based upon the reasons stated in the objections and exceptions to the Findings of Fact and Conclusions of Law and respectfully submits the following Decision, which is supported by the evidence and/or the law:**

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**Based on the foregoing findings of fact and conclusions of law, Respondent's decision to issue Petitioners an NOV and a subsequent CNOV is AFFIRMED. Petitioners have not met their burden of proof in showing that Respondent substantially prejudiced Petitioners' rights or deprived them of property, and that Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule, as alleged in Petitioners' petitions for a contested case hearing under N.C. Gen. Stat. § 150B-23(a).**

Respectfully submitted this the 12<sup>th</sup> day of February, 2010.

FOR THE DIVISION OF  
COASTAL MANAGEMENT



Ward Zimmerman  
Assistant Attorney General  
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**CERTIFICATE OF SERVICE**

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This is to certify that a copy of the attached Respondent's Objections and Exceptions to the ALJ Decision was served on Petitioner, CRC's Executive Secretary, and CRC's Counsel as follows:

**By U.S. Mail:**

Hugh Donaghue, Esq.  
Donaghue & Labrum, LLP  
13 West Third Street  
Media, Pennsylvania 19063


**By Email and U.S. Mail:**

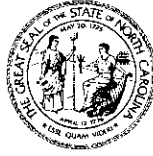
James H. Gregson  
Executive Secretary to the CRC  
Division of Coastal Management  
400 Commerce Avenue  
Morehead City, NC 28557

**By Email and Hand Delivery:**

Jennie Wilhelm Hauser  
Special Deputy Attorney General & CRC Counsel

This the 12<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
Ward Zimmerman  
Assistant Attorney General




STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

ROY COOPER  
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TO: Coastal Resources Commission

FROM: Christine A. Goebel  
Assistant Attorney General 

DATE: June 30, 2010 (for the July 15, 2010 CRC Meeting)

RE: **Variance Request by Parker Overton (10-03)**

---

Petitioner owns an oceanfront lot and an interior lot across Comber Road on Figure Eight Island in New Hanover County, North Carolina. In June of 2002, Petitioner sought a CAMA general permit to place sandbags to protect his "imminently threatened" house located on his oceanfront lot. The authorization for these sandbags expired in May of 2008, though the sandbags remain on the property today. In February of 2010, Petitioner relocated his home from the oceanfront lot to his interior lot. Per several Commission rules, the existing sandbags are required to be removed once the threatened structure is moved or destroyed. Based on these rules, DCM staff notified Petitioner by a letter dated March 15, 2010, that the sandbags were required to be removed. Petitioner now seeks a variance from the rules requiring removal of sandbags once an imminently threatened structure is removed.

The following additional information is attached to this memorandum:

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

cc: James F. Hopf, Counsel for Petitioner, electronically  
Chris O'Keefe, CAMA LPO, New Hanover County, electronically  
DCM Staff, electronically  
Jennie W. Hauser, CRC Counsel, electronically



RELEVANT STATUTES OR RULES

15A NCAC 07H .0308 SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS

- (a) Ocean Shoreline Erosion Control Activities:

\*\*\*

- (2) Temporary Erosion Control Structures:

- (A) Permittable temporary erosion control structures shall be limited to sandbags placed landward of mean high water and parallel to the shore.
- (B) Temporary erosion control structures as defined in Part (2)(A) of this Subparagraph shall be used to protect only imminently threatened roads and associated right of ways, and buildings and their associated septic systems. A structure shall be considered imminently threatened if its foundation, septic system, or right-of-way in the case of roads, is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no obvious erosion scarp may also be found to be imminently threatened when site conditions, such as a flat beach profile or accelerated erosion, increase the risk of imminent damage to the structure.
- (C) Temporary erosion control structures shall be used to protect only the principal structure and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to the erosion setback requirement.
- (D) Temporary erosion control structures may be placed seaward of a septic system when there is no alternative to relocate it on the same or adjoining lot so that it is landward of or in line with the structure being protected.
- (E) Temporary erosion control structures shall not extend more than 20 feet past the sides of the structure to be protected. The landward side of such temporary erosion control structures shall not be located more than 20 feet seaward of the structure to be protected or the right-of-way in the case of roads. If a building or road is found to be imminently threatened and at an increased risk of imminent damage due to site conditions such as a flat beach profile or accelerated erosion, temporary erosion control structures may be located more than 20 feet seaward of the structure being protected. In cases of increased risk of imminent damage, the location of the temporary erosion control structures shall be determined by the Director of the Division of Coastal Management or their designee.
- (F) Temporary erosion control structures may remain in place for up to two years after the date of approval if they are protecting a building with a total floor area of 5000 sq. ft. or less and its associated septic system, or, for up to five years for a building with a total floor area of more than 5000 sq. ft. and its associated septic system. Temporary erosion control structures may remain in place for up to five years if they are protecting a bridge or a road. The property

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

- (G) Temporary sandbag erosion control structures may remain in place for up to five years from the date of approval if they are located in a community that is actively pursuing a beach nourishment project, and for up to eight years from the date of approval if they are located in an Inlet Hazard Area adjacent to an inlet for which a community is actively pursuing an inlet relocation project. For purposes of this Rule, a community is considered to be actively pursuing a beach nourishment or inlet relocation project if it has:
- (i) an active CAMA permit, where necessary, approving such project; or
  - (ii) been identified by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance Study, General Reevaluation Report, Coastal Storm Damage Reduction Study or an ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local or federal money, when necessary; or
  - (iii) received a favorable economic evaluation report on a federal project or,
  - (iv) is in the planning stages of a project that has been designed by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements and has been initiated by a local government or community with a commitment of local or state funds to construct the project and the identification of the financial resources or funding bases necessary to fund the beach nourishment or inlet relocation project.

If beach nourishment or inlet relocation is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void for that section of beach or community and existing sandbags are subject to all applicable time limits set forth in Part (F) of this Subparagraph.

- (H) Once the temporary erosion control structure is determined to be unnecessary due to relocation or removal of the threatened structure, a storm protection project constructed by the U.S. Army Corps of Engineers, a large-scale beach nourishment project or an inlet relocation project, it shall be removed by the property owner within 30 days of official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure.
- (I) Removal of temporary erosion control structures shall not be required if they are covered by dunes with stable and natural vegetation.
- (J) The property owner shall be responsible for the removal of remnants of all portions of any damaged temporary erosion control structure.
- (K) Sandbags used to construct temporary erosion control structures shall be tan in color and three to five feet wide and seven to 15 feet long when measured flat. Base width of the structure shall not exceed 20 feet, and the height shall not exceed six feet.
- (L) Soldier pilings and other types of devices to anchor sandbags shall not be allowed.

- (M) An imminently threatened structure may be protected only once, regardless of ownership unless the threatened structure is located in an Inlet Hazard Area and in a community that is actively pursuing an inlet relocation project in accordance with (G) of this Subparagraph. Existing temporary erosion control structures located in Inlet Hazard Areas may be eligible for an additional eight year permit extension provided that the structure being protected is still imminently threatened, the temporary erosion control structure is in compliance with requirements of this Subchapter and the community in which it is located is actively pursuing an inlet relocation project in accordance with Part (G) of this Subparagraph. In the case of a building, a temporary erosion control structure may be extended, or new segments constructed, if additional areas of the building become imminently threatened. Where temporary structures are installed or extended incrementally, the time period for removal under Part (F) or (G) of this Subparagraph shall begin at the time the initial erosion control structure is installed. For the purpose of this Rule:
- (i) a building and septic system shall be considered as separate structures.
  - (ii) a road or highway shall be allowed to be incrementally protected as sections become imminently threatened. The time period for removal of each section of sandbags shall begin at the time that section is installed in accordance with Part (F) or (G) of this Subparagraph.
- (N) Existing sandbag structures may be repaired or replaced within their originally permitted dimensions during the time period allowed under Part (F) or (G) of this Subparagraph.

**ATTACHMENT B**

**STIPULATED FACTS**

1. Petitioners V. Parker and Becky H. Overton (Petitioners) own oceanfront property located at 13 Comber Road on Figure Eight Island in New Hanover County, North Carolina (oceanfront lot). Petitioners also own a lot located at 21 Comber Road, across the street from the oceanfront lot (interior lot).
2. Both of Petitioners' lots are within the Ocean Hazard Area of Environmental Concern (AEC), the Inlet Hazard AEC (for Rich's Inlet) and the High Hazard Flood AEC. N.C.G.S. § 113A-118 provides that proposed development requires a CAMA permit.
3. Information about Rich's Inlet from the May 2010 "Inlet Hazard Area Boundaries Update" by Warren and Richardson is attached.
4. The long-term annual erosion rate for Petitioners' property is 2 feet per year. However, since 1996, the northern end of Figure Eight Island has been subject to chronic erosion as a result of the northward movement of the main channel of Rich Inlet, and the erosion rates have been in excess of the 2 feet per year long term average.
5. An attached diagram shows the oceanfront lot and the historical shorelines. Based on this data, between 1944 and 1998, the shoreline was accreting at a long-term average of approximately 8 feet per year. From 1944 to 1980, the shoreline accreted at approximately 13 feet per year. From 1980 to 2006, the shoreline eroded at approximately 13 feet per year.
6. Petitioners' lots have also been hit by storms, including hurricanes in 1996, 1998, 1999 2005, as well as seasonal nor'easters.
7. Petitioners' built a 5,379 square-foot house on the oceanfront lot in 1996 according to New Hanover County property records. Along with the house, Petitioners had constructed driveways, attached decking, and fencing.

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8. On June 3, 2002, Petitioners' house was determined by DCM staff to be "imminently threatened" as defined by 15A NCAC 7H.0308(a)(2)(B) and accordingly, staff issued CAMA General Permit #31944D for the installation of a sandbag revetment 6-feet high by 20-feet wide.
9. In July of 2003 the CRC granted a variance for Petitioner and 14 neighboring oceanfront owners on the north end of Figure Eight Island to increase the size of the sandbag revetment from 6-feet high and 20-feet wide to 10-feet high and 40-feet wide. The Variance did not extend the time for the sandbags to remain past the originally permitted deadline. For Petitioners' property, the deadline to remove the bags was May 2008. A copy of this permit and the variance Order are attached.
10. Based on the CRC's variance, CAMA General Permit #31944D was revised accordingly and reissued on September 4, 2003, permitting the larger sandbag structure but with the same removal date of May 2008. A copy of this revised permit is attached.
11. Petitioners previously submitted a CAMA Variance Request on February 28, 2008, seeking to maintain a sandbag revetment on their oceanfront lot. That variance request remains pending.
12. On February 23, 2009, DCM issued CAMA Minor Permit#09-005 to Petitioners authorizing the relocation of the existing single-family residence from the Petitioners' oceanfront lot to Petitioners' vacant interior lot.
13. On or about February 12, 2010, Petitioners' residence was relocated to the interior lot.
14. On March 15, 2010, DCM staff sent a letter to Petitioners notifying them that 15A NCAC 7H.0308(a)(2)(H) and 7H.0308(a)(2)(C) required them to remove the sandbags that had been placed to protect the "imminently threatened" residence while it was on the oceanfront lot. Specifically, 7H.0308(a)(2)(H) states,

Once the temporary erosion control structure has been determined to be unnecessary due to relocation or removal of the threatened structure. . . it shall be removed by the property owner within 30 days of the official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure.

Additionally, 7H.0308(a)(2)(C) states,

Temporary erosion control structures shall be used to protect the principal structure and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to the setback requirement.

A copy of this letter is attached.

15. After the residence was relocated to the interior lot, the remaining development on the oceanfront lot includes the concrete driveway, the concrete house pad and patios, the fencing, the septic system, electrical boxes, irrigation system and landscaping.
16. Petitioners are currently attempting to determine what uses can be made of the oceanfront lot. Development is limited by the existing vegetation line and the associated 60-foot minimum oceanfront setback, as well as county regulations, restrictive covenants and other regulations.
17. Currently, the sandbags on the north end of Figure Eight Island stretch from 8 Inlet Hook (closest to the inlet) to 5 Comber Road (furthest from the inlet), covering 19 lots. It extends approximately 1730 linear feet. Most of the sandbags in this line are 10 feet high by 40 feet wide, pursuant to the 2003 Variance (See Fact 9 above).
18. If Petitioners' sandbags were removed, a gap approximately 90 linear feet long would occur in the overall revetment.
19. Petitioners' seek a variance from the provisions in 7H.0308(a)(2)(C), 7H.0308(a)(2)(F), 7H.0308(a)(2)(G), 7H.0308(a)(2)(H), and 7H.0308(a)(2)(M), so that they are not required to remove the existing sandbags from their now-vacant oceanfront lot at this time. Petitioners also seek a variance from the corresponding provisions in 7H.1700 et seq., the General Permit for Emergency Work Requiring a CAMA and/or Dredge and Fill Permit (the GP for sandbags), which is what Petitioners' CAMA permits were issued pursuant to.
20. House Bill 709 (S.L. 2009-479), signed into law on August 26, 2009, required a moratorium by DCM on sandbag enforcement which lasts through September 1, 2010. This law also provides an exception to the moratorium for sandbags which are no longer protecting an imminently threatened structure. Because of this exception, staff sent the March 15, 2010 removal letter to Petitioners (see Fact 14 above).

21. The neighbors on each side of Petitioners' oceanfront lot, the Cagneys and the Nelsons, support the granting of this variance, and their attached affidavits describe their concerns.
22. During extreme high tides, storm events, and other occasions when the ocean waves reach the sandbags, the areas immediately adjacent to a sandbag gap resulting from the removal of the Overton sandbags on adjoining properties will likely experience accelerated erosion.

ATTACHMENT C

**Petitioner and Staff Positions**

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

**Petitioner's Position: Yes.**

The property at 13 Comber Road, Figure Eight Island, along with adjacent properties, will be damaged and/or destroyed by ocean intrusion and erosion if the sandbag revetment is not allowed to remain in place. Removal of this section of sandbags (on Lot 13), with sandbags in place on the adjacent properties, will cause the ocean to erode this unprotected location of the beachfront, resulting in damage and/or destruction of the associated properties, which could also include Comber Road.

**Staff's Position: Yes.**

Staff agrees that strict application of the Commission's rules requiring removal of sandbags once the threatened structure is removed, cause Petitioner, and Petitioner's adjacent neighbors unnecessary hardships. In this case, the sandbags already exist on Petitioner's property, and are one small part of a larger sandbag revetment protecting imminently threatened homes on 19 lots along 1730 linear feet of shoreline. To require Petitioner to remove the existing bags now, before the bags are removed on the adjacent property, and create a relatively small 90 linear foot gap in the larger structure that could cause accelerated erosion to Petitioner's property and the adjacent property is an unnecessary hardship.

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

**Petitioner's Position: Yes.**

Given the location of this property on the northern end of Figure Eight Island, it is subject to ocean erosion and will be lost to such erosion, along with associated damages and/or destruction to adjacent properties, if sandbags are not allowed to remain in place.

**Staff's Position: Yes.**

Staff acknowledges that this property has been subject to increased erosion due to the typical inlet processes of this Inlet Hazard and Ocean Hazard AEC property. While neither its location within the Inlet Hazard and Ocean Hazard AEC, nor the accelerated erosion is peculiar by itself, the



property's location as one part of a much larger sandbag revetment and the possible resulting small gap in the larger sandbag revetment is the peculiarity of the property in this case. If Petitioner's existing sandbags were required to be removed now before adjacent sandbags were removed, the resulting small gap in the larger structure may cause unnecessary hardships of accelerated erosion to Petitioner's property and to adjacent property.

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

**Petitioner's Position: No.**

The erosion is due entirely to natural coastal conditions and not from any actions that we have taken on the property. Our actions in placing sandbags along the oceanfront on this property have minimized the effects of the ocean erosion that otherwise would occur to this and nearby properties.

**Staff's Position: No.**

Staff agrees that the hardships do not result from actions taken by the Petitioner. Petitioner has relocated his threatened home to his interior lot, further protecting it from the effects of the erosion. That relocation, combined with the fact that his lot is a part of a much larger sandbag revetment and that a small gap in the revetment would cause erosion problems for adjacent neighbors, causes the hardships in this case.

**IV. Will the variance requested by the petitioner**

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

**Petitioners's Position: Yes.**

According to the general policy guidelines for the North Carolina coastal area, the ocean and estuarine shorelines are to be managed in such a manner as to avoid loss of life, property, and amenities. 15A NCAC 7M.0201. Such management shall be conducted so as to minimize the likelihood of damage to private and public resources from recognized coastal hazards. 15A NCAC 7M.0201. Further, erosion response measures should economically, socially and environmentally justified. 15A NCAC 7M.0202. Allowing the continued protection of the Petitioners' property at 13 Comber Road, Figure Eight Island by the existing sandbag revetment, which will also protect adjacent properties and Comber Road, at least until another reasonable solution can be devised, is consistent with the spirit, purpose, and intent of the CRC guidelines and rules in minimizing and avoiding loss of property and amenities, preserves substantial justice, and secures public safety.

**Staff's Position: Yes.**

Staff believes that delaying the removal of Petitioner's sandbags to prevent the creation of a small gap in a larger sandbag revetment is consistent with the spirit, purpose, and intent of the Commission's rules. The sandbag rules are, in effect, an exception to the General Assembly's and the Commission's ban on hardened structures such as seawalls. One purpose for allowing sandbags, as stated in 15A NCAC 7M.0202, is to protect an imminently threatened structure until it can be relocated. Petitioner has relocated his house, but his adjacent neighbors have not. This is combined with the Legislature's actions staying DCM enforcement action on these expired sandbags until September of 2010, though it allows DCM Staff to enforce on lots where the structure has been removed. In this case, it would not be within the spirit of the rules and the Legislature's stay to require Petitioner to remove his sandbags now before requiring removal of the sandbags on either side of Petitioner's property, likely causing accelerated erosion on the adjacent lots through the small sandbag gap. As such, Staff supports a variance ONLY from the rules requiring removal of a sandbag structure once the imminently threatened structure is removed. Staff does not support, and Petitioner is not requesting in this petition, a variance to any provisions which would extend the May 2008 expiration date for Petitioner's sandbags.

A variance will secure public safety and welfare and will preserve substantial justice by preventing the creation of a small gap in the overall sandbag structure and by allowing the continued protection of the adjacent structures.

**Attachment D:  
Petitioner's Variance Request Materials**

RECEIVED

APR 20 2010

N.C. ATTORNEY GENERAL  
Environmental Division

# HOPF & HIGLEY, P.A.

---

JAMES F. HOPF  
jim@hopfhigley.com

ATTORNEYS AT LAW  
1694 E. Arlington Boulevard, Suite E  
Greenville, North Carolina 27858  
Telephone: 252.756.1883  
Facsimile: 252.756.1797  
www.hopfhigley.com

DONALD S. HIGLEY, II  
don@hopfhigley.com

April 15, 2010

Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

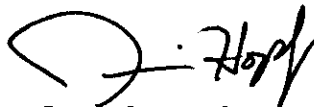
**Re: Variance Petition  
13 Comber Road  
Figure Eight Island**

Dear Sir or Madam:

Enclosed please find a copy of the CAMA Variance Petition being submitted today to the Coastal Resources Commission on behalf of V. Parker and Becky H. Overton regarding their property on Figure Eight Island.

Sincerely yours,

HOPF & HIGLEY, P.A.



James F. Hopf

JFH/blr

Enclosure

DCM FORM 11  
(revised 6/26/06)

CAMA VARIANCE REQUEST

DCM FILE NO.

Petitioners: *V. Parker and Becky H. Overton*

Mailing address: *3933 Mobleys Bridge Road  
Grimesland, North Carolina 27837*

Additional Petitioners: *Bill and Irene Cagney  
14 Comber Road  
Wilmington, North Carolina 28411*

Subject Property Address: *13 Comber Road  
Figure Eight Island, North Carolina*

Telephone: *(252) 717-8700*  
Fax and/or Email: *(252) 756-1771  
vpoverton@earthlink.net*

Name of Your Attorney: *James F. Hopf*  
Address: *Hopf & Higley, P.A.  
1694 E. Arlington Boulevard, Suite E  
Greenville, North Carolina 27858*

Telephone: *(252) 756-1883(phone)*  
Fax and/or Email: *(252) 756-1797(fax)  
jim@hopfhigley.com*

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

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

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

What did you seek a permit to do?

*Maintain the existing sandbag revetment on the ocean shoreline in front of Lot 13 located at 13 Comber Road, Figure Eight Island.*

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

*Rules 15A NCAC 7H.0308(a)(2)(H) and 7H.0308(a)(2)(C)*

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

*Removal of the existing sandbag revetment will result in ocean intrusion, erosion and destruction/damages to the property at 13 Comber Road, the adjacent properties, and the road.*

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

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

*We are not allowed to maintain sandbags to protect the properties located at and adjacent to 13 Comber Road, Figure Eight Island. By receipt of a letter dated March 15, 2010, from Steven H. Everhart, District Manager of the Division of Coastal Management, DENR, we were informed that the sandbags had to be removed.*

RESPOND TO THE FOUR STATUTORY VARIANCE CRITERIA:

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

*The property at 13 Comber Road, Figure Eight Island, along with adjacent properties, will be damaged and/or destroyed by ocean intrusion and erosion if the sandbag revetment is not allowed to remain in place. Removal of this section of sandbags (on Lot 13), with sandbags in place on the adjacent properties, will cause the ocean to erode this unprotected location of the beachfront, resulting in damage and/or destruction of the associated properties, which could also include Comber Road.*

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

*Given the location of this property on the northern end of Figure Eight Island, it is subject to ocean erosion and will be lost to such erosion, along with associated damages and/or destruction to adjacent properties, if sandbags are not allowed to remain in place.*

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

*The erosion is due entirely to natural coastal conditions and not from any actions that we have taken on the property. Our actions in placing sandbags along the oceanfront on this property have minimized the effects of the ocean erosion that otherwise would occur to this and nearby properties.*

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

*According to the general policy guidelines for the North Carolina coastal area, the ocean and estuarine shorelines are to be managed in such a manner as to avoid loss of life, property, and amenities. 15A NCAC 7M.0201. Such management shall be conducted so as to minimize the likelihood of damage to private and public resources from recognized coastal hazards. 15A NCAC 7M.0201. Further, erosion response measures should be economically, socially and environmentally justified. 15A NCAC 7M.0202. Allowing the continued protection of the Petitioners' property at 13 Comber Road, Figure Eight Island by the existing sandbag revetment, which will also protect adjacent properties and Comber Road, at least until another reasonable solution can be devised, is consistent with the spirit, purpose, and intent of the CRC guidelines and rules in minimizing and avoiding loss of property and amenities, preserves substantial justice, and secures public safety.*

Please attach copies of the following:

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

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

Attach all documents you wish the Commission to consider in ruling upon your variance request. [The DCM attorney will also propose documents and discuss with you whether he or she agrees

with the documents you propose. Together you will arrive at a set of documents that both parties agree upon. Those documents will be the only documents that the Commission will consider in determining whether to grant your variance request.]

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

Date: 4-15-10

Signature:



*James F. Hopf  
Hopf & Higley, P.A.  
Attorneys for Petitioners*

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



**CERTIFICATE OF SERVICE**

I hereby certify that this Variance Request has been served on the State agencies named below in a sealed, secure envelope, via Federal Express overnight delivery or United States Mail, to the following:

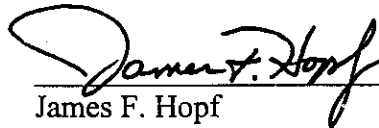
Original served via Federal Express overnight delivery on:

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

Copy served via United States mail on:

Attorney General's Office  
Environmental Division  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

This the 15<sup>th</sup> day of April, 2010.



---

James F. Hopf  
Hopf & Higley, P.A.  
Attorneys for Petitioners



MAR 18 2010

North Carolina Department of Environment and Natural Resources  
Division of Coastal Management  
James H. Gregson  
Director

Dee Freeman  
Secretary

Beverly Eaves Perdue  
Governor

March 15, 2010

V. Parker Overton  
3933 Mobley's Bridge Road  
Grimesland, NC 27837

RE: 13 Comber Road  
Figure Eight Island, New Hanover County

Dear Mr. Overton:

This letter is being sent as an informal compliance assistance notice concerning the temporary erosion control structures located at 13 Comber Road within the Ocean Hazard Area of Environmental Concern (AEC). On February 23, 2009 a CAMA Minor Permit #09-005 was issued to Parker Overton authorizing the relocation of the existing single-family residential structure from 13 Comber Road to 21 Comber Road.

On or about February 15, 2010, staff with the Division of Coastal Management observed the existing single-family residence had been relocated from 13 Comber Road to 21 Comber Road. Specific use standards for temporary erosion control structures found in 15A NCAC 07H.0308(a)(2)(H) state "once the temporary control structure has been determined to be unnecessary due to relocation or removal of the threatened structure, a storm protection project constructed by the USACE, a large-scale beach renourishment project or an inlet relocation project, it shall be removed by the property owner within 30 days of the official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure." The Rule in 15A NCAC 07H.0308(a)(2)(C) states "temporary erosion control structures shall be used to protect the principal structure and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to the setback requirement." Based on the fact that the single-family residence has been relocated and the remaining septic system is no longer servicing the principal structure, the septic system can longer be considered imminently threatened. However, any plans for future development at 13 Comber Road for which the remaining septic system would service should be submitted to this office. If no future development plans are proposed at this time, the temporary erosion control structures shall be subject to removal through official notification by this office.

Thank you for your attention and cooperation regarding this issue. If you have any questions pertaining to this matter, please feel free to call me at (910) 796-7266.

Sincerely,

Steven H. Everhart, PhD.  
District Manager

Cc: Jim Gregson, DCM  
Ted Tyndall, DCM  
Holley Snider, DCM  
James F. Hopf

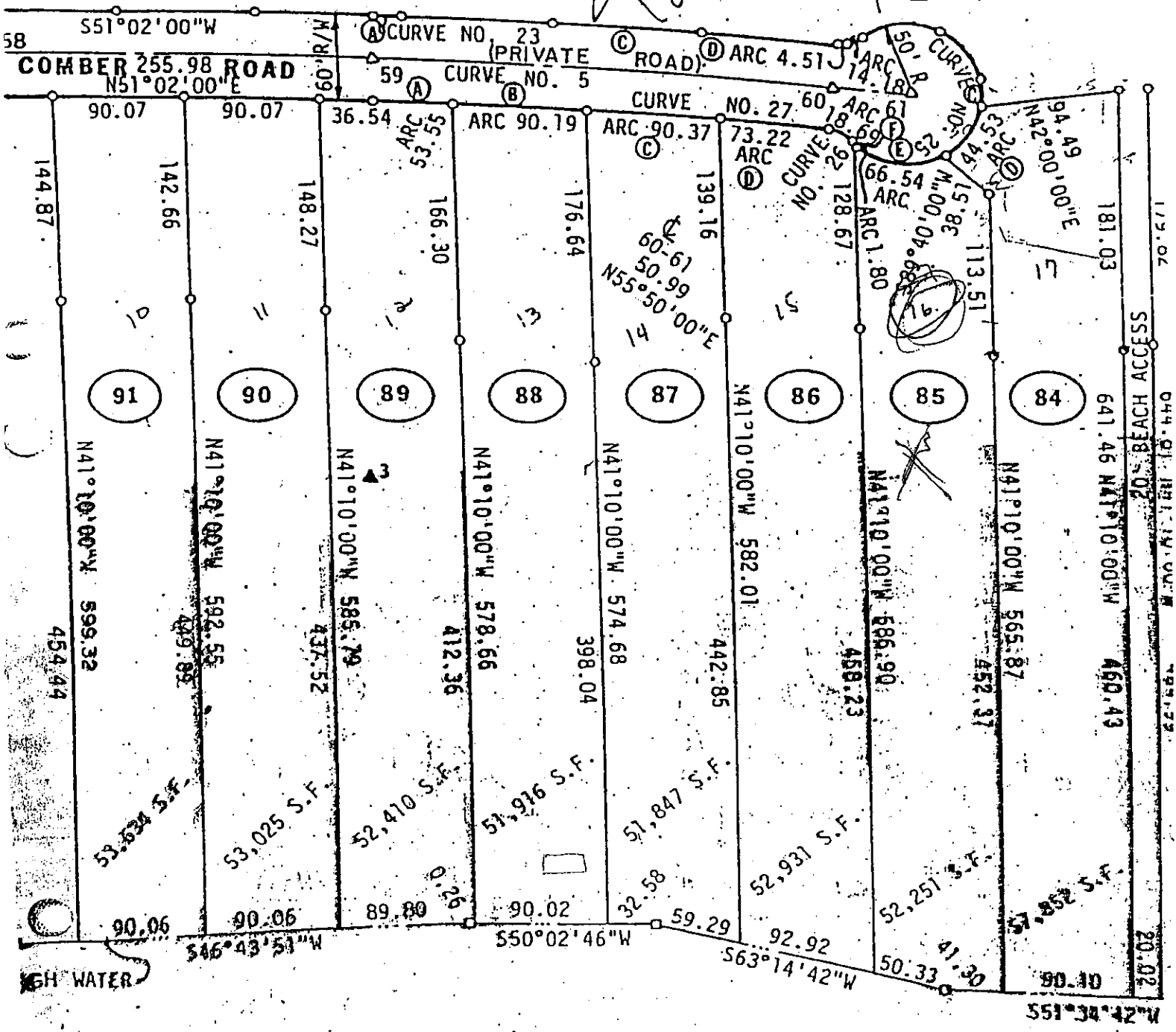
FIGURE EIGHT DEVELOPMENT, INCORPORATED  
 15 BRIDGE ROAD WILMINGTON NC 28403

SECTION 18 BLOCK B LOT \_\_\_\_\_

FIGURE EIGHT ISLAND

NEW HANOVER COUNTY, HARNETT TOWNSHIP, NORTH CAROLINA

*Lot 13 Comber*

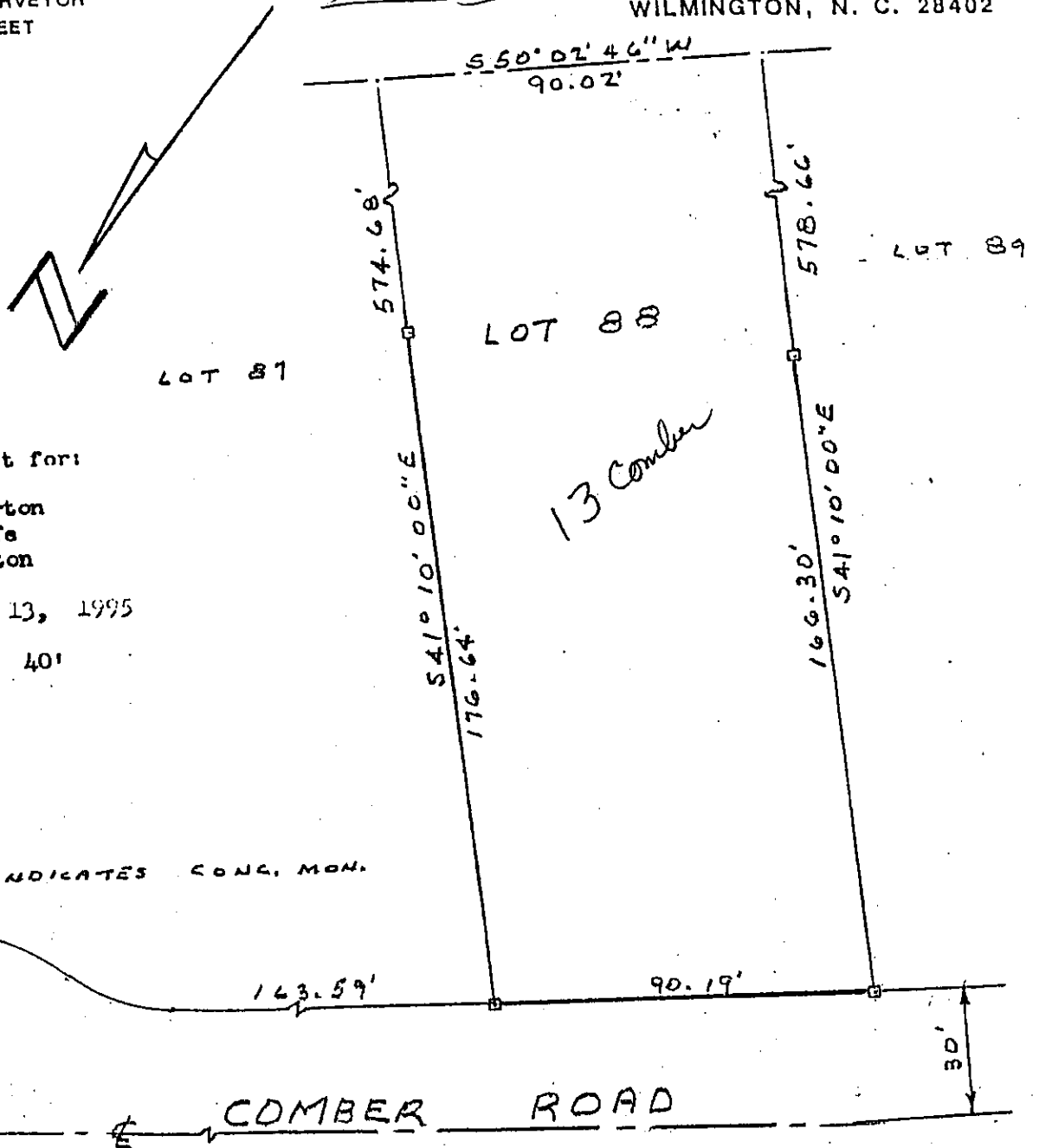


1. F. UNDERWOOD  
REGISTERED LAND SURVEYOR  
120 MARKET STREET

ATLANTIC OCEAN

PHONE 763-8393

P. O. BOX 1108  
WILMINGTON, N. C. 28402



Survey and plot for:

V. Parker Overton  
and wife  
Becky H. Overton

Date: March 13, 1995

Scale: 1" = 40'

□ INDICATES CONC. MON.

I, M. F. Underwood, Registered Land Surveyor of Wilmington, N. C., certify that I have surveyed the lot or parcel of land shown on the above plot, the same being Lot 88, Block B, Section 18, Figure Eight Island as recorded in Map Book 18 at Page 89 of the New Hanover County Registry and being a subdivision northeast of the City of Wilmington, N. C.

There are no encroachments. Unimproved lot

This lot is in Flood Zone All BFE 11 FEMA Map 370168 0061 E September 3, 1992.

*M. F. Underwood*  
M. F. Underwood  
N. C. Reg. No. L 747

# Attachment E: Stipulated Exhibits





# CAMA / DREDGE & FILL GENERAL PERMIT

No: 31944-D

New  Modification  Complete Reissue  Partial Reissue

Previous permit # \_\_\_\_\_

Date previous permit issued \_\_\_\_\_

As authorized by the State of North Carolina, Department of Environment and Natural Resources and the Coastal Resources Commission in an area of environmental concern pursuant to 15A NCAC \_\_\_\_\_

7H.1700

Rules attached.

Applicant Name OVERTON, CAGNEY, LINK, RAYFIELD

Project Location: County NEW HANOVER

Address 15 BRIDGE RD. FIG. 8 ISLAND

Street Address/ State Road/ Lot #(s) 13, 14, 15, 16

City Wilmington State NC ZIP 28411

Comber Rd.

Phone # (910) 686 0635 Fax # ( ) \_\_\_\_\_

Subdivision FIGURE 8 ISLAND

Authorized Agent DAVID KELLAM

City Wilmington ZIP 28411

Affected  CW  EW  PTA  ES  PTS

Phone # ( ) N/A River Basin CAPE FEAR

AEC(s):  OEA  HHF  IH  UBA  N/A

Adj. Wtr. Body ATLANTIC OCEAN (nat /man /unkn)

PWS: \_\_\_\_\_  FC: \_\_\_\_\_

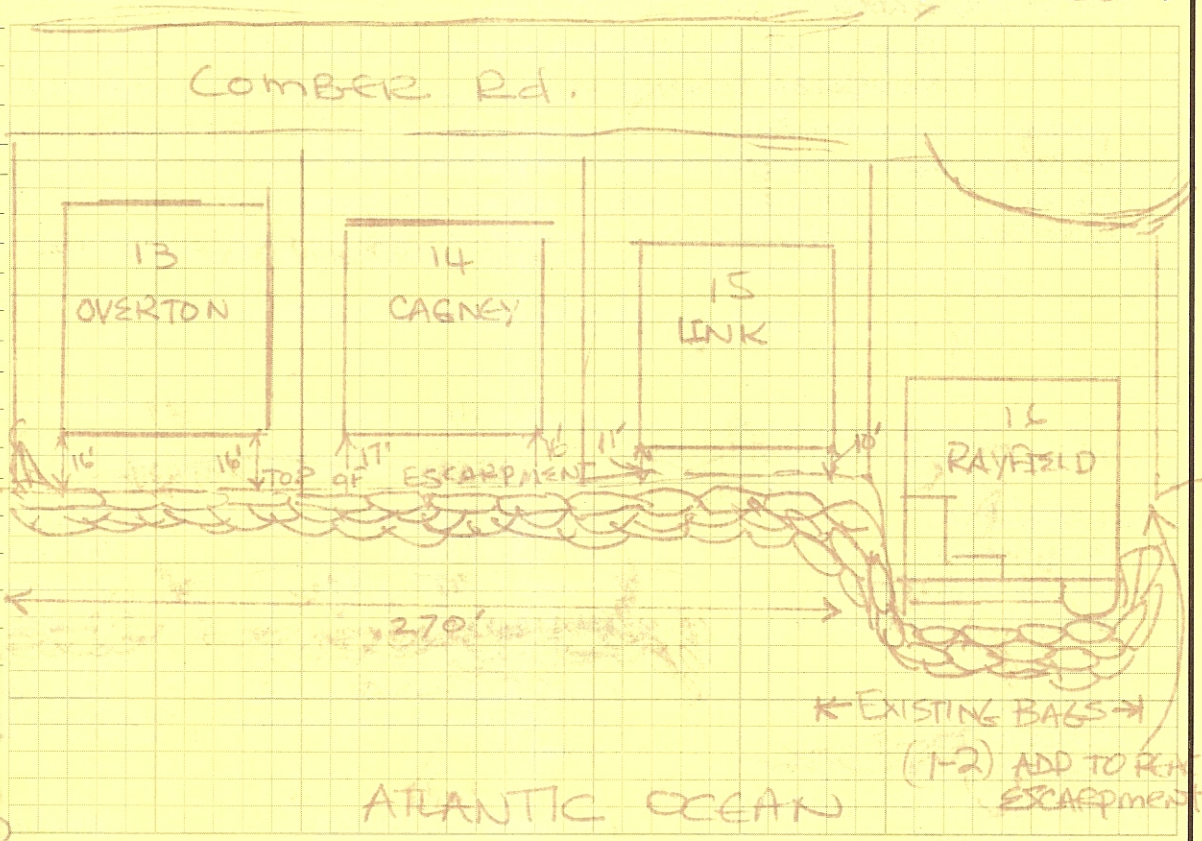
Closest Maj. Wtr. Body SAME

ORW: yes /  no PNA yes /  no Crit. Hab. yes / no

Type of Project/ Activity EMERGENCY SANDBAGS OF THREATENED STRUCTURES

(Scale: 1" = 60')

- Pier (dock) length \_\_\_\_\_
- Platform(s) \_\_\_\_\_
- Finger pier(s) \_\_\_\_\_
- Groin length number \_\_\_\_\_
- Bulkhead/ Riprap length avg distance offshore \_\_\_\_\_ max distance offshore \_\_\_\_\_
- Basin, channel \_\_\_\_\_ cubic yards \_\_\_\_\_
- Boat ramp \_\_\_\_\_
- Boathouse/ Boatlift \_\_\_\_\_
- Beach Bulldozing \_\_\_\_\_
- Other SANDBAGS 270' x 20' x 6'
- Shoreline Length +360'
- SAV: not sure  yes  no
- Sandbags: not sure  yes  no
- Moratorium: n/a  yes  no
- Photos:  yes  no
- Waiver Attached:  yes  no



A building permit may be required by: NHCO.

See note on back regarding River Basin rules.

Notes/ Special Conditions A FEDERAL PERMIT IS REQUIRED PRIOR TO STARTING WORK: CONTACT HENRY WICKER - USACE 251-4930  
SANDBAG REMOVAL PER AMMENDED & TEMPORARY RULE 7H. 1705(a)(7)

Agent or Applicant Printed Name DAVID KELLAM

Permit Officer's Signature [Signature]

Signature [Signature] \*\* Please read compliance statement on back of permit \*\*

Issuing Date 6-3-02 Expiration Date 7-3-02

Application Fee(s) NONE Check # \_\_\_\_\_

Local Planning Jurisdiction NHCO Rover File Name 0-053017A,B,C





CAMA /  DREDGE & FILL  
**GENERAL PERMIT**

New  Modification  Complete Reissue  Partial Reissue

By CRC Variance 31944 D  
 Final Order 7-25-03 No. ~~20110~~

Previous permit # 31944 D  
 Date previous permit issued 6-3-02

As authorized by the State of North Carolina, Department of Environment and Natural Resources and the Coastal Resources Commission in an area of environmental concern pursuant to 15A NCAC

74.1700/CRC variance  
 Rules attached.

Applicant Name Overton, Vance P.  
 Address P.O. Box 644  
 City Greenville State NC ZIP 27835  
 Phone # (910) 686-0635 Fax # ( )  
 Authorized Agent DAVID KELLAM

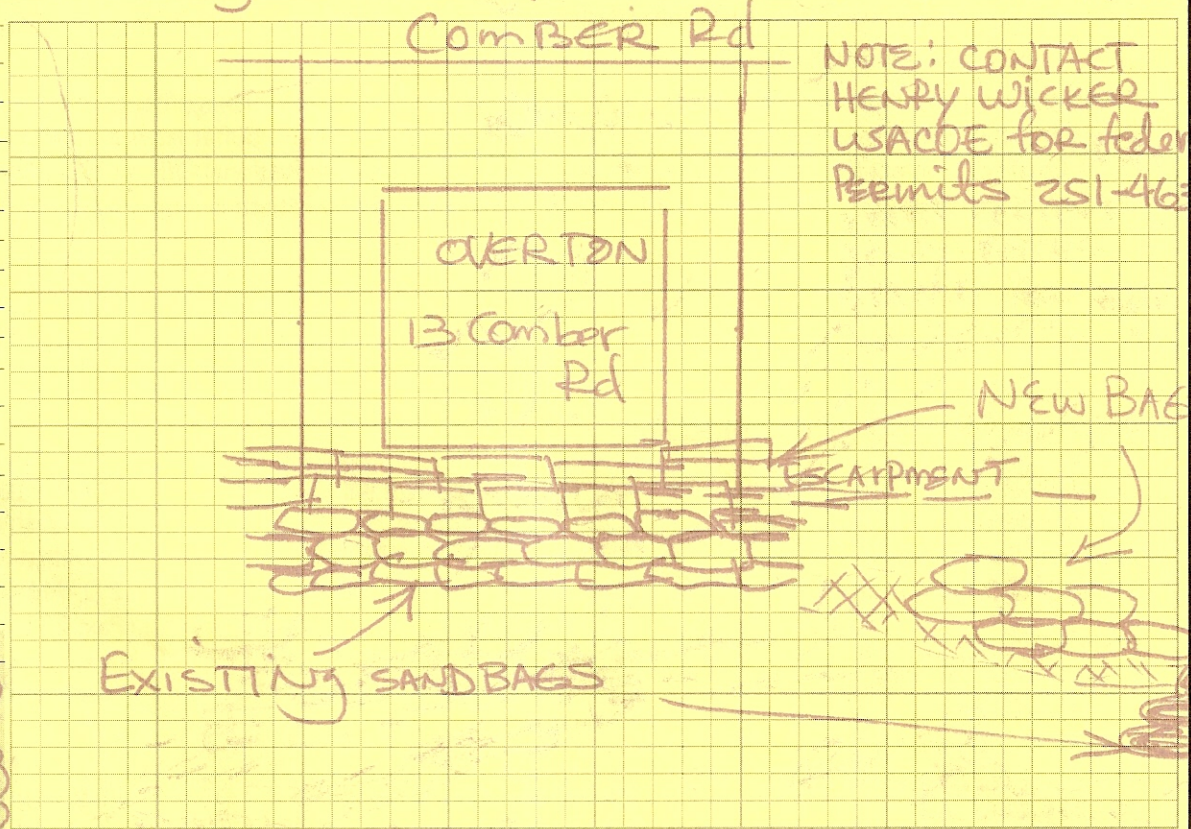
Project Location: County New Hanover  
 Street Address/ State Road/ Lot #(s) 13 Comber Rd.  
 Subdivision Figure 8 Island  
 City Wilmington ZIP 28411  
 Phone # ( ) N/A River Basin Cape Fear  
 Adj. Wtr. Body Atlantic Ocean (nat /man /unkn)  
 Closest Maj. Wtr. Body Same

Affected AEC(s):  CW  EW  PTA  ES  PTS  
 OEA  HHF  IH  UBA  N/A  
 PWS:  FC:

ORW: yes /  no PNA yes /  no Crit. Hab. yes /  no

Type of Project/ Activity Addition to existing sand bags - See Figure 8  
Sandbag Elevation survey in file 8/19/03 (Scale: 1"=40')

Pier (dock) length \_\_\_\_\_  
 Platform(s) \_\_\_\_\_  
 Finger pier(s) \_\_\_\_\_  
 Groin length number \_\_\_\_\_  
 Bulkhead/ Riprap length avg distance offshore \_\_\_\_\_ max distance offshore \_\_\_\_\_  
 Basin, channel cubic yards \_\_\_\_\_  
 Boat ramp \_\_\_\_\_  
 Boathouse/ Boatlift \_\_\_\_\_  
 Beach Bulldozing \_\_\_\_\_  
 Other ±90' x ±15' SANDBAGS  
 Shoreline Length ±90'  
 SAV: not sure yes  no   
 Sandbags: not sure  yes  no  
 Moratorium: n/a yes  no   
 Photos: yes  no   
 Waiver Attached: yes  no



A building permit may be required by: NH Co.  See note on back regarding River Basin rules.

Notes/ Special Conditions Subject to the conditions of CRC-VR-03-09  
40' max width and 10' ABOVE M.H.W. OR GRADE ELEVATION  
MAX HEIGHT.

Agent or Applicant Printed Name David Kellam  
 Signature David Kellam \*\* Please read compliance statement on back of permit \*\*  
 Application Fee(s) N/A Check # \_\_\_\_\_

Permit Officer's Signature [Signature]  
 Issuing Date 8-1-03 Expiration Date 10-1-03  
 Local Planning Jurisdiction New Hanover Co. Rover File Name Same



STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

BEFORE THE NORTH CAROLINA  
COASTAL RESOURCES COMMISSION  
CRC-VR-03-09

IN THE MATTER OF: )  
PETITION FOR VARIANCE )  
BY FIGURE EIGHT ISLAND )  
HOMEOWNERS ROBERT )  
KENEFICK, ET AL )

FINAL ORDER

---

This matter was heard on oral arguments and stipulated facts at the regularly scheduled meeting of the North Carolina Coastal Resources Commission (hereinafter CRC) on July 23, 2003, in Raleigh, North Carolina pursuant to N.C.G.S. § 113A-120.1 and T15A NCAC 7J.0700, *et seq.* Assistant Attorney General Meredith Jo Alcoke appeared for the Department of Environment and Natural Resources, Division of Coastal Management. Mack Paul, Esq. and William A. Raney, Jr., Esq. appeared on behalf of the Petitioners.

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

STIPULATED FACTS

1. Petitioners are fifteen lot owners on the northern end of Figure Eight Island in New Hanover County, North Carolina. The individual Petitioners are listed in Petitioners' variance request materials.
2. Fifteen lots on the north end of Figure Eight Island extending from 9 Comber Road on the south to 8 Inlet Hook on the north (inclusive) have been sandbagged under the general permit provisions on 15A NCAC 7H .1700 *et seq.* The site is depicted in Petitioners' site plan and enlarged site plan submitted with the variance petition.



3. Lots 9 through 12 Comber Road and 5 through 7 Inlet Hook were the subject of a variance petition in July 2002. The 2002 petition requested permission to install emergency sandbags prior to the erosion escarpment being located within 20' of the foundation of the houses on these lots. The variance petition was denied. All of the houses later qualified for sandbags under the general permit when the continued erosion caused the escarpment to be located within 20' of the foundation of the structures. Some houses qualified as imminently threatened where accelerated erosion increased the risk of imminent damage to the structure. 15A NCAC 7H .0308(a)(2)(B).
4. The lots are within the Ocean Hazard Area of Environmental Concern (AEC). All lots are located within the Ocean Erodible AEC and all lots except lots 9, 10, and 11 Comber Road are also located within the Inlet Hazard AEC.
5. The long-term annual erosion rate for this ocean hazard area is 2 feet per year. The setback for the inlet hazard area is equal to the setback required in the adjacent ocean hazard area.
6. The first emergency sandbag permits were issued to 16 Comber Road (Rayfield) and 4 Inlet Hook (Taylor) on October 9, 2001. The last CAMA General Permit for sandbags was issued to 8 Inlet Hook (Woodbury) on January 31, 2003. The CAMA General Permits for Petitioners are provided in Petitioners' variance request materials.
7. Petitioners' sandbags are eligible to remain in place until at least May 2008 because the Figure "8" Beach Homeowner's Association, Inc. has an active CAMA Major Permit for beach nourishment. 15A NCAC 7H .1705(a)(7)(A).
8. In accordance with the provisions of 7H .1705(a)(10), the base width of the sandbag structure "shall not exceed 20 feet, and the height shall not exceed six feet."

9. Certifications of Exemption have been issued for maintenance or repair of the emergency sandbags on April 19, 2002 (16 Comber), June 3, 2002 (13 – 16 Comber), November 22, 2002 (16 Comber), January 6, 2003 (15 Comber – 6 Inlet Hook), January 30, 2003 (9 Comber – 14 Comber), and April 28, 2003 (9 Comber – 6 Inlet Hook).
10. The sandbag structures have been overtopped by waves on numerous occasions since their installation with significant erosion occurring to the property behind at least some of the bags in August 2002, October 2002, January 2003, April 2003.
11. The sandbags were originally installed above the mean high water line as required by the rules. Erosion from subsequent storm event and lunar tides have lowered the beach profile so that portions of some of the bags are covered by the waters of a normal high tide event.
12. Since 1996 this stretch of shoreline has been subject to chronic erosion as a result of the northward movement of the main channel of Rich Inlet.
13. This stretch of shoreline has also been subject to erosion from storms, including two hurricanes in 1996, one hurricane in 1998, one hurricane in 1999 as well as numerous northeasters.
14. The sand displaced from behind the bags, when storms or high tides caused waves to overtop the base, has not visibly remained on the ocean beach seaward of the bags but has apparently been swept into the inlet system by inlet-related currents.
15. On June 14, 2003, the top elevation of the highest sandbag at 5 Inlet Hook, 3 Inlet Hook walkover, 12 Comber Road, and 9 Comber Road ranged from 6' above mean high water to 2.4' above mean high water.
16. On June 14, 2003, the elevation of the beach surface at the seaward toe of the exposed

sandbags in these four locations ranged from -0.1' mean high water to -2.8' mean high water.

Petitioners have not measured the remaining lots. The elevations appear to be similar.

17. The average elevation of the top of the bags in the four locations referenced above was 4.3' above mean high water and the average elevation of the beach surface at the seaward toe of the bags was -1.5' mean high water.
18. The sandbag structures of the size permitted under the general permit, and presently existing on the lots, have not prevented waves from overtopping the bags and eroding the area behind the bags.
19. The photographs submitted by the Petitioners are accurate depictions of the conditions of the properties on the dates indicated on the photographs.
20. The location of the main ebb channel of Rich Inlet as depicted on the photographic exhibit is a generally accurate depiction of the location of the inlet channel on the dates indicated.
21. The main ebb channel of Rich Inlet has moved significantly to the south since the winter of 2002 and appears to be in a favorable position for the Petitioners' shoreline to begin to rebuild.
22. Dr. William Cleary, coastal Geologist and professor at the University of North Carolina at Wilmington serves as a consultant to the Figure "8" Beach Homeowners' Association. In the summer of 2002, Dr. Cleary provided an analysis of the reasons for the shoreline erosion at the Petitioners' properties. This analysis is attached as Exhibit A. Illustrative photographs will be presented at the Commission's hearing on this matter.
23. In May of 2003 Dr Cleary provided an addendum to his analysis containing information gathered since the analysis of the summer of 2002. This addendum is attached as Exhibit B.

Illustrative photographs will be presented at the Commission's hearing on this matter.

24. The data and opinions of Dr. Cleary represent the best information available to explain the causes of the erosion and the likelihood of a natural recovery of this stretch of shoreline.
25. The Figure "8" Beach Homeowners' Association is not proposing beach nourishment of this stretch of shoreline because the inlet related erosion would make nourishment ineffective at this time and because Petitioners believe natural processes provide the best long-term solution to the erosion problems.
26. The Petitioners request a variance from the provisions of 15A NCAC 7H 1705(a)(10) that limit the height and width of the bags to 6' x 20' to allow a higher and wider sandbag structure for the temporary protection of their houses from erosion.
27. The specific variance requested is to vary the limits on the height and width of the sandbag structures as follows:
  - i. The height of the topmost bag of the structure shall not exceed 10 feet above the mean high water.
  - ii. The seaward toe of the structure shall not extend farther seaward than its original location.
  - iii. The total width of the structure shall not exceed 40 feet.
28. The proposed expansion of the sandbags is depicted on engineered drawings located in Petitioners' variance request materials.
29. Additional facts were presented by the parties at the hearing on the variance request and are further stipulated facts upon which this Final Order is based. Those additional facts are recorded on the audio tape of the hearing and incorporated herein by reference.

The Coastal Resources Commission makes the following:

CONCLUSIONS OF LAW

1. The CRC has jurisdiction over the parties and the subject matter.
2. The parties have been correctly designated.
3. All notices for the proceeding were adequate and proper.
4. The Commission concludes that the Petitioners have demonstrated that strict application of Rule 15A NCAC 7H .1705(a)(10) to their permit applications will result in unnecessary hardships. The Petitioners' variance request materials, the staff recommendation, and the stipulated facts are incorporated by reference as support for this conclusion.
5. The Commission concludes that the Petitioners have demonstrated that their hardships result from conditions peculiar to the project properties. The Petitioners' variance request materials, the staff recommendation, and the stipulated facts are incorporated by reference as support for this conclusion.
6. The Commission concludes that the Petitioners have demonstrated that their hardships do not result from their own actions. The Petitioners' variance request materials, the staff recommendation, and the stipulated facts are incorporated by reference as support for this conclusion.
7. The Commission concludes that the Petitioners have demonstrated that their proposed development is within the spirit, purpose and intent of the Commission's rules; that it will secure public safety and welfare; and that it will preserve substantial justice. The Petitioners' variance request materials, the staff recommendation, and the stipulated facts are incorporated by reference as support for this conclusion.

ORDER

THEREFORE, the petition for variance from T15A NCAC 7H .1705(a)(10) is GRANTED.

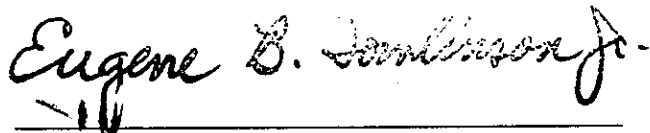
The Petitioners may vary the height and width of Petitioners' sandbag structures as follows:

- (1) The height of the topmost bag of the structure shall not exceed 10 feet above mean high water.
- (2) The seaward toe of the structure shall not extend farther seaward than its original location.
- (3) The total width of the structure shall not exceed 40 feet.

The variance is subject to the following conditions:

- (a) The elevation of the top of the sandbags may not exceed the elevation of the land around the houses; and
- (b) In the event that any sandbag structure fails, the Petitioners shall remove the sandbags from the public beach.

This the 25th day of July, 2003.



---

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

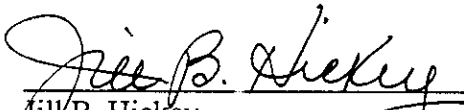
**CERTIFICATE OF SERVICE**

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

W.A. Raney, Jr.  
Wessell & Raney, LLP  
107-B North Second St.  
PO Box 1049  
Wilmington, NC 28402

Meredith Jo Alcock  
Assistant Attorney General  
Environmental Division  
PO Box 629  
Raleigh, NC 27602

This the 25th day of July, 2003.

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

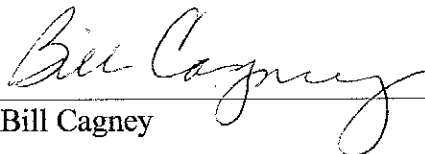
STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

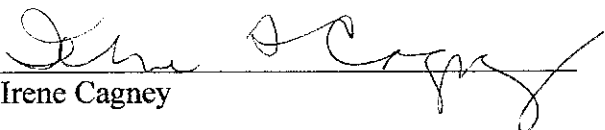
AFFIDAVIT OF BILL & IRENE CAGNEY

The undersigned, Bill and Irene Cagney, first being duly sworn, avers and says:

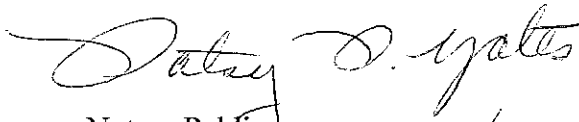
1. Our names are Bill and Irene Cagney and we own property at 14 Comber Road on Figure Eight Island, New Hanover County, North Carolina.
2. Our property is located immediately adjacent to, and on the north side of, the property owned by Parker and Becky Overton at 13 Comber Road, Figure Eight Island.
3. We strongly support the Overtons' request for a variance to allow sandbags to remain in place along the oceanfront of their lot at 13 Comber Road.
4. As the owners of oceanfront property immediately adjacent to the Overtons, we are very concerned about the adverse consequences from ocean erosion that we believe will result from a removal of any sandbags.
5. Given the past erosion experienced in this oceanfront area, we anticipate that the removal of the sandbags at 13 Comber Road will lead to erosion damages not only to the Overton lot but also to our adjacent property.
6. We request that the Coastal Resources Commission grant the variance request of the Overtons allowing sandbags to remain in place on the lot at 13 Comber Road in order to protect our oceanfront properties.

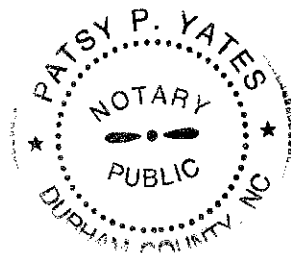
This the <sup>th</sup> 14 day of June, 2010.

  
Bill Cagney

  
Irene Cagney

Sworn to and subscribed before me  
this the <sup>th</sup> 14 day of June, 2010.

  
Notary Public  
My commission expires: 5/20/2013

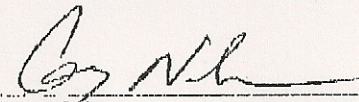


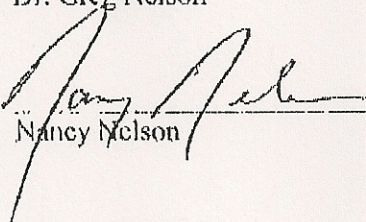


COUNTY OF NASH

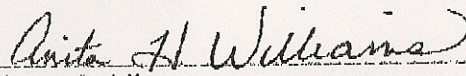
1. Our names are Greg and Nancy Nelson and we own property at 12 Comber Road on Figure Eight Island, New Hanover County, North Carolina.
2. Our property is located immediately adjacent to, and on the south side of, the property owned by Parker and Becky Overton at 13 Comber Road, Figure Eight Island.
3. We strongly support the Overtons' request for a variance to allow sandbags to remain in place along the oceanfront of their lot at 13 Comber Road.
4. As the owners of oceanfront property adjacent to the Overtons, we are very concerned about the adverse consequences from ocean erosion that we believe will result from a removal of any sandbags.
5. Given the past erosion experienced in this oceaufront area, we anticipate that the removal of the sandbags at 13 Comber Road will lead to erosion damages not only to the Overton lot but also to our adjacent property.
6. We request that the Coastal Resources Commission grant the variance request of the Overtons allowing sandbags to remain in place on the lot at 13 Comber Road in order to protect our oceanfront properties.

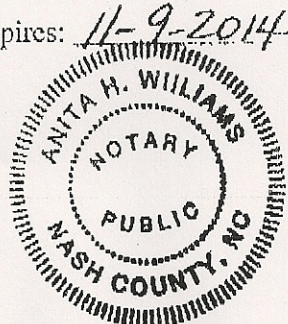
This the 15 day of June, 2010.

  
 \_\_\_\_\_  
 Dr. Greg Nelson

  
 \_\_\_\_\_  
 Nancy Nelson

Sworn to and subscribed before me this the 16 day of June, 2010.

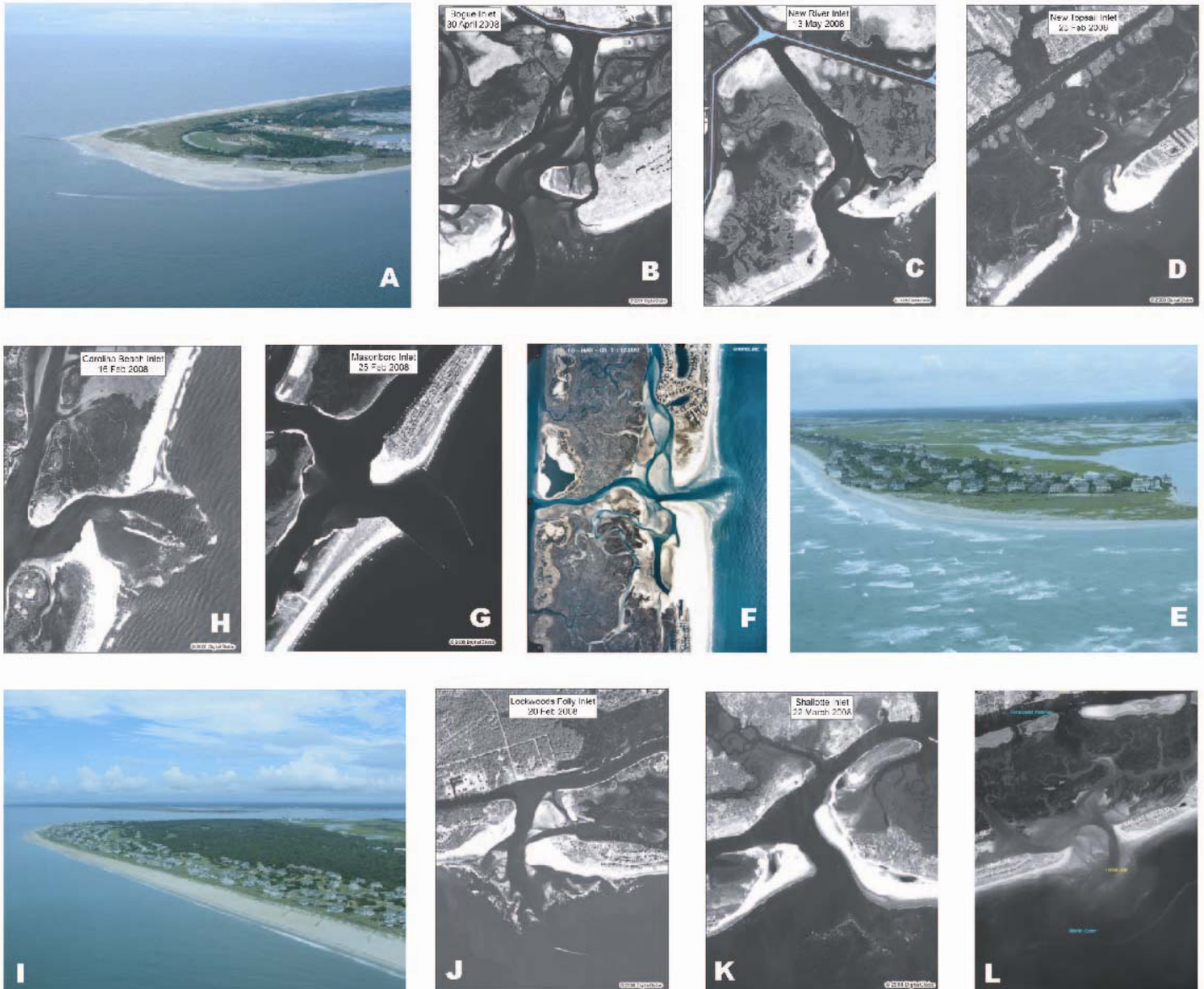
  
 \_\_\_\_\_  
 Notary Public  
 My commission expires: 11-9-2014





# INLET HAZARD AREA BOUNDARIES UPDATE:

Recommendations to the North Carolina Coastal Resources Commission



**Final Report Prepared and Submitted by:**

Jeffrey D. Warren, PhD, CPG

Kenneth R. Richardson

North Carolina Division of Coastal Management

Report # CRC 10-26

May 2010



### 3.8 Rich Inlet

#### **BACKGROUND** (*summarized from Cleary and Marden, 2001*)

- Inlet drains an expansive marsh area where two large tidal creeks, Nixon and Green channels, connect the AIWW
- Inlet's large tidal prism and historic stability are primarily responsible for the size of the ebb-tidal delta
- The ebb delta has been estimated to contain eight million cubic meters of sediment to a depth of six m (19.7 ft)
- Compared to other inlet systems found in this region, Rich Inlet is a relatively large inlet and depths in the main channel range from five to seven m (16 to 23 ft)

#### **BOUNDARY SUMMARY**

##### ***LEFT SIDE OF INLET (Figure Eight Island)***

Shorelines analyzed (9): 1938, 1958, 1973, 1980, 1992, 1997, 1998, 2003, 2004

- Original IHA boundary @ DCM transect 2173
- Proposed IHA boundary @ DCM transect 2151 (IHA boundary movement 3,630 ft or 1,100 m southwest)

Proposed IHA boundaries were delineated based on statistical shoreline trends, inlet processes, and geomorphology. Statistical shoreline trend analysis (standard deviation of shoreline position and average rate of shoreline change) identified transect 2151 as the point along the oceanfront where inlet processes were no longer dominant. At transect 2151 the historical average beach width was used to define the landward extent of the proposed IHA boundary and transitioned to the maximum historical beach width between Clamdigger Point and the private drive that connects Beach Road to Surf Court. The proposed IHA boundary continued to follow maximum beach width along Beach Road and back to Oyster Catcher Road where it intersected the existing IHA boundary and followed that boundary to the backside of the island. A sand spit on the back-barrier portion of the island, the formation of which was driven by inlet processes, was also included in the proposed IHA. Inclusion of inlet-related spits has been the standard for all of the proposed IHAs presented in this report. Man-made landmarks (e.g., existing streets and parcel lines) were taken into consideration by DCM staff to refine the proposed IHA boundary. Refer to Figure 3.10 for proposed IHA boundary. Additional data figures for this inlet are included in the appendix.

### ***RIGHT SIDE OF INLET (Lea/Hutaff Island complex)***

Shorelines analyzed (9): 1938, 1958, 1973, 1980, 1992, 1997, 1998, 2003, 2004

- Original IHA boundary @ DCM transect 2208
- Proposed IHA boundary @ DCM transect 2370 (proposed IHA moved 26,730 ft or 5 mi (8,038 m or 8 km) to the northeast to include the northeastern-most portion of Figure Eight Island, Rich Inlet, the Lea/Hutaff Island complex – joined after the closure of Old Topsail Inlet, New Topsail Inlet and the southwestern-most portion of Topsail Island)

Similar to Masonboro Island, the Lea/Hutaff Island complex (also referred to as Coke and No-Name islands) was created as Old Topsail Inlet closed in 1997 and is heavily influenced by Rich Inlet as well as New Topsail Inlet flanking it to the north. Based on the narrow and low-lying geomorphology of the island complex (e.g., lack of dune ridges and extensive overwash) and inlet processes, the CRC Science Panel determined that the Rich Inlet IHA should include the Lea/Hutaff Island complex in its entirety.

Therefore, the proposed Rich/New Topsail IHA extends to Topsail Island (the northern proposed IHA boundary of New Topsail Inlet). This IHA includes the existing IHA for Old Topsail Inlet (spanning transects 2259 to 2301). Refer to Figure 3.11 for proposed IHA boundary. Additional data figures for this inlet are included in the appendix.

**Figure 3.10.** Proposed IHA boundary for the southwestern side of Rich Inlet (Figure Eight Island).



# Proposed Inlet Hazard Area (IHA) at Rich Inlet (Figure Eight Island)

- Legend**
- Inlet Hazard Area (IHA) ~ Proposed
  - IHA Boundary
  - IHA Boundary - (over water extension)
  - Transects of Interest

The "Proposed Inlet Hazard Area" boundaries illustrated in this map represent the conceptual representation of regions adjacent to North Carolina's developed inlets which are subject to inlet processes. These boundaries have been defined by experts\* following a detailed change analysis of historic shore lines, vegetation, beach width, and geomorphology.

\*NCEM, OIC, Science Personnel, Coastal Hazards and DOD Staff

For more information please visit: [www.nccos.state.nj.gov/management.net](http://www.nccos.state.nj.gov/management.net)

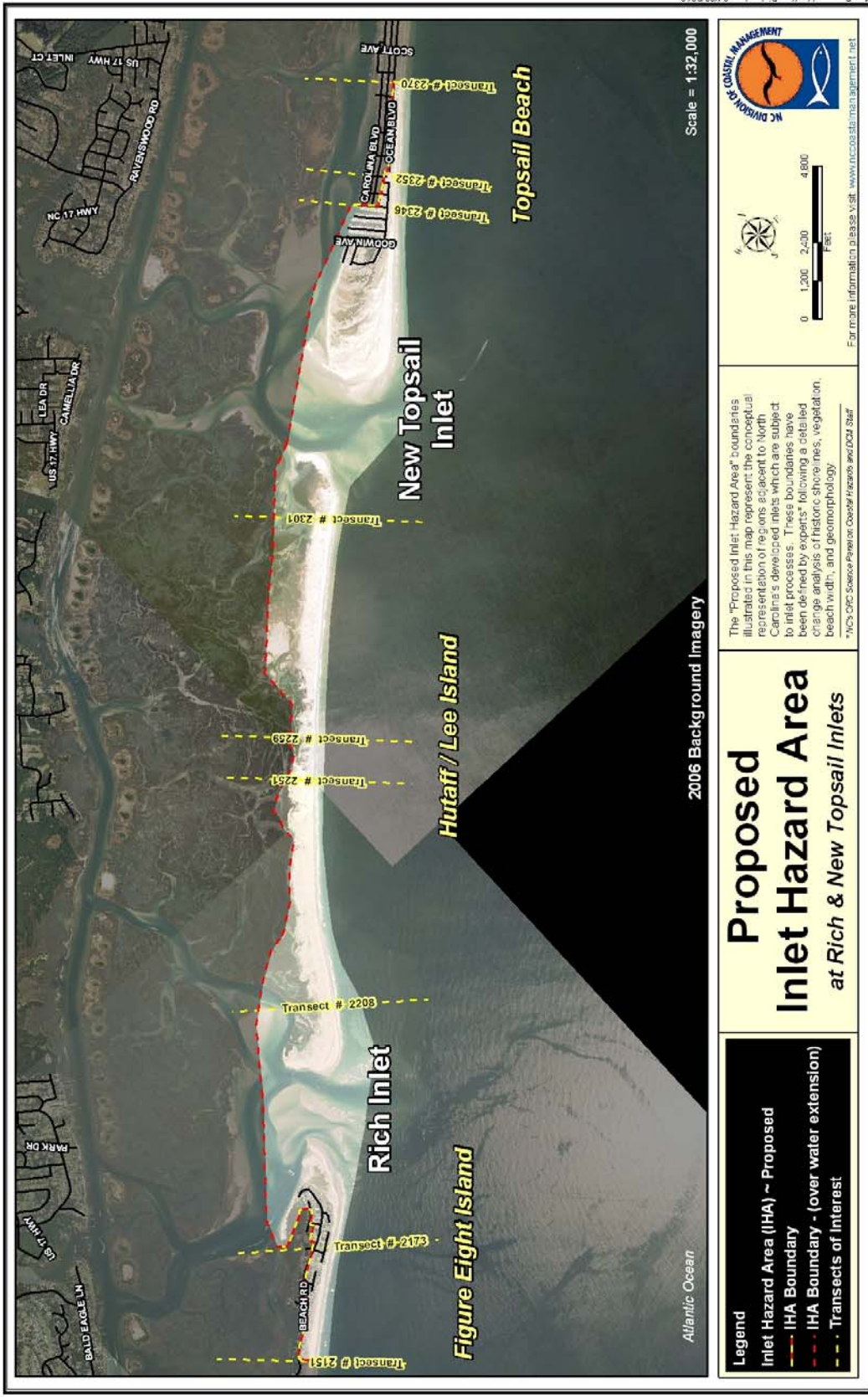
Scale = 1:6,000

0 220 440 880 Feet

NC DIVISION OF COASTAL MANAGEMENT

**Figure 3.11.** Proposed IHA boundary for the area between Rich Inlet and New Topsail Inlet.





Map Prepared by Ken Richardson 04/29/2010

North Carolina DEIR - Division of Coastal Management - 2010



Parker Overton  
Variance Request  
July 15, 2010

13 Comber Road  
Figure Eight Island  
New Hanover County

# Aerial Photography 05/26/2006

13 Comber Road  
North End  
Figure Eight  
Island



**Former Location of  
Single Family  
Residence**

**13 Comber Road  
Figure Eight Island  
New Hanover County**

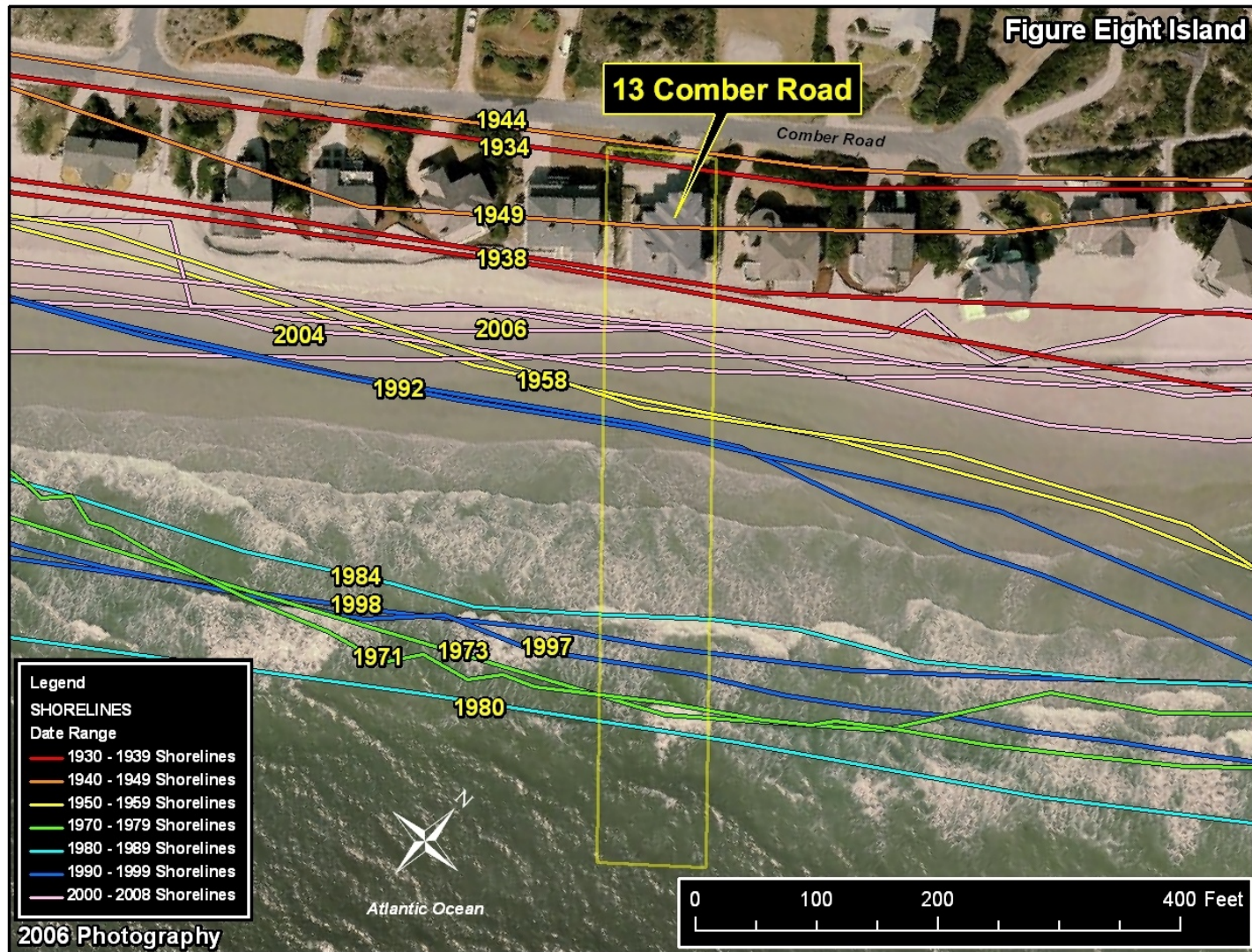


# View of property and existing sandbags facing northwest on 03/06/08





# NC Division of Coastal Management Historic Shorelines





**View of property shoreline facing south from  
the north property corner 01/29/09  
(prior to fall/ winter '09 renourishment)**



**View of property shoreline facing south from the north property corner 03/05/09 (ongoing renourishment)**





# Sandbags at Comber Road

DCM Aerial Flight Photo 04/23/10

Relocated Home  
21 Comber Road



Start Sandbags  
5 Comber Road  
Vacant Lot

13 Comber Road

16 Comber Road



# Sandbags at Inlet Hook Road

DCM Aerial Flight Photo 04/23/10

17 Comber Road

End of Sandbags  
8 Inlet Hook Road



# 13 Comber Road

remaining structures: driveway, decking,  
underground septic system, and dog fence with foundation 06/23/10





# Sandbag repairs at adjacent property to the north 06/23/10



# Sandbag repairs at adjacent property to the south 06/23/10





# Existing Sandbags at 13 Comber Road 06/23/10





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

Beverly Eaves Perdue, Governor

James H. Gregson, Director

Dee Freeman., Secretary

## MEMORANDUM

CRC-10-24

**To:** The Coastal Resources Commission  
**From:** Michael Christenbury, Wilmington District Planner  
**Date:** June 24, 2010  
**Subject:** Certification of the Sunset Beach Core Land Use Plan (July 15, 2010 CRC Meeting)

---

**Staff Recommendation: Certification of the Town of Sunset Beach Core LUP based on the determination that the document has met the substantive requirements outlined within the 2002 7B Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program.**

### Overview

The Town of Sunset Beach is located in southwestern Brunswick County, adjacent to the Town of Ocean Isle Beach and immediately to the north of the North Carolina/South Carolina state line. Since 1990, the Town of Sunset Beach has annexed a significant amount of land on the mainland. Currently Sunset Beach has more land area on the mainland than on the barrier island portion of the town. The Town is separated from the mainland by the Atlantic Intracoastal Waterway and is linked to the mainland by a single wooden pontoon bridge. A new high-rise bridge is currently under construction and is slated to open to traffic within the coming months. The Town of Sunset Beach has a year round population of approximately 2,200 with a seasonal peak population of approximately 7,800. The Town does not have significant issues with oversized structures on the barrier island portion of the town.

The Future Land Use Plan Map depicts the majority of the Town as 'Residential Low Density' and 'Residential High Density' type designations. Sunset Beach is considered a 'family beach' type community with the majority of land uses consisting of residential. A moderate amount of commercial uses exist within the town, the vast majority of which are located on the mainland. The housing stock within the town is primarily single-family residential with some duplex and multi-family uses. A substantial portion of the Town on the mainland is developed as resort-type golf course communities or planned residential communities. The Town is currently working with Brunswick County and Brunswick County Public Utilities to install a centralized planned sewer system throughout the town's planning jurisdiction.

**Some notable policies within the Sunset Beach Land Use Plan include the following:**

*Policy 17 (A): The Town shall retain a 35-foot height limitation for residential, commercial and institutional structures on the island.*

*Policy 17 (C): No structure on the mainland shall be allowed to exceed 50 feet in height. This restriction includes any and all uses and building types currently allowed in the Town.*

*Policy 51: The Town shall require all existing development with on- and/or off-site wastewater systems in the Sunset Beach planning jurisdiction, as well as any future developments, to connect to the Brunswick County sewer system.*

*Policy 71 (A): When central sewer service becomes available, the Town shall require all septic systems in use in the Town's jurisdiction to be professionally pumped-out and crushed, filled or retrofitted to be used as a "storm water cistern".*

The Town of Sunset Beach held a duly advertised public hearing and voted by resolution to adopt the land use plan on June 7, 2010. The plan was prepared through a facilitated process utilizing workshops with citizens, elected officials, and the Land Use Planning Committee. The goals and policies in the plan are a result of detailed analysis and discussion of key issues identified in the workshops.

The public had the opportunity to provide written comments up to fifteen (15) business days prior to the CRC meeting (July 15, 2010). June 24<sup>th</sup> was the deadline date. No comments were received, written or otherwise.

To view a hard copy of the Sunset Beach Core Land Use Plan, go to the link below and scroll down to Sunset Beach LUP.

[http://www.nccoastalmanagement.net/Planning/under\\_review.htm](http://www.nccoastalmanagement.net/Planning/under_review.htm)



A photograph of a beach with driftwood and palm trees under a clear blue sky. The beach is in the foreground, with waves washing onto the shore. The sky is a solid, clear blue. The text is overlaid on the image.

# ADAPTING TO SHORELINE CHANGE

A Foundation for Improved Management  
and Planning in South Carolina

Final Report of the  
Shoreline Change Advisory Committee

April 2010

South Carolina Department of Health and Environmental Control







*Financial assistance provided under Cooperative Agreement NA08NOS4190423 by the Coastal Zone Management Act of 1972, as amended, administered by the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.*

*The photographs in this report were taken by DHEC staff. The images illustrate South Carolina scenes and people. Aerial photography was provided under DHEC contract by Pictometry International Corp.*



# Preamble

*The State of South Carolina should be commended for its foresight and early action on beachfront management issues. Recognizing increasing shoreline development and chronic erosion issues, the SC Coastal Council appointed a 25-member Blue Ribbon Committee on Beachfront Management in 1987 to make recommendations for long-term improvements in beach planning and management. Their recommendations created the foundation for the 1988 South Carolina Beachfront Management Act, and a state beach management program that was recognized nationally for its advancement of science-based policies to reduce coastal vulnerabilities and protect sensitive resources.*

*Two decades later, there are now enhanced capacities at the local level, a number of lessons to be learned from policy and regulatory implementation, and growing attention to threats from chronic erosion and storms. We believe that this Committee was formed at the right time, to help our state reflect on two decades of beach management and identify continuing vulnerabilities and conflicts. Our report was intended to help clarify longstanding policy, reduce community vulnerabilities, resolve conflicts, improve public and private planning, save money, enhance key resource protections, reduce liabilities, and improve public access; but more generally, to ensure the long-term health of coastal shorelines and vitality of the coastal economy.*

*The Committee did not perfectly represent all interest groups, but maintained consistent participation of 23 members from academia, resource agencies, the private sector, nonprofit organizations, and the public – not to “vote” on new rules, but to identify common ground and areas of disagreement to help set the context for future policy deliberations. Because shoreline management involves interweaving actions and influences at the federal, state, and local level, the recommendations we present here are targeted not just toward DHEC-OCRM, but are also for consideration by the General Assembly, other state agencies, and local governments.*

*The members of this Committee met in 14 full-day meetings over a two-year period. We have attended meetings in Columbia, Myrtle Beach, Beaufort, and Charleston, and spent countless hours drafting policy recommendations and debating finer details, many of which do not appear in the final report. We volunteered our time and commitment to this effort because we feel that it is of critical importance to the state, and hope that we have created a new foundation for successful shoreline management for the next two decades and beyond.*

*Jeff Allen  
Sara Brown  
Mark Caldwell  
Jimmy Carroll  
Marc Cherry  
Mary Conley  
Toni Connor-Rooks  
Paul Conrads*

*Hamilton Davis  
Rick DeVoe  
Kirstin Dow  
Josh Eagle  
Jill Foster  
Paul Gayes  
G. Robert George  
Tina Hadden*

*Scott Harris  
Norm Levine  
Jim London  
Chris Mack  
Tara Miller  
Jim Morris  
Bob Van Dolah*

# Acknowledgements

This report would not have been possible without the extraordinary commitment of the Advisory Committee members, who persevered through lengthy meetings, presentations, and detailed policy debates for close to two years. They were asked to get up to speed on large volumes of reference materials, statutes, regulations, and plans, as well as incoming public comments, edits, emails, and logistics; and then to spend considerable time outside of the meetings working in small groups to develop and refine draft text. They have succeeded in generating a thoughtful, detailed report that will inform decision-makers, policy experts, and planners for years to come.

This report would also not have been possible without the concerted effort of a large number of DHEC-OCRM staff, who, across internal agency divisions, coordinated and supported this effort from start to finish. Aside from numerous internal coordination meetings, regulatory staff were present at all Advisory Committee meetings and public hearings to answer questions about details and procedures, policy and planning staff were present to answer questions about, well, policies and plans, and staff directly assigned to this effort spent countless day, night, and weekend hours to ensure that the process ran smoothly.

A special thanks to Nathan Strong of the SC Office of Human Resources, who facilitated meetings and provided expert advice along the way to help achieve fair and productive meetings and outcomes.

And finally, a special thanks to Matthew Slagel, who joined DHEC-OCRM as a NOAA Coastal Management Fellow in 2007 to help lead this initiative, and who truly made this effort a success. Mr. Slagel has now joined OCRM as a Shoreline Management Specialist to help identify and implement appropriate responses and actions to address the recommendations in this report.

OCRM Project Managers: Braxton Davis, Director of Policy and Planning  
Matthew Slagel, NOAA Coastal Management Fellow

Staff Contributors: Carolyn Boltin-Kelly, Deputy Commissioner  
Dan Burger, Director, Program Administration and Communication  
Sadie Drescher, Research Specialist, Policy and Planning  
Bill Eiser, Project Manager, Regulatory Division  
Curtis Joyner, Local Projects Manager, Policy and Planning  
Mark Messersmith, Research Specialist, Policy and Planning  
Barbara Neale, Director, Regulatory Division  
Marian Page, Federal Grants Coordinator, Policy and Planning  
Marvin Pontiff, Assistant Deputy Commissioner  
Melissa Rada, Policy Analyst, Policy and Planning  
William Salters, Coastal Planner, Policy and Planning  
Elizabeth Von Kolnitz, Program Coordinator, Policy and Planning  
Blair Williams, Manager, Wetland Permitting Section

# Members of the Committee

Jeffrey Allen, Ph.D.	Clemson University, Strom Thurmond Institute for Public Policy
Sara Brown, P.E.	U.S. Army Corps of Engineers
Mark Caldwell	U.S. Fish and Wildlife Service
Jimmy Carroll	Carroll Realty, Inc.
Marc Cherry, P.E.	Gramling Brothers, Inc.
Mary Conley	The Nature Conservancy
Toni Connor-Rooks	City of Folly Beach
Paul Conrads	U.S. Geological Survey
Hamilton Davis	SC Coastal Conservation League
M. Richard DeVoe	South Carolina Sea Grant Consortium
Kirstin Dow, Ph.D.	University of South Carolina
Josh Eagle, Esq.	University of South Carolina, School of Law
Jill Foster	Town of Hilton Head Island
Paul Gayes, Ph.D.	Coastal Carolina University, Ctr. for Marine & Wetland Studies
G. Robert George, PLS, P.E.	G. Robert George & Associates, Inc.
Tina Hadden	U.S. Army Corps of Engineers
M. Scott Harris, Ph.D.	College of Charleston
Norman Levine, Ph.D.	College of Charleston
James London, Ph.D.	Clemson University
Chris Mack, P.E.	AECOM
Tara Miller	NOAA Coastal Services Center
James Morris, Ph.D.	University of South Carolina, Baruch Institute
Bob Van Dolah, Ph.D.	SCDNR Marine Resources Research Institute

## **Alternates**

Derk Bergquist, Ph.D.	SCDNR Marine Resources Research Institute
Tim Hall	U.S. Fish and Wildlife Service
Tim Mason, P.E.	Applied Technology and Management, Inc.
Jeff Payne	NOAA Coastal Services Center
Aaron Pope	City of Folly Beach
Denise Sanger, Ph.D.	South Carolina Sea Grant Consortium
Nancy Vinson	SC Coastal Conservation League
Fran Way, P.E.	Applied Technology and Management, Inc.

# Acronyms

AIWW	Atlantic Intracoastal Waterway
ASBPA	American Shore and Beach Preservation Association
ASMFC	Atlantic States Marine Fisheries Commission
BACI	Before, After, Control, Impact sampling design
BERM	Beach Erosion Research and Monitoring
BIMP	North Carolina Beach and Inlet Management Plan
BMA	South Carolina Beachfront Management Act
BMP	Best Management Practice
CAMA	North Carolina Coastal Area Management Act
CBRA	Coastal Barrier Resources Act
CCCL	Florida Coastal Construction Control Line
CCU	Coastal Carolina University
CELCP	Coastal and Estuarine Land Conservation Program
CRS	FEMA Community Rating System
CSO	Coastal States Organization
CZM	Coastal Zone Management
DHEC	South Carolina Department of Health and Environmental Control
DHEC-OCRM	DHEC – Office of Ocean and Coastal Resource Management
DNR	South Carolina Department of Natural Resources
ECL	Florida Erosion Control Line
FCA	Flood Control Act
FEMA	Federal Emergency Management Agency
FL DCA	Florida Department of Community Affairs
FL DEP	Florida Department of Environmental Protection
FMA	Flood Mitigation Assistance program
GAPC	Geographic Area of Particular Concern
GI	General Investigation
GIS	Geographic Information Systems
GOMA	Gulf of Mexico Alliance
GRSMMP	Gulf Regional Sediment Management Master Plan
HHI	Hilton Head Island, SC
HMA	Hazard Mitigation Assistance program
HMGP	Hazard Mitigation Grant Program
HOAs	Home Owners Associations
IPCC	Intergovernmental Panel on Climate Change
LCBMP	South Carolina Local Comprehensive Beach Management Plan
LCSG	Lower Columbia Solutions Group
LiDAR	Light Detection and Ranging



LOV	Line of Vegetation
MA CHC	Massachusetts Coastal Hazards Commission
MEMA	Mississippi Emergency Management Agency
MHW	Mean High Water line
MMS	U.S. Minerals Management Service
MPRSA	Marine Protection, Research, and Sanctuaries Act
NC DCM	North Carolina Division of Coastal Management
NC DWR	North Carolina Division of Water Resources
NEPA	National Environmental Policy Act
NERR	National Estuarine Research Reserve
NFIP	National Flood Insurance Program
NGOs	Non-Governmental Organizations
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NOAA CO-OPS	NOAA Center for Operational Oceanographic Products and Services
NRC	National Research Council
OCSLA	Outer Continental Shelf Lands Act
ODMDS	Ocean Dredged Material Disposal Site
PD	South Carolina Coastal Management Program Document
PDM	Pre-Disaster Mitigation
PDRs	Purchase of Development Rights
REG	DHEC-OCRM Regulations
RSM	Regional Sediment Management
SAMP	Special Area Management Plan
SC REC	South Carolina Real Estate Commission
SCBRC	South Carolina Blue Ribbon Committee on Beachfront Management
SCDNR-MRRI	SCDNR – Marine Resources Research Institute
SCEMD	South Carolina Emergency Management Division
SDS	Spatial Data Standards
SLR	Sea Level Rise
SMP	Sediment Master Plan
SRL	Severe Repetitive Loss
US CCSP	U.S. Climate Change Science Program
USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WRDA	Water Resources Development Act

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# EXECUTIVE SUMMARY

Just over twenty years ago, a “Blue Ribbon Committee on Beachfront Management” was convened by the former South Carolina Coastal Council to address what was considered a “crisis” situation involving our beaches. Recognizing the threats of chronic erosion, sea level rise, increased shoreline development, and a lack of comprehensive beachfront planning and management, the panel developed recommendations that provided guidance to state regulators and legislators in developing state beach management policies. Most of their recommendations were adopted into law through the 1988 South Carolina Beachfront Management Act (SC Code §48-39-250 et seq.; Appendix 1).

Over the past two decades, the Beachfront Management Act and associated regulations have significantly influenced shoreline development and limited hard stabilization of the beachfront. However, the issues raised by the 1987 panel remain important today. We face a continuing challenge in balancing the protection of economic and environmental resources along our shorelines. Complex regulatory, economic, environmental, and legal issues, together with environmental and socioeconomic data limitations, often result in differing perspectives on future shoreline changes and our ability to adapt to those changes. DHEC’s Office of Ocean and Coastal Resource Management (DHEC-OCRM) is currently re-evaluating these issues in light of twenty years of experience and an improved understanding of shoreline dynamics in our state. In late 2007, an external “Shoreline Change Advisory Committee” was formed to: 1) identify continuing information and research needs; and 2) evaluate existing policies and policy alternatives. The Committee was made up of 23 experts from academia, government, and the private sector, and was charged with examining science and policy issues related to both beachfront and estuarine shoreline management in South Carolina, to help the state address future social, economic, and natural resource impacts of shoreline changes that may result from continued (or accelerated) rise in sea level, development encroachment into the beach/dune system, shoreline alterations, and coastal storms.

First and foremost, the Advisory Committee reaffirmed the overarching policies of the SC Beachfront Management Act and encourages the state to renew its commitment to the challenging but important principles advanced by the Legislature over twenty years ago. The state’s retreat policy does not provide for the immediate, active relocation of structures from the beach/dune system; however, by gradually eliminating erosion control structures, it ensures abandonment of property to allow the natural, inland migration of a healthy beach/dune system, **if or when** renourishment becomes unsustainable for a specific area or community. In the meantime, the Committee urges state and local governments to enact policies to ensure that sufficient **space** is provided for the natural migration of the beach/dune system and that the related risks to private and public resources are minimized.

The Committee identified four broad goals for improved shoreline management in South Carolina. The first three goals are focused on beachfront management. Goal 1, “Minimize Future Risks to Beachfront Communities,” proposes solutions to limit future exposure to losses of infrastructure, properties, and economic and natural resources that rely on a healthy beach/dune system; and to reduce the need for erosion control solutions. Goal 2, “Improve the Planning of

Beach Renourishment Projects,” presents opportunities for improved coordination and decision-making with regard to renourishment projects and other “soft” solutions to beach erosion. Goal 3, “Limit the Use of Hard Stabilization Structures,” reinforces existing prohibitions on seawalls and revetments, and recommends improved guidance for the siting, design, and use of groins, breakwaters, and temporary structures. Goal 4, “Enhance the Management of Sheltered Coastlines” presents parallel issues facing estuarine and sheltered coastlines of South Carolina, and policy and management recommendations for addressing those issues.

For each goal, several policy and management recommendations were developed to suggest potential improvements to current practices. For each general recommendation, the Committee was asked to clearly articulate the rationale (problems being addressed), existing policies and programs that are relevant to the issue, new specific policy recommendations, new planning and management actions, general costs and benefits, uncertainties, and examples from other coastal states. The 13 recommendations described in this report call for actions by a number of state agencies and local governments, as well as potential actions by the SC General Assembly. A summary of the recommendations is provided in Appendix 2 and below.

Under Goal 1, the Committee attempts to clarify and reinforce the goals and mechanisms of the state’s “retreat” policy, and lays out five recommendations for improved management to reduce risks to local beachfront communities:

**1) Prevent the Seaward Expansion of Beachfront Development**

- Disallow seaward movement of the DHEC-OCRM Baseline
- Local governments should establish a beachfront building line
- Re-survey public/private boundary prior to renourishment

**2) Strengthen the State’s Beachfront “Setback Area”**

- Increase the minimum setback distance
- Align setback regulations with statutes regarding size limitations
- Evaluate all historical shorelines and short-term variability in unstabilized inlet zones
- Limit building in the most vulnerable beachfront areas, particularly seaward of the DHEC-OCRM Baseline
- Enhance protection of sensitive dune features that are outside of the state’s “beach/dune system”

**3) Eliminate Inconsistent Public Subsidies**

- State should designate “no subsidy” zones in hazardous areas

**4) Strategically Acquire Beachfront Lands and/or Easements**

- Establish state and local voluntary acquisition strategies
- Explore and expand funding mechanisms for voluntary acquisitions, including a state “beach management” trust fund

**5) Strengthen the Role of Local Governments in Beach Management and Planning**

- Develop stronger guidance, new elements, and OCRM assistance for Local Comprehensive Beach Management Plans
- Integrate planning requirements for beachfront communities

Under Goal 2, the Committee describes existing procedures and implications of beach renourishment and other “soft” solutions to beach erosion, and offers three recommendations to improve local and state management practices:

**6) Develop and Implement Regional Sediment Management Plans**

- State should develop and implement a Regional Sediment Management Plan in cooperation with the U.S. Army Corps of Engineers

**7) Strengthen Reviews of Nearshore Dredging and Other Alterations**

- Heightened reviews and monitoring of any projects within 1 mile of the shoreline
- Establish Technical Committee to recommend new criteria

**8) Improve Beach Nourishment Monitoring**

- Require pre- and post-monitoring for all nourishment projects
- Standardize, to the extent possible, data collected and methods

Under Goal 3, the Committee recommends clarification and enforcement of existing prohibitions on erosion control structures, and describes status and trends of other hard stabilization practices in the state, including the use of temporary erosion control solutions during state or locally-declared emergencies. The Committee offers three recommendations for improved management practices:

**9) Refine Criteria for Emergency Orders and Sandbags**

- Establish new criteria for “emergency” – e.g. disaster declarations
- Establish new design criteria for temporary structures (sandbags)

**10) Improve Guidelines for Groins and Breakwaters**

- Establish Technical Committee to recommend siting/design criteria
- Leverage additional expertise in review of groin and breakwater proposals
- Identify ownership and responsibility for all existing groins

**11) Expand Beachfront Real Estate Disclosure Requirements**

- Expand real estate disclosure requirements for approval by the SC Real Estate Commission

Under Goal 4, the Committee describes parallel issues facing estuarine and non-beachfront shorelines in the South Carolina coastal zone, and existing policies related to shoreline developments and alterations. The Committee suggests two recommendations for improved management of estuarine shoreline change:

### **12) Manage Erosion Control in Estuaries**

- Map and characterize estuarine shorelines
- Develop “erosion control options table” for different shorelines
- Expand education and training for property owners and consultants
- Develop Estuarine Shoreline Management Plans at state and local levels
- Promote alternatives to traditional bulkheads and revetments
- Establish minimum setback for bulkheads
- Differentiate “transgression” from erosion in OCRM decisions
- Require evaluation of alternative stabilization approaches on undeveloped properties

### **13) Establish Non-Beachfront Shoreline Buffer Areas**

- Establish 25-ft minimum buffer for all new developments along non-beachfront shorelines in the coastal zone
- For previously developed properties, state tax incentives or credits could be considered for buffers
- Encourage local governments to establish or expand shoreline buffers

The Committee also recommends expansion of the SC Beach Restoration and Improvement Trust Fund (§ 48-40-30 of the SC Beach Restoration and Improvement Act) in several sections (Recommendations 4, 5 and 10; Goal 2). Currently, the fund is used to provide state matching funds for priority public beach renourishment projects and to support emergency response needs to repair beaches after storms. The SC Council on Coastal Futures (2004) recommended that the state should capitalize and adequately fund the trust fund. This Committee concurs with this earlier recommendation and additionally recommends that the fund should be expanded to include a broader range of beach management options, including structure relocation, land acquisition, and planning proposals. Eligibility for expanded and more predictable state beach management funds would be a key incentive for several of the recommendations in this report.

Over the coming year, DHEC-OCRM staff will propose specific responses to the policy and management recommendations identified in this report, and will present the Committee’s discussions and findings to a variety of decision-makers and stakeholders to help set the context for future plans and decisions at the state and local levels.

# INTRODUCTION

Over two decades ago, the State of South Carolina developed a comprehensive beach protection and planning program to ensure that the economic, environmental, recreational, and cultural benefits of our beaches are sustained for this and future generations. The resulting laws, rules, and plans for beachfront development and stabilization are always controversial because they require a difficult balancing of private and public rights. Nearly everyone has a stake in beachfront management in South Carolina, as the coast is the largest contributor to our tourism-based economy. Healthy beaches and shorelines are essential to the quality of life along the coast, and also provide buffers for storms and critical habitats for many species of plants and animals.

Our beaches are caught between rising seas and an impenetrable line of human development. In 1987, this situation was described as a “crisis.” With over 57 miles characterized as “critically eroding,” the natural migration of beaches in developed areas was threatening the very existence of the beach/dune system, as well as beachfront property, the tourism industry, and critical habitats (SCBRC, 1988). Today, the crisis is not as immediate, but the underlying forces and challenges remain. Significant investments in beach renourishment are keeping pace with chronic erosion along most of the coast; however, there are differing perspectives on the long-term sustainability of sand replenishment (see Goal 2 Overview), and there is the ever-present threat of major coastal storms that could transform the shoreline overnight. There are also projections of accelerated sea level rise (Figure 1(a-b)) – even at the present rate, there is significant potential for the loss of coastal wetlands in the coming decades, and difficult decisions to make regarding future “armoring” of our non-beachfront coastlines.

Today, we are taking advantage of the opportunity to plan ahead rather than respond to a crisis or emergency situation. This report reflects on over twenty years of beachfront management in South Carolina, and makes suggestions for the coming decades. The goals and policy and management recommendations presented here are intended to provide a new foundation for continued shoreline planning, policy development, and program implementation at the federal, state, and local levels.

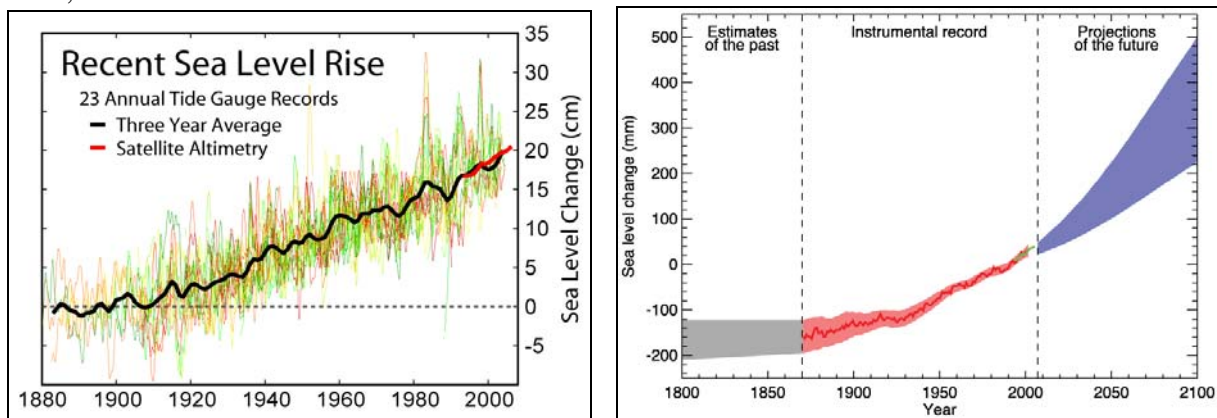


Figure 1(a-b): *Historical rates of sea level rise and projections of accelerated sea level rise.*

*Sources: NOAA CO-OPS, 2009; IPCC, 2007.*



## ***Background***

The South Carolina Coastal Zone Management Program was established in 1977 through the Coastal Tidelands and Wetlands Act (SC Code §48-39-10 et seq.), which authorized the SC Coastal Council (now DHEC-OCRM) to administer a permitting program for designated “critical areas” in the coastal zone (coastal waters, tidelands, beaches, and primary oceanfront sand dunes). Initially, the law provided limited beachfront jurisdiction (only over primary oceanfront sand dunes; or, where none existed, the land covered by the highest uprush of waves), and limited guidance for decisions on beachfront development and erosion control approaches. Following a succession of storms in the late 1970s and early 1980s, the Coastal Council decided to seek a more comprehensive beach protection policy. In the summer of 1986, Senator James Waddell, Jr. and the Coastal Council appointed a citizen committee to study erosion issues and make long-term recommendations for the improvement of beachfront management in South Carolina. This “Blue Ribbon Committee on Beachfront Management” was chaired by former Myrtle Beach Mayor Erick Ficken, and included 25 members from across the private and public sectors (DHEC-OCRM, 2003).

After meeting for one year, the Blue Ribbon Committee issued its final report, and found that “the South Carolina beach/dune system is now in a state of crisis,” with over 57 miles of the state’s approximately 186 miles of oceanfront beaches “critically eroding.” The Committee cited “a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system, and a lack of comprehensive planning” as the primary causes of this crisis. The Committee also found that the 1977 Coastal Tidelands and Wetlands Act “has been ineffective because too little authority over the beach/dune system was given to the Coastal Council...to prevent structures from being sited unwisely close to the eroding beach and the impact area of storms and high tides.” Among other key findings of the report were:

- “Most erosion control structures result in increased erosion, a drastic lowering of the beach profile, and a decrease in the ability of the beach/dune system to protect upland property from storms and high tides;” and as a result “dry sand beaches are rapidly disappearing;”
- “Sea level rise in this century is a scientifically documented fact,” and “the Atlantic Ocean, as a result of sea level rise and periodic storms, is ultimately going to force those who have built too near the beach front to retreat;”
- “Much of South Carolina’s coast is heavily developed...any new rational beach management policy must recognize the existence of such development and the vast differences between various sections of our coast with regard to the degree and pattern of development and the monetary investment involved;”
- “Erosion is a natural process which becomes a significant problem when structures are erected in close proximity to the beach/dune system. Therefore, it is in both the public and private interest to plan a gradual retreat from the beach/dune system by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to retreat from the beach/dune system.”

The 1987 Committee described three possible approaches to beach management – essentially armoring, nourishing, and retreating:

“We believe that a combination of the three approaches, depending upon site-specific factors, may be the most realistic policy. We have already tried armoring the shoreline... carefully planned nourishment is certainly a more desirable approach (and) can be effectively utilized at locations where the benefits justify the costs...it is anticipated that the cost of nourishment will rise as the sea level rises and could ultimately become extremely expensive.”

The Committee therefore concluded that the “only practical approach” was a gradual retreat from eroding beaches “over a thirty year transition period, in combination with selective beach nourishment...a retreat implemented over 30 years will allow owners of structures sited too close to the beach to realize the economic life of their structures and adjust their plans over a reasonable 30-year time period. This retreat must be based on sound state and local comprehensive beach management plans.” The Committee’s report went on to offer detailed policy recommendations and implementation guidelines that established the groundwork for consideration of legislative proposals by the SC General Assembly, including the phasing out of beachfront seawalls, revetments, and bulkheads over time; removal of structures within the beachfront critical area if damaged beyond repair; establishing of setbacks based on a moving average of historic erosion rates, limitation of the size of new structures, and restriction on new structures seaward of the primary dune or baseline (SCBRC, 1988).

Many if not most of the recommendations of the Blue Ribbon Committee were acted on by the legislature the following year. The South Carolina Beachfront Management Act of 1988 amended the state Coastal Tidelands and Wetlands Act to define clear beachfront policies, expand state jurisdiction, and establish new permitting and planning support through the SC Coastal Council.<sup>1</sup> The new law, among other elements:

- Enacted a 40-year policy of “retreat” from eroding beaches
- Established a new jurisdictional area for permitting between a “baseline” (generally the primary dune crest or historical inlet shoreline position) and a “setback” line (based on a multiplier of 40 times the local, annual rate of erosion).
- Limited construction would be allowed within a 20 foot restricted zone landward of the baseline, and construction would be prohibited seaward of the baseline;
- Within the setback area:
  - No new erosion control devices are allowed, and existing seawalls were to be replaced with sloping structures over time;
  - New structures are limited to 5,000 square feet of heated space;
  - Homes damaged beyond repair must be rebuilt farther landward;
- Created standards for state and local comprehensive beach management plans;
- Established real estate disclosure requirements for beachfront property transactions.

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<sup>1</sup> Please refer to the full statute for important details and policies (SC Code §48-39-10 et seq.), some of which are also covered in greater detail throughout this report. See also the associated regulations (R. 30-1 et seq.).

During the 1990 legislative session, the Beachfront Management Act was amended to eliminate the 20-foot restrictive zone landward of the baseline (which had become known derisively as the “dead zone”); and to remove the prohibition on construction seaward of the baseline by authorizing “special permits” (DHEC-OCRM, 2003). The amendment increased regulatory authority over seawalls and prohibited the replacement of structures that are damaged beyond repair (now set at 50% of structural integrity). Subsequent amendments to the Act in 2002 specifically authorized the use of groins in association with beach renourishment projects, under certain guidelines (see Goal 3 overview).

## ***Two Decades of Experience***

Since the enactment of the Beachfront Management Act, rapid population growth in the coastal counties has contributed to continuing pressure to develop or expand the development of beachfront properties. Between 1990 and 2008, the population of Beaufort County expanded by 74%, Colleton County by 13.5%, Charleston County by 18%, Georgetown County by 31%, and Horry County by 79% (NOAA, 2009). On the beachfront, renourishment has kept pace with erosion in most cases. The extent of beachfront development, renourishment, and erosion control are described in detail in the overview sections of Goals 1-3 of this report.

Less is known about shoreline changes along non-beachfront coastlines,<sup>2</sup> many of which are subject to the same pressures (chronic erosion, storm impacts, and development interests) as those confronting beach communities in the 1980s. With the availability of beachfront lots diminishing, the value of non-beachfront shoreline properties in the coastal zone has increased dramatically. And as non-beachfront coastlines have developed, they have increasingly been altered by erosion control structures, docks, and landscaping (e.g. retaining walls, lawns extending to the shoreline, etc).

Over the past twenty years, a growing body of research and technical capacity has also developed concerning shoreline change, including studies of shoreline positions, sediment budgets and erosional forcings, natural resource and community vulnerabilities, and models of future shoreline changes (Barnhardt, 2009; Nelson et al., 2009). Satellite measurements, Geographic Information Systems (GIS), aerial imagery, Light Detection and Ranging (LiDAR) technology, computer modeling capabilities, and other improvements in monitoring and understanding shoreline changes have rapidly developed over this time period. However, a South Carolina Shoreline Change “State of the Knowledge” report developed in support of this Committee’s work (Nelson et al., 2009) found that, among other needs:

- Estuarine shoreline positions, erosion rates and forcings, and ecological characteristics are poorly documented and understood;
- Overall understanding of sediment processes decreases as the distance from the coast increases...few studies are available that assess the sand transport between nearshore (beachfront) and continental shelf areas;

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<sup>2</sup> Throughout this report, non-beachfront shorelines are also referred to as “sheltered coastlines,” and in some cases the focus is more limited toward “estuarine shorelines.” The latter refers only to shorelines of coastal estuaries, which are tidally influenced and where salinity typically exceeds 0.5 parts per thousand.

- Sediment interactions between estuarine and nearshore environments are poorly studied;
- Risk assessments and economic studies are needed to help coastal communities develop and prioritize responses to shoreline change projections;
- Improved modeling capabilities are needed, for example, to project coastal wetland and beach erosion, migration, and vertical accretion in response to elevated sea level rise scenarios, and to better understand inlet processes and dynamics in South Carolina;
- Few regions of the state's seafloor have been mapped sufficiently to identify long-term sources of compatible sand for renourishment.

### ***Timing and Goals of this Study***

In 2007, DHEC-OCRM launched a new “shoreline change initiative” as part of its 5-year strategy for program enhancement grants under the federal Coastal Zone Management Act (16 U.S.C. 1451 et seq.). This grant program supports states in developing programmatic changes in one or more of nine issues of high priority to the state. As part of the 5-year strategy, DHEC-OCRM developed a work plan that identified milestones for strategy implementation, including the establishment of a Shoreline Change Advisory Committee, assessment and acquisition of data and research needs, and the development of policy options.

#### *Shoreline Change Advisory Committee*

The Shoreline Change Advisory Committee is comprised of a broad cross-section of stakeholders including scientists, coastal managers, municipal officials, developers, engineers, conservationists, and legal professionals who volunteered to commit significant time and effort to this report. At its initial meeting in September, 2007, the Committee was charged with “identifying and exploring new ways to resolve use conflicts and reduce socioeconomic and environmental vulnerabilities to shoreline changes in the South Carolina coastal zone, by: 1) identifying research and information priorities; and 2) identifying and exploring options for improved management and planning for shoreline change.” For this study, shoreline change was defined as “physical and biological changes at the land/water interface attributable to: 1) natural shoreline processes and sea level rise; 2) coastal storms; and 3) human developments and alterations. The geographic scope was confined to beachfront and estuarine coastlines within DHEC-OCRM’s Critical Area, but the Advisory Committee was free to consider a wide range of policy options beyond the existing rules or authorities of DHEC-OCRM or other agencies.

Between September 2007 and September 2009, the Advisory Committee participated in 14 full membership meetings, numerous subcommittee meetings, and several public hearings. Two initial “orientation” meetings focused on existing DHEC-OCRM authorities and activities, the Committee work plan and process, and shoreline management in other states. Representatives from the Texas and North Carolina coastal programs attended and presented shoreline management issues and approaches used in their states. Two members from the original 1987 South Carolina “Blue Ribbon Committee on Beachfront Management” also provided the Committee with a historical perspective on shoreline planning and regulation development in South Carolina. The following Committee meeting (January 2008) focused on shoreline research and information needs. Subsequent meetings, on a nearly monthly basis, addressed a sequence of

management topics that mirror the organization of this report (beginning with beachfront “retreat” policy, renourishment, erosion control, the role of local governments in shoreline management, and finally estuarine shoreline management issues). Each full-day meeting consisted of presentations in the morning, followed by facilitated discussions and deliberations of the Advisory Committee in the afternoon. A range of experts were invited to speak in the morning sessions to help the Committee better understand the status, trends, and complexities associated with each management issue before beginning deliberations over specific policy options. Appendix 4 lists the 30 formal presentations to the Committee over a two-year period. At the conclusion of each meeting, a concise list of policy options to be further explored was established based on priority rankings of the Committee.

In developing draft recommendations, the Advisory Committee followed a standard template format to ensure that the many facets of a particular recommendation were fully considered and to maintain consistency between different sections. Each recommendation template was organized according to the following headings:

- A. General Recommendation
- B. Rationale
- C. New Policy Recommendations
- D. New Planning and Management Actions
- E. Existing Policies and Programs
- F. General Costs and Benefits
- G. Measures of Success
- H. Feasibility Issues
- I. Key Uncertainties/Assumptions
- J. Examples from Other States or Areas
- K. Barriers or Concerns (if any)

Once the full Advisory Committee decided which recommendations should be further explored, volunteer subcommittees developed each recommendation according to the template format above. The draft recommendations were then reviewed by the full Committee, and after further iterations, they were finalized for inclusion in the report. In sum, the Committee spent over 100 hours in full committee and subcommittee meetings and public hearings, but contributed a great deal more through countless email exchanges, reviews, and edits of draft recommendations, public comments, and the draft report.

### ***Opportunities for Public Input***

DHEC-OCRM staff sought to make this process as transparent as possible for the public. Each full Committee meeting was advertised via public notice and media release, and resulted in widespread state and local media coverage (television, radio, print, and online stories). The full record of background materials, presentations, approved meeting minutes, and public comments submitted during the meetings were posted on a special website for the Committee. Public comments, although limited, were received at each Committee meeting and two dedicated public hearings. Over 60 pages of written comments were submitted by coastal engineers, town

officials, property owners, and other concerned stakeholders. Each comment was distributed to the Committee, reviewed, and considered as recommendations were drafted. In addition, three Community Leaders Forums were organized in the Grand Strand, Charleston, and Beaufort regions to provide additional opportunity for input. Over 300 “community leaders” were invited, including representatives of municipal governments, state legislators, property owners associations, business organizations, and other community organizations, and over 100 participated across the three regions. Finally, the draft report of the Committee was widely disseminated for public comments, which are summarized in Appendix 3 and included in full in a Supplement to this report.<sup>3</sup> The draft report was downloaded a total of 31,625 times, and a total of 35 comment letters were received.

While public and stakeholders perspectives have varied widely on state and local policy needs, several common themes emerged from the regional discussion forums. First, participants generally agreed that beach communities are more vulnerable to shoreline changes today than in 1987, generally because of increased development and infrastructure, risks associated with climate change and accelerated sea level rise, and/or economic dependencies on uncertain factors (coastal insurance, renourishment funding). Although the participants agreed that beach communities are more vulnerable today than in 1987, they also generally agreed that the beaches of the state are in better condition today than in 1987. Second, most participants generally believe that South Carolina has sufficient sand resources for renourishment for the foreseeable future, but were less certain of the sustainability of funding for renourishment at federal, state, and local levels. Third, it was clear that the state’s policy of retreat was not well understood across coastal communities and organizations. There were key differences in perceived goals and definitions, and significant challenges to the active relocation of structures in vulnerable areas. Fourth, it was agreed that non-beachfront shorelines in the coastal zone face similar issues related to sea level rise, coastal storms, and development pressures, and that more information is needed on shoreline changes and policy options for those areas. Finally, it was largely recognized that local communities have greater capacities in planning and managing beachfront issues than in 1987. It was strongly suggested that local governments be increasingly recognized and supported as partners in shoreline management in South Carolina.

### ***Similar Initiatives in Other Coastal States***

Many other coastal states have recently released, or are currently working on, recommendations to address shoreline change and other coastal hazards. Some states have assembled similar committees to formulate policy recommendations, while others have relied on updates to regulations or shoreline management plans (CSO, 2007). The following examples indicate that many of the shoreline management concerns faced by South Carolina are shared by other states.

#### *North Carolina*

The North Carolina Beach and Inlet Management Plan (BIMP) is an ongoing joint effort of the NC Division of Water Resources and the NC Division of Coastal Management to catalog,

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<sup>3</sup> The Supplement is available from the SCDHEC Office of Ocean and Coastal Resource Management, and available for download (at the time of publication) from the following website: <http://www.scdhec.gov/environment/ocrm/>

archive, and compile relevant coastal information to better manage the state's beaches and inlets (NC DCM, 2009). The planning process involves an Advisory Committee comprised of state and federal agency representatives and other stakeholders, an interdepartmental Technical Work Group, and a contracted coastal engineering firm to develop the plan. The final BIMP report will include coastal data, newly defined beach and inlet management regions, and shoreline management strategies (NC DCM, 2009).

In addition to ocean shorelines, North Carolina has also been focusing on the management of estuarine or sheltered shorelines. In 2006, the North Carolina Estuarine Biological and Physical Processes Work Group released a report which discussed the impacts of stabilizing estuarine shorelines with hard erosion control structures (Bendell et al., 2006). The Work Group identified 11 estuarine shoreline types in the state and then recommended which estuarine shoreline stabilization methods would be appropriate for each type of shoreline. For many estuarine shoreline types, the Work Group recommended that land planning (buffers, setbacks, etc.) and vegetation control (wetland or upland plantings) are the only erosion mitigation options that should be considered (Bendell et al., 2006). The Work Group also noted that groins, breakwaters, sloped structures, and vertical structures should only be considered in limited instances based on shoreline type and other site specific characteristics (Bendell et al., 2006). The recommendations of the Work Group are being used by the NC Division of Coastal Management to update its estuarine shoreline stabilization rules and to promote incentives for the use of alternatives to vertical erosion control structures.

#### *Florida Coastal High Hazard Study Committee*

The Florida Coastal High Hazard Study Committee was created in September 2005 to study and formulate recommendations for managing growth in Coastal High Hazard Areas, which are defined as Category 1 hurricane evacuation zones (FL DCA, 2006). The Committee consisted of state legislators, state officials, local officials, property owners, builders, and other stakeholders. In addition to recommendations regarding hurricane impact modeling and evacuation studies, the Committee also made the following shoreline-specific recommendations:

- The Florida Department of Environmental Protection (FL DEP) should develop a scope of work to re-evaluate setbacks and other dune protection criteria within the Coastal Construction Control Line (CCCL) regulatory program in order to provide greater protection to life, property, and the beach dune system including an economic impact analysis of potential changes.
- To help prevent damage to the beach and dune system, adjacent property owners, and marine turtles from inappropriate coastal armoring following storm events... the FL DEP should develop specific siting and design criteria for temporary coastal armoring that clarify the existing statutory criteria.<sup>4</sup>

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<sup>4</sup> Florida temporary armoring guidelines: <http://www.dep.state.fl.us/beaches/programs/pdf/gemcarlg7-07.pdf>

## *Massachusetts*

A Massachusetts Coastal Hazards Commission was comprised of working groups of state legislators, state officials, local officials, academics, and consultants who drafted recommendations related to coastal hazards information, policy, planning and regulations, shoreline protection, and infrastructure (MA CHC, 2007). The Commission's report, "Preparing for the Storm: Recommendations for Management of Risk from Coastal Hazards in Massachusetts," was released in May 2007 with 29 recommendations, including the following:

- Conserve coastal land and minimize loss through acquisition of storm-prone properties from willing sellers in fee or through conservation restrictions and easements (Recommendation #14).
- Implement a program of regional sand management through policies, regulations, and activities that promote nourishment as the preferred alternative for coastal hazard protection (Priority – Recommendation #22).
- Identify and map potential offshore and inland sources of suitable nourishment sediment (Recommendation #25).
- Establish a Technical Advisory Committee, consisting of a broad range of qualified professionals, to evaluate and develop construction and monitoring guidance, and recommend appropriate approval conditions for those protection approaches determined to be new and innovative (Recommendation #27).

## ***Layout of the Report***

The report is separated into 4 Goal sections: 1) "Minimize Risks to Beachfront Communities," 2) "Improve the Planning of Beach Renourishment Projects," 3) "Limit the Use of Hard Stabilization Structures," and 4) "Enhance the Management of Sheltered Coastlines." For each Goal, a summary is provided of existing policies and programs, status and trends, and ongoing conflicts. Following the summary section, a series of policy, management, and planning recommendations are offered to help meet each respective goal.

\*\*\* The Executive Summary, Introduction, and Goal Overview sections of this report were originally drafted by DHEC-OCRM staff based on meeting presentations, Committee discussions, and research, and these sections were approved by the Committee. All policy and management recommendation sections were developed by Committee members with research and editing support provided by DHEC-OCRM staff.



# GOALS AND POLICY RECOMMENDATIONS

The Advisory Committee identified four broad goals for improved shoreline management in South Carolina. The first three goals are focused on beachfront management, and the fourth is focused on sheltered or estuarine coastlines.

**Goal 1, “Minimize Risks to Beachfront Communities”** - Proposes solutions to limit future exposure to losses of infrastructure, properties, and economic and natural resources that rely on a healthy beach/dune system; and to reduce the need for erosion control solutions.

**Goal 2, “Improve the Planning of Beach Renourishment Projects”** - Presents opportunities for improved coordination and decision-making with regard to renourishment projects and other “soft” solutions to beach erosion.

**Goal 3, “Maintain Prohibitions and Further Restrict the Use of Hard Stabilization Structures”** - Reinforces existing prohibitions on seawalls and revetments, and recommends improved guidance for the siting, design, and use of groins, breakwaters, and temporary structures.

**Goal 4, “Enhance the Management of Sheltered Coastlines”** - Presents parallel issues facing estuarine and sheltered coastlines of South Carolina, and policy and management recommendations for addressing those issues.









## GOAL 1. MINIMIZE RISKS TO BEACHFRONT COMMUNITIES

*“Development unwisely has been sited too close to the (beach/dune) system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development”* (SC Code § 48-39-250(4)).

*“Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it”* (SC Code § 48-39-250(6), *emphasis added*).

### Overview

Over the past 20 years, the South Carolina Beachfront Management Act has limited the degree of development and hard stabilization of the beachfront in many areas, but this has not resulted in a broad-scale “retreat” from the oceanfront beach/dune system. In fact, continued coastal population growth, expansion of tourism industries, and trends in second homes and investment properties have resulted in even greater pressures to develop, or redevelop, beachfront properties. Based on ongoing analysis of aerial imagery (Table 1), there are approximately 3,850 beachfront habitable structures in South Carolina at present; of these, 1,383 (~36%) are at least partially seaward of the DHEC-OCRM “setback line” (see below for further details). The majority of the state’s habitable structures seaward of the setback line are located in Hilton Head Island (22%), Garden City Beach (16%), and North Myrtle Beach (12%). According to a recent estimate, there are at least 65 structures statewide located partially or entirely seaward of the DHEC-OCRM “baseline.”

At the same time, most of South Carolina’s beaches have continued to experience erosion due to natural (e.g. barrier island migration, sea level rise, coastal storms) and anthropogenic (e.g. jetties, navigation projects) changes. Although beaches are inherently dynamic, and may be highly accretional or erosional over short time frames, South Carolina’s oceanfront beaches are known to be net erosional based on numerous studies and long-term observations (e.g. Kana and Guadiano, 2008; Harris et al., 2009; Figure 2(a-c)). In many cases, the primary driver of this gradual trend has been an increase in sea levels over the past century. The relative rate of sea level rise in South Carolina (the global rate of sea level rise plus local rates of land subsidence) has been measured at a rate of approximately 1 to 1.5 ft/century at Springmaid Pier and Charleston Harbor observing stations (NOAA CO-OPS, 2009). Shoreline erosion and the impacts of coastal storms are expected to increase in coming decades as sea level continues to rise and potentially accelerate (US CCSP, 2009).

**TABLE 1: Habitable Structures Seaward of the Setback Line in South Carolina <sup>a</sup>**

Area	Number of Beachfront Habitable Structures	Number of Structures Seaward of Setback Line	Percentage of Beachfront Habitable Structures that are Seaward of Setback Line	Percentage of State Total in each Beach Area	Number of Structures Seaward of Setback Line; Standard Zones	Number of Structures Seaward of Setback Line; Unstabilized Inlet Zones	Number of Structures Seaward of Setback Line; Stabilized Inlet Zones
North Myrtle Beach	415	162	39%	<b>12%</b>	158	0	4
Shore Dr. & Briarcliffe	28	19	49%	<b>1%</b>	19	0	0
Myrtle Beach	328	113	34%	<b>8%</b>	113	0	0
Surfside Beach	192	59	31%	<b>4%</b>	59	0	0
Garden City Beach	300	218	73%	<b>16%</b>	218	0	0
Litchfield Beach	181	24	13%	<b>2%</b>	22	2	0
Pawleys Island	228	68	30%	<b>5%</b>	65	0	3
Debidue Island	90	42	47%	<b>3%</b>	42	0	0
Deweese Island	24	24	100%	<b>2%</b>	0	24	0
Isle of Palms	342	86	25%	<b>6%</b>	0	86	0
Sullivans Island	118	18	15%	<b>1%</b>	0	18	0
Folly Beach <sup>b</sup>	288	0	0%	<b>0%</b>	---	---	---
Kiawah Island	150	0	0%	<b>0%</b>	0	0	0
Seabrook Island	73	2	3%	<b>&lt;1%</b>	0	2	0
Edisto Island	237	87	37%	<b>6%</b>	80	7	0
Harbor Island	58	24	41%	<b>2%</b>	0	24	0
Hunting Island <sup>c</sup>	19	18	95%	<b>1%</b>	0	18	0
Fripp Island	160	96	60%	<b>7%</b>	54	11	31
Hilton Head Island	570	308	54%	<b>22%</b>	258	50	0
Daufuskie Island	49	15	31%	<b>1%</b>	0	15	0
<b>TOTALS:</b>	<b>3,850</b>	<b>1,383</b>	<b>36%</b>		<b>1,088</b>	<b>257</b>	<b>38</b>

<sup>a</sup> These data are current at time of publication but are subject to change as the baseline and setback line positions are revised in the future.

<sup>b</sup> There is no setback line on Folly Beach.

<sup>c</sup> Many of the cabins on Hunting Island have been demolished recently following erosion events.

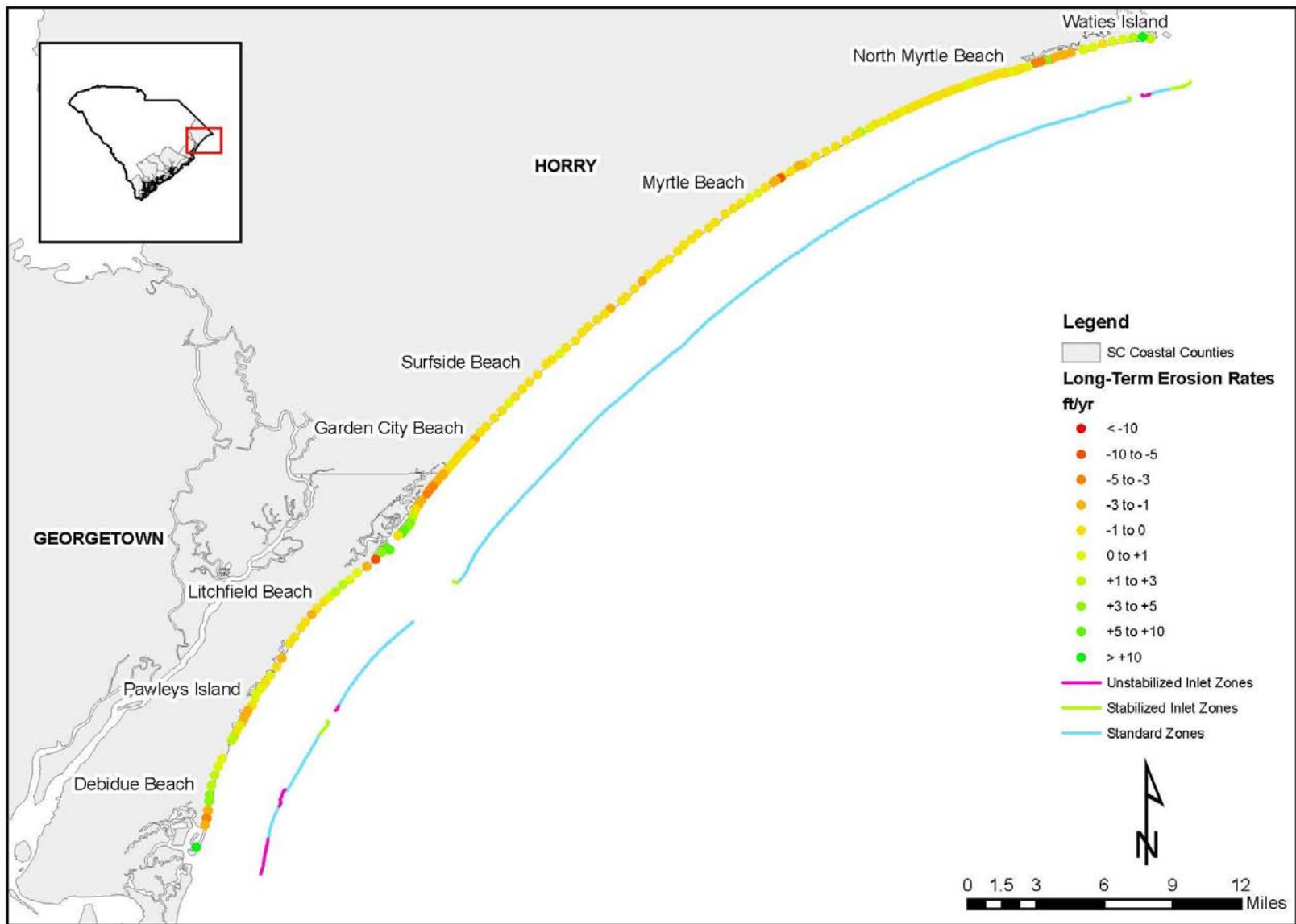


Figure 2(a): Long-term erosion rates and beach zone classifications for South Carolina's northern beaches, using historical shoreline data from the 1850s to 2006.

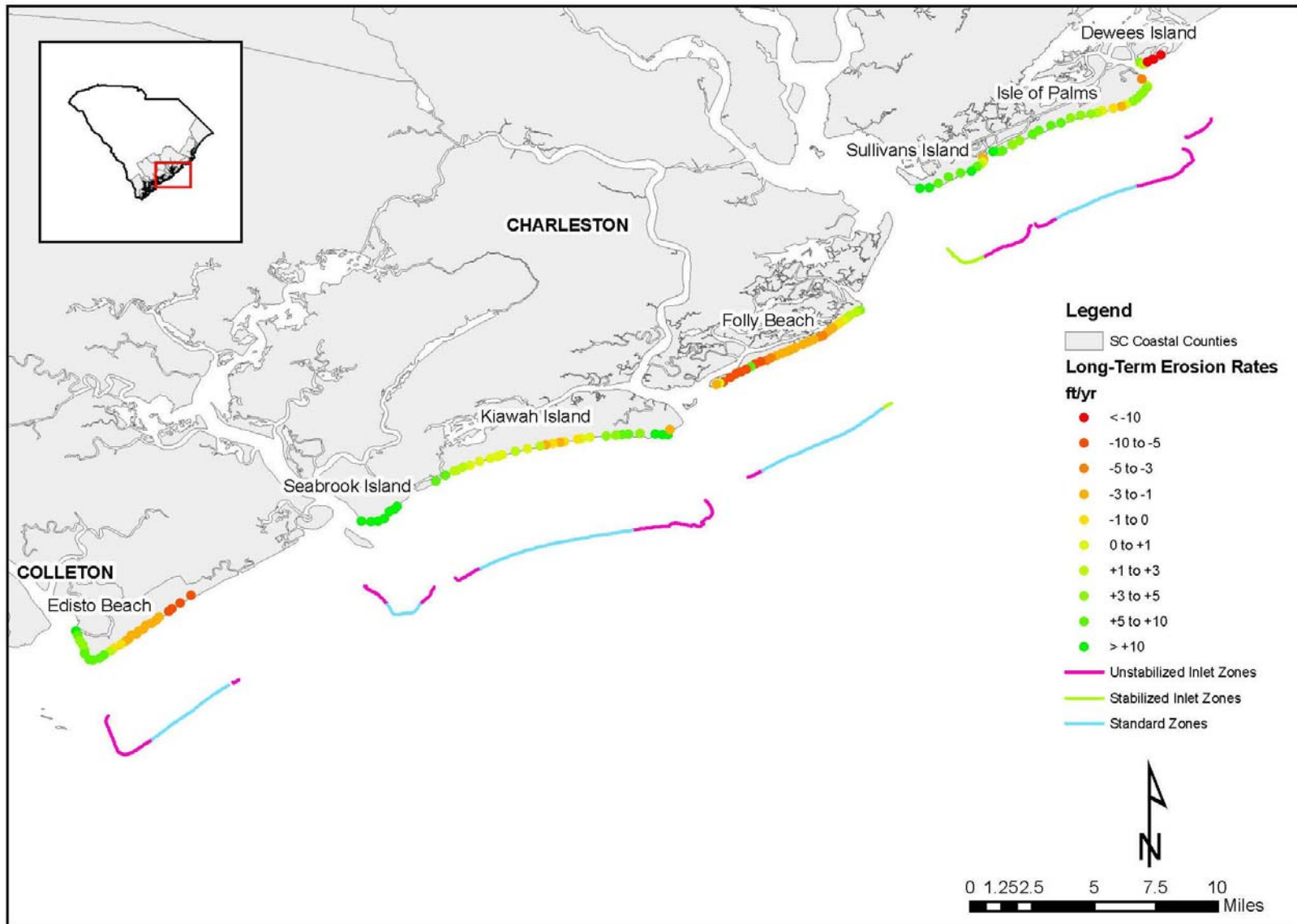


Figure 2(b): Long-term erosion rates and beach zone classifications for South Carolina's central beaches, using historical shoreline data from the 1850s to 2006.

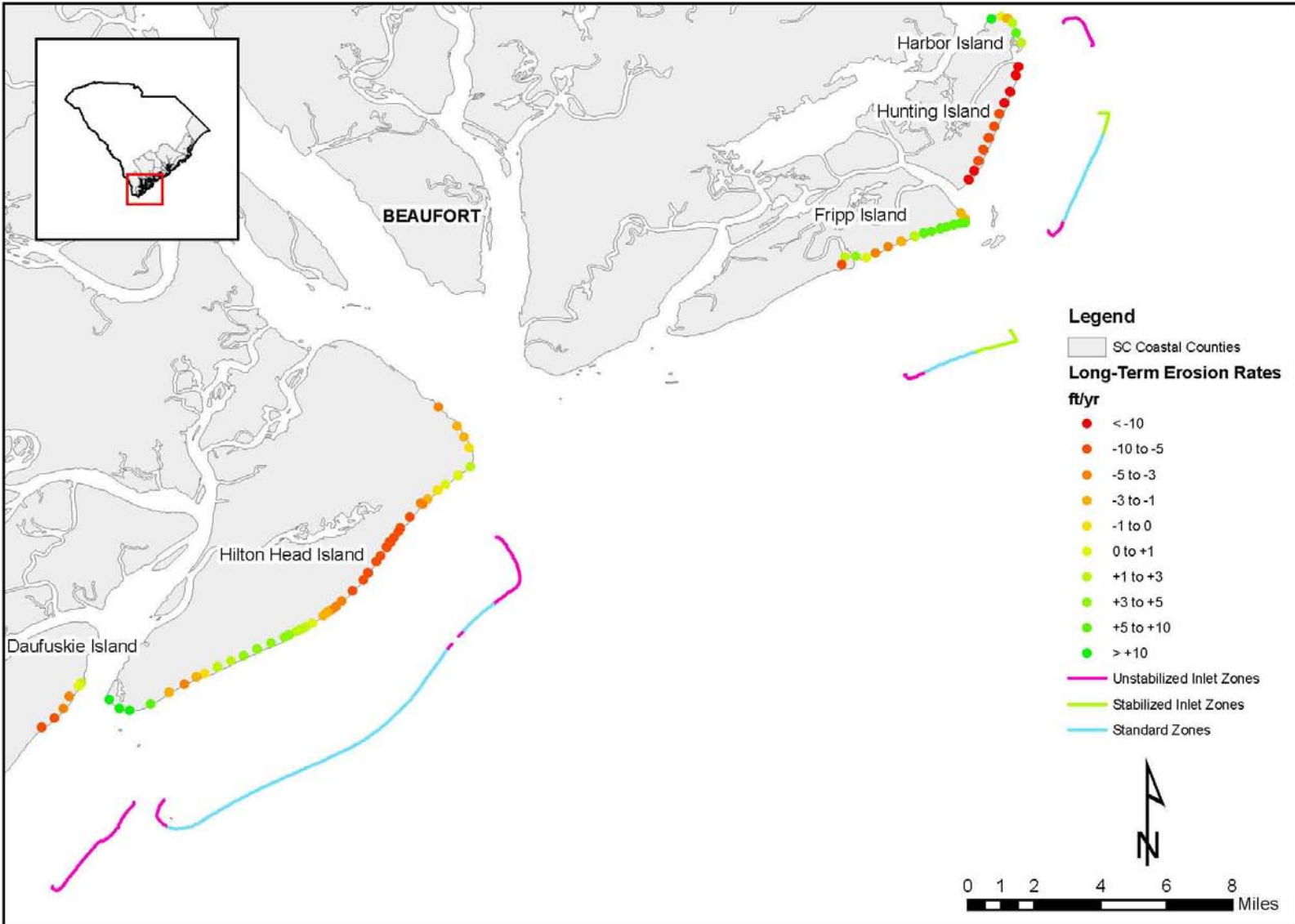


Figure 2(c): Long-term erosion rates and beach zone classifications for South Carolina's southern beaches, using historical shoreline data from the 1850s to 2006.



## Clarifying the Goals and Mechanisms of the State’s “Retreat” Policy

*“A forty-year policy of retreat from the shoreline is established. The department must implement this policy and must utilize the best available scientific and historical data in the implementation”* (SC Code § 48-39-280).

### ***Setback Area***

The 1988 Beachfront Management Act expanded the state’s jurisdiction over beachfront development and alterations by establishing a “setback area” – that is, an area bounded by a “baseline” drawn along the primary oceanfront sand dune (in standard erosion zones), and a parallel “setback line” that is drawn landward of the baseline a distance that depends on the site-specific, long-term rate of erosion (§48-39-280; see Figure 3(a-d)).<sup>5</sup> Restrictions on construction and reconstruction are established within the state setback area, and seaward of the baseline (§48-39-290). Generally, structures within the setback area are limited to 5,000 square feet of heated space; no new erosion control structures are permitted; and structures damaged beyond repair may only be replaced with structures of the original size and must be moved as far landward on the lot as possible. Development seaward of the baseline requires a special permit from DHEC-OCRM and is also subject to restrictions on size and erosion control structures.<sup>6</sup> State regulations define the “beach/dune system” as “all land between the mean high-water mark of the Atlantic Ocean landward to the 40-year setback line” (R. 30-1(D)(5)). This is not an ecological definition of “beach/dune system” since the setback area, which in many cases is limited to a 20 foot-wide strip landward of the primary dune (baseline), often excludes adjacent, landward dune fields (for example, see Figure 3(a)).

### ***State and Local Beach Management Plans***

The SC Beachfront Management Act also established that the policy of South Carolina is to: *“Create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state’s beachfront to include a gradual retreat from the system over a forty-year period”* (§48-39-260(2)). To address this policy, the Act requires local governments to provide in a local comprehensive beach management plan, a *“detailed strategy for achieving the goals of this chapter by the end of the forty-year retreat period. Consideration must be given to relocating buildings, removal of erosion control structures, and relocation of utilities”* (§48-39-350(A)(9)). State regulations also require the Department (DHEC-OCRM) to *“discourage new construction in the beach/dune system, and encourage those who have erected structures within the system to retreat* (R 30-11(D)(1)).

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<sup>5</sup> In unstabilized inlet erosion zones, the baseline is determined differently, as “the most landward point of erosion at any time during the past forty years” (§48-39-280(2)). The setback area is also calculated differently for inlet areas and for beaches fronted by erosion control structures.

<sup>6</sup> Please refer to SC Code §48-39-290 and R. 30-15 for full details, additional restrictions, and exceptions to these rules.



(a)



(b)



(c)



(d)

Figure 3(a-d): *The DHEC-OCRM jurisdictional setback area is between the two solid lines on (a) Kiawah Island, (b) Isle of Palms, (c) Seabrook Island, and (d) Hilton Head Island. The minimum setback distance (20 feet) applies at each of the sites depicted here.*

The state's Beachfront Management Plan (R.30-21) specifically addressed the goal of retreat by establishing three sub-objectives:

- 1) Limit the size of structures within the setback area;

*Within the setback area, structures are generally restricted to 5,000 square feet of heated space (SC Code §48-39-290), which may facilitate retreat since smaller structures may be more easily relocated or removed, and represent a smaller private investment.*

- 2) Move buildings away from the active beach;

*The Beachfront Management Act limits the rebuilding of structures “destroyed beyond repair” to their original size and requires that they be moved as far landward as possible on existing lots, but not necessarily outside of the setback area [48-39-290(B)(iv)]. There are no mechanisms for actively relocating or removing structures prior to damage, unless they were authorized by a special permit and become situated on the “Active Beach” for a set period of time (R.30-14(I)). The active beach is defined as “the area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean landward,” and only applies to structures that have received special permits from DHEC-OCRM (R. 30-1(D)(2)).*

- 3) Implement mitigation guidelines/regulations for construction activity that damages beach/dune vegetation.

*New structures are prohibited on the “primary dune” (R. 30-13(B)(5); and R. 30-15(F)(1)), but secondary dunes can still be impacted by development.*

### ***The Need for Improved Clarity of the Beachfront Management Act***

As documented in a series of recent “discussion forums” among coastal community leaders in South Carolina, and in written comments submitted to this Committee, there is a widespread lack of understanding of, and differing opinions on, the meaning of the state's policy of retreat. This is in part due to the language in the statute. For example, the Beachfront Management Act is unclear in the following respects:

- The goal of the Retreat Policy is not clearly defined. The Act mentions “*relocating buildings, removal of erosion control structures, and relocation of utilities,*” but does not establish clear mechanisms to encourage or require active relocation or removal of structures, nor does it presently establish policies that clearly prevent new development or redevelopment in any areas within the beach/dune system or seaward of the baseline.
- The Act allows for periodic review of the location of the baseline (§48-39-280(C)) and for *seaward* movement of this line following renourishment (§48-39-280(A)(4)), thereby

allowing development to be situated even closer to the ocean and potentially impact remnants of larger, older dunes systems (*see Recommendation #1*).

- The wording of the requirement for local beachfront management plans specifies a forty-year time period for achievement of retreat (§48-39-350(A)(9)). This seems to indicate a period of time *in the future* to be established for complete removal of all structures and utilities from the setback area and seaward of the baseline. This is confusing with SC Code §48-39-280(A)(2), which refers to a method of establishing a baseline location by looking at forty years worth of erosion *history*. The 1987 Blue Ribbon Committee on Beachfront Management report indicates that retreat should occur during a “*transition period*.” The question arises as to whether the intent of the Act was to place a timeframe for removal of all structures in the beach/dune system.

Despite confusion about the long-term goals and mechanisms of retreat, the overall scale of beachfront development has certainly been reduced under the existing policies, and in several cases structures have been built farther landward on beachfront lots than would have occurred in the absence of the Beachfront Management Act and DHEC-OCRM regulations. However, in the 20 years since the Beachfront Management Act, the Committee was only able to find a few examples of voluntary relocation of structures from the setback area, and a limited number of cases of landward movement of structures within a beachfront parcel following storm damage.<sup>7</sup>

Reasons for the limited implementation of the retreat policy may include:

- Many beachfront lots are too small to relocate structures farther landward (within the same lot, as required if structural damage occurs that is greater than 66% of appraised value);
- Relocation to a nearby lot might not be possible, as much of the coast is now heavily urbanized and available land for relocation near the ocean is scarce or prohibitively expensive;
- Zoning, density, and code requirements might have changed since the development was first built, making the structures or land uses non-conforming. Newer laws might prohibit or severely restrict redevelopment (or relocation);
- There are relatively few financial assistance programs or incentives to relocate from beachfront lots;
- Existing federal, state, and local policies to implement retreat are limited – building is not only possible in the state’s setback area, but also seaward of the DHEC-OCRM baseline, even in areas artificially accreted through beach renourishment projects;
- There have been relatively few coastal storms or large-scale erosion events that have required emergency action on a broad scale since Hurricane Hugo (1989);

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<sup>7</sup> For example, 42 structures were rebuilt farther landward on their lots following damage by Hurricane Hugo; however, most were rebuilt in the same location (66) or even seaward of their prior location (10) (Beatley, 1992).

- Renourishment has kept pace with erosion in most areas, reducing the perceived need to retreat (some would argue that retreat is only needed when structures are imminently threatened and no alternative exists; while others would contend that retreat from the setback area should occur regardless of beach stabilization or accretion due to renourishment).

Since enactment of the South Carolina Beachfront Management Act, persistent public and private investment in beach nourishment techniques has considerably slowed erosion rates and landward migration of the shoreline in many areas along the coast (see Goal 2). This has greatly limited application of the state’s retreat policy. In some locations, this has even resulted in modest seaward expansion of an artificial beach/dune system, and suggests that the present practice of beach management may continue to limit the implementation of “retreat” as originally envisioned. However, there are varying perceptions of the sustainability of beach renourishment. The Committee agreed that beach renourishment appears to be viable for at least the “mid-term” for many beach communities, but that renourishment could fail as a statewide solution under several related scenarios - all of which seem plausible at some point, however distant:

- 1) decreasing sand availability (leading to higher costs per project);
- 2) increasing rates of erosion (or frequency of storms); and/or
- 3) decreasing federal, state, and local revenues supporting renourishment (or increasing reliance on local and private funding sources).

### ***A Renewed Commitment to the Policy of Retreat***

The 1987 Blue Ribbon Committee on Beachfront Management (and 1988 Beachfront Management Act) have provided strong justifications for the state’s policy of retreat from eroding beaches. Retreat from eroding shorelines, in order to minimize risks to communities, is still considered the preferred alternative to hard stabilization. Reinforcement of the state’s retreat policy will help maintain the emphasis on soft shorelines, a healthy beach/dune system, and reduced exposures to coastal hazards in the face of increasing stresses and pressures to relax existing rules. As currently constructed, the state’s retreat policy does not provide for the immediate, active relocation of structures from the beach/dune system; however, by gradually eliminating erosion control structures, it ensures abandonment of property to allow the natural, inland migration of a healthy beach/dune system, if or when renourishment becomes unsustainable for a specific area or community. This policy is similar to rolling easements found in Oregon, Texas, Maine, North Carolina, and other coastal states, and relies on common law principles of erosion and the Public Trust Doctrine for its legal foundation.<sup>8</sup> It is likely to be challenged both legally and politically in the coming years. In the meantime, the Committee urges state and local governments to enact policies to ensure that sufficient space is provided for the natural migration of the beach/dune system and that the related risks to private and public resources are minimized.

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<sup>8</sup> A rolling easement allows construction near the shoreline, but requires the property owner to recognize nature's right of way to advance inland as sea level rises, and provides advanced notice to property owners that their land must eventually give way to the sea. For a review, see Titus, 1998.

A successful retreat policy will accomplish four long-term goals:

- 1) Minimize losses of life, property, and public investments in beachfront communities due to coastal storms and chronic erosion;
- 2) Protect and enhance the beach/dune system;
- 3) Protect and enhance public access to the beach; and
- 4) Minimize expenditures of public funds for the mitigation of known or predictable coastal hazards.

The retreat policy is based on the presumption that the long-term societal costs that would result from the loss of the beach/dune system (as rising seas meet stationary erosion control structures) exceed the shorter-term losses to private property holders as shorelines naturally migrate inland. In either case, a successful retreat policy will require long-term investments and commitments by federal, state, and local governments, property owners, and (potentially) other organizations. Property owners should plan ahead for renourishment expenses, consider long-term relocation options and assistance, and make informed decisions on purchases of shoreline real estate. Local governments can play a key role through land use planning, zoning, and regulation; while state and federal governments can provide financial, technical, and planning assistance, and continue to regulate impacts to public trust resources. State and local governments should also take full advantage of existing frameworks for comprehensive beach management planning under the Beachfront Management Act.

The following policy and management recommendations explore potential improvements to existing federal, state, and local policies and practices to reinforce an overarching beachfront management goal – to minimize risks to beachfront communities. In particular, the following recommendations seek to:

- 1) Prevent the seaward expansion of beachfront development;
- 2) Strengthen the beachfront “setback area”;
- 3) Eliminate inconsistent public subsidies that promote development in hazardous areas;
- 4) Promote the strategic acquisition of beachfront lands and/or easements; and
- 5) Strengthen the role of local governments in beach management and planning.



# ***Recommendation 1 – Prevent the Seaward Expansion of Beachfront Development***

## **A. GENERAL RECOMMENDATION**

This recommendation seeks to reinforce the state’s beachfront policies by maximizing the space between existing oceanfront structures and the mean high water line. Key sub-recommendations would restrict seaward movements of the DHEC-OCRM “baseline,” and encourage local governments to establish “hold-the-line” ordinances that limit seaward expansion of development.

## **B. RATIONALE**

*“Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it”* (SC Code § 48-39-250(6), emphasis added).

The continued expansion of development seaward increases the exposure of life and property to well-documented (chronic erosion) and uncertain but predictable (storm) risks, and relies on the uncertain sustainability of beach renourishment practices. Further, this practice is in direct contrast to the state’s established policy of retreat from eroding beaches, and the legislature’s goal of affording sufficient space for natural beach migration (above). Existing policies that allow seaward expansion should be reconsidered or repealed.

First, the 1990 Amendments to the Beachfront Management Act provided for the seaward expansion of beachfront development by allowing the seaward movement of the regulatory baseline in some situations. Since the 1990 Amendments were enacted, there have been several instances where the baseline has been moved seaward on barrier islands or shorelines. In the early 1990s, there were individual petitions from property owners associations at Seabrook Island, Debordieu, and Hilton Head Island for moving the baseline seaward following renourishment. In the late 1990s, large sections of Hilton Head Island and Cherry Grove in North Myrtle Beach had their baselines moved seaward following large-scale renourishment projects.<sup>9</sup> Requests by individual property owners have been more limited in recent years, and in all cases,

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<sup>9</sup> In a specific example, a beachfront property owner on Hilton Head Island petitioned DHEC-OCRM to move the baseline seaward, and this request was granted. Then, the owner sold his land to a developer who purchased the surrounding land as well. The permit from DHEC-OCRM potentially allowed the developer to disturb a 16 ft natural sand dune and build out to a 3 ft sand dune instead. In this case, however, the request did not obtain necessary approval from the local government.



the petitions must be endorsed by the local government as well. Petitions to move the baseline seaward after renourishment projects can be filed whether or not the area is currently within the 8-10 year review “window” during which time DHEC-OCRM is required to review and update as necessary the beachfront baseline and setback line (SC Code § 48-39-280(C)).

DHEC-OCRM began its current 8-10 year review cycle in 2008, and the regulatory baseline has recently moved seaward in several locations due to:

- 1) natural accretion of a new primary sand dune (elevation at least 3 feet and at least 500 feet in length);
- 2) new primary dune formation following a “stabilized” renourishment project; or
- 3) the requirement, in most cases, that only historical shorelines as old as 40 years may be used in the baseline analysis if located within an unstabilized inlet erosion zone.

For example, on Hilton Head Island along Calibogue Sound, the baseline moved seaward an average distance of 50 ft, and the baseline also moved seaward as much as 40 ft on the southwest side of the Folly. On Seabrook Island, along the large rock revetment at the center of the island, the baseline moved seaward an average distance of about 125 ft.

Second, local governments should reexamine existing policies because local ordinances can be more restrictive than the minimum state standards. For example, the Town of Hilton Head Island restricts vertical structures from a line of existing construction to the DHEC-OCRM setback line to protect the entire beach/dune system and related hazardous areas (not just the primary dune as defined by DHEC-OCRM). As a result, there are many oceanfront parcels in Hilton Head Island that have not utilized their entire buildable area, with buildings located in the middle of the parcel or even further landward. Hilton Head Island’s restriction basically “holds the line” of existing vertical construction from moving farther seaward, yet gives the property owner the ability to continue to use his property in non-dune areas, thus keeping its economic viability. Some land use amenities are allowed in this ‘transition’ area such as swimming pools, hot tubs, decks, landscape barriers, boardwalks, fire pits, picnic areas, volleyball nets, and storm water detention, retention and drainage improvements. In another example, the Town of Pawleys Island has established a “Shore Protection Line” to prevent the building of new habitable structures farther seaward than this line, which is drawn generally at the most eastward point of existing construction and across all other undeveloped property.

Third, private property owners are currently benefitting from artificial accretions (beach renourishment), and often at the public’s expense when the renourishment projects are funded in part or in whole by federal, state, or local governments. Under common law in South Carolina, land lost to natural erosion processes reverts to state ownership under the Public Trust Doctrine (*McQueen v. S.C. Coastal Council*, 580 S.E.2d 116 (S.C. 2003)). Since the public/private boundary is set at the Mean High Water line, the public/private boundary is unlikely to change over time if renourishment keeps pace with erosion. However, under common law, property owners may not be granted rights to artificial accretions (reviewed in *Titus*, 1998: see *Patton v. City of Wilmington*, 147 p. 141, 142 (Cal. 1915) (holding that artificial accretions accrue to the state); but see also *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285 (1982) (holding that, under federal common law, accretions along the ocean beach accrue to the

upland owner, whether or not such accretions are artificial and whether or not the riparian owner is responsible for presence of a structure causing the accretions). This Committee is not aware of any South Carolina statute, regulation, or case law that has specifically addressed the matter of whether a beachfront landowner regains title to land raised by a public renourishment project. However, the SC General Assembly has already established a firm position on natural beach accretion beyond the original property boundary (SC Code §48-39-120(B)):

“Provided, further, that no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the state held in trust for the people of the state.”

It is unclear whether a beach renourishment project could already be considered a “permitted structure” under this provision.

### **C. NEW POLICY RECOMMENDATIONS**

- a) Disallow the seaward movement of the regulatory beachfront baseline under any circumstances.**

Specifically, the General Assembly should rescind the 1990 amendment that allows local governments or landowners to petition for a seaward extension of the baseline following a renourishment project, and the statute that provides for revisions of the baseline at 8-10 year intervals should be modified to allow only for landward movement of the baseline, never seaward movement. These changes are consistent with both the existing state retreat policy, and the intent to reduce risks to oceanfront properties and public safety that will occur due to major storms and long-term beach migration. All beachfront baselines for each standard erosion zone, unstabilized inlet zone, and stabilized inlet zone should be kept at the existing updated locations. Any subsequent baseline revisions considered at 8-10 year intervals should only result in “no change” or a landward movement of the baseline. Natural accretion or implementation of a beach nourishment project which expands the beach seaward should not be grounds for movement of the baseline seaward due to the uncertainty of sufficient funding or availability of compatible sand resources to maintain a long-term seaward baseline position.

- b) Local governments should consider a “holding the existing line of construction” philosophy to protect the area seaward of the built environment, or a determined ‘line of construction.’**

Local governments should examine and consider the model ordinances developed by the Towns of Hilton Head Island and Pawleys Island.

- c) Re-establish (re-survey) the legal boundary between private and public property prior to renourishment along shorelines that have eroded gradually over time.**

The state or applicant could re-survey the shoreline prior to any major renourishment project that has resulted from long-term, chronic erosion, to reset the legal boundary between public and private land. This may not apply to areas affected by episodic erosion (for example, from a storm event), because of the common law principle of “avulsion,” which allows property owners to reclaim land lost due to a storm event. North Carolina, by statute, makes renourished beaches property of the state, and “all such raised lands remain open to the free use and enjoyment of the people of the state” (see Case Studies section below). Florida, by statute, fixes the boundary line of private landowners whose property abuts a beach renourishment project so that they do not gain the benefit of accretions. The Florida Supreme Court held that provisions of the FL Beach and Shore Preservation Act that fix the shoreline boundary and that suspend operation of the common-law rule of accretion but preserve littoral rights of access, view, and use after the erosion control line (ECL) is recorded do not, on their face, unconstitutionally deprive upland owners of littoral rights without just compensation. The case was heard by the U.S. Supreme Court on December 2, 2009, and a decision is forthcoming.<sup>10</sup>

DHEC-OCRM could establish permit conditions on renourishment projects that require a new survey of the Mean High Water line, and essentially require the landowner's relinquishment of accretion rights seaward of the high-tide line at the time of renourishment.

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would require legislative action by the South Carolina General Assembly.

#### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) Through planning assistance to local beachfront communities, DHEC-OCRM should encourage beachfront communities to adopt “hold the line” building ordinances, using the Hilton Head Island example as a foundation.
- 2) In addition to the “hold the line” ordinances described above, local beachfront communities should also consider:
  - Limiting the amount, type, and location of development and redevelopment along the immediate oceanfront;
  - Establishing specific Higher Regulatory Standards for all oceanfront construction, and in broader Special Flood Hazard or Special Erosion Hazard Zones to attain improved Community Rating System (CRS) classifications from FEMA;
  - Adding stronger open space preservation areas, freeboard requirements, Cumulative Substantial Improvements, and Lower Substantial Improvements in these zones;

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<sup>10</sup> Transcript of oral arguments: [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/08-1151.pdf](http://www.supremecourt.us/oral_arguments/argument_transcripts/08-1151.pdf)

- Requiring low density or prohibiting developments with high density directly next to the water on undeveloped land. For example, large high-density structures could be prohibited seaward of the first major line of infrastructure;
- Requiring land use planning controls such as deep lots and buffers, large waterfront parcels, and mandatory landward relocation during redevelopment (where possible);
- Limiting or restricting local infrastructure or subsidies that support further development in vulnerable areas. Establish a review and approval process for publicly financed infrastructure including roads, electric and drainage projects to be compatible with the objectives of this policy as part of the regional planning process (*see Recommendation #3*).
- Facilitating acquisition of properties. Local or state governments could establish land acquisition, purchase of development rights (PDRs), or easement programs for any remaining undeveloped, available, or threatened beachfront properties (*see Recommendation #4*).
- Developing a post-storm redevelopment strategy for rebuilding the beach/dune system, and relocating structures as far away from hazards as possible (*see Recommendation #5*).

## **E. EXISTING POLICIES AND PROGRAMS**

### ***Beachfront Management Act with 1990 Amendments (summarized)***

DHEC-OCRM, before July 3, 1991, was to establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line were not to be revised before July 1, 1998, nor later than July 1, 2000. After that revision, the baseline and setback line were to be revised not less than every eight years but not more than every ten years after each preceding revision. The lines were revised in 1998-1999 and are currently being revised in accordance with this timeline. The requirements for establishing the baseline for each standard erosion zone, unstabilized inlet zone, and stabilized inlet zone are similar to the earlier Act. However, the following text in the 1990 amendments adds the option to move the baseline seaward following renourishment projects:

*“Notwithstanding any other provision of this section, where a department-approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition an administrative law judge to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the department in accordance with Section 48-39-280(A)(1) by showing that the beach has been stabilized by department-approved beach nourishment. If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future. If the administrative law judge grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after*

*the initial beach nourishment project has been completed as determined by the department. If the beach nourishment fails to stabilize the beach after a reasonable period of time, the department must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach. Any appeal of an administrative law judge's decision under this section may be made pursuant to Title 23 of Chapter 1.”*

## **F. GENERAL COSTS AND BENEFITS**

- Benefits will include reduced threats to coastal infrastructure and potentially decreased demand for expensive beach nourishment projects.
- Beach nourishment projects, while designed to protect coastal properties from further shoreline erosion, will generally have a period of time when the shoreline has migrated back to a position close to the pre-nourishment conditions, thereby necessitating the next nourishment project. During these periods, any such structures would be at risk to increased storm damage, and as noted above, there remains uncertainty that there are sufficient, affordable sand reserves to continue long-term nourishment operations in the future.
- Impacted parties will be towns or property owners who may enjoy a temporary increase in shoreline accretion that they feel could be built upon.
- Actual costs of implementing this policy are difficult to quantify, but should be minimal as compared with the cost/risk of increased development seaward of current baselines and existing lines of oceanfront structures.
- Maximizing the space between development and the shoreline would eventually be less expensive to governments as a whole by protecting the built environment better than having the structures exposed to the constant erosion and storm surge next to the water.
- A municipality's FEMA Community Rating System (CRS) classification could also improve, resulting in reduced insurance costs.

## **G. MEASURES OF SUCCESS**

- No seaward expansion of existing oceanfront development anywhere in the state.
- Decreased insurance claims and costs.
- Decreased density immediately next to the water.
- Decreased damage to structures and decreased use of materials for repair.
- Improvement of FEMA Community Rating System classifications for local discounts on flood insurance through implementation of open space protection through easements in the beach/dunes system.

## **H. FEASIBILITY ISSUES**

- Tighter regulations will meet stiff opposition by political leaders, real estate and development interests, and possible legal challenges involving private property rights.

- Legal challenges to pre-renourishment property surveys are ongoing and will likely affect this recommendation.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

- Knowing how far away to move from a shoreline, given the rising sea levels.
- Knowing how far away to move from an unstabilized inlet shoreline.
- Knowing the actions of the federal, state, or local government after a disaster.
- Assumptions that business as usual will continue to work – renourishment, etc. economic return on coastal investment... (mix of federal/state/local subsidies)
- Rate of SLR, influence on renourishment/erosion control success into the future
- Shoreline property ownership issues (related to Kings Grants and other title issues)
- Buy-in by local government officials and community leaders
- Assuming that seaward movement of the baseline could be a fairly common request

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Florida***

Relevant sections of Florida code that reset the public/private boundary prior to renourishment are as follows (FL Code §161.191):

“Vesting of title to lands.--

(1) Upon the filing of a copy of the board of trustees' resolution and the recording of the survey showing the location of the erosion control line and the area of beach to be protected as provided in s. 161.181, title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.

(2) Once the erosion control line along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process, except as provided in s. 161.211(2) and (3). However, the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired.”

### ***Maine***

Frontal and back dunes were mapped by the Maine Geological Survey in 1988, and new structures or additions to existing structures are prohibited on frontal dunes. Since 1988, no adjustments have been made to the maps based on either erosion or accretion.

### ***North Carolina***

North Carolina's beachfront setback line is based on the first line of stable and natural vegetation. In areas that have received large scale beach fill, a "static" vegetation line is created and used for setback determinations, and is drawn at the location of vegetation line prior to the beach fill project (or, in cases where beach fill occurred prior to the rule, the vegetation line is approximated from aerial photos or surveys). There is a new rule that should become effective in September 2009 that will allow some exceptions for development in cases where the setback from the static vegetation line cannot be met, but the setback from the new vegetation line can (however, new development will be limited to 2500 sq ft and cannot be any further seaward than the landward-most adjacent building AND the town must be granted a static line exemption from the NC Coastal Resources Commission by proving they have a 25 year or greater beach fill project in place, funds to pay for it, and sufficient compatible sand. NC inlet zones use the same vegetation line and static line concepts.

Relevant sections of North Carolina code that reset the public/private boundary prior to renourishment are as follows (NC Code §146-6(f)):

"...the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the state. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. All such raised lands shall remain open to the free use and enjoyment of the people of the state, consistent with the public trust rights in ocean beaches..."

### ***Texas***

The Plan for Texas Open Beaches was established in 2006 by the Texas General Land Office, and it gives the state or local governments the authority to seek the removal of any encroachment on the public beach. The public beach is a rolling easement from the natural Line of Vegetation (LOV) to the mean high tide line. Beach renourishment is considered artificial manipulation, so it does not move the Line of Vegetation seaward, even if a nourished beach or dune becomes vegetated. The Structure Removal Initiative was announced in July 2006. In the Village of Surfside Beach, 37 structures were located on the public beach, and 25 have been either relocated or demolished. Owners who voluntarily move their houses are reimbursed up to \$50,000 for the cost of relocation, but this money cannot cover the cost of purchasing new land. Many of the owners who relocated are once again earning rental income from their property that they were not earning while the structure was threatened. The cost to relocate each individual property has been around \$150,000-\$160,000, so the Structure Removal Initiative has reimbursed owners about 1/3 of the cost.



## **K. BARRIERS OR CONCERNS**

While the Committee unanimously supports the general recommendation to prevent seaward expansion of beachfront development, some committee members did not agree completely with the condition that the DHEC-OCRM baseline should never move seaward “under any circumstances.” In some situations, adjustments to the baseline accuracy may be warranted. These situations could include the discovery of better scientific evidence to support a correction of baseline, improved shoreline data, and improved standards and methodologies for determining the baseline. In most instances, these potential corrections to the baseline are assumed to be minor and as such, the intent to preclude any further seaward adjustment of the baseline is supported, but some flexibility is suggested in situations where existing baseline positions might be in error or could be made more accurate.

Some committee members also strongly suggest that baseline determinations follow a scientific and consistent methodology similar in practice to the stringent standards applied by FEMA in determining regulatory NFIP flood boundaries and maps. For example, the determination of baselines in unstabilized inlet zones can be based on historic shoreline positions as well as other factors (e.g. historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing, the effects of nearby beach restoration projects, etc.). Committee members suggested that more clear standards be established to reduce the subjectivity in staff decisions related to these line determinations.

## ***Recommendation 2 – Strengthen the Beachfront Setback Area***

### **A. GENERAL RECOMMENDATION**

The “setback area” established under the SC Beachfront Management Act can be more accurately described as a jurisdictional area, since the requirements for building setbacks are actually limited. The policy and management recommendations described here are intended to strengthen the beachfront setback area by: a) increasing the minimum setback line distance; b) improving the formula used to delineate setbacks for highly dynamic shorelines; c) tightening certain restrictions within the setback area; and, d) enhancing the protection of beach and dune features that are located outside of the setback area.

### **B. RATIONALE**

Jurisdictional baselines and setback lines were established by the SC Beachfront Management Act in 1988 to regulate the new construction, repair, or reconstruction of buildings and erosion control structures along the state’s ocean shorelines. Building within the state’s beachfront “setback area” is allowed, but any development is subject to specific regulations. The baseline is established at the crest of the primary oceanfront sand dune in standard zones (beaches not influenced by tidal inlets or associated tidal shoals), and at the most landward point of erosion at any time during the past forty years in unstabilized inlet zones (SC Code §48-39-280(A)). The setback line is established landward of the baseline a distance of forty times the average annual erosion rate or not less than twenty feet from the baseline. The baseline and setback line are updated every 8-10 years using the best available scientific and historical data including aerial imagery, LiDAR data, historical shorelines, beach profile data, and long-term erosion rates.

First, the Beachfront Management Act established a minimum setback of 20 feet for beaches experiencing long-term accretion or long-term erosion rates of less than 1/2 foot per year (SC Code §48-39-280 (B)). Based on a recent analysis of long-term erosion rates along the beachfront, this minimum distance has been applied to approximately 59% of the beachfront stations. As a result, there are large stretches of beachfront properties where the state’s jurisdiction is very limited (for example, Figure 2). In the setback area, new buildings are limited to 5,000 square feet of heated space, and no new erosion control structures are allowed. However, just outside of the setback area, new erosion control structures and/or buildings of any size (that meet requirements under local ordinances) are allowed. In some cases, large multi-family units are constructed on and over secondary dunes, right up to the 20 ft DHEC-OCRM setback line; in other cases, new seawalls are constructed just beyond the setback line, and will be “grandfathered in” as the shoreline migrates (until “damaged beyond repair,” or 50% loss of structural integrity, at a later date). The minimum setback area is particularly narrow with respect to projections for accelerated sea level rise, as the historical rate (~1.5 ft/century) may double or even triple in the coming decades (US CCSP, 2009).

Second, the data, methods, and computing power used to calculate and delineate baselines and setback lines can be improved due to advancements over the past 20 years, and there is a need to improve the scientific basis for protection of the beach/dune system. Shoreline change is more predictable in some regions than in others, and the short-term rate of change in some regions is higher than the long-term average change. This is especially true in unstabilized inlet areas, where the long-term erosion rate may be a gradual 1 foot/year, but the shoreline can vary by hundreds of feet over a 10-year period due to a repetitive series of inlet shoal bypassing events. Currently, the Beachfront Management Act requires that the baseline in unstabilized inlet zones be established using the landward most shoreline in the prior 40-year window (SC Code §48-39-280 (A)(2)), and the setback area is calculated based on the shore-perpendicular, long-term erosion rate (based on data going back to the 1800s). There is no justification for “dropping” shorelines that are older than 40 years from consideration, which allows seaward movement of the baseline in unstabilized, highly dynamic inlet zones.

Third, building restrictions in the setback area and seaward of the baseline are limited. For example, there is a disconnect between the state statute and regulation on building size restrictions. If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the department that the construction meets the following requirements:

“(i) The habitable structure is no larger than five thousand square feet of heated space” (SC Code §48-39-290 (B)(1)(a)).

“(2) That portion(s) of the habitable structure seaward of the setback line is no larger than five thousand square feet of heated space” (R. 30-13(B)(2)).

If DHEC-OCRM staff follow the regulation and not the statute, a much larger building could be allowed as long as the portion within the setback area is limited to 5,000 square feet. Within a 20’ setback area, this is not a substantial limitation. Also, structures within the setback area (and seaward of the baseline) are allowed to be rebuilt to the original size following an event that causes greater than 2/3 loss of assessed value (SC Code §48-39-290 (B)(1)(b)(iv)). Other states, including North Carolina, restrict rebuilding in the beachfront setback area following a determination of “damaged beyond repair.” Finally, over 60 structures have received “special permits” to build seaward of the DHEC-OCRM baseline.

Fourth, valuable beach and dune features are often located outside of the “beach/dune system” as it is defined in the Act (from the Mean High Water line to the landward extent of the 40-year setback line, see SC Code §48-39-270 (5)). While mitigation for dune damage is required under R. 30-11(D)(6), there is no state prohibition on dune destruction other than for the primary dune. Large secondary dunes are vulnerable to development when a new, sometimes temporary primary dune forms at a seaward location (the primary dune is defined as at least 3 feet in height and 500 feet in length (R. 30-1(D)(43)).

## C. NEW POLICY RECOMMENDATIONS

- a) **The minimum beachfront setback should be increased to 50 feet from the baseline (for all beach and inlet zones).**

The expanded setback area along beaches with slow rates of erosion or even accretion is desirable given projections of accelerated sea level rise (Figure 1) and the potential for more intense storm events, and because the current restrictions do little to limit the size of buildings or placement of erosion control structures outside of the setback area but in close proximity to the primary dune or active beach. At present, increasing the minimum setback distance from 20 ft to 50 ft would affect approximately 264 additional habitable structures in the state (an additional 7% of the 3,850 habitable beachfront structures).

The minimum setback is currently established in both statute and regulation. The Committee is unclear on whether a regulatory change expanding the minimum setback would be preempted by the statute.

- b) **The setback area regulation (R. 30-13(B)(2)) should be modified to become consistent with the statute that requires that if part of a new habitable structure is constructed seaward of the setback line, the total structure must be no larger than five thousand square feet of heated space (SC Code §48-39-290(B)(1)(a)).**

Consistency between the relevant regulation and statute is needed so that habitable structures that are located completely within the setback area and those that straddle the setback line are limited to 5,000 square feet, as intended by the statute.

- c) **In “unstabilized inlet zones,” evaluate all historical shorelines for determining the baseline, and include some measure of variability (e.g. standard deviation or variance) in erosion rate formulas for determining the setback line distance.**

Unstabilized inlets are extremely dynamic, and are often the locations of erosion “hot spots” where structures are routinely threatened by rapid shoreline erosion. DHEC-OCRM should not limit baseline determinations based on aerial photographs that are available in the prior 40-years, but should reset the baseline in these areas to a composite of the most landward historical shorelines, possibly since the construction of the Atlantic Intracoastal Waterway (AIWW). This approach is followed by coastal managers in North Carolina to determine which historical shoreline positions should be included in jurisdictional line analyses. The baseline should then be fixed unless new information comes forward at a later date that reveals an even farther landward position (*see Recommendation #1*).

A measure of the variability in these zones (in statistical terms, variance or standard deviation) should be included in the formula used to determine the setback area distance in unstabilized inlet zones. This formula would be more appropriate for inlet areas that show little shore-perpendicular migration, but significant variability over short time frames (as well as longitudinal spit formation and migration). In general, DHEC-OCRM should establish improved formulas to better reflect inlet dynamics in setback line formulas.

The Committee felt that the current approach to establishing baselines and setback lines in standard beach zones is appropriate, except that the minimum setback distance should be increased.

**d) Limit the building or re-building of structures in the most vulnerable beachfront areas, particularly seaward of the baseline.**

To date, about 60 “special permits” have been issued statewide by DHEC-OCRM for habitable structures seaward of the baseline. According to SC Code § 48-39-290(D), special permit houses cannot have a seawall as part of the foundation, and they can never be greater than 5,000 square feet, further seaward than either neighboring house, or located on the primary dune or active beach. Furthermore, if water reaches under the house during high tide over a period of time, removal of the structure is required. The state should reexamine and consider strengthening these criteria. In addition, the state should re-evaluate post-storm reconstruction policies in the setback area.

**e) Enhance protection of sensitive dune features that are outside of the state’s “beach/dune system.”**

Because secondary dunes, recurved spits, and other sensitive beach/dune features are often outside the beach/dune system as defined in the statute, state and local cooperation is needed to protect secondary dunes and special features.

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would require legislative action by the South Carolina General Assembly.

## **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) DHEC-OCRM should establish and hold all historical shoreline data for the coast of South Carolina, and should work with partner agencies and academic institutions to establish a scientifically defensible formula for setback determinations in unstabilized inlet zones.
- 2) DHEC-OCRM should work with local governments and partner agencies to explore opportunities for relocation of vulnerable structures outside of the setback area. DHEC and the General Assembly should also reconsider building size restrictions and the use of special permits on the beachfront.

- 3) DHEC-OCRM could consider the designation of Geographic Areas of Particular Concern (GAPC's) for some locations. Hilton Head Island provides examples of local ordinances that enhance dune protection that should be considered by other beachfront communities.

## **E. EXISTING POLICIES AND PROGRAMS**

This policy recommendation is directly related to existing authorities and procedures followed by DHEC-OCRM under the South Carolina Coastal Tidelands and Wetlands Act: SC Code §48-39-250 et seq., SCDHEC-OCRM Critical Area Permitting Regulations (R. 30-1 et seq), and the South Carolina Beachfront Management Plan (R. 30-21).

The Critical Area Permitting Regulations define Geographic Areas of Particular Concern (GAPC's) as "areas within South Carolina's coastal zone which have been identified in the state's Coastal Management Program as being of such importance as to merit special consideration during the [DHEC-OCRM] review of permit applications (R. 30-1(D)(24)). GAPC's consist of: 1) areas of unique natural resource value; 2) areas where activities, development, or facilities depend on proximity to coastal waters, in terms of use or access; and 3) areas of special historical, archeological or cultural significance.

## **F. GENERAL COSTS AND BENEFITS**

This policy could lead to decreased beachfront property values in some areas, but the specific reductions are difficult to quantify for the following reasons:

- Beachfront parcels have various dimensions (width and depth), and these dimensions limit the size of habitable structures that can be built under existing or new policies.
- Not all habitable structures are of equal value per square foot. If the setback line moves landward in some areas, it could limit new habitable structures to a certain square footage, but the size and type of structure will depend on parcel dimensions, local zoning, and building codes, among other factors.

This policy would benefit long-term planning in coastal communities by using the best available data and historic trends and by including some measure of variability when calculating erosion rates in "unstabilized inlet zones."

This policy would also promote and preserve the storm protection functions and habitat of secondary dunes and other sensitive beach/dune features.

## **G. MEASURES OF SUCCESS**

- Reduction in occurrence of impacted infrastructure and property damage.
- Reduced demand for renourishment, erosion control, Emergency Orders.
- Long-term health of beach / dune system.

## **H. FEASIBILITY ISSUES**

Beachfront property owners will likely oppose any further restrictions on the use of their property, including size limitations, setbacks, and the use of various erosion control alternatives.

The General Assembly will have to consider the reasonable use of beachfront parcels in contrast to the long-term economic and environmental impacts associated with encroachment of development into the beach/dune system – a problem that was recognized in the state’s original passage of the Beachfront Management Act in 1988.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

- Magnitude and influence of sea level rise on shoreline position.
- Magnitude and influence of storm climate on shoreline position.
- Inlet dynamics.
- Costs associated with data collection, compilation, analysis, and product creation.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Texas***

Proposed setback rules call for new buildings to be located landward of the Line of Vegetation, a distance of 60 times the erosion rate. Nueces County recently established a 350-ft setback requirement.

### ***North Carolina***

North Carolina’s Coastal Area Management Act (CAMA) established coastal construction setback rules similar to those found in South Carolina. The Vegetation Line is the “baseline” from which erosion rate-based setback lines are drawn. Under current rules established in 1979, the setback is 30 times the long-term average annual erosion rate for single-family structures regardless of size or for multi-family or commercial structures less than 5,000 sq ft (minimum setback of 60 feet). For multi-family and commercial structures greater than 5,000 sq ft with an erosion rate less than 3.5 ft/yr, the setback is 60 times the long-term average annual erosion rate. If the erosion rate is greater than 3.5 ft/yr, the setback is 30 times the long-term average annual erosion rate plus 105 feet for this type of structure. North Carolina’s Coastal Program has recently changed oceanfront setback rules that are now based on total square footage regardless of whether the structure is single-family, multi-family, or commercial. Under the new policies, the minimum setback factor remains 30 times the erosion rate for all structures less than 5,000 sq ft but, as it does with existing policy, the factor increases to 60 times the erosion rate for structures greater than 5,000 sq ft. The setback factor increases from 60 to 90 times the erosion rate in increments of 5 as total square footage increases, and the maximum setback factor becomes 90 times the erosion rate for structures greater than or equal to 100,000 sq ft.



North Carolina's Coastal Area Management Act (CAMA) also requires that new buildings and development are located as far back from the beach as possible. Relocation, beach renourishment, or temporary sandbags are the only acceptable erosion responses in the state since permanent hard stabilization of the shoreline is not allowed. In February 2009, the NC Coastal Resources Commission and its advisory board unanimously passed a resolution asking the General Assembly to consider creating a state trust fund to help finance coastal infrastructure projects, including the removal of structures encroaching onto public beach areas. In North Carolina, no portion of a building or structure can extend seaward of the ocean hazard setback line.

### ***Rhode Island***

Rhode Island requires a minimum setback distance of 50 ft from coastal features, defined as beaches; dunes; barrier islands and spits; coastal wetlands; rocky shores; manmade shorelines; and headlands, bluffs, and cliffs. Where erosion rates are mapped, the setback distance is 30 times the rate for residential development, or 60 times the rate for commercial (or greater than 4 unit) developments.

### ***Maine***

Maine's Coastal Sand Dune Rules prohibit new structures or additions to existing structures on frontal dunes. A building cannot exceed 20% of the lot coverage, and buildings larger than 2,500 sq ft are not allowed within the dune system unless the applicant can demonstrate that the site will remain stable after allowing for a two-foot rise in sea level over 100 years. All development except single family residences must be set back 250 feet from the high water line. The Municipal Shoreland Zoning Act mandates a 75-foot setback for residential development.

### ***Hawaii***

Hawaii CZM regulations establish statewide shoreline setbacks of not less than twenty feet and not more than forty feet, but County Planning Departments are delegated powers and may establish shoreline setbacks greater than the CZM state requirements. For example, the Kauai County Shoreline Setback and Coastal Protection Ordinance states that no lot shall have a shoreline setback line of less than forty feet, and setback distances increase with increasing lot depth. New lot depths of greater than 160 feet are required, and a proposed building footprint less than 5,000 sq ft has a setback distance of 70 times the erosion rate, plus a forty foot safety buffer. A proposed building footprint greater than 5,000 sq ft has a setback distance of 100 times the erosion rate, plus a forty foot safety buffer. The state is not legally bound to implement the County setback ordinance, and the state recently approved a less restrictive setback distance than would have been required by the County ordinance. However, a condition that no shoreline hardening would be allowed for the life of the development was included in the state authorization. Maui County has adopted shoreline rules that incorporate managed retreat principles as post and pier buildings are relocated inland over time. Through the coastal permitting process, Maui County has been successful in having oceanfront structures removed at several large resorts during their redevelopment.

## **K. BARRIERS OR CONCERNS**

While the Committee unanimously supports the general recommendation to strengthen the DHEC-OCRM Setback Area, the Committee did not reach full agreement on two of the specific sub-recommendations:

- a) Committee members debated whether 50 feet was potentially too great or too little of an increase to the minimum setback distance (currently set at 20 feet). They suggested that if the setback is to be revised, it should be based on a detailed analysis to support the revision. This analysis would include a careful analysis of the implications of the new rule, historic analysis of the success and failure of the existing 20-ft setback, and challenges that coastal communities and the state would face to implement a revision.
- b) Committee members pointed out that the implications of this recommendation depend on actions taken under sub-recommendation (a); that is, if the setback area is increased to 50 feet or more, this recommendation would affect far more habitable structures in applying the 5,000 square foot maximum to all structures that overlap with any part of the setback area.
- c) Some committee members do not support the application of a "measure of variability" or standard deviations in the determination of shoreline positions. They believe this approach is not scientifically justified for policy implementation at this time.
- d) Some committee members strongly suggest that setback determinations follow a scientific and consistent methodology similar in practice to the stringent standards applied by FEMA in determining regulatory NFIP flood boundaries and maps. For example, the determination of long-term erosion rates is based on all available historical shoreline positions, but DHEC-OCRM staff have determined some historical shoreline data to be potentially inaccurate and have therefore not used those data in the calculation of erosion rates. Additional standards are needed to guide staff in the use of various data sources for long-term erosion rates.

## ***Recommendation 3 – Eliminate Inconsistent Public Subsidies***

### **A. GENERAL RECOMMENDATION**

Public investments along the state’s shoreline, including development infrastructure, insurance subsidies, and erosion control solutions, should promote public benefits that are consistent with long-range coastal management policies. This recommendation suggests that public subsidies along coastal shorelines be reevaluated to reduce or eliminate those that may promote further development in vulnerable areas or that are inconsistent with the goals, policies, and rules associated with the South Carolina Beachfront Management Act.

### **B. RATIONALE**

In many cases, new development or building in areas known to be highly vulnerable to coastal storms and shoreline dynamics is subject to additional federal, state, and local regulations - but is still possible, desired, and even profitable. There are two general opinions on new development in high hazard areas: 1) that property owners should be able to build as long as it is at their own risk; and/or 2) that the proposed buildings, infrastructure, and the people who occupy those areas place others at risk due to the need for additional emergency assistance, and due to the additional debris created during a storm event. Given that these additional risks to other people and structures are often considered insufficient grounds for prohibiting development in South Carolina, this recommendation seeks to ensure that new development, at the very least, is undertaken at the property owner’s risk rather than through public support.

Much of the state’s shoreline has been developed at various levels of intensity and with varying levels of vulnerability to shoreline migration and intermittent flooding. Failure to address conflicts between development patterns and changing shoreline conditions can result in stranded assets in tenuous locations. New infrastructure should not exacerbate the problem by facilitating additional density in areas of high vulnerability, and state funding to address shoreline change must take a long-range approach with sustainable investment decisions. Addressing shoreline change will be increasingly expensive given the prospect of accelerated sea level rise. To expend public resources that promote inappropriate coastal development patterns or that offer repeated short-term fixes for long-range problems is fiscally irresponsible. The state should not be the bail-out of last resort where inappropriate development decisions have been made.

In 1982, the federal Coastal Barrier Resources Act (P.L. 97-348) established a Coastal Barrier Resources System (CBRS) along the Atlantic, Gulf, and Great Lakes coastline. The U.S. Fish and Wildlife Service was designated the lead agency and designated then-undeveloped coastal barrier islands (or undeveloped portions of islands) as CBRS units. The intent of this program is to encourage the conservation of hurricane prone, biologically rich coastal barriers by restricting federal expenditures that encourage development, such as flood insurance through the National Flood Insurance Program. The law is considered a free-market approach to conservation – properties within CBRS units can be developed, but federal taxpayers do not underwrite any

private investments in these areas. Sixteen CBRS units have been established along the coastal barriers of South Carolina and include over 17,000 acres of upland.

### **C. NEW POLICY RECOMMENDATIONS**

- a) **The General Assembly should prepare legislation to clarify state policy with respect to public subsidies of development in “high hazard areas” along beachfront and/or sheltered coastlines.**

“High hazard areas” could include the existing federal CBRS units in South Carolina, DHEC-OCRM’s inlet hazard areas, marsh islands, remaining undeveloped or unsubdivided beachfront parcels, and/or other types of designations (e.g. coastal “V” or Velocity zones under SCDNR’s floodplain management program). Within the designated high hazard areas (which have not yet been identified), state and local governments should limit public subsidies that would contribute to greater density or new development within those high hazard areas. The concept is simply “build at your own risk,” and follows the same model as the Coastal Barrier Resources Act that the federal government uses for the same purpose. Examples of state and local subsidies that should be considered include transportation funds, water/sewer extensions (as well as low interest loans or revolving fund programs), Community Development Block Grants (CDBG), tax incentives, the state wind insurance pool, and future state and local investments in beach renourishment projects or other erosion control solutions.

### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

Public investments to address shoreline change should be based on sound scientific information documenting coastal processes, current and projected shoreline change, and vulnerability assessments including physical, natural system, and socio-economic elements. The framework for documenting conditions and options should be included in the update of the State Beachfront Management Plan and in approved Local Comprehensive Beachfront Management Plans, which should be required to obtain state funding. The state should provide information and technical assistance to help develop and/or update local plans.

### **E. EXISTING POLICIES AND PROGRAMS**

The SC Coastal Program Document (III-69 to III-71) indicates that, for undeveloped beach stretches and estuarine shorelines, new road or bridge projects involving the expenditure of public funds providing access to undeveloped barrier islands will not be approved unless a strong public benefit argument can be made. The program document further states that “the extension of public services, such as sewer and water facilities, to barrier islands should only be proposed in a comprehensive approach which considers the natural “carrying capacity” of the island to support development and which integrates these facilities to parallel the level of access which is available to the island.”

## **F. GENERAL COSTS AND BENEFITS**

In general, significant costs for new development in high hazard areas would shift from the public to the private property owners. This may result in reduced development or building, and therefore reduced local tax revenues from property taxes, accommodation taxes, and hospitality taxes.

However, there will also be reduced taxpayer contributions to emergency management operations, post-storm clean-ups, insurance subsidies, and renourishment projects for these areas.

## **G. MEASURES OF SUCCESS**

- Reduced public expenditures for any new development within designated areas.

## **H. FEASIBILITY ISSUES**

New state-level property designations and restrictions will face resistance from property owners but may gain public support. Designations that restrict additional density in already-developed areas may face stronger opposition than designations for currently-undeveloped or not yet subdivided properties.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

The primary uncertainty is in the magnitude and timing of shoreline changes and storm events. There is little doubt that change will come, and it is likely that the rate of change will be greater than has occurred in the historical record given the prospect of accelerated sea level rise. The assumptions on which public investment decisions are based must incorporate sound scientific evidence as well as a range of possible outcomes reflecting uncertainty with respect to natural systems.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### **Maine**

Maine Statute Title 38, Chapter 21 states that “certain areas of the Maine coast, because of their fragile nature, valuable habitat and their storm buffering abilities should be protected and conserved in their natural state and that it is inappropriate to use state funds to encourage or support activities incompatible with the ability of these areas to sustain these activities.”

Therefore, no state funds or state financial assistance are expended for development activities within the Coastal Barrier Resource (CoBRA) system including but not limited to structures, roads, airports, boat landings, bridges, causeways, and erosion control structures. However, the Governor may approve state expenditures or financial assistance available within the CoBRA

system “for assistance for emergency actions essential to the saving of lives, the protection of property, and the public health and safety.”

### **New York**

New York’s Coastal Erosion Management Regulations (Chapter V, Part 505.1(d)) state that “public investment in services, facilities, or activities which are likely to encourage new permanent development in erosion hazard areas is restricted.”

## **K. BARRIERS OR CONCERNS**

None identified; however, this will depend on the types and extent of areas designated for reduced state subsidies.

Some committee members suggest that there may be some rare instances where state supported beach nourishment would be justified for areas that were pre-determined for limited state subsidies, for example, to extend nourishment project reaches to protect adjacent state beach and shoreline resources. In addition, some joint sharing of borrow sources may create beneficial timing and reduction of costs for state nourishment efforts in conjunction with private efforts.

## ***Recommendation 4 – Strategically Acquire Beachfront Lands and/or Easements***

### **A. GENERAL RECOMMENDATION**

Coastal land acquisition and protection mechanisms must be established as part of long-term retreat strategies, and to ensure that sufficient space is afforded for short-term beach/dune erosion cycles. This policy recommendation focuses on programs for the voluntary acquisition of priority high risk coastal properties.

### **B. RATIONALE**

Coastal land acquisition and protection are mechanisms that can be used to encourage and enable long-term retreat strategies, as well as address the near-term goal of maximizing the space for natural beach dynamics. A voluntary land acquisition program would incorporate both fee-simple purchase and conservation easements for properties deemed at risk from storms and erosion. Acquisition options could include (1) purchase of lands that are not currently developed, (2) acquisition of high risk land prior to or after storms and erosion damage, limiting redevelopment, and (3) acquisition of lands further inland that would be locations for relocation.

Undeveloped Lands: Current levels of build out and protection along South Carolina's oceanfront limit the effectiveness of the first scenario. A 1988 survey of the South Carolina shoreline (Kana, 1988) determined that 76 miles, or 42%, of the state's coastline is undeveloped and held in trust as wildlife preserves, research domains and state parks. An additional 9% was identified as undeveloped, but publicly or privately owned and potentially developable in the future (see Table 2 for 2009 update).

These properties provide opportunity for acquisition and/or planned development that takes into account erosion and sea level rise. Conservation easements would be one opportunity to ensure that development occurs behind the DHEC-OCRM setback line. If opportunities present themselves, efforts should be made to acquire and/or limit development on these properties within the DHEC-OCRM setback area.

Developed Lands: Based on the 1988 report, approximately 50% of the South Carolina coastline is developed. State or local governments have the opportunity to utilize and create voluntary land acquisition programs to acquire or place easements on land that is already developed to enable relocation from the beach/dune system. In most instances, these properties in developed areas are not available for acquisition. Coastal land is highly desirable and their property value makes acquisition an expensive proposition. However, storms and high erosion conditions may provide an opportunity for either acquisition or the placement of easements on properties during the redevelopment process. In order for this to be feasible, coastal acquisition programs and associated funding need to be in place in advance.

Relocation: For active retreat through relocation to be feasible in pre- and post-storm situations, land would need to be available. In this scenario, acquisition programs would prioritize lands further inland that could be used for property relocations. This was not identified as a high priority by the Committee, but should be considered in the development of land acquisition program and funding methods.

<b>Location</b>	<b>Miles of Shoreline</b>	<b>Ownership</b>
Waties Island	1.45	Private
Town of Atlantic Beach	0.20	Public - Town of Atlantic Beach
Between Briarcliffe Acres and Lake Arrowhead	1.20	Private
S. of Arcadian Shores	0.25	Private
MB - between Haskell Cir. and Hampton Cir.	0.60	Private
N. of Springmaid Pier	0.13	Private
S. end of Litchfield Beach (spit)	0.40	Private - Inlet Pt S. Community Association
N. end of Debidue Beach	0.17	Private - USC Development Foundation
Debidue Beach - Arcadia Plantation	0.57	Private
S. end of Debidue Beach	0.73	Private - Belle W. Baruch Foundation
N. end of Dewees Island	0.75	Private - Dewees Island Prop. Owners Assoc.
N. end of Folly Beach	0.40	Public
N. end of Kiawah Island	1.60	Private
Kiawah Island - N. of Sea Forest Dr.	0.20	Private
S. end of Kiawah Island (spit)	0.75	Private
Pritchards Island	1.23	Private - University of South Carolina, Beaufort
Bay Point Island	1.50	Private
Hilton Head Island – N. of the Folly	0.30	Public - Town of Hilton Head Island
N. Daufuskie Island - Easter Beach Ln	0.30	Private
Middle of Daufuskie Island - Beauregard Blvd	0.65	Private
<b>TOTAL:</b>	<b>13.38</b>	

There are several state, federal, and local land protection programs in place that could help support coastal land acquisition programs in all three categories. These include the Coastal and Estuarine Land Conservation Program (CELCP), South Carolina Conservation Bank, Charleston County Greenbelt, and other local programs. However, these programs have limited resources and use restrictions that can limit their value in acquiring smaller high cost barrier island properties. As such, they would provide only a small portion of the funds necessary to implement complete programs.

The Town of Hilton Head Island has a land acquisition process in place that could serve as an example for other counties and municipalities along the coast. The process includes: (1) identification of properties for potential acquisition, (2) criteria for making acquisition recommendations, and (3) funding sources for acquisition, including the Real Estate Transfer Fee, Beach Preservation Fee, general revenue, grants and donations. Since the program was



initiated in 1990, 127 parcels have been acquired, totaling 1,171.70 acres. The total expenditures are \$149.7 million. At least 13 of these properties are located on the oceanfront or along Broad Creek. Other sites have focused on high-density areas along U.S. Route 278. In addition to increasing public access, the Town estimates that this has reduced (a) 4.37 million square feet of commercial development, (b) 1,365 motel rooms, and (c) 4,467 residential and timeshare units.

In addition, several coastal states (e.g. Alabama, Mississippi, and Louisiana) have used hazard mitigation funds available through the Federal Emergency Management Agency (FEMA) to support acquisition and relocation programs. Grant programs are available for pre- and post-disaster mitigation. In South Carolina, these programs are administered through the South Carolina Emergency Management Division (SCEMD) and the Department of Natural Resources. There is opportunity to better link these programs with local government coastal acquisition and relocation efforts.

In the past, South Carolina received Flood Mitigation Assistance funding to support stormwater drainage system upgrades in the Hilton Head Island area. In addition, South Carolina has received over \$6.3 million in Pre-Disaster Mitigation funding for the following: Lake Fairfield acquisition, retrofitting/upgrading the Seabrook Island wastewater treatment facility, preparation of local hazard mitigation plans, seismic and wind retrofitting for the Dock Street Theatre in Charleston, and the Litchfield Beach weir replacement project.

### **C. NEW POLICY RECOMMENDATIONS**

- a) Expand the uses allowed under the current SC Beach Restoration and Improvement Trust Fund (§ 48-40-30 of the SC Beach Restoration and Improvement Act) to include land acquisition, voluntary relocation, and technical/planning assistance.**

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would require legislative action by the South Carolina General Assembly.

### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) Create and/or refine voluntary land acquisition strategies to support the purchase of and/or placement of conservation easements on high risk property.**
  - i) Evaluate current federal, state, and local acquisition programs for their effectiveness in beachfront acquisition (e.g. FEMA, CELCP, SC Conservation Bank, Greenbelt Programs).
  - ii) Identify undeveloped shoreline properties that could incorporate land protection strategies through acquisition and/or easements. Work with federal, state, and local

agencies, NGOs and property owners to implement acquisition programs when appropriate.

- iii) Incorporate land acquisition, easement and relocation programs into Local Comprehensive Beach Management Plans (*see Recommendation #5*). In particular, local governments should develop voluntary acquisition programs that could go into effect after storm and erosion events, when opportunities for such land protection are greater.
- iv) Identify opportunities to use acquired areas for public access.

There are opportunities for state and/or local implementation of voluntary acquisition programs. In either case, there is a need for a comprehensive plan so that opportunities are readily available. This would be of particular benefit in a post-storm situation where multiple properties may be interested.

## **2) Identify new (and increase current) funding mechanisms to support coastal land acquisition programs.**

- i) Consider the use of Real Estate Transfer fees to support local land acquisition programs. This would be similar to the current Hilton Head Island program. At this time, such programs are not allowed per Section 6.1.70 of the SC Code of Laws, which prohibits local governments from imposing a fee or tax on the transfer of real property. Consideration should be made to changing this law and to ensure that local taxes raised for this purpose stay with the local community for property acquisition. Local governments may also be able to establish Municipal Improvement Districts for these purposes.
- ii) Expand the uses allowed under the current SC Beach Restoration and Improvement Trust Fund (§ 48-40-30 of the SC Beach Restoration and Improvement Act) to include land acquisition, voluntary relocation and technical/planning assistance. A competitive proposal should then be used to distribute funds to local communities.
- iii) Capitalize on federal mitigation grant programs that support acquisition and relocation efforts. This includes pre-storm programs, such as Pre-Disaster Mitigation (PDM) and Severe Repetitive Loss (SRL), and the post-storm Hazard Mitigation Grant Program (HMGP).

## **E. EXISTING POLICIES AND PROGRAMS**

SC Coastal Program Document:

“The Coastal Council (DHEC-OCRM) encourages and supports state, local, and private efforts to acquire coastal barrier islands for inclusion in preservation and protection programs. Public recreational benefit should be one primary motivation for these efforts, and where appropriate, barrier islands should be maintained for recreational use, based on the capacity of individual areas to accommodate human activity” (III-69 to III-71).

#### SC Conservation Bank:

The mission of the Conservation Bank is “to improve the quality of life in South Carolina through the conservation of significant natural resource lands, wetlands, historical properties and archeological sites.” (Title 48, Chapter 59). To date, the Conservation Bank has not funded projects located on barrier islands. This would need to be evaluated as a possibility.

#### County Government Programs:

Horry County – Parks and Open Space Board, Horry County Open Space Fund  
Georgetown County – no current fund identified for open space, working on a master plan for Recreation and Community Enhancement.  
Charleston County - Greenbelt Plan and Fund supported through a sales tax.  
Beaufort County - Rural and Critical Lands Preservation Program  
Jasper County – no current fund identified for open space

#### Municipal Programs:

Town of Hilton Head Island – land acquisition program.

#### FEMA Mitigation Grant Programs:

Multiple grant programs provide funds to states and local communities to reduce the loss of life and property from natural hazard events. There are a wide range of mitigation projects that can be funded. The following programs enable the acquisition, demolition or relocation of structures with the conversion of underlying property to deed-restricted open space:

- Hazard Mitigation Grant Program (HMGP) - Administered by SCEMD, post-disaster
- Pre-Disaster Mitigation (PDM) – Administered by SCEMD, pre-disaster
- Severe Repetitive Loss (SRL) – Administered by SCDNR, pre-disaster, related to National Flood Insurance Program (NFIP)
- Flood Mitigation Assistance Grant Programs – Administered by SCDNR
- Repetitive Flood Claims Grant Program – Administered by SCDNR

Under these programs, properties are acquired at the current or pre-event market value. The preference is for acquisition and demolition over relocation

#### Coastal and Estuarine Land Conservation Program (CELCP):

Authorizes the acquisition of land and interests in land from willing sellers to improve the conservation of, and to enhance the ecological values and functions of, coastal and estuarine areas to benefit both the environment and the economies of coastal communities. The South Carolina CELCP plan includes coastal counties, watersheds and conservation focus areas.

## **F. GENERAL COSTS AND BENEFITS**

The greatest cost of acquisition is related to the high property values on South Carolina's coast. However, this initial cost should be weighed against the value of the natural system, the public access potential, and the minimized risk/cost of moving development.

The cost of relocation or acquisition is likely to be a one-time expense, whereas hard and soft stabilization approaches will be continual expenditures, including maintenance. There is some expense associated with ongoing stewardship of easements and deed restrictions. Also, local governments may experience a loss of their tax base if property owners relinquish development rights to beachfront parcels for open space conservation.

## **G. MEASURES OF SUCCESS**

- Number of properties acquired or placed under conservation easement.
- Number of acquisition programs modified to incorporate at-risk properties.
- Number of local governments implementing voluntary acquisition programs.

## **H. FEASIBILITY ISSUES**

- High percentage of oceanfront property that is already developed;
- The acceptance of risk in order to live by the beach and the ability to redevelop after storm or erosion events;
- Value of barrier island property and the associated cost of acquisition;
- Small property size, which can limit the overall impact of acquisition in support of relocations when occurring on a lot-by-lot basis;
- Challenge of finding additional funding sources and potentially instituting additional taxes to support programs;
- Competition for acquisition funding with other land conservation sites that may be greater in size and less costly;
- Ability to implement program in a timely fashion when opportunities may arise, e.g. post storm;
- Real Estate Transfer fees, such as that used by the Town of Hilton Head Island to support land acquisition, are now prohibited by the General Assembly for other communities;
- Some funding (e.g. Army Corps of Engineers beach renourishment) is established based on total property value. Undeveloped property has a lower property value, which could impact a local government's decision to acquire property.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

- Availability of annual appropriations;

- Willingness of land owners to move from the beach if other alternatives (e.g. nourishment, rebuilding) exist.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Florida***

From 1990 to 1999, Florida spent more than \$835 million to purchase land that increased public access to the coast.

In 2004, bond measures were approved in eight counties that cost a total of \$300 million to buy and preserve open space. However, in January 2009 an article in the *Miami Herald* reported that the Florida Senate was considering halting the Florida Forever program to stave off more pressing budget cuts. The proposal would stop the state from issuing the remaining \$250 million of \$300 million worth of bonds that are issued each year to buy conservation land across the state.

### ***Virginia***

Since 1991, the Virginia Coastal Program has helped to acquire and preserve over 1,800 acres of coastal lands, including wetlands, sand dune systems, lowland and upland riparian buffers, and other wildlife habitat areas.

### ***Massachusetts***

The Massachusetts Coastal Hazard Commission released a set of recommendations in 2007 which included recommendations related to voluntary land acquisition: *(1) Conserve coastal land and minimize loss through acquisition of storm-prone properties from willing sellers in fee or through conservation restrictions and easements and (2) Encourage coastal communities to adopt the CPA and use the Community Preservation Fund to acquire storm-prone properties.*

### ***Maine***

“Protecting Maine’s Beaches for the Future: A proposal to create an integrated beach management plan.” This 2006 report presented to the Joint Standing Committee on Natural Resources by the Beach Stakeholder’s Group includes a section on “*Voluntary Acquisition of Storm-Damaged Properties or Properties for Dune Enhancement or Public Access.*”

Also, Maine Coast Heritage Trust, a statewide land conservation organization, announced in August 2006 that it had raised more than \$100 million to accelerate land conservation efforts on Maine’s coast.

### ***Mississippi***

The Mississippi Emergency Management Agency (MEMA) implements disaster loss reduction measures through the implementation of state and local mitigation plans. The agency administers federally-funded mitigation programs, including the National Flood Insurance Program’s Community Assistance Program, the Flood Mitigation Assistance Program (FMA), Pre-Disaster Mitigation program (PDM) and post-disaster Hazard Mitigation Grants (HMGP). The FMA,

PDM and HMGP allow for the acquisition of structures and the conversion of property to deed-restricted open space.

***Alabama***

Alabama has established similar Hazard Mitigation Assistance (HMA) grant programs that incorporate the post-disaster HMGP and four annual grant programs for mitigation measures, including acquisition of property. These programs are the PDM, FMA, Repetitive Flood Claims and Severe Repetitive Loss programs.

**K. BARRIERS OR CONCERNS**

None identified.

## ***Recommendation 5 – Strengthen the Role of Local Governments***

### **A. GENERAL RECOMMENDATION**

The South Carolina Beachfront Management Act established incentives for ocean beachfront communities to prepare local comprehensive beach management plans in coordination with DHEC-OCRM. Because the capacities of local governments have evolved significantly since 1988, local comprehensive beach management plans represent an opportunity for strengthened beachfront planning and management at the local level, in cooperation with the state. However, there is a need to clarify, strengthen, and expand the plan elements that are presently required for approval of local beach plans, and to integrate these requirements with other local planning activities.

### **B. RATIONALE**

In recognition of its stewardship responsibilities, it is the policy of South Carolina to “create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration and enhancement of the beach/dune system. These plans must promote wise use of the state’s beachfront to include a gradual retreat from the system over a forty-year period” (SC Code §48-39-260(2)).

The South Carolina’s Beachfront Management Plan, first published by the SC Coastal Council in 1992 and codified as regulation (R. 30-18) houses the original building setbacks lines along the entire coast and referenced approved local beachfront management plans (§48-39-320(A)).

Required elements of the state plan include:

1. Development of a database for the state’s coastal areas to provide essential information concerning the management of the beach/dune system;
2. Development of guidelines for the accomplishment of:
  - a. beach/dune restoration and nourishment;
  - b. development of a beach access program;
  - c. maintenance of a ecologically stable, dry, sandy beach;
  - d. protection of all sand dunes seaward of the setback line;
  - e. protection of endangered and threatened species as well as critical habitats;
  - f. regulation of vehicular traffic upon the beaches and beach/dune system;
  - g. Development of a mitigation policy for construction allowed seaward of the setback line;
3. Development of a public education and awareness program on the importance of the beach/dune system; and
4. Assistance to local governments in developing the local comprehensive beach management plans.

In accordance with the State Beachfront Management Act, all beachfront counties and municipalities must then prepare, in coordination with DHEC-OCRM, a local comprehensive beach management plan which must be submitted to DHEC-OCRM for approval. Once approved, local comprehensive beach management plans become a part of the state plan. The local comprehensive beach management plans, *at a minimum*, must contain all of the following:

1. An inventory of beach profile data and historic erosion rate data for each standard erosion zone and inlet erosion zone under the local jurisdiction;
2. An inventory of public beach access along with a plan for enhancing public access and parking;
3. An inventory of all structures located in the area seaward of the setback line;
4. An inventory of nesting and important habitats of the beach/dune system and a protection and restoration plan if necessary;
5. A conventional zoning and land use plan consistent with the purposes of the Act for the area seaward of the setback line;
6. An analysis of erosion control alternatives, including renourishment of the beach under the local government's jurisdiction;
7. A drainage plan for the area seaward of the setback line;
8. A post disaster plan including plans for cleanup, maintaining essential services, protecting public health, emergency building ordinances, and the establishment of priorities, all of which must be consistent with the Act;
9. A detailed strategy for achieving the goals of this chapter by the end of the forty-year retreat period. Consideration must be given to relocating buildings, removal of erosion control structures and relocation of utilities;
10. A detailed strategy for achieving the goals of preservation of existing public access and the enhancement of public access to assure full enjoyment of the beach by all residents of this state.

Many of the local beachfront management plans originally approved by DHEC-OCRM in the early 1990s were of limited scope, did not necessarily address issues in a consistent manner (across communities), and sometimes failed to address the minimum requirements. Local communities may not have benefited from technical assistance that is now available and certainly did not consider factors beyond the minimum (10) requirements. Recognizing these shortcomings, DHEC-OCRM has already taken the initiative to develop *Interim Guidelines for the Development of Local Comprehensive Beach Management Plans* and has been using these interim guidelines to help standardize the format of all local comprehensive beach management plans. These new guidelines are meant to encourage more robust planning and to expand upon current required elements. The new guidelines have already proven to be effective and well received among several beachfront communities that have recently developed updates to their original plans. However, currently, there are no formal requirements for local communities to go beyond the original minimum requirements.

Furthermore, there are a variety of planning requirements for coastal counties and municipalities in South Carolina outside of the local comprehensive beach management plans. Counties and municipalities are required to prepare a Comprehensive Plan which includes, at a minimum seven elements (SC Code §6-29-510(D)). One element is a natural resource component which



must consider coastal resources (SC Code §6-29-510(D)(3)). There is no additional guidance regarding planning for coastal resources, nor is there any requirement for a county or municipality to confer with the state on this or any aspect. Local Comprehensive Plans, due to thoroughness of the information collected and the decadal rewrites, provide a good opportunity to advance certain coastal planning approaches at the local level. The lack of legislative direction as to what should be discussed in the coastal resources section has resulted in little consistency among comprehensive plans.

Considering all eighteen counties and municipalities along the South Carolina coast are required to develop and implement both Local Comprehensive Plans and Local Comprehensive Beach Management Plans, there is an opportunity for coordination and integration. Greater coordination between these two could strengthen implementation of planning efforts by better informing land-use planning, clarifying zoning decisions, providing consistent guidance on variances, and using consistent definitions. For instance, requirements for managing drainage seaward of the setback line are not well defined. The Hazard Mitigation Plan required of communities participating in the National Flood Insurance Program also addresses land use planning, hazard zone delineation, and other topics related to beachfront management. Currently, DHEC-OCRM planning staff looks for overlaps with hazard mitigation and other planning efforts as they review beachfront management plans, however upfront efforts would assist in streamlining the review process.

Many municipalities and counties are currently working to incorporate the state-approved local comprehensive beach management plans into their local comprehensive plans, an approach encouraged by DHEC-OCRM. For example, the Town of Hilton Head Island has integrated several plans with their Comprehensive Plan by making them adopted appendices to their Comprehensive Plan. Goals and strategies are coordinated with eight mandated elements (Natural Resource, Cultural Resources, Population, Housing, Community Facilities, Economic Development, Land Use, and Priority Investment), a Recreation Element, a Transportation Element, Beach Management Plan and a Post-Disaster Recovery Plan appendices (as required by the Beachfront Management Act), and a Hazard Mitigation Plan appendix (as required by the Flood Insurance Reform Act).

The current planning processes will need to give heightened attention to some topics in order to achieve a more effective coordination and to address changing coastal risks. This planning and management recommendation includes suggestions for augmenting post-storm recovery plans and hazard mitigation plans. The regular update of hazard mitigation plans currently does not account for the changing risks associated with climate change and sea level rise. As part of the regular required updating of these plans, counties and municipalities in South Carolina should incorporate changing information on coastal risks.

## **C. NEW POLICY RECOMMENDATIONS**

### **a) Strengthen the required elements of Local Comprehensive Beach Management Plans.**

The Interim Guidelines should be adopted and included in the new State Beachfront Management Plan update, which DHEC-OCRM intends to begin in the coming year. In particular, the required elements need to be strengthened as follows:

Element 1 –Require an analysis of general shoreline change in conjunct with the beach profile and erosion data.

Element 2 –provide an actual plan for enhancing public access and parking (land acquisition . . . etc).

Element 3 - Provide short and long-term strategies for addressing structures that are currently seaward of setback line. Strategies should consider both active and passive mechanisms (i.e. relocation of buildings, land acquisition, incentives/disincentives, post-storm redevelopment plans and policies, abandonment policies; *see also Recommendation #4*).

Element 4 –Discuss any habitat management or protection activities, such as sand fencing, renourishment, etc. that can positively or negatively affect the system. Also discuss significant dune systems located outside of the beachfront setback area.

Element 5 – Provide discussion on land use conditions beginning with entire community and then focusing on beachfront area. Identify and discuss all major developments that are located adjacent to ocean beaches.

Element 6 – Require discussion on beach alterations (past nourishment projects, past Emergency Orders and temporary sandbags, installation of groins, and removal of erosion control devices) (*see Recommendation #9*). Discussion of past as well as anticipated beach nourishment projects should be provided. Indicate the year, approximate volume, borrow site and placement location for each past project. Note success or lessons learned. Identify suitable borrow locations for anticipated beach nourishment projects. Discuss any sediment budget evaluations that have been undertaken in the area.

Element 7 – Discuss any upland drainage issues that affect the beach, as well as how the county or municipality will manage the stormwater under the federal and state stormwater programs.

Element 8 – Detail all preparedness plans as they relate to local emergency operations. Discuss the following: (1) notification system between DHEC-OCRM and local community, (2) policies which govern repairs and rebuilding of vital infrastructure and support services to insure restoration of service that is consistent with forty-year retreat policy (*see Recommendation #9*), (3) the system for post-disaster damage assessment and how building permits for beachfront reconstruction will be reviewed and administered at the local level, (4) policies for the relocation of structures damaged beyond repair and no longer in compliance with provisions of the beach management plan. Require a post storm redevelopment plan. Re-development plan should include damage assessment,

redevelopment, economic restoration and development, repair and restoration of infrastructure, emergency permitting and inspections, environmental concerns, finance and recovery administration.

Element 9 – Include current local regulations that complement the state’s long-term retreat policy and short-term goal of maximizing the space afforded natural beach and dune dynamics. Any further needs (i.e. renourishment) should be identified. Examine long-term erosion-rates, identify problem areas and outline strategies for how the municipality will address beach erosion, sea level rise and problem areas beyond a ten-year planning horizon. Identify past Emergency Orders, when they occurred and what is being done to prevent them from occurring again. Identify conflicts between any existing plans and ordinances with the state’s forty-year retreat policy.

Element 10 – Detail the community’s beach access plan. Discuss DHEC-OCRM’s “full and complete public access” and what is being done to meet, maintain or improve upon these criteria.

**b) Integrated local plans should be required for a beachfront community to gain access to a state “beach management fund” (see (D)(2) below, and Recommendation #4 (C)(a)).**

Existing legislation includes a schedule for reevaluation and updating of plans, which should be synchronized. This planning and management recommendation suggests that the timing of local beach management and hazard mitigation planning processes be brought into line with the Local Comprehensive Plan process. According to the Planning Enabling Act, comprehensive plans must be reevaluated every five years and updated at least every 10 years. The governing bodies must adopt new comprehensive plans every 10 years. The SC Beachfront Management Act requires updates of the beach management plan every five years. Under the US Disaster Mitigation Act of 2000, interim regulations require that local hazard mitigation plans be updated on a five-year cycle. The timing of updates to the Local Comprehensive Beach Management Plans and Hazard Mitigation Plans should be adjusted to coincide with the next mandated reevaluation, update, or adoption of a Local Comprehensive Plan.

Any statutory changes to requirements for eligibility, including those for state funds for beach maintenance or improvements or mitigation, would involve legislative action by the South Carolina General Assembly. Specifically, establishing additional requirements for local comprehensive plans that would affect only local beachfront governments would require amendment to the State Comprehensive Planning Enabling Act. The requirement of integrated plans to establish community eligibility for any state funds for beach maintenance, mitigation or improvement does not currently exist. Amendments to the State Beachfront Management Act, State Beach Restoration and Improvement Trust Fund, and/or the State Planning Comprehensive Enabling Act may also be required.

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would require legislative action by the South Carolina General Assembly.

#### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) DHEC-OCRM can accomplish the strengthening of Local Comprehensive Beach Management Plans by incorporating new or expanded requirements within the next update of the State Beachfront Management Plan, which is scheduled to be completed within the next few years.

The State Beachfront Management Plan is currently in regulation (R. 30-21), therefore any changes must be promulgated in the same way as any other regulatory amendment. All proposed regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

- 2) Integrate or streamline local planning activities of beachfront communities.

Local Comprehensive Plans should be integrated with Local Comprehensive Beach Management Plans and Hazard Mitigation Plans. Hazard mitigation plans should address but not be limited to repetitive loss areas, vulnerability assessment, community mitigation capability assessment, protection of critical facilities, public education, and linkages with flood risk maps. They should consider hurricane storm surge, tidal surges in the context of the full range of sea level scenarios current at the time of mitigation plan development and/or revision. Mitigation plans should include information on the hazard, the total amount of property, infrastructure, and economic impact that will be affected by storms, and changes in the general sea level or storm severity. For ease of implementation, local comprehensive beachfront management plans should be specifically referenced in the Local Comprehensive Plan and included as appendices of local comprehensive plans.

#### **E. EXISTING POLICIES AND PROGRAMS**

- SC Beach Restoration and Improvement Trust Fund (§48-40)
- State Comprehensive Beach Management Plan (§48-39-320)
- Local Comprehensive Beach Management Plans (§48-39-350)
- Local Government Comprehensive Planning Enabling Act of 1994 SC Code of Laws Title 6, Chapter 29
- Flood Insurance Reform Act of 2000, which requires a hazard mitigation plan to receive federal funding for disaster mitigation grants & Repetitive Loss program monies.
- Disaster Mitigation Act of 2000, Federal Regulations Title 44: Emergency Management and Assistance; § 201.6 Local Mitigation Plans.

## F. GENERAL COSTS AND BENEFITS

**\*\*\*A key incentive for an increased role of local governments in planning and managing beachfront issues, in keeping with the recommendations listed here, will be an enhanced Beach Restoration and Improvement Trust Fund.**

As mentioned in *Recommendation #4(C)(a)*, if the SC General Assembly:

- a) broadens the scope of the trust fund to include other beach management options, including structure relocation and acquisition proposals;
- b) funds the Trust Fund regularly for improved predictability for local governments; and
- c) increases state funding levels for beach management activities;

local governments will have a far stronger incentive to meet the state planning requirements suggested here (as well as meeting the public access requirements under the existing Act). The SC Council on Coastal Futures (2004) recommended that the state “should capitalize and adequately fund the State Beach Renourishment Trust Fund, whose purpose is to provide state matching funds for priority public beach renourishment projects and to provide for emergency response needs to repair beaches after storms.” **We concur and recommend the expansion of this fund to include a broader range of beach management options.**

Strengthened requirements of local comprehensive beach management plans and greater coordination across planning efforts will also require more staff time; however, the results of this planning effort will provide greater utility and efficiency to both local and state governments in managing the beachfront. It will be important to establish a staggered system so that the number of communities pursuing planning will not exceed the capacity of the planning staff. Other benefits may include streamlined permitting of proposed beach nourishment, local infrastructure, or development projects consistent with or discussed in the local approved plans.

## G. MEASURES OF SUCCESS

- Completion of local comprehensive plans which integrate beach/dune planning considerations.
- Improved FEMA Community Rating System (CRS) classifications for discounts on flood insurance.
- Lowering of Building Code Effectiveness Grading Schedule.

## H. FEASIBILITY ISSUES

Currently, some localities update their local beach management plans after the update of their local comprehensive plans due to time and staffing constraints. The coordination of the planning and review process will be important to the feasibility of this approach. Limitations of staffing levels should be considered in refining the timeline for coordination.

The SC chapter of the American Planning Association's South Carolina Chapter, which has supported legislation to require local governments in the coastal zone to incorporate a specific discussion of coastal zone management in their comprehensive plans, may support this approach. Other groups that may provide support in this effort include Municipal Association of South Carolina, the South Carolina Association of Counties, and SC Emergency Management Division.

#### **I. KEY UNCERTAINTIES/ASSUMPTIONS**

None identified.

#### **J. EXAMPLES FROM OTHER STATES OR AREAS**

Town of Hilton Head Island, SC Comprehensive Plan and Appendices

#### **K. BARRIERS OR CONCERNS**

None identified.









## **GOAL 2. IMPROVE THE PLANNING OF BEACH RENOURISHMENT PROJECTS**

*“In recognition of its stewardship responsibilities, the policy of South Carolina is to severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects” (SC Code § 48-39-260(3)).*

*“In recognition of its stewardship responsibilities, the policy of South Carolina is to promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible” (SC Code § 48-39-260(5)).*

### **Overview**

Beach renourishment and other “soft” solutions are the preferred alternatives to hard stabilization in South Carolina. The SC Beachfront Management Act defines beach nourishment as “the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide” (SC Code § 48-39-270(4)). A typical renourishment project consists of dredging beach compatible sand from an offshore site, pumping the sand onto the beach, and distributing it on the beach face. Renourishment can also include trucking sand to the beach from an upland source. The current planning process for major beach renourishment projects involves an evaluation of the environmental impact of the project, the public recreational benefit, the expected useful life, the protection benefit, and the extent of support for the project (R. 30-18(B)). The project review can be time-consuming because it requires extensive coordination with local governments and appropriate agencies and consultants to ensure that all factors are considered.

Since renourishment projects add sand to the beach from an external source, they are the only engineered shore protection alternative that addresses the problem of a sand budget deficit (NRC, 1995). However, renourishment may not be technically or economically feasible on all beaches, and it may not be sustainable over longer time scales due to decreasing sand availability, increasing rates of erosion, and/or decreasing funding sources. In the short- or mid-term, unstable funding may be the deciding factor that limits renourishment project feasibility. Federal funding, in particular, has faced recent scrutiny as questions surface about the fairness and equity of significant federal subsidies for temporary shore protection (Beatley et al., 2002; ASBPA, 2009).

In South Carolina, a Beach Restoration and Improvement Trust Fund was established by the General Assembly in 1999 (SC Code §48-40). The General Assembly has appropriated approximately \$5 million annually for the past 3 years for beach renourishment projects in SC. However, these funds have not been routed through the Beach Restoration and Improvement Trust Fund. The Trust Fund is the primary incentive for beachfront communities to adopt and enforce Local Comprehensive Beach Management Plans (*see Recommendation #5*), and to provide “full and complete” public access – both are preconditions for state renourishment funds

when routed through the Trust Fund (SC Code § 48-39-120(D); 48-39-320(A)(3); 48-39-350(B)). In addition, if the Trust Fund is not used to build sufficient funds over time, communities (and state coastal managers) cannot rely on the availability of annual appropriations for specific beach renourishment projects, and therefore cannot appropriately plan for renourishment needs to avoid major erosion problems.

## **Status and Trends**

Based on DHEC-OCRM data, at least 24 renourishment projects have occurred in South Carolina since 1985, with a total of over 27.5 million cubic yards of sand added at a price of nearly \$225 million (not adjusted for inflation). Table 3 lists the beach renourishment projects in the state between 1985 and 2008, along with the length of beach nourished, sand volume applied, and cost breakdown among private, local, state, and federal sources. Figure 4 depicts the spatial extent of these renourished beaches. Hilton Head Island, the Grand Strand, and Folly Beach have had the most sand applied, combining for 21,039,000 cubic yards or 76% of the state's total. The projects in these areas have cost a combined \$175.2 million, which is 78% of the entire amount that has been spent in the state for renourishment. While all three areas received some state funding, the Grand Strand and Folly Beach projects were supported primarily through federal funding, and the Hilton Head Island projects were supported primarily through local funding. Of the \$223.8 million spent on renourishment projects in South Carolina, \$22.7 million came from private funds (10%), \$58.8 million from local funds (26%), \$45.3 million from state funds (20%), and \$97.3 million from federal funds (44%).

## **Renourishment in Other Coastal States**

Of the 34 states, territories, and commonwealths participating in the National Coastal Zone Management Program, twenty-one have beach renourishment policies. Ten states have a continuing funding program for beach renourishment, and nine states fund projects on a project-by-project basis (NOAA, 2000). A recent study by the NOAA Coastal Services Center found that about \$2.5 billion (in current dollars) were spent nationwide on renourishment between 1950 and 2002. Furthermore, about \$95 million (current dollars) was spent on renourishment projects in the 1950s, but about \$835 million was spent in the 1990s (NOAA, 2008). This represents a nine-fold increase in expenditures for beach renourishment over the past 40 years in the United States.

**TABLE 3: South Carolina Beach Renourishment Projects, 1985-2008**

Area	Year	Length (miles)	Sand Volume (cubic yards)	Private Cost <sup>1</sup> (millions of \$)	Public Cost (millions of \$)			Total Cost (millions of \$)
					Local	State <sup>2</sup>	Federal	
Myrtle Beach	1986-1987	8.6	854,000		4.5			4.5
Seabrook Island	1990	1.1	700,000	1.5				1.5
Debidue Beach	1990	1	200,000	1				1
Hilton Head Island	1990	6.6	2,000,000		2	8		10
Hunting Island	1991	1.5	800,000			2.9		2.9
Folly Beach	1993	5.3	2,500,000			3.5	11.5	15
Edisto Beach	1995	2	150,000		0.5	1		1.5
Grand Strand <sup>3</sup>	1996-1998	26	5,000,000		9	9	36	54
Hilton Head Island	1997	7	2,000,000		11			11
Sullivans Island	1998	0.5	35,000			0.2		0.2
Debidue Beach	1998	1.5	250,000	1.5				1.5
Pawleys Island	1998	2.5	250,000			1.3		1.3
Folly Beach	1998					0.1		0.1
Daufuskie Island	1998	3.5	1,400,000	6				6
Hilton Head Island	1999	0.8	200,000		1.2			1.2
Edisto Beach	2000					0.3		0.3
Folly Beach	2005	5.3	2,300,000		1		11.5	12.5
Edisto Beach	2006	3.5	875,000		3	4.7		7.7
Debidue Beach	2006	1.5	600,000	5.6				5.6
Hunting Island <sup>4</sup>	2006	3	570,000			8.5		8.5
Hilton Head Island	2007	6	2,700,000		19			19
Folly Beach	2007	1.9	485,000				7.5	7.5
MB/Grand Strand <sup>5</sup>	2008	25.3	3,000,000		4.8	4.8	30.8	40.4
Isle of Palms	2008	1.8	885,000	7.1	2.8	<1		~10.6
<b>TOTALS:</b>		<b>116.2</b>	<b>27,754,000</b>	<b>22.7</b>	<b>58.8</b>	<b>45.3</b>	<b>97.3</b>	<b>223.8</b>

<sup>1</sup> The private cost values are estimates.

<sup>2</sup> State money allocated to the SC Beach Restoration and Improvement Trust Fund, which was created in 1999, can be used to fund beach renourishment, improved public access, and beach erosion monitoring.

<sup>3</sup> The Grand Strand project includes North Myrtle Beach (renourished in 1996), Myrtle Beach (renourished in 1997 and 1998), and Surfside Beach and Garden City Beach (renourished in 1998).

<sup>4</sup> The Hunting Island 2006 project includes \$4.5 million for sand renourishment and \$4 million for new groin construction.

<sup>5</sup> The MB/Grand Strand project includes Garden City/Surfside, Myrtle Beach, and North Myrtle Beach.

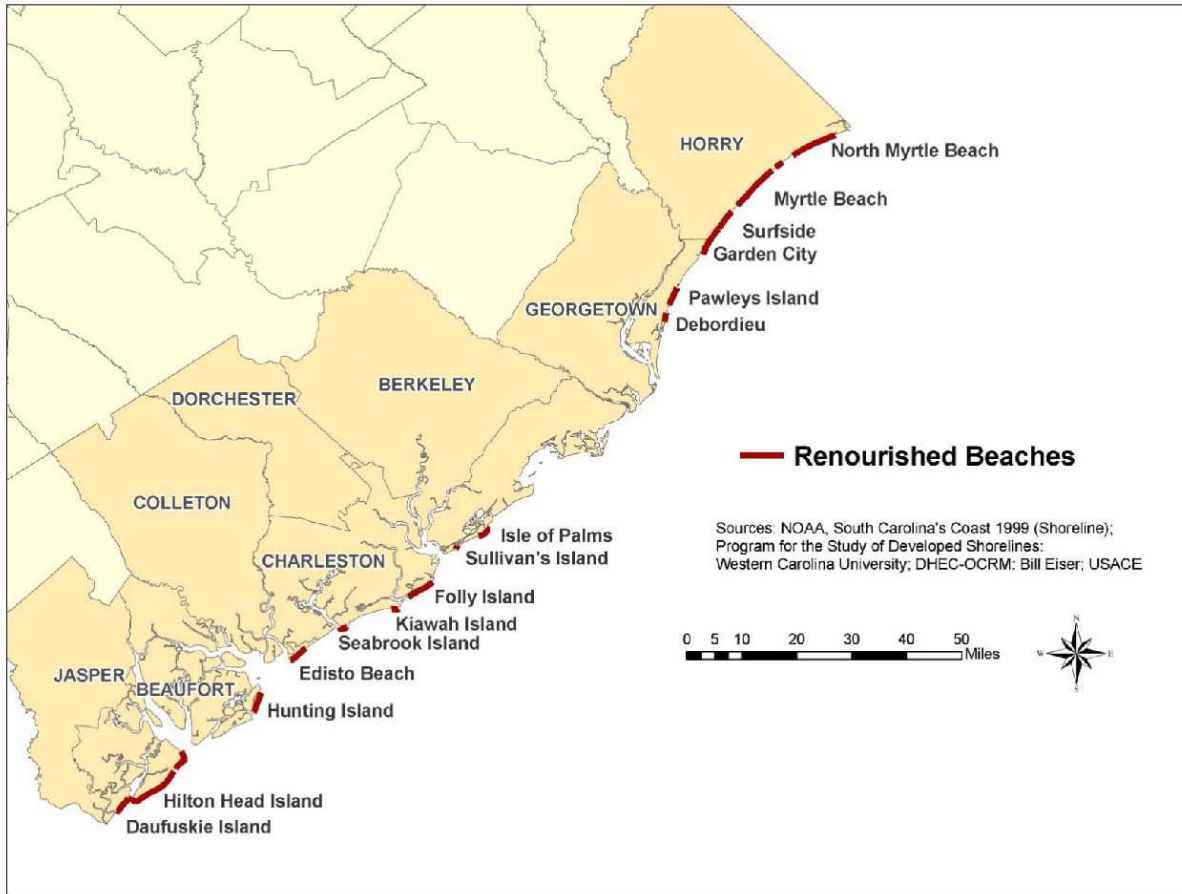


Figure 4: *South Carolina Beach Renourishment Projects (from London et al., 2009).*

### Potential for Downdrift Impacts of Dredging and other Nearshore Alterations

Renourishment costs tend to increase with increasing distances from the shore to sand sources. This creates an incentive for local governments to find suitable sand sources as close to shore as possible. However, dredging for renourishment within the “active sand system,” where the majority of sand is in near-constant flux due to waves, longshore currents, storm events, seasonal changes in beach slope, transport from the beach face to nearshore shoals, and rapidly changing inlet dynamics, can deprive sand from downdrift areas or result in unintended impacts to the system. These projects do not add sediment to the beach system and therefore do not address the problem of a sand budget deficit. This can be thought of as “robbing Peter to pay Paul” – that is, any sand removed from the active sand system was likely to be deposited elsewhere in the active system. Downdrift impacts of nearshore dredging and other alterations can be difficult to predict due to uncertainties in the modeling of complex coastal processes. Because of these uncertainties, DHEC-OCRM needs better guidance with respect to permitting any nearshore alteration project. Other “soft” solutions to beach erosion, such as sand scraping, inlet modifications, and inlet relocations, also require careful consideration for downdrift and long-term impacts.

## Monitoring

Applications for state funding of renourishment projects must include any engineering studies that have been completed and plans for post-project monitoring, but current regulations do not specify standardized monitoring methodologies (R. 30-18(C)(7)). Without consistent monitoring and reporting, it is difficult to assess relative success or impacts of dredging and renourishment projects. For example, the South Carolina Dept. of Natural Resources-Marine Resources Research Institute (SCDNR-MRRI) recently completed a meta-analysis of all renourishment projects in the state, but the researchers experienced difficulty analyzing the importance of design parameters such as seasonal timing and dredge and fill depth due to inconsistent reporting (Bergquist and Crowe, 2008). Reports with environmental monitoring data were identified for 16 renourishment projects in the state, but useable data for the meta-analysis were limited to only nine projects (Bergquist and Crowe, 2008; Figure 5). Minimum data collection requirements, standardized methodologies, and longer term monitoring are needed to more fully evaluate renourishment projects (Bergquist and Crowe, 2008; NRC, 1995).

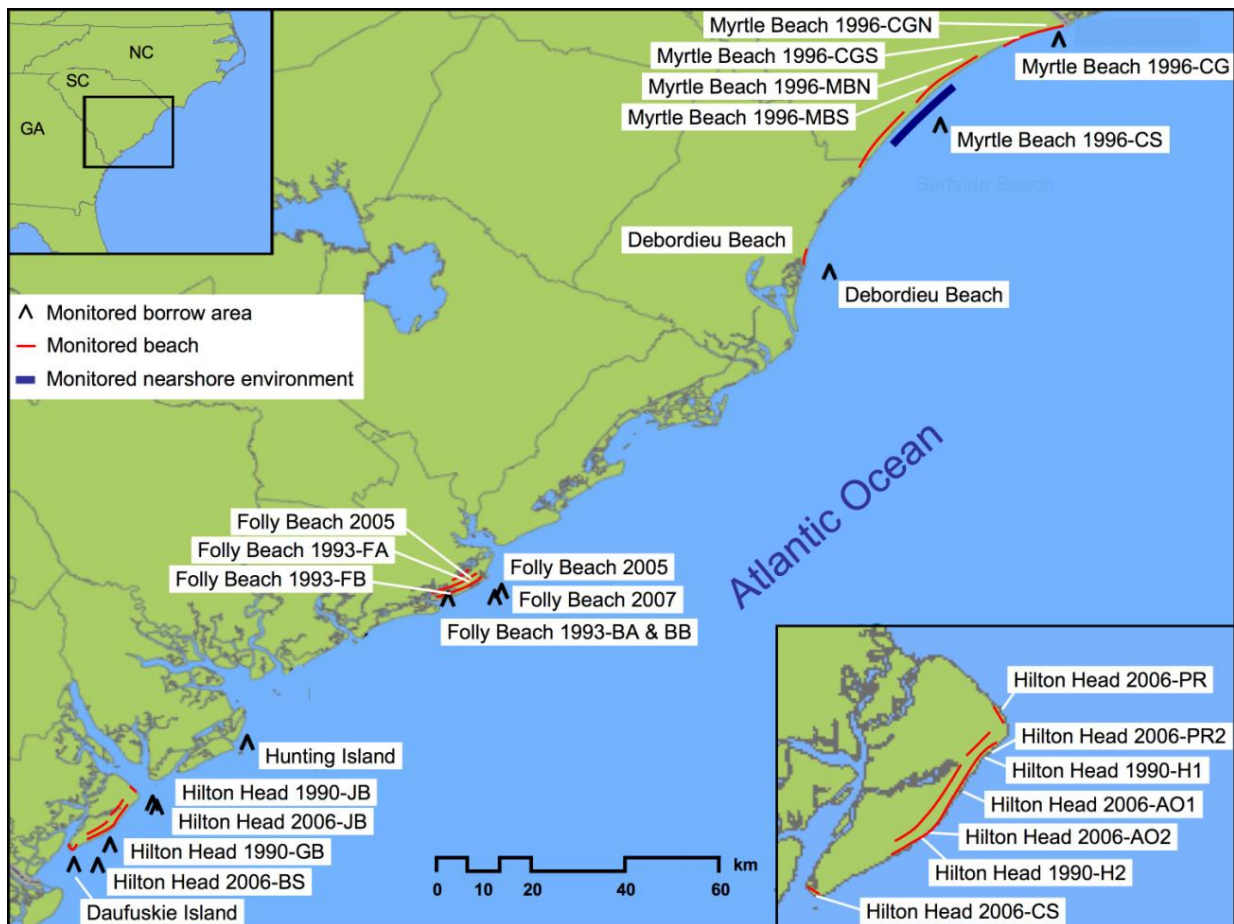


Figure 5: Nourished beach and borrow area projects in South Carolina where appropriate environmental monitoring data are available. Borrow sites are shown over ocean; beach projects are shown over land. Red lines represent approximate areas nourished and multiple lines indicate repeated nourishment. “^” = borrow site. Blue line indicates area where nearshore monitoring has been performed (from Bergquist and Crowe, 2008).

## **Policy and Management Recommendations**

The following policy and management recommendations explore potential improvements to existing federal, state, and local policies and practices. In particular, the following policy recommendations seek to:

- 6) Improve intergovernmental and public/private planning and efficiency in future renourishment projects;
- 7) Improve regulatory decision-making with respect to nearshore alterations that may have “downdrift” impacts; and
- 8) Improve and standardize pre- and post-project monitoring requirements for better assessments of project successes and/or impacts.

## ***Recommendation 6 – Develop and Implement Regional Sediment Management Plans***

### **A. GENERAL RECOMMENDATION**

In order to better and more efficiently manage sediment resources in the coastal zone of South Carolina, the state needs a Regional Sediment Management plan with strong involvement of federal, state, and local governments and the private sector. The plan should identify sources of sediment along the South Carolina coast, quantify and characterize those sediment sources for identification of potential material for beach nourishment, and estimate beach nourishment needs for the shoreline based on erosion rates and storm damage reduction templates. The Plan should also provide opportunities for coordination at the project planning stage to avoid future conflicts and identify opportunities for cost savings.

### **B. RATIONALE**

Currently, not enough is known about the quantity, location, and quality of sand and sediments in SC coastal waters, which often leads to differing perceptions about the sustainability of sand resources for long-term beach renourishment strategies. In addition, there has often been a lack of pre-planning for beach renourishment, which has led to multiple challenges for local beach communities including:

- Increased costs for local governments;
- Reacting with last minute / emergency renourishment project proposals; and
- Missed opportunities for beneficial re-uses of dredged materials.

Regulatory agencies and coastal communities also need a better understanding of regional sediment budgets, including sources, gross quantities, and general characteristics of sediment and coastal processes for the entire state in order to assess future needs and impacts of beach nourishment projects.

The quality and quantity of sand material used in nourishing the shoreline is critical in the design and performance of any project to offset erosion. Locating and investigating a potential source of acceptable borrow material for beach renourishment is costly and time consuming. Investigations require geophysical and geotechnical studies that typically include sub-bottom profiling, side-scan sonar, bathymetric mapping, core boring collection, sand testing, and analysis to identify sediment quantities and characteristics. Costs for such investigations range from \$100,000 to more than \$500,000 per investigation.

Coastal communities need to be proactive by planning ahead for specific nourishment projects so as to avoid unnecessary delays during regulatory reviews (*see Recommendation #5*). In the absence of such advanced planning for nourishment projects, erosion can leave beach sections in

“emergency” situations. Pre-planning could remedy situations where property owners and municipalities push for less than ideal solutions to erosion problems. Recent problems associated with the use of sandbags and last minute nourishment proposals illustrate the importance of identifying high risk areas and crafting a nourishment plan to be implemented before ecologically destructive, short term action is necessary. Knowledge of the location of potential sediment sources would help the state manage its resources and enable it to provide beachfront communities with information that could reduce costs for further investigations and transport distances. The location and characteristics of borrow areas will also allow communities to plan for the type of dredge needed and the time of year dredging can be done in response to environmental factors such as turtle nesting. Subregional sediment management plans would also benefit local governments in developing local comprehensive beach management plans (*see Recommendation #5*).

### **C. NEW POLICY RECOMMENDATIONS**

No policy changes were suggested by the Committee.

### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

#### **1) The State of South Carolina should develop and implement a Regional Sediment Management (RSM) plan.**

The scope of the RSM plan would have multiple components. The plan would require an estimate for the expected sand needs for the entire coastline for a designated period of time based on erosion rates and sub-regional sediment budgets. Addressing the sand material needs in specific reaches of the South Carolina coast, determining sediment budgets, and identifying potential borrow sites within those reaches would result in sub-regional sediment management plans that would then be part of a larger statewide regional sediment management plan. Once a plan is in place, it will need to be updated on a periodic basis (for example, every ten years).

- The Regional Sediment Management Plan should build on known sediment source information, but would need additional state and federal investigations to identify and characterize additional sediment sources.
- The plan should identify potential sources of acceptable sand material to include offshore deposits and nearshore regenerating bars, as well as dredge material that would otherwise be placed in upland disposal areas following state, federal, or private dredging.
- The plan should define standards of acceptable sand grain size, color, composition, and texture by sub-region based on natural or in-situ material. Standards should be developed that take into account all aspects of the nourishment process, and they need to be flexible enough so that the sand that does exist can be used and the project can be constructed. One outcome would be the identification of potential sources of acceptable sand for



beach nourishment projects along the South Carolina coastline; however, for specific beach renourishment projects, site specific data collection, analysis, and design would still be required.

- These identified sources should be correlated to local community reaches based on reasonable pumping distances, and this information should then be considered and incorporated back into Local Comprehensive Beach Management Plans.
- The Regional Sediment Management Plan will require several years of research and data collection to identify compatible sand sources. The borrow sites and other nearby resources should be monitored and re-evaluated after large nourishment projects that utilized the identified sites (*see Recommendation #8*).

Sub-regional sediment management plans should be used to ensure the continued involvement of local communities in: 1) identifying high risk areas and sources of compatible sand; 2) exploring opportunities for partnerships and leveraging of research, mapping, and operations; and 3) developing proactive renourishment plans (*see Recommendation #5*).

General and site specific erosion rates need to be determined to estimate the future nourishment needs. Native sand characterization of grain size, color, composition, shell content, and texture for specific areas, as well as consideration of turtle nesting season and shorebird migration impacts, are necessary when comparing to potential borrow source sites.

### ***Development of a Plan***

DHEC-OCRM should develop and maintain the Regional Sediment Management Plan. In developing the plan, DHEC-OCRM needs to:

- integrate available information from local, state, and federal projects and identify potential data gaps and needs;
- determine the options and alternatives of collecting and storing data;
- divide the coastline into sub-regions of similar sand requirements and needs; and
- help identify potential offshore borrow sources for those sub-regions.

The methods and activities listed above will allow DHEC-OCRM to better identify and manage the sediment resources along the coast. To assist in its planning efforts, DHEC-OCRM should organize sub-regional workshops to engage local governments and stakeholders. A statewide regional plan's success depends on local, regional, and private sector participation.

### ***Funding***

Funding is essential to this effort. State and local funding sources could be used to contribute to a consortium of funding sources. Other possible funding sources could be investigated. Various federal agencies have programs that may be able to provide assistance either for data collection or evaluation and analysis. These may include USGS, USACE, FEMA, and NOAA. In order to obtain federal funds for specific projects, research, or mapping, the state would need support from its congressional delegates who must identify designated funds under various authorities for

each year of a multi-year investigation. DHEC-OCRM would oversee the development of the Regional Sediment Management Plan, but could coordinate with other agencies to leverage resources.

### ***Understanding Needs***

Expected sand needs would be based on erosion rates and sediment budgets that would begin with compilation of existing information. To estimate sub-regional sediment budgets, the coastline would be broken into sections to capture similar geomorphology and focus on higher risk areas. State and federal experts would decide the standard for acceptable material for the reaches based on collected data. Ongoing investigations by federal agencies and their contractors, as well as universities could be expanded for data collection, evaluation and mapping of sand sources. For all specific beach renourishment and coastal engineering projects, site specific data collection, analysis, and design will still need to be conducted by the private sector (as is currently the case for most, if not all, beachfront communities in South Carolina).

### ***Storing Data***

Database structure could utilize the USACE eCoastal framework, which is an enterprise Geographic Information System (GIS) that was developed for coastal engineering business practices. It was developed to concentrate on the specific needs of the coastal engineer, scientist and manager. The architecture was developed by the USACE utilizing spatial data standards (SDS), geodatabase development, and desktop and web applications, and it was designed to provide baseline information for effective planning and prediction of regional and local coastal processes. Coastal Carolina University (CCU) has already begun implementing the web-based eCoastal SDS compliant network which is used to store, analyze, and visualize coastal data on the web as part of an agreement with USACE. DHEC-OCRM, the South Carolina Sea Grant Consortium, USGS, and CCU have provided financial support, expertise, data, and time, to support the hardware infrastructure, software, database development, software development, and staff for the project.

## **E. EXISTING POLICIES AND PROGRAMS**

Regarding the beneficial re-use of dredged material, the South Carolina Beachfront Management Act recognizes that “dredging practices, which include disposal of beach quality sand at sea, also may deprive the beach/dune system of much-needed sand” (SC Code § 48-39-250(7)). The Marine Protection, Research, and Sanctuaries Act (MPRSA) requires investigation of alternative dredge material placement before use of the Ocean Dredged Material Disposal Site (ODMDS).

The South Carolina Beachfront Management Plan implements the South Carolina Beachfront Management Act of 1988 to protect both life and property, protect unique habitats and preserve the beach for future use by all citizens. The act addresses measures to renourish eroding beaches and requires the adoption of Local Comprehensive Beach Management Plans by local governments.

The U. S. Army Corps of Engineers (USACE) defines Regional Sediment Management (RSM) as a “system-based approach” that seeks to solve sediment-related problems by designing solutions that fit within the context of a regional strategy. RSM involves making local project decisions in the context of the sediment system and forecasting the long-range implications of management actions. RSM recognizes that sediment management actions have potential economic and ecological implications beyond a given site, beyond originally intended effects, and over long time scales (decades or more). RSM engages many stakeholders. Many federal and non-federal sediment management activities may potentially have system-wide effects.

USACE Hurricane and Storm Damage Reduction projects require detailed investigations of offshore borrow sites and identification of a sediment source for the 50-year life of the project. Local community beach nourishment investigations via private AE firms are sources of information.

The SC Coastal Erosion Study has developed a geologic framework of the Grand Strand which has implications for sediment volumes, rates of sediment transport, and the distribution and character of near-surface geologic strata at the active coast (Barnhardt, 2009).

## **F. GENERAL COSTS AND BENEFITS**

Identification of borrow sources for a beach nourishment project can be time consuming and costly when approached on a case-by-case basis. Developing a plan to investigate large reaches of the region will result in a time and overall cost savings. The statewide investigation of sediment sources can be done through cost sharing programs with the federal government under the following authorizations:

- General Investigation (South Carolina Shores GI authorized in 1988 under Section 110 of the River and Harbor Act of 1962 includes beach nourishment as well as offshore investigations and is still Open)
- WRDA 2007 Section 2037: Regional Sediment Management (which modified the previous WRDA 1992 Section 204: Beneficial Use of Dredge Material)
- WRDA 1974 Section 22: Planning Assistance to States

At a subregional scale, local communities can work with state or federal cost share programs to develop and expand their plans to include erosion rates, sediment budgets, critical areas, and native sand characterization. Additionally, municipalities can take advantage of current state legislation allowing for the use of the accommodations taxes for nourishment projects. Municipalities should also look to HOAs and local property owners for partial financing.

Federal cost sharing authorizations:

- WRDA 1974 Section 22: Planning Assistance to States
- Section 206, 1960 FCA: Flood plain Management Services

The general public and private property owners will benefit from advanced planning for beach nourishment projects. By avoiding potential legal costs, loss of public and private property, and the potential for environmentally damaging emergency measures, benefits will be widespread.

A Regional Sediment Management approach would not merely be a research activity. The types of benefits that could come from a regional sediment plan would be similar to those resulting from the Coastal Erosion Study funded by USGS and the SC Sea Grant Consortium in the 1990s. The Coastal Erosion Study, a seafloor mapping and study activity that was geographically limited to the northern shoreline of SC, benefitted the USACE and the state and local communities in the Grand Strand Region (Barnhardt, 2009). Benefits included:

- Data gathered by the Beach Erosion Research and Monitoring (BERM), a component of the Coastal Erosion Study, has been used by DHEC-OCRM to generate its annual “State of the Beaches” reports and by Horry County (for Arcadia Shores and Surfside/Garden City) and the City of North Myrtle Beach to help with compliance and monitoring issues regarding nourishment projects.
- Data from the Coastal Erosion Study was used to support local and federal efforts to secure emergency repair funding for nourishment.
- The Coastal Erosion Study has helped provide a baseline for expansion of the regional inventory of sand resources on the inner shelf available for future nourishment projects allowing local communities to focus limited dollars on details of using a reserve rather than on initial searches over large areas.
- Techniques and capability of the Coastal Erosion Study have been used to aid SCDNR with monitoring of the ODMDS for Charleston Harbor and with reefs adjacent to the Grand Strand Beach Nourishment Project.
- The Coastal Erosion Study geologic framework serves as part of the baseline characterization and guidance for locating potentially viable sites for wind power generation on the inner shelf off the Grand Strand.

## **G. MEASURES OF SUCCESS**

- Reduction in future borrow source searches.
- Reduction in long-term and post-emergency nourishment costs.
- Reduction in the frequency of future nourishment projects through best RSM practices.
- Advances in the science and management of SC's regional sediments sources.
- Advances in the knowledge, relationships, and collaborations of key RSM experts and stakeholders.
- Increases in tourism due to high quality beaches developed from RSM sources.
- Improvements in coastal habitats and ecologies due to high quality beaches
- Better, more efficient nourishment designs.

## **H. FEASIBILITY ISSUES**

This framework is dependent on reliable data sets including physical inventories and projected change. The framework also will require an effective institutional framework at both the state and local level to implement the program and the political will to move forward.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

The primary uncertainty is in the timing of funding sources. State and federal fiscal years differ. Federal funding for this type of work would have to be by specific line item, which is never guaranteed once let alone on a multi-year basis.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### **Gulf of Mexico Region**

The Gulf of Mexico Alliance (GOMA) has been instrumental in establishing collaborative partnerships between the states of Alabama, Florida, Louisiana, Mississippi, and Texas to enhance the ecological and economic health of the Gulf of Mexico. Through these partnerships, the Gulf States have acknowledged that sediment resources are integral to and a critical physical resource necessary in accomplishing many of the GOMA initiatives and objectives.

Subsequently, a need has been recognized for the development of the Gulf Regional Sediment Management Master Plan (GRSMMP) to facilitate and assess the implementation of sediment management to provide for more effective use of dredged material and other sediment resources for habitat conservation and restoration. The intent of the plan is to provide guidelines to the Gulf States for more effective management of sediment resources, recognizing they are a part of a regional system involving natural processes and dredging activities.

### **North Carolina**

The North Carolina Beach and Inlet Management Plan (BIMP) is a joint project by the Division of Water Resources (DWR) and the Division of Coastal Management (DCM). Management of the state's inlets and beaches is presently achieved through multiple programs. DWR maintains a six-year plan for water resource development projects in NC, including historical information, current status, and future cost projections for beach and inlet projects. DCM maintains a digital database of shorelines that is used to establish beachfront erosion rates and inlet processes. A collaborative effort between DWR and DCM will catalog, archive, and make available relevant coastal information (*e.g.*, maps, reports, scientific monitoring data) to create a resource that will facilitate beach and inlet management and the development of a BIMP. In addition, NCAC 7H .0312, Technical Standards for Beach Fill Projects, outlines new sediment criteria rules for beach nourishment projects, and went into effect February 1, 2007.

### **California**

California's Coastal Sediment Management Workgroup's Coastal Regional Sediment Management Plan program implements Sediment Master Plan (SMP) objectives by developing a series of regional plans specific to discrete portions of the California coast. The Coastal RSM Plans are intended to formulate regional consensus-driven sediment management policy and guidance in order to restore, preserve and maintain coastal beaches and other critical areas of sediment deficit; sustain recreation and tourism; enhance public safety and access; and restore coastal sandy habitats.

**Lower Columbia River**

In January 2008, the Lower Columbia Solutions Group (LCSG) signed a Declaration of Cooperation to initiate work on a Regional Sediment Management Plan (RSMP) for the lower Columbia River to maximize regional benefits (economic, social and environmental) and reduce regional costs associated with dredging activities.

**SC Coastal Erosion Study:** <http://woodshole.er.usgs.gov/project-pages/scarolina/index.html>

**USACE Regional Sediment Management:** <http://www.wes.army.mil/rsm/>

**K. BARRIERS OR CONCERNS**

None identified.

## ***Recommendation 7 – Strengthen Reviews of Nearshore Dredging and Other Alterations***

### **A. GENERAL RECOMMENDATION**

The State of South Carolina prefers “soft” solutions to coastal erosion, as opposed to “hard” alternatives such as seawalls, revetments, and groins (SC Code § 48-39-260(3); R.30-11(D)(2)). However, some nearshore alterations associated with nonstructural stabilization options, including inlet modifications, dredging for renourishment projects, and large-scale beach scraping projects, can have unanticipated, negative downdrift impacts; and essentially redistribute sand within the active nearshore system rather than increase the sand available to that system. This recommendation seeks new guidance for the evaluation of proposed projects from the beachfront to 1 mile offshore – an area that generally captures the active “littoral zone” where most beach sand transport occurs.

### **B. RATIONALE**

Finding suitable borrow sources of beach quality sands is often a significant challenge to support long-term beach management plans using beach nourishment strategies. One of the biggest costs for beach nourishment is the transport of sediment dependent on the location of, or distance to, the borrow source (e.g., the closer the borrow source, typically the lower the cost of a beach nourishment project). Consequently, borrow source searches often consider nearshore shoals such as those in many inlet ebb shoal deltas.

Since mining of nearshore sediments can potentially impact the future redistribution of sediments in the active littoral system, science-based evaluation criteria are provided to assure adjacent or “receiving” shorelines are not adversely impacted (e.g., physical and numerical modeling and impacts analysis for potential inlet relocations or dredging operations). Monitoring requirements consistent with other state permitting requirements (e.g., long-term monitoring of downdrift impacts) provide a safeguard to mitigate any adverse impacts discovered during the post-project monitoring period.

Other nonstructural nearshore alterations such as beach scraping and inlet modifications can also negatively impact downdrift beaches by disrupting natural sediment transport pathways without adding new sand to the system. Furthermore, as engineering proposals for soft erosion control solutions grow in complexity, and as increasing numbers of stakeholders engage in the decision-making process, the current situation often leads to competing proposals and differing perceptions of the validity of environmental assessments.

## C. NEW POLICY RECOMMENDATIONS

- a) **For nearshore alterations proposed to address beachfront erosion, excluding sand scraping or minor renourishment projects conducted under an approved Emergency Order (see Recommendation #9), DHEC-OCRM should establish a special review process with enhanced scrutiny for any projects affecting the beach, inlet systems, or submerged lands out to 1 (one) mile offshore.**

Permit conditions should include:

- 1) The permittee or project sponsor should demonstrate an inability or hardship in using sand from areas beyond the 1-mile limit, aside from any expected and reasonable increases in associated project costs;
- 2) Project proposals should ensure no negative impacts to the maximum extent practicable by conducting a thorough analysis, peer review process, and/or expanded monitoring in areas where excavation is performed, as well as in areas susceptible to downdrift impacts;
- 3) Contingency plans should be developed in the event that adverse impacts are identified (*see Recommendation #8*).

The Committee was unsure if this recommendation would require a regulation change or could be implemented under existing authorities. Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would involve legislative action by the South Carolina General Assembly.

## D. NEW PLANNING AND MANAGEMENT ACTIONS

- 1) **DHEC-OCRM should establish an ad hoc Technical Committee to establish clear criteria, guidelines, and recommendations for decision-making related to nearshore project proposals (the area that includes inlets and beaches out to the 1-mile offshore limit).**

The results of the Technical Committee should be used to inform and guide future projects, but no changes proposed here should result in delayed permitting.

## E. EXISTING POLICIES AND PROGRAMS

### *Nearshore Alterations*

The SC Coastal Tidelands and Wetlands Act sets forth the following policy:

"In recognition of its stewardship responsibilities, the policy of South Carolina is to...severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage



the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects" (SC Code § 48-39-260(3)).

DHEC-OCRM Critical Area Permitting Regulations state that “the Department shall promote soft-solutions to erosion within the context of a policy of retreat of development from the shore and prevent the strengthening and enlargement of existing erosion control structures” (R.30-11(D)(2)).

### ***Renourishment Projects***

R.30-13(N)(2) “Protection of Beaches and Artificial Beach Nourishment: The following requirements apply to the Department’s consideration of projects for the renourishment of beaches:

- (a) Careful study shall be given to the type (grain size and quality) of material most suitable for nourishment of a particular beach area;
- (b) Borrow areas and sand for artificial nourishment shall be carefully selected to minimize adverse effects. Where possible, artificial beach nourishment shall be performed in concert with inlet stabilization or navigation projects;
- (c) Dredging in the borrow areas shall not be in conflict with spawning seasons or migratory movements of significant estuarine or marine species. Nourishment of beach areas shall be scheduled so as not to interfere with nesting and brood-rearing activities of sea birds, sea turtles, or other wildlife species.”

### ***Federal Policies and Regulations***

The Coastal Barrier Resources Act (CBRA) designated various “undeveloped” barrier islands to be ineligible for federal assistance or support for development (*see Recommendation #3*). This program is administered by the U.S. Fish and Wildlife Service. Several South Carolina tidal inlet systems are defined and mapped as CBRA zones, restricting federal support for infrastructure and improvements within these zones. These restrictions apply to all terrestrial areas within the CBRA and open coastal waters to the 30’ bathymetric contour. CBRA areas that may be of interest to adjacent communities as potential beach nourishment resources include Waties Island, Long Pond, Huntington Beach, Litchfield Beach, Pawleys Inlet, the Debidue/North Inlet Complex, Dewees/Capers Island, the Morris Island/Bird Key complexes, Captain Sam’s Inlet, the Edisto Inlet complex, Hunting Island, and the Daufuskie Island complex. Nearshore alterations in these areas are not eligible for federal funds, but they may be allowed if funded through other sources.

Borrow sites must comply with the Magnuson-Stevens Fishery Conservation and Management Act, which states that adverse effects to essential fish habitat of managed species must be minimized. This program is administered through the National Marine Fisheries Service.

The Minerals Management Service (MMS) administers access and use of natural resources, including sand, from submerged lands of the United States beyond the three-mile jurisdiction of individual states under authority of: the Outer Continental Shelf Lands Act (OCSLA) and Public Law 103-426.

Section 933 of the Water Resources Development Act (WRDA) of 1986 (Public Law 99-662) specifies that it is U.S. Army Corps of Engineers policy to participate in the additional costs for placing clean sand or other suitable material, dredged by the Corps during construction or maintenance of federal navigation projects, onto adjacent beaches or nearshore waters if specific requirements are met. This beneficial reuse of dredged material typically involves cost sharing with state or local governments.

The U.S. Army Corps of Engineers has direct permit authority to evaluate applications for certain activities in the Nation's water pursuant to three separate laws:

- Section 10 of the Rivers and Harbors Act
- Section 404 of the Clean Water Act
- Section 103 of the Marine Protection, Research, and Sanctuaries Act

Section 10 of the Rivers and Harbors Act regulates the construction, excavation, or deposition of material in, over, or under "navigable waters of the US," or any work which would affect the "course, location, condition, or capacity" of those waters. Section 404 of the Clean Water Act regulates the discharge of dredged or fill material into "waters of the US." Section 103 of the Marine Protection, Research, and Sanctuaries Act regulates the transportation of dredged material to the ocean for the purpose of disposal.

The National Environmental Policy Act (NEPA) of 1969 establishes a national environmental policy and a framework for considering the environment in decision-making for federal actions. NEPA applies to federal government activities, and it requires all federal agencies to:

- Assess the environmental impacts of major federal projects or decisions such as issuing permits, spending federal money, or affecting federal lands;
- Consider the environmental impacts when making decisions; and
- Disclose the environmental impacts to the public.

According to the Endangered Species Act, the U.S. Fish and Wildlife Service must be consulted to determine if a nearshore alteration project may affect endangered species or their habitats.

The National Historic Preservation Act also requires that areas worthy of historic preservation be avoided.

## **F. GENERAL COSTS AND BENEFITS**

It may be argued that restricting use of sediment from the closest possible sources may increase the overall cost of beach nourishment projects. Advancing one section of beach; however, through potentially cheaper options that utilize the common "shared" sand resources to protect one area over another is incompatible with the overall objective of beachfront management: to

maintain a viable, functional, and sustainable beach and dune system for the entire state. Limitation of unintended consequences to adjacent properties from redistribution of sediment within the active beach system can reduce potential litigation as well as state and federal liability to mitigate adjacent impacts.

Incorporation of sediment borrow sites as part of individual community beachfront management plans should allow the state to more effectively evaluate community proposals, move to a regional sediment management approach (*see Recommendation #6*), and proactively address potential resource conflicts and shortfalls. In addition, adhering to the recommendations of an ad hoc Technical Committee would reduce the amount of emergency permitting and associated muting of state regulations, which are designed to wisely manage state physical and biological resources.

Adequate long-term monitoring of areas mined within the active beach system and in areas downdrift of the project will increase project costs to a level that might not offset any savings that were intended by not using a sand resource outside the active beach zone. Monitoring of shoreline and shoal changes would require sufficient (at least one year) pre-impact data to understand local coastal processes prior to such a project.

## **G. MEASURES OF SUCCESS**

- Reduced claims of downdrift adverse impacts following a renourishment project or other nonstructural nearshore alteration project.
- Refilling of nearshore borrow areas with compatible sand, reestablishment of benthic communities, and reduced downdrift impacts from nearshore dredging projects.

## **H. FEASIBILITY ISSUES**

The membership of a future nearshore alterations Technical Committee could be controversial. It will be essential to have representation from diverse groups including state regulatory agencies, federal agencies, local governments, natural resource managers, coastal engineers, geologists, and academic experts. It will be difficult to ensure that any outcomes and recommendations from the Technical Committee do not extend the permitting process or timeframe.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

With all nearshore alterations, there are significant uncertainties related to coastal processes and future storms, waves, winds, and currents that make decisions regarding potential downdrift impacts difficult. For the same reason, there will always be uncertainties in attributing any downdrift erosion problems to a specific project.

A littoral cell's offshore extent is variable and differs from site to site. This recommendation is only that projects within one mile offshore receive heightened reviews because this distance generally captures the active littoral zone coast-wide.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### *North Carolina*

NCAC 7H .0312, Technical Standards for Beach Fill Projects, which outlines new sediment criteria rules for beach nourishment projects, went into effect February 1, 2007.

### *Massachusetts*

The Massachusetts Department of Environmental Protection's publication, *Beach Nourishment: Guide to Best Management Practices in Massachusetts*, seeks to minimize erosion and potential adverse environmental impacts, to promote the beneficial reuse of clean, compatible dredge material, and to expedite the regulatory review of nourishment projects.

## **K. BARRIERS OR CONCERNS**

None identified.

## ***Recommendation 8 – Improve Beach Nourishment Monitoring***

### **A. GENERAL RECOMMENDATION**

The goal of this policy is to require, improve, and standardize physical and biological monitoring of all beach nourishment projects conducted in South Carolina. It should include assessments of both the beach that is nourished and the area where the sand is mined from (“borrow sites”) as well as nearby sensitive habitats such as hard bottoms, islands, and estuarine habitats when deemed appropriate.

### **B. RATIONALE**

While most beach nourishment projects conducted in South Carolina have been monitored for effects related to physical and biological changes, a few have received only cursory monitoring, and most others have not been conducted past the first year of post nourishment recovery. An improved, more standardized monitoring program for all beach nourishment projects is warranted based not only on the strong recommendations provided by the National Research Council’s committee on beach nourishment and protection (NRC 1995), but also based on the highly variable recovery rates observed in the studies that have been completed in the United States (NRC, 1995). A recent re-analysis of monitoring projects conducted in South Carolina found several consistent and significant environmental impacts of dredging and nourishment during the 12-15 months following completion of the activities, although considerable variability was observed among the studies (Bergquist and Crowe, 2008).

At present, there are no mandatory requirements or standards for monitoring beach nourishment projects. Beach nourishment projects that have been permitted by DHEC-OCRM and the U.S. Army Corps of Engineers are usually submitted to the agencies identified in Item C(a) for comment. Additional rationale for the recommendations provided in this subsection C is provided by Bergquist and Crowe (2008).

### **C. NEW POLICY RECOMMENDATIONS**

- a) Require pre- and post-monitoring for all beach nourishment projects, for both offshore (borrow area) and onshore (beach and surf zone) results, including downdrift shoreline changes.**

DHEC-OCRM should be required to ensure that all beach nourishment projects are reviewed by appropriate state and federal agency staff to solicit input on required monitoring objectives for each project, which may vary dependent on the size and location of the project, source and characteristics of the sand to be placed on the beach, timing and duration of the project, and information gained from previous monitoring projects in South Carolina and elsewhere.

- At a minimum, recommendations should be solicited from the SCDNR, USFWS, and NOAA-NMFS, in addition to any recommendations provided by DHEC-OCRM and USACE staff, as appropriate.
- It is also recommended that the firm or agency that is conducting the monitoring be independent of the firm or agency conducting the nourishment project.
- Monitoring results should be tied directly to project contingency plans (*see also Recommendation #7*).

#### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

##### **1) To the extent possible, standardize monitoring requirements, including timing, parameters measured, and methodologies, to enable consistent evaluations of project results (and cross-project comparisons).**

Primary physical monitoring issues that should be considered include: (1) how well does material placed on the beach match the native sediments? (2) how effective is the project in retaining nourished material (e.g. is it meeting design predictions) and are there selected locations within the project that are not performing as planned?; (3) have post-nourishment beach profiles been modified significantly such that utilization by sea turtles and other biota is impacted?; (4) is the sand borrow area refilling, at what rate, and with what type of material?; (5) what modifications are occurring with respect to current and wave energy effects in the borrow area?

Primary biological monitoring issues that should be considered include: (1) did the nourishment project have potential long-term negative impacts on faunal or floral resources inhabiting or utilizing the beach, and if so, which resources were affected?; (2) are biological impacts anticipated in subtidal habitats adjacent to the shoreline, and if so, which resources are of concern?; (3) what are the extent and duration of impacts to biological resources in the sand borrow areas?; (4) are larger biota, such as turtles, likely to be impacted by the dredging operation? Based on these potential issues, agency review staff should provide recommendations as to what biological monitoring should be required for each nourishment project since all projects may not warrant the same level of monitoring.

For both physical and biological monitoring, detailed surveys of the beach and borrow sites should be conducted before, after, and at appropriate time intervals thereafter to resolve rate of recovery or any long term changes. Ideally, pre-impact studies should be completed as much as one year in advance of the impact and include multiple survey intervals to characterize natural seasonal variation. At a minimum, the post-project evaluation should include surveys immediately after project completion and further monitoring intervals at least yearly until there is sufficient evidence to understand how the project is performing and how physical and biological recovery is occurring in impacted areas (generally at least five to ten years or the life of the project). Since natural seasonal variation in benthic community structure and composition can occur, seasonal sampling is recommended for the first year after project completion, and the timing of subsequent annual assessment should include

seasonal considerations with respect to the pre-impact assessment season. The sampling design for physical and biological impact effects should utilize a BACI (Before, After, Control, Impact) sampling design with sufficient sampling effort (based on power analysis) in all areas to adequately detect and characterize changes that are occurring. This should be accomplished by sampling numerous, randomly-placed locations within the project areas (beach and borrow sites) as well as in un-impacted reference areas. Reference areas should be interspersed with project areas when feasible and be of similar characteristics to the project area prior to project start. Data from previous monitoring projects should provide sufficient information to resolve appropriate sampling efforts and calculate minimum sample sizes through power analyses.

At a minimum, the following physical parameters that should be monitored/calculated in nourished beach areas and their associated control locations: beach width, berm elevation, beach slope, and surficial sediment characteristics. In borrow areas and their associated control locations, the minimum physical parameters that should be monitored/calculated include: bottom topography (borrow only), average depth of dredging below grade, refilling rates (borrow only), and surficial sediment composition.

At a minimum, biological parameters that should be monitored/ calculated in nourished beach areas and their associated control locations include: densities of major beach invertebrate taxa/species. In borrow areas and associated control locations, the minimum biological parameters that should be monitored include: benthic infaunal densities, number of infaunal species, identities and densities of individual species, and densities of major taxonomic groups.

Analysis of the above data should include appropriate summary statistics (mean, median, standard deviations, sample sizes, etc.) shown in tables or figures to illustrate temporal changes in the impact and control locations. Appropriate inferential statistics should be used to determine the significance of any effect of dredging or nourishment on physical and biological characteristics of beach and borrow locations. Biological community data should be analyzed using modern multivariate statistical techniques.

Within one year of the final monitoring event, a report analyzing, presenting and appending all data from the entire monitoring effort should be completed. All reports should include clear interpretation of broad patterns and trends, including discussion of significant statistical results (or lack thereof) and relevant environmental, ecological, and/or geologic consequences.

Reports prepared by those completing the monitoring effort should receive peer review by the appropriate agency staff and disseminated to relevant state and federal agencies as well as the town and county governments funding or affected by the nourishment project.

## **E. EXISTING POLICIES AND PROGRAMS**

Post-nourishment beach monitoring is authorized by the SCDHEC-OCRM Critical Area Permitting Regulations, but it is not required. Therefore, the formulation of standardized monitoring requirements may need new regulation or policy development.

In the Critical Area Permitting Regulations, R.30-13(N)(2), Protection of Beaches and Artificial Beach Nourishment, is the only regulation that addresses the permitting of beach nourishment projects, but it does not mention monitoring. This regulation discusses grain size and quality of fill material, selection of borrow sites, avoidance of spawning, nesting, or brood-rearing seasons of marine species, and dredge and fill policies.

According to R.30-18(C)(7), applications for state funding of beach restoration projects must include "any engineering studies that have been completed concerning the project, and plans for post-project monitoring."

The U.S. Army Corps of Engineers typically requires monitoring as part of beach nourishment projects, but it does not employ a set of standardized requirements for all projects.

## **F. GENERAL COSTS AND BENEFITS**

Most beach nourishment projects conducted within the state have had some monitoring completed based on agency requests. Thus, the costs to ensure that this is completed as a mandatory effort should not be significantly higher. Impacted parties are the entities who are requesting the permit and must bear the cost of the monitoring effort. Costs associated with most past monitoring efforts have generally represented a very small percentage (1-3%) of the overall project costs. The benefits derived from better understanding the impacts and recovery, or lack thereof, are critical for ensuring that future beach nourishment projects are completed in a manner that has the least environmental/ecological consequences. Much has been learned from past monitoring efforts, which has reduced the need for monitoring some components of the habitat/resources, but has highlighted problems with other components/habitats that need to be addressed in completing future projects. The SCDNR and DHEC-OCRM cannot complete their mandates to protect coastal environments and resources in South Carolina without adequate knowledge of project impacts.

## **G. MEASURES OF SUCCESS**

All beach nourishment projects are adequately monitored using strong scientific approaches. Findings from each project are utilized to minimize impacts related to future projects and document the time required for full recovery of impacted areas. Specific measures of success can include:



- Improved beach construction design. If it is realistic to assume design could be changed based on results, this may allow for considerable change in costs and impact structure (nearshore nourishment such as is done in other areas rather than upper beach face with associated additional costs in interruptions)
- Improved borrow site placement to ensure more rapid recovery and reuse of impacted areas. This is a very important consideration given the physical limitation of sand resources in some areas and regulatory limitations in other areas (e.g. CBRA).
- Improved information base on all projects regarding duration of project lifespan using standardized approaches
- Improved technical assessment of beach nourishment projects

## **H. FEASIBILITY ISSUES**

There are sufficient private firms as well as government and academic institutions to be able to conduct these studies. Since most projects completed in South Carolina have been adequately monitored, the proposed policy is very feasible and consistent with current practice. The proposed policy will make implementation of monitoring efforts more consistent among projects and ensure agency mandates to protect affected habitats and resources are addressed. It should also improve the technical approaches used for monitoring efforts, which in a few cases, have been limited. While costs of monitoring projects are always of concern, all projects warrant some level of monitoring to understand impacts and recovery processes.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

Costs will increase depending on the number of required monitoring parameters, frequency, and duration.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

Many other states have implemented some level of monitoring of beach nourishment projects. Despite the abundance of studies, it is clear that impacts can be quite varied (NRC, 1995; Greene, 2002); and some of these studies have not been considered to lack sufficient scientific rigor with respect to adequate monitoring effort and data analysis (Peterson and Bishop, 2005).

## **K. BARRIERS OR CONCERNS**

None identified.





## **GOAL 3: MAINTAIN PROHIBITIONS AND FURTHER RESTRICT THE USE OF HARD STABILIZATION STRUCTURES**

*“The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry” (SC Code § 48-39-250(5)).*

*“It has been clearly demonstrated that the erosion problems of this state are caused by a persistent rise in sea level, a lack of comprehensive beach management planning, and poorly planned oceanfront development, including construction of hard erosion control structures, which encroach upon the beach/dune system” (R. 30-1(C)(4)).*

### **Overview**

Within its beachfront jurisdiction, and in accordance with the SC Beachfront Management Act, DHEC-OCRM does not allow new “erosion control structures,” which are specifically defined in the Act as seawalls, bulkheads, and revetments (see below). While these structures can protect coastal property and infrastructure from erosion, they do so at the expense of the long-term health of the beach/dune system and the public’s access to this shared resource. The structures themselves can intensify erosion problems in their immediate vicinity; and as sea levels rise, eventually the dry sand and intertidal beach will be lost. Other “hard” stabilization structures such as groins, jetties, and offshore breakwaters, as well as temporary sandbag structures, may still be permitted to mitigate erosion, but have other potential environmental and public safety impacts. Well-documented impacts of beachfront erosion control structures include aesthetic and recreational impacts, loss of the dry sand and intertidal beach, reduced public beach access, losses of critical habitat for invertebrates and shorebirds, and interruption of natural sand transport pathways (including sand that would have originated from the eroding shoreline) (e.g. Griggs, 2005; Dugan and Hubbard, 2006, see Figure 6 for example of a beach revetment in SC).

South Carolina is not the first or the only state to prohibit either the new construction or reconstruction of erosion control structures. North Carolina and Rhode Island are two examples of states that also prohibit hard erosion control structures on ocean shorelines. Like South Carolina, existing erosion control structures that are damaged more than 50% in Rhode Island cannot be rebuilt (RI CRMP, 2008).

Hard structure policies must be considered in light of South Carolina’s retreat policy, and potentials for beach renourishment, habitable structure relocation, and land purchase/conservation. Substantial investments in any one of these areas will affect outcomes in the other program areas. With continued coastal development and population growth, and projections of



Figure 6: *Revetment on Fripp Island, SC. Photo taken September 24, 2009.*

accelerated rates of sea level rise, it has become increasingly important to protect the beach/dune system by prohibiting new erosion control structures. The Advisory Committee wished to reinforce this prohibition to ensure the long-term health of the beach/dune system for future generations.

### ***Erosion Control Structures***

The SC Beachfront Management Act defines erosion control structures as seawalls, bulkheads, or revetments. A seawall is a retaining wall designed specifically to withstand normal wave forces, a bulkhead is a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline, and a revetment is a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion (SC Code § 48-39-270(1)). These structures are built parallel to the shoreline, whereas groins and jetties (not defined as erosion control structures) are built perpendicular to the shoreline. The state applies a strict regulatory position concerning erosion control structures. No new seawalls, bulkheads, or revetments are allowed to be constructed in South Carolina seaward of the DHEC-OCRM beachfront setback line, except, in some cases, to protect a public highway which existed on June 25, 1990 (SC Code § 48-39-290(B)(2)(a)). According to state regulations, an existing functional

erosion control structure may not be enlarged, strengthened, or rebuilt, but may be maintained in its present condition (R. 30-5(D)). Furthermore, an erosion control structure that is damaged more than 50% above grade cannot be repaired or replaced and must be removed from the beach at the owner's expense (SC Code § 48-39-290(B)(2)(b)).

### ***Emergency Orders and Sandbags***

The term “emergency” is defined by the SC Coastal Tidelands and Wetlands Act as “any unusual incident resulting from natural or unnatural causes which endanger the health, safety, or resources of the residents of the state, including damages or erosion to any beach or shore resulting from a hurricane, storm, or other such violent disturbance” (SC Code § 48-39-10(U)). Emergency situations before or after a storm event often prompt local governments to issue Emergency Orders, which allow property owners to construct temporary barriers against wave uprush through sandbagging, sand scraping, or minor renourishment (R. 30-15(H)). Although Emergency Orders are issued by local governments, DHEC-OCRM must be notified within 72 hours of any issuance that would normally require a permit. State regulations require that the notification indicates the nature of the emergency, the substance of the order, the time the order will be issued, the name of the local official executing the order and the authority under which that person is acting, the location of the activity, and an estimate of when the order will be withdrawn (R. 30-5(B)). Current regulations specify that sandbags must be biodegradable, a maximum size of five gallons (0.66 cubic feet) each, filled with beach compatible sand, and stacked at an angle not steeper than 45 degrees (R. 30-15(H)(1)). The property owners being protected by sandbags are responsible for the maintenance of the bags to insure that they remain in place and in good repair, and they are also responsible for the complete removal of the bags when so ordered by DHEC-OCRM (R. 30-15(H)(1)(f)).

### ***Groins***

Groins are shore-perpendicular structures that are designed to stabilize an eroding beach or extend the life of some renourishment projects by trapping sand that is being transported as littoral drift. Groins are not defined as erosion control structures by the SC Beachfront Management Act (as amended), so they are allowed under certain conditions. New groins may only be allowed on beaches that have high erosion rates with erosion threatening existing development or public parks and only in furtherance of an ongoing beach renourishment effort. The applicant for a groin project must also provide a financially binding commitment to cover the estimated cost of reconstructing or removing the groin if monitoring indicates adverse downdrift impacts attributable to the project (SC Code § 48-39-290(A)(8)).

### ***Jetties and Offshore Breakwaters***

Jetties are shore-perpendicular structures (typically much longer than groins) that are constructed on either side of an inlet and designed to keep navigation channels from filling with sediment. Breakwaters are typically shore-parallel structures built offshore and designed to reduce wave

action on an eroding shoreline. Since jetties and offshore breakwaters interfere with the natural transport of sediment, they are only permitted after a thorough analysis of the project demonstrates that there will be no negative effect on adjacent areas. As part of the permitting process, a bond may be required to ensure that remedial steps such as redesign, reconfiguration, or complete removal of a structure will be carried out if it is shown that the structure has caused adverse impacts (R. 30-13(N)(1)).

## **Status and Trends**

### ***Erosion Control Structures***

According to a 1988 study, about 88 miles of ocean coast were developed in South Carolina at that time, or 49% of the total ocean coast of 181 miles (Kana, 1988). The South Carolina Sea Grant Consortium further estimated that 27% of the state's developed beachfront is "armored" or fronted with some hard stabilization structure (Tibbetts, 1997). Calculating the exact length of beachfront erosion control structures in the state is difficult because many have been buried by beach nourishment projects or natural accretion, but the number of beachfront habitable structures with an erosion control device can be estimated. DHEC-OCRM maintains an inventory of seawalls on a parcel-by-parcel basis, and data that are typically recorded include dimensions and construction materials of the walls. Groins and jetties are not included in this inventory because these devices are not considered erosion control structures in the SC Beachfront Management Act, as amended. Statewide analyses of aerial photographs were performed in 1998 to identify additional erosion control structures and digitize them with GIS software. Based on the DHEC-OCRM seawall inventory and the aerial photography analyses, about 933 of the 3,850 beachfront habitable structures (24%) in South Carolina are immediately landward of some type of shore parallel erosion control structure (Table 4).

The greatest densities of erosion control structures are found on Fripp Island, where 100% of the parcels are armored and Folly Beach, where 99% of the parcels are armored. The Grand Strand beaches of North Myrtle Beach, Myrtle Beach, Surfside Beach, and Garden City Beach also have a significant number of armored parcels. Since South Carolina no longer allows the construction of new seawalls seaward of the 40-yr setback line, these numbers should not increase in the future.

<b>TABLE 4: Beachfront Erosion Control Structures in South Carolina</b>			
<b>Area</b>	<b>Number of Beachfront Habitable Structures</b>	<b>Number of Beachfront Habitable Structures with Erosion Control Device<sup>1</sup></b>	<b>% of Beachfront Habitable Structures in each Area with Erosion Control Device</b>
North Myrtle Beach	415	192	46%
Myrtle Beach	356	64	18%
Surfside Beach	192	2	1%
Garden City Beach	300	55	18%
Litchfield Beach	181	4	2%
Pawleys Island	228	7	3%
Debidue Island	90	32	36%
Deweese Island	24	0	0%
Isle of Palms	342	17	5%
Sullivans Island	118	20	17%
Folly Beach	288	285	99%
Kiawah Island	150	0	0%
Seabrook Island	73	26	36%
Edisto Island	237	16	7%
Harbor Island	58	1	2%
Hunting Island	19	0	0%
Fripp Island	160	160	100%
Hilton Head Island	570	42	7%
Daufuskie Island	49	10	20%
<b>TOTALS:</b>	<b>3,850</b>	<b>933</b>	<b>24%</b>

<sup>1</sup> Only shore parallel structures such as seawalls, bulkheads, and revetments were counted. Groins were not counted because they are not considered erosion control structures in the SC Beachfront Management Act.

### *Emergency Orders and Sandbags*

Since 1985, 111 Emergency Orders have been issued by local governments along the beachfront of South Carolina (Table 5). The Emergency Orders specified one or a combination of the following temporary erosion mitigation techniques: sandbagging, sand scraping, or minor renourishment from an upland source. Edisto Beach has had 31 Emergency Orders, but many of these were issued for individual parcels, whereas Emergency Orders for other beaches were issued for the entire barrier island or municipality. Nine Emergency Orders were issued in the 1980s, 43 were issued in the 1990s, and 59 have been issued since 2000. It appears that the number of Emergency Orders has been increasing in recent years and may continue to increase if sea level continues to rise, storms become more frequent, and funding for renourishment becomes more intermittent (see recent example of Emergency Order/sandbagging in Figure 7).

<b>TABLE 5: Emergency Orders Issued Along the Beachfront of South Carolina</b>		
<b>Location</b>	<b>Dates Issued</b>	<b>Specified Mitigation Techniques</b>
Statewide	9/89	Sandbags
Statewide	9/99	Sandbags, Sand Scraping, Renourishment
North Myrtle Beach	10/90	Sandbags
North Myrtle Beach	3/93	Sandbags, Renourishment
North Myrtle Beach	9/93, 9/96	Renourishment
Myrtle Beach	5/05, 8/06, 1/07, 7/07	Sand Scraping
Garden City Beach	9/05	Sand Scraping
Garden City Beach	11/08	Sandbags, Sand Scraping, Renourishment
Pawleys Island	2/93, 4/01, 3/03, 2/04, 2/05	Sand Scraping
Pawleys Island	6/07	Renourishment
Debidue Island	2/96, 1/05, 3/05, 9/05	Sand Scraping
Isle of Palms	4/89, 4/96, 5/96, 10/96, 2/97, 4/97, 7/97	Sandbags, Sand Scraping, Renourishment
Isle of Palms	2/96	Sand Scraping
Isle of Palms	8/05, 9/05, 11/05, 1/06, 2/06, 4/06, 8/06, 11/06	Sand Scraping, Renourishment
Isle of Palms	5/06, 11/06	Sandbags
Sullivans Island	10/94, 9/95, 8/96, 11/96	Sandbags, Renourishment
Sullivans Island	6/97, 9/97, 12/97, 8/01	Sandbags, Sand Scraping, Renourishment
Sullivans Island	9/08	Sandbags
Folly Beach	1/97, 5/99	Sand Scraping, Renourishment
Folly Beach	12/02, 3/04	Sandbags, Sand Scraping, Renourishment
Kiawah Island	10/02, 5/05, 6/05, 8/2005, 9/05, 10/05, 12/05, 1/06, 2/06, 5/06	Sand Scraping
Kiawah Island	9/05	Sandbags
Seabrook Island	9/95	Sandbags
Seabrook Island	10/05, 5/06, 6/07	Sand Scraping
Edisto Beach	3/89, 11/91, 1/92, 5/92, 11/92, 2/93, 3/93, 4/93, 5/93, 10/93, 11/93, 2/94, 3/94, 4/94, 10/94, 1/95, 9/95, 2/99, 4/00, 4/01, 11/01, 4/02, 10/02, 2/03, 4/03, 9/03, 6/04, 3/05, 5/05, 9/05, 10/05	Sandbags, Sand Scraping, Renourishment
Harbor Island	10/05	Sand Scraping
Harbor Island	9/08	Sandbags, Sand Scraping
Hunting Island	2/93, 10/05	Sand Scraping
Hunting Island	11/93	Sandbags
Hunting Island	8/08	Sandbags, Sand Scraping
Hilton Head Island	2/85, 5/85, 10/85, 2/86, 11/86	Sandbags, Sand Scraping
Hilton Head Island	6/86	Sandbags





Figure 7: *Five gallon and 1 cubic meter sandbags protecting structures on the Isle of Palms, SC. (2007)*

### ***Groins***

Based on analysis of 2006 aerial imagery and information from some local communities, there are presently 165 groins along the oceanfront of South Carolina (Table 6). Of these, 6 are terminal groins constructed at one end of a barrier island and designed to stabilize the dynamic inlet shoreline in that area. Pawleys Island, Folly Beach, Edisto Beach, and Hilton Head Island have the most groins, combining for 125 (76%) of the state's total. The number of groins could potentially increase in the future because they are allowed in conjunction with renourishment projects under certain conditions.

### ***Jetties and Offshore Breakwaters***

There are six jetty systems in the state at the following locations: Little River (between NC and SC), Murrells Inlet, the entrance to Winyah Bay, Charleston Harbor, and Savannah River (between SC and GA). There is currently only one offshore breakwater project in the state, and that project consists of six structures along the Hilton Head Island Port Royal Sound shoreline, immediately north of Fish Haul Creek.

<b>TABLE 6: Existing Oceanfront Groins in South Carolina</b>		
<b>General Area</b>	<b>Location</b>	<b>Number of Groins</b>
Garden City Beach	S. of the intersection of Yucca St. and Waccamaw Dr.	6
Garden City Beach	Near intersection of Dolphin St. and Waccamaw Dr.	4
Pawleys Island	Terminal groin at N. end of island	1
Pawleys Island	Along entire island S. of N. Causeway Rd.	23
Debidue Island	N. of the intersection of Middleton Ln. and Beach Bridge Rd.	1
Debidue Island	Derelict timber groins – Hobcaw Tract ~ 3000' S. of Ocean Green	2
Isle of Palms	N. end of the island along Dewees Inlet	1
Sullivans Island	Adjacent to Breach Inlet at N. end of island	7
Sullivans Island	N. of Station 19 St.	1
Sullivans Island	Near Ft. Moultrie (Station 12 St.) along Charleston Harbor	4
Folly Beach	Along entire island - (~10 groins are buried)	42
Edisto Beach	From the State Park S. to Mikell St.	32
Edisto Beach	Louise and Bailey Streets, along the South Edisto River	2
Hunting Island	Terminal groin at N. end of island	1
Hunting Island	Northern half of the island - recent CSE project	6
Fripp Island	Terminal groin at N. end of island	1
Fripp Island	Between 787 and 789 Marlin Dr.	1
Fripp Island	Along southern end of island	4
Hilton Head Island	Port Royal Sound Shoreline	17
Hilton Head Island	Terminal groin on south shore of The Folly Inlet (Atlantic)	1
Hilton Head Island	South Beach shoreline in Sea Pines	6
Hilton Head Island	Terminal groin adjacent to Braddock Cove Creek (Lands End)	1
Daufuskie Island	Terminal groin at Bloody Point	1
	<b>TOTAL:</b>	<b>165</b>

## **Policy and Management Recommendations**

As discussed previously, the Advisory Committee unanimously supports the continued prohibition of new beachfront erosion control structures, defined as seawalls, bulkheads, or revetments. The following policy and management recommendations explore potential improvements to existing federal, state, and local policies and practices regarding those hard structures that are allowed (groins, breakwaters, and temporary sandbag structures). In particular, the following policy recommendations seek to:

- 9) Establish new criteria for defining “emergency” situations and improve regulatory decision-making with regard to new proposals for temporary hard stabilization measures;
- 10) Improve guidelines for groins and breakwaters; and
- 11) Increase public awareness of beach management issues through improved real estate disclosures for beachfront property transactions.

## ***Recommendation 9 – Refine Criteria for Emergency Orders and Sandbags***

### **A. GENERAL RECOMMENDATION**

The use of sandbags and other means of erosion control should be subject to state regulations that will offer specific, reasonable, and temporary solutions for emergency situations while minimizing negative impacts on public safety, beach access, and the health of the beach/dune system.

### **B. RATIONALE**

As evidenced by recent Emergency Orders issued for properties on the Isle of Palms (Figure 6), there are serious deficiencies in existing policy, especially related to:

- 1) When it is appropriate to issue an Emergency Order;
- 2) What design criteria should be used for temporary structures; and
- 3) Enforcement procedures when criteria within an Emergency Order are not met (Table 5 provides a list of all prior Emergency Orders issued along SC beaches).

The goal of these recommendations is to ensure appropriate guidelines are in place to determine the circumstances under which the issuance of an Emergency Order is appropriate and what remedies are available to property owners in emergency situations. Current regulations for Emergency Orders can result in negative and severe impacts to coastal ecosystems and neighboring properties.

If sandbag revetments specifically can be used under an Emergency Order until the effects of a short-term, emergency erosion event are reversed, then they are probably a reasonable option to offer. In practice, the use of sand bags may garner time for beach nourishment planning and permitting and delay major costs associated with relocation or loss of land use without significant harm to the beach. However, there are problems with the interpretation of the appropriate use of sandbags and very few specific regulations exist to address the engineering limitations of their use.

There are several reasons for restricting sandbag usage as emergency erosion control structures:

- 1) Increased loss of access, recreational beach, and habitat over time (a well-designed sandbag revetment has the same potential to cause increased erosion at the site and along adjacent beach property as would a rock revetment or wooden bulkhead).
- 2) Debris at the site and along both adjacent and far-off shorelines from structural failure; and

3) A lack of incentives to fully consider and devise long-term erosion control plans due to practically unlimited sandbag usage.

### C. NEW POLICY RECOMMENDATIONS

a) **The State of South Carolina should redefine criteria for beachfront “emergency” declarations according to the following considerations:**

1. Emergency Criteria: New regulations should differentiate predictable, typical storm and weather events from true emergency situations. Moreover, regulations should distinguish between weather-related emergencies and property-status emergencies. The most objective, predictable approach for determining if a weather-related state of emergency exists is to rely upon state of emergency declarations issued by the Governor of South Carolina or by Joint Resolution of the South Carolina Legislature.

Sandbags should only be used as a temporary emergency measure and only to protect imminently threatened structures. The intent should be that sandbags would only be allowed in the aftermath of an extreme weather event; the fact that a particular property is under severe erosion threat would not, in the absence of an immediately preceding weather event and emergency declaration, provide justification for an Emergency Order. In other words, long-term erosion problems that property owners and municipalities have failed to address should not be addressed through emergency provisions.

Emergency sandbag provisions should be subject to the following process:

- a. Following an emergency declaration by the Governor or Legislature, DHEC-OCRM may issue Emergency Orders for those communities or petitioners within the area specifically included under the declaration. The Emergency Order should establish allowable emergency measures, including the use of temporary sandbags.
- b. Property owners acting under a DHEC-OCRM Emergency Order should be required to post a bond for the eventual removal of all sandbags.
- c. Within 90 days of the issuance of a DHEC-OCRM Emergency Order, the petitioner must also provide DHEC-OCRM with an acceptable plan (1-2 pages may suffice), in writing, for:
  - i. the removal or relocation of the threatened structure; and/or
  - ii. evidence that their community has a feasible and financially viable renourishment plan for the affected area that is consistent with their approved Local Comprehensive Beachfront Management Plan (*see Recommendation #5*).
- d. If the petitioner has not provided DHEC-OCRM with an acceptable plan for removal, relocation, or renourishment within 90 days of the issuance of an Emergency Order, then the Emergency Order should be deemed to have expired at the end of the 90<sup>th</sup> day, and the sandbags should be removed at the property owners' expense.

- e. If the petitioner's plan is approved and calls for renourishment, then a renourishment permit application should be submitted to DHEC-OCRM within 18 months of the issuance of the original Emergency Order.
    - i. If DHEC-OCRM approves the renourishment permit, then sandbags should be allowed to remain in place for up to 12 months after the permit is issued to allow sufficient time for the project to be completed, but must be removed at the time of renourishment or at the end of the 12 month period.
    - ii. If DHEC-OCRM denies the renourishment permit application, the sandbags should be removed within 90 days of the final agency decision (including all appeals), at the property owners' expense.
  - f. If the petitioner's plan is approved and calls for removal or relocation of a threatened structure, this should occur within 18 months of the original Emergency Order issuance and all sandbags should be removed at that time at the property owners' expense.
2. Repeat Emergency Orders: Local Comprehensive Beach Management Plans should include a list of all past Emergency Orders issued and plans for avoiding future Orders for the same locations (*see Recommendation #5*). In other words, if erosion vulnerabilities have been identified, then local governments should take steps to limit those vulnerabilities in preparation for future events.
  3. Types of Structures Protected: Under DHEC-OCRM Emergency Orders, sandbag use should be limited to protection of habitable structures and critical infrastructure, excluding expendable structures such as decks, steps, walkways, and swimming pools.
- b) DHEC-OCRM, in coordination with stakeholders, should re-evaluate the use of sandbags, according to the following considerations:**
1. Siting: Under DHEC-OCRM Emergency Orders, temporary sandbag revetments should be required to be placed as landward as possible to provide more stable protection for the owner.
  2. Bag Material: Fabrics should be a single layer with a tensile strength of 250-600 pounds, and be treated to resist damage from sunlight. This strength range includes most bags presently in use, but prevents the use of heavier and more permanent protection. Bags untreated for sunlight can have a very short structural life, but last for a long time as beach/ocean debris. Biodegradable bags should not be permitted due to a short structural life.
  3. Bag Size: To avoid unintended movement of bags by waves, and to provide substantial temporary stability, sand bags with dimensions of 3 to 5 feet in width and 7 to 15 feet in length should be used.
  4. Bag Fill Material: Bag fill material should be compatible with the sand or natural beach material located at the specific site where sandbags are used.

5. Structure Design: All sandbags should be placed parallel to the shoreline. To promote removal, revetments built from sandbags should generally be limited to a base width of 20 feet and a height of 6 feet, unless supported by site-specific engineering considerations. Public access should also be strongly considered in the design.
6. Enforcement: Clear and consistent enforcement measures and consequences for violations should be delineated prior to issuance of any order (fines, future eligibility, etc.). DHEC-OCRM should have authority to require the petitioner to remove sandbags, or to use proceeds from the deposited bond to begin removal and clean-up, if specifications are not followed.

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would require legislative action by the South Carolina General Assembly.

#### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) If Emergency Orders issued by the Governor or the Legislature are not incorporated as the necessary pre-condition for issuance of a permit, there should be careful consideration of alternative approaches, such as allowing DHEC-OCRM to declare emergencies. Again, the use of sandbags should not be a regular occurrence, but rather a true emergency measure aimed at addressing once-in-a-decade or less frequent events.
- 2) Preparation for emergency conditions should be addressed through Local Comprehensive Beach Management Plans, including an emergency plan as well as a long term renourishment or relocation plan.
- 3) A technical manual with design standards and options for temporary erosion control solutions should be developed and provided by DHEC-OCRM to communities, contractors, and homeowners.

#### **E. EXISTING POLICIES AND PROGRAMS**

Under SC Code § 48-39-130(D), during an emergency, the normal permitting requirements for altering critical coastal areas may be waived. An Emergency Order must first be issued by an “appointed official of a county or municipality or of the state, acting to protect the public health and safety, upon notification to the department.” *Id.* When the Emergency Order pertains to a beach or dune critical area, “only the use of sandbags, sandscraping, or renourishment, or a combination of them, in accordance with guidelines provided by the department is allowed.” *Id.*

SC Code § 48-39-10(U) defines “emergency” as “any unusual incident resulting from natural or unnatural causes which endanger the health, safety or resources of the residents of the state, including damages or erosion to any beach or shore resulting from a hurricane, storm or other such violent disturbance.”

Under SC Administrative Regulation Section 30-5(B)(1), the official declaring the emergency must notify DHEC-OCRM regarding the nature of the emergency, the substance of the order, when the order was or will be issued, the location of the activity, and when the Emergency Order will likely be withdrawn. 30-5(C) imposes penalties if notice is not given or found lacking.

Regulation 30-15(H) describes what types of Emergency Orders are allowed regarding beach/dune critical areas (seaward of baseline).

Sandbags may be used under the following criteria to construct temporary protection for coastal structures if the local official determines a structure to be in imminent danger.

- (a) The bags shall be biodegradable and be commercially manufactured for the purpose of holding sand.
- (b) The bags, when filled, shall be a maximum size of 5 (five) gallons or 0.66 cubic feet and must be filled and installed by hand.
- (c) The bags may be placed no farther seaward than is necessary to protect the structure or to repair an erosion control structure. In no case may sandbags protect a dune or be used to retard normal shoreline movement.
- (d) The bags shall be stacked at an angle not steeper than 45 degrees.
- (e) Only clean sand may be placed in the bags. Beach sand may be used to fill the bags provided the sand is returned to the beach when the bags are removed.
- (f) The property owner is responsible for the day-to-day maintenance of the sandbags to insure that they remain in place and in good repair. The property owner is responsible for the complete removal of the bags when so ordered by the Department (DHEC-OCRM).

Section 10 of the Rivers and Harbors Act regulates the construction, excavation, or deposition of material in, over, or under “navigable waters of the US,” or any work which would affect the “course, location, condition, or capacity” of those waters. Section 404 of the Clean Water Act regulates the discharge of dredged or fill material into “waters of the US.”

## **F. GENERAL COSTS AND BENEFITS**

The cost of Emergency Orders, including the placement of sandbags meeting the proposed criteria (material sources for bags and fill, plus installation, maintenance, and removal) should be

identified. Along with the proposed limitations on the use of sand bags, the high cost of implementation should be incentive to consider pre-planned alternatives like beach nourishment.

## **G. MEASURES OF SUCCESS**

Success will be determined by a reduction in the number of (and frequency of) Emergency Orders.

Success can also be measured by the number of sandbags removed, or a general reduction in time between the placement and removal of bags.

## **H. FEASIBILITY ISSUES**

Revising current regulations to restrict a proliferation of sandbag usage highlights the need for improved real estate disclosures, including information about erosion rates, past Emergency Orders, nearby Emergency Orders, etc. (*see Recommendation #11*).

Potential lawsuits and/or controversies may arise if a property owner loses value as a result of their inability to protect their property in certain situations. The most challenging aspect may be state criteria for “emergency” declarations.

The proposed regulations will be effective only if the public is fully aware of stricter limitations on declaring emergencies, and therefore accepts the risk of owning beachfront property and takes measures to plan for mitigating the risk.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

Larger sandbags may be more difficult to remove from the beach. In North Carolina, some vandalism (slicing open large bags) has also been experienced.

The extent of future emergency declarations and demand for temporary erosion control solutions is unknown.

The sustainability (affordability) of renourishment practices to address chronic and sudden erosion resulting from storm events is unknown in the long-term.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Florida***

Under Florida statute 252.36., the governor may declare coastal erosion emergencies, and so may the Secretary of the Florida Department of Environmental Protection as authorized under 120.569(2)(1).



### *North Carolina*

Sandbags are intended to provide temporary protection to imminently threatened structures (erosion scarp within 20 feet of structure) while their owners seek more permanent solutions, such as beach nourishment or relocation of the structure. Temporary sandbag structures are used to protect only the principal structure and its associated septic system, but not such appurtenances as gazebos, decks or any amenity that is allowed as an exception to the erosion setback requirement. A permitted sandbag structure may remain in place for up to two years after the date of approval if it is protecting a building with a total floor area of 5,000 square feet or less, or, for up to five years if the building has a total floor area of more than 5,000 square feet or if the structure is protecting a bridge or a road. The property owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period. An imminently threatened structure can be protected only once, regardless of ownership. Also, under General Statute § 113A-118, the Secretary of the Department of Environment and Natural Resources must declare an emergency.

## **K. BARRIERS OR CONCERNS**

Committee members agree that some limits on the sand bag systems, dimensions, and applications are warranted. However, some committee members expressed concern that policy recommendations for sand bag system designs should be left to the determination of licensed engineering and science consultants and should be handled on a site-by-site basis versus applying a “one size fits all” approach.

Committee members discussed whether the timeframes proposed here for removal of the temporary bags were appropriate. If less time were allowed, there may be insufficient time to arrange financial resources, permits, coordination, engineering, etc. If longer than the proposed timeframes, then there was concern that the sand bag systems would become in essence permanent structures or erosion control devices.

Based on experiences in both North Carolina and South Carolina that are described in this section, it is the opinion of some committee members that sandbags simply should not be an allowable option as temporary erosion control solutions.

Committee members discussed whether sandscraping should be allowed under locally-declared Emergency Orders or should be subject to the same restrictions proposed here for sand bags. Some Committee members believe that sandscraping and sand bags should only be allowed following a state emergency declaration because they are temporary solutions that should not be substitutes for proactive planning. Other Committee members believe that sandscraping should be authorized under locally-declared Emergency Orders. The Committee generally acknowledges that sandscraping may not have the same long-term negative impacts as sand bags, but can cause short-term impacts to sea turtle nesting, and can prove ineffective in protecting property since it lowers the beach profile in front of the threatened structures (which can intensify erosion).

## ***Recommendation 10 – Improve Guidelines for Groins and Breakwaters***

### **A. GENERAL RECOMMENDATION**

DHEC-OCRM policies and regulations provide some limited restrictions on the construction and use of groins and offshore breakwaters. Strengthened siting and design standards should be considered by DHEC-OCRM during reviews of new groin or breakwater proposals. In addition, ownership and responsibility should be determined for all existing groins in order to negotiate removals of any that are no longer needed or are causing adverse downdrift impacts.

### **B. RATIONALE**

The SC Beachfront Management Act currently allows for the permitting of groins as a shore erosion control mechanism, with certain limitations. Groins are defined as “usually perpendicular to the shore...” and “vary in length from less than one hundred feet to several hundred feet” (R.30-1(D)(26)). Groins are usually constructed as a pile-supported wall or using large rock, and are designed and installed to stabilize beachfront areas by trapping sand undergoing littoral drift. Table 6 lists existing groins in South Carolina (165); new groins are only allowed in conjunction with a financial commitment to renourishment and on beaches that have high erosion rates, with erosion threatening existing development or public parks (R.30-15(G)). However, it is anticipated that an increasing number of locations along the coast will eventually qualify for new groins under these criteria. The use of groins may prove ineffective in preventing beach migration over the long term, can induce localized or “downstream” erosion, and can pose a safety hazard to the general public. Groins are not considered erosion control structures in South Carolina, but they are considered as such in many states including Florida and North Carolina.

Offshore breakwaters are shore-parallel structures that are similar to traditional erosion control devices; however, breakwaters are placed beyond the littoral zone in an attempt to reduce wave energy affecting adjacent shores. Jetties are shore-perpendicular structures (typically much longer than groins) that are constructed on either side of an inlet and designed to keep navigation channels from filling with sediment. DHEC-OCRM regulations presently allow jetties and offshore breakwaters under certain conditions (R.30-13(N)(1)):

“Jetties and offshore breakwaters interfere with the natural transport of sediment and therefore require special permits. They shall only be permitted after thorough analysis of the project demonstrates that there will be no negative effect on adjacent areas. The following standards shall apply:

- (a) A bond may be required to ensure that necessary remedial steps are taken to alleviate any adverse effects on adjacent areas caused by the installation of these structures. These remedial steps may include redesign and reconfiguration of the structures or even complete removal.

- (b) A monitoring plan to assess post-project impact on adjacent areas must be approved by the Department prior to the issuance of a permit.
- (c) Construction activities shall be scheduled so as not to interfere with nesting and brood-rearing activities of sea birds, sea turtles, or other wildlife species.
- (d) Where feasible, jetties shall be designed to provide public recreational fishing opportunities.
- (e) The applicant must have written approval from the local government which has jurisdiction in the area where the project is proposed.

While breakwaters do require “special permits,” the above criteria do not contain specific design or siting standards for DHEC-OCRM decision-making.

There is currently only one offshore breakwater project in South Carolina. That project, which includes six structures, is located along the Hilton Head Island/Port Royal shoreline immediately north of Fish Haul Creek.

### **C. NEW POLICY RECOMMENDATIONS**

Specific policy recommendations are pending results of the management activities described under subsection (D).

### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) **An ad hoc Technical Committee should be established by DHEC-OCRM to recommend specific design and siting standards, as well as review considerations, for future proposals for groins and breakwaters along the South Carolina coast.**

The following aspects should be considered and addressed by the Committee:

- i) **Siting Criteria**  
The Technical Committee should determine beachfront locations where groins or breakwaters are considered inappropriate.
- ii) **Design Standards**  
The Committee should develop specific standards for the types of materials that may be used in construction such as rock, concrete, steel, or other hard structures. The Committee should also evaluate structural designs with respect to public safety concerns.

The Committee should propose guidance for breakwater design and placement as well as determining the length, spacing, and number of groins for standard beach zones and inlet zones. The Committee should suggest appropriate design approaches, such as “tune-able” groins for sand bypassing around groins in inlet zones. Tune-able groins provide

adjustable design features, such as the crest height and/or permeability, for purposes of augmenting the groin's sand retention performance and managing downdrift sediment transport rates. Adjusting crest elevations of the groins is analogous to the control of lake storage via adjustable weir sections or gates (i.e., one uses crest elevation adjustments to control how much sediment is stored on one side or the other of a groin). Likewise an analogy to controlling permeability is observed in the application of airflow flaps used to control descent by a parachutist (i.e., one uses groin permeability to control sediment flow).

iii) Adverse Impacts

The Committee should evaluate or determine adverse impacts from proposed or existing groins or breakwaters, and under what circumstances removal should be required.

iv) Abandonment / Failure

The Committee should evaluate or determine at what point the abandonment or failure of a structure is met, and under what circumstances removal should be required.

v) Monitoring Parameters

The Committee should identify appropriate monitoring methods, parameters, and timelines to determine project performance.

**2) DHEC-OCRM should leverage additional expertise in reviewing all proposals for new groins and breakwaters.**

For example, DHEC-OCRM could develop a more robust peer-review process, and should consider the USACE Independent Technical Review (ITR) process (ER 1110-2-1150, "Engineering Regulation for Engineering Design"): "All engineering documents [and products produced by the District] require an Independent Technical Review (ITR). The members of the ITR team may be District personnel, contract personnel, non-federal sponsor's personnel, or engineers from other sources. The District may use the ITR team in the coordination of special and complex problems as long as such action does not compromise the independence of the ITR team." DHEC-OCRM should also consider expanding in-house staff expertise in coastal engineering.

**3) DHEC-OCRM staff should undertake a concerted effort to determine ownership of all existing groins.**

In many cases, ownership/responsibility may be disputed, and could range from the State Department of Transportation, to local communities, to private resorts. Additionally, bonds to ensure removal should be included with all new groin or breakwater projects in the event that adverse impacts are identified.

DHEC-OCRM staff will be required to perform all necessary administrative and field duties upon policy implementation. Field duties may include a baseline survey to determine the number of existing groins, as well as their ownership, composition, and functional condition.

## **E. EXISTING POLICIES AND PROGRAMS**

This policy and management recommendation is directly related to existing authorities and procedures followed by DHEC-OCRM under the South Carolina Coastal Tidelands and Wetlands Act: SC Code §48-39-250 et seq., SCDHEC-OCRM Critical Area Permitting Regulations (R 30-1 et seq), and the South Carolina Beachfront Management Plan (R 30-21).

The U.S. Army Corps of Engineers has direct permit authority to evaluate applications for certain activities in the Nation’s water pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. Section 10 of the Rivers and Harbors Act regulates the construction, excavation, or deposition of material in, over, or under “navigable waters of the US,” or any work which would affect the “course, location, condition, or capacity” of those waters. Section 404 of the Clean Water Act regulates the discharge of dredged or fill material into “waters of the US.” A permit must be issued by the USACE prior to constructing such structures as groins, revetments, and breakwaters.

## **F. GENERAL COSTS AND BENEFITS**

Existing groins that are maintained would not be impacted by these policy recommendations. Problematic groins that require removal would likely involve expensive operations. The “expanded” beach management trust fund called for under Recommendations #4 and #5 of this report could also be used to offset costs of groin removals where consistent with Local Comprehensive Beach Management Plans.

Wherever dysfunctional groins are removed or new groins or breakwaters are not allowed, adjacent property owners will be forced to use alternative methods of erosion control that are both acceptable and affordable (such as more frequent renourishment projects). As with other restrictions on erosion control solutions, eventually sea level rise, storms, and chronic erosion are expected to force the abandonment of some shoreline properties.

On the other hand, groins can pose public safety risks, are often perceived as having negative impacts on aesthetics and recreational opportunities, and can negatively impact the health of the beach and dune system and endangered/threatened species. Over the long-term, these societal values and the tourism revenues that depend on healthy beach/dune systems in our state are expected to outweigh the impacts to individual property owners. In addition, there should be fewer conflicts between downdrift properties that believe, correctly or incorrectly, that nearby groins or breakwaters are accelerating erosion along their shoreline.

## **G. MEASURES OF SUCCESS**

- Successful removal of dysfunctional groins.
- Improved decisionmaking and project designs for groins and breakwaters.

## **H. FEASIBILITY ISSUES**

- Determining groin ownership may be very difficult in many cases.
- Groins are extremely controversial and any new regulations will be politically sensitive.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

- Total costs to remove any structure determined to be destroyed may vary substantially depending on type, size and number of structures to be removed. Inflation will certainly cause an increase in costs over time.
- Similar to sand bags, will ‘soft’ groins be allowed as a temporary measure in conjunction with renourishment projects or as an emergency measure after a storm? If so, how long will they be allowed to remain in place?
- To what extent will local governments be held responsible for groin installation or removal? Will they be required to contribute money and or man-power to install or remove groins when destroyed?
- How will this affect ‘terminal groins’ used to stabilize inlets or to preserve navigation?
- Should beneficiaries of successful breakwater projects (i.e. local governments) be required to provide financial or other assistance toward long term maintenance of the structure?

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Florida***

Florida Statute 161.061 (1) states that “any coastal construction, or any structure including groins, jetties, moles, breakwaters, seawalls, revetments, or other structures... which serves no public purpose, which is dangerous to or in any way endangers human life, health, or welfare, or which proves to be undesirable or becomes unnecessary, as determined by the department, shall be adjusted, altered, or removed by the abutting upland property owner after written notice by the division.”

### ***North Carolina***

North Carolina Statute 15A NCAC 07H .0308 (a)(1)(B) states that “permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, are prohibited. Such structures include bulkheads, seawalls, revetments, jetties, groins and breakwaters.”

***New York***

New York State Coastal Policy 13 states that “the construction or reconstruction of erosion protection structures shall be undertaken only if they have a reasonable probability of controlling erosion for at least thirty years as demonstrated in design and construction standards and/or assured maintenance or replacement programs.”

***Oregon***

Oregon Statewide Planning Goal 18 Implementation Requirement 5 states that “permits for beachfront protective structures shall be issued only where development existed on January 1, 1977.” In these cases, the criteria for review of all shore and beachfront protective structures provide that visual impacts are minimized, necessary access to the beach is maintained, negative impacts on adjacent property are minimized, long-term or recurring costs to the public are avoided.

**K. BARRIERS OR CONCERNS**

None identified.

## ***Recommendation 11 – Expand Beachfront Real Estate Disclosure Requirements***

### **A. GENERAL RECOMMENDATION**

South Carolina should establish stronger rules for real estate disclosure to provide coastal property buyers information of the potential perils associated with developing or purchasing property seaward of the DHEC-OCRM oceanfront setback line. The intent is to ensure that buyers receive proper warning if the property under consideration is subject to special regulations concerning beach erosion, and if the property currently or previously used erosion control methods to address chronic erosion or storm-related damage.

### **B. RATIONALE**

Most oceanfront property is vulnerable to natural forces such as storms and beach erosion, which can pose threats to a property and undercut its value. Additionally, sea level has risen about one foot during the last century, causing most beaches to migrate landward. In many cases, beach renourishment projects have kept pace with sea level rise and erosion, but it is not always clear to a prospective oceanfront property buyer whether the beach is natural or artificial. For private investment decisions, better information must be disseminated on coastal processes, reasonable use of property, and personal responsibility. For example, a prospective property buyer needs to know if future commitment to beach renourishment will be required to maintain the beach in its current condition. Prospective buyers also need to understand that flood insurance will cover damages caused by flooding resulting from hurricanes and other catastrophic events, but it will not cover damages due to chronic, long-term erosion. Full disclosure of historical shoreline changes, beachfront management issues, and past erosion problems should be provided to prospective buyers at the time that property is shown, or at least before writing a contract, rather than at the time of closing on property.

Stronger real estate disclosure rules for coastal property are needed to limit the transfer of at-risk properties to unsuspecting buyers. Increased disclosure requirements would also protect sellers and their agents from potential lawsuits over not fully disclosing a property's history. Knowing a property's erosion rates and erosion control history as well as the applicable DHEC-OCRM regulations would educate a prospective buyer about the potential risk of ownership, rules for rebuilding within the jurisdictional setback area, and the erosion control options allowed should erosion threaten the property.

### **C. NEW POLICY RECOMMENDATIONS**

- a) **SC real estate disclosure requirements should be amended to include all known information pertaining to beachfront management and property-specific erosion and erosion control histories, including:**



1. Background information on coastal processes, and beachfront management including state jurisdictional lines and regulations governing those areas;
2. Existing erosion control structures on the property, including location, size, and type;
3. Historical erosion rates for the property and dates of any known past significant erosion events;
4. Dates of any known past Emergency Orders or sandbag placements; and
5. Dates of any known past beach renourishment projects and vulnerability of future funding for additional projects.

As part of the disclosure process, all buyers of any beachfront property should be provided copies and should be strongly encouraged to read, at a minimum, the available “State of the Beaches” reports issued annually by DHEC-OCRM and the pamphlet “Q&A on Purchasing Coastal Real Estate in South Carolina,” published by DHEC-OCRM, SCDNR, and the SC Sea Grant Consortium. This pamphlet is a particularly good resource for potential buyers since it clearly discusses the Beachfront Management Act, DHEC-OCRM regulations, coastal hazards, and flood insurance. Additionally, for properties that are currently seaward of the DHEC-OCRM setback line, the language used in the existing disclosure addendum (as described in subsection E below) should continue to be provided by DHEC-OCRM staff.

Beach Reports: <http://www.scdhec.gov/environment/ocrm/pubs/reports.htm#beaches>

Q&A Pamphlet: [http://www.scdhec.gov/environment/ocrm/pubs/docs/qa\\_realestate.pdf](http://www.scdhec.gov/environment/ocrm/pubs/docs/qa_realestate.pdf)

- b) Buyers and sellers should be required to sign contractual documents or affidavits indicating their knowledge of the potential risks associated with a specific property, and their receipt and review of the information listed above, prior to the time of closing.**

The Beachfront Management Act provides statutory authority that would encompass the above recommendations without necessary changes. However, the Residential Property Condition Disclosure Act (SC Code Ann. § 27-50-10 et. seq.) does not reference beachfront disclosure requirements. Any changes to that statute to complement the Beachfront Management Act would require legislative action by the South Carolina General Assembly.

Disclosure statement language is governed by the South Carolina Real Estate Commission. Any changes to disclosure language would require approval from that agency, and any regulatory change would require promulgation pursuant to the SC Administrative Procedures Act (SC Code Ann. § 1-23-10 et seq.). Support from the South Carolina Association of Realtors would be important to this process.

#### **D. NEW PLANNING AND MANAGEMENT ACTIONS**

- 1) DHEC-OCRM would support the South Carolina Association of Realtors by providing the required data on jurisdictional beach line locations and regulations governing activities in those areas; location, size and type of erosion control structures; historical

erosion rates; issuance of any Emergency Orders; past renourishment projects at that location; and other beachfront management and coastal processes information; on a case-by-case basis and within a specified amount of time after the request is received. DHEC-OCRM would potentially need additional staff to work on this effort, reliable and on-demand internet access to data, and periodically updated data.

#### **E. EXISTING POLICIES AND PROGRAMS:**

Section 48-39-330 of the SC Beachfront Management Act requires the following:

*“Thirty days after the initial adoption by the department of setback lines, a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plane Coordinate System (N.A.D.-1983) and include the local erosion rate most recently made available by the department for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.”*

In an effort to satisfy the requirements of Section 48-39-330 of the Beachfront Management Act, there is currently an addendum to real estate contracts for properties that are seaward of the DHEC-OCRM setback line. The addendum includes the property’s erosion rate, distances from the baseline and setback line, and width of the FEMA flood zone, but this form is often poorly understood.

The addendum currently used to comply with the Beachfront Management Act states the following:

“COASTAL TIDELANDS & WETLANDS ACT: This property is subject to regulation of use by the Coastal Tidelands & Wetlands Act, § 48-39-10, et. seq., 1976 South Carolina Code of Laws, as amended, and part of (all of) this property is seaward of the setback line/and the minimum setback line/ and baseline/ and has an erosion rate of \_\_\_\_\_ feet per year, all as adopted by [DHEC-OCRM] on July 1, 1988. This property is also (part of this property is) within the velocity zone as determined by Federal Emergency Management Act. More specifically, the setback line is \_\_\_\_\_ feet (or from \_\_\_\_\_ feet to \_\_\_\_\_ feet) from the seaward property line; the baseline is \_\_\_\_\_ feet (from \_\_\_\_\_ feet to \_\_\_\_\_ feet) from the seaward property line. The velocity zone is \_\_\_\_\_ feet wide (from \_\_\_\_\_ to \_\_\_\_\_ feet wide) starting at the seaward property line and moving landward. The seaward corners of the habitable structures on this property are located \_\_\_\_\_ feet, \_\_\_\_\_ feet, etc., from the seaward property line. This information is shown with more particularity on that certain plat made by \_\_\_\_\_, dated \_\_\_\_\_, filed in Plat Book \_\_\_\_\_, page \_\_\_\_\_, Clerk of Court's Office for \_\_\_\_\_ County, a copy

of which is attached hereto/reference to which is hereby prayed for a more complete disclosure.”

## **F. GENERAL COSTS AND BENEFITS**

Costs to implement this policy would be incurred by current owners of beachfront property and by state agencies. Because risks associated with purchasing beachfront property would be more transparent, there is the potential for the value of the current property to be affected. Additionally, there would be real associated cost for DHEC-OCRM to implement this policy including increased staff time, data acquisition, monitoring efforts and other informational needs.

The main benefit of increased real estate disclosure is the improvement in consumer protection. Prospective beachfront property buyer would assume a greater benefit from education of potential risks associated with erosion problems and knowledge of what steps may be legally taken to address these problems should they be encountered. Since buyers would know the implications and hazards of living on the beachfront at the time of purchase, they could begin planning for potential erosion problems in the future. An additional benefit would include the protection of the seller and realtors from lawsuits claiming that erosion information was knowingly withheld.

## **G. MEASURES OF SUCCESS**

Success of implementing this policy could be interpreted by measuring indicators such as:

- Reduction in lawsuits against sellers or their agents claiming that erosion information was knowingly withheld.
- Fewer permit requests for illegal erosion control devices within the state’s beachfront jurisdiction.
- Faster permit application process and review periods due to increased knowledge of erosion mitigation options allowed on beachfront property.

## **H. FEASIBILITY ISSUES**

The South Carolina Association of Realtors and other groups may be hesitant to support expanded disclosure requirements. Increased disclosure would also require significant coordination between Realtors and DHEC-OCRM to acquire property-specific data as outlined in section C.

Providing property-specific data for each beachfront property also raises concerns about the need for increased DHEC-OCRM staff time, reliable on-demand internet access, and updated and official data. The intent of this recommendation is not to delay real estate transactions, but some additional time may be needed to locate property-specific erosion data in some instances. The state should ensure sufficient staff and data resources are in place before implementation of this recommendation.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

Determining the erosion history of a particular property, such as past erosion events or the extent of past renourishment projects, may be complicated. In addition, some erosion control structures have been buried by renourishment projects, making it difficult to verify if there is an erosion control structure on a property.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***Texas***

Disclosure law requires that closing documents include information regarding the risks associated with purchasing coastal property. A disclosure notification entitled “Addendum for Property Located Seaward of the Gulf Intracoastal Waterway”, promulgated by the Texas Real Estate Commission, provides potential buyers notice of legal and economic risks including statements that the purchaser is assuming economic risks over and above the that involved with inland property. Additionally, the addendum states that the coastal property may become located on public beach due to erosion or storm events, and that the purchaser may be ordered to remove any structure that becomes seaward of the vegetation line. Although the addendum notices the potential for property to become located on public beach, many buyers remain unaware that they may lose their land due to the erosion.

The addendum encourages potential buyers to seek additional information and the advice of a legal professional to determine if the value of the property may be affected by Texas statutes. The buyer is also warned not to sign the addendum without fully understanding the assumed risk.

### ***Florida***

The Florida Coastal Properties Disclosure Statement, which was amended during the 2006 legislative session, targets all property seaward of the Coastal Construction Control Line (CCCL). The CCCL is the portion of the beach-dune system subject to severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. The seller of any property seaward of the CCCL is required to give a written disclosure statement in the following form:

“The property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Florida Department of Environmental Protection, including whether there are significant erosion conditions associated with the shoreline of the property being purchased.”

### ***Oregon***

The Oregon Coastal Management Program partnered with Oregon Sea Grant to create a DVD entitled Living on the Edge, Building and Buying Property on the Oregon Coast. The video is

intended to influence the behavior of prospective coastal property buyers and builders by educating them on the unique risks that come with developing along the ocean shore.

*Alaska*

The State of Alaska's Residential Real Property Transfer Disclosure Statement includes a section where sellers must disclose any environmental concerns about their property. Specifically, the seller is required to indicate whether they are "aware of any erosion/erosion zone or accretion affecting the property?"

**K. BARRIERS OR CONCERNS**

None identified.







## **GOAL 4. ENHANCE THE MANAGEMENT OF SHELTERED COASTLINES**

*“These same unique natural resource areas face increasing land development pressure and negative impacts from human activities in and around them. The marshes constitute a fragile ecosystem; consequently, indiscriminate dredging and filling, degradation of water quality or unsound building and development practices can have long-term detrimental effects” (R. 30-1(B)(6)).*

### **Overview**

Salt marshes provide numerous ecosystem services, including nursery habitat for fish and crabs, nutrient filtering and cycling, and high rates of primary productivity (NRC, 2007). Many commercially and recreationally important fish and shellfish species depend on marshes and estuaries for all or part of their life cycle, and many other forms of wildlife utilize wetlands as habitat and a source of food (R. 30-1(B)(2)). In addition to these ecosystem services, marshes protect adjacent uplands from erosion and storm damage by absorbing and dissipating wave energy and establishing a root system to stabilize sediments (R. 30-1(B)(3)). However, some marsh environments may be lost in the future as development and armoring of estuarine shorelines continues to increase at a rapid pace.

From a regulatory perspective, South Carolina’s Critical Area includes coastal waters (navigable, saline waters subject to the ebb and flood of the tide shoreward to the mean high water mark) and tidelands (land at or below high tide including coastal wetlands, mudflats and similar areas adjacent to coastal waters and integral to estuarine systems) (R. 30-1(D)). The boundaries of the Critical Area are designated by DHEC-OCRM, and in turn determine when state critical area permits are required. Critical areas are dynamic and subject to change over time, so permits are evaluated on an individual basis. Unlike the state’s oceanfront shorelines, estuarine shorelines do not have similar policies related to “retreat,” setbacks, or prohibitions on erosion control structures. Developments are generally not permitted to encroach into tidal marshes, including the transitional banks of the marshes. The number of permit applications for bulkheads and revetments appears to be somewhat constant over the past few years, but permits are not required for erosion control structures built immediately landward of the “Critical Line” as defined by DHEC-OCRM.

South Carolina’s policies for erosion control in the estuarine environment are intended to prohibit erosion control structures in those areas where it is not advantageous for such a structure (SC Code § 48-39-120(B)). The SC Coastal Tidelands and Wetlands Act does not specifically define those areas that are most advantageous for erosion control structures, but the SCDHEC-OCRM Critical Area Permitting Regulations prohibit erosion control devices (bulkheads and revetments) in areas where marshlands are adequately serving as an erosive buffer or where public access would be adversely affected (R. 30-12(C)). Erosion control structures are allowed when there are no erosive buffers (marshlands) and public access is not affected, provided that a minimal amount of fill ( $\leq$  18 inches per erosion control structure) is needed (R. 30-12(C)).

DHEC-OCRM has the authority to remove all erosion control structures that have an adverse effect on the public interest (SC Code § 48-39-120(C)).

## **Status and Trends**

South Carolina has 187 miles of ocean frontage, approximately 2,875 miles of estuarine shorelines (includes estuaries, bays, and barrier islands), and over 500,000 acres of salt marsh (SCDHEC-OCRM, 1979; SC Sea Grant Consortium, 2007). Estuarine shoreline changes are affected by a number of anthropogenic and natural processes that are not well understood including channel dredging, boat wakes, and sea level rise. New and ongoing research will improve understanding of the drivers and succession sequences of estuarine shoreline changes in the state. For example, the North Inlet-Winyah Bay National Estuarine Research Reserve is studying the spatial dynamics of emergent salt marsh to address long-term changes in the community and inland migration of marsh and forest zones in response to sea level rise. In the short-term, this project will assess marsh vegetation spatial responses to soil changes and flooding (Smith and Buck, 2008). In an urban setting, another study found that estuarine shoreline erosion was caused by steep slopes and high sand content, but oyster beds helped to reduce erosion rates (Chose, 1999). In the Palmetto Bluff Development (Beaufort, SC), the U.S. Geological Survey's Digital Shoreline Analysis System and aerial imagery successfully assessed long-term erosion rates, and short-term erosion rates were measured in field studies. The short-term rates were in agreement with measured long-term rates (~0.4 m/yr) and indicated that the system is in an erosional state but unaffected by human activity in the area (Goodwin, 2007).

To better estimate shoreline erosion rates, at least two digital shorelines over a long period of time are required. Currently, there are no existing digital shorelines suitable for large-scale estuarine shoreline erosion and change analysis in South Carolina. However, in response to initial meetings of the Advisory Committee that identified this research need, DHEC-OCRM is working with the SC Dept. of Natural Resources Geological Survey to investigate existing shoreline data and protocols for estuarine shoreline change analysis in the state. These outcomes will be presented at a future workshop, and a standard protocol for classifying and measuring estuarine shorelines will be discussed.

The percentage of estuarine shoreline that is hardened is presently unknown, and trends are difficult to evaluate because permits were not consistently tracked prior to 2001. Since 2001, DHEC-OCRM has issued 835 permits for bulkheads or seawalls and 188 permits for riprap or revetments along eroding estuarine shorelines (Figure 8). This large number of permits in the last decade indicates that erosion is a common concern along South Carolina's estuarine shorelines.



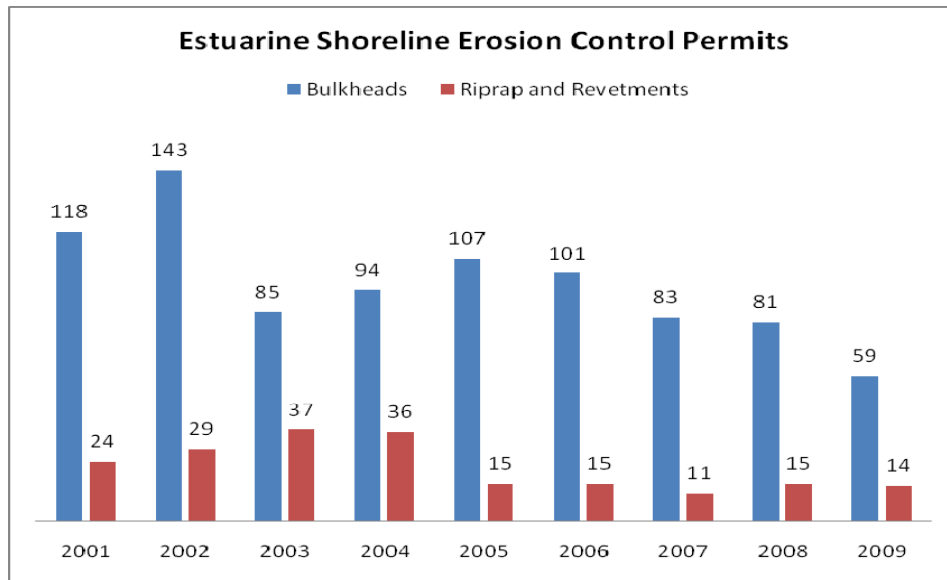


Figure 8: *Permits issued for estuarine shoreline erosion control structures in South Carolina’s Critical Area. From 2001 through 2009, approximately 1,067 permits have been issued. Figure modified and updated from Tibbetts, 2007.*

### ***Alternative Estuarine Shoreline Stabilization***

Alternative or “living shoreline” stabilization projects typically use natural materials such as oyster shells or plantings to mitigate estuarine shoreline erosion. The following is a list of past and present alternative estuarine shoreline stabilization projects that have been implemented in South Carolina:

- An alternative shoreline stabilization project at the North Inlet-Winyah Bay National Estuarine Research Reserve (NERR) used a cellular concrete mat system sold under the brand name Armorflex© (by Contech Construction Products) along a 150 ft estuarine shoreline that had a 40 ft highly erosional area. Coastal EcoScapes produced native vegetation that was planted in April 2008. Monitoring for water quality, oyster recruitment, and biomass vegetation surveys will be conducted over three years.
- The SC Oyster Restoration Project established twenty-four sites between 2001 and 2003, and monitoring from seven of these sites indicates that polypropylene mesh bags filled with shell help to stabilize the shoreline. Reef development and success occurred after two years, and the project included extensive public outreach and education (Hadley, 2007). Construction of an expanded oyster reef resulted in 8 m of marsh growth for a previously eroding tidal creek shoreline in Palmetto Islands County Park (Coen and Hadley, 2005).
- In 1996, 1,080 bushels of oyster shells were distributed along 350 ft of Hobcaw Creek in Charleston Harbor to examine shoreline erosion suppression. Three treatment areas (polypropylene netting, reinforcing wire and uncovered) examined shell stability. Initial bi-monthly sampling indicated the uncovered areas were more conducive to propagating

vertical intertidal oyster populations. However, maintenance planting (adding additional shells) is necessary in high wave energy environments (Anderson, 1997; Anderson, pers. comm.).

### ***Local Government Buffer Guidelines***

Undeveloped shoreline “buffer” or setback areas are often established through state or local shoreline management policies in order to enhance water quality (by “filtering” surface and groundwater discharges from developed areas), allow for natural marsh migration, preserve views from the water, conserve unique and important habitats, provide for recreational opportunities and public access (e.g. shoreline trails), or protect life and property from erosion, flooding or storm surge. South Carolina does not have statewide estuarine shoreline buffer rules, but the following examples represent a list of local governments that have established riparian buffer guidelines:

- **Beaufort County** requires a 50 ft buffer along tidal waters and wetlands (SC General Assembly LAC, 2007). Beaufort County requires critical river buffers (Zoning Development Standards Ordinance, Sec. 106-1845), and buffers are also part of the stormwater ordinance’s Best Management Practices (BMP) manual (Ahern, pers. comm.)
- **Charleston County** has landscaping buffers (9.5.4), and land use required buffers are determined by guidelines in 9.5.4-B (a-d). Charleston County requires wetland, waterways, and DHEC-OCRM critical line buffers that are 15 or 35 ft as described in 9.7.1 B1 (Charleston County Zoning and Land Development Regulations Ordinance, 2008).
- **Dorchester County**’s Ashley River Historic District Overlay Zone requires a  $\geq 200$  ft buffer along the Ashley River Corridor’s District 1 and includes natural vegetation and buffer guidance (Dorchester County Zoning and Land Development Standards Ordinance 04-13, Article XI, Section 11.5, Revised 2007).
- **Georgetown County** requires a minimum 15 ft setback from the edge of any salt water marsh wetland line as determined by DHEC-OCRM (Georgetown County Zoning Ordinance, 2008).

### **Refocusing on the Management of Estuarine Shorelines**

As described in the Introduction to this report, many estuarine shorelines face similar pressures as those experienced along the beachfront - in terms of chronic erosion, transgression, and inundation; storm impacts; and development pressures. However, there is not a similar management framework for estuarine shorelines, in terms of the expanded jurisdictional area, setback area, structure limitations, etc. for the beach/dune system. Estuarine shoreline erosion control structures such as bulkheads and revetments prevent natural marsh migration inland as sea level rises, and they often change the hydrodynamics of tidal creek channels by causing currents to increase (NRC, 2007; Tibbetts, 2007). The increased currents in turn can prevent

sediments from “settling out” of the water column and nourishing nearby marshes. A single erosion control structure may not have a dramatic negative impact on the estuarine environment, but the cumulative impacts of hundreds, or even thousands, of structures in the coastal zone must be considered (NRC, 2007; Figure 9).



Figure 9: *Estuarine shoreline erosion control structures near Charleston, SC. Many stretches of tidal creek shorelines in South Carolina have been armored with a variety of structures including wooden bulkheads and rock revetments.*

In light of these impacts, an expert national panel recently recommended that alternative shoreline stabilization structures and buffers should be investigated and used more frequently to combat erosion while providing ecological benefits (NRC, 2007).

### **Policy and Management Recommendations**

The following policy and management recommendations explore potential improvements to existing federal, state, and local policies and practices. In particular, the following policy recommendations seek to:

- 12) Improve regulatory decision-making with regard to estuarine shoreline stabilization;
- 13) Promote natural shoreline migration, wetland transgression, improved water quality, and reduced exposure to erosion and storm damage through the use of shoreline vegetative buffers.

## ***Recommendation 12 – Manage Erosion Control in Estuaries***

### **A. GENERAL RECOMMENDATION**

Current regulations and permitting procedures for estuarine shorelines are not adequate to ensure the protection of the state’s salt marsh-tidal creek ecosystems. The placement of erosion control structures (e.g. bulkheads) may result in undesirable cumulative impacts, and in cases where erosion control structures are approved, alternatives to traditional bulkheads may be preferred. This recommendation suggests strengthened regulations related to estuarine bulkheads, and investments in developing guidance and criteria for alternative erosion control approaches.

### **B. RATIONALE**

South Carolina has approximately 2,875 miles of estuarine shoreline. These areas can experience erosion as a result of long-term (e.g. sea level rise) and short-term (e.g. waves, boat wakes) forces. The rate of shoreline erosion is not consistent across the state. Currently, there is limited data on both the rate of erosion and shoreline hardening along South Carolina’s estuarine shorelines. There is also limited understanding of the physical and ecological characteristics and values of various estuarine shorelines throughout the state.

In addition to increasing the understanding of South Carolina’s estuarine shorelines, there is a need to re-evaluate regulations to ensure that the state’s critical areas are conserved. Current state regulations allow owners of non-beachfront shoreline property to construct bulkheads along the upland edge of their property to minimize erosion and to protect against flooding and inundation from boat wakes, coastal storms and, in the long run, sea level rise. There are few requirements that limit bulkhead permitting, which can lead to their placement in areas where they may not be necessary. For example, the governing regulations do not:

- establish maximum lengths or heights for estuarine bulkheads;
- identify methods for evaluating cumulative or secondary impacts;
- clearly define an “adequate marsh buffer” (R. 30-12(C)(1)(c));
- restrict bulkheads just landward of the DHEC-OCRM Critical Line, which defines the boundary between upland and intertidal areas; or
- restrict bulkheads on undeveloped (vacant) properties where no structures are threatened.

Finally, there is a need to consider the type of shore erosion control devices that should be allowed along estuarine shorelines. Current state guidelines do not address types of shoreline stabilization used along the sheltered coast. The likely result will be estuarine shorelines with significant armoring that limits ecosystem connectivity and mobility, increases downstream erosion, and impacts natural hydrology and habitats. In order to establish state guidelines and

regulations for estuarine shoreline permits, the level of local knowledge about the effectiveness of alternative shoreline stabilization technologies must be increased.

### C. NEW POLICY RECOMMENDATIONS

#### a) **Establish a Minimum Setback for Non-Beachfront Erosion Control Structures.**

*In the absence of* a restricted, undisturbed vegetative shoreline buffer (where bulkheads would already be prohibited - as proposed in Recommendation #13, and as currently exists under some local ordinances), we propose that a minimum setback be established for nonbeachfront shorelines throughout the DHEC-OCRM “Critical Area,” wherein no bulkhead, revetment, or hard erosion control structures should be constructed. The setback distance should be established to be consistent with existing local easements and building setbacks from the shoreline or DHEC-OCRM critical line boundary; and could possibly be tied to erosion rates or slope of the property to adjust for local circumstances.

These setbacks (and subsequent adjustments) will allow for natural shoreline and marsh transgression for some period of time into the future. There should also be consideration given to the state’s long-term policy of retreat from eroding beaches, and whether there is a need for a similar policy for some non-beachfront regions. For example, “retreat” may not be appropriate for downtown Charleston; however, in some areas, long-term retreat policies may be desirable to allow critical estuarine habitats to migrate inland. These policies and decisions should be based on comprehensive cost-benefit analyses that take into account any losses of the nonmarket values associated with natural resources and/or ecosystem services.

This recommendation would have to be implemented in two ways:

- DHEC-OCRM Regulation R.30-12.C would have to be amended to include the estuarine bulkhead setback; and
- The same information should be incorporated in applicable zoning ordinances as a riparian buffer (or setback) requirement, if possible. Implementation at the local level would probably provide better initial site design review and enforcement oversight and provide several collateral benefits, provided buffers included requirements for the preservation of natural vegetation.

#### b) **Differentiate Shoreline “Transgression” from Shoreline “Erosion.”**

Under existing regulatory language, DHEC-OCRM staff should not allow hard stabilization of nonbeachfront shorelines when the shoreline is “transgressing,” or migrating inland naturally due to sea level rise, as evidenced by emergent vegetation at the upland boundary on lowlying properties. Bulkheads are only to be allowed where erosion of upland is occurring, which is a distinct process that can be caused boat wakes, wave action, stormwater runoff, and other physical forces. No regulatory change is

needed, only a change in DHEC-OCRM staff implementation or interpretation of the rule.

**c) Require Evaluation of Alternative Stabilization Approaches on Vacant Properties.**

Traditional bulkheads, rip-rap, and revetments should not be allowed for undeveloped properties unless the permittee demonstrates that no practical alternative exists. Given that no structure is imminently threatened by erosion on an undeveloped property, the burden for evaluating alternatives to traditional bulkheads and revetments should be on the property owner. If the state follows recommendations under section (D) below, eventually the state should be able to offer guidance on alternative options that are appropriate for specific shorelines. Alternatives to be considered, in order of preference, should include better site design, vegetation plantings, and hybrid structures.

Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes.

Any statutory changes would involve legislative action by the South Carolina General Assembly.

**D. NEW PLANNING AND MANAGEMENT ACTIONS**

**1) Develop a knowledge-base for understanding of estuarine shoreline dynamics and processes, including human impacts and implications of sea level rise.**

There are a series of steps that the State of South Carolina should take to gain a better understanding of estuarine shoreline dynamics. The state has built a strong baseline of information for beachfront shorelines; similar information is needed for estuarine shorelines which are facing many of the same threats. This information will inform both the process by which existing rules for bulkheads are developed and alternatives to traditional shoreline control methodology are promoted.

(i) **Map and Characterize Estuarine Shorelines** – Multiple priorities identified in the South Carolina Shoreline Change State of Knowledge Report (Nelson et al., 2009) focus on the need to increase knowledge of sheltered shorelines. Completion of these projects would greatly benefit development of revised permit guidelines and regulations for erosion control. In particular, future projects and funding should be directed towards:

- Historic and current digital marsh/estuarine shorelines, monitoring of estuarine shoreline change and marsh migration; and
- A shoreline inventory and classification system.

(ii) **Develop an Erosion Control Response Table** – Not all sites are appropriate for alternative erosion control methods. Information is available in other coastal states (e.g. Maryland and North Carolina) on erosion sites being evaluated for the effectiveness of different shore erosion management techniques, including structural, non-structural and hybrid approaches. Information that should be considered includes erosion rate, fetch, water depth, slope, and ecological values. Developing a table relevant to South Carolina’s sheltered shorelines could help determine when alternative methods should be applied.

(iii) **Education and Training** – Increased information and education should be provided to owners of properties located adjacent to estuarine shorelines. This includes understanding of (a) the link between salt marsh and upland habitats, (b) the difference between erosion threats such as boat wakes and transgression due to sea level rise, (c) permit guidelines, and (d) the impacts of shoreline control devices. With the development of alternative shoreline techniques, outreach should be conducted in cooperation with contractors and engineers who generally design and implement erosion control projects.

(iv) **Development of Estuarine Shoreline Management Plans** – When additional information is available on the status of estuarine shorelines, the state should consider development of broader Estuarine Shoreline Management Plans. Through local and subregional research, mapping, and planning efforts, local governments should partner with DHEC-OCRM to evaluate areas where bulkheads would have unacceptable secondary or cumulative impacts to estuarine ecosystems, public access, recreational opportunities, or other values. The mechanism could be similar to that used for Local Comprehensive Beach Management Plans under the Beachfront Management Act. In this case, an estuarine shoreline management plan could be used to address cumulative impacts, and to designate which shoreline control devices are appropriate and where they should be used.

DHEC-OCRM should serve as lead for most of the background data collection, including erosion rates and shoreline characterization. This should be done in coordination with partners, including federal agencies and universities. Information gathered should be made available to landowners, contractors, local governments and other interested parties.

## **2) Promote alternatives to traditional erosion control approaches.**

Alternatives to traditional bulkheads and rip-rap exist and can help minimize estuarine shoreline erosion while maintaining the natural characteristics of estuarine ecosystems. These include, among others, marsh plantings, intertidal oyster reef restoration, and offshore sills. Promoting these techniques in appropriate situations can limit the impact of shore erosion control on natural systems while enabling protection of upland structures. The following steps should be taken to develop and promote alternatives to traditional shore erosion control:

(i) Implement Pilot Projects - South Carolina’s sheltered shorelines vary from many of the areas across the country that have started to implement non-structural and living shoreline methods. In particular, the state’s greater tidal ranges could make use of some techniques challenging. As such, it is recommended that a series of pilot projects be built

and monitored under different ecological conditions across the state. Information gathered from these pilot projects will help to refine future policy, regulation, and permitting guidelines. Pilot projects should be promoted and supported by DHEC-OCRM and its partners, including permitting requests. Actual on-the-ground projects could be led/coordinated with/by DHEC-OCRM or other partners, including but not limited to DNR, land owners, NGOs, local governments, federal agencies and universities. Mechanisms should be put in place to track and monitor pilot projects in order to develop a set of South Carolina specific principles for alternative shoreline control methodology.

(ii) Evaluate and Revise Regulations and Permit Guidelines - Upon completion of pilot studies and other research and mapping efforts, DHEC-OCRM should consider what modifications to shoreline regulations and permitting guidelines might be necessary to incorporate alternative methodologies into state policy and management. The specifics of the changes will be dependent on pilot project outcomes, but could include requiring that all permit applicants demonstrate that alternative methods are (or are not) feasible or creating incentives to support non-structural shore erosion techniques. There is also the potential that local governments could choose to develop regulations, for instance, through overlay zones.

## **E. EXISTING POLICIES AND PROGRAMS**

Existing policies for estuarine bulkheads are found in section R.30-12.C of DHEC-OCRM's Critical Area Permitting Regulations, as follows:

### **C. Bulkheads and Revetments (Rip-rap) (Other than ocean front, as covered under R.30-13(N)):**

(1) In an attempt to mitigate certain environmental losses that can be caused by these structures, the following standards are adopted:

(a) Structures must be designed to conform to the critical area line (upland boundary), to the maximum extent feasible, and constructed so that reflective wave energy does not destroy stable marine bottoms or constitute a safety hazard;

(b) Structures may be constructed up to 18 inches from the existing escarpment. In situations where this is not feasible, Department staff will determine the location of the bulkhead or revetment on a site by site basis;

(c) Bulkheads and revetments will be prohibited where marshlands are adequately serving as an erosion buffer, where adjacent property could be detrimentally affected by erosion, sedimentation, or where public access is adversely affected unless upland is being lost due to tidally induced erosion.;

(d) Bulkheads and revetments will be prohibited where public access is adversely affected unless no feasible alternative exists.



Additionally, DHEC-OCRM has the authority to remove all erosion control structures which have an adverse effect on the public interest (SC Code § 48-39-120(C)).

#### South Carolina Water Quality Certification, Section 401

Any applicant for a federal permit or license for an activity which may result in a discharge to a “water of the US” must receive certification from DHEC that applicable state water quality standards will not be violated. The federal permit or license cannot be issued until certification is issued or waived and cannot be issued at all if certification is denied. Certification is required for activities permitted by the USACE for those activities that are subject to Section 404 of the Clean Water Act. Bulkheads are an example of an activity requiring a Corps permit.

Authorizing Statute: Section 401 of the Federal Water Pollution Control Act of 1972 (P.L. 92-500) as amended by the Clean Water Act of 1977 (P.L. 95-217) and the Water Quality Act of 1987 (P.L. 100-4).

#### Clean Water Act, Section 404

Section 404 of the Clean Water Act regulates proposed discharges into waters of the United States, including jurisdictional wetlands. Any proposed discharge of fill material into “waters of the United States” (including wetlands) requires authorization from the Army Corps of Engineers (USACE) and the State of South Carolina.

#### Rivers and Harbors Act, Section 10

Section 10 of the Rivers and Harbors Act regulates the construction, excavation, or deposition of material in, over, or under “navigable waters of the US,” or any work which would affect the “course, location, condition, or capacity” of those waters.

## **F. GENERAL COSTS AND BENEFITS**

- a) ***Develop a knowledge-base for understanding of estuarine shoreline dynamics and processes, including human impacts and implications of sea level rise.***
  - Costs to conduct research and surveys
- b) ***Strengthen existing rules governing estuarine bulkheads.***
  - One benefit would be the enabled landward migration of estuarine marshes beyond the critical area line.
- c) ***Promote alternatives to traditional erosion control approaches.***
  - Erosion control costs per foot Maryland – nonstructural (\$50-100), hybrid (\$150-500), structural (\$500-1200).
  - Costs to the property owner would be dependent on the nature of the regulations to be added.
  - It is currently easier/quicker to obtain a permit for a traditional bulkhead rather since an alternative may require additional or unfamiliar review.

- Ecosystem services provided by techniques that enable habitat connectivity and migration?
- Alternatives to traditional bulkheads are likely to be of long-term benefit to both the state and the property owners, as maintenance and repairs of bulkheads are expected to be greater than costs associated with the alternatives.

## **G. MEASURES OF SUCCESS**

- Regulations modified to include bulkhead setback with additional criteria for construction.
- Database completed for estuarine erosion rates and current hardened shorelines.
- Permit guidelines changed to promote alternative techniques
- Percent of critical area permits that use nonstructural shoreline control techniques
- Number of marine contractors trained in nonstructural and living shoreline techniques

## **H. FEASIBILITY ISSUES**

Enacting these recommendations in an effective manner is dependent on state and local government interest and commitment.

Requires good scientific information on both the status of estuarine shorelines and the suitability of nonstructural and hybrid techniques in a variety of environments. Gaining this information could be costly.

Desire to maintain private property may challenge implementation of newer techniques.

Varying costs of techniques – if structural methods are less expensive and have been proven effective in minimizing erosion, how do you promote or incentivize alternatives?

Review of regulations to see if current permits make living shorelines harder to permit. It is a challenge to permit living shorelines in GA, but this analysis has not been completed for SC.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

These recommendations are subject to the nature of the jurisdiction of DHEC-OCRM, and may be unattainable if they are applied to lands that lie outside of DHEC-OCRM's critical line jurisdiction.

Estuarine shoreline change analysis must take place to justify the 50' or other value assigned to standard bulkhead setbacks to account for future sea level rise given local differences in geomorphology.

Feasibility and likely success of implementing nonstructural and/or living shorelines along SC estuarine shoreline is unknown.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### *Alternative Estuarine Shoreline Stabilization in South Carolina*

The following is a list of past and present alternative estuarine shoreline stabilization projects that have been implemented in South Carolina:

- An alternative shoreline stabilization project at the North Inlet-Winyah Bay National Estuarine Research Reserve (NERR) used a cellular concrete mat system sold under the brand name Armorflex© (by Contech Construction Products) along a 150 ft estuarine shoreline that had 40 ft of highly erosional area. Coastal EcoScapes produced native vegetation that was planted in April 2008. Monitoring for water quality, oyster recruitment, and biomass vegetation surveys will be conducted over three years.
- The SC Oyster Restoration Project established twenty-four field sites between 2001 and 2003, and monitoring from seven of these sites indicates that polypropylene mesh bags filled with shell help to stabilize the shoreline. Reef development and success occurred after two years, and the project included extensive public outreach and education (Hadley, 2007). Construction of an expanded oyster reef resulted in 8 m of marsh growth for a previously eroding tidal creek shoreline in Palmetto Islands County Park (Coen and Hadley, 2005).
- In 1996, 1,080 bushels of oyster shells were distributed along 350 ft of Hobcaw Creek in Charleston Harbor to examine shoreline erosion suppression. Three treatment areas (polypropylene netting, reinforcing wire and uncovered) examined shell stability. Initial bi-monthly sampling indicated the uncovered areas were more conducive to propagating vertical intertidal oyster populations. However, maintenance planting (adding additional shells) is necessary in high wave energy environments (Anderson, 1997; Anderson, pers. comm.).
- In 2007, an eroding tidal marsh in Hilton Head Island, SC, was the site of marsh restoration efforts that included installing stabilizing structures, planting about 1.5 acres of *Spartina spp.*, and using the fill material. The project also includes a physical monitoring program and potential project related effects.

Maryland – Shorelines Online, Erosion Rates and Categorization

Virginia – Living Shoreline Program, Shore Erosion Advisory Service

North Carolina – CZM program and demonstration projects

Washington – Shoreline Management Act/Shoreline Masters Program (local governments develop shoreline plans)

## **K. BARRIERS OR CONCERNS**

None identified.

## ***Recommendation 13 – Establish Non-Beachfront Shoreline Buffer Areas***

### **A. GENERAL RECOMMENDATION**

Shoreline “buffers” offer a number of significant benefits, including water quality improvements, erosion control, wildlife habitat, improved aesthetics, recreational opportunities (e.g. low-impact trail systems), and possibly storm damage reduction. This policy recommendation suggests that a 25-foot minimum vegetated buffer requirement should be established for all new non-beachfront shoreline developments in the South Carolina coastal zone. The Committee recognizes that a number of coastal communities have already taken the lead in establishing shoreline buffer requirements, and encourages other local governments to consider adopting similar ordinances.

### **B. RATIONALE**

Development within the coastal counties along the shorelines of estuaries is growing at a rapid pace. The demand for water-front property is high and shoreline property commands premium prices. Rising sea levels, coastal storms accompanied by high tides and waves, and recreational activities (vessel wake) can cause increased erosion along these shorelines. Combined with the clearing of natural vegetation for lawns to extend to the water, there is no protection for the banks against wave action and other sources of shoreline erosion. Natural vegetation buffer zones provide a root system to hold the bank in place, absorb nutrients and other pollutants, slow stormwater runoff to less erosive velocities, and mitigate increased sediment loading.

There are adverse impacts to the estuaries due to increased development. Increased stormwater runoff from impervious land use, combined with enriched or polluted waters draining pervious surfaces, such as treated lawns and golf courses, is discharging into our estuaries. This runoff contains nitrogen and phosphorus, which are acceptable in moderate concentrations but turn into pollutants when they become overabundant in the environment. Stormwater runoff also contains sediment from erosion of soils as water flows across disturbed and unvegetated areas. This sediment is affecting fish, shrimp and oyster habitat.

Estuarine and lagoon shores account for the longest stretches of eroding shoreline in the Southeast Atlantic region (National Assessment of Shoreline Change, USGS Open File Report 2005-1401). Much of South Carolina’s marsh system may be lost to sea level rise unless it can migrate landward, and one group of researchers found that “a three-foot rise in sea level would result in a net loss of about 50 percent of the marsh in the Charleston area;” Morris et al., 2002). The primary impediment to managed retreat or landward migration of wetlands under sea level rise is not just the construction of buildings, but the holding back of the sea through seawalls or bulkheads and their associated fill. Providing a buffer zone along the marsh will allow space for this migration. A report from the National Academy of Sciences (NRC, 2002) recently identified protection and restoration of riparian areas as a national priority.

## C. NEW POLICY RECOMMENDATIONS

- a) **Establish a minimum vegetated buffer zone, extending 25 feet inland from the DHEC-OCRM Critical Line boundary, for all new developments along non-beachfront shorelines within the coastal zone.**

All new development, including single family homes, would be required to include a vegetated buffer zone. The area within the buffer should not be cleared or altered from its natural vegetated state, unless low-impact recreational uses (low-impact trails) and minimal limb clearing to expand viewsheds are determined to be acceptable by DHEC-OCRM. No shore protection structures, such as bulkheads or riprap, should be allowed within the buffer zone (and seaward of the buffer) for new developments; and all existing development should also be prohibited from placing new hard structures within the 25-foot buffer zone, even if it has been cleared of all natural vegetation (this would preclude the need for the bulkhead setback area described in Recommendation #12).

A law requiring a statewide buffer zone in the coastal zone and designating DHEC-OCRM as the implementing agency would be needed. This would require a legislative action possibly amending the Coastal Tidelands and Wetlands Act (SC Code Ann. § 48-39-10 et seq.) to expand DHEC-OCRM's jurisdiction to include a 25' buffer area inland and adjacent to the Critical Area. Statutory changes would require legislative action by the South Carolina General Assembly.

New buffer regulations would be required and would need approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing or new statutes.

- b) **For previously developed properties, state tax incentives or credits should be considered for property owners who re-establish, certify, and deed restrict riparian/estuarine buffers on their property, and/or record "rolling easements" that allow unimpeded, natural shoreline migration.**

## D. NEW PLANNING AND MANAGEMENT ACTIONS

- 1) **Coastal communities should be encouraged to adopt shoreline buffer ordinances that are more stringent than the state buffer zone requirement.**

DHEC-OCRM should guide local governments' development of buffer ordinances, based on lessons learned by coastal communities with existing buffer ordinances.

## **E. EXISTING POLICIES AND PROGRAMS**

The Ashley River Special Area Management Plan (SAMP) includes a shoreline buffer policy of 100 ft to preserve historic shoreline views while allowing 30% selective clearing.

SCDHEC-OCRM stormwater guidelines require a 20 ft buffer between golf courses and water, and recommends 35 to 50 ft buffers to protect water quality and quantity.

DHEC published a pamphlet entitled “Vegetated Riparian Buffers and Buffer Ordinances”. The purpose of this pamphlet is to provide basic information on riparian buffers. It is also intended as a general resource for local policy makers who are considering the creation of buffers or greenways in their communities.

See examples of existing local buffer ordinances in the Goal 4 Overview section.

## **F. GENERAL COSTS AND BENEFITS**

Benefits would be hard to quantify but would include: improved water quality, ecosystem diversity, habitat protection and restoration, erosion reduction, prevention of sediment loading in waters, recreational benefits, aesthetic appeal, increased property values, and storm surge protection.

Buffers could provide a credit for meeting stormwater requirements related to site design under the DHEC Standards for Stormwater Management and Sediment Reduction.

## **G. MEASURES OF SUCCESS**

- Improvements in coastal water quality.
- Increase in fisheries, shellfish, and other commercial revenue sources.
- A decreased rate of shoreline hardening of non-beachfront shorelines in the coastal zone.

## **H. FEASIBILITY ISSUES**

South Carolina has been trying for almost 10 years to get a statewide buffer zone law passed. Private property rights advocates will fight restrictions on the use of property. However, this buffer recommendation focuses on the coastal zone and the Committee believes is feasible given that several coastal communities have already adopted more stringent buffer ordinances.

## **I. KEY UNCERTAINTIES/ASSUMPTIONS**

The optimum buffer zone width is uncertain due to site-specific characteristics such as adjacent land use and shoreline stability.

## **J. EXAMPLES FROM OTHER STATES OR AREAS**

### ***North Carolina***

The North Carolina Coastal Shoreline Buffer Rules (15A NCAC 07H .0209) require a 30-foot buffer for new coastal shoreline development, and a 50-foot buffer for select waterways.

The Neuse Riparian Area Rule (15A NCAC 2B .0233) requires a 50-foot buffer along all perennial and intermittent streams, lakes, ponds, and estuaries (but not wetlands) in the Neuse River Basin. 50-foot stream buffers are measured horizontally along lines perpendicular to the sides of surface waters, which typically begin at the top of the stream banks. The 50-foot Neuse buffer is divided into two zones: Zone 1 (the inner 30 feet, closest to the surface water) is to remain undisturbed in its natural state; Zone 2 (the outer 20 feet) must be vegetated. Minor grading is allowed in Zone 2, provided that diffuse flow and the health of the existing vegetation in Zone 1 is not compromised. No fertilizer may be used in either zone, other than a one-time application to establish replanted areas after minor grading and when additional plantings are installed to enhance the buffer's functionality.

### ***Georgia***

Georgia requires 50-foot buffers under the Coastal Marshlands Protection Act. The rule allows exceptions and hardships, requires stormwater management plan submittals, and attempts to have only 15% effective impervious cover within the buffer zone when possible.

## **K. BARRIERS OR CONCERNS**

While the Committee unanimously supports the general recommendation to establish a non-beachfront shoreline buffer zone for new developments in the coastal zone, the Committee did not reach full agreement on one of the specific sub-recommendations:

- a) Committee members debated whether the zone should be based on an average of 25 feet in width, or based on a 25-foot line that parallels nonlinear shorelines. For example, where small channels or creeks intrude into shoreline parcels, parallel buffer lines would be drawn inland a significant distance to account for those intrusions. Alternatively, in using an "averaging" method, a property owner could clear significant portions of a lot right up to the waterline in exchange for deeper buffers in other parts of the lot, which would be inconsistent with the purposes of a 25-foot minimum buffer.

Some committee members suggested that the final buffer distances should be based on scientific studies, ecological impact analyses, development projections, private property rights, and best practices for preserving a rationale buffer distance.

# Appendix 1. South Carolina Beachfront Management Act (as amended)

## TITLE 48 – ENVIRONMENTAL PROTECTION AND CONSERVATION

### CHAPTER 39

#### COASTAL TIDELANDS AND WETLANDS

**SECTION 48-39-250.** Legislative findings regarding the coastal beach/dune system.

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this state and serves the following functions:

(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

(d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system.

Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.



(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also may deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

**SECTION 48-39-260. Policy statement.**

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;

(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the department which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

**SECTION 48-39-270. Definitions.**

As used in this chapter:

(1) Erosion control structures or devices include:

(a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;

(b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;

(c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

(2) Habitable structure means a structure suitable for human habitation including, but not limited to, single or multifamily residences, hotels, condominium buildings, and buildings for commercial purposes. Each building of a condominium regime is considered a separate habitable structure but, if a building is divided into apartments, then the entire building, not the individual apartment, is considered a single habitable structure. Additionally, a habitable structure includes porches, gazebos, and other attached improvements.

(3) Department means the Department of Health and Environmental Control.

(4) Beach nourishment means the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide.

(5) The beach/dune system includes all land from the mean highwater mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280.

(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced directly by tidal inlets or associated inlet shoals.

(7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

(8) Master plan means a document or a map prepared by a developer or a city as a policy guide to decisions about the physical development of the project or community.

(9) Planned development means a development plan which has received local approval for a specified number of dwelling and other units. The siting and size of structures and amenities are specified or restricted within the approval. This term specifically references multifamily or commercial projects not otherwise referenced by the terms, master plan, or planned unit development.

(10) Planned unit development means a residential, commercial, or industrial development, or all three, designed as a unit and approved by local government.

(11) Destroyed beyond repair means that more than sixty-six and two-thirds percent of the replacement value of the habitable structure or pool has been destroyed. If the owner disagrees with the appraisal of the department, he may obtain an appraisal to evaluate the damage to the building or pool. If the appraisals differ, then the two appraisers must select a third appraiser. If the two appraisers are unable to select a third appraiser, the clerk of court of the county where the structure lies must make the selection. Nothing in this section prevents a court of competent jurisdiction from reviewing, de novo, the appraisal upon the petition of the property owner.

(12) Pool is a structure designed and used for swimming and wading.

(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, whichever first occurs, measured from the ocean.

**SECTION 48-39-280.** Forty-year retreat policy.

(A) A forty-year policy of retreat from the shoreline is established. The department must implement this policy and must utilize the best available scientific and historical data in the implementation. The department must establish a baseline which parallels the shoreline for each standard erosion zone and each inlet erosion zone.

(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other manmade alterations, the baseline must be established by the department using the best scientific and historical data, as where the crest of the primary oceanfront sand dunes for that zone would be located if the shoreline had not been altered.

(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors, must consider: historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dunes of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.

(4) Notwithstanding any other provision of this section, where a department-approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition an administrative law judge to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the department in accordance with Section 48-39-280(A)(1) by showing that the beach has been stabilized by department-approved beach nourishment. If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future. If the administrative law judge grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after the initial beach nourishment project has been completed as determined by the department. If the beach nourishment fails to stabilize the beach

after a reasonable period of time, the department must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach. Any appeal of an administrative law judge's decision under this section may be made pursuant to Title 23 of Chapter 1.

(B) To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan.

(C) The department, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1998, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision. In the establishment and revision of the baseline and setback line, the department must transmit and otherwise make readily available to the public all information upon which its decisions are based for the establishment of the final baseline and setback line. The department must hold one public hearing before establishing the final baseline and setback lines. Until the department establishes new baselines and setback lines, the existing baselines and setback lines must be used. The department may stagger the revision of the baselines and setback lines of the erosion zones so long as every zone is revised in accordance with the time guidelines established in this section.

(D) In order to locate the baseline and the setback line, the department must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department must acquire sufficient surveyed topographical information on which to locate the baseline. Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered. The department, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on the coastline which would preclude significant development, or both.

(E) A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the department board in accordance with Section 44-1-60 and the final decision of the board may be appealed to the Administrative Law Court as provided in Chapter 23 of Title 1.

**SECTION 48-39-290.** Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

(A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty-four square feet;

(3) fishing piers which are open to the public. Those fishing piers with their associated structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) golf courses;

(5) normal landscaping;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device;

(8) existing groins may be reconstructed, repaired, and maintained. New groins may only be allowed on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed and existing groins may be reconstructed only in furtherance of an on-going beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:

(a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:

(i) establishment of new monuments;

(ii) determination of the annual volume and transport of sand; and

(iii) annual aerial photographs.

Subsequent monitoring requirements must be based on results from the first five-year report.

(b) Groins may only be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subsection (c).

(c) If the monitoring program established pursuant to subsection (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department must require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the pre-construction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.

(d) Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project.

(e) Nothing in the section shall be construed to create a private cause of action, but nothing in this section shall be construed to limit a cause of action under recognized common law or other statutory theories. The sole remedies, pursuant to this section, are:

(i) the reconstruction or removal of a groin; and/or

(ii) restoration of the adversely affected beach and adjacent real estate through renourishment pursuant to subsection (c).

An adjacent or downdrift property owner that claims a groin has caused or is causing an adverse impact shall notify the department of such impact. The department shall render an initial determination within sixty (60) days of such notification. Final agency action shall be rendered within twelve months of notification. An aggrieved party may appeal the decision pursuant to the Administrative Procedures Act.

A permit must be obtained from the department for items (2) through (8).

(B) Construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the department that the construction meets the following requirements:

(i) The habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the department showing a footprint of the structure on the property, a cross section of the structure, and the structure's relation to property lines and setback lines which may be in

effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the department.

(ii) Additions to habitable structures are allowed if the additions together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a).

(iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed.

(iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the department that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback line. The linear footage of the replaced structure parallel to the coast does not exceed the original linear footage parallel to the coast.

b. The replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. The reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48-39-250 through 48-39-360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possible, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.



(b) Erosion control structures or devices which existed on the effective date of this act must not be repaired or replaced if destroyed:

(i) more than eighty percent above grade through June 30, 1995;

(ii) more than sixty-six and two-thirds percent above grade from July 1, 1995, through June 30, 2005;

(iii) more than fifty percent above grade after June 30, 2005.

(iv) Damage to seawalls and bulkheads must be judged on the percent of the structure remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or device standing, cracked or broken piles, whalers, and panels must be assessed on an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the department, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired.

(c) Erosion control structures or devices determined to be destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner's expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) The provisions of this section do not affect or modify the provisions of Section 48-39-120(C).

(e) Subitem (a) does not apply to a private island with an Atlantic Ocean shoreline of twenty thousand, two hundred ten feet of which twenty thousand, ninety feet of shoreline is revetted with existing erosion control devices and one hundred twenty feet of shoreline is not revetted with existing erosion control devices. Nothing contained in this subitem makes this island eligible for beach renourishment funds.

(3) Pools, as defined in Section 48-39-270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is built landward of an erosion control structure or device which was in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the department.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the department pursuant to Section 48-39-270(11), it may be replaced if the owner certifies in writing to the department that:

(i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements.

(ii) It is rebuilt no larger than the destroyed pool.

(iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the department pursuant to Section 48-39-270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to sub-subitem (iii) of subitem (c).

(4) All other construction or alteration between the baseline and the setback line requires a department permit. However, the department, in its discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of Sections 48-39-250 through 48-39-360.

(C)(1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48-39-280 may proceed with construction pursuant to a valid building permit issued as of the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidenced by at least one of the following:

(a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the completion of the utility and infrastructure installation designed to service the real property that is subject to the setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the department.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the department may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the department orders the removal. However, the use of the property authorized under this provision, in the determination of the department, must not be detrimental to the public health, safety, or welfare.

(2) The department's Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360.

(4) A party aggrieved by the decision to grant or deny a special permit application may appeal pursuant to Section 48-39-150(D).

(E) The provisions of this section and Section 48-39-280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds. The baseline determined by the local governing body and the department is the line of erosion control

devices and structures and the department retains its jurisdiction seaward of the baseline. In addition, upon completion of a department approved beach renourishment project, including the completion of a sand transfer system if necessary for long-term stabilization, an area under a Section 111 Study becomes subject to all the provisions of this chapter. For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration project is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one-half miles, with a project design capable of withstanding a one-in-ten-year storm, as determined by department, and renourishment is conducted annually at a rate, agreed upon by the department and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the department must obtain the opinion of an independent third party. Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.

**SECTION 48-39-300.** Local governments given authority to exempt certain erosion control structures from restrictions.

A local governing body, if it notifies the department before July 1, 1990, may exempt from the provisions of Section 48-39-290, relating to reconstruction and removal of erosion control devices, the shorelines fronting the Atlantic Ocean under its jurisdiction where coastal erosion has been shown to be attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the Rivers and Harbors Act of 1968, as amended by the Water Resources Development Act of 1986 and approved by the United States Army Corps of Engineers. Erosion control devices exempt under this section must not be constructed seaward of their existing location, increased in dimension, or rebuilt out of materials different from that of the original structure.

**SECTION 48-39-305.** Judicial determination of ownership and whether construction prohibition applies or requires compensation; burden of proof.

(A) A person having a recorded interest or interest by operation of law in or having registered claim to land seaward of the baseline or setback line which is affected by the prohibition of construction or reconstruction may petition the circuit court to determine whether the petitioner is the owner of the land or has an interest in it. If he is adjudged the owner of the land or to have an interest in it, the court shall determine whether the prohibition so restricts the use of the property as to deprive the owner of the practical uses of it and is an unreasonable exercise of police power and constitutes a taking without compensation. The burden of proof is on the petitioner as to ownership, and the burden of proof is on the State to prove that the prohibition is not an unreasonable exercise of police power.

(B) The method provided in this section for the determination of the issue of whether the prohibition constitutes a taking without compensation is the exclusive judicial determination of

the issue, and it must not be determined in another judicial proceeding. The court shall enter a judgment in accordance with the issues. If the judgment is in favor of the petitioner, the order must require the State either to issue the necessary permits for construction or reconstruction of a structure, order that the prohibition does not apply to the property, or provide reasonable compensation for the loss of the use of the land or the payment of costs and reasonable attorney's fees, or both. Either party may appeal the court's decision.

**SECTION 48-39-310.** Prohibition of destruction of any beach or dune vegetation seaward of setback line.

The destruction of beach or dune vegetation seaward of the setback line is prohibited unless there is no feasible alternative. When there is destruction of vegetation permitted seaward of the setback line, mitigation, in the form of planting of new vegetation where possible, for the destruction is required as part of the permit conditions.

**SECTION 48-39-320.** Comprehensive beach management plan.

(A) The department's responsibilities include the creation of a long-range and comprehensive beach management plan for the Atlantic Ocean shoreline in South Carolina. The plan must include all of the following:

(1) development of the data base for the state's coastal areas to provide essential information necessary to make informed and scientifically based decisions concerning the maintenance or enhancement of the beach/dune system;

(2) development of guidelines and their coordination with appropriate agencies and local governments for the accomplishment of:

(a) beach/dune restoration and nourishment, including the projected impact on coastal erosion rates, cost/benefit of the project, impact on flora and fauna, and funding alternatives;

(b) development of a beach access program to preserve the existing public access and enhance public access to assure full enjoyment of the beach by all residents of this State;

(c) maintenance of a dry sand and ecologically stable beach;

(d) protection of all sand dunes seaward of the setback line;

(e) protection of endangered species, threatened species, and important habitats such as nesting grounds;

(f) regulation of vehicular traffic upon the beaches and the beach/dune system which includes the prohibition of vehicles upon public beaches for nonessential uses;

(g) development of a mitigation policy for construction allowed seaward of the setback line, which must include public access ways, nourishment, vegetation, and other appropriate means;

(3) formulation of recommendations for funding programs which may achieve the goals set forth in the State Comprehensive Beach Management Plan;

(4) development of a program on public education and awareness of the importance of the beach/dune system, the project to be coordinated with the South Carolina Educational Television Network and Department of Parks, Recreation and Tourism;

(5) assistance to local governments in developing the local comprehensive beach management plans.

(B) The plan provided for in this section is to be used for planning purposes only and must not be used by the department to exercise regulatory authority not otherwise granted in this chapter, unless the plan is created and adopted pursuant to Chapter 23 of Title 1.

**SECTION 48-39-330.** Disclosure statement.

Thirty days after the initial adoption by the department of setback lines, a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plane Coordinate System (N.A.D.-1983) and include the local erosion rate most recently made available by the department for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.

The provisions of this section are regulatory in nature and do not affect the legality of an instrument violating the provisions.

**SECTION 48-39-340.** Distribution of funding.

Funding for local governments to provide for beachfront management must be distributed in a fair and equitable manner. Consideration must be given to the size of the locality, the need for beach management in the area, the cost/benefits of expenditures in that area, and the best interest of the beach/dune system of the State as established by priority by the department.

**SECTION 48-39-345.** Coastal Division of DHEC to administer funds reimbursed to nonfederal project sponsors under local cooperative agreement with Army Corps of Engineers for cost-shared beach renourishment project.

Any funds reimbursed to nonfederal project sponsors under the terms of a Local Cooperative Agreement (LCA) with the Army Corps of Engineers for a federally cost-shared beach renourishment project, where the reimbursement is for credit to the nonfederal sponsor for federally approved effort and expenditures toward the nonfederal project sponsor obligations detailed in the LCA and where the State has provided funding to the nonfederal sponsor to meet the financial cost-sharing responsibilities under the LCA, must be refunded by the nonfederal

sponsor to the State with the State and the nonfederal sponsor sharing in this reimbursement in the same ratio as each contributed to the total nonfederal match specified in the LCA. The Coastal Division of the South Carolina Department of Health and Environmental Control shall administer these funds and make these funds available to other beach renourishment projects.

**SECTION 48-39-350.** Local comprehensive beach management plan.

(A) The local governments must prepare by July 1, 1991, in coordination with the department, a local comprehensive beach management plan which must be submitted for approval to the department. The local comprehensive beach management plan, at a minimum, must contain all of the following:

- (1) an inventory of beach profile data and historic erosion rate data provided by the department for each standard erosion zone and inlet erosion zone under the local jurisdiction;
- (2) an inventory of public beach access and attendant parking along with a plan for enhancing public access and parking;
- (3) an inventory of all structures located in the area seaward of the setback line;
- (4) an inventory of turtle nesting and important habitats of the beach/dune system and a protection and restoration plan if necessary;
- (5) a conventional zoning and land use plan consistent with the purposes of this chapter for the area seaward of the setback line;
- (6) an analysis of beach erosion control alternatives, including renourishment for the beach under the local government's jurisdiction;
- (7) a drainage plan for the area seaward of the setback zone;
- (8) a post disaster plan including plans for cleanup, maintaining essential services, protecting public health, emergency building ordinances, and the establishment of priorities, all of which must be consistent with this chapter;
- (9) a detailed strategy for achieving the goals of this chapter by the end of the forty-year retreat period. Consideration must be given to relocating buildings, removal of erosion control structures, and relocation of utilities;
- (10) a detailed strategy for achieving the goals of preservation of existing public access and the enhancement of public access to assure full enjoyment of the beach by all residents of this State. The plan must be updated at least every five years in coordination with the department following its approval. The local governments and the department must implement the plan by July 1, 1992.

(B) Notwithstanding the provisions of Section 48-39-340, if a local government fails to act in a timely manner to establish and enforce a local coastal beach management plan, the department

must impose and implement the plan or the State Comprehensive Beach Management Plan for the local government. If a local government fails to establish and enforce a local coastal beach management plan, the government automatically loses its eligibility to receive available state-generated or shared revenues designated for beach/dune system protection, preservation, restoration, or enhancement, except as directly applied by the department in its administrative capacities.

**SECTION 48-39-355.** Documentation of authorized activity.

A permit is not required for an activity specifically authorized in this chapter. However, the department may require documentation before the activity begins from a person wishing to undertake an authorized construction or reconstruction activity. The documentation must provide that the construction or reconstruction is in compliance with the terms of the exemptions or exceptions provided in Sections 48-39-280 through 48-39-360.

**SECTION 48-39-360.** Application of chapter.

The provisions of Sections 48-39-250 through 48-39-355 do not apply to an area which is at least one-half mile inland from the mouth of an inlet.



## Appendix 2. Policy and Management Recommendations Matrix

MINIMIZING RISKS		Sub-Policy	BMA	REG	OCRM	State	Local
<b>1) Prevent the Seaward Expansion of Beachfront Development</b>	Disallow seaward movement of the DHEC-OCRM Baseline	<b>X</b>	<b>X</b>				
	Local governments should establish a beachfront building line			<b>X</b>			<b>X</b>
	Re-survey public/private boundary prior to renourishment	<b>X</b>		<b>X</b>			
<b>2) Strengthen the Beachfront Setback Area</b>	Increase the minimum setback distance	<b>X</b>	<b>X</b>				
	Align setback regulations with statutes regarding size limitations		<b>X</b>				
	Evaluate all historical shorelines and short-term variability in unstabilized inlet zones	<b>X</b>	<b>X</b>	<b>X</b>			
	Limit building in the most vulnerable beachfront areas, particularly seaward of the DHEC-OCRM Baseline	<b>X</b>	<b>X</b>	<b>X</b>			<b>X</b>
	Enhance protection of dunes outside of “beach/dune system”	<b>X</b>	<b>X/PD</b>	<b>X</b>			<b>X</b>
<b>3) Eliminate Inconsistent Public Subsidies</b>	State should designate “no subsidy” zones in hazardous areas	<b>X</b>				<b>X</b>	
<b>4) Strategically Acquire Beachfront Lands and/or Easements</b>	Establish state and local voluntary acquisition strategies			<b>X</b>		<b>X</b>	<b>X</b>
	Explore and expand funding mechanisms for voluntary acquisitions, including a state “beach management” trust fund	<b>X</b>		<b>X</b>		<b>X</b>	<b>X</b>
<b>5) Strengthen the Role of Local Gov’ts</b>	Develop stronger guidance, new elements, and OCRM assistance for Local Comprehensive Beach Management Plans	<b>X</b>	<b>X</b>	<b>X</b>			
	Integrate planning requirements for beachfront communities			<b>X</b>		<b>X</b>	<b>X</b>
<b>RENOURISHMENT</b>							
<b>6) Develop and Implement Regional Sediment Management Plans</b>	State should develop and implement a regional sediment mgmt. plan in cooperation with U.S. Army Corps of Engineers			<b>X</b>			<b>X</b>
<b>7) Strengthen Reviews of Nearshore Dredging and Other Alterations</b>	Heightened reviews and monitoring of any projects within 1 mile		<b>X</b>	<b>X</b>			
	Establish Technical Committee to recommend new criteria		<b>X</b>	<b>X</b>			
<b>8) Improve Beach Nourishment Monitoring</b>	Require pre- and post-monitoring for all nourishment projects			<b>X</b>			
	Standardize, to the extent possible, data collected and methods			<b>X</b>			

HARD STABILIZATION STRUCTURES		Sub-Policy	BMA	REG	OCRM	State	Local
9) Refine Criteria for Emergency Orders and Sandbags	Establish new criteria for “emergency” – e.g. disaster declarations	X	X				
	Establish new design criteria for temporary structures (sandbags)		X	X			
10) Improve Guidelines for Groins and Breakwaters	Establish Technical Committee to recommend siting/design criteria		X	X			
	Leverage additional expertise in review of groin/BW proposals			X			
	Identify ownership / responsibility for all existing groins			X			
11) Expand Beachfront Real Estate Disclosure Requirements	Expand R/E disclosure requirements for approval by SC REC			X		X	
<b>“SHELTERED” COASTLINES</b>							
12) Manage Erosion Control in Estuaries	Map and characterize estuarine shorelines			X		X	
	Develop “erosion control options table” for different shorelines			X			
	Expand education, training for property owners, consultants			X		X	
	Develop Estuarine Shoreline Mgmt. Plans at state and local levels	X		X		X	X
	Promote alternatives to traditional bulkheads/revetments			X			
	Establish minimum setback for bulkheads		X				X
	Differentiate “transgression” from erosion in OCRM decisions			X			
	Require analysis of alt. stabilization for undeveloped properties		X				
13) Establish Non-Beachfront Shoreline Buffer Areas	Establish 25-ft min. buffer for nonbeachfront shorelines in CZ	X	X				
	State tax incentives or credits could be considered for buffers					X	
	Encourage local gov’ts to establish / expand shoreline buffers			X			X

**BMA = may require amendment to Beachfront Mgmt Act; REG = requires new or change to OCRM regulations; PD = requires amendment to SC Coastal Program Document; OCRM = requires implementation by DHEC-OCRM staff; STATE = implementation through other state agency or statute; LOCAL = requires implementation by local government.**

### Appendix 3. Summary of Public Comments and Committee Responses / Clarifications

The Draft Report of the Shoreline Change Advisory Committee was made available for public comments during a period from November 6, 2009 through February 5, 2010. The Draft Report was downloaded a total of 31,625 times, and a total of 35 comment letters were received. The full and complete record of public comments on the Draft Report is available in a Supplement to this final report, upon request, from the SCDHEC Office of Ocean and Coastal Resource Management, and available for download (at the time of publication) from the following website: <http://www.scdhec.gov/environment/ocrm/>. The comments were categorized, summarized, and counted in this Appendix. The Committee chose to respond to some comments where it saw the opportunity to clarify the intent of the original text or address items that may have been misinterpreted.

TOPIC	COMMENT	COMMITTEE RESPONSES / CLARIFICATIONS
<i>General Support</i>	Letters indicating support for all 13 General Recommendations (15 received).	
<i>General Dissatisfaction</i>	Letters indicating general dissatisfaction (4 received).  The Beachfront Management Act has been a success and the recommendations in the report represent a significant shift from the original legislative findings and intent (1 comment).	
<i>Committee Composition and Process</i>	The work of the Committee in discussing these complex issues is relevant, timely, and appreciated (25 comments).  The composition of the Committee was heavily weighted toward government and academic members (2 comments).  Changes in beachfront management policy should be dictated by elected officials, not by agency personnel	<b>Response from DHEC-OCRM:</b> This was intended to be an expert Committee that leaned heavily on our state’s university and agency scientists. Other coastal stakeholders, with a broad range of backgrounds and expertise, were included on the Committee to ensure that the practicalities and implications of any recommendations were discussed and considered.  <b>Response from DHEC-OCRM:</b> DHEC routinely uses advisory committees to engage outside experts

	<p>and a volunteer committee for which there was no legislative oversight (1 comment).</p> <p>The relevancy of the expertise of some committee members was questioned (specifically related to coastal geology) (1 comment).</p> <p>The “stealth roll-out” of the draft report and short response time window demonstrated the intent to limit public input (1 comment).</p> <p>Beachfront property owners were excluded from the process (2 comments).</p>	<p>and stakeholders on contemporary research and policy issues. It has been over 20 years since the SC Beachfront Management Act called for the establishment of a statewide beach management program, and given the rapid coastal population growth and development during that period and continuing beachfront challenges and conflicts, it was the right time to reflect on state and local policies to improve upon the agency’s required state and local beach management plans.</p> <p>As acknowledged on pg. 30 and throughout the report: “Any regulatory changes would require approval from the DHEC Board for promulgation pursuant to the SC Admin. Procedures Act (SC Code Ann. § 1-23-10 et seq.), which requires review by the SC General Assembly, and must be authorized under existing statutes. Any statutory changes would require legislative action by the South Carolina General Assembly.”</p> <p><b>Response from DHEC-OCRM:</b> DHEC-OCRM staff acknowledge that the original one month window for public review was insufficient for a report of this magnitude, and immediately extended to a 90-day comment period upon request. Email notices and press releases were distributed statewide, and the draft report was downloaded over 30,000 times during the comment period.</p> <p><b>Response from DHEC-OCRM:</b> Please see text under the “Opportunities for Public Input” subheading on pp. 10-11, which includes a description of regional discussion forums where 27 people attended on behalf of 13 different beachfront Homeowners/Property Owners Associations.</p> <p><b><u>All responses and clarifications from this point forward are from the Shoreline Change Advisory Committee.</u></b></p>
<p><i>Content / Analysis under General Recommendations</i></p>	<p>The “Measures of Success” and “Key Uncertainties/Assumptions” sections of each</p>	

	<p>recommendation should be reconsidered, revised, and elaborated upon (1 comment).</p> <p>Pertinent text from local ordinances or other documents should be included directly in the report (1 comment).</p>	
<i>Planning Timeframes</i>	<p>The descriptors “short-term,” “mid-term,” and “long-term” need to be clarified throughout the report (1 comment).</p> <p>Coastal erosion is time- and space-specific, so a realistic frame of reference for planning purposes needs to be established (1 comment).</p> <p>Accelerated sea-level rise is of less importance to coastal erosion at decadal to century time scales than the effects of inlet sediment bypassing, storms, sand-trapping structures, and shoals (1 comment).</p>	
<i>Coordination</i>	<p>Coordination between all levels of government is needed to avoid conflicts between potential new state regulations and existing local and/or federal regulations (1 comment).</p> <p>The draft report fails to fully recognize the role that local governments can and must play in policy development and implementation (1 comment).</p>	<p>The Committee fully agrees that local governments can and should play a stronger role in shoreline management, as described in Recommendation #5 and throughout the report.</p>
<i>Education and Outreach</i>	<p>Public education activities are noticeably absent from this report (2 comments).</p>	
<i>Cost-Benefit Analysis</i>	<p>For many proposed recommendations, the report did not use cost-benefit analysis to quantify or analyze potential negative economic impacts (2 comments).</p>	<p>The Committee attempted to identify and broadly describe the potential economic costs and benefits associated with each recommendation. However, it was beyond the scope of the Committee to provide specific and detailed cost-benefit analysis. For</p>

	<p>Coastal stakeholders want to know how the recommendations in the report will affect properties and the coastal economy; not just the environment (3 comments).</p>	<p>many of the recommendations, any future study should further quantify nonmarket values, indirect economic benefits, and ecosystem services (for example, storm surge protection, water quality improvement, recreational uses, and enhanced public health and welfare) as well as direct impacts such as decreased property values of oceanfront lots.</p>
<p><i>Inlet Management</i></p>	<p>Changes associated with tidal inlets account for the majority of erosion problems in South Carolina (2 comments).</p> <p>Inlet Management Zones should be established (1 comment).</p> <p>The lack of discussion surrounding inlet shoal attachment, management, and erosion mitigation is a major deficiency in the report (1 comment).</p>	<p>The Committee agrees that tidal inlets play a key role in beachfront management in South Carolina and understands that, for example, inlet shoals are attractive sources of sand given cost benefits and the fact that some shoals can be reliably predicted to attach to downdrift beaches. However, given concerns about the potential for unintended consequences of some inlet management approaches, the Committee suggests that an ad hoc technical committee (see Recommendation #7) provide additional guidance to DHEC-OCRM on criteria, guidelines, and recommendations for such projects.</p>
<p><i>Goal 1: Minimizing Risks</i></p>	<p>The original intent and current implementation of the Beachfront Management Act’s “retreat policy” needs to be clarified (3 comments).</p> <p>The term “retreat policy” should be replaced with “stabilization policy” and renourishment should be the preferred response to erosion (1 comment).</p>	<p>From pg. 25 of the report:  “As currently constructed, the state’s retreat policy does not provide for the immediate, active relocation of structures from the beach/dune system; however, by gradually eliminating erosion control structures, it ensures abandonment of property to allow the natural, inland migration of a healthy beach/dune system, <b>if or when</b> renourishment becomes unsustainable for a specific area or community... In the meantime, the Committee urges state and local governments to enact policies to ensure that sufficient <b>space</b> is provided for the natural migration of the beach/dune system and that the related risks to private and public resources are minimized.”</p>

	<p>The proposed retreat policy would be detrimental to the SC economy, would hinder tourism, and would diminish property values (2 comments).</p> <p>Retreat is a viable option only in select instances (2 comments).</p>	
<p><i>Recommendation 1: Prevent the Seaward Expansion of Beachfront Development</i></p>	<p>Specific support expressed for Rec. #1 (5 letters).</p> <p>SC Code §48-39-120(B) should be clarified to include renourishment, in addition to natural accretion, as areas that cannot be developed if they extend beyond the original property line or boundary (1 comment).</p> <p>This recommendation appears to be more punitive than sensible (1 comment).</p> <p>Seaward movement of the DHEC-OCRM beachfront jurisdictional lines should continue to be allowed (2 comments).</p> <p>“Holding the line of existing development” should be a state regulation rather than a local ordinance to ensure coast-wide uniformity (2 comments).</p> <p>Many of the planning actions (on pages 30 and 31) are suited to vacant lands, but not to developed areas (2 comments).</p> <p>If the state’s desire is to prohibit any future seaward movement of the baseline, then it must adopt a different basis for establishing the baseline than the dune crest (1 comment).</p> <p>The current definition of a new primary sand dune (3 feet high, 500 feet long) is woefully deficient and should not serve as the basis for seaward baseline movement as dunes of this size offer little storm protection or</p>	

	<p>sediment supply to the beach (1 comment).</p> <p>It is generally difficult to receive enough points to change the FEMA Community Rating System class and reduce flood insurance premiums for a community (1 comment).</p> <p>The state should establish criteria for the evaluation of shoreline location accuracy (1 comment).</p>	
<p><i>Recommendation 2: Strengthen the Beachfront Setback Area</i></p>	<p>Specific support expressed for Rec. #2 (4 letters).</p> <p>Increasing the minimum setback line distance will cause more houses to enter into DHEC-OCRM’s beachfront permitting jurisdiction and render them valueless (3 comments).</p> <p>A phased implementation of this minimum setback distance should be considered (1 comment).</p> <p>Erosion rate variability should be incorporated into the calculation of the setback distance for all beaches; not just unstabilized inlet zones (1 comment).</p> <p>Implementing standard deviation or variance in inlet areas could result in impractically wide setbacks (1 comment).</p> <p>There are inconsistencies that need to be addressed between local flood ordinances and state post-storm reconstruction laws (1 comment).</p> <p>This recommendation could lead to difficulty in obtaining insurance, increased insurance cost, difficulty in obtaining mortgages, and the potential loss of property value (1 comment).</p>	<p>Development and redevelopment are allowed within the setback area. From pg. 36 of the report: “Building within the state’s beachfront ‘setback area’ is allowed, but any development is subject to specific regulations.”</p> <p>The Committee is not aware of any private insurance companies that have used state-designated erosion hazard areas to determine insurance premiums or coverage eligibility. The National Flood Insurance Program, implemented by the Federal Emergency Management Agency and the SC DNR Floodplain Management Program, can actually discount flood insurance premiums if sufficient setbacks are enacted at the state and local levels through the</p>



	<p>The OCRM jurisdictional setback line should become the building control line, which was the original intent of the 1987 Blue Ribbon Committee’s recommendations (1 comment).</p> <p>If natural accretion or renourishment cannot be sustained in the future, the existing methodology for establishing baselines and setback lines will allow jurisdictional lines to migrate landward (1 comment).</p> <p>The state can further restrict the size of new / replacement habitable structures seaward of the baseline, but eliminating all such structures seaward of the baseline is not practical (1 comment).</p> <p>Provision 44 CFR sec. 60.3(e)(7) of the NFIP V zone regulations may be useful in protecting dune areas beyond those protected by the state (1 comment).</p> <p>I agree that the setback area should be expanded, but the basis for a minimum setback distance of 50 feet needs to be explained (1 comment).</p> <p>The allowable size of 5,000 sq ft of heated space seaward of the setback line should be reduced, and buildings seaward of the baseline should be restricted to an even smaller size (1 comment).</p>	<p>Community Rating System (see pages 30, 32, and 62).</p> <p>From pg. 39 of the report: The recommendation is to “<u>Limit</u> the building or re-building of structures in the most vulnerable beachfront areas, particularly seaward of the baseline.”</p>
<p><i>Recommendation 3: Inconsistent Public Subsidies</i></p>	<p>Specific support expressed for Rec. #3 (1 letter).</p> <p>The recommendation to eliminate inconsistent public subsidies of private property is unclear (7 comments).</p>	<p>Pg. 45 of the report has been clarified with the following: “Within the designated high hazard areas (which have not yet been identified), state and local governments should limit public subsidies that would contribute to <u>greater density or new development within those high hazard areas</u>. The concept is simply ‘build at your own risk,’ and follows the same model as the Coastal Barrier Resources Act that the federal government uses for the same purpose.”</p>

	<p>The elimination of public subsidies would jeopardize eligibility for FEMA and state post-disaster funding (for designated areas). Clarification of the report’s proposal is warranted (1 comment).</p> <p>This recommendation will do irreparable harm to homeowners in the state wind insurance pool (1 comment).</p> <p>This recommendation should apply to sheltered shorelines in addition to ocean shorelines (2 comments).</p> <p>This recommendation is potentially one of the most important issues presented in the report, but it needs to be expanded (1 comment).</p>	<p>The Committee felt that, if a shoreline property were developed AFTER designation as a special high hazard area by the General Assembly, it should be developed at the property owner’s risk and should not qualify for public post-disaster funds for reconstruction or erosion control (see pg. 45).</p> <p>The Committee felt that, if a shoreline property were developed AFTER designation as a special high hazard area by the General Assembly, it should be developed at the property owner’s risk and should not qualify for the state wind insurance pool.</p>
<p><i>Recommendation 4: Strategically Acquire Beachfront Lands and/or Easements</i></p>	<p>Specific support expressed for Rec. #4 (2 letters).</p> <p>Any available funding should be used for beach renourishment; not for land acquisition or other uses (2 comments).</p> <p>It is unlikely that voluntary acquisition will be a viable option except after a hurricane or sever storm destroys a building and leaves the land unbuildable (2 comments).</p> <p>Not all beachfront communities can follow the Town of Hilton Head Island’s example of using accommodations taxes and real estate transfer fees for beach management and land acquisition (1 comment).</p> <p>Efforts should be directed into strengthening post-storm redevelopment regulations; not into developing voluntary relocation programs (1 comment).</p>	<p>As noted on pg. 53 of the report: “The cost of relocation or acquisition is likely to be a one-time expense, whereas hard and soft stabilization approaches will be continual expenditures, including maintenance.”</p>

	<p>The Bolivar Peninsula post-Ike buyout program could provide some “lessons learned” regarding voluntary acquisition (1 comment).</p>	
<p><i>Recommendation 5: Strengthen the Role of Local Governments</i></p>	<p>Specific support expressed for Rec. #5 (2 letters).</p> <p>The recommendation for additional elements in Local Comprehensive Beach Management Plans will be very difficult for smaller communities and counties to implement due to staff limitations (3 comments).</p> <p>Where the state owns beachfront areas, such as in Myrtle Beach, Edisto Island, and Hunting Island, it should work with the local community to ensure that clear lines of responsibility are established for all potential issues (1 comment).</p> <p>The timing of comprehensive plans and beachfront management plans needs to be consistent with federal hazard mitigation plan timing to avoid risking eligibility for federal disaster assistance and loss of flood insurance premium discounts (1 comment).</p> <p>Eligibility for state beach management funds should not be contingent upon integrated local plans (1 comment).</p> <p>The state should specify the sea level rise values and other future conditions scenarios that should be considered by local governments in their hazard mitigation plans (1 comment).</p>	<p>The Committee believes that stronger guidelines and requirements for local beachfront communities are needed and should be accompanied by state support for communities in the form of technical planning assistance and enhanced funding under a state “beach management trust fund” (pg. 62).</p> <p>As acknowledged on pg. 62 of the report: “Strengthened requirements of local comprehensive beach management plans and greater coordination across planning efforts will also require more staff time; however, the results of this planning effort will provide greater utility and efficiency to both local and state governments in managing the beachfront.”</p>
<p><i>Goal 2: Renourishment</i></p>	<p>The report suggests that beach renourishment is expensive to the point of being cost prohibitive, but it does not provide legitimate cost-benefit analysis to support this argument (3 comments).</p>	<p>From pg. 25 of the report: “The Committee agreed that beach renourishment appears to be viable for at least the “mid-term” for many beach communities, but that renourishment could fail as a <u>statewide solution</u> under several</p>

	<p>The costly expense of renourishment should not be continued – barrier islands and coastlines should be allowed to erode and accrete naturally (1 comment).</p> <p>By not funding continued beach nourishment, tourism in the region will suffer (1 comment).</p> <p>A presumption in the Draft Report is that most of the developed coast is eroding or going to erode in the future. Yet as the report mentions in passing, most developed beaches in the state are in better condition today than in 1988. There are fewer exposed seawalls, more protective dunes, and wider beaches in many localities – whether due to normal accretion or renourishment (1 comment).</p> <p>Better permit transparency and timelines are needed for renourishment projects (2 comments).</p>	<p>related scenarios - all of which seem plausible at some point, however distant:</p> <ol style="list-style-type: none"> <li>1) decreasing sand availability (leading to higher costs per project);</li> <li>2) increasing rates of erosion (or frequency of storms); and/or</li> <li>3) decreasing federal, state, and local revenues supporting renourishment (or increasing reliance on local and private funding sources).”</li> </ol> <p>The combined influence of these factors will be different for each beach community – i.e. some communities will be able to sustain renourishment over longer time horizons.</p> <p>From pg. 62 of the report:  “The SC Council on Coastal Futures (2004) recommended that the state ‘should capitalize and adequately fund the State Beach Renourishment Trust Fund, whose purpose is to provide state matching funds for priority public beach renourishment projects and to provide for emergency response needs to repair beaches after storms.’ <u>We concur and recommend the expansion of this fund to include a broader range of beach management options.</u>”</p>
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	<p>The artificial enlargement of protective dunes should be promoted and added to this section of the report (1 comment).</p> <p>DHEC-OCRM should not require full-scale permits for sand fencing for dune protection/restoration (1 comment).</p> <p>Recommendations for improved sand fencing policies (with regard to nesting sea turtles) should be added to this section of the report (1 comment).</p>	
<p><i>Recommendation 6: Develop and Implement Regional Sediment Management Plans</i></p>	<p>Specific support expressed for Rec. #6 (3 letters).</p> <p>Erosion zone mapping would need to be consistent with the erosion zone determinations of the National Flood Insurance Program (1 comment).</p> <p>RSM can be a long and expensive process that may not greatly expand knowledge in South Carolina. Inlet management plans would result in more comprehensive solutions than RSM (1 comment).</p>	
<p><i>Recommendation 7: Strengthen Reviews of Nearshore Dredging and Other Alterations</i></p>	<p>Specific support expressed for Rec. #7 (1 letter).</p> <p>Sand for renourishment should be allowed to be removed within the existing already narrow parameters for permitting (4 comments).</p> <p>For consistency, the proposed ad hoc Technical Committee should include local government representatives with expertise in the enforcement of floodplain management regulations (1 comment).</p>	<p>From pg. 80 of the report:  “DHEC-OCRM should establish a special review process with enhanced scrutiny for any projects affecting the beach, inlet systems, or submerged lands out to 1 (one) mile offshore.” This recommendation does not call for prohibiting the use of nearshore sand resources.</p>

	<p>Management of attaching shoals (via scraping and redistribution of sediment) should be considered by the proposed ad hoc Technical Committee (4 comments).</p> <p>Wave refraction studies should also be performed prior to the issuance of any renourishment or groin permits (1 comment).</p> <p>The basis for the 1-mile criterion needs to be further explained, and the three proposed permit conditions for projects within this distance seem excessive and unnecessary (1 comment).</p>	
<p><i>Recommendation 8: Improve Beach Nourishment Monitoring</i></p>	<p>Specific support expressed for Rec. #8 (2 letters).</p> <p>Small scale sand fence installation and dune building projects should be exempt from additional monitoring requirements (1 comment).</p> <p>Excessive monitoring should be avoided so it doesn't become overly burdensome and expensive (2 comments).</p> <p>Firms that design beach renourishment projects should not be precluded from monitoring their own projects (1 comment).</p>	
<p><b><i>Goal 3: Hard Stabilization Structures</i></b></p>	<p>There are statements that mislead the reader into believing that there may be imminent danger or that support current beach erosion theory suggesting beach armament results in damage to adjoining properties or loss of the dry sand beach (1 comment).</p>	<p>The text referred to on pg. 91 was not drafted by the Committee but rather is a legislative finding from the Beachfront Management Act (SC Code § 48-39-250(5)).</p>
<p><i>Recommendation 9: Refine Criteria for Emergency Orders and Sandbags</i></p>	<p>The current regulations regarding the size of allowable sandbags need to be reevaluated (3 comments).</p>	

	<p>Acute erosion events that are not caused by storms or disaster events also need to be covered by Emergency Orders (3 comments).</p> <p>Emergency Orders should be differentiated between sand scraping and sand bagging emergency orders (2 comments).</p> <p>Local government officials should have input into whether or not an erosion situation justifies emergency measures (1 comment).</p> <p>Properties that are not “habitable” (i.e. public golf courses or other public access uses) should be considered as potential candidates for emergency measures (1 comment).</p> <p>It would not be possible to obtain the necessary permits and funding for a beach renourishment project in 90 days following an erosion emergency (1 comment).</p>	<p>The following text has been added to pg. 105 of the report:  “Committee members discussed whether sandscraping should be allowed under locally-declared Emergency Orders or should be subject to the same restrictions proposed here for sand bags. Some Committee members believe that sandscraping and sand bags should only be allowed following a state emergency declaration because they are temporary solutions that should not be substitutes for proactive planning. Other Committee members believe that sandscraping should be authorized under locally-declared Emergency Orders. The Committee generally acknowledges that sandscraping may not have the same long-term negative impacts as sand bags, but can cause short-term impacts to sea turtle nesting, and can prove ineffective in protecting property since it lowers the beach profile in front of the threatened structures (which can intensify erosion).”</p> <p>From pp. 100-101 of the report:</p> <ul style="list-style-type: none"> <li>e. “If the petitioner’s plan is approved and calls for renourishment, then a renourishment permit application should be submitted to DHEC-OCRM <u>within 18 months</u> of the issuance of the original Emergency Order. <ul style="list-style-type: none"> <li>i. If DHEC-OCRM approves the renourishment permit, then sandbags should be allowed to remain in place for <u>up to 12 months</u> after the permit is issued to allow sufficient time for the project to be completed, but must be removed</li> </ul> </li> </ul>
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	<p>This Committee should not try to distinguish between or tie allowable responses to various causes of emergencies (1 comment).</p> <p>The option requiring all sandbags to be placed beneath a pile-supported building is not practical (1 comment).</p>	<p>at the time of renourishment or at the end of the 12 month period.”</p> <p>The Committee agreed with this comment and made changes to the relevant text on pg. 101.</p>
<p><i>Recommendation 10: Improve Guidelines for Groins and Breakwaters</i></p>	<p>Specific support expressed for Rec. #10 (1 letter).</p> <p>There are concerns about the true need for, as well as the transparency and composition of, ad hoc Technical Committees assembled to review applications for the construction of groins and breakwaters (3 comments).</p> <p>Soft, fabric tube-type, removable groins should be considered (1 comment).</p> <p>Groin regulations need enforcement “teeth” to ensure removal of dysfunctional groins and/or those that cause downdrift impacts (1 comment).</p> <p>Restrictions on groins and their upkeep would be a detriment to the economy in some areas (2 comments).</p> <p>Current guidelines are sufficiently clear and should remain in place (3 comments).</p> <p>Groins should be redefined as hard erosion control structures and should be treated similarly as policies for seawalls (1 comment).</p>	<p>From pg. 107 of the report: “An ad hoc Technical Committee should be established by DHEC-OCRM to recommend specific design and siting standards, as well as review considerations, for future proposals.” As envisioned, this group (and the ad hoc technical committee described under Recommendation # 7) would not be a decision-making entity, but would suggest appropriate review standards and potentially comment on specific project proposals during the open public comment period.</p>



	Adjustable groins have generally not worked well in previous installations in other states (1 comment).	
<i>Recommendation 11: Expand Beachfront Real Estate Disclosure Requirements</i>	<p>Specific support expressed for Rec. #11 (2 letters).</p> <p>Expanded real estate disclosure should include background information on regulations in place to protect sea turtles (1 comment).</p> <p>Should verify with FEMA as to whether or not the National Flood Insurance Program would pay for flood losses associated with chronic erosion in low-lying areas (1 comment).</p> <p>An educational program regarding issues related to beachfront construction and hazards would be more effective than affidavits (1 comment).</p> <p>Disclosure needs to occur early in the property buying process (1 comment).</p>	
<b><i>Goal 4: “Sheltered” Coastlines</i></b>	It appears that less effort was put forth on sheltered shorelines, which are arguably more critical to the future health and welfare of our coastal ecosystems and economies than are our beaches (1 comment).	
<i>Recommendation 12: Manage Erosion Control in Estuaries</i>	<p>Specific support expressed for Rec. #12 (2 letters).</p> <p>An estuarine shoreline retreat policy is needed since these shorelines are as much a part of the state’s public trust responsibilities as the beachfront (2 comments).</p> <p>Interim measures should be proposed since pilot studies and other research and mapping efforts may take some time to complete (1 comment).</p>	

	<p>Pilot projects would enhance the knowledge of beneficial alternative erosion control approaches (1 comment).</p> <p>OCRM can't require an owner of an oceanfront lot to perform an alternatives analysis before being allowed to develop the lot (2 comments).</p> <p>Very objective criteria would need to be established to implement set-backs for erosion control structures (1 comment).</p> <p>Since most erosion control structures in marsh areas are designed to protect real estate rather than public resources, perhaps similar policies as oceanfront erosion control structures should be applied (1 comment).</p>	<p>From pg. 126 of the report: The recommendation is to "Require Evaluation of <u>Alternative Stabilization Approaches</u> on Vacant Properties." This recommendation applies to <u>non-oceanfront shorelines</u> only and states that "traditional bulkheads, rip-rap, and revetments should not be allowed for <u>undeveloped properties</u> unless the permittee demonstrates that no practical alternative exists," which could include other forms of stabilization.</p>
<p><i>Recommendation 13: Establish Non-Beachfront Shoreline Buffer Areas</i></p>	<p>Specific support expressed for Rec. #13 (3 letters).</p> <p>A minimum 25 foot buffer is a good starting policy, but wider buffers should be considered that can accommodate a three foot rise in relative sea level (2 comments).</p> <p>Tax incentives or credits should apply to buffers beyond the minimum 25 feet up to a distance that can accommodate marsh migration for a three foot rise in relative sea level (1 comment).</p> <p>Strategic acquisition of marshfront lands / easements should be pursued (1 comment).</p>	

## Appendix 4. Presentations to the Committee

<b>Presenter</b>	<b>Title of Presentation</b>
Braxton Davis, Ph.D., SCDHEC-OCRM	South Carolina Shoreline Change Initiative Overview
Barbara Neale, SCDHEC-OCRM	Shoreline Management in South Carolina
Braxton Davis, Ph.D., SCDHEC-OCRM	Shoreline Management in Other Coastal States
Angela Sunley, Texas General Lands Office	Texas Shoreline Management: History, Challenges, and Current Status
John Mark Dean, Ph.D. and Dr. Richard Beck, 1987 Blue Ribbon Committee	A Look Back at the 1987 Blue Ribbon Committee on Beachfront Management
Paul Gayes, Ph.D., Coastal Carolina University	Beach Monitoring and Coastal Erosion Studies
Scott Harris, Ph.D., College of Charleston	Shoreline Inventories and Applications
Jim Morris, Ph.D., University of South Carolina	Responses of South Carolina's Coastal Wetlands to Rising Sea Level

Chris Mack, P.E.,  
AECOM

Engineering Perspectives on Research & Information Needs

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Doug Marcy,  
NOAA Coastal Services Center

NOAA Shoreline Information Resources and Perspectives

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Bill Eiser,  
DHEC-OCRM

Beachfront Management Act – Overview of Retreat Policy

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Jim London, Ph.D.,  
Jeff Allen, Ph.D.,  
Caitlin Dyckman, Ph.D., and  
Courtney St. John,  
Clemson University

Overview of Clemson Research on Beachfront Policies

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Kirstin Dow, Ph.D.,  
University of South Carolina

Adaptation to Sea Level Rise and Associated Hazards

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Tina Hadden  
U.S. Army Corps of Engineers

USACE Regulatory Program Overview

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Sara Brown, P.E.,  
U.S. Army Corps of Engineers

USACE Hurricane and Storm Damage Reduction

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Tim Kana, Ph.D, P.G.,  
Coastal Science & Engineering

Experiences with Beach Nourishment in South Carolina

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Bob Van Dolah, Ph.D. and  
Derk Bergquist, Ph.D.,  
S.C. Dept. of Natural Resources

Environmental Impacts of Beach Nourishment

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Mark Caldwell,  
U.S. Fish & Wildlife Service

The Roles of the USFWS in Beach Nourishment

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Jim Gregson,  
Ted Tyndall,  
Guy Stefanski, and  
Doug Huggett,  
N.C. Division of Coastal Mgmt.

Ocean Shoreline Management in North Carolina

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Barbara Neale,  
SCDHEC-OCRM

South Carolina Beachfront Erosion Control Regulations

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Rob Young, Ph.D.,  
Western Carolina University

Perspectives on Coastal Science and Management

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Elizabeth Von Kolnitz,  
SCDHEC-OCRM

Overview of State and Local Beach Management Planning

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Jill Foster and  
Scott Liggett, P.E.,  
Town of Hilton Head Island

Beachfront Management on Hilton Head Island

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Barbara Neale,  
SCDHEC-OCRM

Overview of OCRM Authorities for Estuarine Shorelines

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Debra Hernandez,  
Hernandez and Company

Mitigating Erosion along Sheltered Coasts

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Lisa Jones,  
S.C. Dept. of Natural Resources

South Carolina's Floodplain Management Program

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Steve Underwood,  
N.C. Division of Coastal Mgmt.

North Carolina's Estuarine Shoreline Policies and Initiatives

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Guy Stefanski,  
N.C. Division of Coastal Mgmt.

North Carolina's Estuarine Shoreline Mapping Project

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Sadie Drescher,  
SCDHEC-OCRM

Estuarine Shoreline Vegetative Buffers

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Ross Nelson,  
Tidewater Environmental  
Services, Inc.

Shoreline Change State of Knowledge Report

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Braxton Davis, Ph.D.,  
SCDHEC-OCRM

Overview of Shoreline Change Committee and Preliminary  
Findings – Grand Strand, Beaufort, and Charleston  
Regional Community Leaders Forums

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

Beverly Eaves Perdue, Governor

James H. Gregson, Director

Dee Freeman, Secretary

July 1, 2010

**MEMORANDUM**

**CRC 10-28**

**TO:** Coastal Resources Commission

**FROM:** Jeffrey Warren, PhD, CPG  
Coastal Hazards Specialist

**SUBJECT:** Inlet Hazard Areas Study Update

I updated the Commission at your last meeting in May on the proposed Inlet Hazard Area (IHA) boundary changes and the ongoing discussions on what development policies may be appropriate for you to consider for general use standard revisions within the IHAs. Dr. Margery Overton, chair of the CRC's Science Panel on Coastal Hazards, also provided a summary at this meeting on the Panel's risk line that was developed within each of the twelve proposed IHAs. The IHA boundary proposal report, which presents the boundaries, the data and methods employed, is available online: <http://tinyurl.com/34z49t9>.

During the May discussion, the potential impact of numerous development scenarios that could be considered during policy development were discussed (e.g., setbacks and size limitations based on numerous spatial data including the hybrid shoreline, the existing vegetation line, the hybrid vegetation line, and the Science Panel's risk line). One question that came up during the meeting was the impact of these different development scenarios on existing structures and properties. An additional comment was made regarding the date of the aerial photography used in the presentation. To address these issues, DCM's coastal hazards GIS (Geographical Information System) specialist Ken Richardson will present live, on-screen GIS data incorporating 2009 aerial photography (the most recent available). Ken and I also conducted site-specific field surveys in June with DCM field staff to acquire GPS survey points of the first line of stable and natural vegetation at Shallotte, Lockwood Folly, and Bogue inlets. These points are also incorporated into the GIS database to show setback measurements based on current conditions (and based on existing policies) at these locations. These spatial references provide the necessary framework when considering potential development scenarios, which will also be viewable during the live, on-screen display at our July meeting presentation.

I look forward to our upcoming GIS demonstration and subsequent discussion. While you consider the appropriate course of action(s) for development standards with respect to inlet-related coastal hazards, DCM continues to recommend that final approval of the proposed IHA boundaries (T15A NCAC 07H.0304) does not occur until revisions to the IHA development regulations (T15A NCAC 07H.0310) are complete.

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

Beverly Eaves Perdue  
Governor

James H. Gregson  
Director

Dee Freeman  
Secretary

(CRC-10-29)

June 25, 2010

**MEMORANDUM**

**TO:** Coastal Resources Commission

**FROM:** Mike Lopazanski

**SUBJECT:** Sandbag Overview and Update

1984-1985

As the CRC began development of rules prohibiting the placement of permanent shoreline stabilization structures along the oceanfront, sandbags were allowed to be used as a temporary means of protecting imminently threatened structures. This policy was in accordance with the 1984 recommendations of the CRC Outer Banks Erosion Task Force that stated:

“Temporary measures to counteract erosion, such as beach nourishment, sandbag bulkheads and beach pushing, should be allowed, but only to the extent necessary to protect property for a short period of time until threatened structures may be relocated or until the effects of a short-term erosion event are reversed. In all cases, temporary stabilization measures should be compatible with public use and enjoyment of the beach.”

The purpose of allowing the sandbags was to provide for the temporary protection of a structure until the owner could make arrangements to move the structure or until the beach and dune system could naturally repair itself. As the CRC developed the rule, it was noted that “temporary” would normally require time limits on projects. At that time, staff explained that due to enforcement problems, limits on structural types, including the ephemeral nature of materials used for sandbags, was a more practical method of ensuring removal of the structure from the beach.

The original 1985 rule included some of the current provisions such as the definition of imminently threatened, the 20’ seaward limit, adjacent property owner notification and no interference with use of the beach. The rule also included a provision requiring removal if the sandbag structure remained exposed for more than six months. The only other limit on the dimension of the structure was that it be no more than 15’ wide and that it be above the high tide line.

## 1987

In March of 1987, the CRC requested information on the effects of sandbag structure design and placement were having on the beach.

## 1990-1995

During the early 1990's, the Commission began hearing numerous complaints that sandbags were not being used as a temporary measure but as a permanent shoreline erosion measure. Many citizens complained that sandbags were blocking pedestrian access along the beach and in some cases sandbags were being fortified to become massive immovable structures. The temporary nature of sandbags was indirectly addressed in September 1991 when the CRC discussed the definition of threatened structures and considered requiring the relocation or demolition of a threatened structure 2-3 years from its designation.

A 1994 inventory of sandbags showed that approximately 15,000 linear feet of ocean shoreline were protected by sandbag structures with some of the structures being in place for as long as eight years. While most sandbag structures complied with the rules, some were installed without authorization and did not comply with the standards. Staff provided the CRC with an analysis of the problems associated with the sandbag rules including what types of structures can be protected by sandbags, when do the sandbags interfere with the public use of the beach, monitoring burial, the limitation on width of the sandbag structure but not the height and most importantly, how long is temporary.

In 1995, the CRC amended the rules to address the size and physical location of sandbags, the types of structures that were eligible for protection, as well as the time they could remain in place if they were not covered by dunes with stable, natural vegetation. The rule was amended to allow a sandbag structure to remain in place up to two years if it was protecting a small structure (less than 5,000 square feet floor area) and up to five years for larger structures. The rule also allowed the sandbags to remain for five years if they were located in a community actively pursuing a beach nourishment project. Existing sandbags installed prior to May 1, 1995 were grandfathered and allowed the full time period prior to removal.

## 1996-1999

While most of the beachfront communities qualified for the five-year time period, some sandbags structures in unincorporated areas were subject to removal in 1997. However, due to Hurricanes Bertha and Fran in 1996, the CRC extended the deadline to May 1998 for those areas declared federal disasters. This deadline was again extended to September 1998 after Hurricane Bonnie.

In 1997, four sites in Dare and Currituck Counties were subject to having their sandbags removed. Several of the owners applied for variances from the CRC but their petitions were denied and all the sandbag structures were subsequently removed.

Over the next couple of years the CRC began to receive variance requests from property owners wanting their sandbag structures to remain in place. In Onslow County, six property owners were granted variances to allow their sandbags to remain in place until August 31, 2001.

## 2000

With the majority of sandbags subject to removal in 2000, the Division began preparing to notify property owners of the approaching deadline. Records indicated that 141 properties were to be subject to removal. The Division believed this number to be low since prior to 1995, the majority of sandbag permits were processed by local governments and their record keeping abilities varied greatly and in some cases, was nonexistent. A post Hurricane Floyd inventory revealed that 236 temporary sandbag structures had been permitted since the early 1980's.

In January 2000, Dare County submitted a Petition for Rule Making to the CRC requesting that properties protected by sandbags in communities pursuing beach nourishment be given an additional extension to 2006. The Division consulted with the CRC Science Panel and received a recommendation to grant an extension, but only to sandbag structures that currently conform to the size limits. Given the time it takes for communities to complete the necessary steps for a beach nourishment project, the CRC granted a coast-wide extension on sandbag permits in these areas to May 2008. The CRC also refined what it meant for a community to be actively pursuing beach nourishment. A community is considered to be actively pursuing beach nourishment if it has:

1. been issued a CAMA permit, where necessary, approving such project, or
2. been deemed worthy of further consideration by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance Study, or an ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local money, when necessary, or
3. received a favorable economic evaluation report on a federal project approved prior to 1986.

The CRC further added the stipulation that if beach nourishment is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void and existing sandbags are subject to all applicable time limits.

## 2005

The majority of sandbag structures were located in areas included in beach nourishment projects or studies, however, some structures needed to be removed by their owners prior to the May of 2008 deadline. In North Topsail Beach, an area within the Coastal Barriers Resource Act (CoBRA) Zone containing a significant number of sandbag structures was dropped by the US Army Corps of Engineers from further study. North Topsail Beach applied for permits to conduct a privately funded



nourishment project to cover this area as was the case on the east end of Ocean Isle Beach and in the vicinity of The Point in Emerald Isle.

At this time, staff reported to the CRC that 251 sandbag structures had been permitted since 1996, 146 of these since 2001. Prior to 1995, local governments permitted sandbag structures and there was some question as to the accuracy of record keeping. For this reason, staff estimated that there were approximately 320 sandbag structures on the coast.

## 2006

Staff reported that enforcement of the six-foot height limitation on structures had become an issue. Owners were allowed to maintain the six-foot height of the structure as the bags become damaged or sink into the sand. During erosion episodes, the submerged bags once again became exposed, greatly increasing the overall height of the structure. Enforcement was also further being complicated by the fact that the bags can become covered or exposed before any enforcement action can be taken. The CRC directed the DCM staff, to measure the height of the sandbag wall from the base of the structure to the top rather than from the existing beach to the top, in order to ensure sandbag structures do not exceed six feet in height, unless otherwise permitted.

## 2007

With the May 2008 deadline approaching, the Division once again prepared to notify property owners of the requirement for removal. However, the situation along the ocean beaches was somewhat different than in 2000. The extensive beach nourishment that occurred along the coast during the intervening years presented a new set of challenges to ensuring compliance with the Commission's rules. Many sand bag structures were not removed prior to nourishment activities so the bags became covered with sand. Technically, these sand bag structures were out of compliance since the rule requires them to be covered and vegetated. It had also become typical to find sand bag structures where the bags are inter-laced across properties as adjoining properties become imminently threatened. Since the removal date is dictated by when the first bags are placed, long sand bag structures often have varying expiration dates across properties. Varying expiration dates could also be found when sand bags protecting large structures (5 years) are tied in with those protecting a small structure (2 years). Given the intricacies of ensuring compliance with the current rule, staff sought guidance from the Commission on how to address the upcoming deadline, the nuances of enforcement and compliance with the current rule and how aggressively to pursue removal of buried bags or bags that become exposed.

In addition to the current time limits and removal deadlines, the Commission discussed the possible utilization of degradable materials rather than polypropylene as a means of ensuring the eventual removal of sandbags from the oceanfront. DCM research revealed issues associated with the use of biodegradable textiles for sandbags, primarily concern over the length of time biodegradable bags can withstand the combination of elements present in the coastal environment. The complex nature of coastal beaches makes it difficult to predict how long a biodegradable sandbag would last, as a variety of assailants including; microorganisms, temperature, moisture,

humidity, seawater composition and wave energy act upon beaches. In addition, pathogenic viruses, bacteria, and fungi are present in stormwater runoff. The combination of these reactants leads to the increased degradability of natural fibers used in sandbag installations.

The CRC ultimately decided that the current rule would be enforced and all uncovered sandbags would have to be removed in May 2008. Sandbag permits could still be applied for throughout this process and there was interest modifying the sandbag rules.

#### November 2007

DCM sent letters to 371 property owners with active sandbag structure permits in preparation for the May 1, 2008 deadline for the removal of certain sandbag structures.

#### March - 2008

DCM begins to inventory sandbag structures, to determine which ones will need to be removed. Sandbags structures subject to removal are prioritize based on how long they have been in place, condition of the bags, and whether they are an impediment to the public's use of the beach. This prioritization is used to notify property owners that their sandbags must be removed.

The CRC receives a Petition for Rulemaking from the Landmark Hotel Group requesting amendments to the sandbag rules that would allow specific provisions for their use in protecting commercial structures and to allow indefinite maintenance of the structures. The CRC denied the petition.

#### May 2008

The CRC receives a Petition for Rulemaking from the law firm Kennedy Covington Lodbell & Hickman L.L.P. representing property owners from Figure Eight Island, Nags Head and Ocean Isle Beach. The petition requested amendments to the sandbag rules to remove the time limits on sandbags and change the "actively pursuing beach nourishment" provision to a long-term erosion response plan that is modeled after the proposed static line exception. The petition also created a new sandbag management strategy for the inlet hazard areas where the maintenance of sandbags would be tied to an inlet relocation plan or an inlet-monitoring plan. The Division was supportive of the request to create a new strategy inside inlet hazard areas due to limited effectiveness of beach fill project and the While the Petition was denied, the CRC directed staff to incorporate some provisions of the petition that would improve the current rule language.

#### Variance Requests:

By the May 2008 CRC meeting, the Division had received 29 sandbag variances requests.

#### Comprehensive Beach Management Task Force Subcommittee Report:

Recommends conditioning certain CAMA permits to preclude the use of sandbags under the single-family exception and consideration of alternative sandbag structure design.

### July 2008

The CRC approves amendments to the sandbag rules [15A NCAC 7H .0308(a)(2)] to allow sandbags to remain in place for eight years if the community is actively seeking an inlet relocation project; require sandbags to be removed when the structure is no longer threatened, when the structure is removed or relocated, or upon completion of an inlet relocation or beach nourishment project; to allow structures to be protected more than one time in an inlet area. Additional language was also added to the criteria by which a community would be considered pursuing a beach nourishment or inlet relocation project.

### September 2008

DCM sends 21 letters to property owners requesting removal of sandbag structures that have exceeded their time limits. In addition, the a GIS map depicting sandbag locations is made available on the Division's web site.

### October 2008

As a result of Hurricane Hanna and an unnamed storm, Senator Basnight's office submitted a letter to the CRC requesting, "If a storm exposes sandbags that had been covered and vegetated, I believe the affected property owner should be allowed to return his or her property to its pre-storm condition." The CRC, under the authority of the Secretary's Emergency General Permit that was issued September 29, 2008, allows sandbags which were previously covered and vegetated that became exposed and were in compliance prior to either Hurricane Hanna or the unnamed storm, be allowed to be recovered under Emergency General Permit 15A NCAC 7H .2500.

### January 2009

Administrative Law Judge dismissed a motion to stay enforcement by 18 recipients of sandbag removal letters. The homeowners sought permission to repair their sandbag structures while they pursue variance relief, and also sought to keep DCM from going forward with enforcement. After the ruling, the Division sent Notices of Violation to homeowners who received the first round of sandbag removal letters in September 2008.

### August 2009

Session Law 2009-479 (House Bill 709) establishes a moratorium on certain actions of the Coastal Resources Commission preventing the removal of a temporary erosion control structure that is located in a community that is actively pursuing a beach nourishment project or an inlet relocation project. The moratorium does not prohibit the Commission from:

- Granting permit modifications to allow the replacement, within the originally permitted dimensions, of temporary erosion control structures that have been damaged or destroyed.
- Requiring the removal of temporary erosion control structures installed in violation of its rules.
- Requiring that a temporary erosion control structure be brought back into compliance with permit conditions.
- Requiring the removal of a temporary erosion control structure that no longer protects an imminently threatened road and associated right-of-way or an imminently threatened building and associated septic system.

### July 2010

While the imposition of the moratorium has stopped enforcement action on sandbag structures with expired permits, it has not stopped the removal of sandbag structures that were out of compliance with other provisions of the temporary erosion control structure rules. Several sandbag structures have been removed in Dare County when houses were condemned or otherwise removed and the sandbags were no longer necessary. However, there are approximately 380 temporary erosion control structures remaining and with the removal moratorium expiring on September 1, 2010, the Division will be looking to the CRC for guidance on the issue.



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

Beverly Eaves Perdue  
Governor

James H. Gregson  
Director

Dee Freeman  
Secretary

June 29, 2010

**CRC-10-22**

**MEMORANDUM**

**TO:** Coastal Resources Commission

**FROM:** Mike Lopazanski

**SUBJECT:** Outer Continental Shelf (OCS) Update

The last active leasing of offshore blocks in North Carolina's federal waters occurred in 1981 and 1983 as part of the 21-block Manteo Unit. Since that time, leasing activities for energy development along the Atlantic Seaboard have historically been prohibited through Congressional and Presidential moratoriums. In June 2008, amid calls for more domestic production, President George W. Bush lifted the executive moratorium. At that time, the Department of Interior - Minerals Management Service (MMS) was directed to begin preparation of an accelerated Five-Year Lease Program that could have taken effect as early as July 2010 before the current Program expires. The Congressional moratorium that had been in place as part of the Department of Interior's appropriations for the past 26 years was allowed to expire on September 30, 2008. The MMS announced in July 2008 that it was jump starting the development of a new 5-Year Lease Program, giving the next administration a two-year head start in expanding energy production in federal waters (beyond three nautical miles from shore) that would include areas under the Congressional moratorium. While unusual, the Outer Continental Shelf Lands Act (OCSLA) does allow for "out-of-cycle" leasing programs. The accelerated 5-Year Lease Program strategy has now been abandoned, and the MMS (renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement, or BOE, on June 18<sup>th</sup> under Secretarial Order 3302) continues to develop options for a 5-Year Lease Program to begin on July 1, 2012.

**Current 2007-2012 Lease Program**

With regard to the current 2007-2012 Lease Program, the Center for Biological Diversity filed suit on July 2, 2007 for violations under the OCSLA and the National Environmental Policy Act (NEPA). This suit was followed by another filed by the Native Village of Point Hope, Alaska, in August 2007. On April 17, 2009, the Court remanded the 2007-2012 OCS oil and gas leasing program, requiring the Interior Department to "conduct a more complete comparative analysis of the environmental sensitivity of different areas." The Court clarified that the decision was limited to three areas of the Alaska OCS—Beaufort, Chukchi, and Bering Seas. On March 31, 2010, Secretary Salazar announced his Preliminary Revised Program (PRP) for 2007-2012 which is subject to a 30-day public comment period ending May 3, 2010. After consideration of comments received, the Secretary plans to take another look at his PRP decisions and thereafter approve a final leasing program for 2007-2012.

## **Virginia Lease Sale 220**

This remand of the 2007-2012 Lease Program, as well as the Secretary of Interior's decision to reconsider portions of the Revised Program does not affect the potential lease sale off the coast of Virginia. The 2007-2012 PRP includes a Mid-Atlantic Sale (VA Lease Sale 220) as a special interest sale. The first step in the process has concluded with comments having been due January 13, 2009 on 2.9 million acres located 50 nautical miles offshore of VA. A lease sale was scheduled for this area in 2011. However, on May 7, 2010 the MMS announced that it was cancelling scheduled public meetings and was postponing indefinitely, the EIS process for Lease Sale 220 off the coast of Virginia. Governor Easley had submitted comments objecting to the proposed lease sale. DENR provided comments in 2009 citing the omission of potential impact analysis on North Carolina's coastal resources.

## **Geological & Geophysical Activities PEIS**

The MMS has announced its intent to prepare a Programmatic EIS (PEIS) to evaluate potential environmental effects of multiple Geologic and Geophysical (G&G) activities on the Atlantic Outer Continental Shelf. These activities (generally seismic surveys) are associated with Atlantic OCS siting for renewable energy projects, marine minerals extraction (sand and gravel), and oil and gas exploration. The areas of the Atlantic OCS that will be analyzed within the G&G PEIS are the Mid-Atlantic Planning Area (includes NC) and the South Atlantic Planning Area. A public scoping meeting was held in Wilmington on April 29, 2010. The Division of Coastal Management originally provided comments on March 23, 2009 citing DENR agency concerns regarding the effects on fish and fish habitat including sub-lethal behavioral changes. The extended comment deadline was May 17, 2010.

## **2012-2017 Five-Year Lease Program**

On March 31, 2010, Secretary of the Interior Ken Salazar announced that the Obama Administration will expand oil and gas development and exploration on the U.S. Outer Continental Shelf, as part of a comprehensive strategy for strengthening the nation's energy security. The Administration's strategy calls for developing oil and gas resources in new areas, such as the Eastern Gulf of Mexico, increasing oil and gas exploration in frontier areas, such as the Arctic Ocean and the Mid and South Atlantic Ocean. According to the Administration, this strategy is intended to expand offshore oil and gas exploration and development in "the right ways and in the right places" in order to provide order and certainty to industry and investors, while delivering a fair return to American taxpayers for the use of their resources. The strategy calls for the use of science and new technologies to expand OCS oil and gas production, while protecting fisheries, tourism, and places that are not appropriate for oil and gas development.

The potential opening of the Mid-Atlantic OCS to oil and gas leasing is the primary impetus for the G&G PEIS discussed above. Much of data for the Mid-Atlantic Planning Area is over 30 years old and since the potential benefits and risks of developing OCS frontier areas are not sufficiently known, the Administration is calling for seismic exploration in the Mid and South Atlantic OCS to support conventional and

renewable energy planning. The MMS estimates of undiscovered, economically recoverable resources for the Atlantic OCS areas proposed for EIS scoping are: Mid-Atlantic: 0.5-1 billion barrels of oil and 2.5-11 trillion cubic feet of natural gas; South Atlantic: 0.03-0.15 billion barrels of oil and 0.3-0.7 trillion cubic feet of natural gas.

The development of a new (2012-2017) Five-Year Lease Program consists of the schedule for lease sales as well as the size and location of blocks to be offered. Once a Five-Year Program is developed, MMS will allow companies to bid for specific lease areas. Oil and gas leases are issued for an initial period of five years, and may be extended to 10 years where such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions. Once production is established, the term continues as long as there is production. Upon completion of a lease sale, a company submits a Plan of Exploration (POE) with associated environmental documents. Exploration is comprised of seismic studies and exploratory wells. If a discovery is made, a company may submit a Plan of Development and Production to MMS. There are about 20 federal and state permits required for production which include air and water quality permits from the EPA. It takes about 1-3 years to reach production.

Under the current procedures outlined by the OCSLA, it takes approximately 2.5 years to develop a lease program and, absent additional Congressional action, this is the fastest a new plan can be prepared. The MMS had announced that public meetings specific to the development of the next Five-Year Lease Program (2012-2017) were to be held in coastal locations in June and early July, 2010 to help determine the appropriate scope of the EIS in terms of geographical areas and issues. However, no meetings have been announced and there is some uncertainty regarding schedules due to the Deepwater Horizon Incident. The comment deadline for this stage of the 2012-2017 Lease Program process is June 30, 2010 and is likely to be extended.

### **States Reactions to Lifting of Moratorium**

The Mid-Atlantic States have expressed varying opinions regarding development of oil and gas in their respective OCS planning areas. However, a common area of support voiced by all has been for oil and gas revenue sharing. For example, the State of Delaware has expressed an interest in increasing knowledge of what resources may exist off its shores but does not envision leasing in the near future. The Governor of Maryland does not support oil and gas activities at this time, but will reconsider in the next planning cycle if a critical need develops. The Governor of Virginia has strongly supported oil and gas leasing, exploration and potential production. In North Carolina, Governor Perdue has also indicated that she would like more information about the potential offshore resources and formed a Legislative Subcommittee tasked with providing input to her about potential OCS oil and gas activities within the State's OCS planning area.

### **Revenue Sharing**

Prior to and since the lifting of the moratorium in the Atlantic OCS Planning Area, there has been a great deal of discussion regarding the benefits to states and revenue sharing. Under the current framework, a State retains all revenue from activities conducted within state waters, generally the first three nautical miles off the coast (or

three leagues, which is approximately nine nautical miles, in the case of Texas, Louisiana, and the Gulf Coast of Florida). States also receive 27 percent of revenues from the “section 8(g) zone,” which extends out the next three nautical miles from the state/federal boundary. The states also benefit from OCS revenues that come through the Historic Preservation, Land and Water and Reclamation Funds, and the Coastal Impact Assistance Program (CIAP). As a result of the Energy Policy Act of 2005, CIAP distributes \$250 million annually for four years to the six states with offshore oil and gas activity. The Gulf of Mexico energy Security Act (GOMESA) established revenue sharing with four Gulf Coast States in newly available Gulf areas through 2016 and all Gulf areas starting in 2017. Any further provision for revenue sharing with states would need to be enacted by Congress.

## **Alternative Energy**

The Energy Policy Act of 2005 granted the MMS authority to regulate renewable energy development on the OCS. In April 2009, the Department of the Interior finalized its framework for renewable energy production by establishing a program to grant leases, easements, and rights-of-way for renewable energy development activities, such as the siting and construction of off-shore wind farms. The framework also establishes methods for sharing revenues generated from OCS renewable energy projects with adjacent coastal States. Very broadly, the framework includes coordination of offshore projects with state, local and tribal governments through the establishment of task forces. Mirroring the process for conventional OCS energy development, a process is in place for granting leases, requirements for plans and operations oversight including site assessments, construction and operations, plan approval and environmental safety and monitoring. Provisions are also in place to cover bonding activities and decommissioning.

In April 2010, the DOI announced approval of the Cape Wind renewable energy project, to be sited in federal waters in Nantucket Sound. The \$1 billion wind energy facility will be the first wind farm on the U.S. Outer Continental Shelf, generating enough power to meet 75 percent of the electricity demand for Cape Cod, Martha's Vineyard and Nantucket Island combined. According to the MMS, the Cape Wind facility would occupy a 25-square-mile section of Nantucket Sound with the capability of generating 468 megawatts with an average anticipated output of 182 megawatts. The expectation is that the facility will produce enough energy to power more than 200,000 homes in Massachusetts. The project includes a 66.5-mile buried submarine transmission cable system, an electric service platform and two 115-kilovolt lines connecting to the mainland power grid.

Also in April, the DOI announced the first steps in the newly developed leasing process to site a wind energy facility off the coast of Delaware. The State has approved a proposal by Bluewater Wind Delaware, LLC for the construction of a new power plant to sell up to 200 megawatts of power from an offshore wind farm to the state's largest utility, Delmarva. Bluewater Wind Delaware, LLC is still required to apply to the MMS for an offshore lease, which may entail competing with other companies if competitive interest exists. The project is part of a planned 450MW offshore wind development park to be sited 7.5 nautical miles due east from Rehoboth Beach, Delaware. The geographic extent was selected through consultation with the Delaware Outer



Continental Shelf Renewable Energy Task Force, an intergovernmental coordination group comprised of federal and state agencies, and local agencies that having a role in permitting, reviewing or regulating resources or activities that are involved in energy development on the OCS.

The NC Coastal Wind Demonstration Project has begun to move through the permitting process beginning with a public scoping meeting held by the US Army Corps of Engineers in Manteo on March 18, 2010. The purpose of the meeting was to solicit comments from the public, federal, state and local agencies and officials, and other interested parties regarding the proposed project to identify issues and concerns. As the project may require excavation and filling within jurisdictional waters of the United States, a permit will be required pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The scoping meeting is a requirement of the National Environmental Policy Act (NEPA) in preparation of a Draft EIS.

The proposal currently includes the construction of three wind turbines in the Pamlico Sound with the intention of conducting research on the development of future offshore wind energy projects. The project site is comprised of three-mile square area located approximately seven statute miles west of Avon and nine statute miles north of Frisco in the Pamlico Sound. Construction of the demonstration facility will require barge-supported equipment needed for the installation of foundations supporting the turbines and rock aprons to protect the base of the structures. The project will also include a six-inch diameter electric cable to be buried in the bottom of Pamlico Sound that will connect to an existing, land-based substation near the community of Avon, Buxton, Frisco, or Hatteras. Power generated by this project would be supplied to the electric grid on Hatteras Island. After completion of the EIS, the US Army Corps of Engineers will issue a Record of Decision Document which will serve as the basis for permitting decisions by federal and state agencies.

### **Deepwater Horizon, Drilling Moratoriums, Lawsuits, MMS Reorganization, and Legislation**

On April 20, 2010 the semi-submersible drilling rig Deepwater Horizon was in the final phases of drilling an exploratory well in the Gulf of Mexico approximately 50 nautical miles off the coast of Louisiana. An explosion and fire resulted in death of 11 crewmen and the release of an estimated 1.5 to 2.5 million gallons of oil per day. After an initial 30-day investigation of the incident, the U.S. Department of the Interior (DOI) issued a directive May 30, 2010 to oil and gas lessees and operators on the OCS notifying them of requirements under the six month deepwater drilling moratorium. The moratorium directs oil and gas lessees and operators to cease drilling new deepwater wells, and puts oil and gas lessees and operators on notice that, with certain exceptions, MMS will not consider for six months drilling permits for deepwater wells and for related activities. For the purposes of the moratorium "deepwater" means depths greater than 500 feet. The rationale for moratorium according to the DOI is that, under current conditions, deepwater drilling poses an unacceptable threat of serious and irreparable harm or damage to wildlife and the marine, coastal and human environment and that the installation of additional safety or environmental protection equipment is necessary to prevent injury or loss of life and damage to property and the environment.

In addition, the Obama Administration is proposing to extend from 30 days to 90 days the congressionally-mandated deadline to complete environmental and safety reviews, as needed. Under current law, MMS is currently required to review exploration plans within 30 days and determine whether the environmental analysis conducted at several previous stages in the leasing and planning process is sufficient.

A coalition of businesses that provide services and equipment to drilling rigs filed a lawsuit, which was supported by the State of Louisiana, citing that there was no evidence that all projects were unsafe and that the suspension would cause harm to the state economy. A U.S. District Court judge found in favor of the suit and issued a preliminary injunction against the enforcement of the moratorium. In addition to planning an appeal of the decision, the DOI expects to issue a new order that will provide additional information on why a suspension of activities is necessary.

On June 18, 2010 the DOI announced a restructuring of the Minerals Management Service (Secretarial Order 3302). The agency is now called the Bureau of Ocean Energy Management, Regulation and Enforcement (Bureau of Ocean Energy or BOE). The reorganization will result in three separate entities to address the conflicting missions of the MMS.

1. **Bureau of Ocean Energy Management:** responsible for the sustainable development of the Outer Continental Shelf's conventional and renewable energy resources, including resource evaluation, planning, and other activities related to leasing.
2. **Bureau of Safety and Environmental Enforcement:** responsible for ensuring comprehensive oversight, safety, and environmental protection in all offshore energy activities.
3. **Office of Natural Resources Revenue:** responsible for the royalty and revenue management function including the collection and distribution of revenue, auditing and compliance, and asset management.

Since the oil spill in the Gulf of Mexico, there have been numerous bills introduced in Congress to address the responsibility for cleanup, recovery and compensation. One bill in particular, (H.R. 5356) Oil Spill Response and Assistance Act, deals with the federal liability cap placed on parties responsible for a spill and the associated economic damages. The cap is currently \$75 million and efforts have been made to raise it to \$10 billion or remove it entirely. The proposed legislation is relevant to North Carolina as NC Senate Bill 836 proposes to amend the NC Oil Pollution and Hazardous Substances Control Act to address the Gulf oil spill. The bill expands the definition of offshore waters to include all states bordering the Atlantic Ocean and Gulf of Mexico extending out to the federal Exclusive Economic Zone (EEZ – 200 nautical miles from shore). The bill includes references to exploration, cleanup, and the use of chemical dispersants and also disassociates the federal liability cap from discharges occurring in State waters.

Senate Bill 836 directs the Department of Crime Control and Public Safety to review the potential impacts of the Gulf spill on North Carolina and directs DENR to review the limitations on recovery by the State for damage to public resources. Of particular interest to the CRC is a proposed amendment to CAMA mandating information necessary for the review and for the consistency determination of an offshore fossil fuel

facility. Most of the information required is referenced in federal regulations for Exploration Plans and Oil Spill Response Plans as required by the BOE (formerly MMS). Also included would be an assessment of alternatives to the proposed facility that would minimize the likelihood of unauthorized discharges and an assessment of the potential for unauthorized discharges. Finally the bill directs the CRC to review existing rules and statutes related to offshore energy exploration and production, making recommendations to the Environmental Review Commission by April 1, 2011.

There is no doubt that since the lifting of the drilling bans in 2008, tracking the status of OCS activities and processes has been somewhat confusing. The change in administration, delays and extensions in comment periods, new moratoriums, reorganization of federal agencies, the push for non-conventional ocean based energy development, and now the oil spill in the Gulf, has made it difficult to understand a process not all that familiar to many in North Carolina. As evidenced by the Division's recently completed ocean policy study, ocean-related issues are likely to be on the Commission's agenda for some time to come. I'm looking forward to our meeting in Beaufort and ensuing discussions.



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

Beverly Eaves Perdue, Governor

James H. Gregson, Director

Dee Freeman, Secretary

July 1, 2010

**MEMORANDUM**

**TO:** CRC & Interested Parties  
**FROM:** Tancred Miller  
**SUBJECT:** Rulemaking Update

Along with this memo is a spreadsheet that contains all of the Commission's rules that are currently in the rulemaking process—from those being proposed for initial action to those reviewed by the N.C. Rules Review Commission (RRC) since the last CRC meeting. Listed below is a description and recent history of the CRC's action on each rule. Complete drafts of rules scheduled for public hearing at this meeting will be available on the DCM website.

*RULE DESCRIPTIONS*

1. 15A NCAC 7H.0104 Development Initiated Prior to Effective Date of Revisions  
**Status:** At rules review.  
The proposed amendments are to clarify how erosion rate setback factors for oceanfront development are to be applied. The amendments also establish limitations for new development that cannot meet the current setback, but could meet the setback based on the rate in effect when the lot was created. Anticipated effective date August 1, 2010.
2. 15A NCAC 7H.0106 General Definitions (Wind Energy)  
**Status:** Going to public hearing.  
The proposed amendment creates a definition for wind energy facilities. Public hearing anticipated in late summer 2010.
3. 15A NCAC 7H.0208 Estuarine System Use Standards (Docks & Piers provisions, wind energy)  
**Status:** Docks and piers changes effective June 1st; wind energy changes going to public hearing.  
This rule was amended to make conforming changes to the CRC's shoreline stabilization and docks & piers rules. These changes approved by the Rules Review Commission. Additional changes proposed at the January meeting for wind energy facilities were approved for public hearing, anticipated in summer 2010.
4. 15A NCAC 7H.0304 AECs Within Ocean Hazard Areas  
**Status:** Going to public hearing.  
The proposed amendment changes the formula used to calculate the Ocean Erodible AEC to make it consistent with the CRC's new oceanfront setbacks. The amendment would also remove the "unvegetated beach" designation for Hatteras Island that was adopted in 2004.

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5. 15A NCAC 7H.0309 Use Standards for Ocean Hazard Areas: Exceptions

**Status:** Effective June 1st.

This rule underwent one round of public comment to make the development limitations conform with changes to 7H.0306, and changes to the pier house section that allow construction and expansion of pier houses oceanward of the setback. Another round of public comment was necessary to incorporate additional changes related to allowing electrical transmission lines oceanward of the development setback.

6. 15A NCAC 7H.0310 Use Standards for Inlet Hazard Areas

**Status:** Under Science Panel review.

The CRC has seen the new inlet hazard area delineations prepared by its Science Panel on Coastal Hazards and had further discussion in July and November 2008. The CRC Science Panel and DCM staff continue to work on recommendations to bring to the CRC at a later meeting. Science panel work on this rule has been delayed by the Panel's focus on the terminal groin study and preparation of a sea level rise metrics report.

7. 15A NCAC 7M.0400

**Status:** Going to public hearing.

Amendments proposed in January to define policies for wind energy facilities were approved for public hearing, anticipated in late summer 2010.

**COASTAL RESOURCES COMMISSION RULEMAKING STATUS - JULY 2010**

<b>Item #</b>	<b>Rule Citation</b>	<b>Rule Title</b>	<b>July '10 Status</b>	<b>July Action Required?</b>	<b>Next Steps</b>
1	15A NCAC 7H.0104	Development Initiated Prior to Effective Date of Revisions	At Rules Review	No	At Rules Review Commission. Anticipated effective date August 1, 2010.
2	15A NCAC7H.0106	General Definitions	Going to public hearing	No	Changes to insert a definition of "wind energy facilities" going to public hearing.
3	15A NCAC 7H.0208	Estuarine System Use Standards	At Rules Review	No	Effective June 1st. Additional changes proposed in January for wind energy facilities going to public hearing.
4	15A NCAC 7H.0304	AECs Within Ocean Hazard Areas	Going to public hearing	No	Changes proposed to make the ocean erodible area calculation consistent with oceanfront setback calculations, and to remove "unvegetated beach" designation for Hatteras Island.
5	15A NCAC 7H.0309	Use Standards for Ocean Hazard Areas: Exceptions	Effective June 1st, 2010	No	Changes related to electrical transmission lines oceanward of the setback.
6	15A NCAC 7H.0310	Use Standards for Inlet Hazard Areas	Under Science Panel review	No	DCM and Science Panel continue to work on recommendations to CRC.
7	15A NCAC 7M.0400	Coastal Energy Policies	Going to public hearing	No	Amendments proposed in January to define policies for wind energy facilities. Going to public hearing.