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

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

(CRC-10-39)

November 1, 2010

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Review of Existing Statutes and Rules to Address Offshore Energy Exploration

In response to the BP Deepwater Horizon explosion and resulting oil spill, the General Assembly passed S836 (SL 2010-179) to address the possibility of such an event occurring in, or having some affect on the State. Specifically, the General Assembly (1) clarified the liability for damages caused by the discharge of oil, gas or drilling wastes into State coastal fishing waters or offshore waters; (2) provided for the review of information required for a proposed offshore fossil fuel facility in order to determine consistency with State guidelines for the coastal area; (3) directs the CRC to review existing laws and regulations that pertain to offshore energy regulation and production; (4) directs the Department of Crime Control and Public Safety to review the State Oil Spill Contingency Plan; and (5) directs DENR to review limitations on recovery of damages to public resources or the cost of oil or other hazardous substance cleanup pursuant to the Oil Pollution and Hazardous Substance Control Act.

In addition to directing the CRC to review existing statutes and rules, the General Assembly amended CAMA, creating a new section (113A-119.2 Review of Offshore Fossil Fuel Facilities – see attached) that incorporate some provisions of the Commission's 15A NCAC 7M .0400 Coastal Energy Policies. Specifically, the CAMA amendment incorporates some elements from 7M .0403 Definitions, the NC Oil Pollution and Hazardous Substance Control Act as well as elements of federal definitions.

These actions by the General Assembly address concerns that were raised as the impacts of the BP spill on the Gulf region began to manifest themselves, the questions surrounding how such an event could have been prevented and what was deemed necessary to prepare North Carolina for a similar event. The discharge of oil or other substances into the environment and corresponding liabilities are found in N.C.G.S. 143-215.75 et seq. known as the Oil Pollution and Hazardous Substances Control Act (OPHSCA). This State law compliments the federal Water Pollution Control Act which imposes liability for spills of petroleum products. The OPHSCA requires the reporting of a spill to DENR, corrective actions, restitution to State and local governments for

cleanup, liability for damages and civil penalties in the case of intentional or negligent discharges. A notable change is the OPHSCA is the dissociation of the liability limits contained in the federal Oil Pollution Act. That liability is currently capped at $75 million. The General Assembly amendments remove any limits for oil spills occurring within the territorial jurisdiction (three nautical miles) of the State. In addition to removing a liability cap in State waters, the changes expand the liability provisions for any exploration activities, as well as damages associated with cleanup measures such as chemical dispersants. Other amendments to the OPHSCA, such as expanding the definition of "Offshore Waters" to include any coastal state bordering the Atlantic Ocean and the Gulf of Mexico addressed the possibility of oil from the Gulf having an impact on North Carolina.

The General Assembly actions also address questions that arose in the wake of the BP spill with regard to information required for the review of an offshore fossil fuel facility. In addition to incorporating definitions found in the OPHSCA, the CAMA amendments include the federal requirements related to spills and other discharges, an assessment of alternatives to the offshore facility that would minimize spills and an assessment of a spill that could cause a temporary or permanent violation of federal and State water quality standards.

With regard to federal requirements addressing "unauthorized discharges", exploration and develop plans must include:

Bonds - The activities and facilities proposed in the exploration or development plan are or will be covered by an appropriate bond (30 CFR part 256, subpart I);

Financial Responsibility - A demonstration of oil spill financial responsibility for proposed facilities (30 CFR part 253);

Relief Well Capacity - A demonstration of the financial capability to drill a relief well and conduct other emergency well control operations.

Suspension of Activities - A discussion of any suspensions of operations that may be necessary in the course of operations.

Blowout Scenario. A scenario for the potential blowout of the proposed well that would be expected to have the highest volume of liquid hydrocarbons. The scenario should include the estimated flow rate, total volume, and maximum duration of the potential blowout. A discussion of the potential for the well to bridge over, the likelihood for surface intervention to stop the blowout, the availability of a rig to drill a relief well, and rig package constraints. Estimated time it would take to drill a relief well.

An approved Oil Spill Response Plan (OSRP) is also required (30 CFR part 254, subpart B) by the Bureau of Ocean Energy Management, Regulation and Enforcement (formerly Minerals Management Service) which includes:

- The location of primary oil spill equipment base and staging area.
- The name(s) of oil spill removal organization(s) for both equipment and personnel.

- The calculated volume of the worst case discharge scenario (30 CFR 254.26(a)), and a comparison of the appropriate worst case discharge scenario in an approved regional OSRP with the worst case discharge scenario that could result from the proposed exploration/development activities;
- A description of the worst case discharge scenario that could result from proposed exploration/development activities (30 CFR 254.26(b), (c), (d), and (e)).
- Modeling report for a potential oil or hazardous substance spill.

While the CRC has been recently charged with reviewing the rules and statutes related to offshore energy exploration, there have been, and currently still are ongoing similar efforts. The Commission has considered and acted upon recommendations from Division's Ocean Policy Study Committee to incorporate the siting of wind facilities in the CRC's Use Standards and the Coastal Energy Policies. The amendments to the Coastal Energy Policies also include a broadening of language to cover all ocean-based energy development and not exclusively oil and gas development. The Commission has also heard from the Legislative Research Commission Advisory Subcommittee on Offshore Energy Exploration although those recommendations were couched in light of BP spill. The Governor's Scientific Advisory Panel on Offshore Energy is currently charged with analyzing the feasibility of tapping offshore energy sources and identifying the benefits and areas of concern related to energy resources. The group is also studying current laws, rules, processes and procedures that affect the use of offshore energy resources, such as federal leasing programs, state and federal permitting programs, and local zoning and ordinances.

At the federal level, the Bureau of Ocean Energy, Management Regulation and Enforcement has recently announced revised drilling and workplace safety regulations. The revised drilling rules address new standards for well design, casing and cementing and well control equipment, such as blowout preventers. Operators are now required to obtain independent third-party inspection and certification of each stage of the proposed drilling process. The safety rules include development of a comprehensive safety and environmental management program that identify the potential hazards and risk-reduction strategies for all phases of activity - well design and construction, operation and maintenance, and decommissioning of platforms. According to BOEMRE, additional safety measures, as well as more stringent requirements for blowout preventers, is expected in the near future.

In light of the continuing work by the Governor's Scientific Advisory Panel and the federal overhaul of the Department of the Interior's oversight of OCS energy development regulations, staff is not recommending any action on the part of the Commission at this time. It is expected that there will be more information available on offshore drilling rules by the February 2011 CRC meeting.

In the mean time, the Commission will be able to adopt amendments to 15A NCAC 7H.0106 Definitions, 7H .0208 Use Standards and 7M .0400 Coastal Energy Policies at the upcoming meeting in Beaufort. Staff will be recommending adoption of these rules changes as they will allow the siting of wind energy facilities in State waters as well as broaden the Coastal Energy Policies to incorporate all manner of ocean-based energy development. This action will facilitate consistency review of projects located in federal waters. I look forward to discussing these legislative actions at our up coming meeting.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

SESSION LAW 2010-179
SENATE BILL 836

AN ACT TO: (1) CLARIFY LIABILITY FOR DAMAGES CAUSED BY THE DISCHARGE OF NATURAL GAS, OIL, OR DRILLING WASTE INTO STATE COASTAL FISHING WATERS OR OFFSHORE WATERS; (2) PROVIDE FOR THE REVIEW OF INFORMATION REQUIRED FOR A PROPOSED OFFSHORE FOSSIL FUEL FACILITY IN ORDER TO DETERMINE CONSISTENCY WITH STATE GUIDELINES FOR THE COASTAL AREA; (3) DIRECT THE COASTAL RESOURCES COMMISSION TO REVIEW EXISTING LAWS AND REGULATIONS THAT PERTAIN TO OFFSHORE ENERGY EXPLORATION AND PRODUCTION IN LIGHT OF THE EXPLOSION, SINKING, AND SUBSEQUENT DISCHARGE OF OIL FROM THE BRITISH PETROLEUM DEEPWATER HORIZON OFFSHORE DRILLING RIG; (4) DIRECT THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY TO IMMEDIATELY REVIEW AND UPDATE THE STATE OIL SPILL CONTINGENCY PLAN IN ORDER TO PREPARE THE STATE IN THE EVENT THAT OIL DISCHARGED FROM THE BRITISH PETROLEUM DEEPWATER HORIZON OFFSHORE DRILLING RIG IS TRANSPORTED BY CURRENTS OR OTHER MECHANISMS TO THE NORTH CAROLINA COAST; AND (5) DIRECT THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TO REVIEW LIMITATIONS ON RECOVERY BY THE STATE FOR DAMAGE TO PUBLIC RESOURCES AND FOR THE COST OF OIL OR OTHER HAZARDOUS SUBSTANCE CLEANUP ESTABLISHED PURSUANT TO G.S. 143-215.89.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 143-215.89 reads as rewritten:

"**§ 143-215.89. Multiple liability for necessary ~~expenses.~~<u>expenses; limit on State recovery.</u>**

<u>(a)</u> Any person liable for costs of cleanup of oil or other hazardous substances under this Part shall have a cause of action to recover such costs in part or in whole from any other person causing or contributing to the discharge of oil or other hazardous substances into the waters of the State, including any amount recoverable by the State as necessary expenses.

<u>(b)</u> The total recovery by the State for damage to the public resources pursuant to G.S. 143-215.90 and for the cost of oil or other hazardous substances cleanup, arising from any discharge, shall not exceed the applicable limits prescribed by federal law with respect to the United States government on account of such discharge.<u> The limitations on recovery referenced in this subsection shall not apply to damages recoverable pursuant to G.S. 143-215.94CC.</u>"

SECTION 1.(b) G.S. 143-215.94BB reads as rewritten:

"**§ 143-215.94BB. Definitions.**

In addition to the definitions set out in G.S. 143-215.77, ~~as used in this Part,~~ the following definitions shall ~~apply:~~<u>apply to this Part:</u>

(1) "Damages" are damages for any of the following:

a. Injury or harm to real or personal property, which includes the cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge under this section, any income lost from the time such property is damaged to the time such property is restored, repaired, or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto.

b. Business loss, including loss of income or impairment of earning capacity due to damage to real or personal property or to damage or

destruction of natural resources upon which such income or earning capacity is reasonably dependent.

c. Interest on loans obtained or other financial obligations incurred by an injured party for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this Article.

d. Costs of cleanup, removal, or treatment of natural gas, oil, or drilling waste discharges.

e. Costs of restoration, rehabilitation, and, where possible, replacement of wildlife or other natural resources damaged as a result of a discharge.

f. When the injured party is the State or one of its political subdivisions, in addition to any injury described in subparagraphs (a) to (e), inclusive, damages include all of the following:

1. Injury to natural resources or wildlife, including recreational or commercial fisheries, and loss of use and enjoyment of public beaches and other public resources or facilities within the jurisdiction of the State or one of its political subdivisions.

2. Costs to assess damages to natural resources, wildlife, or habitat.

3. Costs incurred to monitor the cleanup of the natural gas, oil, or drilling waste spilled.

4. Loss of State or local government tax revenues resulting from damages to real or personal property proximately resulting from a discharge.

(2) For the purposes of this Part, "oil" and "drilling wastes" include, but are not limited to: petroleum, refined or processed petroleum, petroleum by-products, oil sludge, oil refuse, oil mixed with wastes and chemicals, or other materials used in the exploration, recovery, or processing of oil. "Oil" does not include oil carried in a vessel for use as fuel in that vessel.

(3) "Natural gas" includes natural gas, liquefied natural gas, and natural gas by-products. "Natural gas" does not include natural gas carried in a vessel for use as fuel in that vessel.

(4) "Exploration" means undersea boring, drilling, ~~and soil sampling.~~soil sampling, and any other technique employed to assess and evaluate the presence of subterranean oil and natural gas deposits.

(5) "Injured party" means any person who suffers damages from natural gas, oil, or drilling waste which is discharged or leaks into marine waters, or from offshore exploration. The State, or a county or municipality, may be an injured party.

(6) "Responsible person" means any of the following:

a. The owner or transporter of natural gas, oil, or drilling waste which causes an injury covered by this Part.

b. The owner, operator, lessee of, or person who charters by demise, any offshore well, undersea site, facility, oil rig, oil platform, vessel, or pipeline which is the source of natural gas, oil, drilling waste, or is the source or location of exploration which causes an injury covered by this Part.

"Responsible party" does not include the United States, the State, any county, municipality or public governmental agency; however, this exception to the definition of "responsible person" shall not be read to exempt utilities from the provisions of this Part.

(7) "Offshore waters" shall include both the territorial sea extending seaward from the coastline of North Carolina ~~to the State and federal boundary, and United States jurisdictional waters of the Atlantic Ocean adjacent to the territorial sea of the State.~~or any other coastal state bordering the Atlantic Ocean, including the Gulf of Mexico, and the exclusive economic zone extending seaward from the territorial sea of each such state.

(8) "Natural resources" shall include "marine and estuarine resources" and "wildlife resources" as those terms are defined in G.S. 113-129(11) and G.S. 113-129(17), respectively.

(9) "Coastal fishing waters" has the same meaning as in G.S. 113-129.

(10) "Exclusive economic zone" has the same meaning as in section 1001(8) of the Oil Pollution Act of 1990, 33 U.S.C. § 2701(8)."

SECTION 1.(c) G.S. 143-215.94CC reads as rewritten:

"**§ 143-215.94CC. Liability under this section; exceptions.**

(a) Any responsible person shall be strictly liable, notwithstanding any language of limitation found in G.S. 143-215.89, for all cleanup and removal costs and all direct or indirect damages incurred within the territorial jurisdiction of the State by any injured ~~party, which~~party that arise out of, or are caused ~~by,~~by any of the following:

(1) ~~the discharge or leaking~~ The discharge, as defined in G.S. 143-215.77, of natural gas, oil, or drilling waste into or onto ~~"coastal fishing waters" as defined in G.S. 113-129(4), or offshore waters, or by any exploration in or upon~~ coastal fishing waters or offshore waters, from any of the following ~~sources:~~sources wherever located:

~~(1)~~a. Any ~~offshore~~ well or undersea site at which there is exploration for or extraction or recovery of natural gas or oil.

~~(2)~~b. Any ~~offshore~~ facility, oil rig, or oil platform at which there is exploration for, or extraction, recovery, processing, or storage of, natural gas or oil.

~~(3)~~c. Any vessel ~~offshore~~ in which natural gas, oil, or drilling waste is transported, processed or stored other than for purposes of fuel for the vessel carrying it.

~~(4)~~d. Any pipeline ~~located offshore~~ in which natural gas, oil, or drilling waste is transported.

(2) Any exploration in or upon coastal fishing waters.

(3) Any technique or method used for cleanup and removal of any discharge of natural gas, oil, or drilling waste from any source listed in subdivision (1) of this subsection into or onto coastal fishing waters, including, but not limited to, chemical dispersants.

(b) A responsible person is not liable to an injured party under this section for any of the following:

(1) Damages, other than costs of removal incurred by the State or a local government, caused solely by any act of war, hostilities, civil war, or insurrection or by an unanticipated grave natural disaster or other act of God of an exceptional, inevitable, and irresistible character, which could not have been prevented or avoided by the exercise of due care or foresight.

(2) Damages caused solely by the negligence or intentional malfeasance of that injured party.

(3) Damages caused solely by the criminal act of a third party other than the defendant or an agent or employee of the defendant. In any action arising under the provisions of this Article wherein this exception is raised as a defense to liability, the burden of proving that the alleged third-party intervention occurred in such a manner as to limit the liability of the person sought to be held liable shall be upon the person charged.

(4) Natural seepage not caused by a responsible person.

(5) Discharge ~~or leaking~~ of oil or natural gas from a private pleasure boat or commercial fishing vessel having a fuel capacity of less than 500 gallons.

(6) Damages which arise out of, or are caused by, a discharge ~~which~~ that is authorized by and in compliance with a State or federal permit.

(7) Damages that could have been reasonably mitigated by the injured party in accordance with common law.

(c) A court of suitable jurisdiction in any action under this Part may award reasonable costs of the suit and attorneys' fees, and the costs of any necessary expert witnesses, to any prevailing plaintiff. The court may award reasonable costs of the suit and attorneys' fees to any prevailing defendant only if the court finds that the plaintiff commenced or prosecuted the suit under this Part in bad faith or solely for purposes of harassing the defendant."

SECTION 1.(d) G.S. 143-215.94JJ reads as rewritten:

"**§ 143-215.94JJ. Federal law.**

Nothing in this Part shall authorize State agencies to impose any duties or obligations in conflict with limitations on State authority established by federal law at the time such agency action is taken. Likewise, no additional liability is established by this Part to the extent that, at the time of the injury, federal law establishes limits on liability which preempt State law. The federal limits on liability established in the Oil Pollution Act of 1990, 33 U.S.C.A. §§ 2701 to 2762, shall not apply to discharges or pollution by oil within the territorial jurisdiction of the State."

SECTION 2. Part 4 of Article 7 of Chapter 113A of the General Statutes is amended by adding a new section to read:

"**§ 113A-119.2. Review of offshore fossil fuel facilities.**

(a) In addition to the definitions set out in G.S. 113A-103, as used in this section, the following definitions shall apply:

(1) "Coastal fishing waters" has the same meaning as in G.S. 113-129.

(2) "Discharge" has the same meaning as in G.S. 143-215.77.

(3) "Offshore fossil fuel facility" means those facilities for the exploration, development, or production of oil or natural gas which, because of their size, magnitude, or scope of impacts, have the potential to affect any land or water use or natural resource of the coastal area. For purposes of this definition, offshore fossil fuel facilities shall include, but are not limited to:

a. Structures, including drill ships and floating platforms and structures relocated from other states or countries, located in coastal fishing waters.

b. Any equipment associated with a structure described in sub-subdivision a. of this subdivision, including, but not limited to, pipelines and vessels that are used to carry, transport, or transfer oil, natural gas, liquid natural gas, liquid propane gas, or synthetic gas.

c. Onshore support or staging facilities associated with a structure described in sub-subdivision a. of this subdivision.

(4) "Oil" has the same meaning as in G.S. 143-215.77.

(b) In addition to any other information necessary to determine consistency with State guidelines adopted pursuant to G.S. 113A-107, the following information is required for the review of an offshore fossil fuel facility located in coastal fishing waters:

(1) All information required to be included in an Exploration Plan required pursuant to Subpart B of Part 250 of 30 C.F.R. (July 1, 2009 edition).

(2) All information required to be included in an Oil-Spill Response Plan required pursuant to Subpart B of Part 254 of 30 C.F.R. (July 1, 2009 edition).

(3) An assessment of alternatives to the proposed offshore fossil fuel facility that would minimize the likelihood of an unauthorized discharge.

(4) An assessment of the potential for an unauthorized discharge to cause temporary or permanent violations of the federal and State water quality standards, including the antidegradation policy adopted pursuant to section 303(d) of the federal Clean Water Act (33 U.S.C. § 1313(d)).

(5) Any other information that the Commission determines necessary for consistency review."

SECTION 3. In light of the recent events pertaining to the British Petroleum Deepwater Horizon offshore drilling rig, the Coastal Resources Commission shall review existing statutes and modify existing rules that pertain to offshore energy exploration and production and make recommendations, if any, to the Environmental Review Commission on or before April 1, 2011.

SECTION 4. The Department of Crime Control and Public Safety shall immediately review the potential impacts of oil leaking from the British Petroleum Deepwater Horizon offshore drilling rig on the North Carolina coast and shall update the Oil Spill Contingency Plan, required by G.S. 143-215.94HH, as necessary to ensure the State's preparedness in the event the oil leaking from the British Petroleum Deepwater Horizon offshore drilling rig is transported by currents or other mechanisms to the North Carolina coast or the State's waters. In updating the plan, the Department shall assess the actions that are being

implemented to manage and mitigate economic and environmental impacts resulting from the spill, determine which solutions have proven successful, identify the best management practices available to address the impacts, and identify the resources necessary to carry out the Oil Spill Contingency Plan.

SECTION 5. The Department of Environment and Natural Resources shall review the limitations on recovery by the State for damage to public resources and for the cost of oil or other hazardous substance cleanup established pursuant to G.S. 143-215.89. The Department shall report the results of its review, including any recommendations for changes to the limitations, to the Environmental Review Commission on or before December 1, 2010.

SECTION 6. This act is effective when it becomes law. Sections 1(a), 1(b), 1(c), and 1(d) of this act apply to any damages, as defined in G.S. 143-215.94BB, incurred on or after that date.

In the General Assembly read three times and ratified this the 9th day of July, 2010.

s/ Walter H. Dalton
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 4:29 p.m. this 2nd day of August, 2010