



NORTH CAROLINA
Environmental Quality

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CRC-20-17

September 1, 2020

MEMORANDUM

TO: Coastal Resources Commission

FROM: Jonathan Howell, DCM Major Permits Coordinator

SUBJECT: Amendments to 15A NCAC 7M .0600 & 7H .0208 – Floating Upweller Systems

In 2016, the Divisions of Marine Fisheries (DMF) and Coastal Management (DCM) agreed that DCM should have a commenting role during the review of proposed shellfish lease applications. This was due to the expanding shellfish aquaculture industry in North Carolina and the increasing demand for shellfish water column leases with associated gear. This commenting process is consistent with existing statutory authorities that grant the DMF Director discretion in determining the suitability of proposed shellfish lease sites and activities. Since that time, DCM has been reviewing shellfish leases and providing comments to DMF for four complete shellfish leasing cycles (April – September).

Through this commenting process, DCM has generally recommended that DMF establish a 20' buffer between coastal wetlands and shellfish leases that utilize gear. In addition, DCM has often commented on navigational impacts associated with proposed shellfish lease locations, the size of pilings, and the need for riparian property owner coordination. DCM also requested that DMF notify shellfish lease applicants that CAMA permits will be required for any shellfish leases proposing to include structural elements or gear that are over and above those typically associated with shellfish aquaculture operations in NC; for example, those applications including pilings greater than 4" in diameter, floating structures other than aquaculture gear, or land-based utilities.

Only one CAMA major permit application has been reviewed for a shellfish lease since 2016. In this example, the applicant requested to use large pilings to mark the corners of the shellfish lease and the permit was issued without objection from the resource agencies. However, DCM staff is noticing an increase in requests for structural components that may require a CAMA permit, including larger or greater densities of pilings to anchor gear, new growing systems, work platforms, and floating upweller systems. DCM can address some these requests (floating upwellers and pilings, etc.) through the CAMA Major Permit process, but CRC Rules lack specific use standards that apply to this type of development.



DCM began to discuss ways to formalize the division's role in reviewing leases, and which activities might be suitable for CAMA permit exemptions through CRC rulemaking. Staff also attended several meetings with the NC Coastal Federation, DMF, several shellfish growers, and other regulatory agencies to receive feedback on draft policies. The results were presented at the April and November 2019 CRC meetings. Staff presented draft rule language for regulatory exemptions from CAMA permitting and draft General Permit language for consideration by the commission.

In January 2020, DCM staff met again with DMF staff to discuss how best to address the DCM's and the CRC's interests and concerns related to shellfish leases. DMF staff discussed several regulatory and statutory changes that DMF will be pursuing in the coming year related to the shellfish leasing process, as part of a General Assembly mandated (S.L. 2019-37) study on user conflicts that was completed in December 2019. The session law also required DMF and the Marine Fisheries Commission (MFC) to complete rulemaking by March of 2021 consistent with the findings of the user conflict study to help reduce user conflicts. Because most of the "rules" associated with shellfish leasing in North Carolina are governed by state statutes (see N.C.G.S. §113-201 and -202), DMF will also require statutory changes. DMF staff presented this rule revision initiative to the MFC at their August meeting and will be presenting those outcomes to you at our upcoming meeting.

At your February meeting, DCM submitted recommendations regarding exemption language for some bottom leases. At that time, the Commission did not recommend moving forward with the proposed language, instead opting to wait for any changes in the rule language proposed by the MFC. DCM also recommended moving forward with modifications to 15A NCAC 07M policies for floating structures to specifically state floating upweller systems are floating structures and are allowed at private docks as well as marinas. To allow floating upweller systems at a private docking facility will require a change in 15A NCAC 07H .0208(b)(6) Piers and Docking Facilities, a reference to 7H .0208(b)(5) Marinas in 15A NCAC 7M Floating Structure Policies, as well as amendments to 7M .0602 and 7M .0603. These proposed amendments are attached and will be discussed at our upcoming meeting.

As the State continues to encourage commercial cultivation of shellfish in coastal waters, DCM continues to seek guidance from the CRC on how to best manage this emerging industry in partnership with DMF and the MFC. I will be joined by DMF Habitat Manager Jacob Boyd at your September meeting for presentations and discussion of this material.

15A NCAC 07H .0208 USE STANDARDS

(b) Specific Use Standards

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

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

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

SECTION .0600 - FLOATING STRUCTURE POLICIES

15A NCAC 07M .0601 DECLARATION OF GENERAL POLICY

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

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

15A NCAC 07M .0602 DEFINITIONS

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

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

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

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

15A NCAC 07M .0603 POLICY STATEMENTS

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

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

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

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

15A NCAC 07H .0208 USE STANDARDS

(b) Specific Use Standards

- (5) Marinas. Marinas are defined as any publicly or privately owned dock, basin or wet boat storage facility constructed to accommodate more than 10 boats and providing any of the following services: permanent or transient docking spaces, dry storage, fueling facilities, haulout facilities and repair service. Excluded from this definition are boat ramp facilities allowing access only, temporary docking and none of the preceding services. Expansion of existing facilities shall comply with the standards of this Subparagraph for all development other than maintenance and repair necessary to maintain previous service levels. Marinas shall comply with the following standards:
- (A) Marinas shall be sited in non-wetland areas or in deep waters (areas not requiring dredging) and shall not disturb shellfish resources, submerged aquatic vegetation as defined by the MFC, or wetland habitats, except for dredging necessary for access to high-ground sites. The following four alternatives for siting marinas are listed in order of preference for the least damaging alternative; marina projects shall be designed to have the highest of these four priorities that is deemed feasible by the permit letting agency:
 - (i) an upland basin site requiring no alteration of wetland or estuarine habitat and providing flushing by tidal or wind generated water circulation or basin design characteristics;
 - (ii) an upland basin site requiring dredging for access when the necessary dredging and operation of the marina will not result in significant adverse impacts to existing fishery, shellfish, or wetland resources and the basin design shall provide flushing by tidal or wind generated water circulation;
 - (iii) an open water site located outside a primary nursery area which utilizes piers or docks rather than channels or canals to reach deeper water; and
 - (iv) an open water marina requiring excavation of no intertidal habitat, and no dredging greater than the depth of the connecting channel.
 - (B) Marinas which require dredging shall not be located in primary nursery areas nor in areas which require dredging through primary nursery areas for access. Maintenance dredging in primary nursery areas for existing marinas shall comply with the standards set out in Part (b)(1)(I) of this Rule;
 - (C) To minimize coverage of public trust areas by docks and moored vessels, dry storage marinas shall be used where feasible;
 - (D) Marinas to be developed in waters subject to public trust rights (other than those created by dredging upland basins or canals) for the purpose of providing docking for residential developments shall be allowed no more than 27 square feet of public trust areas for every one linear foot of shoreline adjacent to these public trust areas for construction of docks and mooring facilities. The 27 square feet allocation does not apply to fairway areas between parallel piers or any portion of the pier used only for access from land to the docking spaces;
 - (E) To protect water quality in shellfishing areas, marinas shall not be located within areas where shellfish harvesting for human consumption is a significant existing use or adjacent to such areas if shellfish harvest closure is anticipated to result from the location of the marina. In compliance with 33 U.S. Code Section 101(a)(2) of the Clean Water Act and North Carolina Water Quality Standards adopted pursuant to that section, shellfish harvesting is a significant existing use if it can be established that shellfish have been regularly harvested for human consumption since November 28, 1975 or that shellfish are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting for the purpose of human consumption. The Division of Coastal Management shall consult with the Division of Marine Fisheries regarding the significance of shellfish harvest as an existing use and the magnitude of the quantities of shellfish that have been harvested or are available for harvest in the area where harvest will be affected by the development;

- (F) Marinas shall not be located without written consent from the leaseholders or owners of submerged lands that have been leased from the state or deeded by the state;
- (G) Marina basins shall be designed to promote flushing through the following design criteria:
 - (i) the basin and channel depths shall gradually increase toward open water and shall never be deeper than the waters to which they connect; and
 - (ii) when possible, an opening shall be provided at opposite ends of the basin to establish flow-through circulation;
- (H) Marinas shall be designed so that the capability of the waters to be used for navigation or for other public trust rights in estuarine or public trust waters are not jeopardized while allowing the applicant access to deep waters;
- (I) Marinas shall be located and constructed so as to avoid adverse impacts on navigation throughout all federally maintained channels and their boundaries as designated by the US Army Corps of Engineers. This includes mooring sites (permanent or temporary); speed or traffic reductions; or any other device, either physical or regulatory, that may cause a federally maintained channel to be restricted;
- (J) Open water marinas shall not be enclosed within breakwaters that preclude circulation sufficient to maintain water quality;
- (K) Marinas which require dredging shall provide areas in accordance with Part (b)(1)(B) of this Rule to accommodate disposal needs for future maintenance dredging, including the ability to remove the dredged material from the marina site;
- (L) Marina design shall comply with all applicable EMC requirements for management of stormwater runoff. Stormwater management systems shall not be located within the 30-foot buffer area outlined in 15A NCAC 07H .0209(d);
- (M) Marinas shall post a notice prohibiting the discharge of any waste from boat toilets and listing the availability of local pump-out services;
- (N) Boat maintenance areas shall be designed so that all scraping, sandblasting, and painting will be done over dry land with collection and containment devices that prevent entry of waste materials into adjacent waters;
- (O) All marinas shall comply with all applicable standards for docks and piers, shoreline stabilization, dredging and dredged material disposal of this Rule;
- (P) All applications for marinas shall be reviewed by the Division of Coastal Management to determine their potential impact to coastal resources and compliance with applicable standards of this Rule. Such review shall also consider the cumulative impacts of marina development in accordance with G.S. 113A-120(a)(10); and
- (Q) Replacement of existing marinas to maintain previous service levels shall be allowed provided that the development complies with the standards for marina development within this Section.