

NC COASTAL RESOURCES COMMISSION
November 4, 2013

The State Government Ethics Act mandates that at the beginning of any meeting the Chair remind all the members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. If any member knows of a conflict of interest or potential conflict, please state so when the roll is called.

Monday, November 4th

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| 9:30 | COMMISSION CALL TO ORDER <ul style="list-style-type: none">• Roll Call/SEI Evaluation Letters• Introduction of Commission Members (2-3 minutes per person)• Chairman's Comments | Frank Gorham, Chair |
| 10:00 | Commissioner Orientation <ul style="list-style-type: none">• Executive Secretary Briefing | Braxton Davis |
| 11:00 | Cape Fear River AEC Study | Mike Lopazanski |
| 11:15 | CRC Business <ul style="list-style-type: none">• Approval of July 11, 2013 and August 26, 2013 CRC Meeting Minutes• Initial CRC Organization and Procedures• Review and Discuss December 2013 Draft Agenda | Frank Gorham, Chair
Frank Gorham, Chair
Braxton Davis |
| 11:45 | Public Comments | |
| 12:00 | Closed Session <ul style="list-style-type: none">• Ongoing Litigation Related to CAMA | |
| 12:25 | Old/New Business <ul style="list-style-type: none">• 2014 CRC Meeting Dates and Locations | Frank Gorham, Chair |
| 12:30 | ADJOURN | |

Executive Order 34 mandates that in transacting Commission business, each person appointed by the governor shall act always in the best interest of the public without regard for his or her financial interests. To this end, each appointee must recuse himself or herself from voting on any matter on which the appointee has a financial interest. Commissioners having a question about a conflict of interest or potential conflict should consult with the Chairman or legal counsel.



N.C. Division of Coastal Management
www.nccoastalmanagement.net

Next Meeting:
December 11-13, 2013

NC COASTAL RESOURCES COMMISSION (CRC)

July 11, 2013

NOAA/NCNERR Auditorium

Beaufort, NC

Present CRC Members

Bob Emory, Chair

Lee Wynns

David Webster

Jerry Old

Bill Peele

Joe Hester

Larry Baldwin

Gwen Baker

Ed Mitchell

Pat Joyce

Present Attorney General's Office Members

Mary Lucasse

Christine Goebel

Amanda Little

CALL TO ORDER/ROLL CALL

Bob Emory called the meeting to order reminding the Commissioners of the need to state any conflicts due to Executive Order Number One and also the State Government Ethics Act. The State Government Ethics Act mandates that at the beginning of each meeting the Chair remind all members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. If any member knows of a conflict of interest or a potential conflict of interest, please state so when the roll is called.

Angela Willis called the roll. No conflicts were reported. Joan Weld, Renee Cahoon, Jamin Simmons and Scott Cutler were absent. Based upon this roll call, Chairman Emory declared a quorum.

MINUTES

David Webster made a motion to approve the minutes of the May 2013 Coastal Resources Commission meeting. Jerry Old seconded the motion. The motion passed unanimously (Wynns, Hester, Webster, Old, Peele, Baldwin, Baker) (Joyce, Mitchell absent for vote).

EXECUTIVE SECRETARY'S REPORT

DCM Director Braxton Davis gave the following report.

In your meeting materials you will find the DCM Update Memo that covers the Division of Coastal Management's recent permitting, enforcement, Planning and Coastal Reserve activities. It's also a good place to find the status of proposed rules. As you'll see in this meeting's Division update, our permit numbers continue to be up in comparison with the last few years, which is hopefully a good sign for the coastal economy. Our Policy/Planning staff are continuing to work on beach and inlet management planning efforts, and are working with our Coastal Reserve staff on "living shorelines"

approaches to estuarine shoreline stabilization. We are also making progress on our comprehensive review of the land use planning program, which you will hear more about later today. From what I understand, this year's July 4 celebrations at our Masonboro Island Coastal Reserve were relatively calm in comparison with last year. We appreciate the work of our partners in law enforcement, the efforts of our Reserve staff who have been working to improve coordination among the various agencies down there, and who developed what seems to have been a successful public relations campaign, and we appreciate all of the local volunteers who have pitched in to help with this situation.

We worked with the Executive Committee to develop today's agenda, and I will just highlight a few items. First, we are very grateful for today's participation of Mayor Richard Stanley from the Town of Beaufort. We look forward to hearing his thoughts about the Town's experiences with coastal issues and interactions with CAMA and the Division of Coastal Management. This afternoon, we have a series of action items for you to consider, including the approval of several proposed rule changes that continue to follow from the Division's internal review of rules to help identify unnecessary burdens or negative impacts on customer service. We will also have a follow-up discussion, as you requested at the last meeting, on different approaches to the replacement of septic tanks on the beachfront and related implications. We are planning for the September Commission meeting to be held at Jennette's Pier in Nags Head.

CHAIRMAN'S COMMENTS

Bob Emory announced that following the public comment period the Commission will go into closed session for consideration of some legal matters. Chairman Emory also reported that Lester Simpson, CRAC member since 1989, has passed away.

LEGISLATIVE UPDATE

Braxton Davis gave an overview of legislative bills that have implications for the coast, the Commission and the Division.

HB1011 (formerly SB10) – This bill passed the House on May 9 and the language regarding the CRC and CRAC was included in Senate Bill 402 which is the Senate Budget Bill. The House took up the Budget Bill and removed the special provision in the bill related to Boards and Commissions. The current status is now unclear. It could be resolved in budget negotiations.

SB151 – This bill makes changes to the 2011 terminal groin construction law and clarifies that cities and towns may enforce ordinances within the state's public trust areas on the beachfront. The Senate version has passed. A House substitute went through the House Environment Committee on June 20. The House version retained the cap of four terminal groins which had been removed from the Senate version. The House has not voted on this bill.

HB94 – This is an omnibus bill that amends a number of different environmental laws. The most recent version includes many provisions of the Senate's version of this bill. This bill would change the threshold at which an agency must prepare a fiscal note for a rule change. It amends the definition of a 'built upon area' to exclude gravel surfaces and wooden slatted decks. This is directly related to coastal stormwater rules and would probably have implications on some of the CRC's rules. This bill combines the Divisions of Water Resources and Water Quality into one Division of Water Resources. There are two pieces in this bill that the Department requested on behalf of the Division and we were pleased to see in it. The first is the elimination of the requirement for newspaper publications of public notices for CAMA Minor Permits. This will

improve the Minor Permitting program and standardizes the notices for Minor Permits with General Permits. This bill also amends the Dredge and Fill Law to allow signed statements of no objection by the adjacent property owners to be considered as an acceptable alternative to certified mail requirements for Major Permits. This bill has been referred to the House Committee on Environment.

SB112 – This is another omnibus bill. A House substitute was brought to committee on July 10 including language similar to what was in HB74. This bill would require agencies to review all of their existing rules once every ten years. It would also require cities and counties to repeal any ordinances stricter than any state or federal regulation. This bill passed the House Regulatory Reform Committee on July 10.

HB707 – This bill directs DENR to pursue various strategies to maintain the state’s shallow draft inlet navigation channels. It also establishes the Oregon Inlet Acquisition Task Force for the purpose of considering options for acquiring federally owned property adjacent to Oregon Inlet. This was signed into law by Governor McCrory on June 19.

HB294 – This allows Brunswick and Dare counties to remove abandoned vessels from navigable waters. This bill has passed both houses.

HB484 – This bill establishes a permitting program for the siting and operation of wind energy facilities within the Department’s new Division of Energy, Mineral and Land Resources. This was signed into law on May 17.

HB300 – This gives cities and towns the right to enforce local ordinances on ocean beaches. This passed the House and was sent to the Senate State and Local Government Committee.

PRESENTATIONS

Town of Beaufort – Welcome Richard L. Stanley, Mayor

Mayor Stanley welcomed the CRC on behalf of the Town of Beaufort, America’s Coolest Small Town. Beaufort is one of the homes of Blackbeard, home of the Rachel Carson Coastal Reserve, home of the North Carolina Maritime Museum, home of Duke University’s Nicholas School of Environment, and home of the NOAA facility which is one of the nation’s first marine laboratories in the United States. Beaufort residents and visitors hold dear our natural resources from our sandy dunes to our clean waterways and access facilities. We welcome you to drive Front Street to observe our old homes as we treasure the past while planning for the future. A lot of this had to do with the Coastal Resources Commission. It is through your planning, permit process and water access programs, rulemaking and enforcement programs that you have helped us observe our maritime heritage. We have public docks enjoyed by thousands every year which were approved and permitted by the CRC. For this and the many things you do for coastal North Carolina, we applaud you and owe you a great debt of gratitude. I have appeared before the CRC as town attorney for Emerald Isle. I have also worked with DCM staff regarding a permanent beach restoration program involving our counties oceanfront towns. We have been involved with the staff with many marina projects and are investigating the establishment of a harbor refuge and anchoring area. All of the interaction with the staff has been excellent and most supportive. I have been asked to comment on some problems that we are facing now. Beaufort is a town that is 304 years old and

has never done much about stormwater other than the natural flow of water. We are facing stormwater problems. We have a new bridge that is coming and there are going to be some changes to the accesses, but we have problems with the ditches, canals and creeks that take out the stormwater. We are undertaking a study and looking at possible solutions that we know will not be cheap. Much of this will have to be coordinated with DCM staff. Our state is most fortunate that the coastal counties and communities have CAMA and the planning and permit process. We have clean waters as a result and I would like to thank you.

USF&W Service's Proposed Designation of Critical Habitat for the Sea Turtle – Update Braxton Davis

Braxton Davis stated the USF&W Service proposed a rule to designate 740 miles of shoreline in six states as critical habitat for the northwest Atlantic population of loggerhead sea turtles. That includes 96 miles in North Carolina, including all of Bogue Banks and part of the shoreline in Brunswick, New Hanover, Onslow and Pender counties. This proposal generated significant concern among coastal communities over what the proposal means in terms of additional rules, procedures and costs for coastal projects. A good deal of pride exists in North Carolina over the existing sea turtle conservation programs that we have in this state. We learned of the proposed rule the same way most everyone did, in the newspaper. The implications of this suggested that there were no additional regulatory burdens. That was reflected later in the proposed rule language. The Department and many others were not so sure about that. We were concerned that the designation may unfairly impact beach and inlet management activities in particular. We weren't sure how this would affect requirements for biological assessments in consultations with the Fish and Wildlife Service under the Endangered Species Act. Given the lack of clarity over exactly what the Critical Habitat Designation meant and the potential for significant impacts on the way we manage beaches and inlets in North Carolina, DENR sent a letter to the Fish and Wildlife Service as part of the public comment period that concluded with five key requests. The first was to submit a federal consistency determination to the Division of Coastal Management as we believe is required by the Federal Coastal Zone Management Act. This would initiate the formal public and agency review process on this federal action. The second was to clarify the potential range of management efforts, regulatory reviews or other operational conditions that could be placed on activities considered threats in the critical habitat designation. The third was to prepare a comprehensive economic analysis of impacts to coastal communities and stakeholders. The fourth was to provide additional information on data utilized for designations. Finally, we requested a meeting with the relevant North Carolina agencies, local governments, and National Marine Fisheries Service to discuss the potential for integrated environmental studies, streamlined permitting, and improved regulatory conditions for projects in critical habitat areas for coastal threatened and endangered species in North Carolina. After the CRC's discussion at its last meeting, Chairman Emory put together a letter on behalf of the Commission to the Fish and Wildlife Service seconding the concerns raised by the Department and reinforcing the recommendations in the Secretary's letter. Yesterday, staff had a conference call with several Fish and Wildlife Service representatives and one from the Department of Interior to follow up on our requests. Fish and Wildlife indicated that their decision remains the same. They will not submit a federal consistency determination to North Carolina. They are also communicating this position to several other southeastern states which had requested a review. Their position is that no federal consistency determination is required because no federal action has taken place until specific reviews take place under the new designation. They also argue that the proposed rule change is a procedural change and there is no specific standard or requirements that come along with it. We placed a call to NOAA OCRM which manages the federal consistency program. The staff response there was initially in line with the Fish and

Wildlife position based on a prior case in Hawaii that critical habitat designation at the federal level only requires other federal agencies to consult with each other and therefore may not constitute a coastal effect. Furthermore, a procedural change like this without a specific standard may not be enough to invoke a coastal effect under federal consistency law. They did say that they would entertain additional review of the matter with Fish and Wildlife Service and other states in the region. They will be following up with us on additional background information that we submitted to them. Even with the federal consistency review process on this matter, there is no predetermined outcome for this. Under federal consistency law a federal action or permit has to be consistent to the maximum extent practicable with enforceable state policies. There are a number of things to look at. A lot of times it is not a strong hammer, but it is an important coordination mechanism with state policies and procedures. Regardless, we reminded them that using the federal consistency provision is a really important coordination mechanism with state coastal programs and instead of the 19,000 comments that they have received so far on this proposed rule change, we could have helped coordinate a state agency, local government and public review of this and provided a coordinated response.

My interpretation of the management measures included with this designation is that it would involve a different process for reviewing projects within a critical habitat area. Most of the beach and inlet management projects already require consultation with the Fish and Wildlife Service under the Endangered Species Act. A biological opinion is issued. For a long standing Corps of Engineers project this biological opinion may have to be revisited and additional analysis may have to be done for the critical habitat impacts. For a new project a section of the review would have to address critical habitat impacts. The treatment of critical habitat would be within the same biological opinion and would have to be done within the same allowed timeframe for the review. There cannot be conditions imposed on a project that are only required to protect habitat. The condition has to be required to protect the species. Most of the projects that we are doing these days already require conditions, monitoring and mitigation that would resolve the critical habitat issues for this species. They also did not foresee additional requirements for local projects like lighting and beach access. Most importantly, there will be public hearings in this region at multiple locations in early August. We asked them to conduct a comprehensive economic impact analysis. That should be coming out very soon. They were also receptive to having a broader meeting among the key agencies to look at coastal endangered or threatened species more holistically to think about regional and integrated analysis. They were willing to discuss the potential for a programmatic biological opinion for beach nourishment projects as is currently practiced in Florida which covers multiple species.

Braxton then invited comment from Louis Daniel, Director Division of Marine Fisheries, who was present at the CRC meeting. Director Daniel stated we have been working very closely with DCM and the Department on this and I feel comfortable with where we are. We have been dealing with the turtle issue since 1999. Our protected resources section staff are here today to hear this discussion. The one thing I would be cautious of as we move forward is there does tend to be some differences in how the Fish and Wildlife Service does things and how the National Marine Fisheries Service does things. We may find additional differences as we move forward. I am in lock step with Braxton and think that we have a good coordinated Departmental position on this issue.

Progress on Cape Fear River AEC Study (CRC 13-22)

Heather Coats

Heather Coats stated that last year the General Assembly passed HB819 which is best known for its directive on sea level rise. The law also contained a section directing the CRC to study the feasibility of creating an AEC for the lands adjacent to the mouth of the Cape Fear River. HB819 directs the CRC to consider if the unique coastal morphologies and hydrographic conditions of the area warrant appropriate development standards for a single unique AEC. Our report is due to the Secretary of the Department, the General Assembly and the Governor by the end of this calendar year. In October, DCM staff held a meeting with the Village of Bald Head Island (Village), the Town of Caswell Beach (Town) and representatives from the North Carolina Baptist Assembly. Chairman Emory was also present at that meeting. At that time we heard initial concerns and thoughts on the study. We asked the Village, Town and their consultants to use the AEC nomination procedure set forth in 7H .0503 as a guide to provide DCM with the information as to how the Cape Fear Inlet area is unique and why a new AEC is needed. Staff then met in May with representatives of the Village and Town to plan a workshop to identify further concerns. The workshop was held in late June in Southport. A background of the law was given as well as a description of AECs and the current regulatory structure and permitting process. We heard from Charles Baldwin, the attorney for the Village. He gave a presentation explaining the Village's premise that the federal channel is the dominant influence of the Cape Fear River Inlet and the fact that the channel is maintained in a fixed location makes this area unique and results in manmade erosion. The Village has spent over \$22 million over the years to mitigate erosion on the island and because of this the Village would like DCM to develop a new AEC and rules that are more collaborative, cooperative and flexible with engineering based problem solving for this unique location. The Village would also like to see more staff-level resolutions and rules that are more efficient, effective and anticipatory. The Village conceptualizes the new Cape Fear AEC limits on their side of the inlet to encompass the proposed inlet hazard area box. The AEC boundaries would be established by the CRC at a later date if you decide to proceed with the creation of the AEC. The Village would also like new rules for the AEC to replace those of the current inlet hazard and ocean erodible AECs. They stated that existing regulations would continue to apply outside the Cape Fear AEC and that they are not looking to reduce development setbacks or change the Estuarine Shoreline AEC rules. The Village's regulatory concerns seem to focus specifically on responses to shoreline erosion. The Village also stated that they would like the CRC to recommend to the General Assembly an exception for the Cape Fear AEC from the state's hardened structure ban. The Village would also like the CRC's rules to allow staff to permit structures or options such as rock groins, terminal structures, breakwaters, jetties, sandbags, beach bulldozing, and sand placement projects to mitigate channel induced erosion that are otherwise currently prohibited. Of course before some of these structures could be allowed, a change in state law would be required. The Village also wants these permits to be issued more quickly and with expedited processing. We also heard from Johnny Martin of Moffat and Nichol who presented on behalf of the Town of Caswell Beach. He discussed the historical deepening of the Cape Fear River, the independent littoral system, the importance of adjacent shoals and a couple of other unique features on Caswell Beach including Fort Caswell and the Duke Energy Outfall. The Town's findings show that work performed on one side of the channel does not influence the other side. He expressed some concerns regarding erosion on Caswell Beach, particularly on the east end of the island near Fort Caswell. We also heard comments from numerous other people representing various interests at the workshop. To summarize, people felt this was a good opportunity to collaborate and innovate. There was widespread concern regarding impacts of the federal channel. There are also some who want DCM and the CRC to acknowledge the impacts of channel maintenance. The Department of

Cultural Resources informed us that the area encompasses 9 listed historic properties and 27 known ship wrecks. There are also questions regarding state versus federal permitting requirements. Some things to keep in mind as we proceed through the study are that we feel we have the flexibility in the rules to respond to unique situations as they arise, we have the variance process, a declaratory ruling process to establish the applicability or validity of rules, the petition for rulemaking, and the AEC nominations and designations procedure. These processes are available to any individual at any time. Current permitting often requires coordination with the Army Corps of Engineers and other state and federal agencies and many of these types of projects require permits from these other agencies. We need to be cognizant of the impact of changing the rules and whether the changes may inadvertently bog down the system rather than streamlining it. Creating a new AEC and use standards does not change the permit requirements or the procedures required. In August we plan to refine the concerns and zero in on more specifics during an additional meeting. In September we will present the draft report at the next Commission meeting. We will then send the report out for public comment and hold a public hearing in Southport during the October/November timeframe. Then upon incorporating all the comments received, we will present the final report to the CRC at the December meeting allowing time to make changes before the final report is submitted at the end of the calendar year.

Regional Planning and Permitting of Beach Nourishment Projects (CRC 13-23)

Matt Slagel

Matt Slagel provided an update on the steps the Division is taking to implement the Beach and Inlet Management Plan (BIMP). The BIMP was approved in April 2011. It set up a framework for regional planning and permitting of beach projects by dividing the coast into sub-regions and looking at beach and inlet project needs before an emergency, pooling of resources between communities, integrating data and improving data collection, streamlining permits, and developing proactive nourishment plans. DCM is focusing on the Bogue Banks master beach nourishment plan. Bogue Banks is trying to develop a plan for a multi-decadal long term beach nourishment program. This could be a model for other communities around the state. Our hope is to create a guidance document that would walk communities along the path to follow the process for getting their own multi-decadal beach nourishment program in place. The Pine Knoll Shores project was primarily funded by FEMA and the Carteret County Beach Commission used some local funding to extend the project and add more sand to the project than FEMA was going to reimburse. This project was eligible for FEMA funding since Bogue Banks has an annual beach erosion monitoring program in place where they take yearly beach profiles and show FEMA the loss. In conjunction with the Bogue Banks master beach nourishment plan, the information in the document will feed into a programmatic environmental impact statement. DCM has been working with the towns on Bogue Banks, the County, their consultants, and state and federal agencies to figure out what the process will look like and how it could be permitted at the state and federal levels. We have been assessing the goals and priorities of the local communities, figuring out what the regulatory requirements of the permit would be, what the proposed thresholds for adding sand to the beach would be, and required monitoring. We have met with Carteret County, the Town of Atlantic Beach, the Town of Pine Knoll Shores, and the Town of Emerald Isle to get their local perspectives on the development of the plan and what should be included in it. We met with consultants that are developing the programmatic EIS to assess their preliminary permit wish list and the project overview. We also met with state and federal regulatory and resource agencies that would be involved in the review and permitting of such a project to try to determine the scope of this programmatic instrument. Across the board the participants noted that the three tiered approach that they have employed has worked well. They have a Beach Commission which provides the

organizational structure necessary to have the different municipalities talking together. They have a coordinator that staffs the Commission and they may have an approved planning, engineering and funding document which provides the framework for the long term project. They also identified long term funding concerns. They expressed a desire to be proactive. In speaking with the consultants there were four key components. One would be documenting the sediment needs over the years. Once that need is established, where will the sand be found? Then there is a need for a volumetric trigger. The last is they would like to include inlet management. The preliminary idea is to establish a safe box based on historical inlet migration and where the channel has been located in the past. Once the Bogue Inlet channel begins to migrate outside of the safe box then they would initiate action to try to relocate it back into a location that is no longer threatening. The agencies that we have talked with believe that we should start at DCM with the Army Corps' permit conditions from recent nourishment projects as a starting point. Once we come to an agreement of what the minimums are then we can determine if there are additional requirements that would be needed for a long term project. There are concerns about including inlet relocation as part of a fifty year project. We have a good handle on what is required for beach nourishment projects and how many successful projects have taken place. But with inlet relocation projects there are a few more variables to consider. There are also concerns about the frequency interval of sand placement on a given beach. Would Carteret County want to put sand on the beach every year? What would that do to the benthic invertebrates and sea turtle nesting and other issues that would be impacted by sand being added every year? That is probably not likely to happen, but there were concerns about it. The last thing discussed was how often would data need to be reviewed over the course of the project? If it is a fifty year project and a permit is issued would they have to update the data every five or ten years? A time period for updating the data would need to be established. We would like to meet with other towns and stakeholders around the state to determine if there is interest in pursuing a similar regional strategy. There have been a lot of discussions in Dare County about a better way to coordinate projects. We want to try to understand the format of existing local regional agreements and explore the potential for region specific implementation. We intend to draft a guidance document based on the discussions that we have had so far using Bogue Banks as a model. Then we will present it to the Commission, CRAC and other local governments with the goal of addressing a range of anticipated beach nourishment activities. We envision some amendments to the CRC's shoreline erosion policies.

PUBLIC INPUT AND COMMENT

Chris McCall, Assistant Village Manager and Shoreline Protection Manager for the Village of Bald Head Island, stated I have been a CAMA LPO for about nine years and work directly with DCM staff and it has been a good relationship. I have nothing bad to say about the work that DCM does with the local permitting program and we work well together. As Heather indicated in her presentation, the channel between Bald Head and Caswell Beach comes close to the toe of Bald Head. The channel was realigned in 2001. (*slides of the channel were shown*) The channel is maintained at a particular location unlike natural inlets that migrate. A couple of years ago we came to the CRC for a variance for a 350 foot sandbag revetment to put at the Point to stop the erosion. The CRC granted the variance and we installed the revetment. Since then there hasn't been any further landward migration of the first line of vegetation. We received sand from a dredging project this past winter which has been helpful. At the time of the variance request we had lost about 350-400 feet of shoreline within a year's time. The private residential structures at the Point all have sandbags and for the most part we have been able to keep them covered and vegetated. That process works. The morphology is changing as the Point unravels and moves north. The local tax payers have spent upwards of \$22 million to mitigate this over the last decade

which doesn't include the ongoing work we have with the terminal groin. The Village feels that looking at a Cape Fear AEC is in the best interest of the Village, the State, the Port Authority, the environment, and commerce. We would appreciate the opportunity to work with DCM staff and the Commission and hope that we will receive a favorable recommendation for the move to the next step.

Lee Wynns made a motion that the Coastal Resources Commission go into closed session pursuant to N.C. General Statute 143-318.11(a)(3) to consider and give instructions to its attorney concerning the handling of the petition for judicial review case filed in Wake County Superior Court as 12 CVS 16364. There are two named Petitioners in that lawsuit (1)Defenders of Wildlife and (2)National Wildlife Refuge Association. The named respondents are the North Carolina Department of Environment and Natural Resources, Division of Coastal Management, who has been dismissed from the appeal, and the North Carolina Coastal Resources Commission. NCDOT was allowed to intervene as a Respondent in the petition for judicial review. Jerry Old seconded the motion. The motion passed unanimously (Baldwin, Mitchell, Webster, Peele, Wynns, Baker, Hester, Old)(Joyce absent for vote).

Bill Peele made a motion to close the closed session and return to open session. Lee Wynns seconded the motion. The motion passed unanimously (Baldwin, Mitchell, Webster, Peele, Wynns, Baker, Hester, Old)(Joyce absent for vote).

LAND USE PLAN CERTIFICATIONS AND AMENDMENTS

Currituck County LUP Implementation Status Report (CRC 13-29)

John Thayer

John Thayer stated the rules require that local governments that prepare a land use plan using state money provide an implementation status report every two years. Currituck County's plan was originally certified in 2007 and it reflects amendments in the plan through 2009. No action is necessary on this item.

Characterization of Land Use Plans – Assessment Update (CRC 13-28)

John Thayer

John Thayer reviewed the preliminary results from the planner's review of the local land use plans. We wanted to see how the plans have been personalized and use this information as background to local governments as well as see if there is something that could help us in the 7B clarifications. This review will also help us with the technical manual. We looked at Joint Land Use Plans which are when a city and a county go in on a land use plan process together. The city and county separately adopt the plan and hold their own public hearings per the state's requirements. In the future when the document is amended the city and county adopt the amendments separately. The other types of land use plans are where towns and cities are pulled into the document. Many of the plans are of this category. The other type of plan is the workbook plan. We have a few communities that have taken advantage of this process, but oceanfront communities do not prepare a workbook plan. The counties are required to prepare a land use plan. If a municipality does not join in with the county and doesn't prepare their own land use plan then they are subject to the plan of the county. The assessment focused on common community attributes such as economics, permanent populations, management topics, marinas, existing and future infrastructure, beach nourishment, transportation planning and flood mapping. We looked at 52 plans during this review.

Overall there were 13 county plans reviewed, 34 municipal plans, and five joint land use plans. Of all the plans that were prepared, 41 of the communities have one or more planners and 35 of the communities also have an LPO. We will be taking our observations out to a workshop with the Coastal Federation and BASE. We will look at who has done their plan well and do some outreach to hear from communities that have been involved with the plans to see what is working and what is useful.

ACTION ITEMS

Adopt 15A NCAC 7H .0312 Technical Standards for Beach Fill Projects (CRC 13-31)

Tancred Miller

Tancred Miller stated the public comment period on this amendment just ended. These changes apply to maintained navigation channels, nearshore disposal areas and offshore dredge disposal sites. The purpose of this change is to reduce the sampling costs and sampling burden for projects that we know have beach quality material. This will reduce the burden on communities that want to use these regularly dredged areas with good quality sand and not spend money to sample again. The fiscal analysis shows about \$100,000 savings per year per project. This is a significant cost savings. No comments were received from the public. A public hearing was held May 2 and no comments were received since we had worked with the communities while drafting the changes. The proposed effective date is September 1, 2013.

Jerry Old made a motion to adopt 15A NCAC 07H .0312. Larry Baldwin seconded the motion. The motion passed unanimously (Joyce, Baldwin, Webster, Peele, Wynns, Baker, Hester, Old) (Mitchell absent for vote).

Adopt 15A NCAC 7H .0306(a)(2)

General Use Standards for Ocean Hazard Areas (CRC 13-24)

Mike Lopazanski

Mike Lopazanski stated HB 819 directed the CRC to not deny permits for the replacement of single family or duplex residential structures with a total square footage of 5,000 square feet or more based on their failure to meet the oceanfront setback requirements in 7H .0306. The CRC's rules set up a graduated setback for the siting of development on the oceanfront. There were certain conditions in the legislation that included the structure being constructed prior to August 2009, when they are replaced they cannot exceed their original square footage or their original footprint, they have to meet the minimum setback, and they can only take advantage of this grandfather provision if they cannot meet the graduated setback. Temporary rules were adopted in November of last year and the permanent rulemaking process began at that time. We did not receive any comments on the rule amendment. The permanent rule will take the place of the temporary rule once it becomes effective. The proposed effective date is September 1, 2013.

David Webster made a motion to adopt 15A NCAC 7H .0306. Gwen Baker seconded the motion. The motion passed unanimously (Joyce, Baldwin, Webster, Peele, Wynns, Baker, Hester, Old) (Mitchell absent for vote).

Amendments to 15A NCAC 7H .1200

GP for Construction of Piers and Docking Facilities (CRC 13-25)

David Moye

David Moye stated that currently the way the rules are written allows for two slips on a General Permit. In the 1990's the Commission's guidance was that anywhere there was a boat was counted as a slip. When I was going back through the rule change made ten years ago, I came upon a reiteration of that definition. When we started down this path there weren't as many jet skis, personal watercraft or kayaks. A lot of people have multiple types of vessels. What we are talking about today is for the exclusive use of the landowner. The GP does not authorize the lease, rental or commercial use of the dock. We want to keep the rule intact with a two slip maximum. If you want more than two slips then a Major Permit will be required. Staff is suggesting to the Commission a change in the way we count slips. If you are going to place a kayak, canoe or jet ski on your platform then we would not count it as a boat slip.

Jerry Old made a motion to approve 15A NCAC 7H .1200 for public hearing. Larry Baldwin seconded the motion. The motion passed unanimously (Joyce, Baldwin, Mitchell, Webster, Peele, Wynns, Baker, Hester, Old).

Amendments to 15A NCAC 7H .0312

Technical Standards for Beach fill Projects (CRC 13-26)

Matt Slagel

Matt Slagel stated at the May 2013 CRC meeting options for amendments to this rule were presented. Based on continuing discussions DCM has had with stakeholders since that meeting rule language will be presented today. The goal of this rule is to meet the sediment criteria threshold comparing the native beach to material that will be placed on the beach. This rule tries to strike a balance between minimizing the risks of incompatible material being placed on the beach while at the same time ensuring that the rules are not overly burdensome. Discussions with stakeholders have revealed support for the existing rules, but there are a few issues that need to be addressed. A suggestion was made that instead of requiring 100% coverage of a proposed borrow area with multi-beam bathymetry the proposed rule be changed to allow a certain spacing of single beam bathymetry. The multi-beam bathymetry equipment is about 15% more expensive than the single beam. For the moderate cost increase the applicant gets more certainty about the resource. The single beam requires more time on the water. The multi-beam is also better at detecting hard bottoms. The Division recommends that the requirement for 100% coverage with multi-beam remain in the rule. The rule will be clarified to define swath sonar and seafloor imaging without an elevation component. The second item under consideration is to allow more flexibility in vibracore plans, especially when the borrow area is relatively small. Currently for each individual borrow site the rules require no less than ten evenly spaced vibracores or one core per 23 acres whichever is greater. DCM recommends that the minimum number of vibracores be reduced from ten to five but that the 1,000 foot per grid spacing remain for larger borrow areas. For small borrow sites it would require five cores instead of ten. For larger borrow sites it would keep the existing required spacing. This will be a significant cost savings for permit applicants. The third item under consideration is to expand the granular coarse sand threshold from native plus five percent to native plus ten percent. That would allow slightly more coarse sand to be placed on the beach based on the native beach. This will provide more flexibility for applicants. There will be no change to the fine material and gravel requirements. The fourth item under consideration is to allow excavation depths to exceed the maximum vibracore depth but only where geophysical sub-bottom data clearly

indicates that below the core is beach compatible. After talking with geologists and coastal engineers we found that to meet the thresholds we need to have the vibrocore data to perform the sediment grain size analysis. DCM proposes no changes to this part of the rule. Since the May meeting, DCM has talked about excavation exceeding the permitted dredge depth. We believe that the language is somewhat redundant and could lead to confusion. Throughout the permit review process a review would be done of the proposed dredging depths and subsequently indicate the depth that dredging can occur. DCM recommends that this language be stricken from the rule.

David Webster made a motion to approve 15A NCAC 7H .0312 for public hearing. Bill Peele seconded the motion. The motion passed unanimously (Joyce, Baldwin, Mitchell, Webster, Peele, Wynns, Baker, Hester, Old).

Continued Discussion of 15A NCAC 7J .0210

Replacement of Existing Structures

Frank Jennings

Frank Jennings provided a presentation to facilitate further discussion on the interpretation and application of 7J .0210. At the last meeting, the Division presented a memo to the Commission regarding treatment of septic systems in the Ocean Hazard Area. The memo stated that the Commission's rule on the repair of existing structures in an AEC allows repairs to be made without a permit if the cost to do the work does not exceed 50% of the market value. DCM regulatory staff had been applying this rule in such a manner that septic systems servicing oceanfront structures were viewed as separate structures. A damaged septic system could not be repaired without a permit if the cost of the repairs exceeded 50% of the market value of the septic system. After a thorough review of the CRC's rules, DCM determined that the rules do not clearly state whether septic systems and houses should be treated as one structure for the purpose of the repair and replacement rule or as separate structures. As a result of this review the Division informed the Commission that it is interpreting the rule to require that an oceanfront structure and its septic system be treated as a single structure for the purposes of repair and replacement determinations. At the last meeting, the Commission had directed DCM to come back with three general options to deal with this matter. Specifically, the CRC wanted to see language for a rule amendment that defines septic systems in the Ocean Hazard AEC as a separate structure and language that would define the septic systems as a component of a primary structure. The anticipated impacts or consequences of both options were to be provided as well as ways to mitigate the matter as it currently exists and for future purposes. Frank Jennings presented a first option which would consider a septic system in the Ocean Hazard AEC as a separate structure for the purposes of repair or replacement determinations. In 7J .0210 a paragraph could be added to state that septic systems will be considered separate. The consequences of this would be that septic systems in a lot of cases would not be able to be repaired. The result will be abandoned cottages. The cottage may not have received much, if any, damage and yet will not be habitable if DCM considered the septic system as a separate structure. In Nags Head there are approximately 42 houses that would be impacted if septic systems are treated as a separate structure. In addition, just about every cottage in Kitty Hawk could end up in this situation. The second option is to define a building and septic system as a single structure for the purpose of repair or replace determinations. The impact of this interpretation is that it would be more likely that the septic system repairs would be allowed (since a damaged septic system would be less likely to exceed the combined value of the structure and septic and therefore could be repaired). If these septic systems are repaired, then the house could be habitable for another twenty years or more. The third option DCM was asked to provide was ways to mitigate the matter as it currently exists and for future purposes and to consider a different way to

manage this specific issue in Ocean Hazard Areas. Frank reported that the CRC's rules already allow a property owner ways to mitigate this type of issue. Specifically, under the existing rules, a property owner could use relocation to mitigate this situation. In addition, the CRC allows property owners to protect their septic systems with sandbags which is another way to mitigate the situation. Beach nourishment is another alternative. One new management approach would be to declare septic systems as separate structures in 7J .0210 or limit the replacement of septic tanks based on specific conditions under 7J .0211. Non-conforming development excludes the ocean hazard area and this would require including the ocean hazard area for this specific issue. The rule could be expanded to authorize development in the Ocean Hazard AEC specifically to allow replacement of septic systems under certain conditions. Following the presentation on this issue, the Commission decided to continue the discussion on this issue at a future meeting.

CRC SCIENCE PANEL UPDATES

Science Panel Member Appointments

Mike Lopazanski

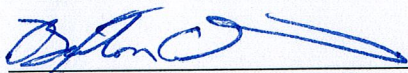
Mike Lopazanski stated at the last meeting we talked about changes to the Science Panel and adopted a Charge to the Panel as well as the process for nominations. New members are to be nominated by the CRC, CRAC, DCM and the Science Panel. The appointments would be made by the CRC Chair based on a review of their expertise and credentials. The initial appointments would be for four years and conditioned on being mutually agreed upon for reappointment at the expiration of the term. We included provisions for appointing *ad hoc* members that would facilitate specific projects at the request of the Science Panel. The Sea Level Rise Assessment Report Update is an example of where we would use some *ad hoc* members. We came up with a process for reviewing Science Panel nominations and noted that there were four full membership vacancies and the Commission added an additional two members. A Call for Nominations was sent out. The Executive Committee and the Science Panel Chair will review the nominations and make recommendations to the CRC Chair who will make the appointments. A separate Call for Nominations was sent out for the Sea Level Rise Assessment group. Due to the potential legislative action affecting the membership of the Commission, we didn't want to appear to rush appointments. We received ten nominations for appointment to the full Panel membership and three nominations for *ad hoc* members for the Sea Level Rise Assessment Update. There is a Science Panel meeting scheduled for August 22 and they will review the nominees and make their recommendations to the Science Panel Chair. The Science Panel Chair will sit with the CRC Executive Committee to make the nominations. We hope to have that take place in September so we can have everyone in place by the September CRC meeting. The current Science Panel members were reappointed at the last CRC meeting.

With no further business, the CRC adjourned.

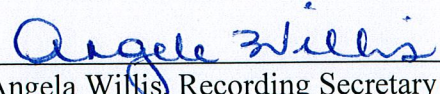
OLD/NEW BUSINESS

Chairman Emory announced the next Coastal Resources Commission meeting is scheduled for September 24-26 in Nags Head.

Respectfully submitted,



Braxton Davis, Executive Secretary



Angela Willis, Recording Secretary

NC COASTAL RESOURCES COMMISSION
August 26, 2013, Special Meeting by Conference Call
DCM Central Office, 400 Commerce Avenue, Morehead City, NC
Access to the Special Meeting was provided at DCM's District Offices at the following locations:

Wilmington District Office 127 Cardinal Drive Extension Wilmington, NC 28405	Washington District Office 943 Washington Square Mall Washington, NC 27889	Elizabeth City District Office 1367 U.S. 17 South Elizabeth City, NC 27909
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Commission Members Present

Bob Emory, Chair
Renee Cahoon
Lee Wynns
Jamin Simmons

Attorneys from the Attorney General's Office Present

Mary L. Lucasse
Christine A. Goebel

CALL TO ORDER/ROLL CALL

Chairman Emory called the meeting to order reminding the Commissioners of the need to state any conflicts due to Executive Order Number One and the State Government Ethics Act. The State Government Ethics Act mandates that at the beginning of each meeting the Chairman remind all members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. Any member, who knows of a conflict of interest or a potential conflict of interest, was directed to state the conflict or potential conflict when the roll was called.

Angela Willis called the roll. No conflicts were reported. All duly appointed members of the Commission were present. Based on this roll call, Chairman Emory declared a quorum.

MOTION TO GO INTO CLOSED SESSION

Commissioner Jamin Simmons moved the Commission into closed session in accordance with N.C.G.S. § 143-318.11(c) in order to provide direction to the Commission's attorneys concerning *The Riggings Homeowners, Inc. v. Coastal Resources Commission* COA 12-1299 (09-CVS-2761, New Hanover County) as permitted pursuant to N.C.G.S. § 143-318.11(a)(3). Commissioner Cahoon seconded the motion. The motion passed.

During the closed session Special Deputy Attorney General Mary L. Lucasse and Assistant Attorney General Christine A. Goebel reviewed with the Commission the history of the dispute and the recent decision by the North Carolina Court of Appeal (COA) affirming the decision of the New Hanover Superior Court judge, who reversed the CRC's denial of the request for a


variance and remanded the matter to the CRC for a rehearing and determination consistent with his decision. Ms. Lucasse informed the Commission of the legal options available subsequent to this decision by the COA and described the process by which the decision on whether to appeal would be made by the Solicitor General of the N.C. Department of Justice (which includes the Commission and the Division of Coastal Management (DCM) providing input to the Solicitor General). The Commission members discussed their positions on the legal options presented.

Commissioner Simmons moved that the Commission accept the recommendation of counsel and DCM and inform the Solicitor General that the Commission recommends filing a notice of appeal and petition for discretionary review to the North Carolina Supreme Court. Commissioner Cahoon seconded the motion. The motion passed.

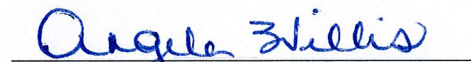
Commissioner Cahoon made a motion to return to the open meeting. Commissioner Simmons seconded the motion. The motion passed.

With no further business, the Commission adjourned.

Respectfully submitted,



Braxton Davis, Executive Secretary



Angela Willis, Recording Secretary



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

P.O. BOX 629
RALEIGH, NC 27602

REPLY TO: MARY L. LUCASSE
ENVIRONMENTAL DIVISION
TEL: (919) 716-6962
FAX: (919) 716-6767
mlucasse @ncdoj.gov

October 17, 2013

Elisabeth L. Gray
105 Dasher Drive
Beaufort, NC 28516

CERTIFIED MAIL
RETURN RECEIPT REQUESTED and
electronically: gray.elis@gmail.com

Re: Final Decision DENYING Third Party Hearing Request

Dear Mrs. Gray:

The Chairman of the Coastal Resources Commission has denied your request for a third party hearing to contest CAMA Major Permit and State Dredge and Fill Law Permit No. 121-05 issued on September 18, 2013 to Carolina Marlin Club Marina Association, Inc. for maintenance dredging in an upland basin marina (including slips) and access channel. The marina includes a total of 74 slips and is adjacent to the Newport River at or near Island Drive, Beaufort, Carteret County, North Carolina. Attached is a copy of the Final Decision. Pursuant to N.C.G.S. §113A-121.1(c), the permit is no longer suspended.

You may appeal the Chairman's decision by filing a petition for judicial review in the Superior Court of Carteret County within thirty days after receiving the Final Decision enclosed herein. A copy of the judicial review petition must also be served on the Coastal Resources Commission's agent for service of process at the following address:

Lacy M. Presnell, III, General Counsel
Dept. Of Environment and Natural Resources
1601 Mail Service Center
Raleigh, N. C. 27699-1601

If you chose to file a petition for judicial review, I request that you serve a copy on me as well at the address included in the letterhead.

Very truly yours,

Mary L. Lucasse
Counsel to the Coastal Resources Commission

Elisabeth L. Gray
October 17, 2013
Page 2

cc w/ encl.: Howard Dozier, Registered Agent, by US Mail
Joseph Barwick, President, electronically
Frank D. Gorham, III, Chairman, electronically
Braxton Davis, Director, electronically
Christine A. Goebel, electronically
Michael E. Bulleri, electronically
Angela Willis, electronically

STATE OF NORTH CAROLINA
COUNTY OF CARTERET

BEFORE THE CHAIRMAN
COASTAL RESOURCES COMMISSION
CMT 13-12

IN THE MATTER OF THE THIRD PARTY)
HEARING REQUEST BY)
ELISABETH L. GRAY)
)

FINAL DECISION

I. PROCEDURAL BACKGROUND

Petitioner Elisabeth L. Gray submitted a request for a Third Party Hearing to the Division of Coastal Management (DCM) on October 4, 2013 (Request) seeking permission to file a petition in the Office of Administrative Hearings for a contested case hearing pursuant to N.C.G.S. § 113A-121.1(b) and 15A N.C.A.C. 07J .0301(b). Petitioner seeks to challenge the Major CAMA Permit and State Dredge and Fill Law Permit No. 121-05 issued on September 18, 2013 (Amended Permit) to Carolina Marlin Club Marina Association, Inc. (Permittee or Carolina Marlin Club) for maintenance dredging in an upland basin marina (including slips) and access channel. The marina includes a total of 74 slips and is adjacent to the Newport River at or near Island Drive, Beaufort, Carteret County, North Carolina.

In reviewing the Request the undersigned considered the following which together constitute the official record on which this decision was made:

- October 4, 2013 Request identified as DCM File No. 13-12, including attached one page narrative;
- Permit 121-05 (Amended) dated September 18, 2013 and Permit 121-05 dated October 20, 2010;
- October 11, 2013 e-mail to DCM Counsel forwarding e-mail chain from March 2010;

- Declaration of Unit Ownership, Book U087, Page 108 of the Carteret County Registry;
- March 5, 2010 Letter to Permittee from James H. Gregson;
- September 7, 2010 e-mail to Rep. Pat McElraft from Jim Gregson with e-mail chain;
- August 16, 2013 Letter to Brad Connell from Joe Barwick;
- Notice of Appeal to the North Carolina Court of Appeals, 11-CVS-415;
- September 18, 2013 Letter to Permittee from Douglas V. Huggett;
- October 14, 2013 Letter to Braxton C. Davis from Joe Barwick on behalf of Permittee with attachments 1 through 11, including the Judgment issued by the Honorable L. Walter Mills, District Court Judge in file number 11-CVD-415 on August 9, 2013.

II. STANDARD OF REVIEW

Under the Coastal Area Management Act (CAMA), a third party may file a contested case hearing petition to challenge the issuance or denial of a CAMA permit to someone else only if the Coastal Resources Commission (Commission) first determines that a contested case hearing is appropriate. Moreover, the statute provides that

A determination of the appropriateness of a contested case . . . shall be based on whether the person seeking to commence a contested case:

- (1) Has alleged that the decision is contrary to a statute or rule;
- (2) Is directly affected by the decision; *and*
- (3) Has alleged facts or made legal arguments that demonstrate that the request for a hearing is not frivolous.

Section 113A-121.1(b)(emphasis added). The Commission has delegated to its Chairman authority to determine whether a third party request for a hearing should be granted. 15A NCAC 7J .0301(b). A third party whose hearing request is granted may file a contested case hearing petition with the Office of Administrative Hearings and the permit remains suspended pursuant

to N.C.G.S. §113A-121.1 (b) and (c). A third party whose hearing request is denied may seek judicial review. *Id.* If the third party's hearing request is denied, the permit is reinstated by operation of law pursuant to N.C.G.S. §113A-121.1(c).

III. FACTS

A. The Permittee is a non-profit corporation organized under the laws of the State of North Carolina pursuant to N.C.G.S. Chapter 47C (The North Carolina Condominium Act). The purpose of the non-profit corporation is to operate the homeowners' association for the condominium marina.

B. The marina owned by Permittee is comprised of an upland basin marina and access channel.¹ On June 22, 1989, S. Gene McClung filed a Declaration of Unit Ownership with the Carteret County Register of Deeds creating a condominium for a 44-slip marina and the surrounding area.² On December 8, 1989, the Declaration was amended to create additional slips, for the present day total of 74 slips.³

C. The Petitioner is Elisabeth L. Gray, who owns Slip 16. Petitioner purchased the property right to Slip 16 on March 19, 1996 according to Carteret County records.⁴ Petitioner's slip is located within the condominium marina operated by Permittee.

D. Harry and Valerie Preddy own Slip 46⁵ within the condominium marina operated by Permittee.

E. The Permittee's property is riparian property adjacent to the Newport River. At this site, the upland basin and channel area are closed to the shellfish harvesting. The Newport

¹ Development of the upland marina and access channel are more particularly shown on the map recorded at Map Book 10P, Page 42, of the Carteret County Registry which was included with the Staff Recommendation.

² Recorded at Book U087, Page 108, of the Carteret County Registry.

³ Recorded at Book U090, Page 340, of the Carteret County Registry.

⁴ Recorded at Book 773, Page 275, of the Carteret County Registry.

⁵ Recorded at Book U108, Page 327, of the Carteret County Registry.

River adjacent to the upland basin is classified as SA waters by the Environmental Management Commission and is open to shellfish harvesting just outside the connecting channel.

F. The waters of the Newport River are within the Public Trust Area and Estuarine Waters Areas of Environmental Concern (AECs). The Permittee's proposed maintenance excavation qualifies as "development" under N.C.G.S. § 113A-118. Accordingly, a CAMA permit is required before development can take place. Pursuant to N.C.G.S. § 113-229, a Dredge and Fill permit is also required before the proposed development can take place.

G. The Carolina Marlin Club was originally permitted to do maintenance dredging on August 8, 2005 with the issuance of Permit No. 121-05. This Permit was renewed on May 27, 2008.

H. By letter dated March 5, 2010, James H. Gregson, Director of DCM, revoked Permit No. 121-05 pursuant to 15A NCAC 07J .0407(e)(2) based upon new facts. The letter stated that:

The Marlin Club, Inc. may not in fact own all of the lands within the boundaries of the permitted maintenance excavation area [S]everal parties have provided information to this office that the lands falling within the boundaries of boat slips in fact belong to the slip owner and not the Marlin Club. Representatives of the N.C. Attorney General's office have reviewed the claim of these parties and determined that the submerged lands under the slips in question are in fact owned by the slip owners and not the Marlin Club.

A copy of the letter was attached to the Staff Recommendation.

I. On March 17, 2010, Permit No. 121-05 was reinstated for the maintenance excavation of the access channel but not the upland marina.

J. On October 20, 2010, Permit No. 121-05 was modified to include maintenance excavation of the upland marina with the exclusion of slips No. 3, 16(Gray), 28, 38, 46(Predy),

and 49.⁶ The amendment to the permit was made after DCM received signed letters from 67 slip owners giving the Permittee permission to dredge their slips and providing copies of their deeds. A description of these events is detailed in an e-mail from Mr. Gregson to Rep. Pat McElraft dated September 3, 2010 and was attached to the Staff Recommendation.

K. In 2011, the Permittee brought a civil action in the District Court of Carteret County, File No. 11-CVD-415 against Harry and Valerie Preddy for their share of the costs associated with dredging the basin and access channel. The matter was heard in February and April of 2013 in the District Court of Carteret County, the Honorable L. Walter Mills judge presiding.

L. On August 9, 2013, Judge Mills ruled in favor of the Permittee, making the following relevant conclusions of law:

1. The marina basin and the slips located therein contain public trust waters subject to the riparian rights of the Plaintiff and, as such, all areas in the marina basin including slips are common area properties subject to the control of the Association, Carolina Marina Club Association, Inc. d/b/a Morehead-Beaufort Yacht Club.
2. The Defendants own a 1/73 undivided interest in the Association and its property and the exclusive right to utilize Unit 46, subject to the Declaration of Unit Ownership and the Amendments thereto.
3. All the docks, pilings and bottom (soil) under each slip are common property.

A copy of this decision was attached to the DCM Staff Recommendation.

M. In a letter to DCM dated August 16, 2013, Joe Barwick, Commodore of the Morehead Beaufort Yacht Club, sought modification of Permit No. 121-05 "without the

⁶ Permit No. 121-05 dated October 20, 2010, attached to the DCM Staff Recommendation.

exclusion of any slips.” Mr. Barwick cited the decision of Judge Mills as justification for the requested modification. A copy of the letter was attached to the DCM Staff Recommendation.

N. On September 9, 2013, the Preddys filed a Notice of Appeal to the Court of Appeals of North Carolina.⁷

O. On September 18, 2013, DCM issued Amended Permit No. 121-05 replacing all earlier versions. The modified permit includes authorization to dredge the entire marina basin including the land or silt under the slips bases on Judge Mills’ Conclusion of Law No. 3 which found that this portion of the marina was common property.

P. On September 18, 2013, Mr. Huggett sent a letter to the Permittee informing them of the permit issuance and the process of appeal.⁸

Q. On October 4, 2013, the Petitioner timely filed her Request seeking a hearing in the Office of Administrative Hearings to challenge DCM’s issuance of Permit No. 121-05. In her Request, Petitioner claims, “in 1996 we purchased Slip #16 of the Carolina Marlin Club Marina Association, Inc. When we did so, our deed specifically transferred the land of our slip.” In addition, Petitioner reports, “We paid more for our slip than we would have for a slip that did not include the land.”

R. In the Request, Petitioner also states that she objects to the Amended Permit because it allows “the Carolina Marlin Club Marina Association to enter our property and remove material from our property without our permission [and] effectively takes our land from us.” In support of her objection, Petitioner reports that DCM’s present position, as reflected in the Amended Permit, is contrary to the previous position taken by DCM on the ownership issue. Specifically, Petitioner reports that in February 2010 she forwarded material to DCM regarding

⁷ Notice of Appeal in 11-CVD-415 dated September 9, 2013, attached to the DCM Staff Recommendation.

⁸ September 18, 2013 letter from Douglas Huggett to Permittee, attached to the DCM Staff Recommendation.

her claim of ownership to the land under the slip and following a review by J. Allen Jernigan, an attorney with the North Carolina Office of Attorney General, DCM issued a “modified permit requiring the Carolina Marlin Club Marina Association, Inc. to have a copy of our deed to our land and to have our permission before entering our slip.” In support of her Request, Petitioner states, “There has been no legal action brought against us that would change the ruling made by J. Allen Jernigan.”

S. On October 14, 2013 in response to the Request Permittee’s representative, Joe Barwick, forwarded a series of documents for the Chairman’s consideration, including the Judgment in 11-CVD-415 which concludes as a matter of law that “All the docks, pilings and bottom (soil) under each slip are common property.”

IV. CONCLUSIONS OF LAW

A. The Coastal Area Management Act was adopted, in significant part, to address “development,” as defined in N.C.G.S. § 113A-103(5a) in any area that the CRC may designate as an “Area of Environmental Concern,” pursuant to N.C.G.S. § 113A-113.

B. The CRC has by rule designated public trust waters and estuarine waters as Areas of Environmental Concern (AECs). The waters of the Newport River are within the Public Trust Areas and Estuarine Waters AECs, 15A NCAC 07H .0201, .0206, and .0207. Therefore, the proposed development requires a CAMA permit pursuant to N.C.G.S. § 113A-118.

C. CAMA requires that third parties who wish to challenge a decision to deny or grant a minor or major development permit file their hearing request “within 20 days after the disputed permit decision is made.” N.C.G.S. § 113A-121.1(b). In the present case, DCM issued its decision to grant Permittee’s permit on September 18, 2013. Petitioner’s request for a third party hearing was filed October 4, 2013, and is therefore timely.

D. Thus, the Chairman addresses the factors set forth in N.C.G.S. § 113A-121.1(b)(1)-(3) as follows:

1. Petitioner has alleged that the Decision is Contrary to a Rule or Statute.

In considering whether Petitioner is entitled to a contested case hearing, the first factor to consider is whether Petitioner has alleged that the decision made by the DCM is contrary to a rule or statute. N.C.G.S. § 113A-121.1(b)(1). In this case, Petitioner alleges that the permit decision was issued contrary to the following laws:

1. N.C. Gen. Stat. §47C-3-107 and
2. N.C. Gen. State §47C-3-115

Regardless of whether the permitting decision was consistent with the referenced statutes and for the sole purpose of determining whether Petitioner has met the burden of identifying a statute or rule, the Commission affirmatively finds that Petitioner's Request meets the first requirement set forth in N.C.G.S. § 113A-121.1(b)(1).

2. Petitioner has shown she is directly affected by issuance of the Permit.

In determining whether Petitioner is entitled to a contested case hearing, the second factor to consider is whether Petitioner has shown that she is directly affected by issuance of the Permit. In her Request, Petitioner has shown that she has an ownership interest in the slip located within the condominium marina. In addition, Petitioner has shown that the periodic maintenance excavation authorized by the Amended Permit will directly impact her slip. For the purposes of this Request only, the Commission does not dispute that Petitioner is directly affected by the decision, primarily due to the fact that she is a slip owner to the permitted development. Therefore, the Commission affirmatively finds that Petitioner has met the requirements of N.C. Gen Stat. § 113-121.1(b)(2).

3. Petitioner Fails to Demonstrate that the Hearing Request is not Frivolous

Petitioner challenges the issuance of the Amended Permit on the grounds that it is contrary to two statutory provisions. However, the referenced statutes are not part of the statute setting forth CAMA requirements that govern the issuance of CAMA permits but are from another statute. Neither DCM nor the Commission is a proper party to defend any claim that Petitioner may choose to bring under North Carolina Condominium Act. Moreover, there are not provisions within the North Carolina Condominium Act which must be met prior to issuance of a CAMA permit. In order to meet her burden of showing that a contested case hearing to challenge the permit would not be frivolous, Petitioner is required to allege facts or make a legal argument showing that the Amended Permit was issued contrary to some provision in the CAMA statute. Petitioner has not done so. Therefore, on this basis alone, Petitioner has failed to demonstrate that the hearing request is not frivolous as required by N.C. Gen. Stat. § 113A-121.1 (b)(3).

In addition, Petitioner claims that DCM can not change its position on the land ownership questions on the grounds that “[t]here has been no legal action brought against us that would change the ruling made by J. Allen Jernigan that we own the bottom land of our slip.” This legal argument is not sufficient to meet Petitioner’s burden of showing that a hearing would not be frivolous for several reasons. First, neither Mr. Jernigan, DCM, the Commission, nor the Office of Administrative Hearings has authority to make property ownership determinations. Nor do they have authority to make rulings related to the North Carolina Condominium Act (N.C. Gen. Stat. Chapter 47C *et seq.*). Thus, although Mr. Jernigan, in his capacity as Special Deputy Attorney General, provided *an opinion* about the matter to his client, DCM, he did not “*make a ruling*” (i.e. a decision that is binding on a party, DCM, or the Commission) on this issue.

Issues of property ownership are decided by the North Carolina General Courts of Justice. See *Richard C. Flowers v. North Carolina Department of Environment, Health and Natural Resources, Division of Coastal Management*, 90 EHR 0864, Carteret County (finding that DCM improperly found that a permit application was incomplete when the permit applicant submitted a deed and other information showing ownership, but the State Property Office claimed that the property was owned by the State of North Carolina.). In *Flowers*, the Administrative Law Judge held that DCM should have processed the permit application based on the claim of title made by the person applying for a CAMA permit. Since the *Flowers* decision, DCM has processed otherwise complete permit applications so long as the applicant claims ownership and submits a deed and/or other supporting documentation even though another party disputes the claim of ownership.

Second, in 2010 when Mr. Jernigan provided an opinion to DCM on the land ownership issue, his review was limited to the material available and provided at that time. Since then, DCM has received additional information. Specifically, DCM made the decision to issue the Amended Permit based on the Permittee's claim that it owns the "common area" of the upland marina, the Declaration of Unit Ownership, as well as the August 9, 2013 ruling by Judge Mills in 11-CVD-415 holding, "[a]ll the docks, pilings, and bottom (soil) under each slip are common property." Such additional information provided support for DCM to change its position on the land ownership issue and issue the Amended Permit.

A CAMA permit is neither a determination of title nor permission to trespass on another's property to do the permitted development. Instead it is a statement by DCM that the proposed work is in compliance with the CAMA and the Commission's rules. DCM staff is not authorized, nor do they have the training or expertise to make determinations of property ownership such as

have been raised by Petitioner. Instead, this issue should be, and in the related Preddy litigation has been, resolved in the General Court of Justice. The question of whether Petitioner or the Permittee hold title to the land under the slip cannot be resolved through the administrative hearing process in a claim against a state agency. The Honorable District Court Judge, Judge Mills has ruled on this issue as it relates to the rights of Mr. and Mrs. Preddy who hold title to another slip in the marina. The Judgment in the North Carolina General Court of Justice for Carteret County appears to have resolved the ownership issue. Certainly the issue has been decided in the proper forum, one which is authorized to determine property issues relating to ownership of the submerged basin bottom. However, if additional opinions are issued by the North Carolina General Courts of Justice on any property issues as yet unresolved between the Permittee and the Petitioner, such as a quiet title action to determine Petitioner's property rights, or if there is an opinion on the current appeal of Judge Mills' ruling to the North Carolina Court of Appeals, DCM and the Commission will include such additional information in future permitting decisions. The Office of Administrative Hearings does not have subject matter jurisdiction to decide a claim between Petitioner and the Permittee on the ownership of the submerged land. Moreover, DCM is not a proper party to any claim on the ownership issue.

For the reasons set forth above, the Commission affirmatively finds Petitioner has not met the burden of showing that the hearing request is not frivolous as required by N.C. Gen. Stat. § 113A-121.1 (b)(3). Thus, it would be frivolous to hold a contested case hearing when the Amended Permit was issued in compliance with the relevant CAMA statutes and rules.

V. DECISION

Accordingly, since Petitioner has failed to demonstrate each of the three factors upon which a third-party hearing determination must be made, Petitioner is not entitled to a third party

hearing under the criteria of the statute creating this administrative procedural safeguard for issuance of CAMA permits. For the reasons stated herein, Petitioner's third party hearing request is DENIED.

This the 16 day of October, 2013.



Frank Gorham, Chairman
N.C. Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the attached Final Decision by the means specified below:

Method by which Service was made:

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This the 17th day of October, 2013.


Mary L. Lucasse
Special Deputy Attorney General

