

**SHELLFISH CULTIVATION LEASE REVIEW COMMITTEE**

**THIRD PARTY APPEALS FORM**

**PETITIONER'S NAME:** Lukens Island Timber Enterprises, LLC

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**COUNTY AND GENERAL LOCATION OF THE SHELLFISH LEASE(S) (i.e., WATERBODY):**  
Carteret County, South River

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**PROPOSED SHELLFISH LEASE NUMBER(S) AND APPLICANT(S) NAME:**

No. 22-019BL & No. 22-020WC Changing Tide Renovations, LLC

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*Please complete the blanks above to make clear the shellfish lease(s) you are challenging.*

PLEASE TAKE NOTE that the undersigned Petitioner, a person other than the applicant who is aggrieved by the decision of the Secretary of the Department of Environmental Quality (DEQ) and delegated to the Division of Marine Fisheries' (DMF) Director, to grant a shellfish lease, hereby requests permission from the Marine Fisheries Commission's (MFC) Shellfish Cultivation Lease Review Committee (SCLRC) to file an appeal to determine the appropriateness of a contested case hearing pursuant to N.C.G.S. § 113-202(g). Requests are reviewed and a determination is made by the SCLRC whether a contested case hearing is appropriate. If the SCLRC determines that a contested case hearing is appropriate, the Petitioner must file a contested case petition with the Office of Administrative Hearings within thirty (30) days of receiving notice of the SCLRC's determination. A determination by the SCLRC that the Petitioner may not commence a contested case is a final agency decision which may be appealed to Superior Court as a Petition for Judicial Review under N.C.G.S. § 113-202(g) and Chapter 150B in accordance with N.C.G.S. § 113-202(g).

For this application to be complete, the Petitioner must address each of the three factors from N.C.G.S. § 113-202(g) listed below. The SCLRC's decision to grant a hearing will be based on whether the Petitioner: *(Please answer these questions on a separate page or e-document and submit with this form.)*

**(1) Has alleged that the decision is contrary to a statute or rule;** *(Please cite the relevant statute or regulation allegedly violated by the shellfish lease decision.)*

**(2) Is directly affected by the decision; and** *(Please describe how you are directly affected by the shellfish lease decision. Persons directly affected by a decision may include persons who can demonstrate a history of substantial use of public resources in the area directly affected by the shellfish lease.)*

**(3) Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous.** *(Please summarize the evidence and arguments you would present at a hearing in support of your appeal explaining why the shellfish lease was improperly approved.)*

*The MFC notes that there are some opinions of the State Bar which indicate that non-attorneys may not represent others at quasi-judicial proceedings such as this Third Party.*

Party Hearing Request before the Review Committee. These opinions note that the practice of non-lawyers representing others in quasi-judicial proceedings through written argument may be considered the practice of law. Before you proceed with this hearing request, you may wish to seek the advice of counsel before having a non-lawyer represent your interests through preparation of this Petition.

**DELIVERY OF THIS HEARING REQUEST**

The law requires that this request must be received by (not postmarked by) the SCLRC, in care of the DMF, within thirty (30) days of the date of the disputed shellfish lease decision in accordance with N.C.G.S. § 113-202(g). Failure to do so constitutes waiver of the right to request a hearing. A copy of this request must also be sent to the Attorney General's Office, Environmental Division.

Contact Information for DMF Office:

**By U.S. Mail:**

NC Division of Marine Fisheries  
MFC Office  
PO Box 769  
Morehead City, NC 28557

**By express mail or hand delivery:**

NC Division of Marine Fisheries  
MFC Office  
3441 Arendell Street  
Morehead City, NC 28557

**By Email:**

MFCComm@ncdenr.gov

Contact Information for Attorney General's Office:

**By U.S. Mail:**

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

**By express mail or hand delivery:**

Environmental Division  
MFC Counsel  
114 W. Edenton Street  
Raleigh, NC 27603

Based on the attached responses to the above factors, the undersigned hereby requests a third party appeal determination.



Signature of Petitioner or Attorney

5/4/23

Date

Robert B. Pike, II

Printed Name of Petitioner or Attorney

bryce@pikelawfirm.com

Email address of Petitioner or Attorney

P.O. BOX 1581

Mailing Address of Petitioner or Attorney

(252)-314-9659

Telephone number of Petitioner or Attorney

Morehead City NC 28557  
City State Zip

THE PIKE LAW FIRM, PLLC  
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May 4, 2023

N.C. Division of Marine Fisheries  
Via Hand Delivery and Email: [MFCComm@ncdenr.gov](mailto:MFCComm@ncdenr.gov)

Environmental Division  
MFC Counsel  
114 W Edenton Street  
Raleigh, NC 27603

RE: Third Party Appeal to Lease in South River by Changing Tide Renovations, LLC.

Dear MFC:

My firm represents Lukens Island Timber Enterprises, LLC. (“Lukens”) regarding their Third Party Appeal of the approval of the Changing Tide Renovations, LLC shellfish leases in April of 2023 and hereby requests a hearing due to the decision to approve this lease being contrary to many statutes and rules, Lukens being directly affected by the decision, and due to the facts, and legal arguments that demonstrate that the request for the hearing is not frivolous.

In responding to the three factors from N.C.G.S. § 113-202(g) and in addition to what is attached hereto, Lukens hereby incorporates the entire record of the hearing held on February 15, 2023 and all documentation and testimony that was submitted before, during, and after the hearing in support of Lukens’ position.

**1. NCDMF’s decision to approve this shellfish lease is contrary to the following statute or rules:**

- a. N.C. Gen Stat. 113-202
- b. Senate Bill 616 (S.L. 1981-581)
- c. 15A NCAC 02B .0202
- d. 15A NCAC 02B .0201
- e. 15A NCAC 03O .0201

**2. NCDMF's decision to approve this shellfish lease has a direct negative effect on Lukens by:**

*This proposed lease will not be compatible with the lawful utilization by the public of other marine and estuarine resources, including, but not limited to, navigation, fishing and recreation, as outlined in N.C. Gen. Stat. 113-202(a)(3).* The North Carolina Division of Water Resources stated in their review of the application of this proposed lease that, "their office has concerns regarding other commercial and recreational usage limitations associated with the proposal due to the acreage of open water impact." The internal review of Fisheries Management concluded that the proposed lease would have a year around impact on commercial and recreational fisheries, general boating activities, and waterfowl hunters.

Marine Patrol's review concluded that the proposed lease site is used to set crab pots, is a popular spot for hook and line fishing, is in close proximity to a popular anchoring site for larger vessels, and that there are two duck blinds within 50 yards of the proposed lease site. According to Marine Patrol, "***hunting activity will be on the proposed lease site when these blinds are used.***" Please note that, for safety reasons, in Carteret County, duck blinds are required, by law, to be 500 yards apart. "Within 50 yards" is not a safe distance. Based on the review of the proposed lease by the North Carolina Division of Water Resources, Fisheries Management, and Marine Patrol, this proposed lease should be denied. Due to the foregoing reasons, this proposed lease is not compatible with the lawful utilization by the public of other marine and estuarine resources.

*The proposed lease is not a suitable location for the cultivation and harvesting of shellfish in commercial quantities, as outlined in N.C. Gen. Stat. 113-202(a)(1).* The NCDMF has closed everything South of this proposed lease site due to pollution. E.coli and other harmful bacteria and chemicals do not stop at that line. All creeks surrounding Open Grounds Farm are closed bottom due to pollution, for good reason. *This proposed lease sight is less than 150 yards from the closure line.* Allowing this lease, would mean allowing a lease that would be closed to harvest many days of the year and allowing oysters to be sold to the public that have a high chance of being contaminated with various harmful substances, such as the ones that caused all the waters located to the South of this lease to be closed.

*The proposed lease will violate N.C. Gen. Stat. 113-202(a)(4) because it will infringe upon Lukens riparian ownership rights.* Lukens has owned the adjoining property since 1991. It was started as and remains a hunting and fishing club with a clubhouse to accommodate *as many as 40*

*people*. Lukens has built docks, piers, and launching ramps all along the shoreline to launch boats for boating, hunting, and fishing. Lukens hunts all the marsh points, including the two in front of the proposed lease, from the mouth of South River to the head of Eastman Creek.

Lukens has erected paths to these points to access their blinds and points. Some of these blinds are on shore, some are offshore, some are permanent, and some are temporary. Lukens has built over 75 duck blinds on this shoreline since they purchased this property in the 90s. Some have been destroyed by hurricanes through the years, many remain. Lukens has two blinds within 50 yards of the proposed lease. Lukens is allowed to have blinds this close due to their riparian ownership of the entire shoreline. Allowing this proposed lease would cause this club, whose riparian ownership allows them to erect such blinds, to abandon their hunting spots they have maintained for over 30 years and have invested a great deal of time and money in. Most importantly, the proposed lease would pose a safety issue for anyone working the lease during hunting season. Along with bird hunting, Lukens hunts deer, bear, and other animals in proximity to this lease with rifles that have a range of over 400 yards.

Lukens members and their guests regularly fish from the shoreline and piers and shrimp and fish near shore from boats. As noted in the various state agency reviews, this location is a regularly used location, in all months of the year, for recreational and commercial fishing. Many Lukens members have commercial fishing licenses and participate in commercial and recreational fishing activities. Lukens members and their guests fish from their shoreline to the proposed lease area. The proposed lease area is a sandy beach where Lukens members, their families, and pets swim, ski, and enjoy the beach. Allowing the proposed lease would close this area to their use as swimming for children and dogs would be unsafe and the beach unusable for the aforementioned purposes.

Finally, this lease would interfere with the waterfront development plans Lukens has for this area. Lukens has developed a master plan, see attached, to sell lots to members and the public to build recreational homes, with individual docks, along with a marina and boat ramp. This lease would end these plans and cause significant financial harm to the Lukens membership as this is their most valuable property. Lukens is not against oyster farming. However, they have no other choice but to protect their investment of more than 30 years.

**3. The following facts and legal arguments demonstrate that the request for the hearing is not frivolous.**

In addition to the foregoing arguments, I would focus on the fact that duck blinds are a water dependent structure, that Lukens' duck blinds, on shore and offshore are the exclusive property of Lukens and not accessible by the general public, that the proposed shellfish lease area alone and considered cumulatively with existing leases in the area will interfere with navigation and with existing traditional uses of the area, and the proposed site will create a hazard to public safety.

15A NCAC 02B .0202(59) defines a water dependent structure as "structures that require access or proximity to or siting within surface waters to fulfill its purpose, such as boat ramps, boat houses, docks, and bulkheads." **I will introduce affidavits from former employees of the Army Corps of Engineers and CAMA** that will demonstrate that a duck blind is a water dependent structure that would, at a minimum, require a 250ft setback from Lukens' shoreline. This lease site, as proposed is inside of 250 feet of the shoreline, is not compatible with the multiple water dependent structures (duck blinds).

Lukens has multiple duck blinds, on shore and offshore, within 500 yards of this lease site. I will demonstrate, with documentation from Carteret County and various law enforcement agencies, that the duck blinds Lukens has on their property create a 500 yard buffer that allows them to hunt this area without interference and prevents others from hunting inside of this 500 yard buffer. This is contrary to the finding in the approval memorandum which asserted, "these blinds are considered public property...and builders have no more right to their use than any other public trust users." No one else can hunt within 500 yards of their shore blind. Their stake blinds in the water, that are in front of their shore blinds, are the private property of Lukens and not available for hunting without permission from Lukens. I will have affidavits and testimony of law enforcement and County officials to demonstrate this.

Based on the wording of Senate Bill 616 (S.L. 1981-581), no one may hunt within 500 yards of Lukens blinds. I will introduce pictures and the GPS coordinates of these blinds, that are on shore and offshore, within 250 yards of the lease, and demonstrate how allowing this lease infringes on Lukens ability to exercise their substantial right to hunt this area as they have continuously for the last 30 years.

The proposed shellfish lease area along and considered cumulatively with existing leases in the area will interfere with navigation and with existing traditional uses of the area. The traditional uses of this area for Lukens and the public at large has always been, commercial and recreational fishing, recreational boating, hunting, mooring, and navigation. All of these are traditional uses of the area and will all be interfered with by this lease.

The North Carolina Division of Water Resources stated in their review of the application of this proposed lease that, "their office has concerns regarding other commercial and recreational usage limitations associated with the proposal due to the acreage of open water impact." The internal review of Fisheries Management concluded that the proposed lease would have a year around impact on commercial and recreational fisheries, general boating activities, and waterfowl hunters.

Marine Patrol's review concluded that the proposed lease site is used to set crab pots, is a popular spot for hook and line fishing, is in close proximity to a popular anchoring site for larger vessels, and that there are two duck blinds within 50 yards of the proposed lease site. According to Marine Patrol, "*hunting activity will be on the proposed lease site when these blinds are used.*"

**Even if you do not take into consideration any of the arguments of my clients, please consider the observations of the various state agencies that have reviewed this concurring that the these issues are real and not frivolous.**

In addition to the comments already provided by various state agencies, I will provide further comments from various law enforcement agencies that demonstrate that this lease will create multiple hazards to public safety due to its conflict with the traditional uses of the area.

Thank you for your attention to this matter and please feel free to reach out with any questions.

Sincerely,

THE PIKE LAW FIRM, PLLC.



Robert B Pike II