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CRC-22-07

January 27, 2022

MEMORANDUM

TO: Coastal Resources Commission

FROM: Braxton Davis

SUBJECT: Proposed Amendments to 15A NCAC 7M .0600 and 7H .0208 – Floating Structures Associated with Shellfish Lease

Over the past two years, the commission has had several discussions related to shellfish aquaculture leases and DCM’s role in permitting aquaculture operations as “development” under the Coastal Area Management Act. Due to the rapid growth of the industry and expanding use of water column leases and associated gear and infrastructure, in 2016 DCM began providing the N.C. Division of Marine Fisheries (DMF) with comments on proposed lease sites on a case-by-case basis. These comments address potential impacts to navigation and other concerns, such as preserving a buffer between the lease operation and adjacent salt marshes. In 2020, the Division worked with the Coastal Resources Commission (CRC) to draft rules for floating upweller systems (“Flupsies”) by specifically allowing these platforms in permitted marinas and at private docking facilities consistent with existing platform size limitations (through amendments to 15A NCAC 07H.0208 Docks and Piers and 07M.0600 Floating Structure Policy rules). DCM also worked with DMF staff to address concerns related to water column leases. DMF and the Marine Fisheries Commission (MFC) have continued to implement measures to help address issues/concerns with shellfish leases including launching a new interactive shellfish aquaculture mapping tool in 2020 to assist the public in finding information about shellfish leases in North Carolina. In 2021, the MFC adopted multiple rule amendments to limit the overall number of allowable lease boundary corner markers to 8 (not exceeding 12” in diameter), establish a 250’ buffer between adjacent leases and increased the buffer from 100’ to 250’ from developed shorelines, add cumulative impact language, enhance training requirements for shellfish lease applicants to include user conflict information, and require reflective tape on corner markers.¹ The General Assembly also established a third-party appeal process, similar to that of the CRC’s, for shellfish leases granted by DMF. DMF also addressed some of the CRC/DCM concerns through changes in the leasing process (requiring more descriptive drawings, updates to management plans, and adjacent riparian owner notification).

¹ Additional rule changes intended to lessen user conflicts, which were required by the legislature, were adopted by the RRC but are pending legislative review per SL 2019-198.



Most recently, DCM and the CRC have had presentations and discussions regarding potential rules for allowing floating processing facilities, potentially through further amendments to the Floating Structure Policy rules. At the November 2021 CRC meeting, due to continuing overlap between CRC/DCM and MFC/DMF interests and authorities, the continued growth of the industry, and the emergence of even more types of gear associated with water column leases, DCM requested a pause in further rulemaking to allow time for DCM, DMF, and DEQ leadership to discuss the recommended roles of each division going forward. DCM staff outlined a number of legal and practical considerations based on the different approaches, rules, authorities, and capacities of each division. In early-January 2022, a meeting was held with DMF staff, DEQ leadership and representatives of the DEQ Office of General Counsel, where agreement was reached on a proposed path forward to present to both the CRC and MFC for consideration, as follows:

- 1) All cages, poles, anchoring systems, and any above-water frames or structural supports used to suspend or hold in place aquaculture equipment should be considered as “gear” in accordance with N.C.G.S. 143B-289.52, and therefore regulated through the DMF shellfish lease and not as “development” under CAMA at N.C.G.S. 113A-103(5)a. This will allow shellfish growers to experiment with different types of gear and potentially reposition gear within their lease over time without being subject to CAMA permitting and enforcement.
- 2) All platforms and floating structures will require CAMA permits and will not be authorized through a DMF shellfish lease. In all cases, a CAMA Major Permit would be required. This is consistent with past practice and with recent changes to 7M.0600 related to floating upweller systems.

Under #2, applications for proposed platforms and floating structures, including floating processing facilities, at most shellfish leases would be denied by DCM based on the current 7M.0600 rules and would require a variance from the CRC. During recent discussions, DCM and DMF staff agreed that, at least initially, this approach is appropriate so that the CRC can review each proposal on a case-by-case basis, especially given the potential for conflicts and lack of existing spatial plans and zoning for these types of structures. In addition, DCM may receive unique concerns or comments from other federal and state resource agencies and local governments that should be considered by the Commission on a case-by-case basis.² Finally, CRC variance rules require a petitioner for a CRC variance to notify adjacent riparian property owners and all who commented to DCM during the permit review process. DCM could also provide notice to all who commented to DMF on the original lease proposal, so that the CRC can consider all public and adjacent property owner concerns on a case-by-case basis. Staff believe that over time, CRC rules and standards allowing floating processing facilities may be better justified based on lessons learned from reviews of specific project proposals, experience with any processing facilities that are granted variances, and spatial planning efforts to help identify and “de-conflict” certain areas that are most suitable and in need of floating structures or processing facilities.

I look forward to discussing this approach in more detail at your February meeting.

² The Corps of Engineers Nationwide Permit #48 applies to all DMF-issued shellfish leases but does not authorize floating (enclosed) structures and would therefore require a federal permit review and a State 401 Water Quality Certification.

