JOSH STEIN
Governor
D. REID WILSON
Secretary
TANCRED MILLER
Director

NORTH CAROLINA
Environmental Quality

CRC-25-13

February 13, 2025

MEMORANDUM

TO: Coastal Resources Commission
FROM: Tancred Miller, Director
THROUGH: Daniel Govoni, Policy Section Chief
SUBJECT: Petition for Rulemaking by Mr. Nelson Paul

The Division of Coastal Management (Division) received a petition for rulemaking from Nelson G. Paul (Petitioner) on December 6, 2024. The Coastal Resources Commission's (CRC) rules governing review of a petition for rulemaking found at 15A NCAC 7J .0605(b), provide that the Director shall prepare a recommended response to the petition for the CRC's consideration. For reasons that will be explained below, the Director, on behalf of the Division, states that we do not support Petitioner's proposed amendment to the CRC's description of the Estuarine Waters Area of Environmental Concern (AEC) in 15A NCAC 7H .0206(a).

I. BACKGROUND

Mr. Paul filed a petition for rulemaking pursuant to G.S. § 150B-20 and 15A NCAC 7J .0605 on December 6, 2024, requesting that the CRC make the underlined addition to the description of Estuarine Waters in 15 NCAC 07H .0206(a).

> (a) Description. Estuarine waters are defined in G.S. 113A-113(b)(2) to include all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters. The boundaries between inland and coastal fishing waters are set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Environment and Natural Resources and in the most current revision of the North Carolina Marine Fisheries Regulations for Coastal Waters, codified at 15A NCAC 3Q .0200. '<u>All the waters' described herein include man-made ditches.</u>

A copy of Petitioner's request is attached. Petitioner also had two letters to the editor published on this topic which have generated public interest (Attached). In a December 13, 2024 letter, CRC Counsel Special Deputy Attorney General Mary Lucasse notified the Petitioner that his petition is complete, and that it would be heard at your February 27, 2025 meeting. In a February 7, 2025 memo to the CRC, Ms. Lucasse also laid out the statutes and rules related to the Commission's handling of the Petitions for Rulemaking Under 15A NCAC 7J .0605(b).

II. PETITIONER'S PROPOSED RULE AMENDMENT AND REASONS FOR RULEMAKING

Petitioner is petitioning the CRC to amend 15 NCAC 07H .0206(a) "Estuarine Waters" to include as Estuarine Waters all waters within man-made ditches. 15A NCAC 07H .0206 establishes the Estuarine Waters AEC and describes its importance in North Carolina's coastal area. In his petition, Petitioner claims that "this wording is a necessary and urgent matter of public disclosure regarding the relatively recent and novel practice of NC Division of Coastal Management field staff adding man-made ditches to the definition of the Estuarine Waters Area of Environmental Concern." The Petitioner states that the "adoption of this rule will serve as constructive public notice regarding the extent to which Estuarine Waters jurisdiction is being applied by the NC Division of Coastal Management." DCM does not agree that man-made ditches should be considered Estuarine Waters AECs. This is due to the definition and description of Estuarine Waters within the Coastal Area Management Act (CAMA) and the North Carolina Dredge and Fill Law, which are discussed in detail below.

III. LAWS RELEVANT TO MAN-MADE DITCHES

The CAMA and the N.C. Dredge and Fill Law confer the CRC's legal authority within man-made ditches, including agriculture and forestry ditches, and the public trust and coastal resources found within these ditches. Below is a list of relevant statutes:

- **G.S. § 113A-103(5)a.** provides a definition of "development", with specific regard to activities occurring within one of the Commission's designated Areas of Environmental Concern (AEC) (Attached).

- **G.S. § 113A-103(5)b.4.** provides criteria for when an activity is exempt from the definition of "development" when the use of land is for agricultural and forestry purposes, therefore removing any CAMA permitting requirements unless the excavation or filling of estuarine waters or navigable waters is involved (Attached).

- **G.S. § 113A-113(b)(1)** grants the CRC the authority to adopt coastal wetlands as defined in G.S. 113-229(n)(3) as an AEC, including contiguous areas necessary to protect those wetlands (Attached).

- **G.S. § 113A-113(b)(2)** provides the definition of "estuarine waters" and the types of waterbodies that may contain estuarine waters, including "all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters,". The definition does not specifically include man-made ditches (Attached).

- **G.S. § 113-229(n)(2)** is the Dredge & Fill definition of estuarine waters, which is nearly identical to the CAMA definition (Attached).

- **G.S. § 113-229(n)(3)** provides the definition of "Marshland" and includes areas where named species are present and where "tidewaters reach the marshland areas through

natural or artificial watercourses," (Attached). This definition is cross-referenced in the CAMA definition of "Coastal Wetlands" at G.S. § 113A-113(b)(1).

IV. AREAS OF ENVIRONMENTAL CONCERN PERTIAINING TO MAN-MADE DITCHES

Through authority from the General Assembly in G.S. § 113A-113 and as previously mentioned above, the CRC designated geographic areas of the coastal area as AECs and specified their boundaries. Of all the AECs captured within and regulated under the Commission's rules, Coastal Wetlands, Public Trust Waters, and Coastal Shoreline AECs could all apply to man-made ditches.

A. Coastal Wetlands AEC

The Coastal Wetland AEC is defined within 15A NCAC 7H .0205 (Attached) In practice, this AEC is identified during site visits to determine the presence of one or more coastal wetland plant species listed in 15A NCAC 07H .0205(a). These species must also be exposed to "regular or occasional flooding" by tides which can reach coastal wetlands through natural or artificial watercourses. Field indicators are used to determine "regular or occasional flooding" and can include observations of tidal water presence, elevation changes, evidence of appropriate species such as periwinkle (littoraria spp.) and crab burrows, vegetation staining, or wrack lines. Any development that does not meet the provided exemptions would require a CAMA or Dredge & Fill permit authorization to take place within the Coastal Wetlands AEC.

B. Public Trust Areas AEC

Public Trust Areas are identified by G.S. § 113A-113(b)(5) as an AEC the CRC could adopt, and subsequently did adopt through 15A NCAC 7H .0207 (Attached). This AEC was established both to protect the public's right to use these areas but also to "safeguard and perpetuate" their value. This AEC is bound by the high water mark or normal water level in natural or "artificially created" waterbodies, and requires staff to conduct a site visit, or the applicant to provide a stamped survey to identify this high water line. The definition in 15A NCAC 7H .0207 includes six factors to be considered by staff when determining whether the public has acquired rights in artificially created bodies of water. These factors include:

1. the use of the body of water by the public;
2. the length of time the public has used the area;
3. the value of public resources in the body of water;
4. whether the public resources in the body of water are mobile to the extent that they can move into natural bodies of water;
5. whether the creation of the artificial body of water required permission from the state; and
6. the value of the body of water to the public for navigation from one public area to another public area.

Factor 6 requires staff to consider whether a waterbody is navigable. To determine if a waterbody is navigable, and consequently subject to public trust use, staff rely on case law interpreting the Public Trust Doctrine, including the decisions in Gwathmey v. State of NC (the rights of the public

in waters subject to the public trust doctrine are established by common law), Bauman v. Woodlake Partners (the "test" for navigability is if it is navigable by watercraft (kayak) in its natural condition) and Fishhouse v. Clarke (a navigable manmade canal connected to a natural waterbody would be subject to the Public Trust Doctrine) (Attached).

C. Coastal Shorelines AEC

The CRC adopted 15A NCAC 07H .0209 Coastal Shorelines AEC, (Attached) which is broken into two subcategories: Estuarine Shorelines AEC and the Public Trust Shorelines AEC, and function as the "intersection of the upland and aquatic elements of the estuarine and ocean system". The AECs are similar in that both require new development to be located 30 feet landward of high water, with exceptions for the development activities detailed in 15A NCAC 7H .0209(d)(10). The Estuarine Shorelines AEC's landward boundary is 75' or 575' (dependent upon the Division of Water Resources' water classification) landward of high water. This AEC comes with specific use standards that provide criteria for development, including impervious surface limitations.

In addition to the laws and rules pertaining to man-made ditches, the CRC has also adopted permit exemptions through rulemaking for certain development activities including agriculture and forestry at 15A NCAC 7K .0206 (Attached). 15A NCAC 7K .0206 states "Ditches used for agricultural or forestry purposes with maximum dimensions equal to or less than six feet (top width) by four feet deep are exempted from the CAMA permit requirement." However, if the ditches cease to be used for agricultural or forestry purposes the exemption is no longer applicable.

V. DIRECTOR'S RESPONSE

The regulation of man-made ditches under statute and the CRC's rules is driven by the need to protect North Carolina's coastal resources. DCM field staff consider all the laws and rules noted above when examining specific site conditions and reviewing development proposals. In the case of the CRC's Estuarine Waters AEC, the definitions provided by the General Assembly in the CAMA and Dredge and Fill Law encompass "all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters," but do not include man-made ditches so the Estuarine Waters AEC does not apply. DCM claims regulatory jurisdiction in man-made ditches in two circumstances, provided the agricultural and forestry exemption does not apply:

1. Presence of Coastal Wetlands (G.S. § 113-229(n)(3), 113A-113(b)(1), 15A NCAC 7H .0205)
   Coastal Wetlands AEC; No buffer implicated, but fill is not allowed without authorization.

2. Public Trust resources and navigability (G.S. § 113A-113(b)(5), 15A NCAC 07H .0207(a))
   Public Trust Areas AEC; 30-foot buffer required measured landward from high water, water dependent development only within buffer. Navigability must be maintained.

The Petitioner asserts that the Division is newly classifying man-made ditches as Estuarine Waters AECs. This is not the case; the designation of Estuarine Waters AECs is based on the statutory and regulatory definitions which do not apply to man-made ditches. In response to the Petitioner's stated concern that DCM staff are "adding man-made ditches to the definition of the Estuarine Waters Area of Environmental Concern", the Division, in applying the definition of Estuarine Waters found in law and rule, does not claim man-made ditches as Estuarine Waters. Instead, DCM staff assess whether the man-made ditch meets the Public Trust Areas and Coastal Wetlands AECs definitions, while also considering whether the proposed development activity qualifies for an exemption under the CAMA or qualifies for an exemption under 15A NCAC 07K .0206. It is important to note that jurisdictional calls by Staff are not permitting decisions but are instead determinations that the proposed development is subject to review for compliance with the State Dredge and Fill Law, the CAMA, and the CRC's rules, and may require a permit.

In the example provided as part of this petition, the drawings presented by Petitioner label the man-made ditches as "CAMA Ditch" and apply a 30' buffer and 75' jurisdictional area but are unclear which AECs are present. The consultant annotates that a portion of the ditch system was identified as containing Coastal Wetlands. In cases like these, staff evaluate whether the man-made ditch meets the requirements for the Public Trust Areas and Coastal Shorelines AECs and if so, would apply the 30' buffer, the 75'/575' AEC boundary line, and related impervious surface limitations as laid out in rule. The portion containing Coastal Wetlands would fall under regulatory oversight as well, assuming new non-agricultural development was proposed within the Coastal Wetlands AEC. While the Coastal Wetlands AEC does not require development buffers, any development or activity involving impacts to coastal wetlands would require a CAMA permit or a Dredge and Fill permit and must comply with both the laws and the use standards contained in the CRC rules, unless the proposed development is exempted by law or rule.

In DCM Staff's experience, there is not typically development proposed within man-made ditches, especially if the ditches are being used for agriculture or forestry purposes. If development were to occur, the AECs most likely to occur on properties that contain man-made ditches are the Coastal Wetlands AEC and the Coastal Shorelines AEC (specifically the Public Trust Shoreline sub-category) and the Public Trust Areas AEC. If man-made ditches are influenced by tidal inundation, which occurs either through lunar cycles in the central and southern coastal counties or by wind-driven tides in the northern coastal counties, the area may contain coastal wetlands species and public trust resources.

Ultimately, the permitting process ensures that development activities associated with man-made ditches are managed in a way that safeguards Coastal Wetlands, Estuarine Waters systems, Public Trust Areas, and Coastal Shorelines. By taking this case-by-case approach based on site conditions approach, DCM staff strive to provide clarity to property owners while protecting those coastal resources as directed by law and rule.

VI. CONCLUSION

North Carolina's coastal area varies significantly across different regions, with distinct environmental characteristics from north to south. Factors such as tidal influence—whether driven by lunar cycles or wind patterns—vary across coastal counties, as do dominant wetland vegetation, geologic features, and elevation changes. Despite these regional differences, North Carolina's laws

and the CRC's rules are designed to be applied consistently across the entire coast, providing a comprehensive regulatory framework for protecting coastal resources. DCM field staff must assess each site individually, considering specific field indicators and site conditions to ensure proper application of these regulations. Given this case-by-case approach, DCM believes that the proposed rule change is unnecessary, as existing laws and rules already provide the necessary guidance for determining jurisdiction over man-made ditches and an exemption for typical agricultural ditches. Not all man-made ditches will be considered jurisdictional, and jurisdictional determinations are made in accordance with legal definitions and site-specific evaluations.

DCM does not agree with the premise for this petition and does not believe the proposed rule language would add value beyond the existing regulatory structure. The statutory definitions under the CAMA or Dredge & Fill Law of Estuarine Waters do not include man-made ditches. Making that jurisdictional claim in all man-made ditches would represent a significant expansion of our current regulatory footprint in man-made ditches, which is limited to Public Trust (navigation and public trust resources) and Coastal Wetlands determinations.

DCM does not support the Petitioner's proposed rule amendment and does not recommend the CRC proceed with rule making.

Attachments to
DCM Director's Response
for
Nelson Paul Petition for Rulemaking

https://www.dailyadvance.com/opinion/letters/letter-cama-was-enacted-to-protect-natural-shorelines-not-man-made-ditches/article_ec99d52a-cf95-11ef-bac7-43a788619b67.html

Letter: CAMA was enacted to protect natural shorelines, not man-made ditches

Jan 14, 2025

I want to make you aware of an urgent and pressing issue regarding a relatively recent development in how the N.C. Division of Coastal Management is implementing the Coastal Area Management Act.

Recently, I have been made aware that the NC Division of Coastal Management is designating man-made ditches as CAMA Estuarine Waters Area of Environmental Concern. This is a new and novel interpretation that extends CAMA jurisdiction thousands of feet inland.

Besides unnecessarily bringing estuarine waters designation protection to man-made ditches, the estuarine waters designation brings mandatory setbacks associated with the Coastal Shorelines Area of Environmental Concern.

As the NC Division of Coastal Management pushes the estuarine waters designation inland, on the lower Coastal Plain terraces (like we have in Carteret County), the CAMA jurisdictional picture takes on the look of a hay rake.

The estuarine waters designation eliminates the freedom to conduct necessary ditch maintenance activities. In addition, vast amounts of acreage are deemed useless to any future development due to Coastal Shorelines AEC setbacks.

There is no ecological reason for Coastal Management to extend CAMA jurisdiction over man-made ditches. CAMA was originally enacted to protect the "natural shorelines" and "natural environment." (See N.C. General Statute 113A-102 (a)). Man-made ditches are neither.

A petition has been filed for rulemaking with the Coastal Resources Commission to address this issue. This matter will be coming before the CRC at the end of February.

Please support this effort to bring sanity back to CAMA regulatory enforcement!

PAUL NELSON

Morrisville

https://www.carolinacoastonline.com/news_times/opinions/letters_to_editor/article_15569ffe-d4fd-11ef-88b0-bb2fd98d1fba.html

LETTER TO THE EDITOR: The NC Coastal Area Management Act and man-made ditches

Jan 19, 2025

Morrisville, N.C.

Jan. 11, 20205

TO THE EDITOR:

I want to make you aware of an urgent and pressing issue regarding a relatively recent development in how the Division of Coastal Management is implementing the Coastal Area Management Act.

Recently, I have been made aware that the NC Division of Coastal Management is designating man-made ditches as CAMA Estuarine Waters Area of Environmental Concern. This is a new and novel interpretation that extends CAMA jurisdiction thousands of feet inland.

Besides unnecessarily bringing Estuarine Waters designation protection to man-made ditches, the Estuarine Waters designation brings mandatory setbacks associated with the Coastal Shorelines Area of Environmental Concern.

As the NC Division of Coastal Management pushes the Estuarine Waters designation inland, on the lower NC Coastal Plain terraces (like we have in Carteret County), the CAMA jurisdictional picture takes on the look of a hay rake.

The Estuarine Waters designation eliminates the freedom to conduct necessary ditch maintenance activities. In addition, vast amounts of acreage are deemed useless to any future development due to Coastal Shorelines AEC setbacks.

There is no ecological reason for the NC Division of Coastal Management to extend CAMA jurisdiction over man-made ditches. The CAMA was originally enacted to protect the "natural shorelines" and "natural environment" (NCGS 113A-102 (a)). Man-made ditches are neither.

A petition has been filed for rulemaking with the Coastal Resources Commission to address this issue. This matter will be coming before the CRC at the end of February.

My interest is to bring the NC Division of Coastal Management back to the original interpretation of the Estuarine Waters AEC using the statutory criteria of the Coastal Area Management Act and the current Rules of the Coastal Resources Commission.

Your readers support of this effort would be most appreciated!

NELSON PAUL

§ 113A-103. Definitions.

As used in this Article:

(1) "Advisory Council" means the Coastal Resources Advisory Council created by G.S. 113A-105.

(1a) "Boat" means a vessel or watercraft of any type or size specifically designed to be self-propelled, whether by engine, sail, oar, or paddle or other means, which is used to travel from place to place by water.

(2) "Coastal area" means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean (extending offshore to the limits of State jurisdiction, as may be identified by rule of the Commission for purposes of this Article, but in no event less than three geographical miles offshore) or any coastal sound. The Governor, in accordance with the standards set forth in this subdivision and in subdivision (3) of this section, shall designate the counties that constitute the "coastal area," as defined by this section, and his designation shall be final and conclusive. On or before May 1, 1974, the Governor shall file copies of a list of said coastal-area counties with the chairmen of the boards of commissioners of each county in the coastal area, with the mayors of each incorporated city within the coastal area (as so defined) having a population of 2,000 or more and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean, and with the Secretary of State. By way of illustration, the counties designated as coastal-area counties under this subdivision as of July 1, 2012, are Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington. The coastal-area counties and cities shall transmit nominations to the Governor of members of the Coastal Resources Commission as provided in G.S. 113A-104(d).

(3) "Coastal sound" means Albemarle, Bogue, Core, Croatan, Currituck, Pamlico and Roanoke Sounds. For purposes of this Article, the inland limits of a sound on a tributary river shall be defined as the limits of seawater encroachment on said tributary river under normal conditions. "Normal conditions" shall be understood to include regularly occurring conditions of low stream flow and high tide, but shall not include unusual conditions such as those associated with hurricane and other storm tides. Unless otherwise determined by the Commission, the limits of seawater encroachment shall be considered to be the confluence of a sound's tributary river with the river or creek entering it nearest to the farthest inland movement of oceanic salt water under normal conditions. For purposes of this Article, the aforementioned points of confluence with tributary rivers shall include the following:

a. On the Chowan River, its confluence with the Meherrin River;
b. On the Roanoke River, its confluence with the northeast branch of the Cashie River;
c. On the Tar River, its confluence with Tranters Creek;
d. On the Neuse River, its confluence with Swift Creek;
e. On the Trent River, its confluence with Ready Branch.

Provided, however, that no county shall be considered to be within the coastal area which: (i) is adjacent to, adjoining or bounded by any of the above points of confluence and lies entirely west of said point of confluence; or (ii) is

not bounded by the Atlantic Ocean and lies entirely west of the westernmost of the above points of confluence.

(4) "Commission" means the Coastal Resources Commission created by G.S. 113A-104.

(4a) "Department" means the Department of Environmental Quality.

(5)a. "Development" means any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision) involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal; or placement of a floating structure, except a floating structure used primarily for aquaculture as defined in G.S. 106-758 and associated with an active shellfish cultivation lease area or franchise, in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).

b. The following activities including the normal and incidental operations associated therewith shall not be deemed to be development under this section:

1. Work by a highway or road agency for the maintenance of an existing road, if the work is carried out on land within the boundaries of the existing right-of-way, or for emergency repairs and safety enhancements of an existing road as described in an executive order issued under G.S. 166A-19.30(a)(5).

2. Work by any railroad company or by any utility and other persons engaged in the distribution and transmission of petroleum products, water, telephone or telegraph messages, or electricity for the purpose of inspecting, repairing, maintaining, or upgrading any existing substations, sewers, mains, pipes, cables, utility tunnels, lines, towers, poles, tracks, and the like on any of its existing railroad or utility property or rights-of-way, or the extension of any of the above distribution-related facilities to serve development approved pursuant to G.S. 113A-121 or 113A-122;

3. Work by any utility and other persons for the purpose of construction of facilities for the development, generation, and transmission of energy to the extent that such activities are regulated by other law or by present or future rules of the State Utilities Commission regulating the siting of such facilities (including environmental aspects of such siting), and work on facilities used directly in connection with the above facilities;

4. The use of any land for the purposes of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, uses related to aquaculture and aquaculture facilities as defined in G.S. 106-758 and associated with an active shellfish cultivation lease area or franchise, or for other agricultural purposes except where

excavation or filling affecting estuarine waters (as defined in G.S. 113-229) or navigable waters is involved;

5. Maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements or to prevent damage to imminently threatened structures by the creation of protective sand dunes.
6. The construction of any accessory building customarily incident to an existing structure if the work does not involve filling, excavation, or the alteration of any sand dune or beach;
7. Completion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to ratification of this Article and which development was initiated prior to the ratification of this Article;
8. Completion of installation of any utilities or roads or related facilities not otherwise in violation of law, within a subdivision that was duly approved and recorded prior to the ratification of this Article and which installation was initiated prior to the ratification of this Article;
9. Construction or installation of any development, not otherwise in violation of law, for which an application for a building or zoning permit was pending prior to the ratification of this Article and for which a loan commitment (evidenced by a notarized document signed by both parties) had been made prior to the ratification of this Article; provided, said building or zoning application is granted by July 1, 1974;
10. It is the intention of the General Assembly that if the provisions of any of the foregoing subparagraphs 1 to 10 of this paragraph are held invalid as a grant of an exclusive or separate emolument or privilege or as a denial of the equal protection of the laws, within the meaning of Article I, Secs. 19 and 32 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions.

c. The Commission shall define by rule (and may revise from time to time) certain classes of minor maintenance and improvements which shall be exempted from the permit requirements of this Article, in addition to the exclusions set forth in paragraph b of this subdivision. In developing such rules the Commission shall consider, with regard to the class or classes of units to be exempted:

1. The size of the improved or scope of the maintenance work;
2. The location of the improvement or work in proximity to dunes, waters, marshlands, areas of high seismic activity, areas of unstable soils or geologic formations, and areas enumerated in G.S. 113A-113(b)(3); and
3. Whether or not dredging or filling is involved in the maintenance or improvement.

(5a) "Floating structure" means any structure, not a boat, supported by a means of floatation, designed to be used without a permanent foundation, which is used or intended for human habitation or commerce. A structure shall be considered a floating structure when it is inhabited or used for commercial purposes for more than thirty days in any one location. A boat may be

considered a floating structure when its means of propulsion has been removed or rendered inoperative.

(6) "Key facilities" include the site location and the location of major improvement and major access features of key facilities, and mean:

a. Public facilities, as determined by the Commission, on nonfederal lands which tend to induce development and urbanization of more than local impact, including but not limited to:

1. Any major airport designed to serve as a terminal for regularly scheduled air passenger service or one of State concern;
2. Major interchanges between the interstate highway system and frontage-access streets or highways; major interchanges between other limited-access highways and frontage-access streets or highways;
3. Major frontage-access streets and highways, both of State concern; and
4. Major recreational lands and facilities;

b. Major facilities on nonfederal lands for the development, generation, and transmission of energy.

(7) "Lead regional organizations" means the regional planning agencies created by and representative of the local governments of a multi-county region, and designated as lead regional organizations by the Governor.

(8) "Local government" means the governing body of any county or city which contains within its boundaries any lands or waters subject to this Article.

(9) "Person" means any individual, citizen, partnership, corporation, association, organization, business trust, estate, trust, public or municipal corporation, or agency of the State or local government unit, or any other legal entity however designated.

(10) Repealed by Session Laws 1987, c. 827, s. 133.

(11) "Secretary" means the Secretary of Environmental Quality, except where otherwise specified in this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 913, s. 1; c. 932, s. 2.1; 1987, c. 827, s. 133; 1989, c. 727, s. 126; 1991 (Reg. Sess., 1992), c. 839, ss. 1, 4; 1995, c. 509, s. 58; 1997-443, s. 11A.119(a); 2012-202, s. 1; 2014-100, s. 14.7(l); 2015-241, s. 14.30(u), (v); 2024-45, s. 16.1(a).)

Part 3. Areas of Environmental Concern.

§ 113A-113. Areas of environmental concern; in general.

(a) The Coastal Resources Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part.

(b) The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination:

(1) Coastal wetlands as defined in G.S. 113-229(n)(3) and contiguous areas necessary to protect those wetlands;

(2) Estuarine waters, that is, all the water of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters, as set forth in the most recent official published agreement adopted by the Wildlife Resources Commission and the Department of Environmental Quality;

(3) Renewable resource areas where uncontrolled or incompatible development which results in the loss or reduction of continued long-range productivity could jeopardize future water, food or fiber requirements of more than local concern, which may include:

a. Watersheds or aquifers that are present sources of public water supply, as identified by the Department or the Environmental Management Commission, or that are classified for water-supply use pursuant to G.S. 143-214.1;

b. Capacity use areas that have been declared by the Environmental Management Commission pursuant to G.S. 143-215.13(c) and areas wherein said Environmental Management Commission (pursuant to G.S. 143-215.3(d) or 143-215.3(a)(8)) has determined that a generalized condition of water depletion or water or air pollution exists;

c. Prime forestry land (sites capable of producing 85 cubic feet per acre-year, or more, of marketable timber), as identified by the Department.

(4) Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems, which may include:

a. Existing national or State parks or forests, wilderness areas, the State Nature and Historic Preserve, or public recreation areas; existing sites that have been acquired for any of the same, as identified by the Secretary; and proposed sites for any of the same, as identified by the Secretary, provided that the proposed site has been formally designated for acquisition by the governmental agency having jurisdiction;

b. Present sections of the natural and scenic rivers system;

c. Stream segments that have been classified for scientific or research uses by the Environmental Management Commission, or that are proposed to be so classified in a proceeding that is pending before said Environmental Management Commission pursuant to G.S.

143-214.1 at the time of the designation of the area of environmental concern;

d. Existing wildlife refuges, preserves or management areas, and proposed sites for the same, as identified by the Wildlife Resources Commission, provided that the proposed site has been formally designated for acquisition (as hereinafter defined) or for inclusion in a cooperative agreement by the governmental agency having jurisdiction;

e. Complex natural areas surrounded by modified landscapes that do not drastically alter the landscape, such as virgin forest stands within a commercially managed forest, or bogs in an urban complex;

f. Areas that sustain remnant species or aberrations in the landscape produced by natural forces, such as rare and endangered botanical or animal species;

g. Areas containing unique geological formations, as identified by the State Geologist; and

h. Historic places that are listed, or have been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966; historical, archaeological, and other places and properties owned, managed or assisted by the State of North Carolina pursuant to Chapter 121; and properties or areas that are or may be designated by the Secretary of the Interior as registered natural landmarks or as national historic landmarks;

(5) Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution;

(6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include:

a. Sand dunes along the Outer Banks;

b. Ocean and estuarine beaches and the shoreline of estuarine and public trust waters;

c. Floodways and floodplains;

d. Areas where geologic and soil conditions are such that there is a substantial possibility of excessive erosion or seismic activity, as identified by the State Geologist;

e. Areas with a significant potential for air inversions, as identified by the Environmental Management Commission.

(7) Areas which are or may be impacted by key facilities.

(8) Outstanding Resource Waters as designated by the Environmental Management Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary for the purpose of maintaining the exceptional water quality and outstanding resource values identified in the designation.

(9) Primary Nursery Areas as designated by the Marine Fisheries Commission and such contiguous land as the Coastal Resources Commission reasonably

deems necessary to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

(c) In those instances where subsection (b) of this section refers to locations identified by a specified agency, said agency is hereby authorized to make the indicated identification from time to time and is directed to transmit the identification to the Commission; provided, however, that no designation of an area of environmental concern based solely on an agency identification of a proposed location may remain effective for longer than three years unless, in the case of paragraphs (4)a and d of subsection (b) of this section, the proposed site has been at least seventy-five percent (75%) acquired. Within the meaning of this section, "formal designation for acquisition" means designation in a formal resolution adopted by the governing body of the agency having jurisdiction (or by its chief executive, if it has no governing body), together with a direction in said resolution that the initial step in the land acquisition process be taken (as by filing an application with the Department of Administration to acquire property pursuant to G.S. 146-23).

(d) Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly. (1973, c. 476, s. 128; c. 1262, ss. 23, 86; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 518, s. 1; 1989, c. 217, s. 1; c. 727, s. 128; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(u).)

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

(1) The size of the development.
(2) The impact of the development on areas of environmental concern.
(3) How often the class of development is carried out.
(4) The need for on-site oversight of the development.
(5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii) providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(e2) The Department shall not include any condition in a permit issued pursuant to subsection (e) of this section that restricts dredging activities to a specified time frame, except those time frames, or moratorium periods, that are required pursuant to the federal Clean Water Act and Endangered Species Act, regulations promulgated thereunder, or other applicable federal law.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a

petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(*l*) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

(3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass *(Spartina alterniflora)*, Black Needlerush *(Juncus roemerianus)*, Glasswort *(Salicornia spp.)*, Salt Grass *(Distichlis spicata)*, Sea Lavender *(Limonium spp.)*, Bulrush *(Scirpus spp.)*, Saw Grass *(Cladium jamaicense)*, Cattail *(Typha spp.)*, Salt-Meadow Grass *(Spartina patens)*, and Salt Reed-Grass *(Spartina cynosuroides)*. (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55; 2014-115, s. 17; 2023-137, s. 10.5.)

15A NCAC 07H .0205 COASTAL WETLANDS

(a) Definition. "Coastal Wetlands" are defined as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides, that reach the marshland areas through natural or artificial watercourses, provided this does not include hurricane or tropical storm tides. Regular or occasional flooding shall be established through field indicators, including the observation of tidal water on the site, changes in elevation, presence of periwinkle (littoraria spp.), presence of crab burrows, staining, or wrack lines. Coastal wetlands may contain one or more of the following marsh plant species:

(1) Cord Grass (Spartina alterniflora);
(2) Black Needlerush (Juncus roemerianus);
(3) Glasswort (Salicornia spp.);
(4) Salt Grass (Distichlis spicata);
(5) Sea Lavender (Limonium spp.);
(6) Bulrush (Scirpus spp.);
(7) Saw Grass (Cladium jamaicense);
(8) Cat-tail (Typha spp.);
(9) Salt Meadow Grass (Spartina patens);or
(10) Salt Reed Grass (Spartina cynosuroides).

The coastal wetlands AEC includes any contiguous lands designated by the Secretary of DEQ pursuant to G.S. 113-230(a).

(b) Significance. The unique productivity of the estuarine and ocean system is supported by detritus (decayed plant material) and nutrients that are exported from the coastal wetlands. Without the wetlands, the high productivity levels and complex food chains typically found in the estuaries could not be maintained. Additionally, coastal wetlands serve as barriers against flood damage and control erosion between the estuary and the uplands.

(c) Management Objective. It is the objective of the Coastal Resources Commission to conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values, and to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource necessary to the functioning of the entire estuarine system.

(d) Use Standards. Suitable land uses are those consistent with the management objective in this Rule. First priority of use shall be allocated to the conservation of existing coastal wetlands. Secondary priority of coastal wetland use shall be given to those types of development activities that require water access and cannot function elsewhere.

Unacceptable land uses include restaurants, businesses, residences, apartments, motels, hotels, trailer parks, parking lots, private roads, highways, and factories. Acceptable land uses include utility easements, fishing piers, docks, wildlife habitat management activities, and agricultural uses such as farming and forestry drainage as permitted under North Carolina's Dredge and Fill Law, G.S. 113-229, or applicable local, state, and federal laws.

In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

(e) Alteration of Coastal Wetlands. Alteration of coastal wetlands includes mowing or cutting of coastal wetlands vegetation whether by mechanized equipment or manual means. Alteration of coastal wetlands by federal or state resource management agencies as a part of planned resource management activities is exempt from the requirements of this Paragraph. Alteration of coastal wetlands shall be governed according to the following provisions:

(1) Alteration of coastal wetlands shall be exempt from the permit requirements of the Coastal Area Management Act (CAMA) when conducted in accordance with the following criteria:
    (A) Coastal wetlands may be mowed or cut to a height of no less than two feet, as measured from the coastal wetland substrate, at any time and at any frequency throughout the year;
    (B) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, once between each December 1 and March 31;
    (C) Alteration of the substrate is not allowed;
    (D) All cuttings or clippings shall remain in place as they fall;
    (E) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, to create an access path four feet wide or less on waterfront lots without a pier access; and
    (F) Coastal wetlands may be mowed or cut by utility companies as necessary to maintain utility easements.
(2) Coastal wetland alteration not meeting the exemption criteria of this Rule shall require a CAMA permit. CAMA permit applications for coastal wetland alterations are subject to review by the North Carolina Wildlife Commission, North Carolina Division of Marine Fisheries, U.S. Fish and

Wildlife Service, and National Marine Fisheries Service in order to determine whether or not the proposed activity will have a significant adverse impact on the habitat or fisheries resources.

History Note: *Authority G.S. 113A-107; 113A-113(b)(1); 113A-124;*
Eff. September 9, 1977;
Amended Eff. September 1, 2016; November 1, 2009; August 1, 1998; October 1, 1993; May 1, 1990; January 24, 1978;
Readopted Eff. July 1, 2020.

15A NCAC 07H .0207 PUBLIC TRUST AREAS

(a) Definition. "Public trust areas" are all waters of the Atlantic Ocean and the lands thereunder from the mean high water mark to the seaward limit of state jurisdiction; all natural bodies of water subject to measurable lunar tides and lands thereunder to the normal high water or normal water level; all navigable natural bodies of water and lands thereunder to the normal high water or normal water level as the case may be, except privately-owned lakes to which the public has no right of access; all water in artificially created bodies of water containing public fishing resources or other public resources which are accessible to the public by navigation from bodies of water in which the public has rights of navigation; and all waters in artificially created bodies of water in which the public has acquired rights by prescription, custom, usage, dedication, or any other means. In determining whether the public has acquired rights in artificially created bodies of water, the following factors shall be considered:

(1) the use of the body of water by the public;
(2) the length of time the public has used the area;
(3) the value of public resources in the body of water;
(4) whether the public resources in the body of water are mobile to the extent that they can move into natural bodies of water;
(5) whether the creation of the artificial body of water required permission from the state; and
(6) the value of the body of water to the public for navigation from one public area to another public area.

(b) Significance. The public has rights in these areas, including navigation and recreation. In addition, these areas support commercial and sports fisheries, have aesthetic value, and are important resources for economic development.

(c) Management Objective. To protect public rights for navigation and recreation and to conserve and manage the public trust areas so as to safeguard and perpetuate their biological, economic and aesthetic value.

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in Paragraph (c) of this Rule. In the absence of overriding public benefit, any use which jeopardizes the capability of the waters to be used by the public for navigation or other public trust rights which the public may be found to have in these areas shall not be allowed. The development of navigational channels or drainage ditches, the use of bulkheads to prevent erosion, and the building of piers, wharfs, or marinas are examples of uses that may be acceptable within public trust areas, provided that such uses shall not be detrimental to the public trust rights and the biological and physical functions of the estuary. Projects which would directly or indirectly block or impair existing navigation channels, increase shoreline erosion, deposit spoils below normal high water, cause adverse water circulation patterns, violate water quality standards, or cause degradation of shellfish waters are considered incompatible with the management policies of public trust areas. In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

History Note: *Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(5); 113A-124;*
Eff. September 9, 1977;
Amended Eff. February 1, 2006; October 1, 1993;
Readopted Eff. July 1, 2020.

Gwathmey v. STATE THROUGH DEPT. OF ENVIR.

464 S.E.2d 674 (1995)

342 N.C. 287

Richard Barbee GWATHMEY, Jr., and wife, Gwendolyn Brown Gwathmey, Robert F. Cameron and wife, Elizabeth Beck Cameron, and Elizabeth Beck Cameron, Louise deR. Smith, Robert Y. Kelly and wife, Elsie W. Kelly, and in the Matter of Wachovia Bank of North Carolina, N.A., Edith R. Merrill and Barbara M. Walser, Trustees Under the Will of Leslie M. Merrill v. The STATE of North Carolina, acting through its agency, the DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, acting through its Secretary, William W. COBEY, Jr., and the Division of Marine Fisheries, acting through its Director, Dr. William T. Hogarth, and the Submerged Lands Program, acting through its Director, P.A. Wojciechowski.

No. 74PA94.

Supreme Court of North Carolina.

December 8, 1995.

*676 Stephens, McGhee, Morgan, Lennon & O'Quinn by Janet R. Coleman and Darren S. Hart, Wilmington, for plaintiffs-appellees.

Michael F. Easley, Attorney General by Daniel F. McLawhorn and J. Allen Jernigan, Special Deputy Attorneys General, and David W. Berry, Associate Attorney General, for defendant-appellant.

Thompson & Godwin, L.L.P. by Billy R. Godwin, Jr., Dunn, and by Robert Kerry Kehoe, counsel, Washington, DC, on behalf of Coastal States Organization, Inc., amicus curiae.

MITCHELL, Chief Justice.

The parties stipulated at trial that the lands claimed by each of the plaintiffs that comprise the subject of this litigation are marshlands located between the high and low water marks in the Middle Sound area of New Hanover County. Title to the lands in question was conveyed by the State Board of Education (SBE) to the original purchasers of the marshlands between 1926 and 1945. Each of the deeds from the SBE to the original purchasers purports to convey a tract of "marshland" in the "Middle Sound" area to the purchasers, their "heirs and assigns in fee simple forever."[1] The parties stipulated that each of the plaintiffs could establish a chain of title linking their deeds to the source deeds from the SBE, with one exception.[2]

In 1965, the General Assembly enacted N.C.G.S. § 113-205, which required individuals who claimed any part of the bed lying beneath navigable waters of any coastal county to register their claims with the Secretary of the Department of Natural Resources by 1 January 1970, or their claims would be null and void. The plaintiffs in this case, or their predecessors in interest, registered their claims in compliance with this statute. The parties stipulated that the plaintiffs' submerged lands claims, as originally filed, included both marshlands lying between the mean high and mean low water marks of Middle Sound and lands beyond the mean low water mark that lie beneath the open waters of Middle Sound or Howe Creek. In 1987, the Submerged Lands Program, which was established to assess the validity of the claims of title previously registered pursuant to N.C.G.S. § 113-205, came under the administration of the Division of Marine Fisheries. In assessing the plaintiffs' claims, the Division of Marine Fisheries issued resolution letters concluding that the plaintiffs had valid titles to the marshlands between the mean high and mean low water marks. However, pursuant to N.C.G.S. § 146-20.1(b), the resolution letters purporting to validate the plaintiffs' titles to the marshlands were accompanied in each case by a purported reservation of public trust rights in those same marshlands. The plaintiffs responded by filing separate complaints against the State between 26 February 1991 and 31 May 1991, in Superior Court, New Hanover County, seeking a determination of the quality of their titles to the marshlands and other relief. The plaintiffs' actions were consolidated by consent of all the parties following filing of the State's answer.

The State made a motion in the Superior Court for summary judgment on the ground *677 that waters covering the lands in question are subject to the ebb and flow of the tides and are, thus, navigable as a matter of law. The State argued that, as the waters are navigable in

law, title to the land beneath those waters is governed by the public trust doctrine, and such land is not subject to fee simple ownership by the plaintiffs. Judge G.K. Butterfield, Jr., denied the motion in an order concluding that the test for determining navigability in law in North Carolina is "navigability in fact."

This case then came on for trial without a jury in the Superior Court, New Hanover County, before Judge James D. Llewellyn. The trial court entered judgment for the plaintiffs on 12 August 1993.

The trial court found from substantial evidence before it that at low tide no boat of any size could navigate in the marshlands claimed by the plaintiffs, except in dredged channels. The trial court also found that "as to the marshlands claimed by Plaintiffs, at high tide the area covered by marsh grass is not navigable." Based upon its findings, the trial court concluded as a matter of law that no part of the marshlands on Middle Sound within the boundaries of the plaintiffs' deeds is covered by waters navigable in fact; therefore, those lands are not covered by waters that are navigable in law. The trial court further found that the open waters of Howe Creek are navigable in fact based upon actual current and historical use and, therefore, concluded that those open waters are navigable as a matter of law. The trial court also concluded that no public trust rights existed in the marshlands claimed by the plaintiffs and that the SBE had conveyed fee simple title to those lands to the plaintiffs' predecessors in title without reservation of any public trust rights. However, the trial court concluded that as to the land lying beneath the open waters of Howe Creek, the SBE had conveyed title subject to public trust rights. The trial court further concluded that "the `Declaration of Final Resolution' recorded by the Defendant is a cloud upon each Plaintiff's title and is ineffective as a recognition of any right, title or interest of the public in the marshlands." The trial court then concluded that as the plaintiffs' marshlands were not beneath waters navigable in law, N.C.G.S. § 146-20.1(b) is "invalid as it purports to impress upon the marshlands owned by Plaintiffs public trust rights which did not exist in said lands at the time they were conveyed to Plaintiffs' predecessors in title."

Based upon its findings and conclusions, the trial court ordered, adjudged, and decreed that the plaintiffs were owners in fee simple absolute without any reservation of public trust rights of the "certain tract of marshlands described" in each of their deeds. With regard to the claims of the plaintiffs Richard and Gwendolyn Gwathmey, however, the trial court adjudged and decreed that "those areas of deeded bottom lying beneath the open waters of Howe Creek and within the boundaries of Plaintiffs' [Gwathmey] deed are owned in fee simple subject to the public trust."

The defendant State of North Carolina gave notice of appeal. On 7 April 1994, this Court allowed the defendant's petition for discretionary review prior to a determination by the Court of Appeals.

Before addressing the specific issues raised on this appeal, we will briefly discuss the public trust doctrine and the operation of the entry laws in North Carolina. A brief introductory review of these two areas of the law at this point will facilitate an understanding of the issues raised on this appeal.

This Court has long recognized that after the Revolutionary War, the State became the owner of lands beneath navigable waters but that the General Assembly has the power to dispose of such lands if it does so expressly by special grant. E.g., Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 524, 44 S.E. 39, 41 (1903). However, "[l]ooming over any discussion of the ownership of estuarine marshes is the `public trust' doctrinea tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland, and a concept embracing asserted inherent public rights in these lands and waters." Monica Kivel Kalo & Joseph J. Kalo, The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public *678 Trust, 64 N.C.L.Rev. 565, 572 (1986) [hereinafter Battle to Preserve N.C.'s Estuarine Marshes.]

In Tatum v. Sawyer, 9 N.C. 226 (1822), this Court recognized the importance of navigable waters as common highways and held: "Lands covered by navigable waters are not subject to entry under the entry law of 1777, not by any express prohibition in that act, but, being necessary for public purposes as common highways for the convenience of all, they are fairly presumed not to have been within the intention of the Legislature." Id. at 229. Thus, this Court has recognized the public interests inherent in navigable waters and qualified the State's ability to part with title to lands submerged by navigable waters with a presumption that legislative enactments do not indicate a legislative intent to authorize the conveyance of lands beneath navigable waters. Atlantic & N.C. R.R. Co. v. Way, 172 N.C. 774, 776-78, 90 S.E. 937, 938-40 (1916). The practical significance of this presumption under the public trust doctrine is that it can operate to invalidate claims to lands submerged by navigable waters. The issue of navigability is controlling because the public trust doctrine is not an issue in cases where the land involved is above water or where the body of water regularly covering the land involved is not navigable in law. The public trust doctrine is discussed in more detail at other points in this opinion where we deal directly with the assignments of error.

This Court's discussions of navigability have arisen most often in cases where the parties claimed title to contested lands under grants obtained pursuant to the general entry laws. In 1777, the General Assembly enacted the entry laws,[3] also known as the "general entry laws." These laws established a system whereby the people of North Carolina could acquire the State's unappropriated vacant lands. The entry laws provided for the election of "entry-takers" and surveyors in every county. An individual who wished to acquire State land was first required to pay the statutory amount set for the quantity of land purchased in addition to the fees authorized by the laws. Subsequently, the surveyor was required to enter the lands claimed and survey them. The entry laws also provided that if part of the survey was made on any navigable water, the water was to form one boundary of the land surveyed. The law prescribed the manner in which the individual received a grant from the State for the land surveyed and in which that grant would be registered in the county in which the land was located.

By an assignment of error, defendant, the State of North Carolina, contends that the trial court erred in concluding that no public trust rights exist in the lands claimed by the plaintiffs. The State says this is so because those lands were not covered by waters "navigable in fact." More specifically, the State contends that the proper test for determining navigability in law where tidal waters are concerned is the "lunar tides" test, also known as the "ebb and flow" test. Under this test, "navigable waters are distinguished from others, by the ebbing and flowing of the tides." Wilson v. Forbes, 13 N.C. 30, 34 (1828) (Henderson, J.). We do not agree.

The evidence adduced at trial tended to show that the marshlands claimed by the plaintiffs are located in the Middle Sound area. The waters of Middle Sound are subject to the ebb and flow of the lunar tide. The marshlands in question are covered by the waters of the sound at certain stages of the tides. The depth of the water over any specific portion of the marshlands claimed by the plaintiffs varies according to the level of the tide in the sound. The State argues that because the marshlands are covered at regular intervals by waters subject to the ebb and flow of the tides, they are covered by navigable waters under the lunar tides test and are not subject to private appropriation. Based on an extensive review of the law of this State regarding the test for "navigability in law" as that term applies to the public trust doctrine, we conclude that the State's argument must fail because it is premised on the applicability of the lunar tides test.

Under the common law as applied in England, the navigability of waters was determined *679 by whether they were subject to the ebb and flow of the tides. This common law rule "developed from the fact that England does not have to any great extent nontidal waters

which are navigable." Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 68, 197 S.E. 714, 717 (1938).

In one of this Court's earliest decisions dealing with the test to be applied for determining navigability in law, however, we expressly stated:

It is clear that by the [lunar tides] rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides. But this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths. By that rule Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property.

Wilson v. Forbes, 13 N.C. at 34-35. Justice Hall concurred in a separate opinion, stating:

I think that part [the lunar tides test] of the English law is not applicable to the waters and streams of this State. But few of them could be marked by such a distinction. There can be no essential difference for the purposes of navigation, whether the water be salt or fresh, or whether the tides regularly flow and ebb or not. And of this opinion the legislature seems to have been, when they passed the [general entry laws of 1715 and 1777].

Id. at 38 (Hall, J.) (emphasis added).

N.C.G.S. § 4-1 provides:

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

N.C.G.S. § 4-1 (1986). The "common law" referred to in N.C.G.S. § 4-1 has been held to be the common law of England as of the date of the signing of the American Declaration of Independence. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971). In State ex rel. Bruton v. Flying "W" Enters., 273 N.C. 399, 412, 160 S.E.2d 482, 491 (1968), we stated that the term "common law" as used in the statute "refers to the common law of England and not of any particular state." Although technically not erroneous, that statement is incomplete and may be misleading. At least after 1715, the common law of England was applicable in North

Carolina only to the extent it was deemed "compatible with our way of living." State v. Willis, 255 N.C. 473, 474, 121 S.E.2d 854, 854 (1961); see also State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967). Further, the express wording of N.C.G.S. § 4-1 makes it clear that only those parts of the English common law which had been "in force and use" in North Carolina and which were not contrary to the freedom and independence of North Carolina are to be applied. Thus, the statement from Bruton quoted above is correct only if it is understood to mean that the "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4-1. Further, much of the common law that is in force by virtue of N.C.G.S. § 4-1 may be modified or repealed by the General Assembly, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

In Wilson, this Court made it clear that the lunar tides test had never been part of the English common law applied in this State before or after the Revolution. Wilson, 13 N.C. 30. Therefore, it is not a part of the common law to be applied in North Carolina. Additionally, we indicated in Wilson that the lunar tides test was "obsolete," as it *680 was inapplicable to the conditions of the waters within this State. Id. For both of these reasons, the lunar tides test is not a part of the common law as it applies in North Carolina. See N.C.G.S. § 4-1.

In Collins v. Benbury, 25 N.C. 277 (1842), this Court emphasized that "whether there was any tide or not in the [Albemarle] Sound, when this patent issued, we do not think material; for we concur in the opinion of his Honor that this is `a navigable water,' in the sense of our [entry] statutes." Id. at 282. Thus, this Court reaffirmed its earlier conclusion in Wilson that the lunar tides test does not control when determining the navigability of waters in this State for purposes of applying the public trust doctrine.

There are two cases in which this Court erroneously applied the lunar tides test to determine the navigability in law of waters of this State. In the first, Hatfield v. Grimstead, 29 N.C. 139 (1846), the plaintiff's grant from the State included land covered by the waters of Currituck Sound near Currituck Inlet. Currituck Inlet had closed prior to the plaintiff's obtaining title from the State in 1839. A revisal of the general entry laws in 1836 left out the language in earlier versions of those statutes which had required that the water form one of the boundaries of property conveyed under the entry laws and lying along navigable water. [4] From this omission, this Court decided in Hatfield that the navigability of the water

involved in that case must be determined by the English common law lunar tides test. The Court concluded that the plaintiff held valid title to the submerged lands in that case because, under the English common law, only waters affected by the ebb and flow of the tides were navigable. Since the plaintiff's land was not affected by the ebb and flow of the tides because of the closing of the inlet, this Court concluded that the entry laws in effect at the time of the grant did not proscribe the plaintiff's grant.

Assuming arguendo that the omission of the language in question from the revised entry laws concerning boundaries of lands on navigable bodies of water required that this Court look to the common law for its decision in Hatfield, it nevertheless was improper to apply the lunar tides test in that case. As discussed previously, this Court already had unequivocally indicated that the lunar tides test had never been a part of the common law to be applied for determining navigability in North Carolina. Wilson, 13 N.C. 30. Therefore, the application of that test in Hatfield was error. In light of the foregoing, we expressly disavow the language in this Court's opinion in Hatfield to the extent it indicates that the lunar tides test was ever a part of the common law as applied in North Carolina.

In Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952), the source of title for a portion of the disputed land originated in an entry law grant from the State in 1841. In that case, we held that the lunar tides test of the English common law must be applied to determine whether the waters covering that portion of the disputed land represented by the 1841 grant were navigable. This part of our decision was based on our prior erroneous interpretation of the law in Hatfield and also is hereby expressly disavowed.

Next, although the State has acknowledged this Court's clear rejection of the English lunar tides test in Wilson and in Collins, the State nevertheless argues that our summary of North Carolina law in State v. Glen, 52 N.C. 321 (1859), established a dual test for determining navigability in law in North Carolina. Its argument is based on the following language from Glen:

1. All the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether publici juris, and the soil under them cannot be entered and a grant taken for it under the entry law. In them, too, the right of fishing is free. Collins v. Benbury, 25 N.C. [ ] 277, and the other cases to which we have referred on this point.

Glen, 52 N.C. at 333 (emphasis added). The State essentially argues that by using the *681 words "where the sea ebbs and flows" to describe "[a]ll the bays and inlets on our coast,"

this Court indicated in Glen that the lunar tides test was a proper test for determining navigability, but not the sole and exclusive test. The State reads the remainder of the italicized language in the above quotation to mean that only the issue of the navigability of waters which are unaffected by the lunar tides is to be determined by whether they are navigable in fact. Accordingly, the State would have us hold that waters which meet either the test of navigability in fact or the lunar tides test are navigable in law. However, we are convinced that the language in Glen that refers to the ebb and flow of the tides is merely a phrase descriptive of all of the bays and inlets of the open ocean along our coast and has no independent legal significance.

The portion of the Glen opinion from which the above quotation was taken is but a summarization of cases previously reviewed in that opinion. Earlier in Glen, this Court stated that in England, navigability in law was ascertained by the ebb and flow of the tide. Id. at 325. We then said that the lunar tides or ebb and flow test

has been held by our courts not to be applicable to the watercourses of North Carolina, and has been long since repudiated. We hold that any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not the subject of entry and grant under our entry law, and the rights of fishing in which are, under our common and statute law, open and common to all the citizens of the State.

Id. (emphasis added). Glen is not to be read to mean that there is a dual test for navigability which includes the lunar tides test when, in that opinion, this Court so clearly rejected the lunar tides test and expressly held that the test of navigability in fact controls in North Carolina. Additionally, in cases subsequent to this Court's decision in Glen, the lunar tides test was clearly rejected as an anachronistic tool, inapplicable to North Carolina's waters. See, e.g., Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S.E. 714; Staton v. Wimberly, 122 N.C. 107, 29 S.E. 63 (1898); State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894).

This Court was required to further explain the navigability in fact test in three cases near the beginning of the twentieth century. State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901); State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888). Each of those cases involved criminal prosecutions on indictments charging the defendants with obstructing public navigation. In each case, the evidence showed that the waters of the sound in question were frequently navigated by boats of varying sizes. The defendants argued that a right existed to obstruct travel over the waters involved because the land covered by those waters was privately owned in fee pursuant to general entry law grants from the State.

In Narrows Island Club, this Court essentially assumed arguendo that the defendant's title to the land submerged by the water in question was valid. Narrows Island Club, 100 N.C. at 480, 5 S.E. at 412. In determining whether the public trust doctrine applied, the Court focused on the capacity of the waters for navigation by any "useful vessels" and concluded:

Navigable waters are natural highways, so recognized by government and the people, and hence it seems to be accepted as a part of the common law of this country arising out of public necessity, convenience and common consent, that the public have the right to use rivers, lakes, sounds and parts of them, though not strictly public waters, if they be navigable, in fact, for the purposes of a highway and navigation, employed in travel, trade and commerce. Such waters are treated as publici juris, in so far as they may be properly used for such purposes, in their natural state. The public right arises only in case of their navigability. Whether they are navigable or not depends upon their capacity for substantial use as indicated.

Id. at 481, 5 S.E. at 412.

In State v. Baum, 128 N.C. 600, 38 S.E. 900, this Court again reviewed the development of the common law of navigability and *682 noted that much of it was inconsistent and inapplicable to conditions in the United States. The Court went on to say:

The rule now most generally adopted, and that which seems best fitted to our own domestic conditions, is that all watercourses are regarded as navigable in law that are navigable in fact. That is, that the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use.

Id. at 604, 38 S.E. at 901. Thus, this Court reiterated its holding in Narrows Island Club that navigability in fact by useful vessels, including small craft used for pleasure, constitutes navigability in law.

In State v. Twiford, 136 N.C. 603, 48 S.E. 586, this Court reemphasized that "[i]f a stream is `navigable in fact ... it is navigable in law.' The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use." Id. at 606, 48 S.E. at 587 (citations omitted). By applying the foregoing test, we determined that the waters covering the land in question were navigable. Id. at 608, 48 S.E. at 588. As in Narrows Island Club and Baum, the basis for the defendants' claim in Twiford that they had a right to obstruct the waters was an assertion of fee simple ownership of the underlying land free of public trust rights. In Narrows Island Club, we

had explicitly found it unnecessary to decide whether the title to the underlying land was affected by our determination that the waters were navigable. Significantly, we addressed this issue in Twiford. Our decision that the defendants had illegally obstructed the water in question in Twiford was based in part, if not entirely, on our conclusion that the land was not subject to entry and grant to a private party by the State under the general entry laws because it was covered by navigable waters. Id. at 607, 48 S.E. at 587.

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: "`If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.'" Id. at 608-09, 48 S.E. at 588 (quoting Attorney General v. Woods, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. For the foregoing reasons, the State's assignment of error is without merit.

By another assignment of error, the State contends that the SBE was never vested with title to the marshlands free of public trust rights and, as a result, could not convey such title to the plaintiffs' predecessors in interest.

The State's first argument in support of this assignment of error is based on the assumption that the lands at issue are submerged by navigable waters governed by the public trust doctrine and that, as a result, the legislature could do nothing which would impair public trust interests in them. It is true that lands submerged by waters which are determined to be navigable in law are subject to the public trust doctrine. However, the assumption that such lands may not be conveyed by the General Assembly without reservation of public trust rights is incorrect.

The State's argument that the public trust doctrine prevents the State from conveying lands beneath navigable waters without reserving public trust rights is based principally on two cases. The first is Shepard's Point Land Co. v. Atlantic Hotel, 132 N.C. 517, 44 S.E. 39, which involved competing claims to waterfront property in Morehead City based on general entry law grants. The defendant's property consisted of dry land on the shore of Bogue Sound. The land claimed by the plaintiff was submerged by the navigable waters of Bogue Sound and was located directly in front of the defendant's waterfront property. Before reaching its ultimate conclusion, this Court quoted the following language from a United States Supreme Court case: "`The control of the State for the purposes of the

[public] trust can never be *683 lost except as to such parcels as [1] are used in promoting the interests of the public therein or [2] can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.'" Id. at 527, 44 S.E. at 42 (quoting Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 453, 13 S. Ct. 110, 118, 36 L. Ed. 1018, 1042 (1892), aff'd sub nom. United States v. Illinois Cent. R. Co., 154 U.S. 225, 14 S. Ct. 1015, 38 L. Ed. 971 (1894)).[5]

The State contends that the validity of any conveyance of land encumbered with the public trust must be judged with reference to the principles enunciated in Shepard's Point Land Co. That case is not controlling. The quoted statement was obiter dictum in Shepard's Point Land Co. because in that case the plaintiff's claim of title was based on the general entry laws. This Court based its decision to reject the plaintiff's claim on the well-established principle that lands submerged by navigable waters are not subject to entry under the general entry laws. We reject the above statement in Shepard's Point Land Co. to the extent that it implies that the public trust doctrine completely prohibits the General Assembly from conveying lands beneath navigable waters to private parties without reserving public trust rights. That position is without authority in either our statutes or our Constitution.

In State v. Twiford, 136 N.C. 603, 48 S.E. 586, this Court said: "Navigable waters are free. They cannot be sold or monopolized. They can belong to no one but the public and are reserved for free and unrestricted use by the public for all time. Whatever monopoly may obtain on land, the waters are unbridled yet." Id. at 609, 48 S.E. at 588. To the extent that this statement in Twiford can be read expansively to indicate that the General Assembly does not have the power to convey lands underlying navigable waters in fee, it too was mere obiter dictum, unsupported by our laws or our Constitution, and is hereby expressly disapproved.

In State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988), this Court said:

Navigable waters, then, are subject to the public trust doctrine, insofar as this Court has held that where the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public. A land grant in fee embracing such submerged lands is void.

Id. at 527, 369 S.E.2d at 828 (citing Shepard's Point Land Co., 132 N.C. 517, 44 S.E. 39). The first sentence is entirely consistent with our opinion in this case. The second sentence is true in the sense that a land grant in fee pursuant to the general entry laws and conveying such submerged lands is void. However, we hereby expressly reject any construction of the second sentence in the above quotation from Credle that would support

the proposition that the General Assembly is powerless to convey lands lying beneath navigable waters free of public trust rights when it does so by special legislative grant. To construe the second sentence so broadly would conflict with the long-established rule of Ward v. Willis, 51 N.C. 183 (1858) (per curiam), that fee simple conveyanceswithout reserving rights to the people under the public trust doctrineof lands beneath navigable waters pursuant to special legislative grants are valid. Further, our construction of the second sentence recognizes that in Rohrer this Court relied on cases involving grants under the general entry laws to support its statement in the second sentence. Thus, we are only limiting the statement there to the precedent established in those cases.

In Credle, we also quoted with approval dictum from our decision in Twiford to the effect that lands under navigable waters can never be conveyed in fee simple. Credle, 322 N.C. at 534, 369 S.E.2d at 832 (quoting Twiford, 136 N.C. at 609, 48 S.E. at 588). For reasons previously discussed in our analysis of Twiford in this opinion, we expressly disavow any such statements.

In Martin v. N.C. Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970), this Court restated the long-established principle that "`under our Constitution, the General Assembly, so *684 far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.'" Id. at 41, 175 S.E.2d at 671 (quoting Thomas v. Sandlin, 173 N.C. 329, 332, 91 S.E. 1028, 1029 (1917)). Similarly, in State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989), we emphasized that "[a]ll power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." Id. at 448-49, 385 S.E.2d at 478 (citing McIntyre v. Clarkson, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

No constitutional provision throughout the history of our State has expressly or impliedly precluded the General Assembly from conveying lands beneath navigable waters by special grant in fee simple and free of any rights arising from the public trust doctrine. See Battle to Preserve N.C.'s Estuarine Marshes, 64 N.C.L.Rev. at 576-77. The public trust doctrine is a common law doctrine. In the absence of a constitutional basis for the public trust doctrine, it cannot be used to invalidate acts of the legislature which are not proscribed by our Constitution. Thus, in North Carolina, the public trust doctrine operates as a rule of construction creating a presumption that the General Assembly did not intend to convey lands in a manner that would impair public trust rights. "Unless clear and specific words state otherwise, terms are to be construed so as to cause no interference with the public's

dominant trust rights, for the presumption is that the sovereign did not intend to alienate such rights." RJR Technical Co. v. Pratt, 339 N.C. 588, 590, 453 S.E.2d 147, 149 (1995). However, this presumption is overcome by a special grant from the General Assembly expressly conveying lands underlying navigable waters in fee simple and without reservation of any public trust rights. See Ward v. Willis, 51 N.C. at 185-86.

For the foregoing reasons, we conclude that the General Assembly is not prohibited by our laws or Constitution from conveying in fee simple lands underlying waters that are navigable in law without reserving public trust rights. The General Assembly has the power to convey such lands, but under the public trust doctrine it will be presumed not to have done so. That presumption is rebutted by a special grant of the General Assembly conveying the lands in question free of all public trust rights, but only if the special grant does so in the clearest and most express terms.

The State also argues in support of this assignment of error that the General Assembly has never conveyed any marshlands covered by navigable waters to the SBE free of public trust rights and, therefore, that the SBE could not convey any such lands free of such public trust rights. The 1825 General Assembly passed an act to "create a fund for the establishment of Common Schools." Act of Jan. 4, 1826, Ch. I, 1825 N.C.Sess.Laws 3. This act created a "body corporate and politic, under the name of the President and Directors of the Literary Fund" and named the Governor as President of the Board which was to administer the Literary Fund. Ch. I, sec. II, 1825 N.C.Sess.Laws at 3-4. The fund consisted of the appropriations made by the legislature and included, inter alia, "all the vacant and unappropriated Swamp lands in this State." Ch. I, sec. I, 1825 N.C.Sess.Laws at 3. In 1833, the legislature passed a resolution which made it clear that it had originally conveyed title to all vacant marshlands to the Literary Fund by the 1825 act. The resolution stated: "[A]ll the vacant and unappropriated marsh and swamp lands in this State were, by the law passed in 1825, actually transferred, and do now belong to the Literary Fund of this State." Resolution of the Committee on Education and the Literary Fund, 1833 Leg. Docs., No. 15 (emphasis added), quoted in Kenneth B. Pomeroy & James G. Yoho, North Carolina Lands: Ownership, Use, and Management of Forest and Related Lands 98 (1964) [hereinafter N.C.Lands].

In 1837, the legislature reorganized the Board of the Literary Fund. See David A. Rice, Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control, 46 N.C.L.Rev. 779, 787 (1968); see also N.C. Lands at 99. In the 1837 enactment, the *685 legislature stated that "all the swamp lands of this State, not heretofore duly entered and granted to individuals, shall be vested in the [Literary Fund]." Act of Jan. 20, 1837, ch.

XXIII, sec. 3, 1836-37 N.C.Sess.Laws 131, 131-32 (an act to drain swamplands and create Literary Fund). The act then gave the Board "full power and authority to adopt all necessary ways and means, for causing so much of the swamp lands aforesaid to be surveyed, as they may think capable of being reclaimed." Ch. XXIII, sec. 5, 1836-37 N.C.Sess.Laws at 132. Finally, the law empowered the Board to "sell and convey any part of the lands, which may be reclaimed, for the best price that can be obtained for the same; and the title of the purchaser or purchasers, shall be good and valid in law and in equity." Ch. XXIII, sec. 11, 1836-37 N.C.Sess.Laws at 134. Thus, the legislature reiterated its grant of the marshlands and swamplands within the State to the Literary Fund and authorized the Board to set up a system whereby those lands would be surveyed and sold by the Board.

The Constitution of 1868 provided that the SBE "shall succeed to all the powers and trusts of the President and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to... the Educational fund of the State." N.C. Const. of 1868, art. IX, § 9. Thus, title to the State's vacant marshlands and swamplands was vested in the newly created SBE. See Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. at 70, 197 S.E. at 719.

In 1891, the General Assembly reaffirmed what it had said previously by its resolution in 1833: "[T]he words `swamp lands' employed in the statutes creating the literary fund and literary board of North Carolina and the state board of education of North Carolina, or in any act in relation thereto, shall be construed to include all those lands which have been or may now be known and called `swamp' or `marsh' lands...." Act of Mar. 4, 1891, ch. 302, 1891 N.C.Sess.Laws 254. This enactment did not amend the previous statutes to reflect a change in the law, but merely restated the legislative intent concerning a term within them. Thus, either the Board of the Literary Fund or the SBE as its successor in interest was at all times vested with title to the vacant marshlands and swamplands in the State after the 1825 act. Title to those lands continued to be held by the SBE until our statutes regarding the control and disposition of all state lands were amended in 1959. See N.C.G.S. §§ 146-1 to -83 (1959).

The State contends in support of this assignment of error, however, that even if the legislature conveyed title to the marshlands at issue to the SBE, it did not convey to the SBE any of those marshlands covered by navigable waters in fee simple without reservation of public trust rights for the people of this State. The State further contends that since the SBE never received title to such lands free of the public trust rights of the people, it could not convey title free of those public trust rights to the plaintiffs' predecessors in interest. We agree.

In addressing these contentions by the State, we must consider the statutes concerning the authority of the Board of the Literary Fund and the SBE with regard to the marshlands. Our review of the laws governing the sale of vacant swamplands and marshlands reveals that each of the relevant statutes in effect between 1837 and 1959 contained the following language or its equivalent:

The state board of education is invested with full power to adopt all necessary ways and means for causing so much of the swamp lands to be surveyed as it may deem capable of being reclaimed, and shall cause to be constructed such canals, ditches, roads, and other necessary works of improvement as it may deem proper and necessary.

N.C.G.S. § 146-78 (1943); see also 2 N.C. Cons.Stat. § 7605 (1919); 2 N.C.Rev. § 4036 (1905); 2 N.C.Code § 2508 (1883); 1854 Rev. Code, Ch. 66, § 5; Ch. XXIII, sec. 5,1836-37 N.C.Sess.Laws at 132. Further, in the statutes the legislature authorized the sale of the marshlands by the following language or its equivalent:

The state board of education is authorized and directed to sell and convey the swamp lands [including marshlands] at public or *686 private sale at such times, for such prices, in such portions, and on such terms as to it may seem proper.... The proceeds, as also money received on entries of vacant land, shall become a part of the state literary fund.

N.C.G.S. § 146-94 (1943); see also 2 N.C.Cons.Stat. § 7621 (1919); 2 N.C.Rev. § 4049 (1905); 2 N.C.Code § 2514 (1883); 1854 Rev.Code, ch. 66, § 11; Ch. XXIII, sec. 11, 1836-37 N.C.Sess.Laws at 134.

In no statute enacted by the General Assembly from 1825 to the present has that body ever expressly stated that it was granting the Literary Fund or the SBE fee simple title to the marshlands free of all public trust rights whatsoever. Therefore, the presumption arising under the public trust doctrine that the General Assembly did not convey title free of public trust rights has not been rebutted and prevails in this case. Applying that presumption, we must conclude that the General Assembly did not convey the marshlands covered by navigable waters to the SBE free of any applicable public trust rights and, therefore, that the SBE could not convey such lands to the plaintiffs' predecessors in title free of such public trust rights. Thus, we conclude that to the extent, if any, the marshlands at issue in this case are covered by navigable waters, the people of North Carolina retain their full public trust rights.

By other assignments of error, the State contends that the trial court erred in holding that N.C.G.S. § 146-20.1(b) "is invalid as it purports to impress upon the marshlands owned by

Plaintiffs public trust rights which did not exist in said lands at the time they were conveyed to Plaintiffs' predecessors in title." We need not address the precise contention presented here. It appears that the trial court based this holding on its conclusion that the marshlands within the boundaries of the plaintiffs' deeds were never covered by navigable waters, and therefore no public trust rights exist in them. If this is so, N.C.G.S. § 146-20.1(b) simply does not apply to these plaintiffs' claims. The General Assembly has provided: "No provision of this Chapter [146] shall be applied or construed to the detriment of vested rights [or] interests ... acquired prior to June 2, 1959." N.C.G.S. § 146-83 (1991). Thus, to apply N.C.G.S. § 146-20.1 to impose public trust rights on any parts of the plaintiffs' marshlands not covered by navigable waters and which therefore are free of public trust rights in this case would be contrary to N.C.G.S. § 146-83.

By another assignment of error, the State contends that the trial court erred as a matter of law when it expanded plaintiff Louise deR. Smith's complaint to add an allegation inconsistent with a stipulated fact. We disagree.

Prior to trial, the parties entered certain stipulations of fact to narrow the issues. The State contends that the parties stipulated to the boundaries of the various tracts of submerged lands and to the plaintiffs' chains of title. Moreover, the State contends that the judgment of the trial court adopted stipulations saying (1) the mean low water mark of Middle Sound is the landward boundary of the 1926 deed from the SBE to J.F. Roache and wife, the sole source of title asserted by the plaintiff Smith; and (2) Smith lacked a connected chain of title to that deed for the lands between the mean high and low water marks.

The trial court adopted the following relevant stipulated facts:

GG. Louise deR. Smith has linked her chain of title for that portion of said submerged land lying waterward (in southeasterly direction) of the mean low water mark of Middle Sound and landward of the western right-of-way line of the Intracoastal Waterway to a deed from the State Board of Education to J.F. Roache ... and wife, Edith M. Roache dated April 26,1926 and recorded in Book 173 at Page 309. HH. Louise deR. Smith has not linked her chain of title for the marshland lying between the mean high and mean low water marks at the western shoreline of Middle Sound to the Roache Board of Education deed. The western (landward) boundary of the Roache Board of Education deed is the mean low water mark at the western shoreline of Middle Sound; therefore, the Roache deed does not describe *687 the marshland located to the west (landward) of the mean low water mark of Middle Sound.

Taken in the context of the entire judgment of the trial court, we conclude that the stipulation and the foregoing findings of the trial court that the plaintiff Smith "has not linked her chain of title for the marshland lying between mean high and mean low water marks ... to the deed from the SBE to the Roaches" was not truly a stipulation that there was any break in Smith's chain of title; instead, it was a stipulation that the description of the property in the deed from the SBE to the Roaches did not include a metes and bounds description that included "the marshland lying between the mean high and mean low water marks at the western shoreline of Middle Sound."

The stipulations, although unartfully drawn, were stipulations as to the description contained within the SBE deed to the Roaches and were not stipulations concerning the accuracy of the description contained therein or concerning any gap in the chain of title. The parties could only stipulate to the facts which were contained in the deed itself. However, what the boundaries of a deed are is a question of law for the court; where they are is a question of fact for the jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951); Totem v. Paine, 11 N.C. 64 (1825).

Even though stipulations are encouraged by the courts, they will be restricted to the intent manifested by the parties in the agreement. Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79 (1972). "[I]n ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished." Outer Banks Contractors v. Forbes, 302 N.C. 599, 604-05, 276 S.E.2d 375, 380 (1981) (citing Rickert v. Rickert, 282 N.C. 373, 193 S.E.2d 79). The trial court, in construing the stipulations entered into by plaintiff Smith, properly concluded that plaintiff Smith did not intend to admit anything other than what the deed said and did not intend to waive any rights concerning her claim to marshland located between the high and low water marks of Middle Sound.

The trial court recognized that "a mistake or apparent inconsistency in a deed description shall not be permitted to defeat the intent of the parties if the intent appears in the deed." Miller v. Miller, 34 N.C.App. 209, 211, 237 S.E.2d 552, 554 (1977). The Roache deed contains the following description:

BEGINNING at an iron pipe near the high water mark of Middle Sound, said iron pipe being O.T. Wallace's southeast corner and the northeast corner of the sub-division known as "Queene Point", and running thence: 1. South 42 degrees 55 minutes east with the line of O.T. Wallace's [m]arsh land about four-thousand nine-hundred (4900) feet to the center of the Banks Channel. 2. Thence in a southwesterly direction with the center of said Banks

Channel, taking in and including all the marsh land two-thousand four-hundred (2400) feet to a corner in the center of said Banks Channel. 3. Thence north 42 degrees 30 minutes west five-thousand one-hundred (5100) feet to an iron pipe in the center of Barren Inlet Creek. ([I]f the southeast end of this line be extended it will pass through a point "D" shown on the attached map, said point "D" can be accurately located, as it is tied to the mainland by triangulation from the U.S. Coast Survey Triangulations Stations. Said point "D" is also located in approximately the center of the property line that divided the Banks land owned by George H. Hutaff and Chas. B. Parmele. The next course ties the northwest end of this line so that the line can be definately [sic] located[.]) 4. Thence north 37 degrees east fivehundred (500) feet to a concrete monument located near the high water mark on "Queene Point". 5. Thence in a northeasterly direction along the low water mark of the main land one-thousand eight-hundred (1800) feet to the beginning.

*688 The trial court found that the intent of the parties in the SBE deed to the Roaches was to convey those lands between the mean high water mark and the mean low water mark of Middle Sound. We agree that a careful reading of the Roache deed manifests this intent, as the beginning point of the deed is the high water mark of Middle Sound, and the description returns to this point, but then says "along the low water mark ... to the beginning." (Emphasis added.) The trial court did not err in concluding that the use of the word "low" rather than "high" was a mere clerical error in the deed description and correcting that error in its judgment. Accordingly, this assignment of error is without merit.

In conclusion, we must vacate the judgment of the trial court and remand this case to the trial court for its further consideration. The trial court correctly rejected the lunar tides test and accepted the navigability in fact test in determining whether waters in question in this case are navigable in law. However, it appears that the trial court may have decided the issue of navigability in fact in this case solely on the basis of whether the waters at issue were actually being used for or had historically actually been used for navigation, rather than on the proper basis of whether the waters were such that navigation on them by watercraft was possible even if no watercraft had ever actually navigated on them. As we have indicated in this opinion, whether waters are navigable in fact is to be determined by their capacity to support watercraft used for pleasure or commercial purposes, not by whether they ever have actually been used for purposes of navigation. In this connection, although evidence of present or past actual navigation of the waters in question is evidence tending to support a finding that the waters are navigable in fact, such evidence will not be needed in every case in order to establish navigability in fact.

Additionally, certain findings and conclusions of the trial court appear to be unclear. For example, the trial court found upon stipulations that the lands at issue in this case were marshlands between the high water mark and the low water mark of the sound. Further, the trial court found that at the time the SBE conveyed the lands in question to the plaintiffs' predecessors in title, those lands were comprised entirely of marshlands. Nevertheless, in addition to settling the status of the plaintiffs' titles to marshlands, the trial court's judgment also purports to settle questions of title with regard to lands underlying the open and navigable waters of Howe Creek.

We imply no criticism here of the able trial court. As we have indicated throughout this opinion, the law involving the public trust doctrine has been recognized by this and other courts as having become unnecessarily complex and at times conflicting. However, the material facts found from the stipulations of the parties and set forth in the judgment leave us in a sufficient state of apparent inconsistency and conflict in respect to the properties conveyed that we cannot safely reach a final resolution as to the rights of the parties before us on appeal. In such situations, it is necessary to vacate the judgment of the trial court and remand to the trial court in order that it may have the opportunity to determine the facts presented for decision accurately and truly upon a proper interpretation of the applicable law. Lackey v. Hamlet City Bd. of Educ., 257 N.C. 78,125 S.E.2d 343 (1962); see generally 1 Strong's North Carolina Index 4th Appeal and Error § 517 (1990), and cases cited therein. Accordingly, the judgment in this case is vacated, and this case is remanded to Superior Court, New Hanover County, for such further proceedings, not inconsistent with this opinion, "as to justice appertains and the rights of the parties may require." Calaway v. Harris, 229 N.C. 117, 120, 47 S.E.2d 796, 798 (1948).

JUDGMENT VACATED AND CASE REMANDED.

NOTES

[1] The quoted language appears in each of the deeds except for the SBE deed to Paul Rogge through which the plaintiffs Cameron claim a portion of their land. The Rogge deed uses the word "land" instead of "marshland." That deed also has the words "heirs and assigns" and later states that Rogge receives the land "in fee simple." The other deeds use the language "heirs and assigns in fee simple forever," all in one sentence.

[2] We deal with the status of plaintiff Louise deRosset Smith's chain of title below in our discussion of the relevant issue presented by this appeal.

[3] The summary of the entry laws at this point in this opinion is developed with particular reference to chapter 1 of the November 1777 Session Laws of North Carolina.

[4] The general entry laws were again revised prior to this Court's decision in Hatfield, and the revised law reinstated the omitted provisions referred to in Hatfield. Hatfield, 29 N.C. at 140.

[5] It is worth noting that the Supreme Court in Illinois Central admitted that no authority supported its position. Illinois Cent. R. Co., 146 U.S. at 455, 13 S. Ct. at 119, 36 L. Ed. at 1043. More importantly, that case did not involve North Carolina law.

FRANK BAUMAN, MICHAEL BROUGH, PAM JONES, GENE FRAZELLE, and GREG TILLMAN, Plaintiffsv. WOODLAKE PARTNERS, LLC, WOODLAKE PARTNERS, LIMITED PARTNERSHIP, Defendants, FRANK A. DUBE, KARL B. KILLINGSTAD, JUDITH R. KILLINGSTAD, WITHERS G. HORNER, ELIZABETH A. HORNER, and ELIZABETH LANTZ, Defendant-Intervenors.

NO. COA08-897

(Filed 1 September 2009)

1. Trials - nonjury trial - failure to make specific findings of fact - failure to make separately stated conclusions of law

The trial court did not err in a nonjury trial by failing to make specific findings of fact and separately state its conclusions of law. The Court of Appeals was able to adequately evaluate the propriety of the trial court's order and plaintiffs were not entitled to a judgment in their favor under any view of the evidence.

2. Waters and Adjoining Lands - navigable waterway - public trust doctrine

The trial court did not err by failing to determine that Crane's Creek constituted a navigable waterway so that a lake formed by damming the creek was subject to the public trust doctrine and available for use by the public without charge. A stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to show that the pertinent stream is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake.

Appeal by Plaintiffs from judgment entered 16 January 2008 by Judge Lindsay R. Davis, Jr. in Moore County Superior Court. Heard in the Court of Appeals 9 March 2009.

Van Camp, Meachum & Newman, PLLC, by Michael J. Newman, for Plaintiffs.

Gill & Tobias, LLP, by Douglas R. Gill, for Defendants.

West & Smith, LLP by Stanley West, for Defendant-Intervenors

ERVIN, Judge.

Plaintiffs, owners of real property situated in Woodlake Country Club (Woodlake), appeal a judgment entered by the trial court in favor of Defendants, Woodlake Partners, LLC, and Woodlake Partners, Limited Partnership, the owner and developer of Woodlake. Plaintiffs sought, among other things, a declaration that Defendants' imposition of a lake access fee charged to those Woodlake property owners desiring boating privileges was contrary to law and could not be enforced. For the reasons stated below, we affirm the trial court's judgment.

Factual Background

Woodlake is a gated residential community located near Vass in Moore County. Among its varied amenities is a lake with a surface area of approximately 1,200 acres formed by the damming of two creeks, one of which is known as Crane's Creek.

Ingolf Boex (Boex) is the Defendants' sole shareholder and president. In 2000, after obtaining sole ownership of Defendants, Boex adopted the Woodlake Constitution and By-Laws, which supplemented Woodlake's Rules and Regulations. According to the Rules and Regulations, two categories of membership were available at Woodlake: a Premiere Membership and a Social Membership.[1] Regardless of whether one was a Premiere or Social resident, all members enjoyed unfettered access to the lake without the necessity for paying a fee.

[1] The essential difference between the two categories of membership at Woodlake is that a Premiere membership provided membership in the Woodlake Golf Association while the Social membership did not. A third category of membership, transitional membership, is not relevant to the present dispute.

At a Board of Advisors meeting held in November, 2004, Boex announced plans to implement new membership categories and rights that were to become effective 1 January 2005. Among the changes Boex intended to implement was the imposition of an annual lake access fee of $1,250 that had to be paid in order for a property owner to operate a boat on the lake.

On 12 May 2005, Plaintiffs filed a declaratory judgment action against Defendant in which Plaintiffs requested that the court examine the relevant provisions of the Woodlake Constitution, By-laws, Rules and Regulations and the applicable law in order to determine the rights of the parties. Among the declarations sought by Plaintiffs was a pronouncement that "the purported implementation by Defendant[] of a lake access fee violates the parties' agreements and violates the Plaintiff's right of access to navigable waters as set forth in applicable state and federal law."[2] Plaintiffs subsequently filed an amended complaint on 27 May 2005.

On 22 July 2005, Defendants filed a motion for judgment on the pleadings and an answer in which they denied the material allegations of Plaintiffs' complaint and requested that the complaint be dismissed with prejudice. On 5 September 2005, Frank A. Dube, Karl P. Killingstad, Judith R. Killingstad, Withers G.

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[2] Due to the nature of the relief sought and the number of affected parties, Plaintiffs requested that this case be certified as a class action pursuant to N.C. Gen. Stat. § 1A-1, Rule 23. By means of an order dated 4 August 2005, Judge James M. Webb certified this case as a class action, allowing all Woodlake members to intervene as plaintiffs in the action.

Horner, Elizabeth Horner, and Elizabeth Lantz filed a motion to intervene and a complaint in intervention in which they sought leave to participate in this proceeding in alignment with Defendants. On 19 November 2005, Judge Donald L. Smith entered a Consent Order allowing Intervenors' intervention and authorizing Intervenors to file an answer to Plaintiffs' amended complaint. On 22 December 2005, Intervenors filed an answer and counterclaim in which they denied the material allegations of Plaintiffs' amended complaint and requested the court to uphold Defendant's actions. On 17 February 2006, Plaintiffs filed a reply to Intervenors' counterclaim.

This case came on for trial before Judge Lindsay R. Davis, Jr., at the 14 January 2008 civil session of Moore County Superior Court. At that session of court, the parties eventually stipulated to an agreed-upon resolution of all issues related to the proper interpretation of the Constitution and By-Laws and Rules and Regulations. In light of the parties' agreement, the trial court determined that "the only issue to be tried [was] whether the waters of the lake [were] "navigable waters." The lone disputed issue was heard by the trial court, sitting without a jury.

At trial, Plaintiff, Frank Bauman (Bauman), presented evidence on behalf of himself and the other Plaintiffs.[3] Bauman testified that he and plaintiffs, Mike McGee (McGee) and Don Jones (Jones), took a half-mile canoe trip on Crane's Creek upstream from the lake

[3] Defendant and Intervernors were provided with an opportunity to introduce evidence, but elected not to do so.

during the summer of 2006. The trip taken by Bauman, Jones, and McGee was videotaped, and the videotape was introduced into evidence. At the time of their voyage up Crane's Creek, Bauman and Jones utilized a canoe that was approximately seventeen feet in length while McGee paddled a twelve-foot kayak.

The boats were launched near a bridge on McLaughlin Road, which runs north and south and separates Woodlake on the east from other privately owned land on the west. At the point where the canoe was launched, the creek was approximately 100 feet in width. At the conclusion of the half-mile trip, the width of the stream from bank to bank remained the same. In addition, the three men encountered a tributary of Crane's Creek during their travels that appeared to be navigable itself.

As they traveled upstream in a westerly direction, the three men dipped their oars, which were approximately six to eight feet in length, into the water at various points in order to measure its depth. When the three men tested the water's depth in this manner, their oars were completely submerged.

Aside from describing his trip up Crane's Creek, Bauman testified that Crane's Creek appeared to be navigable by small boat at the point where it intersected Crane's Creek Road and Cypress Creek Road, which are located about two to three miles upstream from the lake. Although Bauman had not personally paddled along Crane's Creek below the dam that created the lake, he testified that he was aware that others had done so.

After Plaintiffs rested, Defendants and Intervenors elected to refrain from presenting evidence and moved to dismiss. After hearing the arguments of counsel, the trial court took the matter under advisement. On 16 January 2008, the trial court entered an Order and Judgment in which it determined "that the [D]efendants[']and [D]efendant-[I]ntervenors['] motions to dismiss at the close of the evidence are granted, and [P]laintiffs' claim based on the [D]efendants' imposition of a fee for use of the lake is dismissed, with prejudice." In the concluding paragraph of its order, which attempted to explain the basis for its decision, the trial court stated that:

> The "test" for navigability . . . requires a showing that the body of water is navigable by watercraft in its natural condition. "Natural condition" clearly means without modification at the hands of man. *See Fitch v. Selwyn Village*, 234 N.C. 632, 635, 68 S.E.2d 255, 257 (1951), which involved a claim based on attractive nuisance, and in which the Court distinguished between artificial impoundments and streams which flow in their "natural state." The plaintiffs offered evidence that the lake is man-made, by the damming of two creeks. They offered evidence that one of the creeks, Cranes Creek, is navigable in its natural condition upstream of the lake, but no evidence whether it is navigable in its natural condition at the site of the lake or downstream. . .

Plaintiffs noted an appeal to this Court from the trial court's judgment.

Procedural Issues and Standard of Review

[1] Trials conducted by the court sitting without a jury are governed by N.C. Gen. Stat. § 1A-1, Rule 41. N.C. Gen. Stat. § 1A-1, Rule 41(b) provides, in pertinent part, that:

> After the plaintiff, in an action . . . without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Ordinarily, the standard of review on appeal from a judgment entered by a trial judge sitting without a jury is whether there was competent evidence to support the trial court's findings of fact and whether the trial court's conclusions of law were proper in light of such facts. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 37, 351 S.E.2d 786, 792 (1987). The trial court's factual findings in such a proceeding are treated in the same manner as a jury verdict and are conclusive on appeal if they are supported by the record evidence. *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987). A trial court's conclusions of law, however, are reviewable *de novo*. *Wright v. T&B Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493, 495 (1985).

According to Plaintiffs, the trial court erred by failing to make specific findings of fact and to separately state its conclusions of law. Generally speaking, Plaintiffs have accurately described what a trial court is supposed to do at the conclusion of a non-jury trial. "In all actions tried upon the facts without a jury . . . the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of

the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(1)(1); *Pineda-Lopez v. N.C. Growers Ass'n*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002) (emphasis in original). Furthermore, "[t]he requirement that findings of fact be made is mandatory, and the failure to do so is reversible error." *Graphics, Inc. v. Hamby,* 48 N.C. App. 82, 89, 268 S.E.2d 567, 571 (1980) (citing *Carteret County General Hospital Corp. v. Manning*, 18 N.C. App. 298, 300, 196 S.E.2d 538, 539 (1973)); *see also Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999).

Admittedly, the trial court's order is not couched in the usual form, in which separately-numbered findings of fact are followed by separately-numbered conclusions of law, all of which lead up to and provide a justification for the result reached by the trial court. The absence of such separately-stated findings of fact and conclusions of law does not, even if erroneous, invariably necessitate a grant of appellate relief. Instead, the critical factor in determining whether an alleged error necessitates a new trial or some other form of relief is the extent to which "this Court is unable to determine the propriety of the order unaided by findings of fact explaining the reasoning of the trial court." *Hill*, 135 N.C. App. at 518, 520 S.E.2d at 800. Assuming *arguendo* that the trial court's order lacks sufficient, separately-numbered findings and conclusions to comply with N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a), we do not believe that such an error necessitates an award of appellate relief in this instance for two different, albeit related, reasons.

First, as we have already noted, the trial court found that Plaintiffs "offered evidence that the lake is man-made, by the damming of the two creeks" and that "one of the creeks, Crane[']s Creek, is navigable in its natural condition upstream of the lake." However, the trial court also noted that Plaintiffs offered "no evidence whether [Crane's Creek] was navigable in its natural condition at the site of the lake or downstream." In view of the fact that we are able to discern the factual basis for the trial court's decision from the language of its order, we conclude that the trial court's failure to separately state the basis for its decision in the form of traditional findings and conclusions has not precluded us from ascertaining the extent to which the trial court's decision has adequate evidentiary support and the extent to which the trial court properly applied the law to the facts. Thus, since we are able to adequately evaluate "the propriety of the order," *Hill*, 135 N.C. App. at 518, 520 S.E.2d at 800, we do not believe that an award of appellate relief is necessary in this case even if the trial court's failure to set out separately enumerated findings of fact and conclusions of law violated N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a).

Secondly, despite the fact that a trial judge sitting without a jury serves as the trier of fact and "may weigh the evidence, find the facts against plaintiff and sustain defendant's motion [for involuntary dismissal] at the conclusion of his evidence even though plaintiff has made out a *prima facie* case which would have precluded a directed verdict for defendant in a jury case," *Helms*

v. Rea, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973), the trial court may have also faced a situation in which Plaintiff was not entitled to relief under any theory given the facts in the record. In such an instance, no remand for proper findings is necessary even if the trial court failed to make proper findings. *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999) (stating that "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them"); *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (stating that "a remand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the undisputed facts.") As a result, we conclude that, in the event the evidence presented to the trial court, even when considered in the light most favorable to Plaintiff, is insufficient to sustain a decision in Plaintiff's favor, a failure to make adequate findings of fact and conclusions of law as required by N.C. Gen. Stat. § 1A-1, Rules 41(b) and 52(a), will not be deemed to constitute prejudicial error. For the reasons set forth below, we do not believe that Plaintiffs are entitled to judgment in their favor under any view of the evidence, so that no award of appellate relief is required here for that reason as well.

Substantive Analysis

[2] On appeal, Plaintiffs contend that the trial court erred by failing to determine that Crane's Creek constitutes a navigable

waterway, so that the lake is subject to the public trust doctrine and available for use by the public without charge. According to Plaintiffs, the public trust doctrine is applicable to "those lakes that are created by interrupting the flow of a naturally occurring navigable stream." Petitioners equate North Carolina's "navigable-in-fact" test to a recreational boating test, under which the ability to travel up and down a stream in a kayak would render that stream navigable in law and, therefore, subject to the public trust doctrine. After careful review of the applicable law and the evidence presented at trial, we conclude that Plaintiffs failed to adequately demonstrate the navigability of Crane's Creek, so that the lake at Woodlake is not subject to the public trust doctrine.

Though "the extent of the public trust ownership of North Carolina is confused and uncertain . . . the Supreme Court of North Carolina has affirmed original state ownership of . . . lands under all waters navigable-in-fact." Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L.Rev. 1, 17 (1970-71). Under the public trust doctrine, navigable waters are held in trust for the public based on "inherent public rights in these lands and waters." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 293, 464 S.E.2d 674, 677 (1995). The rights of the public in waters subject to the public trust doctrine are established by common law and extend to "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State[.]" N.C. Gen. Stat. § 1-45.1.

According to the Supreme Court:

> The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: "'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.'" [136 N.C.] at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. . . .

Gwathmey, 342 N.C. at 301, 464 S.E.2d at 681. As a result, "the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are *in their natural condition* capable of such use." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682 (quoting *State v. Baum*, 128 N.C. 600, 38 S.E. 900, 901 (1901)(emphasis added)). The public retains the right to travel, by watercraft, on waters which are in their natural condition, capable of such use, without the consent of the riparian owners. *Gwathmey*, 342 N.C. at 300-301, 464 S.E.2d at 682.

Gwathmey clearly states that the public has a right to unobstructed navigability of waters in their natural state. Water that is navigable in its natural state flows without diminution or obstruction. *Wilson v. Forbes*, 13 N.C. 30, 35 (1828). As the trial court noted, "plaintiffs contend that[,] if the lake is navigable in fact, that is enough to sustain their position that

the defendants cannot impose a use fee." Thus, the principal issue before the trial court was whether Crane's Creek was "navigable in fact."

At most, the competent evidence presented by Plaintiffs demonstrated that one could take a canoe and a kayak one half mile upstream on Crane's Creek from the lake and that Crane's Creek appeared passable in a canoe or kayak at two road crossings several miles upstream from the lake. Thus, when taken in the light most favorable to Plaintiffs, the evidence reflects, as the trial court found, that "Cranes Creek[] is navigable in its natural condition upstream of the lake"[4] and that there was "no evidence whether it was navigable in its natural condition at the site of the lake or downstream."[5] As a result, the issue presented for decision by

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[4] Actually, Plaintiffs' evidence did not demonstrate that Crane's Creek was navigable by canoe or kayak for its entire length between the lake and the two road crossings described by Bauman. Instead, Plaintiffs' evidence merely tended to show that Crane's Creek could be navigated in such craft for a half mile upstream from the lake and at two other isolated upstream points. Thus, the trial court's finding is actually more favorable to Plaintiffs than the evidence that they adduced at trial.

[5] Admittedly, Bauman testified that he had heard that someone else had traveled in a canoe on Crane's Creek downstream from the lake. Aside from the fact that the testimony that Bauman "kn[e]w people that had" "put in below the dam and tried to paddle the creek" likely constituted inadmissible hearsay, N.C. Gen. Stat. § 8C-1, Rule 802, which the trial court is presumed to have disregarded in reaching its decision, *In re Foreclosure of Brown*, 156 N.C. App. 477, 487, 577 S.E.2d 398, 405 (2003) ("When sitting without a jury, the trial court is able to eliminate incompetent testimony, and the presumption arises that it did so."), nothing in this portion of Bauman's testimony indicates that water conditions were normal at the time that these attempts were made or that they were even successful. As a result, there is no error in the trial court's failure to determine that Crane's Creek was navigable in fact below the dam that resulted in the creation of the lake.

this Court is whether such evidence would suffice, if believed, to support a finding that the lake is subject to the public trust doctrine.

In attempting to demonstrate that the record evidence sufficed to demonstrate that the lake is subject to the public trust doctrine, Plaintiffs candidly admit that they have not identified any decisions of the Supreme Court or of this Court that address the issue which is before us in this case. For that reason, Plaintiffs place principal reliance on two decisions from other jurisdictions in support of their contentions. After carefully examining these decisions, we do not believe that they support Plaintiffs' position.

In *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (1997), the defendant was convicted of violating a statute which prohibited fishing "on the lands of another." The 246 acre site, known as Black's Pond, on which the defendant was charged with illegally fishing was created by damming Black Creek in Lexington County, South Carolina. *Id.* at 84, 498 S.E.2d at 391. The dispositive issue in *Head* was whether Black's Pond was navigable and, thus, subject to the public trust doctrine. *Id.* at 88, 498 S.E.2d at 393. In support of his contention that the water was open to public use, the defendant "produced aerial photographs as well as a map entitled 'Navigable Waters of South Carolina'" which had been produced by the South Carolina Water Resources Commission "reflect[ing] the Commission's determination of navigable waterways through its interpretation of the applicable statutes and

regulations," which "list[ed] . . . the relevant area of Black Creek as a navigable waterway." *Id.* at 85, 498 S.E.2d at 392. Although a lower tribunal found that the damming of Black Creek rendered it non-navigable, *Id.*, the South Carolina Court of Appeals held that "the existence of occasional natural obstructions to navigation . . . or artificial obstructions to navigation, such as dams, generally does not change the character of an otherwise navigable stream" and reversed the defendant's conviction for violating the relevant statute. *Id.* at 90, 498 S.E.2d at 394 (citation omitted).

In *Diversion Lake Club v. Heath*, the owners of property on the shores of a lake created by the damming of the Medina River filed suit to enjoin the defendants from boating and fishing in the lake waters. 126 Tex. 129, 86 S.W.2d 441 (1935). The defendants, in turn, asserted their rights to use the lake under the public trust doctrine. *Id.* Prior to the damming of the lake, the Medina River had been designated as navigable by Texas statute. *Id.* at 132, 86 S.W.2d at 442. In deciding that the defendants were entitled to access to the lake under the public trust doctrine, the Texas Supreme Court determined that "statutory navigable streams in Texas are public streams," that "their beds and waters are owned by the State in trust for the benefit and best interests of all the people," and that such streams are "subject to use by the public for navigation, fishing and other lawful purposes, as fully and to the same extent that the beds and waters of streams navigable in

fact are so owned and so held in trust and subject to such use." *Id.* at 138, 86 S.W.2d at 445.

Although we do not quarrel with the result reached in either of the cases upon which Plaintiffs rely, both are readily distinguishable from the present case. In both *Head* and *Diversion Lake Club*, the streams that fed into Black Pond and Diversion Lake had been declared navigable by public agencies. Plaintiffs have not produced similar evidence in this case. Moreover, we do not believe, and are not holding, that the mere fact that a dam has been placed across a navigable stream, without more, suffices to render that stream non-navigable. Were we to adopt such a rule, many of the major rivers in North Carolina, such as the Catawba and the Yadkin, would become non-navigable, which would be a troubling result. Finally, while *Head* contains language to the effect that the ability to use small boats on a stream renders it navigable in fact, that decision does not provide us with much guidance on the proper disposition of this case, which hinges on whether evidence that a stream can be traversed in small boats in isolated locations renders that stream navigable in fact for purposes of the public trust doctrine. Thus, we do not find either of the out-of-state decisions upon which Plaintiffs place principal reliance to be particularly useful in resolving the issue before us in this case.

After careful consideration of the record evidence, we conclude that Plaintiff's evidence, as reflected in the trial court's findings, does not suffice to support a determination that Crane's Creek is navigable in fact. As we have already noted,

Plaintiff's evidence tends to establish merely that Crane's Creek is navigable in canoes and kayaks for about a half mile upstream from the lake and at a couple of upstream road crossings at a greater distance from the lake. Plaintiffs did not present any evidence addressing the navigability of Crane's Creek prior to the formation of the lake. Moreover, the record does not contain evidence that would support a finding that Crane's Creek was or had been navigable downstream from the lake or under the area now covered by the lake under normal conditions. Furthermore, there were significant "holes" in Plaintiffs' evidence relating to the navigability of Crane's Creek. For example, Bauman testified on cross-examination that:

> Q Now Cranes Creek comes roughly down west, comes under U.S. 1, and then comes over to Woodlake. Is that correct?
>
> A Correct
>
> Q So you didn't - you didn't attempt to put your kayak or your canoe in Cranes Creek over to the west at U.S. 1?
>
> A No.
>
> Q And did you - did you attempt to put your kayak or your canoe into Cranes Creek below the dam which is roughly at the far eastern end of Woodlake?
>
> A I didn't, no.
>
> . . .
>
> Q Have you done - have you done any examinations of the Cranes Creek territory or the Woodlake territory using U.S. Coast and Geodetic Survey Maps or anything else like that?
>
> A I have seen maps, yes.

Q But you haven't studied those?

A It depends on what you mean by study.

Q Or done - done calculations, that sort of thing?

A No.

Q And did you - did you ever look at any maps or U.S.G.S. surveys that existed before the Woodlake dam was installed?

A I - I - - Yes, I have seen some. Yes.

Q And do you have those with you?

A No.

Finally, despite the trial court's findings with respect to the navigability of Crane's Creek upstream from the lake, Bauman provided testimony on cross-examination that raised questions about the extent to which the expedition which he, Jones, and McGee took occurred during a time in which there were normal water conditions.

Q Mr. Bauman, on the videotape that we watched, would it be fair to say that in that area you were paddling, just from observing the video, there was very little current?

A Yes. The current was not an issue with us.

Q In fact, the current in the area you paddled in was negligible, wasn't it?

A The current is negligible? Yes, I'd say.

Q Okay

A Yes

. . .

Q So the water impounded by the lake in fact impounds the water - that is, the water backed up all the way to the bridge

you put in at is water that's backed up from the dam, isn't it, as opposed to the original creek?

A I can't say that.

Q Well, as soon as you go under McLaughlin Bridge there, is it not true that it's very wide right there, far wider than the creek, that immediately widens out?

A Not a great deal, no. It's about the same size as you come through the bridge there. And it stays pretty much the same size. It might be a little wider as you get to the golf course, yes.

Q It's not the original creek bank there, is it?

A I have no idea.

Q And wouldn't it be fair to say that because there's no current in the area you were paddling and it is wider than - certainly than the creek as you get up into it that most of the area you were paddling is actually impounded backed-up water?

A I didn't say there wasn't current. I just said there wasn't current that impeded our progress. I'm quite sure that there was probably current there. I've seen current - I've seen current there a number of times.

Thus, the record evidence, even when taken in the light most favorable to Plaintiffs, merely tends to show that Crane's Creek was navigable in small watercraft at various points upstream from the lake.

After a thorough review of the record and the applicable law, we conclude that a stream cannot be said to be navigable in fact for purposes of subjecting a lake created by damming that stream to the public trust doctrine in the absence of evidence tending to

show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of,[6] and downstream from the lake. If we were to find that Plaintiffs' evidence sufficed to trigger application of the public trust doctrine in this instance, we would effectively be holding that the navigability of a stream should be tested using short segments of the relevant waterway and that the same stream could have short, intermittent, intermingled navigable and non-navigable sections, a result which would introduce considerable confusion and difficulty into the application of the public trust doctrine in North Carolina. We do not believe that such a result is mandated by or consistent with applicable North Carolina law and decline to adopt such an approach.

As a result, for the reasons set forth above, we hold that the trial court correctly concluded that the absence of evidence tending to show that Crane's Creek was "navigable in fact" for a meaningful distance both upstream of, under the surface of, and downstream from the lake precluded a finding that the lake was subject to the public trust doctrine. Furthermore, given that Plaintiffs' evidence was insufficient to permit a valid determination that the lake was subject to the public trust doctrine and that the trial court correctly concluded that Plaintiffs' failure to demonstrate that Crane's Creek was navigable under the surface of and downstream from the lake, any error that

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[6] Obviously, the determination of whether a stream was navigable in fact under the surface of a lake should hinge upon its navigability as of the time before the lake existed.

the trial court may have committed by failing to make separately-numbered findings and conclusions does not necessitate an award of appellate relief. Thus, the trial court's determination that Plaintiffs had failed to demonstrate that the lake is subject to the public trust doctrine should be affirmed.

Conclusion

Thus, we conclude that Plaintiffs received a fair trial free from prejudicial error. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and JUDGE WYNN concur.

FISH HOUSE, INC. Plaintiff, v. PATRICE C. CLARKE, Defendant.

NO. COA09-1047

(Filed 18 May 2010)

1. Trespass - navigable waters - public trust doctrine

The trial court did not err in dismissing plaintiff's trespass action because the manmade canal upon which defendant allegedly trespassed was a navigable waterway held by the State in trust for all citizens of North Carolina pursuant to the public trust doctrine.

2. Jurisdiction - subject matter - standing - navigable waters

Plaintiff's argument that the trial court erred in determining whether a canal was navigable because defendant had no standing to litigate the rights of the State of North Carolina was overruled because defendant raised navigable waters as a defense to plaintiff's trespass claim and was not seeking monetary damages for interference with navigable waters.

3. Trespass - title to land - immaterial - navigable waters

Plaintiff's argument that the trial court erred in dismissing its trespass claim because it was immaterial that plaintiff did not allege title to the land in question was dismissed because the canal at issue was navigable water subject to the public trust doctrine.

4. Waters and Adjoining Lands - navigable canal in its entirety - no error

The trial court did not err in determining that a canal was navigable in its entirety because plaintiff's complaint did not limit its trespass claim to any particular portion of the canal and defendant did not limit its defense of navigability to a specific portion of the canal.

Appeal by Plaintiff from an order entered 12 February 2009 by Judge Quentin T. Sumner in Hyde County Superior Court. Heard in the Court of Appeals 10 February 2010.

Vandeventer Black LLP, by Norman W. Shearin, Jr. and Allison Holmes Pant, for Plaintiff.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., Jonathan E. Huddleston, and S. Adam Stallings, for Defendant.

BEASLEY, Judge.

Fish House, Inc. (Plaintiff) appeals from an order denying its motion for partial summary judgment and dismissing its trespass action and all claims alleged therein. Because we agree with the trial court that the canal through which Patrice C. Clarke (Defendant) has allegedly trespassed is navigable waters, and therefore subject to the public trust doctrine, we affirm.

Plaintiff and Defendant own adjacent tracts of land in the Village of Engelhard, North Carolina, upon which they each operate their respective fish houses. Plaintiff purchased three contiguous parcels (the "Fish House Parcels") from its principals pursuant to a deed executed on 22 June 1992. Far Creek, LLC (who was a co-plaintiff in this action but filed notice of voluntary dismissal under Rule 41(a)) purchased the Fish House Parcels on 30 August 2005 and leased the land back to Plaintiff. Therefore, since 1992, Plaintiff has been and remains in possession of the Fish House Parcels, either pursuant to the lease or as record owner thereof. Located on the western border of Plaintiff's property and to the east of Defendant's lies a canal called the Old Sam Spencer Ditch (the "Canal"). Defendant has consistently allowed boats to enter upon the Canal and tie up on the western side.

Plaintiff commenced a trespass action against Defendant by filing a complaint on 9 October 2007 to enjoin her from using the Canal. In Defendant's answer, she moved to dismiss the trespass action pursuant to Rule 12(b)(6) on the grounds that Plaintiff's

leasehold interest is not sufficient to confer a viable claim. Defendant raised as affirmative defenses adverse possession, prescriptive easement, and navigable waters, and asserted several counterclaims. Defendant filed a motion for summary judgment on 8 December 2008, and Plaintiff filed a motion for partial summary judgment for dismissal of Defendant's counterclaims the following day. A motions hearing was held at the 12 January 2009 civil session of Martin County Superior court. The trial court found that neither party was entitled to judgment as a matter of law and denied both parties' summary judgment motions. Defendant's motion to dismiss, which was converted to a summary judgment motion at the hearing, for lack of standing was also denied. Finally, the trial court found that the waters of the Old Sam Spencer Ditch are navigable waters in which the State of North Carolina has public trust rights. Accordingly, the trial court concluded that neither party has any rights in the waters of the Canal except as members of the public and, therefore, dismissed the action in its entirety. Plaintiff appealed from this order .

STANDARD OF REVIEW

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

"Under the public trust doctrine, the lands under navigable waters 'are held in trust by the State for the benefit of the public' and 'the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce.'" *Parker v. New Hanover Cty.*, 173 N.C. App. 644, 653, 619 S.E.2d 868, 875 (2005) (quoting *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988)); *see also* N.C. Gen. Stat. § 1-45.1 (2007) (codifying the public trust doctrine and extending its protections to "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State"). "Though 'the extent of the public trust ownership of North Carolina is confused and uncertain[,] the Supreme Court of North Carolina has affirmed original state ownership of . . . lands under all waters navigable-in-fact.'" *Bauman v. Woodlake Partners, LLC*, __ N.C. App. __, __, 681 S.E.2d 819, 824 (2009) (quoting Thomas J. Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C. L. Rev. 1, 17 (1970-71)).

Our Supreme Court has clarified the law on navigability in the context of the public doctrine succinctly: "'[A]ll watercourses are regarded as navigable in law that are navigable in fact.'" *Gwathmey v. State of North Carolina*, 342 N.C. 287, 300, 464 S.E.2d 674, 682 (1995) (quoting *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901)); *see also State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 587 (1904) ("[I]f a stream is 'navigable *in fact* . . . it is navigable in *law*.'"). The Court has explained that "if a body

of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose." *Gwathmey*, 342 N.C. at 301, 464 S.E.2d at 682. Those lands submerged under such waters that are navigable in law are the subject of the North Carolina public trust doctrine. *See id.*

I.

[1] Plaintiff argues that the trial court committed reversible error in dismissing its trespass action because even if the Old Sam Spencer Ditch is "navigable," Plaintiff is entitled to exclude Defendant therefrom. We disagree.

Plaintiff cites *Vaughn v. Vermillion*, 62 L. Ed. 2d 365, 444 U.S. 206 (1979) and *Kaiser Aetna v. United States*, 62 L. Ed. 2d 332, 444 U.S. 164 (1979) for the proposition that the privately owned, manmade waterways in those cases did not become open to use by all United States citizens simply because it joined with other navigable waterways. These cases, however, address the laws of the United States regarding the general public use of navigable waters in the context of interstate commerce. Plaintiff never addresses the rights enjoyed by the citizens of North Carolina under the Public Trust Doctrine, based upon which the trial court's order was rendered, and the cases cited are inapposite thereto.

We agree with the trial court and Defendant that the Canal, although manmade, is a navigable waterway held by the state in trust for all citizens of North Carolina.

This Court recently stated that "the public ha[s] the right to [] unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are *in their natural condition* capable of such use." *Bauman*, __ N.C. App. at __, 681 S.E.2d at 824 (quoting *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682). The question here is whether the test for navigability is different when applied to a manmade canal. "*Gwathmey* clearly states that the public has a right to unobstructed navigability of waters in their natural state." *Id.* at __, 681 S.E.2d at 824-25. However, it is not whether the waterway itself is natural or artificial but, rather, "[w]ater that is navigable in its natural state flows without diminution or obstruction." *Id.* at __, 681 S.E.2d at 825 (citing *Wilson v. Forbes*, 13 N.C. 30, 35 (1828)). The South Carolina case of *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990), is instructive, as it addresses very similar facts under a similar state law providing for common law rights of the public in navigable water. The issue before the South Carolina Court of Appeals was "whether the waters of the canal are navigable waters, making the canal a public highway, or whether, on the other hand, the canal is private property, like a privately owned road." *Id.* at 104, 399 S.E.2d at 25. Moreover, the test for navigability used by the South Carolina courts is akin to that employed in North Carolina, such that the court's analysis in *Hughes* is particularly persuasive. *See id.* at 105, 399 S.E.2d at 25 ("The true test to be applied is whether a stream inherently and by its nature has the capacity for valuable

floatage, irrespective of the fact of actual use or the extent of such use.").

The court in *Hughes* held that "[t]he fact that a waterway is artificial, not natural, is not controlling. When a canal is constructed to connect with a navigable river, the canal may be regarded as a part of the river." *Id.*; *see also State ex rel. Medlock v. S.C. Coastal Council*, 289 S.C. 445, 448, 346 S.E.2d 716, 718 (1986) (holding canals and ditches, dug by rice planters for the purpose of water control but used thereafter by the general public as natural waterways, "have become the functional equivalent of natural streams"); *State v. Columbia Water Power Co.*, 82 S.C. 181, 186, 63 S.E. 884, 887 (1909) (stating that a canal constructed to improve the navigability of two navigable rivers becomes "a part of those rivers, and therefore navigable just as any other portion of them is navigable"). Accordingly, the court in *Hughes* concluded that the canal which was privately constructed to connect with a navigable river, had the capacity for navigation, and had indeed been navigated for the past fifteen years without exclusion of the public was navigable water.

Although the North Carolina authority on this issue is sparse, the N.C. Department of Environment and Natural Resources, Division of Coastal Management (DCM) likewise suggests that our test for navigability does not discriminate between natural and artificial waterways. The DCM, in its CAMA [Coastal Area Management Act] Handbook for Development in Coastal Carolina, defines navigable waters and identifies the various public trust areas. The handbook

identifies public trust areas as, *inter alia*: (1) "all navigable natural water bodies and the lands underneath;" (2) "all water in artificially created water bodies that have significant public fishing resources and are accessible to the public from other waters;" and (3) "all waters in artificially created water bodies where the public has acquired rights by prescription, custom, usage, dedication or any other means." Division of Coastal Management, N.C. Dep't of Env't & Natural Res., *CAMA Handbook for Development in Coastal North Carolina* § 2(A)(1), http://dcm2.enr.state.nc.us/Handbook/section2.htm. In *Pine Knoll Assn. v. Cardon*, this Court stated, without dispute, that "Plaintiff and defendant own adjoining canal front properties on the 'dead end' canal of Davis Landing Canal, which is navigable by pleasure boats," and described the canal as a navigable waterway. 126 N.C. App. 155, 157, 484 S.E.2d 446, 447 (1997). In light of the preceding authority, we hold that the controlling law of navigability concerning the body of water "in its natural condition" reflects only upon the manner in which the water flows without diminution or obstruction. Therefore, any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes "navigable water" under the public trust doctrine of this state.

Here, there is no dispute that boats with a length of thirty (30) feet have navigated the Old Sam Spencer Ditch or that Defendant and other members of the public have used the Canal for commercial purposes in excess of twenty (20) years. Several

affidavits setting forth the navigability and historical use of the Canal, which remain uncontested by Plaintiff, indicate that the Old Sam Spencer Ditch is indeed navigable water and subject to the public trust doctrine. Therefore, we hold the trial court did not err in dismissing Plaintiff's action for trespass against Defendant to enjoin her from using these waters held in trust by the state for the benefit of the public.

II.

[2] Plaintiff argues that even if the waters of the Canal are "navigable," the trial court erred in determining their navigability because Defendant has no standing to litigate the rights of the State of North Carolina. Plaintiff contends that the issue of navigable waters is not a defense or a claim available to Defendant. We disagree.

Standing implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal. *Woodring v. Swieter*, 180 N.C. App. 362, 366-67, 637 S.E.2d 269, 274-75 (2006).

Although Plaintiff is correct that no party has the standing to litigate the rights of the state, Defendant in this case raised navigable waters as an affirmative defense to Plaintiff's trespass action. Our courts have held that private litigants lack standing to sue for damage to public lands, including navigable waters. *See Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 27-28 (2005) (holding that because of the unique nature of the public trust doctrine, this is a claim that may only be raised by a sovereign). This Court stated: "As such, the public trust

doctrine cannot give rise to an assertion of ownership that would be available to any 'private litigants in like circumstances.'" *Id.* at 41-42, 621 S.E.2d at 27 (citation omitted).

> The state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters. Under the public trust doctrine, the State holds title to the submerged lands under navigable waters, but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002) (internal quotations omitted).

Defendant is not seeking monetary damages for interference with navigable waters but, rather, merely raises the doctrine as a defense to Plaintiff's trespass claim and to preserve the public's rights to the Canal under the public trust doctrine. *Cf. Bauman*, __ N.C. App. __, 681 S.E.2d 819 (allowing the class action suit brought by riparian owners against defendants who had begun charging a toll for use of the lake to proceed). Although the lake in *Bauman* was ultimately not deemed navigable, this Court did not prohibit the plaintiffs from invoking the public trust doctrine where they merely wanted access to the lake's allegedly navigable waters, free from interference and charge. Similarly, Defendant invokes the public trust doctrine, not to litigate the rights of the state, but to ensure that Plaintiff does not prevent her from enjoying those rights. Accordingly, we hold the trial court did

not err in deciding that the waters of the canal were "navigable" because Defendant's standing is not an issue.

III.

[3] Plaintiff argues that the trial court committed reversible error in dismissing its trespass action because it is immaterial that Plaintiff does not allege title to the land in question. Pursuant to the discussion above, the trial court's proper determination that the Canal at issue is navigable water subject to the public trust doctrine means exactly that no party can attain possessory rights therein sufficient to support a trespass cause of action. Accordingly, Plaintiff's argument is meritless, and we dismiss this assignment of error.

IV.

[4] Lastly, Plaintiff argues that the trial court committed reversible error in adjudicating the rights in the eastern half of the Canal because there was no dispute between the parties as to that portion of the Old Sam Spencer Ditch. We disagree.

The relief granted by the trial court is proper when consistent with the claims pleaded and embraced within the issues presented to the court. *NCNB v. Carter*, 71 N.C. App. 118, 322 S.E.2d 180 (1984). Not only did Plaintiff's complaint fail to limit the action to any particular portion of the Canal, but Defendant also raised the issue of navigability of the Canal, without specifying which portion, as an affirmative defense and as a counterclaim in her answer. Therefore, the issue of navigability of the entire canal was properly before the trial court, and the

judge did not err in adjudicating the Canal as navigable in its entirety.

In conclusion, we affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

15A NCAC 07H .0209 COASTAL SHORELINES

(a) Description. The Coastal Shorelines category includes estuarine shorelines and public trust shorelines.

(1) Estuarine shorelines AEC are those non-ocean shorelines extending from the normal high water level or normal water level along the estuarine waters, estuaries, sounds, bays, fresh and brackish waters, and public trust areas as set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Environmental Quality [described in Rule .0206(a) of this Section] for a distance of 75 feet landward. For those estuarine shorelines immediately contiguous to waters classified as Outstanding Resource Waters (ORW) by the Environmental Management Commission (EMC), the estuarine shoreline AEC shall extend to 575 feet landward from the normal high water level or normal water level, unless the Coastal Resources Commission establishes the boundary at a greater or lesser extent following required public hearing(s) within the affected county or counties.

(2) Public trust shorelines AEC are those non-ocean shorelines immediately contiguous to public trust areas, as defined in Rule 07H .0207(a) of this Section, located inland of the dividing line between coastal fishing waters and inland fishing waters as set forth in that agreement and extending 30 feet landward of the normal high water level or normal water level.

(b) Significance. Development within coastal shorelines influences the quality of estuarine and ocean life and is subject to the damaging processes of shore front erosion and flooding. The coastal shorelines and wetlands contained within them serve as barriers against flood damage and control erosion between the estuary and the uplands. Coastal shorelines are the intersection of the upland and aquatic elements of the estuarine and ocean system, often integrating influences from both the land and the sea in wetland areas. Some of these wetlands are among the most productive natural environments of North Carolina and they support the functions of and habitat for many valuable commercial and sport fisheries of the coastal area. Many land-based activities influence the quality and productivity of estuarine waters. Some important features of the coastal shoreline include wetlands, flood plains, bluff shorelines, mud and sand flats, forested shorelines and other important habitat areas for fish and wildlife.

(c) Management Objective. All shoreline development shall be compatible with the dynamic nature of coastal shorelines as well as the values and the management objectives of the estuarine and ocean system. Other objectives are to conserve and manage the important natural features of the estuarine and ocean system so as to safeguard and perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a management system capable of conserving and utilizing these shorelines so as to maximize their benefits to the estuarine and ocean system and the people of North Carolina.

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in Paragraph (c) of this Rule. These uses shall be limited to those types of development activities that will not be detrimental to the public trust rights and the biological and physical functions of the estuarine and ocean system. Every effort shall be made by the permit applicant to avoid or minimize adverse impacts of development to estuarine and coastal systems through the planning and design of the development project. Development shall comply with the following standards:

(1) All development projects, proposals, and designs shall preserve natural barriers to erosion, including peat marshland, resistant clay shorelines, and cypress-gum protective fringe areas adjacent to vulnerable shorelines.

(2) All development projects, proposals, and designs shall limit the construction of impervious surfaces and areas not allowing natural drainage to only so much as is necessary to service the primary purpose or use for which the lot is to be developed. Impervious surfaces shall not exceed 30 percent of the AEC area of the lot, unless the applicant can demonstrate, through innovative design, that the protection provided by the design would be equal to or exceed the protection by the 30 percent limitation. Redevelopment of areas exceeding the 30 percent impervious surface limitation shall be permitted if impervious areas are not increased and the applicant designs the project to comply with the rule to the maximum extent feasible.

(3) All development projects, proposals, and designs shall comply with the following mandatory standards of the North Carolina Sedimentation Pollution Control Act of 1973:

(A) All development projects, proposals, and designs shall provide for a buffer zone along the margin of the estuarine water that is sufficient to confine visible siltation within 25 percent of the buffer zone nearest the land disturbing development.

(B) No development project proposal or design shall propose an angle for graded slopes or fill that is greater than an angle that can be retained by vegetative cover or other erosion-control devices or structures.

(C) All development projects, proposals, and designs that involve uncovering more than one acre of land shall plant a ground cover sufficient to restrain erosion within 30 working days of completion of the grading; unless the project involves clearing land for the purpose of forming a reservoir later to be inundated.

(4) Development shall not have a significant adverse impact on estuarine and ocean resources. Significant adverse impacts include development that would directly or indirectly impair water quality increase shoreline erosion, alter coastal wetlands or Submerged Aquatic Vegetation (SAV), deposit spoils waterward of normal water level or normal high water, or cause degradation of shellfish beds.

(5) Development shall not interfere with existing public rights of access to, or use of, navigable waters or public resources.

(6) No public facility shall be permitted if such a facility is likely to require public expenditures for maintenance and continued use, unless it can be shown that the public purpose served by the facility outweighs the required public expenditures for construction, maintenance, and continued use.

(7) Development shall not cause irreversible damage to valuable, historic architectural or archaeological resources as documented by the local historic commission or the North Carolina Department of Natural and Cultural Resources.

(8) Established common-law and statutory public rights of access to the public trust lands and waters in estuarine areas shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the use of the accessways.

(9) Within the AECs for shorelines contiguous to waters classified as ORW by the EMC, no CAMA permit shall be approved for any project that would be inconsistent with rules adopted by the CRC, EMC or MFC for estuarine waters, public trust areas, or coastal wetlands. For development activities not covered by specific use standards, no permit shall be issued if the activity would, based on site-specific information, degrade the water quality or outstanding resource values.

(10) Within the Coastal Shorelines category (estuarine and public trust shoreline AECs), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of the following:

(A) Water-dependent uses as described in Rule 07H .0208(a)(1) of this Section;

(B) Pile-supported signs (in accordance with local regulations);

(C) Post- or pile-supported fences;

(D) Elevated, slatted, wooden boardwalks exclusively for pedestrian use and six feet in width or less. The boardwalk may be greater than six feet in width if it is to serve a public use or need;

(E) Crab Shedders, if uncovered with elevated trays and no associated impervious surfaces except those necessary to protect the pump;

(F) Decks/Observation Decks limited to slatted, wooden, elevated and unroofed decks that shall not singularly or collectively exceed 200 square feet;

(G) Grading, excavation and landscaping with no wetland fill except when required by a permitted shoreline stabilization project. Projects shall not increase stormwater runoff to adjacent estuarine and public trust waters;

(H) Development over existing impervious surfaces, provided that the existing impervious surface is not increased;

(I) Where application of the buffer requirement would preclude placement of a residential structure with a footprint of 1,200 square feet or less on lots, parcels and tracts platted prior to June 1, 1999, development shall be permitted within the buffer as required in Subparagraph (d)(10) of this Rule, providing the following criteria are met:

(i) Development shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities, such as water and sewer; and

(ii) The residential structure development shall be located a distance landward of the normal high water or normal water level equal to 20 percent of the greatest depth of the lot. Existing structures that encroach into the applicable buffer area

may be replaced or repaired consistent with the criteria set out in 15A NCAC 07J .0201 and .0211; and

(J) Where application of the buffer requirement set out in Subparagraph (d)(10) of this Rule would preclude placement of a residential structure on an undeveloped lot platted prior to June 1, 1999 that are 5,000 square feet or less that does not require an on-site septic system, or on an undeveloped lot that is 7,500 square feet or less that requires an on-site septic system, development shall be permitted within the buffer if all the following criteria are met:

(i) The lot on which the proposed residential structure is to be located, is located between:

(I) Two existing waterfront residential structures, both of which are within 100 feet of the center of the lot and at least one of which encroaches into the buffer; or

(II) An existing waterfront residential structure that encroaches into the buffer and a road, canal, or other open body of water, both of which are within 100 feet of the center of the lot;

(ii) Development of the lot shall minimize the impacts to the buffer and reduce runoff by limiting land disturbance to only so much as is necessary to construct and provide access to the residence and to allow installation or connection of utilities;

(iii) Placement of the residential structure and pervious decking shall be aligned no further into the buffer than the existing residential structures and existing pervious decking on adjoining lots;

(iv) The first one and one-half inches of rainfall from all impervious surfaces on the lot shall be collected and contained on-site in accordance with the design standards for stormwater management for coastal counties as specified in 15A NCAC 02H .1005. The stormwater management system shall be designed by an individual who meets applicable State occupational licensing requirements for the type of system proposed and approved during the permit application process. If the residential structure encroaches into the buffer, then no other impervious surfaces shall be allowed within the buffer; and

(v) The lots shall not be adjacent to waters designated as approved or conditionally approved shellfish waters by the Shellfish Sanitation Section of the Division of Marine Fisheries of the Department of Environmental Quality.

(e) The buffer requirements in Paragraph (d) of this Rule shall not apply to Coastal Shorelines where the EMC has adopted rules that contain buffer standards.

(f) Specific Use Standards for ORW Coastal Shorelines.

(1) Within the AEC for estuarine and public trust shorelines contiguous to waters classified as ORW by the EMC, all development projects, proposals, and designs shall limit the built upon area in the AEC to no more than 25 percent or any lower site specific percentage as adopted by the EMC as necessary to protect the exceptional water quality and outstanding resource values of the ORW, and shall:

(A) provide a buffer zone of at least 30 feet from the normal high water line or normal water line; and

(B) otherwise be consistent with the use standards set out in Paragraph (d) of this Rule.

(2) Single-family residential lots that would not be buildable under the low-density standards defined in Subparagraph (f)(1) of this Rule may be developed for single-family residential purposes so long as the development complies with those standards to the maximum extent possible.

(g) Urban Waterfronts.

(1) Definition. Urban Waterfronts are waterfront areas, not adjacent to ORW, in the Coastal Shorelines category that lie within the corporate limits of any municipality duly chartered within the 20 coastal counties of the state. In determining whether an area is an urban waterfront, the following criteria shall be met:

(A) the area lies wholly within the corporate limits of a municipality; and

(B) the area has a central business district or similar commercial zoning classification where there are mixed land uses, and urban level services, such as water, sewer, streets, solid

waste management, roads, police and fire protection, or in an area with an industrial or similar zoning classification adjacent to a central business district.

(2) Significance. Urban waterfronts are recognized as having cultural, historical and economic significance for many coastal municipalities. Maritime traditions and longstanding development patterns make these areas suitable for maintaining or promoting dense development along the shore. With proper planning and stormwater management, these areas may continue to preserve local historical and aesthetic values while enhancing the economy.

(3) Management Objectives. To provide for the continued cultural, historical, aesthetic and economic benefits of urban waterfronts. Activities such as in-fill development, reuse and redevelopment facilitate efficient use of already urbanized areas and reduce development pressure on surrounding areas, in an effort to minimize the adverse cumulative environmental effects on estuarine and ocean systems. While recognizing that opportunities to preserve buffers are limited in highly developed urban areas, they are encouraged where practical.

(4) Use Standards:

(A) The buffer requirement pursuant to Subparagraph (d)(10) of this Rule shall not apply to development within Urban Waterfronts that meets the following standards:

(i) The development shall be consistent with the locally adopted land use plan;

(ii) Impervious surfaces shall not exceed 30 percent of the AEC area of the lot. Impervious surfaces may exceed 30 percent if the applicant can demonstrate, through a stormwater management system design, that the protection provided by the design would be equal to or exceed the protection by the 30 percent limitation. The stormwater management system shall be designed by an individual who meets any North Carolina occupational licensing requirements for the type of system proposed and approved during the permit application process. Redevelopment of areas exceeding the 30 percent impervious surface limitation shall be permitted if impervious areas are not increased and the applicant designs the project to comply with the intent of the rule to the maximum extent feasible; and

(iii) The development shall meet all state stormwater management requirements as required by the EMC;

(B) Non-water dependent uses over estuarine waters, public trust waters and coastal wetlands shall be allowed only within Urban Waterfronts as set out below.

(i) Existing structures over coastal wetlands, estuarine waters or public trust areas may be used for commercial non-water dependent purposes. Commercial, non-water dependent uses shall be limited to restaurants and retail services. Residential uses, lodging and new parking areas shall be prohibited.

(ii) For the purposes of this Rule, existing enclosed structures may be replaced or expanded vertically provided that vertical expansion does not exceed the original footprint of the structure, is limited to one additional story over the life of the structure, and is consistent with local requirements or limitations.

(iii) New structures built for non-water dependent purposes are limited to pile-supported, single-story, unenclosed decks and boardwalks, and shall meet the following criteria:

(I) shall provide for enhanced public access to the shoreline;

(II) may be roofed, but shall not be enclosed by partitions, plastic sheeting, screening, netting, lattice or solid walls of any kind;

(III) shall require no filling of coastal wetlands, estuarine waters or public trust areas;

(IV) shall not extend more than 20 feet waterward of the normal high water level or normal water level;

(V) shall be elevated at least three feet over the wetland substrate as measured from the bottom of the decking;

(VI) shall have no more than six feet of any dimension extending over coastal wetlands;

(VII) shall not interfere with access to any riparian property and shall have a minimum setback of 15 feet between any part of the structure and the

adjacent property owners' areas of riparian access. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the structure commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development;

(VIII) shall be consistent with the US Army Corps of Engineers setbacks along federally authorized waterways;

(IX) shall have no significant adverse impacts on fishery resources, water quality or adjacent wetlands and there shall be no alternative that would avoid wetlands. Significant adverse impacts include the development that would impair water quality standards, increase shoreline erosion, alter coastal wetlands or Submerged Aquatic Vegetation (SAV), deposit spoils waterward of normal water level or normal high water level, or cause degradation of shellfish beds;

(X) shall not degrade waters classified as SA or High Quality Waters or ORW as defined by the EMC;

(XI) shall not degrade Critical Habitat Areas or Primary Nursery Areas as defined by the NC Marine Fisheries Commission; and

(XII) shall not pose a threat to navigation.

History Note: *Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-124;*
Eff. September 1, 1977;
Amended Eff. April 1, 2001; August 1, 2000; August 3, 1992; December 1, 1991; May 1, 1990; October 1, 1989;
Temporary Amendment Eff. October 15, 2001 (exempt from 270 day requirement-S.L. 2000-142);
Temporary Amendment Eff. February 15, 2002 (exempt from 270 day requirement-S.L. 2001-494);
Amended Eff. April 1, 2019; March 1, 2010; April 1, 2008; August 1, 2002;
Readopted Eff. July 1, 2020.

15A NCAC 07K .0206 AGRICULTURAL AND FORESTRY DITCHES EXEMPTED

(a) Ditches used for agricultural or forestry purposes with maximum dimensions equal to or less than six feet (top width) by four feet deep are exempted from the CAMA permit requirement.

(b) All ditches with maximum dimensions greater than six feet by four feet will require a permit.

(c) Width and depth dimensions of all ditches will be measured at the ground level.

History Note: *Authority G.S. 113A-103(5)(a); 113A-118(a);*
Eff. November 1, 1984;
Readopted Eff. November 1, 2021.