STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE

COASTAL RESOURCES COMMISSION

CRC-22-02

IN THE MATTER OF THE PETITION FOR RULEMAKING REQUEST BY: NELSON G. PAUL	**RECOMMENDATION OF THE DIRECTOR OF THE DIVISION OF COASTAL MANAGEMENT**

I. BACKGROUND

Petitioner Nelson G. Paul ("Petitioner") filed a petition for rulemaking on January 3, 2022, pursuant to N.C.G.S § 150B-20 and 15A NCAC 7J .0605 requesting the repeal of 15A NCAC 7H .0205(e) which regulates marsh mowing. A copy of Petitioner's request is attached as Attachment A. In a January 12, 2022 letter, CRC Counsel Special Deputy Attorney General Mary Lucasse notified DCM and Petitioner that his petition is complete, and that it would be heard at your February 10, 2022, meeting. In a January 23, 2022, memo to the Commission, Ms. Lucasse also laid out the statutes and rules related to the Commission's handling of Petitions for Rulemaking. Under 15A NCAC 7J .0605(b), the Commission directs that "the director shall prepare a response to the petition for the Commission's consideration" and this is that response.

II. PETITIONER'S PROPOSED RULE AND REASONS FOR REPEAL

Petitioner is proposing the repeal of 15A NCAC 7H .0205(e) in its entirety. This rule generally prohibits the alteration of coastal wetlands, except as allowed by exemption when undertaken in one of the two ways, as follows:

> (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.
> ***

In his petition, Petitioner recites the definition of "development" in the CAMA at § 113A-103(5)a. and states

> No authority is granted to the Coastal Resources Commission under the Coastal Area Management Act to regulate "mowing" and/or "cutting", as neither activity is listed as "Development" in the enabling legislation. Because "mowing" and/or "cutting" are not Development as indicated under the Coastal Area Management Act, the activities described herein are clearly outside the legislative authority and jurisdiction of the Coastal Resources Commission.

Petitioner continues that "[b]eing that this rule was adopted in error, it compromises the integrity and diminishes the authority of other rules lawfully adopted and administered by the Coastal Resources Commission." Petitioner concludes that "[r]epeal of this rule will result in the

reallocation of resources into other activities pursuant to the proper implementation of the legislative intent of the Coastal Area Management Act."

III. DCM'S RESPONSE

A. History of the Marsh Mowing Rule

Based on Staff research, questions regarding DCM's authority to regulate the alteration or mowing of coastal wetlands date back as far as the late 1990s. In a March 19, 1998 memo, Major Permits Manager John Parker outlined his opinion on the matter to Assistant Director Charles Jones, a copy of which is attached as Attachment B. A few months later, in a June 2, 1998 memo, Mr. Parker forwarded his earlier memo to Commission Counsel (and former Commissioner) Robin Smith with the NC Attorney General's Office (NC DOJ), and attached a letter on the issue from Professor Stephen Broome of the NCSU Soil Sciences Department outlining how regular mowing of two coastal wetlands species in particular "eliminates the life support and erosion control values generally attributed to high marshes and will eventually cause a change in the dominant plant species composition." Also on June 2, 1998, former DCM Director Roger Schecter raised questions concerning the Commission's or Division's authority over marsh alteration to Commission Counsel Ms. Smith.

Several weeks later, Ms. Smith responded to Director Schecter's successor, Donna Moffitt, in a July 21, 1998 legal opinion[1], a copy of which is attached as Attachment C. Director Schecter had asked "Does the Coastal Resources Commission have the authority to regulate the alteration of shoreline vegetation or coastal wetlands (through the cutting, pruning, burning, etc.)?" Ms.

[1] The 1998 memo was not reviewed or approved as a formal Attorney General Opinion.

Smith's response specific to coastal wetlands (vs. shoreline vegetation in general) noted that the CAMA identified Coastal Wetlands as a discreet Area of Environmental Concern (AEC) for designation by the Commission. Additionally, the CAMA at N.C.G.S. §113A-120(b)(1), requires permit denial (through incorporating a standard from N.C.G.S. §113-230 the NC Dredge and Fill Law), where dredging, filling, "or otherwise altering coastal wetlands" is prohibited. Ms. Smith also noted that alteration of coastal wetlands (by cutting, burning, etc.) may fall within the definition of development because it includes "alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, bank, stream, lake or canal."

The "marsh mowing" rule concept was brought by DCM Staff to the Commission for consideration in 2006. This was initially prompted by District Manager Terry Moore in the Washington region, who described intensified efforts to develop marginal land, often through repeated mowing undertaken to change plant species resulting in a more favorable coastal wetlands delineation for development. Mr. Moore's memo to the Commission dated February 22, 2006 is attached as Attachment D.

At the Commission's September 21, 2006 meeting, Mr. Moore presented photographs of sites where marsh alteration was taking place and asked the Commission if it believed it had the authority to regulate this activity. A copy of the minutes is attached as Attachment E and shows that the Commission referred the matter to then-CRC Counsel Special Deputy AG Ms. Jill Hickey. DCM, through a memo from DCM Assistant Director Ted Tyndall dated November 29, 2006, asked for an advisory opinion on the question of "Does the Coastal Resources Commission have authority under CAMA to regulate the clearing, cutting, mowing, or burning of Coastal Wetlands and if so, is there a *de minimis* threshold?" This memo is attached as Attachment F.

In a March 20, 2007 memo, CRC Counsel Jill Hickey responded to the question of the Commission and DCM[2] and a copy is attached as Attachment G. Ms. Hickey's conclusion was that "The CRC has the authority to regulate the burning and mowing of coastal wetlands by means of rulemaking and, in certain situations, permitting. Further, the Secretary of the Department of Environment and Natural Resources (DENR) may seek injunctive relief to halt the rule violation and seek restoration."

We encourage the Commission to read both the 2007 and the 1998 memorandums to the Commission from CRC Counsel at the Attorney General's office to understand the reasoning for their conclusions.

B. Director's Response

Petitioner proposes removing the Marsh Alteration rule at (e) in its entirety because it is Petitioner's belief that the Commission lacks the statutory authority to regulate such alteration of coastal wetlands. In a conversation with Director Davis, Petitioner indicated that he had worked as regulatory field staff for DCM in the Elizabeth City office in the 1980's. Petitioner indicated that when he worked at DCM, it was his understanding that the division did not have the authority to regulate or enforce the mowing and burning of coastal wetlands vegetation. Staff are unsure whether Petitioner is aware of the thorough discussion and examination of this question of the Commission's authority to regulate the alteration of coastal wetlands by DCM staff, the Commission and the Attorney General's Office.

The DCM Director and Staff strongly assert that the unrestricted mowing of marsh vegetation can lead to alteration of the substrate and can therefore constitute "development" under

[2] The 2007 memo was not reviewed or approved as a formal Attorney General Opinion.

CAMA. If the CRC and DCM were not authorized to regulate this activity, significant alterations to salt marshes in North Carolina would likely result over time. Given the vital importance of salt marsh ecosystems, this result would be inconsistent with core missions and goals of the NC Dredge and Fill Act, the CAMA, the Coastal Habitat Protection Plan, the Commission, and DCM, among others. Staff submits that this issue has been appropriately vetted by the Division, Commission and Attorney General's Office in the past, and note that the NC Rules Review Commission did not raise any concerns about the statutory authority of the Commission to enact marsh alteration rules at (e) when it was before that body in 2009, when other portions of this rule changed in 2016, and when these rules went through the re-adoption process in July of 2020.

Finally, to respond to Petitioner's stated concern that "[r]epeal of this rule will result in the reallocation of resources into other activities pursuant to the proper implementation of the legislative intent of the Coastal Area Management Act. Since enactment of this rule on November 1, 2009, Staff have not expended significant resources administering the two written exemptions (projects undertaken by federal or state management agencies and small-scale projects pursuant to 7H.0205(e)(1)(A-F)). Regardless, DCM submits that any resources allocated to the prevention of significant salt marsh alterations by mowing, cutting, or other means are well-justified given the importance of these resources.

IV. CONCLUSION

In conclusion, as laid out in the attached documents from the Attorney General's Office regarding advising the Commission about its authority, the Commission has the legislative authority to regulate the alteration of Coastal Wetlands.

This the 4th day of February 2022.

FOR THE DIRECTOR OF THE
DIVISION OF COASTAL MANAGEMENT

___/s/ Christine A. Goebel_____
Christine A. Goebel
Assistant General Counsel
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601
(919) 707-8554
Christine.Goebel@ncdenr.gov

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the attached Response of the Director of the Division of Coastal Management on Petitioner, addressed as follows:

Special Deputy AG Mary Lucasse,
Commission Counsel, by email to mlucasse@ncdoj.gov

Nelson G. Paul, Petitioner, by email to nelson@nelsonpaul.com
307 Misty Grove Circle
Morrisville, NC 27560

This the 4th day of February 2022.

__/s/ Christine A. Goebel__
Christine A. Goebel
Assistant General Counsel

LIST OF ATTACHMENTS

A. Petitioner's Petition, received on January 3, 2022
B. 1998 John Parker Memo with Professor Broome letter attached, and with June 2, 2022 cover memo to CRC Counsel Robin Smith
C. 1998 AG Memo from CRC Counsel Robin Smith
D. February 22, 2006, memo from Terry Moore to CRC
E. September 2006 CRC Minutes
F. November 29, 2006, memo from Ted Tyndall to AG's Office requesting guidance
G. 2007 AG Memo from CRC Counsel Jill Hickey

To: **NC Division of Coastal Management**
C/O Dr. Braxton Davis, Director
400 Commerce Avenue
Morehead City, NC 28557

Subject: **Petition for Rulemaking Pursuant to NCGS 150B-20**

Title: **Request to Repeal Coastal Resources Commission Rule 15 NCAC 7H .0205 (e) Alteration of Coastal Wetlands**

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(1) either a draft of the proposed rule or a summary of contents;

Response: This petition is to request the repeal of the subject rule outlined in 15 NCAC 7H .0205 (e) governing the "mowing" and "cutting" of marsh grass in the Coastal Wetland Area of Environmental Concern.

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(2) a statement of reasons for adoption of the proposed rule(s);

Response: The rule being petitioned for repeal states the following:

"*(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.*"

The definition of "Development" in the Coastal Area Management Act is outlined in NCGS 113A-103 (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 in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).*"

No authority is granted to the Coastal Resources Commission under the Coastal Area Management Act to regulate "mowing" and/or "cutting", as neither activity is listed as "Development" in the enabling legislation. Because "mowing" and/or "cutting" are not "Development" as indicated under the Coastal Area Management Act, the activities described herein are clearly outside the legislative authority and jurisdiction of the Coastal Resources Commission.

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(3) a statement of effect on existing rules or orders;

Response: Being that this rule was adopted in error it compromises the integrity and diminishes the authority of other rules lawfully adopted and administered by the Coastal Resources Commission.

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(4) any data in support of the proposed rule(s);

Response: See item (2) above.

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(5) a statement of the effect of the proposed rule on existing practices;

Response: Repeal of this rule will result in the reallocation of resources into other activities pursuant to the proper implementation of the legislative intent of the Coastal Area Management Act.

Mandatory Requirements pursuant to 15A NCAC 07J .0605:
(6) the name and address of the petitioner.

Response: Nelson G. Paul, Petitioner
307 Misty Grove Circle
Morrisville, NC 27560

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF COASTAL MANAGEMENT

NCDENR

JAMES B. HUNT JR.
GOVERNOR

WAYNE MCDEVITT
SECRETARY

ROGER N. SCHECTER
DIRECTOR

MEMORANDUM

TO: Robin Smith

FROM: John Parker

SUBJECT: Marsh Mowing

DATE: June 4, 1998

On or about June 2 a memorandum was submitted to you from the Director requesting certain formal opinions on shoreline alterations, etc., including marsh mowing. As a result of the larger effort to rewrite sections of 7H, Charles Jones has approved my sending you ... "A Different Viewpoint" ... for your use. My proposal is more specific and was developed before I had knowledge of the draft rules. Of course, I am not requesting an individual ruling. But, if I am on target, this may be something that could be put into place long before new rules, of any form, are approved.

Attachment

P.O. BOX 27687, RALEIGH, NC 27611-7687 / 2728 CAPITAL BLVD., RALEIGH, NC 27604
PHONE 919-733-2293 FAX 919-733-1495

NCDENR

JAMES B. HUNT JR.
GOVERNOR

WAYNE MCDEVITT
SECRETARY

ROGER N. SCHECTER
DIRECTOR

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF COASTAL MANAGEMENT

MEMORANDUM

TO: Charles Jones

FROM: John Parker

SUBJECT: Marsh Mowing -- A Different Viewpoint

DATE: March 19, 1998

In the writer's opinion, marsh mowing is by definition - "development" - subject to the Division's regulatory authority. I offer the following opinion of the applicability of the statue based on a "plain English reading" of same:

113A-103 (5) a. "Development" means any activity in a duly designated area of environmental concern .... involving .... clearing or alteration of land as an adjunct of construction; .... alteration of the shore, bank .... of .... any sound, bay, river, creek, stream .... .

"Clearing" as an adjunct, I believe is applicable, especially in new subdivision development of the type we are seeing in Pamlico County, e.g., because many of the lots would not be purchased if mowing was not done before the sale; and perhaps an indication provided by the seller that mowing could continue as desired for view, etc. One definition of adjunct, incidentally, is: "A nonessential attribute of a thing .... ". The thing in this case is the upland or other development, usually a residence or pier.

If the route to "Development" appears somewhat circuitous in the first definition, I suggest that the second is most direct: "alteration of the shore, bank .... of .... any creek" requires no explanation. However, to further my mission, I suggest that .... mowing a seven foot tall stand of giant cordgrass to one inch and maintaining that height until the plant dies, is - "alteration".

If marsh mowing is a form of development, is it major or minor development? Technically, it would be minor. I believe we will all agree that there will be no other players other than a round of applause from resource agencies and some public. More importantly, I'm not aware of any rule or policy that precludes the Division from exercising authority over minor development, as needed.

P.O. BOX 27687, RALEIGH, NC 27611-7687 / 2728 CAPITAL BLVD., RALEIGH, NC 27604
PHONE 919-733-2293 FAX 919-733-1495

A general permit could be developed for mowing to provide access corridors, or other essential needs. I am fully aware of the variations on the subject, ranging from a five foot marsh fringe along a long established residential lot to a ten acre mow in a new subdivision. Another variation would be large tract mowing (or burning) by the Wildlife Resources Commission or hunt club to attract geese to feed on new plant shoots. Burning is a form of clearing, but I am not suggesting we go there -- yet. Burning is not (safely) available to most landowners. It does not cause subsidence and rutting as does wheeled equipment and is not applicable to regrowth of green plants. I will also not suggest we go to the point of asking if any clearing or altering the 75' shoreline AEC is development. Not yet. But have we had our own 3,000 mile "buffer" all these years without recognizing it? The issue here is high value, scientifically described plant species listed in the statue.

I call your attention to the attached photo copy which shows several acres of mowing at Windsong S/D on Cambell Creek. If you will look at the actual photos with a hand lens, you can see wheel ruts, (a mosquito breeding enhancement) from what I believe was made by a tractor and bush-hog. This is one of many examples. Staff could provide new photographs and background information as needed. One staff person reported recently on another subdivision with several acres mowed with widths of hundreds of feet to the water. Some staff have suggested that after repeated mowing, there is an attempt to convert the marsh to lawn grass and later request bulkheading, etc. This activity will increase as subdivision activity moves up the estuaries. Raleigh staff received an inquiry this week wherein the caller ask if mowing was legal.

If conversion is successful, or tried, staff may be, perhaps has been, confronted with the problem of deciding jurisdiction for excavation and fill, if such work is later requested.

Regardless if you agree or disagree with my "take" on statutory authority, I am convinced that over time, if this practice is not strictly regulated, coastal Carolina will lose hundreds of acres of marsh, small tract by small tract.

The history of the Division position on mowing as it is now is not important. However, it is probably not unlike the position that a four man, all weather duck blind with boat slip is not a structure, or development, but a single tie pile is. If regulating mowing appears to be a reach under the N.C. Coastal Management Program, than I call your attention to the Gaston Pipe Line and the Global Transpark. In my opinion, we need no further authority to advance this over-due marsh protection. And I find nothing in 7K or G.S. 113A-103(5)b that exempts the subject activity. A GP is recommended, however.

Finally, I call your attention to the attached letter from Dr. Steve Broome on the adverse effects of repeated mowing. Although I would welcome an opportunity to carry out an in-depth review of the subject, I will end this exercise with two "Parkerisms": "once mowed -- always mowed", and "you can kill it, but you can't fill it".

Attachment

North Carolina State University is a land-grant university and a constituent institution of The University of North Carolina

Department of Soil Science
College of Agriculture and Life Sciences

NC STATE UNIVERSITY

Campus Box 7619
Raleigh, NC 27695-7619

919.515.2655
919.515.2167 (fax)

February 20, 1998

Mr. John R. Parker, Jr.
North Carolina Division of Coastal Management
P.O. Box 27687
Raleigh, NC 27611-7687

Dear Mr. Parker:

I am writing in response to your letter of October 16, 1997 regarding the effects of mowing on irregularly flooded high marsh dominated by *Spartina cynosuroides* (big cordgrass) and *Juncus roemerianus* (black needlerush). Continuous mowing will obviously affect both the structure and function of these marshes and is likely to eventually eliminate both species.

Loss of the aboveground portion of the plants destroys wildlife and bird habitat and reduces primary production. If less biomass is produced, less food is available for grazing insects and for detritus, which may be exported to the estuary where it is utilized by filter feeders.

The stems and leaves of marsh vegetation are also effective in dampening waves, thereby reducing shoreline erosion.

Continuous mowing will eventually kill big cordgrass and black needlerush by eliminating the source of photosynthate that supports the roots and rhizomes. In our sampling of marsh vegetation we have found that black needlerush is particularly sensitive to clipping. When plots were clipped in the fall, plants did not grow back during the following spring and summer.

In summary, repeated mowing (or burning) eliminates the life support and erosion control values generally attributed to high marshes and will eventually cause a change in the dominant plant species composition.

Sincerely,

Steve Broome

Stephen W. Broome
Professor

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF COASTAL MANAGEMENT

NCDENR

JAMES B. HUNT JR.
GOVERNOR

WAYNE MCDEVITT
SECRETARY

ROGER N. SCHECTER
DIRECTOR

MEMORANDUM

JUN 4

TO: Robin Smith
FROM: Roger Schecter
SUBJECT: Advisory Opinion
DATE: June 2, 1998

Robin,

We would like to request an advisory opinion from the Office of Attorney General on the follow topics related to CAMA and T15.0200 of the Administrative Code.

1) Does the Coastal Resources Commission have the authority to regulate the alteration (cutting, pruning, burning, etc.) of shoreline vegetation or coastal wetlands? If we implement a vegetated buffer zone, can we regulate the management of any vegetative material?

2) Are the storage and processing of animal wastes covered by the agricultural exemption in CAMA? Can we prohibit or regulate these facilities in the shoreline AEC?

Thank you for your prompt response, since we are drafting new shoreline rules this information is vital to the process.

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State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

MICHAEL F. EASLEY
ATTORNEY GENERAL

Reply to: Robin W. Smith
Environmental Division
Tel: (919) 716-6600
Fax: (919) 716-6767

July 21, 1998

Donna Moffitt, Director
Division of Coastal Management
P.O. Box 27687
Raleigh, N.C. 27611-7687

Re: Advisory letter on the authority of the Coastal Resources Commission to require permits under N.C.G.S. §113A-118 for certain shoreline activities.

Dear Donna :

By letter of June 2, 1998, Roger Schecter requested an opinion from this office concerning the scope of the Coastal Resources Commission's (CRC) authority to regulate two categories of shoreline activities. The questions presented and my responses are set out below.[1]

(1) Does the Coastal Resources Commission have the authority to regulate the alteration of shoreline vegetation or coastal wetlands (by cutting, pruning, burning, etc.) ?

Under N.C.G.S. § 113A-118, a Coastal Area Management Act (CAMA) permit is required for development in an area of environmental concern (AEC). N.C.G.S. §113A-103(5)a defines "development" to include:

> any activity.... 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 in an area of

[1]This letter has not been reviewed and approved under the procedures for issuance of an Attorney General's Opinion.

> environmental concern identified in G.S. 113A-113(b)(2) or (b)(5). [Emphasis added.]

In defining the scope of the permitting jurisdiction, the legislature also establishes the parameters of the Commission's regulatory authority.

In construing a statute, the first rule is to determine legislative intent while giving the language of the statute its natural and ordinary meaning. *Turlington v. McLeod*, 323 N.C. 591, 374 S.E.2d 394 (1988). Another general guideline for statutory construction provides that when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list. *See, Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 (1993). The only language in N.C.G.S. § 113A-103(5)(a) specifically referring to removal of vegetation from upland areas is circumscribed by its characterization as "clearing or alteration of land as an adjunct of construction". This description would not cover mowing, pruning, selective cutting and similar post-construction maintenance activities.[2]

Under this language, land-clearing preparatory to construction and landscaping associated with new construction requires a CAMA permit. As a result, those activities are clearly subject to regulation by the Commission. The Commission can exercise that authority by imposing buffer requirements for all land-clearing activities or otherwise restricting the type of vegetation that may be removed in preparation for construction or landscaping of new development.

The definition as currently written does not otherwise subject removal of nonwetland vegetation to CAMA permitting requirements. The statute also specifically excludes the use of land for "planting, growing, or harvesting plants, crops, trees or other agricultural or forestry products" from the definition of "development"requiring a CAMA permit. N.C.G.S. §113A-103(5)(b).

The Commission can exercise some additional control over removal of vegetation through conditions on CAMA permits for other regulated development. For example, the Commission could vary the width of any required buffer based on the degree of disturbance of the natural vegetation -- requiring a wider buffer where the owner converts the area to lawn and reducing the width of the buffer where the area is left undisturbed. The permit condition then becomes the means of enforcing

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[2] Since this language covers "alteration of land", the later reference to "alteration of the shore, bank or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal" appears intended to describe only activities directly affecting water bodies and their immediate interface with the shoreline.

restrictions on future removal of vegetation.[3]

The situation with respect to coastal wetland vegetation is somewhat different. The legislature recognized the special value of coastal wetlands by identifying coastal wetlands as a discrete category for designation as an area of environmental concern. The legislature also indirectly provided for consideration of the removal or alternation of coastal wetlands as a basis for denying a CAMA permit. N.C.G.S. § 113A-120(b)(1) states that a CAMA permit shall be denied if the development "would contravene an order that has been or could be issued pursuant to G.S. 113-230." Under N.C.G.S. §113-230, the Secretary is authorized to issue orders "regulating, restricting or prohibiting dredging, filling, removing or otherwise altering coastal wetlands." [4] As a result, removal or alteration of coastal wetlands may be grounds for denial of a CAMA permit where: (1) "development" has been proposed; [5] and (2) the Secretary has issued a protective order prohibiting removal or alteration of coastal wetland vegetation.

Certain activities that may occur in wetlands, such as excavation and filling, are specifically included in the CAMA definition of "development" and require a CAMA permit in any case. If the activity resulting in alteration or removal of coastal wetland vegetation does not involve one of the listed activities, it may still fall within the scope of the N.C.G.S. §113A-103(5)(a) definition of "development" to include "alteration of the shore, bank or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake or canal". Coastal wetlands are, by statutory definition, areas subject to regular or irregular flooding by tides. As a result, coastal wetlands function as a part of the estuarine water body. Those coastal wetlands located below the mean high water line are also public trust areas under N.C.G.S. §113A-113(b)(5).

Because of the integral relationship between coastal wetlands and the adjoining water body, alteration or removal of coastal wetland vegetation may also alter the "shore, bank or bottom" of the water body within the meaning of N.C.G.S. §113A-103(5)(a). To find that the proposed activity

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[3] Continuing enforcement of those permit conditions as the property changes ownership raises again the issue of providing notice of permit conditions to prospective purchasers.

[4]This authority has never been exercised and under the Administrative Procedure Act, N.C.G.S. Ch. 150B, issuance of such orders may constitute rulemaking that would require adherence to the notice and hearing requirements of the APA. This advisory letter does not attempt to address procedural questions surrounding exercise of the Secretary's authority under the statute.

[5] As discussed further below, the removal or alteration of coastal wetlands may in itself constitute "development" under N.C.G.S. §113A-103(5)(a) in some instances.

constitutes "development" under this section of the definition, however, it will be necessary to find that removal or alteration of the wetlands would, in turn, alter the "shore, bank or bottom" of the adjoining water body. Wetland alteration that would change the nature of the shoreline or water bottom-- by impairing its ability to support fish and wildlife, for example --would require a CAMA permit.

In sum, land-clearing activities associated with upland development requires a CAMA permit, but normal post-construction mowing, pruning and cutting of upland vegetation does not. Removal or alteration of coastal wetlands may constitute "development" requiring a CAMA permit if the activity: (1) involves excavation, dredging, filling or some other activity specifically included in the CAMA definition of "development"; or (2) would result in the alteration of the "shore, bank or bottom" of the adjoining water body. Otherwise, removal or alteration of coastal wetlands would not in itself require a CAMA permit and could only be considered in review of other development activities requiring a CAMA permit. In those circumstances, the CAMA permit could be denied if alteration of the wetlands would violate an order issued by the Secretary of the Department of Environment and Natural Resources under N.C.G.S. § 113-230.

(2) Can the CRC prohibit or regulate facilities for the storage and processing of animal wastes or are these facilities covered by the agricultural exemption in CAMA?

The legislature has exempted most agricultural and forestry activities from CAMA permitting requirements under N.C.G.S. §113A-103(5)(b)(4) which states as follows:

> 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 live-stock or poultry, 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. [Emphasis added.]

As noted above, the fundamental rule of statutory construction is to give effect to legislative intent. In doing so, words in a statute should be understood according to their common and ordinary meaning unless they have a technical meaning or one definitely indicated by their context. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970 (1987).

The use of land for "raising livestock or poultry" would generally be understood to include the facilities necessary to do so. In decisions interpreting the statutory exemption of "bona fide farm[s]" from local zoning authority under N.C.G.S. § 153A-340, our courts have held that such

ancillary activities as construction of driveways, use of the driveway by large trucks, operation of large fans and the selling of plants fall within the scope of the farming exemption because those activities are "so essential to large-scale agricultural production that their exclusion from the exemption would render it meaningless." *Sedman v. Rijdes*, 127 N.C.App. 700, 429 S.E.2d 620 (1997).

Applying the same analysis to the CAMA exemption, disposal of animal waste is similarly essential to raising livestock and poultry. Subjecting animal waste management facilities to CAMA permit requirements would appear to frustrate the legislature's intent and make the CAMA exemption for agriculture, particularly as applied to raising livestock and poultry, meaningless. Thus, as currently written, N.C.G.S. § 113A-103 exempts such facilities from the CAMA permit requirement.

I hope this response is helpful to the Commission's further consideration of proposed estuarine shoreline rules. Please call if you have other questions.

Very truly yours,

Robin W. Smith
Assistant Attorney General

cc: Courtney Hackney
Daniel F. McLawhorn

ep/25834(wp)

North Carolina Department of Environment and Natural Resources
NC Division of Coastal Management
943 Washington Square Mall
Washington, NC 27889
252-946-6481

MEMORANDUM

TO: Coastal Resources Commission/I&S Committee

FROM: Terry Moore

DATE: 22 February 2006

RE: I&S #06-08 – DCM Ability to Regulate Marsh Alteration

I think we all recognize that the majority of the better lands for development along the shorelines in North Carolina have already been built upon. Therefore, it is becoming increasingly apparent to the field staff of this Division that development pressure on more marginal lands is growing. Additional development pressures brought on by rapidly rising coastal property values, accompanied by new initiatives to enhance, restore, and protect critical habitats by the Department, have served to increase the awareness of the significance of Coastal Wetlands and the sensitivity to the delineations requested of the DCM field staff.

For years, (since the beginning of the regulatory requirements promulgated by the CAMA), the Division has advised the public, "No permits required to mow, cut, or burn the marsh." This is most likely from the implementation of the Dredge & Fill Law in 1969, NCGS 113-229 which basically requires permits only for the excavation or filling of estuarine waters, tidelands, and coastal marsh. Although this interpretation is still true for the Dredge & Fill Law, it could be interpreted differently under the state's more comprehensive Coastal Area Management Act, NCGS 113A-118 which regulates not only the above mentioned activities but all "development" activities in Areas of Environmental Concern (AECs) including the shoreline as well as the marsh and water areas.

Under NCGS 113A-103(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; bulk-heading, 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 in an area of environmental concern identified is G.S. 113A-113(b)(2) of (b)(5).

Although staff has consistently interpreted the above definition of development to mean "no permits required to mow, cut, or burn the marsh," this may not necessarily mean that we are absent the authority to do so. It may also be that such an interpretation conflicts the Division of Water Quality River Basin Buffer rules and the management needs of the habitats identified in the CHPPs. One of the significant things that the Division of Water Quality River Basin Buffer rules do is to restrict the cutting of vegetation within 50 feet of the coastal wetland or water; whichever is the most landward as delineated by DCM.

Interest in marsh mowing seems to have evolved for many reasons such as beautification, view, habitat elimination, defacing the resource, or disguising the marsh. In the early days of the Division, marsh mowing itself was self-limited due to a host of reasons, such as available equipment. This is not so today. Higher land values, new equipment, available labor, and increased opportunities by entrepreneurs, have intensified efforts. The field staff is often summoned for Coastal Wetland delineations after years of mowing, burning, seeding, planting, and general overall manipulation of a site in what often appears to be attempts to influence the wetland call.

Field staff of the Division has now had the opportunity to monitor long-term repetitive marsh mowing operations. To our own satisfaction, we have concluded that repetitive mowing sometimes accompanied with burning, can and does, change plant species composition as pioneering as well as fugitive species begin to colonize in these areas.

Therefore, staff is seeking the answer to several questions. First, does the Commission agree that there is statutory authority to consider these activities as development? If so, what guidance should the staff use in developing standards for rule making? Staff looks forward to this discussion with the Committee.

Implementation and Standards Committee
September 21, 2006
Hilton Hotel, Wilmington, NC

Bob Emory, Chair

DWQ Acceptance of Permeable Pavement Systems (I&S-06-26)

Tancred Miller informed the committee that the State's Phase II stormwater bill requires DWQ to give property owners and developers credit for using pervious paving materials. Tancred's memo and the included section of DWQ's Best Management Practices Manual outline the amount of credit that may be given for various pervious paving systems. Tancred noted that the CRC has historically given credit for pervious paving systems under the "innovative design" provision of our coastal shorelines rules. DWQ's BMP Manual includes requirements for maintenance and inspection of the pavement systems, and represents an improvement in regulation of these systems. Tancred informed the committee that DCM staff and local permit officers will be directed to apply the DWQ standards in our normal course of business. Property owners and developers will be advised that in order to receive credit from DCM for installing pervious paving systems, they must provide satisfactory evidence to DCM that their systems meet the DWQ guidelines for design and installation. Staff does not see the need for any CRC action on this item.

Water Depth and Pier Construction (I&S-06-24)

Rich Weaver presented an issue to the Committee pertaining to an increasing number of requests for boat slips in water depths that may be too shallow to support boating activity. Rich presented a brief description of the problem and then introduced a memo from the Division of Marine Fisheries requesting that boat slips proposed in water depths of less than 3 ft. (4 ft. in some cases) be elevated to the Major Permit process. Rich then suggested that prior to taking such action, staff wanted to compile and analyzes the data and present it to the Committee for discussion. The data for 2006 (to date) was presented to the Committee showing the total number of boat slips issued and denied, the total number of boat slips issued in waters open to shell fishing, the total number of boat slips issued in Primary Nursery Areas, and the number of boat slips issued in each CAMA county. Rich then presented an aerial photograph example that demonstrated the issue. After suggesting a few options, he closed the presentation by asking the Committee for guidance in addressing the issue of boat slip requests in shallow water depths.

Bob Emory asked if the recommendations from the Multi-slip Docking Facility Working Group addressed the issue of water depths. Staff responded that it did and committed to communicating with that group for details. Mike Street then commented on the reasons that Marine Fisheries is concerned with the issue and mentioned that "prop kicking" is becoming a big problem in these shallow areas as well.

Ted Tyndall expressed concerns that pushing the piers into deeper water often causes navigational issues, so it becomes a balancing act in permitting such structures. Lee Wynns and Chuck Bissette expressed that they felt that the current coordination between DCM and DMF appears to be working well and would rather not implement news rules at this time. Staff also expressed concern that elevating the many GPs for full review would drastically increase the workload of the Major Permits staff.

Melvin Shepherd then moved to allow staff to continue dialogue with DMF, and look for a non-regulatory solution. Lee Wynne seconded the motion. The motion passed with one vote in opposition.

Wetland and Marsh Alteration (I&S-06-21)

Terry Moore gave a slide presentation to the Committee that showed evidence that the constant mowing, burning, seeding, planting, and general alteration of the marsh can change the plant species composition as pioneering and fugitive species colonize an area. Terry stated that interest in marsh mowing seems to have evolved for many reasons including beautification, view, habitat elimination, defacing of the resource, and for disguising the marsh. He posed two questions to the Committee. First, does the Commission believe that there is statutory authority under the CAMA to consider these activities as development? And second, if it does, what guidance should the staff use in developing standards for rule making?

After some discussion and clarification, including whether or not to refer the issue to the Division of Water Quality for potential rule change to their basin-wide buffer rules, a motion was made and seconded to refer the issue to the Attorney General's office to ask for an opinion on the question of authority to regulate the mowing and cutting of the marsh. If the answer from the AG's office is in the affirmative, then Staff could come back to the Committee to address the specifics associated with the regulating of such activities. The motion passed eleven to four.

Static Vegetation Line Discussion (I&S-06-20)

Jeff Warren informed the Committee that the intent of his presentations was to present numerous concepts on static vegetation lines and oceanfront setbacks. Dr. Warren underscored the point that the draft rule language presented in the memo was prepared by staff as a tool for strategic discussions and not meant to imply that rule language was being presented for adoption. Data were presented on coastal hazards to frame the need for discussion including expected population increases, higher frequencies and potential magnitudes of hurricane, relative sea level rise, and statewide erosion rates. Dr. Warren began by describing the static vegetation line and presented the current policy that defined such a line. To simplify the discussion, a list of four concepts were presented for consideration: 1) Should large-scale projects be redefined in existing rules? 2) Should the setback revert from the static vegetation line to natural vegetation when most or all of beach fill project sand has eroded, 3) Should the alternative vegetation line language in existing rules be amended to allow additional methodologies for developing the line?

4) If a static vegetation line has been established, and if setback measurements revert back to natural vegetation, should development be allowed and, if so, only under certain restrictions?

Ocean Development Setback Discussion (I&S-06-22)

Dr. Warren also reviewed existing policies on oceanfront development setbacks and described a concept of a graduated setback based on the size of a structure. Three major concepts were identified for discussion: 1) Should oceanfront setbacks be based on size, and not use, of the structure? 2) Should oceanfront setbacks be increased? 3) Is the graduated setback concept an appropriate management tool for the oceanfront? Chairman Emory suggested that the Committee offer DCM staff guidance by considering all seven concepts. Melvin Shepherd made a motion to consider setbacks based on the size of a structure and not the use (e.g., residential versus commercial) and Spencer Rogers seconded. Numerous concerns were voiced, including how to define the size of a structure (e.g., height, footprint, total floor area) and its use (residential versus commercial versus multi-family), but the motion was withdrawn after it appeared there were still many unknown variables the needed to be considered before decisions could be made. Bob Wilson noted the issue of re-development versus new development since the barrier islands were almost fully developed must be considered when reviewing exisiting and future policies. Mr. Wilson also stressed the importance of including the local municipalities in the process. Spencer Rogers and Harry Simmons commented that 30-year setback factors may not be enough and Melvyn Shepherd added that the high number of non-conforming lots along the oceanfront indicated the setback factors guiding the initial development were not doing their job. Joan Weld wanted more information from the CRC Science Panel on their recommendations regarding setbacks. Jeff Warren agreed to re-distribute the 1999 short-term recommendations that had been made to the CRC by the Science Panel. Joan Weld also felt that the Science Panel should discuss the static line and setback concepts and potentially report back to the Committee. Overall, it was agreed that more data and further discussion would be needed before the Committee could give DCM staff guidance on potential directions for rule making.

Update on Estuarine Shoreline Stabilization Subcommittee and the Biological & Physical Processes Workgroup (I&S-06-25)

Bonnie Bendell stated that the Estuarine Biological and Physical Processes Workgroup has completed their task of making recommendations on appropriate shoreline stabilization methods for different shoreline types. The recommendations are compiled in a report and included in the CRC packet. Bonnie also reported that the Estuarine Shoreline Stabilization Subcommittee met Wednesday to discuss the recommendations report in detail. Discussion centered around the direction that staff should take in drafting possible rule concepts. The Subcommittee will meet again in October. Bob Emory, chairman to the Estuarine Subcommittee commended the Estuarine Work Group for completing the report in a concise and timely manner.

Draft Exception to Buffer Rule for Stormwater Ordinance (I&S-06-23)
Due to the lack of time, this agenda item was rescheduled until the November meeting.

North Carolina Department of Environment and Natural Resources
Division of Coastal Management
Michael F. Easley, Governor **Charles S. Jones, Director** William G. Ross Jr., Secretary

MEMORANDUM

TO: James C. Gulick
Senior Deputy Attorney General

FROM: M. Ted Tyndall
Assistant Director, DCM

DATE: November 29, 2006

SUBJECT: Advisory Opinion Concerning CAMA Authority to Regulate the Clearing, Mowing or Burning of Coastal Wetlands

The Division of Coastal Management recently received input from the Coastal Resources Commission expressing interest in pursuing their ability to regulate the clearing, mowing, and burning of Coastal Wetlands. The Commission voted unanimously to refer the question to the Attorney's General Office for an advisory opinion.

The definition of "development" in General Statute 113A-103 (5)a. is explicit when it refers to "clearing or alteration of land as an adjunct of construction", however it is less clear when it refers to the "alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake or canal." Consequently, when alteration (cutting, mowing, burning, etc.) of Coastal Wetlands occurs and cannot be linked to the "adjunct of construction", the Division has historically determined the activity not to be development and has not required permits for the activity.

Therefore, the Division hereby requests an advisory opinion on the following question: Does the Coastal Resources Commission have authority under CAMA to regulate the clearing, cutting, mowing or burning of Coastal Wetlands, and if so is there a de minis threshold?

The Commission has asked staff to bring this issue back to them at their January 25-26, 2006 meeting in Morehead City. If an advisory opinion can be given by that date, staff would be much appreciative. I know how busy your office is and I apologize for this late request.

I thank you for your assistance. Please call me if you have any questions.

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ROY COOPER
ATTORNEY GENERAL

State of North Carolina

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Reply to:
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March 20, 2007

Dr. Courtney Hackney, Chairman
Coastal Resources Commission
7007 Northbend Rd.
Wilmington, NC 28405

Charles S. Jones, Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

Dear Dr. Hackney and Mr. Jones:

This responds to your request for an opinion[1] from this office on the following question:

> Does the Coastal Resources Commission (CRC) have authority under the Coastal Area Management Act (CAMA), N.C.G.S. §§113A-100, *et seq.* to regulate the clearing, mowing or burning of coastal wetlands, and if so, is there a *de minimis* threshold?

We understand that the request for an opinion from this office was precipitated by the Division of Coastal Management's (DCM) report to the CRC regarding the repeated mowing and burning of certain coastal wetlands over time. These activities can result in elimination of wetland species, thereby hampering efforts by DCM inspectors to delineate the area as coastal wetlands, and impairing the beneficial functions of these coastal wetlands.

For the reasons discussed below, we conclude that the CRC has the authority to regulate the burning and mowing of coastal wetlands by means of rulemaking and, in certain situations, permitting. Further, the Secretary of the Department of Environment and Natural Resources (DENR) may seek injunctive relief to halt the rule violation and require restoration.

This office previously addressed a similar question in a July 21, 1998 advisory letter

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[1] This letter has not been reviewed and approved in under the procedures for issuing an Attorney General's Opinion.

from Assistant Attorney General Robin W. Smith to Donna Moffitt, Director of the Division of Coastal Management (DCM). Our July 21, 1998 advisory letter addressed the question of whether cutting or burning constituted development for which a CAMA permit was required. That advisory letter concluded that if the "cutting, pruning, burning, etc." of coastal wetlands is deemed to alter the "shore, bank or bottom" of the adjoining water body, those activities would fall within the definition of development. It also concluded that land clearing as an adjunct of construction requires a CAMA permit. Those conclusions have not changed. There are, however, regulatory options other than permitting, as discussed below.

In adopting CAMA and the Dredge and Fill Act, N.C.G.S. §113-229, the General Assembly recognized the vital significance of coastal wetlands to the State's estuarine system.

> The General Assembly enacted DFA [the Dredge and Fill Act] in 1969 and CAMA in 1974 to protect, preserve, manage and provide for the orderly development of one of North Carolina's most valuable resources, the coastal estuarine system. N.C.G.S. § 113A-102(a) (legislative findings and goals). In particular, coastal wetlands, or marshlands, historically considered wastelands that should be reclaimed or put to productive use, have been recognized by the General Assembly as integral to the entire estuarine system -- "unique, fragile, and irreplaceable."

State, ex rel. Cobey v. Simpson, 333 N.C. 81, 84, 423 S.E.2d 759, 760 (1992). Coastal wetlands are among the State's "most valuable resources." *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 692-93, 249 S.E.2d 402, 408 (1978).

In CAMA, the General Assembly required the CRC to designate by rule areas of environmental concern (AECs) and authorized the CRC to designate as an AEC "[c]oastal wetlands as defined in N.C.G.S. §113-229(n)(3) and contiguous areas necessary to protect those wetlands." N.C.G.S. §113A-113(b)(1). N.C.G.S. § 113-299(n)(3) provides:

> (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) .

N.C.G.S. § 113-229(n)(2005). Thus, the statutory definition of coastal wetlands has two components, the presence of at least one of the enumerated wetland plant species and an elevation low enough to be subject to regular or occasional flooding by the tides.

In its rules, the CRC followed the General Assembly's mandate to define the coastal wetland AEC consistent with the General Assembly's definition of marshland and further provided that "[t]he coastal wetland AEC includes any contiguous lands designated by the Secretary of ENR pursuant to G.S. 113-230(a)."[2] 15A NCAC 7H .0205(a).

The CRC has designated coastal wetlands as an AEC. 15A NCAC 7H .0205. The "unique productivity" of the ocean and estuarine system is dependent upon coastal wetlands. "Without the marsh, the high productivity levels and complex food chains typically found in the estuaries could not be maintained." 15A NCAC 7H .0205(b). Thus, the management objective of the coastal wetland AEC is to:

> conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values; to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource essential to the functioning of the entire estuarine system.

15A NCAC 7H .0205(c). Use standard for coastal wetlands are set forth in 15A NCAC 7H .0205(d) as follows:

> Suitable land uses shall be those consistent with the management objective in this Rule. *Highest priority of use shall be allocated to the conservation of existing coastal wetlands.* Second priority of coastal wetland use shall be given to those types of development activities that require water access and cannot function elsewhere.

15A N.C.A.C. 7H.0205(d)(emphasis added). This regulatory scheme was cited with approval by the North Carolina Supreme Court in *State, ex rel. Rhodes v. Simpson*, 325 N.C. 514, 516, 385 S.E.2d 329, 330 (1989).

Lastly, subsequent to our July 21, 1998 advisory letter, the General Assembly authorized the Environmental Management Commission (EMC) to safeguard water quality by protecting

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[2]N.C.G.S. § 113-230(a) authorizes the Secretary of DENR to adopt orders to prohibit "removing or otherwise altering coastal wetlands."

and maintaining existing riparian buffers adjacent to coastal wetlands. See, N.C.G.S. §§143-214.7, 143-214.20, *et seq.*, *Hashemi v. Town of Cary*, 2005 N.C. App. LEXIS 2005 (No. COA04-128, unpublished). To accomplish that goal, the EMC has adopted rules to protect existing riparian buffers in the Tar-Pamlico River Basin and the Neuse River Basin. 15A NCAC 2B.0233 and 2B.0259. These rules create a protective zone prohibiting "periodic mowing and harvesting of plant products" a distance of 30 feet "from the landward limit of coastal wetlands as defined by the Division of Coastal Management." 15A NCAC 2B.0233(4)(a)(iii) and (6), and 15A NCAC 2B.0259(4)(a)(iii) and (6). It would seem absurd to have a regulatory scheme which bans mowing or harvesting vegetation 30 feet landward of coastal wetlands to protect the estuarine system, but allows those same activities in the coastal wetlands themselves, which are the heart of the system. We do not believe that the Legislature would have intended such a result. If possible, "the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

The CRC's Regulatory Options in Addition to Permitting

Rulemaking

The General Assembly has clearly authorized the CRC to adopt rules defining the coastal wetlands AEC and to adopt rules, called "state guidelines," for use in the coastal area. N.C.G.S. § 113A-107 provides:

> (a) State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission under Part 3. . . .
>
> (b) The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines.

N.C.G.S. § 113A-107. The only requirement imposed by the General Assembly is that the rules be consistent with the goals of CAMA as set forth in G.S. 113A-102. These goals are:

> (1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;

> (2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;
>
> (3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;
>
> (4) To establish policies, guidelines and standards for:
>
> > a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value; . . .

N.C.G.S. § 113A-102(b). Clearly, a paramount goal of CAMA is the preservation coastal wetlands. The CRC has the authority, therefore, to amend its rules for the coastal wetlands AEC to prohibit the destruction of coastal wetlands by mowing and burning.

Thus, the CRC could amend the use standards for coastal wetlands (15A NCAC 7H .0205(d)) by inserting a sentence which prohibits mowing and burning of coastal wetlands or it could specify certain *de minimus* thresholds which are is acceptable. One example is the underlined language below:

> Suitable land uses shall be those consistent with the management objective in this Rule. Highest priority of use shall be allocated to the conservation of existing coastal wetlands. Second priority of coastal wetland use shall be given to those types of development activities that require water access and cannot function elsewhere. Mowing and burning [or otherwise altering] coastal wetlands is prohibited [except for some specified *de minimus* amount or in certain *de minimus* situations.]

15A NCAC 7H .0205(d).

The CRC could also amend its definition of coastal wetlands to make it clear that coastal wetlands that have been destroyed by mowing or burning will still be considered to be coastal wetlands for the purposes of CAMA. A possible amendment might take the following form of the underlined language below:

15A NCAC 7H .0205(a):

Coastal wetlands are defined as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Coastal wetlands contain some, but not necessarily all, 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),
(10) Salt Reed Grass (Spartina cynosuroides).

The coastal wetlands AEC includes any contiguous lands designated by the Secretary of ENR pursuant to G.S. 113-230 (a). The coastal wetlands AEC also includes any areas that have been mowed or burned [or otherwise altered] such that the marsh plant species have been temporarily eliminated but will regenerate naturally if undisturbed by human activity.

Injunctive Relief

CAMA provides for injunctive relief for violations of any rule adopted under the authority granted in CAMA, as follows:

Upon violation of any of the provisions of this Article *or of any rule or order adopted under the authority of this Article* the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission. Neither the

> institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

N.C. Gen. Stat. § 113A-126(a)(emphasis added). Thus, if the CRC were to adopt a rule prohibiting the mowing and burning of wetlands, the Secretary could seek a court order to stop the violation and require restoration.

In addition to injunctive relief, CAMA provides that "[a]ny person who shall be adjudged to have knowingly or willfully violated any provision of this Article, or any rule or order adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor." N.C.G.S. § 113A-126(c). Thus, if the CRC were to adopt a rule prohibiting the mowing and burning of wetlands, persons who knowingly and willfully mowed or burned coastal wetlands could be found guilty of a Class 2 misdemeanor.

De Minimus Threshold

You also inquired whether there is a *de minimis* threshold for the regulation of the clearing, mowing, or burning of coastal wetlands, e.g., do all levels of these actions negatively impact the AEC, or is there a *de minimis* level that may be allowed? While CAMA does not expressly require a *de minimis* threshold, the CRC has ample authority to establish one by rule, or to create a general permit for certain categories of activities. N.C.G.S. §§113A-107, 113A-118.1, and 113A-124(b)(8); *Adams v. Dept. of N.E.R.*, 295 N.C. at 694, 249 S.E.2d at 409.

We hope this response is helpful. Please advise if you have further questions.

Sincerely,

Jill B. Hickey
Special Deputy Attorney General