NC COASTAL RESOURCES COMMISSION
January 13, 2010
Hilton North Raleigh
Raleigh, NC

The State Government Ethics Act (Chapter 138A of the General Statutes) mandates that the Chair (1) remind members of their duty to avoid conflicts of interest or appearances of conflict, and (2) inquire as to whether any member knows of any known conflict of interest or appearance of conflict with respect to matters before the Commission. If any member knows of a conflict of interest or appearance of conflict, please so state when requested by the Chairman.

Wednesday, January 13th

9:00 EXECUTIVE COMMITTEE MEETING — Bob Emory, Chair

10:00 COMMISSION CALL TO ORDER (Salon E,F,G) — Bob Emory, Chair
- Roll Call
- Approval of October 30, 2009 Meeting Minutes
- Executive Secretary's Report — Jim Gregson
- Chairman's Comments — Bob Emory

10:30 STATIC VEGETATION EXCEPTION REQUESTS
- Town of Ocean Isle Beach *(CRC-10-01)* — Jeff Warren, Christine Goebel

PRESENTATIONS
- CRC Study of the Use of Terminal Groins - Update — Johnny Martin, Paul Tschirky, Moffatt & Nichol

12:00 PUBLIC INPUT AND COMMENT

12:15 LUNCH

1:30 PRESENTATIONS
- Draft Wind Energy Facility Amendments to 15A NCAC 7M .0400 Coastal Energy Policies; 15A NCAC 7H .0208 Use Standards and 15A NCAC 7H .0106 General Definitions *(CRC-10-02)* — Mike Lopazanski, Scott Geis
- Local Implementation and Enforcement Programs — Ed Brooks
- Stable and Natural Vegetation *(CRC-10-04)* — Ted Tyndall
- Governor's South Atlantic Alliance — Jim Gregson
- Contested Cases – Procedures & CRC Role/Responsibilities — Jennie Hauser

4:30 PUBLIC HEARING — Bob Emory, Chair
- 15A NCAC 7H .2300 General Permit for Replacement of Existing Bridges and Culverts
- CRC Study of the Feasibility and Advisability of the Use of Terminal Groins

ACTION ITEMS — Bob Emory, Chair

Land Use Plan Certifications and Amendments — John Thayer
- Onslow County LUP Certification *(CRC-10-06)*
- Beaufort County LUP Certification *(CRC-10-07)*
- Carteret County LUP Update

Rule Adoptions — Tancred Miller
- 15A NCAC 7H .0208 General and Specific Use Standards
- 15A NCAC 7H .0309 Use Standards for Ocean Hazard Areas: Exceptions – Structure Limitations; Pier Houses; and Electrical Transmission Lines from Energy Producing Facilities
- 15A NCAC 7H .1704 General Conditions - Temporary Erosion Control Structures
- 15A NCAC 7H .1705 Specific Conditions – Temporary Erosion Control Structures

OLD/NEW BUSINESS Bob Emory, Chair

- Future Meetings and Agenda Items

6:00 ADJOURN – NC Sea Level Rise Science Forum January 14-15, 2010

Next Meeting
February 17, 2010
New Hanover County Government Complex
Wilmington, NC

NC COASTAL RESOURCES COMMISSION (CRC)
October 29 - 30, 2009
Sheraton
Atlantic Beach, NC

Present CRC Members
Bob Emory, Chairman
Joan Weld, Vice-Chair

James Leutze
Melvin Shepard
Renee Cahoon
Charles Elam (present at 10:10 10/29, absent 10/30)
Bill Peele (absent 10/30)
Veronica Carter (present at 10:20 10/29)
Chuck Bissette (absent 10/30)
Jerry Old
Ed Mitchell (absent 10/30)
Bob Wilson
Lee Wynns
David Webster

Present CRAC Members
Dara Royal, Chair
Penny Tysinger, Vice-Chair

Bob Shupe
Charles Jones
Tim Tabak
Ray Sturza
Dave Weaver
Christine Mele
Bill Morrison
Wayne Howell
Webb Fuller
Joe Lassiter
Anne Deaton
Phil Harris
J. Michael Moore
Frank Rush
Harry Simmons
Rhett White
Bert Banks
Judy Hills
Tim Ware (Eddy Davis Alternate)
Tracy Skrabal
Spencer Rogers
Lee Padrick
Cyndi Karoly

Present Attorney General's Office Members
Jennie Hauser
Christine Goebel
Jill Weese

CALL TO ORDER/ROLL CALL
Chairman Emory called the meeting to order and reminded Commissioners of the need to state any conflicts due to Executive Order Number One and also the State Government Ethics Act.

Angela Willis called the roll. Chairman Emory stated that he is a friend of attorney Clark Wright, attorney representing the Petitioner in the contested case hearing, however it will not affect his ability to participate in the case. No other conflicts or appearance of conflict were stated by Commissioners at this time. Based upon this roll call, Chairman Emory declared a quorum.

MINUTES
Melvin Shepard made a motion to approve the minutes of the August 27, 2009 Coastal Resources Commission meeting. Bill Peele seconded the motion. The motion passed

unanimously (Weld, Leutze, Bissette, Cahoon, Webster, Old, Peele, Shepard, Mitchell, Wilson, Wynns) (Elam, Carter absent for vote).

EXECUTIVE SECRETARY'S REPORT

DCM Director Jim Gregson gave the following report.

DCM/DWQ Agreement

The Division of Coastal Management has entered into a memorandum of agreement with the Division of Water Quality that will help streamline environmental permitting in the Neuse and Tar-Pamlico River basins. This agreement grants DCM the authority, on behalf of DWQ, to review and approve requests for Buffer Authorization Certificates for development projects that also require a Coastal Area Management Act general or minor permit.

Specifically, this agreement applies to development activities that are consistent with CAMA general permits for bulkheads; riprap; docks and piers; boat ramps; groins; maintenance excavation activities; installation of aerial and subaqueous utility lines; emergency CAMA and/or dredge and fill projects; temporary structures; replacement of existing bridges and culverts; riprap revetments; the emergency storm permit; and riprap sills.

This agreement also applies to all minor development activity that is exempt under the DWQ riparian buffer rules Table of Uses. The agreement does not apply to projects that require an individual 401 Water Quality Certification or a non-404 wetlands and waters permit.
DWQ staff will continue to track and report authorizations and will offer technical assistance to DCM permitting staff when requested.

South Atlantic Alliance

At the Coastal States Organization's meeting last week, representatives of four Southeastern states announced an agreement to work together to better manage and protect ocean and coastal resources, ensure regional economic sustainability and respond to disasters such as hurricanes. The agreement establishes an alliance among North Carolina, South Carolina, Florida and Georgia. The Governor's South Atlantic Alliance will leverage resources from each state to protect and maintain healthy coastal ecosystems, keep waterfronts working, enhance clean ocean and coastal waters and help make communities more resilient after they've been struck by natural disasters. The alliance was signed by North Carolina Gov. Bev Perdue, South Carolina Gov. Mark Sanford, Georgia Gov. Sonny Perdue and Florida Gov. Charlie Crist. All of the Governors welcomed the agreement as an example of the ability to discuss and act regionally on common issues paramount to the South's economic vitality and quality of life. CRC Commissioner Jim Leutze, DENR Secretary Dee Freeman, and former DENR Secretary Bill Ross attended this meeting.

Email Retention Policies

The Department has some new email retention policies. State employees are required to retain all of their e-mails for 24 hours so they can be backed up on the State's exchange servers. I would ask that if you receive an email that is part of conducting CRC business, please forward to a DCM staff person so they can be maintained. CRC members' email addresses are not currently listed on DCM's web site.

Clean Marina Position

DCM is in the process of creating a temporary Clean Marina position using some coastal non-point source funds, provided through the NOAA Section 310 Grant. We are working with DWQ to use this position to provide education on some specific water quality issues related to pressure

washing and hull-scraping at coastal marinas. This position will also implement the N.C. Clean Marina program and the Marina Pumpout Grant program that is funded through the U.S. Fish and Wildlife Service. Mike Lopazanksi currently operates these two programs for DCM. Currently we also use the Section 310 Grant to fund a water quality planner position with NC Sea Grant.

CAMA Lines

The Division of Coastal Management is pleased to introduce a new blog site called CAMA Lines that is located at camalines.wordpress.com. A link to the blog is also available from the front page of the DCM web site. We hope the blog will be a useful way to keep you up to date on issues regarding the Division and the N.C. Coastal Reserve Program. It will be updated frequently, so please check it often.

BIMP Update

The engineering firm of Moffatt and Nichol has delivered their final BIMP report to DCM and the Division of Water Resources. It is currently being reviewed by DENR and will be made available for public comment in the near future.

Masonboro Island

At the August CRC meeting I gave an update on the situation that was happening on July 4th at the Masonboro Island component of the NC National Estuarine Research Reserve located in New Hanover County. In that report I stated that the Division was considering many options for addressing this issue and that we intended to incorporate public input into our decision making process. A public meeting to discuss options for addressing usage of Masonboro Island was held Oct. 8, at the UNCW Center for Marine Science. The meeting was very well attended by local residents, who overwhelmingly asked DCM not to punish them for the actions of a few people who abuse the island on summer holiday weekends, particularly July 4th. Southern sites Reserve manager Hope Sutton began the meeting with a presentation about the Reserve; the Reserve's goals for education, stewardship and research; and an overview of Reserve rules. Rebecca Ellin then moderated a public input session, which included several suggestions about how to manage holiday crowds, including suggestions for a permit system, increased law enforcement presence, and educating local university students about the Reserve. We are currently considering instituting a ban on alcohol on all Reserve properties, which you will be hearing about from Rebecca Ellin later this morning. We have also had some good discussions with the Division of Marine Fisheries, the Wildlife Resources Commission, the Division of Parks and Recreation, the U.S. Coast Guard and local law enforcement agencies about increasing law enforcement presence at the Reserve on holiday weekends.

Reserves Management Plan

The Division and the N.C. Coastal Reserve Program have adopted a revised management plan that outlines the administrative structure; the education, stewardship, and research goals of the reserve; plans for future land acquisition and facility development to support reserve operations; and future staffing and facilities needs. The plan identifies coastal management issues that affect the Reserves sites, and that the Reserve will work to address through its program, including coastal population increase, altered land use, stormwater runoff, invasive species, tropical and coastal storm impacts and sea level rise. To view a copy of the plan, visit the Reserve's website at nccoastalreserve.net.

CHAIRMAN'S COMMENTS

Chairman Emory stated that we have had a lot of attention on terminal groins since the last time we met. This topic is on the agenda today. Before we are finished tomorrow we will talk about how we might get from here to April 1, which is when we will have to make our report to the Legislature. Both the wind turbine and coastal reserve presentations will need to be looked at by the Commission. We have what could potentially be a very full agenda today and we need to remember that have a lot to cover.

PRESENTATIONS

CRC Study of the Use of Terminal Groins – Update
Paul Tschirky

Jim Gregson stated House Bill 709 is why the Commission is doing this study. This is a two part bill. The first part was to impose a moratorium on certain actions of the CRC and stated that the Commission shall not order the removal of temporary erosion structures in a community that was actively seeking a beach nourishment project or an inlet relocation project. It had some exceptions on some actions that the Commission could continue to do relative to sandbags. It also directed the Commission to study the feasibility and advisability of the use of a terminal groin as an erosion control device. In section two of the bill it also stated that the CRC would do this study in consultation with the Division of Coastal Management, the Division of Land Resources, and the Coastal Resources Advisory Commission which is actually the Coastal Resources Advisory Council. In this consultation, the CRC shall study the feasibility and advisability of the use of a terminal groin at the end of littoral cell or at the side of an inlet to limit or control sediment passage into the channel. The bill goes on to define what a littoral cell is and this definition is taken directly from the Corps of Engineers manual. Chairman Emory has forwarded a letter sent by Senator Basnight to address this issue and whether terminal groins should only be studied at inlets or in other locations at the end of a littoral cell. When we go over the sites that were selected by the Science Panel, it will become clear on how this issue is being addressed in the study. The bill required the Commission to consider six things in conducting the study. The first of which was to gather data regarding the effectiveness of terminal groins constructed in North Carolina and other states in controlling erosion. The second was to gather scientific data regarding impact on natural wildlife habitats. The third was the information regarding the engineering techniques used to construct terminal groins including any technological advances that are available that would minimize the impacts on adjacent shorelines. The fourth and fifth parts of the bill are the economic part of the study. The fourth part is to gather information regarding the current and projected economic impact to the state caused by shifting inlets. The fifth part is information regarding public and private money that would be used to pay for terminal groin construction and the cost of the terminal groins. The last part is whether the potential use of terminal groins should be limited to dredged inlet channels that are used for navigation. House Bill 709 also requires the Commission to hold at least three public hearings where interested parties and members of the public would have the opportunity to give their views on the study and the use of the terminal groin as an erosion control device. The Commission is required no later than April 1, 2010 to report their findings and recommendations to the Environmental Review Commission and the General Assembly. The big question since the bill came out has been what will the role of the CRC and the CRAC be during the study. It was decided at the last CRC meeting that the science panel should have a big part in the study. The CRC and the CRAC will provide guidance to the contractor during the study and would be ultimately responsible for developing the policy conclusions and recommendations that would be reported to the ERC and General Assembly. The science panel

was at the original scoping meeting that was held in New Bern. They will be used as peer review of all the interim documents as well as the draft and final reports prior to recommendations being considered by the Commission. Moffatt and Nichol has committed to providing memos describing methodologies that they are using for the study. We are currently working on the best way to schedule meetings with the science panel; however the problem is that this is a short study and we are well into it. We are trying to work in science panel meetings as well as the existing CRC meetings and trying to get the reports and recommendations back to the contractor.

Paul Tschirky of Moffatt and Nichol stated the study was divided into tasks. The first was the coastal engineering analysis and the effectiveness of terminal groins. Part of the first task was selecting sites which we will use in the study to gather information. The second part of this is looking at the environmental impact of these structures at those sites. The third task is to look at construction techniques. The project schedule is quite tight. We have seven months. There are three public hearings required and there are four scheduled.

The first proposal was to try to choose the best eight possible sites for coastal analysis. On September 29 we met with the science panel in Raleigh and reduced the list of sites to five. The five sites were Oregon Inlet and Fort Macon in North Carolina and Amelia Island, Captiva Island and John's Pass in Florida. You will see that there is diversity of characteristics at these sites and the type of structure at each site. It is hopeful that this diversity of coastal sites could avoid bias in the study. Oregon Inlet has a wrap around shape and there is a fairly rich dataset on Oregon Inlet as there has been monitoring done, it is in North Carolina and there is extensive information about its construction. A historic photo from 1961 was shown of Fort Macon and the main terminal groin was pointed out. South Amelia Island has a terminal groin structure at the south end of Amelia Island. The designers call this a porous, leaky structure and the objective was to not block all sand but to allow some to flow through. It is a fairly recently constructed structure so there is data available. Captiva Island's terminal structure is a rock structure with a different size with an inlet coming in. John's Pass is unique because it has structures on both sides, but the primary purpose is retention of sediment. Some of the important considerations were that our data collection and assessments are going to be specific to these five sites. We will assess these projects and we will discuss the applicability to North Carolina, but our part of the study will not specifically address North Carolina inlets. The study will focus on what has been learned from these existing installations with respect to geology of the sediment transport, the hydrodynamics, the natural resources and how effective they have been and what kind of impact they have had. Some modeling will be done but it will simply be schematic desktop analysis. The next phase with the science panel will be to address what approaches we will take. We will look at trends and relative behaviors of these kinds of structures and not absolute design values. The contractor's part of the study will be to do an assessment of the terminal groins and look at the technical data and then the CRC will take over the policy decision side. The seventh part of the study is the public input. The first public hearing will be today, the second is in Raleigh on January 13, the third is in Wilmington in February and the last is in Sunset Beach in March. There is a website setup for the project at www.nccoastalmanagement.net and will contain the minutes of meetings, presentations, the locations of the five sites and public comments received. Comments should be sent to Jim Gregson in his role as Executive Secretary to the CRC at jim.gregson@ncdenr.gov. The draft report from the contractor is due on February 1, 2010. The final report is due on March 1, 2010. We are finalizing the data collection and have put together a bibliography of what we found on these five sites that we will send out to the science panel to solicit their feedback. We will develop methodology statements for analysis and are trying to set up a science panel meeting for November to discuss data and methodology review and discussion. The next CRC meeting and public hearing will be in January.

Renee Cahoon requested that another hearing be scheduled in the northeast. After discussion it was determined that another public hearing should be scheduled in the northern section of the coast. Bill Peele stated that he would be willing to set some time aside to be present at a hearing in December in Nags Head.

Town of River Bend Implementation & Enforcement Plan (CRC 09-31)
Ed Brooks

Ed Brooks stated the Town of River Bend has submitted an implementation and enforcement plan for the minor permit program. Within CAMA is a cooperative effort between the state and local governments in the management of our coastal resources. The minor permit program is a big part of that. The law and the CRC's Administrative rules 15A NCAC 07I set forth a process by which a local government can be delegated the authority to issue minor permits within their jurisdiction. The reason you don't see these very often is because most of the local governments that have minor permit programs had this done back in 1977-1978. Occasionally as new towns become incorporated along our coast they show interest in becoming a part of our minor permit family. The Town of River Bend was incorporated in 1980 and at your last meeting delivered a letter of intent that they were interested in moving forward in trying to get a delegation of authority to issue minor permits within their jurisdiction. The Administrative rules set forth the process a local government must go through to devise a plan, a public hearing process, and the local adoption. The plan is then brought before the Commission for its approval. Once the plan is approved the local government must go back through the public hearing process to adopt the plan into ordinance to give it authority. The Town of River Bend would be the forty-second local government in the twenty coastal counties to adopt a local program and become a permitting agency for minor permits.

Jim Leutze made a motion to approve the implementation and enforcement plan submitted by the Town of River Bend and delegate authority to the Town of River Bend to administer the CAMA minor development permit program. Ed Mitchell seconded the motion. The motion passed unanimously (Cahoon, Old, Webster, Mitchell, Wynns, Peele, Weld, Shepard, Carter, Bissette, Wilson, Leutze, Elam).

Discussion of Amendments of 15A NCAC 7O .0202
Reserve Use Requirements (CRC 09-33)
Rebecca Ellin

Rebecca Ellin stated she would like to remind the Commission about the purpose of the Reserve since we are not before you all that often. We are mandated to protect representative coastal habitats and we do this through the ten sites that we have in the Reserve program. Currently we protect about 41,000 acres of salt marsh, maritime forest, sand and mud flats, submerged aquatic vegetation, and dune and beach system. We are required to maintain the essential character of these sites to conduct research and education as well as allow for compatible, traditional, recreational uses. CAMA stipulates that the Reserve was established by the Department of Environment and Natural Resources and is administered by the Department. The Department shall consult with and seek the ongoing advice of the Coastal Resources Commission. The Department, by rule, may define the areas to be included in this system and set standards for its use. The rules in our Administrative code define the purposes of the Reserve, describe the different components that are within the Reserve, describe the Division's management

responsibilities and the Reserve use requirements. The Reserve rules are Department rules so we will be seeking your input and guidance with respect to changes but you will not be required to take action on them.

With the increase in coastal population and the increased interest in enjoying North Carolina's beautiful coast, the rules and policies for managing and protecting the Reserve have not kept pace with the level of use that the Reserve sites are currently experiencing. As a result the Reserve sites are experiencing types of uses at levels that are not consistent with the Reserve's purpose. The Division must maintain essential, natural character of its ten sites for the primary purpose of research, education and compatible traditional uses. In doing so, the Division does seek to promote a clean, safe and family oriented atmosphere. There has been recent evidence of alcohol use and misuse at the sites and that has caused the Division to consider an amendment to its Reserve use requirements that would prohibit possession and consumption of alcoholic beverages and controlled substances while on the Reserve. There are a variety of reasons for considering such a rule. Alcohol use and recreation based on the consumption of alcohol does not support the mission or purpose of the Reserve and these do not constitute compatible traditional uses. Many of the Reserve sites are remote and difficult to access easily. Prohibiting alcohol will ensure the safety of visitors as it may be difficult for help to arrive quickly should a medical problem or altercation arise. Prohibiting alcohol on the Reserve will help limit the liability of the state of North Carolina should an incident arise. Small and large groups gather at Reserve sites and consume alcohol. State and volunteers often have to clean up significant quantities of alcohol related trash, such as bottles and cans, as a result of these gatherings. Consumption of alcohol may also contribute to the vandalism that has occurred recently at Reserve sites. We have a couple of sites where we have experienced spray painting of trees and defacement of the boardwalk. Significant amounts of staff and volunteer time are dedicated to addressing alcohol related issues from trash clean up and filing vandalism reports to developing strategies and programs to address large group gatherings such as what is going on down at Masonboro. Prohibiting alcohol will align the Reserve with the rules of other publically held lands such as N.C. State Parks and N.C. State Forests both of which do not currently allow alcohol on those properties. It will also align the Reserve with many local municipalities that provide public access. Such a rule will clarify the Division's position to the public and to law enforcement regarding alcohol and controlled substances providing a tool for law enforcement in case problems arise. The rule that we are proposing will apply to all ten sites of the Reserve. This came up as an option when we were discussing strategies for dealing with the Masonboro Island issue, but upon examination of what was going on at our other nine sites and the desire for consistency, we did make the determination that it would be appropriate to have this rule apply to all ten of the sites to provide the consistency in how the sites are managed and to resolve issues that we are experiencing at most if not all of the sites. I do want to say that it can be confusing if we have rules that are site specific from the public's and partner's perspective as well as law enforcement. The proposed rule language comprises two parts. The first is prohibiting possession or consumption of any alcoholic beverage or controlled substance within the Reserve. The second part of the rule states that persons shall not be or become intoxicated while within the Reserve. This is an effort to make sure that we don't have people coming onto the Reserve already in an intoxicated state and then creating challenges for law enforcement or vandalizing property. I want to state that we did conduct research with respect to the language of these rules and the language presented here is similar to what is included in State Parks and State Forest rules. As many of you know the Reserve does not possess law enforcement power and we rely on state and local law enforcement entities such as the Wildlife Resources Commission, the Marine Patrol, county sheriff's offices and town police departments. It is our intent that the enforcement of the proposed rule will be accomplished by state and local law enforcement officers. Enforcement will not change dramatically because of this rule except on an as needed

basis. Law enforcement has asked for more specific rules to help them when patrolling Reserve sites and the proposed rule will accomplish this for alcohol and controlled substances. I do want to be upfront and recognize that there have been some questions raised about the ability to enforce our rules. We have requested some assistance from the Attorney General's office to provide us some clear guidance on the authority for state and local law enforcement to enforce Administrative rules such as these. We have not received this guidance back so we recognize that we need to have this input before we move forward. We also are looking to get some clarification from the Attorney General's office on how our rules apply to waters within the Reserve boundaries.

The process that we go through when making a change to our rules is different since they are Departmental rules. Per our Administrative Code we have local advisory committees. On Tuesday we wrapped up input of our local advisory committees. The prohibition of alcohol was presented as an option at the Masonboro public meeting. The intent of this meeting was not to review this proposed rule change specifically but it was an opportunity to hear from the public about their thoughts on how we should manage crowds on holiday weekends at Masonboro. Obviously today, as part of our guidelines for making rule changes, we are here to seek input from the Commission. We will take all of this input, talk with the Department and make a recommendation as to whether we want to proceed with the rule change or not. If we do decide to proceed with rulemaking it is our intent that we would like to have something in place by the visitor season of 2010. We have received a lot of input from the local advisory committees. Currently there are seven local advisory committees. We do not have one for Buckridge, Permuda or Bird Island. The purpose of the local advisory committee is to advise Reserve staff and give us feedback and recommendations on the site activities and management. The composition of the committees varies based upon the needs and characteristics of the site. Average membership is about eight to ten individuals. The collective input received from the advisory committees indicated from the 48 responses received that 29 are in favor of this proposed rule change, 15 are in favor of the rule changes with some changes to the language, three are opposed and one person was not able to make a determination. There were some concerns about the proposed language. There are several instances within the Reserve where people actually have to navigate through Reserve property to access their personal property. There was concern that landowners could not access their own property with alcohol in their car. There are two options for the language changes. The first would be complete removal of the possession of alcohol from the language and only speak to the consumption of alcohol. Seven of the 15 advisory members were in favor of this change. The second language change that was suggested was adding a clarification to the proposed language keeping possession in the rule as prohibited, but making an exception for those who have to traverse Reserve property to get to private property.

We received comments concerned about the change indicating that the masses should not punished by the actions of a few. There was considerable conversation about utilizing the existing state laws that are on the books to address the problems that we have. These laws include underage drinking, drunk and disorderly conduct, and littering. There were concerns about the ability to enforce the rules. While it is our intent that law enforcement presence would not change significantly, we do not have control over law enforcement on our properties because it is managed through partners. It is the opinion of the staff that this proposed rule will proactively address the misuse at the Reserve sites by providing a tool for law enforcement and will preserve public access. This is especially important as the coastal populations continue to increase. We do not have the rules and policies in place that we need to protect the Reserve. It is our intent to conduct a close examination of the rules and policies that we have in place. It is important for us to consider that all proposed actions and changes need to be made under the

consideration of the resources that the Reserves have. We do not have law enforcement authority and we have very limited education and site management staff. We also have very limited program implementation funds. Any changes that are made with respect to the program are made in light of that context. We want to make sure it will actually support and enhance our ability to move forward.

Charles Elam stated there are limited resources and it may be better to turn the land over to an agency that has management resources. Jim Leutze stated that the problems he is familiar with on Masonboro Island are pretty concentrated to the holidays, so would it be easier if we made these restrictions specific to these times. He further stated that he did not see a problem with people drinking a beer at Masonboro Island and taking their trash home with them and it doesn't hurt the Island. The newspaper today said that dogs were not going to be allowed on Masonboro Island. Rebecca Ellin stated when we looked at this rule it was from the context of what was happening at Masonboro, but when we looked at the activities going on at all the other sites we saw that this was a rule that would protect all of them. The issues at the other sites have been outside of the holiday weekends. She further stated that currently in the management plan, the Reserve has a policy that states that pets must be under control and it defers to the local county or municipal ordinance. In New Hanover County there is an ordinance that states that dogs must be on leash. Jim Leutze stated that the reason that the public sets these sites apart is so that they may be preserved in their natural setting, but also so there can be dual use. Bill Peele stated that if a person shall not be or become intoxicated while at the Reserve is it enough of a law enforcement issue to deal with possession and consumption. We can vote for the need for responsible citizen action first and then if it is still a problem we can look at possession and consumption. Bob Wilson stated possession of something, whether it is a firearm, a knife or alcohol what matters is the use. It is far reaching for any state agency to say that if I have a six pack of beer in my boat and I am going to one of these facilities by vessel, then I am in technical violation of some rule by possessing a six pack of beer that I may consume later in the day. I think a rule needs to make sense and you should try to focus on the abuse of alcohol. If you are talking about the behavior of people that might be intoxicated that is one thing, but to try to control possession is far overreaching for any state agency. It is unenforceable. Even if you could enforce it, it smacks to me to be an abusive process. Chuck Bissette suggested striking 6(a) from the proposed rule language. Veronica Carter asked how rules are enforced now. Ms. Ellin stated it is very difficult to enforce rules currently. Veronica Carter asked if it would be better to have a law since law enforcement can enforce a law, but a rule may not be enforceable. Jim Gregson stated that state parks and state forests currently prohibit state possession and consumption. Vice-Chair Weld stated that law enforcement is already stretched so thin that maybe Marine Fisheries could come in and help. She asked what kind of input the Reserves got from the meeting about Masonboro. Ms. Ellin stated the public meeting was in direct response to Fourth of July. Between twenty and twenty-five public comments were received and the general sentiment was do not punish us for the actions of a few. Lee Wynns suggested that it might be time to say that this was a knee-jerk reaction. While there is a problem on a very small scale you cannot penalize the majority on the actions of a few. Maybe there is another way around this without this rule change. I respect law enforcement people and they get caught in between a rock and a hard place when they are faced with enforcing rules that they might not particularly like to enforce. They have enough to do and they don't need to go here. Chairman Emory asked if there would be a consensus of the Commission that part (b) of the rule amendment is reasonable because I hear lots of concern about (a). Jim Leutze stated this is too difficult to enforce and the more practical way to accomplish it is to close Masonboro Island on the Fourth of July. Further instead of restricting camping on these islands you could issue permits for camping. Jim Leutze stated that he does not want to infringe on the public's ability to enjoy these sites and the next time we want to put something in a preserve, the public will vote

against it. Bob Wilson stated this sounds like we have been informed rather than consulted, but I don't know if it isn't appropriate for the CRC to have a recommendation to the Department that (a) in the proposed rule change be eliminated or has this just been a discussion and there is not any action the CRC can take. Chairman Emory stated that the consensus of the CRC is that we are comfortable with (b) but not with (a) in the proposed rule amendment.

PUBLIC COMMENT

Charles Baldwin, representing the Village of Bald Head Island, stated he would like to report a favorable development. After many years of work, Bald Head Island's sand placement is now underway. Sand pumping will start next week. I want to thank Jim Gregson, Doug Huggett, Heather Coats and all the DCM staff that have worked with the island so closely over these years to get this done and they will be doing a lot more work as the project develops.

Richard Johnson, representing Masonboro.org, stated the focus of Masonboro.org is to focus on traditional uses. In one month we now have over 200 members. We are concerned that the public's right of use is getting watered down with every management plan revision. I think one reason this is happening is the broad definition of the word compatible. Those who have suggested more restrictive rule changes or amendments are looking at opposing their unique perspective in suggesting changes using broad studies that took place in Florida and are being extrapolated with specific conclusions without doing any local research or impact studies. They are also using the negative publicity and the ugly pictures that result from the annual Fourth of July party to push for changes. While this party has a bad reputation it takes place on a very small percentage of the island and volunteers quickly clean up the mess. Within a few days you would not even know the party took place. One recent change is requiring dogs to be on a leash. This happened without proper review. One reason I was told is that it was not a traditional use, but I have 200 people that say that it is. There haven't been any real impact studies of the dogs versus foxes or wildlife. There is some question as to whether the state or the county would supersede their role and it wasn't the case in years previous and hasn't been enforced and just recently it has. That's a flash point for a lot of people that live locally in Wilmington because Masonboro makes one third of our coastline. It is just a real concern that we are losing control. The last thing I would like to say is I have tried to understand how rules get passed and I am not sure the Department could impose a rule if you did decide to vote on something. If you don't then I guess they can do what they want, but there is a reason they have to go through this body. Thank you.

PRESENTATIONS

Ocean Policy/Beach Summit Recommendation Implementation
Joan Weld/Scott Geis

Joan Weld stated you may remember at the August meeting Scott Geis provided a list of eleven priorities from the CRC subcommittee. These priorities are related to the implementation of the recommendations of the Ocean Policy Steering Committee and the 2009 Beach Summit. The subcommittee has approved rule language that will be provided to the CRC in more detail during Staff's presentations later in the meeting. Changes to the rule language are based on various reports and have been circulated through state agencies, the General Assembly, and the EMC. The subcommittee has approved the rule language revisions and is recommending that this is the right time for the CRC to consider wind turbines to be water dependent structures.

Scott Geis stated that in going forth with wind energy recommendations, the one aspect we want you to be aware of is that we are not coming forward and asking for approval of the rule

language changes to go to public hearing. This is just the beginning steps to circulate ideas through the Commission as well as other state agencies.

VARIANCE REQUEST
Town of Caswell Beach CRC-VR 09-04
Christine Goebel

Christine Goebel of the Attorney General's Office represented Staff. Ms. Goebel stated Bill Raney, legal counsel for the Town of Caswell Beach, would represent Petitioners. This is a variance of the oceanfront setback rules for a proposed sewer line. Petitioner plans to develop a sewer system that will connect to the Town of Oak Island's new sewer system and will ultimately treat wastewater from both town at the treatment plant on the mainland owned by Brunswick County and the Town of Oak Island. Petitioner was issued CAMA Major Development Permit 71-09 on May 29, 2009, and seeks a variance from permit condition number three which requires compliance with the ocean erosion setbacks. Ms. Goebel discussed the stipulated facts, noting the fact that at the time the permit was issued the new CRC setback rules were not in place. Ms. Goebel stated that Staff and Petitioners agree on all four statutory criteria.

Bill Raney of Wessell & Raney, LLP represented the Town of Caswell Beach (petitioners). Mr. Raney stated Ms. Goebel has addressed the facts and the Town does not disagree with the Staff as far as the recommendations. The only thing to add is that this is a project that is desirable and necessary. The clean water management trust fund is very competitive and they only give grants to projects that meet the requirements of the clean water management trust fund funding standards and require a significant benefit to the environment to get a grant.

Melvin Shepard made a motion that strict application of the applicable development rules, standards, or orders issued by the Commission would cause the Petitioner unnecessary hardships. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Old, Webster, Mitchell, Wynns, Peele, Weld, Shepard, Carter, Bissette, Leutze, Elam) (Wilson absent for vote).

Melvin Shepard made a motion that hardships result from conditions peculiar to the petitioner's property. Veronica Carter seconded the motion. The motion passed unanimously (Cahoon, Old, Webster, Mitchell, Wynns, Peele, Weld, Shepard, Carter, Bissette, Leutze, Elam) (Wilson absent for vote).

Veronica Carter made a motion that hardships do not result from actions taken by the Petitioner. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Old, Webster, Mitchell, Wynns, Peele, Weld, Shepard, Carter, Bissette, Leutze, Elam) (Wilson absent for vote).

David Webster made a motion that the variance request will be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; will secure the public safety and welfare; and preserve substantial justice. Jerry Old seconded the motion. The motion passed unanimously (Cahoon, Old, Webster, Mitchell, Wynns, Peele, Weld, Shepard, Carter, Bissette, Leutze, Elam) (Wilson absent for vote).

This variance was granted.

CONTESTED CASE

Taylor et. al. v. DCM and TP Inc. (08 EHR 1765)
Jennie Hauser gave an overview of the Contested Case procedures.

Jennie Hauser, CRC counsel, stated the CRC will exercise their quasi-judicial authority to make a decision. You have to ask yourself do you have a conflict with any of the parties before the Commission, have you received any ex parte contacts from members of the public or the parties themselves that would bias your understanding. You are required to make your decision on the record you have received. There are many exhibits you will receive today, but they are exhibits that the parties are going to emphasize to you in their oral arguments. This case arose as a third party petition for a contested case. It challenges the issue of three CAMA minor permits. The petition was granted by the former Chairman of the CRC as to particular issues. In presenting the contested case to the ALJ, the Petitioner has the burden of proof and the burden was to prove that the permits were issued contrary to law. The ALJ determined that based on the evidence presented in the hearing, the Petitioner had failed to meet the burden of proof. Ms. Hauser reminded the CRC that the Administrative Procedures Act requires you to adopt the ALJ's findings of fact unless you can determine that his findings are clearly contrary to the preponderance of the evidence in the record. You must give due regard to the ALJ's evaluation of the credibility of the witnesses. If you decide to modify the ALJ's decision you must set forth reasons for doing so and you must set out the evidence in the record that supports your changes. If you decide to adopt the ALJ's decision then the Petitioner has filed with you his exceptions to that decision and he will have the ability to go to Superior Court to appeal the decision. Oral arguments will be presented by the parties, then you will have the opportunity to look at all of the oversized exhibits that are on the walls as you have not seen these in their exact form, and then you will have the opportunity to present questions to counsel for the parties and to do deliberation. There can be no questions of persons other than the attorneys representing the parties because we have to make sure that we do not take any new evidence in this proceeding as you are limited to the evidence that has already been gathered.

Clark Wright of Davis Hartman Wright represented Petitioners. Jill Weese of the Attorney General's Office represented the Respondent. David Pokela of Nexsen/Pruet represented the Intervenor-Respondent. Clark Wright presented Petitioner's exceptions, argument, and proposed decision to the ALJ's decision. Jill Weese presented Respondent's arguments in support of the ALJ's decision. David Pokela presented Intervenor-Respondents arguments in support of the ALJ's decision.

Following the break to examine oversize exhibits, Ms. Hauser stated that during the break it was brought to her attention that Mr. Giles is an employee of the Coastal Federation and serves as the coastkeeper for the southeastern portion of our coast. There are two member of the CRC that have Board positions with the Coastal Federation. Veronica Carter stated that as a member of the CRC and a member of the Board of Directors for the NC Coastal Federation she will recuse herself from any further discussion in this case. Melvin Shepard stated that as President of the NC Coastal Federation he will recuse himself from this case. Ms. Hauser stated that there has not been any discussion or deliberation on this matter up to this point and there is not a problem for the Commission to continue in its decision making with recusals occurring at this point. Jim Leutze stated he has missed everything from the beginning of the case and will recuse himself.

Bob Wilson stated he has been to this site. Jennie Hauser stated he cannot consider what he saw and limit his deliberations to the official record, oral arguments, and the discussion today. David Pokela asked that BobWilson recuse himself. Jennie Hauser asked Bob Wilson if the site visit would prevent him from having an unbiased ability to make a decision. Bob Wilson stated that

there is nothing that he saw at the site that would in any way change or influence his decision and he will not recuse himself.

After CRC discussion, Jerry Old made a motion to uphold the ALJ's decision. This motion did not receive a second.

Jim Leutze stated that he has a question about his recusal. He further stated he was only absent for 35 minutes and has been present for 2 ½ hours and reviewed the record prior to the meeting. Jennie Hauser stated that Jim Leutze had properly recused himself since he had missed the oral arguments by counsel. Ms. Hauser stated that it was very late in the presentations, in fact it had already gone into the question and answer session, when Jim Leutze joined back with the Commission and it would not be appropriate for him to participate.

David Webster made a motion to overturn the ALJ's decision. David Webster stated the reasons for overturning the decision include that he is troubled by the transition of the definition of naturally occurring stable vegetation being applied in this particular instance to propagated vegetation that was artificially watered and fertilized except during the cold months when photosynthesis and the need for water greatly decreased. David Webster further stated the decision was made in a way that did not interpret the statutes correctly. David Webster stated the property owner of these lots should not push vegetation out beyond scarp lines and bulldozing lines in places that are naturally very unstable. It would be very easy for me to find just one or two places that undermine this entire argument because everything is based on a false premise or a false interpretation of statute. There is also a question of the encroachment on public trust property. Looking at the photographs in the record this was an individual effort on restricting part of the beach. Charles Elam seconded the motion. The motion failed with three votes in favor (Webster, Weld, Elam) and five votes opposed (Cahoon, Old, Mitchell, Wynns, Wilson) (Peele, Bissette absent for vote).

Bob Wilson made a motion to adopt the ALJ's decision in its entirety. Lee Wynns seconded the motion. The motion passed with five votes in favor (Cahoon, Old, Mitchell, Wynns, Wilson) and three opposed (Webster, Weld, Elam) (Peele, Bissette absent for vote).

PUBLIC HEARING

CRC Study of the Feasibility and Advisability of the Use of Terminal Groins

Paul Tschirky stated this study comes from House Bill 709. The Bill specified six items that should be considered in this study. Three public hearings are required during this study. The final report and CRC recommendations are due to the General Assembly and the Environmental Review Commission on April 1, 2010. The contract study team to look at data gathering and information of the feasibility of terminal groins is made up of Moffatt and Nichol. Dial Cordy and Associates will handle the environmental aspects. Dr. Duncan Fitzgerald from Boston University will help with the coastal geology and Dr. Chris Dumas of UNCW will look at the economic aspect. The scope of work consists of eight tasks which follow along with the six items identified in HB709. The study team will look at the information and the CRC and CRAC will provide guidance to the team. The CRC will be responsible for any policy conclusions and recommendations that are supplied to the ERC and General Assembly. The Science Panel has been involved in the scoping and will be involved in the peer review of the documents. The team will provide the Science Panel with memos describing methodologies and analysis for their review and comment. The team met with the Science Panel on September 29 and five sites were

chosen. There are four public hearings currently scheduled. The Division of Coastal Management's website will contain the terminal groin presentations, meeting summaries, and public comments. In his role as Executive Secretary of the CRC, Jim Gregson is the e-mail contact for any comments. The draft report is due at the beginning of February and the final report is due to the CRC on March 1, 2010 so they can give their input to the Legislature by April 1. The team is ending the first phase of data collection mode. The team will finalize the data collection, meet with the Science Panel to discuss the data collection and methodology, and the next CRC meeting and public hearing will be in Raleigh on January 13.

The following public comments were received:

Andy Sayre stated he represents the Village Council of Bald Head Island. In preparation for the nourishment project we had some survey information that we would like to share with the CRC. As you know, in the springtime, we had the dredging of the Wilmington Harbor Channel with the sand dredge going over to Caswell Beach and not on Bald Head Island. From May 2009 to September 2009, actually less than five months we lost 700,000 cubic yards of sand. For the eleventh month period of November 2009 to September 2009 we lost 1,050,000 cubic yards of sand. Our historical loss is 300,000 cubic yards of sand per year. We are in a critical situation. In anticipation of what we projected to be a much less serious situation, knowing that the dredged material would not be put on our beaches in this cycle, the Village recently sold general obligation bonds of $15,000,000.00 to be paid off over six years. This money plus more from general revenue will fund a private sand placement project which has been five years in the planning. This completely privately funded project will deposit about 1,500,000 cubic yards of sand on our beaches. In other words we are barely keeping up and it has become obvious that the present strategy for shoreline stabilization along this federal navigation channel is ineffective and unsustainable. One of our goals is to have the channel moved westward to diminish this impact. However, it is our firm belief that a robust terminal groin or groin field is essential in order for us to manage the unnatural erosion caused by the channel.

Marty Cooke of the Brunswick County Commission stated there are many people who are very passionate on both sides of this issue, but not only do I serve as a county commissioner I have a business at Ocean Isle Beach and have seen through the years the realities of beach renourishment and erosion. I believe that terminal groins from what I have seen based on reports that were presented to this board in June as well as other research that we have seen from other terminal groins up and down the coast that they show to be a stable and establishment of a permanent structure that will allow us to have stability with respect to our beaches. We see this with respect to the evidence that was presented in June regarding the Pea Island Oregon Inlet bridge. We know the state of North Carolina had to find a viable and effective means to be able to stabilize the bridge structure. We also see it at Fort Macon with respect to the stability of that area and to present a way of preserving that historic fort. We see the same thing with respect to the aspects of our area beaches and we feel like it would do a variety of things. The beaches are not just beaches they are towns. The inlets aren't just inlets, they are highways. We have a stability issue whereas we would like to be able to retain the tax base and infrastructure and we would like to see this board look past the mischaracterization that we see in the media as it being presented as jetties. We would like to see the agendas by some individuals and organizations to go past that and look at scientific studies. We would like for this to be brought forth so this board can look at this as a viable means as an option to the situations that we see throughout North Carolina.

Frank Iler, N.C. House of Representatives District 17, stated District 17 includes about ninety percent of Brunswick County including all of the coastal area of Brunswick County. We almost

had an opportunity to vote on a Bill that would authorize this Commission to permit terminal groins this year. The next opportunity will be in May after the report from the CRC. What we have been hearing is there is a need for another tool for the CRC in the toolbox to stabilize inlets, protect turtle habitat, protect property, etc. As you know I represent Brunswick County of which there are citizens and officials who are very interested in this subject. As far as the study we are discussing today, I appreciate the extra hearing being scheduled in Wilmington February 17. I hope there will be at least two things considered. One would be an exercise of smart planning to consider all viable alternatives as opposed to the continued expense of dredging and other temporary solutions. Number two would be that the study be driven by facts, by the science and not by personal or group agendas. As a member of the House of Representatives I am pretty frustrated that the Bill authorizing the tool for the CRC, not the study, to have terminal groins as an option passed the Senate with about eighty percent of the vote. It was held up in a House Committee by agendas based on bad science. It has been endorsed by the Senate President Pro-Tem Marc Basnight; I believe he recently transmitted a letter to the CRC Chairman. He has been in support of it and it has been very bipartisan in nature as far as the House is concerned as well as the Senate. What we are asking for is for the people's representatives in the House to be given a chance to vote on the issue. We would like to debate just like the Senate did and if it passes the House it would be another tool in the toolbox for this group to permit or decide not to permit. If not this then what? If not now then when?

Debbie Smith, Mayor of Ocean Isle Beach, stated there are emotions on both sides of this issue. We are faced with a unique opportunity right now to look at the science and to study situations where there have been terminal groins in place for short periods of time and for long periods of time. I hope we will all keep an open mind that we will do what is the best for the coast of North Carolina. You know I am a proponent and think a terminal groin will be a useful tool. But, if this study proves that it is not, then I am not in favor of doing what is not the best for our coast. Let's just all keep an open mind and know that we do the right thing. There was much discussion this morning about exactly what a terminal groin is and you have all seen pictures, but I would challenge you that while you are on this island today to drive north five or six miles and walk out on the beach and see what the actual effect is of a terminal groin on the public strand and what it can do to protect what it is designed to protect.

Win Batten, Mayor Town of Warsaw, stated I don't know if I am for groins or not because I don't really know how they work. I have seen Fort Macon and I have visited some other places and they seem to be working fine in certain locations. I don't know how they might work in our location. I am from the Town of Warsaw but I also own property on North Topsail Beach. I am concerned more about that situation. I think that any approach that we take to this is going to have to be somewhat site specific. I think that if you look at a particular inlet or a particular area there are different economic factors that are involved and different uses involved and if you don't get down to site specifics I don't know how you can equate those economic issues into it. For example, the group that I am associated with spent over $353,000.00 this past year hauling sand in to put in front of our buildings and that is certainly an economic factor that we have to be concerned about. I think that we need to be able to look at things and say that this inlet or that inlet or that area of the beach deserves protection more or less than some other area does. Site specific may be something that we need to consider. The other thing is that I hope that we will get input that will tell us if this is the way to go or is it not the way to go. If it is the way to go then let's start doing something with it and if it isn't the way to go then let's figure out some other way. Today we have heard from the engineering firm that is doing the study, but we have not heard from any other components of the study committee. I hope that we will have input from them so that we can understand what their factors and issues are in the use of groins.

Charles Baldwin of Rountree Losee and Baldwin representing the Village of Bald Head Island stated he wanted to reiterate some of the concerns that you have heard that we study this issue properly and that if it is appropriate in certain locations that this be considered another tool in the toolbox. Obviously the Island is very concerned about what it does next. We have spent all of our money to put sand on our beach and now what? We are hoping that this study might be an opportunity to look more specifically at Bald Head, but understand after the presentation today the limitations of what this study can and cannot achieve. I commend the Commission for the thought that has been put into this and the process that has been put in place and look forward to seeing results. The Village sent a letter to that effect to Mr. Gregson on September 24. I also have a letter dated October 26 from Bald Head Island resident, Mr. Joe Garner and I will submit that to Mr. Gregson.

Todd Miller, North Carolina Coastal Federation, stated he would like to endorse some of the comments that have been made by several people here today that right now the most important thing is that we have a thorough study and evaluation of the feasibility of these proposed structures. The critical issue at this stage in the CRC's deliberations in carrying out this study is to make sure that the process has been well thought through and that everyone will have confidence in the outcome of the study. I want to congratulate Bob and other members of the Commission who have put a lot of effort into making sure that the process is visible. As this goes forward, the work that has gone into thinking about how to structure this so that all views get heard and that the analysis is credible is very important. In that vein I would encourage as quickly as possible to focus on the calendar that you will be following and specifically meeting dates as you have a lot of really busy people involved in this with the science panel and other parties and scheduling meetings at the last minute is unfair in terms of getting the full participation that is needed. I would encourage members of the Commission to attend the science panel meetings to hear the discussion that goes on. The science panel as it is comprised has broad representation and interest in the meetings that have been held so far on this study. The more you can take in of the discussions the better equipped you will be to make policy recommendations when you get the report. It was interesting to me that when we really got down to where is there experience with terminal groins that we found through the work of the science panel that there are actually very few places with any relevance to North Carolina's situation. The five sites that were selected were really stretching it in terms of experience and how these five case studies are carried out and how thorough they are will really be some of the best information in terms of what groins do and what the experiences have been. There is a lot of emphasis being placed on the peer review that will occur. There is one area that the science panel is very weak in being able to do the peer review and that is the economic analysis. As most if not all of the members have a natural science or engineering background and the panel does not have any economists. This should be circulated out more broadly and I know you will do this through public comment. In my opinion so far this has been the least talked through element in terms of what will be done with the limited resources that have been provided for the economics and making sure that it is relevant to the decisions that have to be made. In closing I would just state that the science and the economics will be important in the final policy making, but when you receive this information you will need to look at your permitting authorities and how you have to make decisions because the expectation to the public is that you are going to be able to make correct decisions on these proposals if you are given the authority to do it on a consistent basis to protect the public trust beach. The level of certainty that comes out of this information is going to be pretty important in terms of whether or not the CRC is in a position based on the Coastal Area Management Act to make good permit decisions.

Harry Simmons, Town of Caswell Beach, stated I have been to and seen four of the five terminal groins that are in the study collection and there is a lot that can be learned for North Carolina by

those sites. I was at John's Pass about two weeks ago from the boat side and from the land side of the terminal groin and it is a marvelous structure. The one that is in Amelia Island, which is the one that I haven't seen, on paper seems to be a fabulous opportunity for North Carolina to consider something like it. A leaky terminal groin if you will. I encourage you as did Todd to seek all the input that you can possibly get in the time that you have to do it in and good luck.

Don Martin, Mayor North Topsail Beach, stated our inlet is very unique in that we could probably use this terminal groin on our beach to stop beach erosion. To the north is Camp Lejeune and it will not affect Camp Lejeune a bit. But to the right is our beach and it has beach erosion very badly so we hope that you will take this into consideration and do the best you can.

PRESENTATIONS

DCM Sea Level Rise Initiative – Preliminary Survey Report
Mike Lopazanski

Mike Lopazanski stated this is a preliminary look at the survey that we did over this past summer to get an idea on the public's perception of sea level rise in the state. The survey ran from July 21 through August 31 and an invitation to complete the survey circulated broadly. There were over 1,100 responses to this survey. There was an overwhelming belief that sea level rise is occurring and that the state should be planning for it. It was interesting that the amount of sea level rise most respondents expected during the next century was in line with the IPCC assessment and projections. Nearly 800 respondents believe sea level rise is happening in North Carolina and think their property or finances will be affected. About 400 of them believe it is happening, but don't know if they will be affected. Most of the survey participants think that the state should be taking steps now to plan and prepare for sea level rise. When asked how much they think the sea will rise along the North Carolina coast by 2100, over 400 respondents though it would be around two feet. Most respondents thought that it would be three feet or less. Nearly 200 respondents said that they didn't know how much the sea would rise along the North Carolina coast and that tells us that there is an opportunity for some public education. We asked about the vulnerability of the various regions of the state and the barrier islands were perceived to be at a higher risk. Most of the studies have shown that it is actually the mainland areas, in particularly the Albemarle and Pamlico Peninsula, as one of the most at risk areas in the state and it was not reflected in the survey results. This shows another opportunity to do some public education. When survey participants were asked who should be taking action on sea level rise in North Carolina and in what roles, the CRC topped the list as needing to address sea level rise. The CRC was followed closely by the scientific community as well as state agencies. This indicates a need for public involvement in preparing a response to sea level rise. The private sector was not looked at as a group to take a lead role although there were a significant number of respondents that noted that the real estate and development interest as well as private land owners should have a supporting role. We asked what measures you would recommend the CRC and DCM take to address sea level rise. In response to this education and land use planning was recommended. The unlimited use of sandbags, use of sea walls, and groins were not recommended. We asked folks to describe what else should be done in North Carolina to address sea level rise. Respondents wanted hazard disclosure, prohibiting public expenditures in high risk areas, determine a sea level rise rate, and produce maps. The final survey report will be presented at the DENR/DCM sea level rise science forum on January 14-15, 2010. The CRC Science Panel and Biological & Physical Processes Workgroup are preparing sea level metrics report as requested by the CRC and this will be presented at the January science forum. The report will include the current and projected rates of sea level rise in North Carolina through 2100.

Wind Turbines and Water Dependent Structure Issues (CRC 09-34)
Doug Huggett

Doug Huggett stated in 2005, I came before the Planning and Special Issues Committee to discuss the issue of water dependency with wind facilities. At that time we were starting to get a feel that wind energy facilities was a rising issue, but it hadn't risen to the forefront. The CRC's rules state that only water dependent activities and structures can be permitted within our state's public trust and estuarine waters in the coastal zone. The CRC's rules have a long list of things that may be considered water dependent and things that are not considered water dependent. The rules are not all inclusive because when the rules were written you could not have contemplated all of the various scenarios and types of development activities that would pop up. With that in mind, wind facilities were not included as either a water dependent structure or a non-water dependent structure. The P&SI Committee felt that utility grade wind facilities could work equally well in certain land areas in coastal North Carolina as well as within our waters. There also wasn't a concrete proposal on the table at the time and there didn't seem to be a whole lot of movement with the idea of moving forward with a defined wind energy proposal. The guidance that the P&SI Committee gave to Staff was to not consider these structures to be water dependent and they could not be allowed under the rules without getting a variance.

In the past couple of years the wind energy issue has really exploded. You have heard multiple presentations over time and heard updates and recommendations to the Legislature from the EMC. It has become clear that the wind energy issue is out there and is in front of us today. There has been legislation that was introduced during the last legislative session that ultimately was not passed that would have set up a permit program for wind energy facilities. As part of that program it was going to modify CAMA to define large-scale, utility grade wind energy facilities as water dependent structures. There was a provision in the state budget that did pass that set up a pilot program that is going to allow potentially three offshore wind towers to be built in either our sounds or our ocean waters. This budget rider also included provisions that basically exempted these facilities from going through most of the state's permit requirements including CAMA. It doesn't exempt it from the state dredge and fill law, but it does exempt it from CAMA. All of this leads us to believe that this issue is coming and it is something that we have to deal with. The political desires appear to be to allow these things in coastal North Carolina and you put that with a lot of the studies that you have heard which seem to indicate that probably the most feasible location for utility-grade and utility-scale wind development in coastal North Carolina appears to be within our sounds or ocean waters. Once you start coming over land with the wind resource the wind resource starts to dissipate where it does not become cost effective to try to build utility-grade wind farms in coastal North Carolina. We believe there is a public policy and political desire to move forward in examining these structures within our waters. It is Staff's recommendation that the CRC grant us guidance today that would change the Commission's guidance from a few years ago that we do want to consider these to be water dependent structures. This would allow us to do several things. The first is it would clear the pathway for us to move forward with a more formal rulemaking initiative that would add wind energy facilities to the water dependent definition and would also setup various siting and permitting requirements for wind energy facilities. The second positive to this is we are receiving two to three calls per week from developers that are looking into wind energy in North Carolina. Currently we have to tell all of them that the rules say that you cannot put them into our waters and sounds. This would remove that technical obstacle. Lastly, it would be safe to say that it is a good idea to try to take hold of this issue ourselves instead of the decision being made elsewhere.

Dr. Pete Peterson stated several years ago North Carolina purchased estimates of wind speeds over the land and over the water of North Carolina. Our particular study updated that so we would have true knowledge of wind speeds at the elevation that will turn the blades. The actual wind resource is not what we experience, it is higher. Our assessment of this with numerous wind speed locations showed that the only areas in the state that have utility grade wind power that could be harvested are over water. Furthermore, there is only a small portion in the sounds that meet the criteria that would provide a harvestable resource and those are in four small areas in eastern Pamlico Sound. The bulk of this lies offshore and the further offshore, the better. Especially south of Hatteras down to Cape Lookout and somewhat south of Cape Lookout. There is also a small patch south of the Cape Fear. Most of these patches are in federal waters, but they include state waters where they are feasible and in Pamlico Sound. We had a public hearing in relation to the potential one to three windmills that may be constructed as a pilot construction in Pamlico Sound. Jim Leutze attended that hearing and can share his views on how it was received. My views are that there was a dramatic acceptance by the public on Hatteras Island. The University of North Carolina system has a signed contract with Duke Energy for the construction of one to three of these pilot windmills in the eastern part of Pamlico Sound guided by all the use conflict studies that we have done, but also consistent with any other permit that is required. I and our UNC group had absolutely nothing to do with the provisions of that legislation that asked that the CAMA rules be overlooked in developing these. We did have a number of policy recommendations in our report and a big one is the very one that we have on the table. Another was the issue of the prohibition against utility transmission lines coming through the beach and we have moved ahead on that. We participated in a UNC law presentation for attorneys interested in coastal law in New Bern and Joe Kalo had the opinion that rather than call these structures wind dependent that there is a provision that allows it already. That provision says that there are exceptions or there are reasons why something go ahead even though it is not wind dependent because it is essentially the only practical way to achieve that and it is in the public interest. Our group has identified this as a very important policy issue that needs to go forward and is in support of the CRC discussing it. Hopefully the CRC will be moving ahead to allow a green energy without a carbon footprint and one for which North Carolina could be a leader in the country to move forward.

Joan Weld made a motion that after due consideration the Coastal Resources Commission considers utility-grade wind energy facilities water dependent. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Shepard, Carter, Wilson, Leutze) (Old absent for vote).

Wind Energy Facility Amendments to 15A NCAC 07M .0400 Coastal Energy Policies; 15A NCAC 07H .0208 Use Standards and 15A NCAC 07H .0106 General Definitions (CRC 09-35) Mike Lopazanski/Scott Geis

Mike Lopazanski stated since we have gotten the nod on the water dependency issue we would like to move ahead with developing rules. I will be covering rules for siting facilities within state waters. Scott will talk about amendments to the coastal energy policies and those will primarily apply to facilities that will be constructed in offshore waters outside the state's jurisdiction. This is just to get an idea from the CRC to make sure we are on track. After this we would like to take this to other DENR permit review agencies to be sure we are asking the right questions when it comes to siting these facilities. If the Commission intends to move ahead then we will have to make additional amendments to our Administrative rules for the siting of wind facilities. In developing these amendments staff has relied on the recommendations of various groups considering these issues and we have put a lot of emphasis on the findings of the EMC. One of the first things we need to look at is the definition and this appears in 7H .0106. Since the state

has focused on utility-scale wind power, the EMC developed a definition that was consistent with the requirement for facilities to receive a certificate from the North Carolina Utilities Commission. "Wind energy facility means the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that cumulatively, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of three megawatts or more of energy" has been added to 7H .0106. In 7H .0208 we will add wind energy facility to the section that deals with structures that are considered water dependent.

David Webster made a motion to accept the definition as presented in 15A NCAC 07H .0106. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Shepard, Carter, Wilson, Leutze) (Old absent for vote).

Amendments to the use standards for ocean and estuarine systems AEC (7H .0208) will be necessary for the actual siting considerations and permitting of a facility in state waters. Staff is proposing the addition which draws heavily on the work of the EMC and with what appeared in Senate Bill 1068. The provisions in (A) outline what would be required of a permit applicant in terms of what they need to address in their application. Section (B) contains the findings that would be used by the Division in making the permit decision. Many of these provisions are similar to those used to evaluate other types of development already present in your rules. Section (C) addresses permit conditions and this is standard language we have to ensure compliance with other guidelines for development. It also lets the applicant know that monitoring will be included. There is also a public benefits exception included in (D) that includes the types of development that are allowed.

Scott Geis stated the coastal energy policies look in general terms to broaden the way we look at energy development. When we last visited these ten years ago they were in the form of oil and gas development primarily. One of our main goals was to update this policy in terms of incorporating how we look at alternative energies. The changes you will see in 7M mirror those that were in 7H. The first section "Declaration of General Policy" talks a lot about balancing the public welfare in terms of the need for energy development with conservation. Originally it talked about balancing the necessity of energy production with the protection of the resources, but we wanted to expand it a little bit. We wanted to balance the need for energy, the protection of the natural resources and ecosystems, and also the public's ability to use or have access to those resources. The "Definitions" section has two areas that we have tweaked. We focused on impact assessment and major energy facility. Impact assessment is important because impact assessments are required for any major energy facility that would go in. An impact assessment is an assessment of the costs and benefits of the entire project. We have changed the assessment to include effects the project will have on the use of public trust waters, adjacent lands and on the coastal resources of the coastal area. Natural resource has been changed to coastal resource in several areas as we have found that it gives us more flexibility going forward with our permitting. The first major change that we see is under the definition of impact assessments (4). We have added a component that talks about beach compatible sand. This is not a permitting requirement, but needs to be included in the assessment. In (a)(7) this language comes from the efforts made in Senate Bill 1068. There were specific requirements in terms of studies for shadow flicker and turbine noise. In (a)(10) decommissioning is an obvious concern with any type of structure that is going to be placed out into the water. Language is needed discussing the decommissioning plan. Another issue that comes up with decommissioning is the requirement of a bond. We do not have the authority to require a bond. Therefore if the CRC feels that a bond is the appropriate activity to require for decommissioning, then we would have to get a formal opinion from the Attorney General's office and pursue legislative action in order to do it. In

(a)(11) oil and gas has changed to energy exploration to make it a wider ranging statement to incorporate all forms of alternative energy. The second part of the definitions is the major energy facility. In this section we were hoping to get at the specific types of projects that would go out into federal waters and how they would fall back in line with the major energy facility. In the permitting process a major energy facility requires an impact assessment. In (b)(5) this is the same language that was used in 7H. In 7M .0403 we pull in the defined words. In (c) it states that this section shall not limit the ability of a city or county to plan for and regulate the siting of a wind facility in accordance with land-use regulations authorized under Chapter 160A and Chapter 153A of the General Statutes. Wind energy facilities constructed within the planning jurisdiction of a city or county shall demonstrate compliance with any local ordinance concerning land use and any applicable permitting process. This comes out of the EMC's report and addresses the ability of the local government to plan for and regulate the siting of a wind energy facility. There should be state permitting oversight; however it will allow local governments to continue to exercise the full range of land use and police power ordinances. In (H), (I), (J) and (K) we have added language for areas that we would not want to have significant adverse impacts. Veronica Carter made a suggestion that (I) should be changed to include training areas. Renee Cahoon stated the definition of local significance found in (J) should be noted.

CRAC REPORT

Dara Royal, CRAC Chair, stated there were three agenda items at the meeting. The first was the annual election of Chair and Vice-Chair of the CRAC. The Chair and Vice-Chair serve two annual terms, however the Council has decided to make a change in this year since we feel that we have not had a full year this year. Also, Penny Tysinger has had a change in employment so she will not be the representative of the Cape Fear Council of Government. The Council reelected me as Chair next year and elected Frank Rush as Vice-Chair. I would like to thank Penny Tysinger for her services to CRAC. The second order of business was discussion about CRAC involvement in the land use plan guidelines update. John Thayer presented us with a preliminary list of issues that maybe addressed in the review process. After much discussion, it was the recommendation of the Council that there should be a subcommittee workgroup established to do some of the groundwork in preparation for more extensive presentation. Next, we had discussion about the composition and function of the CRAC. This was an opportunity to provide some feedback to DENR who is reviewing their Boards, Commissions and Councils as asked by the General Assembly. We believe the principles upon which the CRAC was created are as valid today as they were 35 years ago. At its best the CRAC is a model for state and local government relationship in coastal management. Lastly we discussed some future agenda items. One of the things that has resurfaced that we would like to revisit is any permitting obstacles that may still exist in beach nourishment projects.

ACTION ITEMS

Chairman Emory asked Jennie Hauser to discuss how we should treat the Taylor Contested Case going forward. Ms. Hauser stated the CRC reached a decision yesterday; however the Chairman and I will be working to draft a written decision. That will not happen for a period of time. Once that happens it is very likely that the case will go into judicial review at the Superior Court. You have most recently experienced the remand of a variance case from the Superior Court and that is a possibility in this case. You should still avoid ex parte contacts with people who might be involved with this case. This includes Staff, members of the CRAC, or any person that might contact you about the case. The ex parte issue doesn't arise in conversations that you have with other Commission members, but if the case comes back to you there is always the question of whether or not you have become biased in making a new decision. I would encourage you not to have conversations about the matter during this time.

Chairman Emory stated the proceeding yesterday was difficult. Ms. Hauser has been asked to give us some instructions on how the contested case proceedings go at a future meeting so we will not be caught unprepared. Jim Leutze stated that he questions the whole process. He stated the process seems flawed. After the ALJ rules, it seems almost impossible to overturn it. So why are we hearing it? It is a waste of time. He stated that he would personally pursue legislation that changes this. He further stated that he wanted an Attorney General's ruling on the issue of recusal and whether one can withdraw a recusal. The opinion should include whether recusal means you cannot speak or whether it means that you cannot vote. Jim Leutze stated he has had a legal opinion that recusal can be withdrawn at any time. Jim Leutze further stated that commissioners Carter and Shepard's recusals are also somewhat questionable.

LAND USE PLANS

John Thayer stated that on June 24 there was a first batch of amendments to the Brunswick County LUP. This request has additional amendments. They could be characterized as a group of amendments that are related more particularly to the Town of Saint James that is incorporated. There are 24 minor plan map adjustments.

The Town of Swansboro, City of Havelock, and Craven County are also requesting certification of their plans. Staff has found no issues with any of these documents and have not received any correspondence raising questions with the local adoption or certification. Staff would recommend that the CRC certify each of these requests as having met the substantial requirements of the 7B guidelines and there are no conflicts with the State's provisions.

Brunswick County Land Use Plan Amendments (CRC 09-36)

Veronica Carter stated that she has worked with the Brunswick County planning director who is here for the Brunswick County land use plan, but has had absolutely no dealings with the land use plan.

Jim Leutze made a motion to approve the Brunswick County Land Use Plan Amendments. Renee Cahoon seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Veronica, Wilson, Leutze) (Old, Shepard absent for vote).

Town of Swansboro Land Use Plan Certification (CRC 09-37)

Veronica Carter made a motion to certify the Town of Swansboro Land Use Plan. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Shepard, Carter, Wilson, Leutze) (Old absent for vote).

City of Havelock Land Use Plan Certification (CRC 09-38)

Renee Cahoon made a motion to certify the City of Havelock Land Use Plan. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Shepard, Carter, Wilson, Leutze) (Old absent for vote).

Craven County Land Use Plan Certification

Chairman Emory stated that he is a resident of Craven County and attended one of the scoping meetings early on in the process.

Veronica Carter made a motion to certify the Craven County Land Use Plan. Jim Leutze seconded the motion. The motion passed unanimously (Cahoon, Webster, Wynns, Weld, Shepard, Carter, Wilson, Leutze) (Old absent for vote).

OLD/NEW BUSINESS

Bob Wilson stated that we need to look at the concept of natural vegetation and what it means to various members of the Commission, what it means to the public, and what it means to our Staff in actual practice. Jim Gregson stated new rules were effective April 1, 2008 that defined exactly what a vegetation line is and it goes into more detail about what stable is and what natural is. This rule was not in effect at the time of the Taylor permit decision.

Jim Leutze stated that Jim Gregson had announced that there is a new coastal alliance between North Carolina, South Carolina, Georgia and Florida. He stated that he would like us to think of how we can gain some information from other states on issues that are similar to the issues we are dealing with. Jim Gregson stated that Staff can come back with a short presentation on this alliance at the next CRC meeting. Mr. Gregson further stated that he will send the link to the CSO to the Commission.

Melvin Shepard stated the he is concerned that an LPO can trump the Division of Coastal Management. The Division is guided by the CRC and the Division should be able to guide the LPO. Jim Gregson stated that a presentation could be given at a future meeting regarding the relationship of the LPO and DCM.

With no further business, the CRC adjourned.

Respectfully submitted,

James H. Gregson, Executive Secretary

Angela Willis, Recording Secretary

ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

MEMORANDUM

TO: North Carolina Coastal Resources Commission

FROM: Christine A. Goebel, Assistant Attorney General

DATE: December 30, 2009 (for the January 13, 2010 CRC Meeting)

RE: Static Line Exception Request by the **Town of Ocean Isle Beach**

Petitioner, the Town of Ocean Isle Beach ("Town") requests an exception from the static vegetation line from the Commission pursuant to N.C.G.S. §§ 113A-107, -113(b)(6), -124, and 15A NCAC 7J.1200 et seq. The granting of such a request by the Commission would result in the application of 15A NCAC 7H.0305(a)(5) and 7H.0306(a)(8) to proposed development projects along the affected area of the town, instead of the current use of the static vegetation line for Ocean Isle Beach per 7H.0305(a)(6). The Town has had a static vegetation line, used for determining ocean erosion setbacks, in place since 2001 when the static line rules became effective for the Town in connection with their first large-scale nourishment project.

Pursuant to the requirements of 15A NCAC 7J.1202(a), this memorandum will contain a description of the area subject to the static line exception request, a summary of the fill projects in this area, a summary of the evidence required from and produced by the Town, and a recommendation by Staff to the Commission.

The following information is attached to this memorandum:

Attachment A: Relevant Rules
Attachment B: Staff's Recommendation
Attachment C: Petitioner's Report
Attachment D: Petitioner's supplemental materials

cc: Elva Jess, Counsel for Town of Ocean Isle Beach
Daisy L. Ivey, Town Administrator
Jennie W. Hauser, CRC Counsel

ATTACHMENT A
Relevant Rules

SECTION .1200 – STATIC VEGETATION LINE EXCEPTION PROCEDURES

15A NCAC 07J .1201 REQUESTING THE STATIC LINE EXCEPTION

(a) Any local government or permit holder of a large-scale beach fill project, herein referred to as the petitioner, that is subject to a static vegetation line pursuant to 15A NCAC 07H .0305, may petition the Coastal Resources Commission for an exception to the static line in accordance with the provisions of this Section.
(b) A petitioner is eligible to submit a request for a static vegetation line exception after five years have passed since the completion of construction of the initial large-scale beach fill project(s) as defined in 15A NCAC 07H .0305 that required the creation of a static vegetation line(s). For a static vegetation line in existence prior to the effective date of this Rule, the award-of-contract date of the initial large-scale beach fill project, or the date of the aerial photography or other survey data used to define the static vegetation line, whichever is most recent, shall be used in lieu of the completion of construction date.
(c) A static line exception request applies to the entire static vegetation line within the jurisdiction of the petitioner including segments of a static vegetation line that are associated with the same large-scale beach fill project. If multiple static vegetation lines within the jurisdiction of the petitioner are associated with different large-scale beach fill projects, then the static line exception in accordance with 15A NCAC 07H .0306 and the procedures outlined in this Section shall be considered separately for each large-scale beach fill project.
(d) A static line exception request shall be made in writing by the petitioner. A complete static line exception request shall include the following:

(1) A summary of all beach fill projects in the area for which the exception is being requested including the initial large-scale beach fill project associated with the static vegetation line, subsequent maintenance of the initial large-scale projects(s) and beach fill projects occurring prior to the initial large-scale projects(s). To the extent historical data allows, the summary shall include construction dates, contract award dates, volume of sediment excavated, total cost of beach fill project(s), funding sources, maps, design schematics, pre-and post-project surveys and a project footprint;

(2) Plans and related materials including reports, maps, tables and diagrams for the design and construction of the initial large-scale beach fill project that required the static vegetation line, subsequent maintenance that has occurred, and planned maintenance needed to achieve a design life providing no less than 25 years of shore protection from the date of the static line exception request. The plans and related materials shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work;

(3) Documentation, including maps, geophysical, and geological data, to delineate the planned location and volume of compatible sediment as defined in 15A NCAC 07H .0312 necessary to construct and maintain the large-scale beach fill project defined in Subparagraph (d)(2) of this Rule over its design life. This documentation shall be designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for said work; and

(4) Identification of the financial resources or funding sources necessary to fund the large-scale beach fill project over its design life.

(e) A static line exception request shall be submitted to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. Written acknowledgement of the receipt of a completed static line exception request, including notification of the date of the meeting at which the request will be considered by the Coastal Resources Commission, shall be provided to the petitioner by the Division of Coastal Management.
(f) The Coastal Resources Commission shall consider a static line exception request no later than the second scheduled meeting following the date of receipt of a complete request by the Division of Coastal Management, except when the petitioner and the Division of Coastal Management agree upon a later date.
History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124 Eff. March 23, 2009.

15A NCAC 07J .1202 REVIEW OF THE STATIC LINE EXCEPTION REQUEST

(a) The Division of Coastal Management shall prepare a written report of the static line exception request to be presented to the Coastal Resources Commission. This report shall include:

(1) A description of the area affected by the static line exception request;

(2) A summary of the large-scale beach fill project that required the static vegetation line as well as the completed and planned maintenance of the project(s);

(3) A summary of the evidence required for a static line exception; and

(4) A recommendation to grant or deny the static line exception.

(b) The Division of Coastal Management shall provide the petitioner requesting the static line exception an opportunity to review the report prepared by the Division of Coastal Management no less than 10 days prior to the meeting at which it is to be considered by the Coastal Resources Commission.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124 Eff: March 23, 2009.

15A NCAC 07J .1203 PROCEDURES FOR APPROVING THE STATIC LINE EXCEPTION

(a) At the meeting that the static line exception is considered by the Coastal Resources Commission, the following shall occur:

(1) The Division of Coastal Management shall orally present the report described in 15A NCAC 07J .1202.

(2) A representative for the petitioner may provide written or oral comments relevant to the static line exception request. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

(3) Additional parties may provide written or oral comments relevant to the static line exception request. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

(b) The Coastal Resources Commission shall authorize a static line exception request following affirmative findings on each of the criteria presented in 15A NCAC 07J .1201(d)(1) through (d)(4). The final decision of the Coastal Resources Commission shall be made at the meeting at which the matter is heard or in no case later than the next scheduled meeting. The final decision shall be transmitted to the petitioner by registered mail within 10 business days following the meeting at which the decision is reached.

(c) The decision to authorize or deny a static line exception is a final agency decision and is subject to judicial review in accordance with G.S. 113A-123.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124 Eff. March 23, 2009.

15A NCAC 07J .1204 REVIEW OF THE LARGE-SCALE BEACH-FILL PROJECT AND APPROVED STATIC LINE EXCEPTIONS

(a) Progress Reports. The petitioner that received the static line exception shall provide a progress report to the Coastal Resources Commission at intervals no greater than every five years from date the static line exception is authorized. The progress report shall address the criteria defined in 15A NCAC 07J .1201(d)(1) through (d)(4) and be submitted in writing to the Director of the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557. The Division of Coastal Management shall provide written acknowledgement of the receipt of a completed progress report, including notification of the meeting date at which the report will be presented to the Coastal Resources Commission to the petitioner.

(b) The Coastal Resources Commission shall review a static line exception authorized under 15A NCAC 07J .1203 at intervals no greater than every five years from the initial authorization in order to renew its findings for the conditions defined in 15A NCAC 07J .1201(d)(2) through (d)(4). The Coastal Resources Commission shall also consider the following conditions:

(1) Design changes to the initial large-scale beach fill project defined in 15A NCAC 07J .1201(d)(2) provided that the changes are designed and prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for the work;

(2) Design changes to the location and volume of compatible sediment, as defined by 15A NCAC 07H .0312, necessary to construct and maintain the large-scale beach fill project defined in 15A NCAC 07J .1201(d)(2), including design changes defined in this Rule provided that the changes have been designed and

prepared by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements for the work; and

(3) Changes in the financial resources or funding sources necessary to fund the large-scale beach fill project(s) defined in 15A NCAC 07J .1201(d)(2). If the project has been amended to include design changes defined in this Rule, then the Coastal Resources Commission shall consider the financial resources or funding sources necessary to fund the changes.

(c) The Division of Coastal Management shall prepare a written summary of the progress report and present it to the Coastal Resources Commission no later than the second scheduled meeting following the date the report was received, except when a later meeting is agreed upon by the local government or community submitting the progress report and the Division of Coastal Management. This written summary shall include a recommendation from the Division of Coastal Management on whether the conditions defined in 15A NCAC 07J .1201(d)(1) through (d)(4) have been met. The petitioner submitting the progress report shall be provided an opportunity to review the written summary prepared by the Division of Coastal Management no less than 10 days prior to the meeting at which it is to be considered by the Coastal Resources Commission.

(d) The following shall occur at the meeting at which the Coastal Resources Commission reviews the static line exception progress report:

(1) The Division of Coastal Management shall orally present the written summary of the progress report as defined in this Rule.

(2) A representative for the petitioner may provide written or oral comments relevant to the static line exception progress report. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

(3) Additional parties may provide written or oral comments relevant to the static line exception progress report. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124 Eff. March 23, 2009.

15A NCAC 07J .1205 REVOCATION AND EXPIRATION OF THE STATIC LINE EXCEPTION

(a) The static line exception shall be revoked immediately if the Coastal Resources Commission determines, after the review of the petitioner's progress report identified in 15A NCAC 07J .1204, that any of the criteria under which the static line exception is authorized, as defined in 15A NCAC 07J .1201(d)(2) through (d)(4) are not being met.

(b) The static line exception shall expire immediately at the end of the design life of the large-scale beach fill project defined in 15A NCAC 07J .1201(d)(2) including subsequent design changes to the project as defined in 15A NCAC 07J .1204(b).

(c) In the event a progress report is not received by the Division of Coastal Management within five years from either the static line exception or the previous progress report, the static line exception shall be revoked automatically at the end of the five-year interval defined in 15A NCAC 07J .1204(b) for which the progress report was not received.

(d) The revocation or expiration of a static line exception is considered a final agency decision and is subject to judicial review in accordance with G.S. 113A-123.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124 Eff. March 23, 2009.

15A NCAC 07J .1206 LOCAL GOVERNMENTS AND COMMUNITIES WITH STATIC VEGETATION LINES AND STATIC LINE EXCEPTIONS

A list of static vegetation lines in place for petitioners and the conditions under which the static vegetation lines exist, including the date(s) the static line was defined, shall be maintained by the Division of Coastal Management. A list of static line exceptions in place for petitioners and the conditions under which the exceptions exist, including the date the exception was granted, the dates the progress reports were received, the design life of the large-scale beach fill project and the potential expiration dates for the static line exception, shall be maintained by the Division of Coastal Management. Both the static vegetation line list and the static line exception list shall be available for inspection at the Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.

History Note: Authority G.S. 113A-107; 113A-113(b)(6), 113A-124 Eff. March 23, 2009.

15A NCAC 7H .0305 GENERAL IDENTIFICATION AND DESCRIPTION OF LANDFORMS

(a) This section describes natural and man-made features that are found within the ocean hazard area of environmental concern.
***

(5) Vegetation Line. The vegetation line refers to the first line of stable and natural vegetation, which shall be used as the reference point for measuring oceanfront setbacks. This line represents the boundary between the normal dry-sand beach, which is subject to constant flux due to waves, tides, storms and wind, and the more stable upland areas. The vegetation line is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment. The Division of Coastal Management or Local Permit Officer shall determine the location of the stable and natural vegetation line based on visual observations of plant composition and density. If the vegetation has been planted, it may be considered stable when the majority of the plant stems are from continuous rhizomes rather than planted individual rooted sets. The vegetation may be considered natural when the majority of the plants are mature and additional species native to the region have been recruited, providing stem and rhizome densities that are similar to adjacent areas that are naturally occurring. In areas where there is no stable natural vegetation present, this line may be established by interpolation between the nearest adjacent stable natural vegetation by on ground observations or by aerial photographic interpretation.

(6) Static Vegetation Line. In areas within the boundaries of a large-scale beach fill project, the vegetation line that existed within one year prior to the onset of initial project construction shall be defined as the static vegetation line. A static vegetation line shall be established in coordination with the Division of Coastal Management using on-ground observation and survey or aerial imagery for all areas of oceanfront that undergo a large-scale beach fill project. Once a static vegetation line is established, and after the onset of project construction, this line shall be used as the reference point for measuring oceanfront setbacks in all locations where it is landward of the vegetation line. In all locations where the vegetation line as defined in this Rule is landward of the static vegetation line, the vegetation line shall be used as the reference point for measuring oceanfront setbacks. A static vegetation line shall not be established where a static vegetation line is already in place, including those established by the Division of Coastal Management prior to the effective date of this Rule. A record of all static vegetation lines, including those established by the Division of Coastal Management prior to the effective date of this Rule, shall be maintained by the Division of Coastal Management for determining development standards as set forth in Rule .0306 of this Section. Because the impact of Hurricane Floyd (September 1999) caused significant portions of the vegetation line in the Town of Oak Island and the Town of Ocean Isle Beach to be relocated landward of its pre-storm position, the static line for areas landward of the beach fill construction in the Town of Oak Island and the Town of Ocean Isle Beach, the onset of which occurred in 2000, shall be defined by the general trend of the vegetation line established by the Division of Coastal Management from June 1998 aerial orthophotography.

15A NCAC 07H .0306 GENERAL USE STANDARDS FOR OCEAN HAZARD AREAS

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in the CRC's Rules shall be located according to whichever of the following is applicable:
(1) The ocean hazard setback for development is measured in a landward direction from the vegetation line, the static
vegetation line or the measurement line, whichever is applicable.

***
(8) Beach fill as defined in this Section represents a temporary response to coastal erosion, and compatible beach fill as defined in 15A NCAC 07H .0312 can be expected to erode at least as fast as, if not faster than, the pre-project beach. Furthermore, there is no assurance of future funding or beach-compatible sediment for continued beach fill projects and project maintenance. A vegetation line that becomes established oceanward of the pre-project vegetation line in an area that has received beach fill may be more vulnerable to natural hazards along the oceanfront. A development setback measured from the vegetation line provides less protection from ocean hazards. Therefore, development setbacks in areas that have received large-scale beach fill as defined in 15A NCAC 07H .0305 shall be measured landward from the static vegetation line as defined in this Section. However, in order to allow for development landward of the large-scale beach fill project that is less than 2,500 square feet and cannot meet the setback requirements from the static vegetation line, but can or has the potential to meet the setback requirements from the vegetation line set forth in Subparagraph (1) and (2)(A) of this Paragraph a local government or community may petition the Coastal Resources Commission for a "static line exception" in accordance with 15A NCAC 07J .1200 to allow development of property that lies both within the jurisdictional boundary of the petitioner as well as the boundaries of the large-scale beach fill project. This static line exception shall also allow development greater than 5,000 square feet to use the setback provisions defined in Part (a)(2)(K) of this Rule in areas that lie within the jurisdictional boundary of the petitioner as well as the boundaries of the large-scale beach fill project. The procedures for a static line exception request are defined in 15A NCAC 07J .1200. If the request is approved, the Coastal Resources Commission shall allow development setbacks to be measured from a vegetation line that is oceanward of the static vegetation line under the following conditions:

(A) Development meets all setback requirements from the vegetation line defined in Subparagraphs (a)(1) and (a)(2)(A) of this Rule;
(B) Total floor area of a building is no greater than 2,500 square feet;
(C) Development setbacks are calculated from the shoreline erosion rate in place at the time of permit issuance;
(D) No portion of a building or structure, including roof overhangs and elevated portions that are cantilevered, knee braced or otherwise extended beyond the support of pilings or footings, extends oceanward of the landward-most adjacent building or structure. When the configuration of a lot precludes the placement of a building or structure in line with the landward-most adjacent building or structure, an average line of construction shall be determined by the Division of Coastal Management on a case-by-case basis in order to determine an ocean hazard setback that is landward of the vegetation line, a distance no less than 30 times the shoreline erosion rate or 60 feet, whichever is greater;
(E) With the exception of swimming pools, the development defined in 15A NCAC 07H .0309(a) is allowed oceanward of the static vegetation line; and
(F) Development is not eligible for the exception defined in 15A NCAC 07H .0309(b).

ATTACHMENT B

Staff's Report to the Commission

I. Description of the affected area

The Town of Ocean Isle Beach (Town) is located primarily on a barrier island known as Ocean Isle Beach, located in Brunswick County, North Carolina. The island-portion of the Town is approximately 2.7 square miles in size, and is approximately 5.8 miles long and 0.6 miles wide. It is generally oriented in an east-west direction. It is bounded on the north by the Atlantic Intracoastal Waterway (AIWW), on the south by the Atlantic Ocean, on the west by Tubbs Inlet and on the east by Shalotte Inlet.

The current static line extends for approximately 3.2 miles of shoreline from just east of Duneside Drive (western end of the static line) to Shalotte Boulevard (eastern end of the static line). The initial static line location was determined by DCM Staff in December 1999 by staking the existing vegetation line before the 2001 large-scale nourishment project began, and having that staked line surveyed[1].

The initial static line was replaced on April 1, 2008 through the Commission's adoption of 15A NCAC 07H .0305(a)(7) which states,

> *Because the impact of Hurricane Floyd (September 1999) caused significant portions of the vegetation line in the Town of Oak Island and the Town of Ocean Isle Beach to be relocated landward of its pre-storm position, the static line for areas landward of the beach fill construction in the Town of Oak Island and the Town of Ocean Isle Beach, the onset of which occurred in 2000, shall be defined by the general trend of the vegetation line established by the Division of Coastal Management from June 1998 aerial orthophotography.*

The "new" static line had the same east-west boundaries at the former static line had, being the area within the authorized project limits shown in Figure 1 below, but the location of the static line was changed based on this rule.

The current average annual erosion setback for the affected area is primarily 2.0 feet per year, except a section at the east end of the project area which is 4.5 feet per year. The static line area is a highly developed area, with approximately 273 total oceanfront lots. Based on 2004 aerial photography, the Town estimates that about70 developed oceanfront lots and 10 vacant oceanfront lots could potentially be affected by the granting of this exception.[2]

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[1] One section of the surveyed line data, located in the eastern end of the project area, went missing and per an Administrative Law Judge's decision upheld by the CRC, Staff recreated that missing section based on pre-project aerial photography.

[2] Based on Town estimates and review of 2004 aerial photography. (See letter from Town dated 12/21/09, p.1 attached)

Figure 1. Ocean Isle Beach project limits and USACE Baseline Stations.

II. Summary of past nourishment project and future project maintenance

Ocean Isle Beach first received beach nourishment in February 2001. Their project was authorized as part of a larger congressional authorization for a hurricane-flood control project from the North Carolina-South Carolina border to the Cape Fear River. This initial authorization came in 1966 as part of Section 203 of the Flood Control Act of 1966, Public Law 89-789, dated November 7, 1966. Funding for the Town's portion of this larger project happened in 2000 as part of the Energy and Water Development Appropriations Act, 2000, Public Law 106-60 and house Report 253, Energy and Water Development Appropriations Bill, One-Hundred-Sixth Congress, First Session. The contract between the Corps and the Town for the Town's 50-year project was signed on January 9, 2001 (2001-2051). The initial nourishment project was completed in early-2001, and moved sand from Shalotte Inlet to the project area. Maintenance is scheduled for every three years, but due to strong early performance of the project, the first maintenance was performed in late-2006, approximately 6 years later. Maintenance is again scheduled for 2009-10. As the initial date of construction, 2001, is more than five years ago the request meets the 5-year requirement of 15A NCAC 7J.1201(c).

III. Summary of Petitioner's evidence supporting the four factors

The Commission's rule 15A NCAC 07J.1203(b) indicates that the Commission "shall authorize a static line exception request following affirmative findings on each of the criteria presented in 15A NCAC 07J.1201(d)(1) through (d)(4)." Specifically, these four criteria require a showing by the Petitioner of (1) a summary of all beach fill projects in the area proposed for the exception, (2) plans and related materials showing the design of the initial fill projects, and any past or planned maintenance work, (3) documentation showing the location and volume of compatible sediment necessary to construct and maintain the project over its design life, and (4) identification of the financial resources or funding sources to fund the project over its design life. (See 15A NCAC 07J.1202(d) for exact rule language). Staff's summary and analysis of Petitioner's response to these four criteria follows.

A. Summary of fill projects in the area- First factor per 15A NCAC 7J.1202(d)(1)

The Town's report, specifically pages 13-17, provides the following information about the history of the two completed and one impending beach fill projects that have/will have taken place beginning in 2001:

PROJECT NOURISHMENT HISTORY.

a. 2001. The initial stage of construction for the project started in February 2001 and was completed on May 7, 2001. The project consisted of placing 1,952,600 cubic yards of fill over 28,000 feet of shoreline. The project protected approximately 3 ¼ miles of beach along Ocean Isle Beach. The beach was increased in width by 125 feet in areas with a full construction profile. Advanced maintenance fill was also placed at the time of construction which added an additional 50 feet of width to the beach. (See Figure 2a-2b.)

Although the project is scheduled to be completed every 3 years, the initial project performed so well that the first periodical nourishment was not considered necessary until 6 years after the completion of the initial project construction.

b. 2006-2007. Beginning in November 2006 the first project maintenance dredging began. Approximately 409,530 cubic yards of sand was placed on the beach from Station 10 to Station 70 (Shallotte Boulevard to approximately Southport Street). (See Figure 4.)

c. 2009-10. The Town is currently scheduled for a second maintenance dredging to occur in the winter of 2009-10. This project is scheduled to place sand from Station 10 to Station 130. (See Figure 5)

d. Ocean Isle Beach Historic Funding Sources. The source of funds used for each of the nourishment events listed in Table 1 is provided in Table 2.

Table 1. Ocean Isle Beach Nourishment History

Nourishment Dates	Borrow Area[3]	Placement Area (Stas.)[4]	Pay Yardage (cy)	Cost of Operation	Cost Per Cubic Yard
Feb. 2001-May 2001	Shallotte Inlet	10 to 180	1,952,600	$5,135,338.00	$2.63
Nov. 2006–Dec. 2006	Shallotte Inlet	10 to 72	540,347	$2,019,176.26	$4.94
Projected 2009-2010	Shallotte Inlet	10 to 125	509,200	$5,923,077.00	$7.00

[3] Borrow area shown on Figure 6.
[4] Stations in 100's feet (Figure 1).

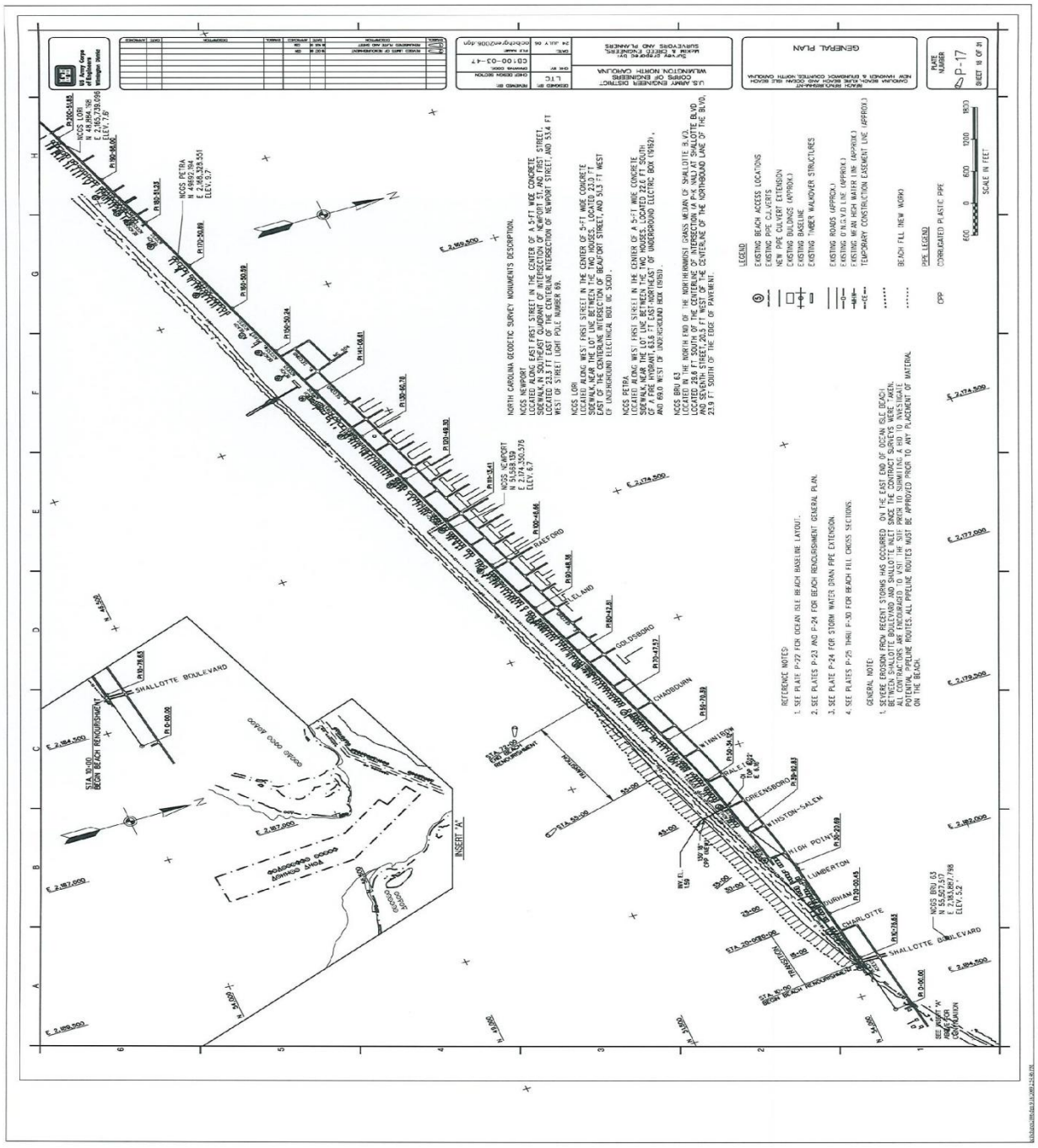

Figure 4. 2006 General Plan.

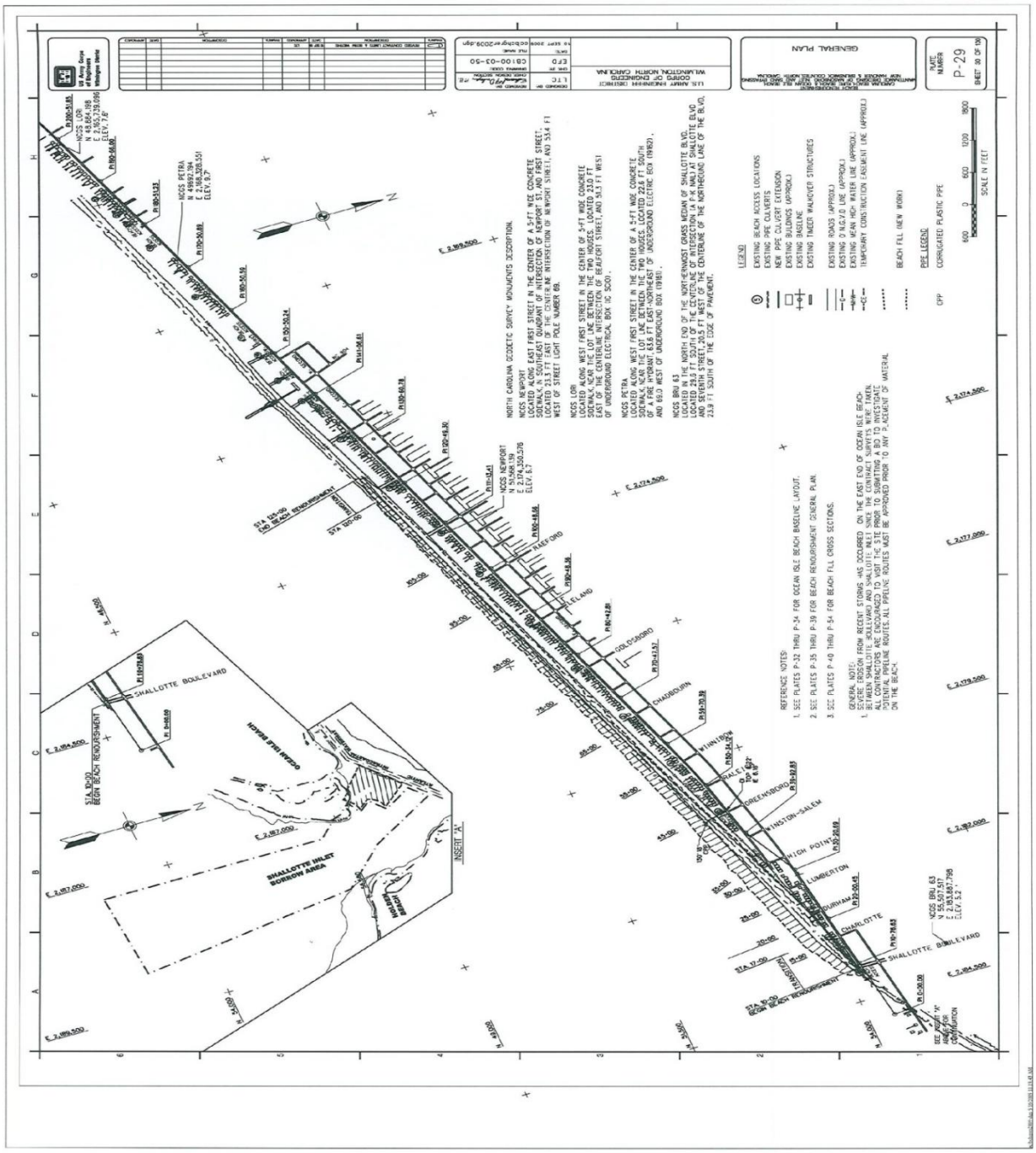

Figure 5. 2009-2010 General Plan.

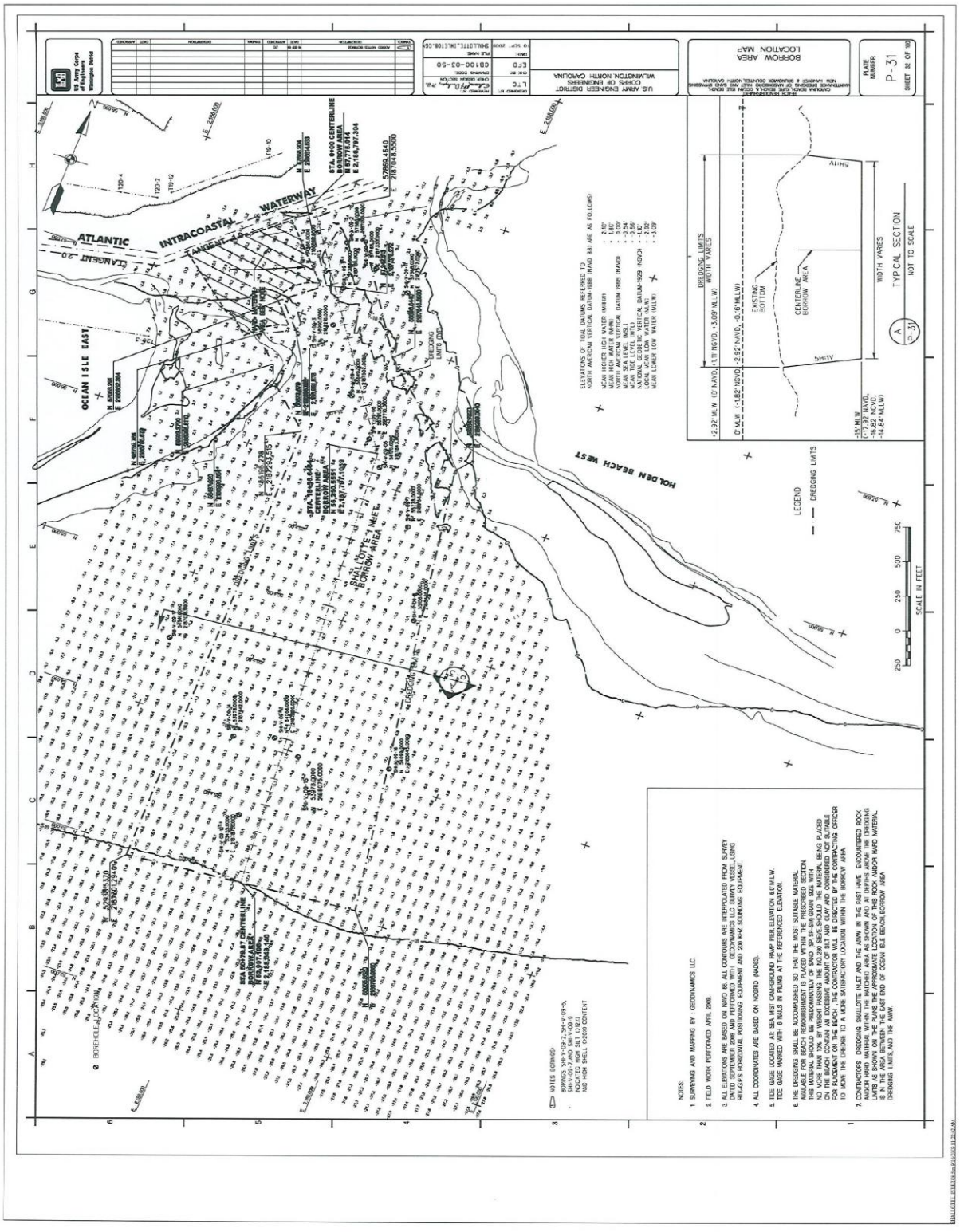

Figure 6. Shallotte Inlet Borrow Area.

Table 2. Ocean Isle Beach Funding Sources

Nourishment Dates	Federal Funding Source	Non-Federal	Cost of Operation
Feb. 2001-May 2001	$3,337,969.00	$1,797,369.00	$5,135,338.00
Nov. 2006– Dec. 2006	$1,312,464.26	$706,712.00	$2,019,176.26
Projected 2009-2010	$3,850,000.00	$2,073,077.00	$5,923,077.00

B. Design of the initial fill projects and past/planned maintenance Second factor per 15A NCAC 7J.1202(d)(2)

The Town's report, specifically pages 2-5 and 17-19, has the following information about the design of the beach fill project for Ocean Isle Beach, and how that project has performed in the past:

PROJECT DESCRIPTION/AUTHORIZATION.

The project for hurricane-flood control from Cape Fear to the North Carolina-South Carolina State Line, was authorized in House Document Number 511, Eighty-ninth Congress, by Section 203 of the Flood Control Act of 1966, Public Law 89-789, dated November 7, 1966 to provide hurricane protection, shore protection, and Federal participation in the cost of periodic nourishment for the first 10 years of project life at Holden Beach, Long Beach, Ocean Isle Beach, Sunset Beach, and Yaupon Beach in Brunswick County, NC.

Funding to initiate construction of the Ocean Isle Beach portion of the Brunswick County Beaches Project was provided by the Energy and Water Development Appropriations Act, 2000, Public Law 106-60, and House Report 253, Energy and Water Development Appropriations Bill, One-Hundred-Sixth Congress, First Session.

The initial project was to have a dune with a crown width 25 feet at an elevation of 9.5 feet NGVD extending for 5,150 feet. The dune was fronted by a berm with a width of 50 feet at elevation 7 feet NGVD for a distance of 5,150 feet, then, to its west, shall have a berm with a crown width of 50 feet at elevation 7 feet NGVD for a distance of 2,600 feet, and then a berm with a crown width of 25 feet at an elevation 7 feet NGVD for a distance of 2,400 feet. The dune and berm shall have transitions of 4,200 feet on the eastern end and 2,800 feet on the western end. The total project covered over 28,000 feet of shoreline (Figure 1).

Periodic beach nourishment was authorized by Section 934 of the Water Resources Development Act of 1986, Public Law 99-662, for a period that does not exceed 50 years after initiation of construction, for water resources development projects for which such nourishment has been authorized for a limited period. Construction of the Ocean Isle Beach project was initiated in 2001; therefore, Federal cost-sharing for beach nourishment is authorized to continue until 2051.

PROJECT PERFORMANCE.

Overall, the Town of Ocean Isle Beach Erosion Control and Hurricane Wave Protection Project has performed very well. The first Inlet and Shoreline Monitoring Report, prepared in December 2002, showed that approximately 262,000 cubic yards of beachfill was lost during the first year over the entire project area. This represented about 15% of the initial placement volume. Most of the area had experienced losses ranging from less than 50 cubic yards to over 21,000 cubic yards. Some of the larger losses occurred in reaches near the ends of the project, which was not unexpected. (Information taken from *Ocean Isle Beach Nourishment Project: Inlet and Shoreline Monitoring Report No. 1, December 2002*)

A May 2004 survey indicated that the east end of the beachfill placement (Stations 10-80) lost approximately 302,000 cubic yards, while the western part (Stations 90-180) gained 203,000 cubic yards. That represented a net loss of about 99,000 cubic yards over the original fill area between December 2001 and May 2004. In summing the volume changes along the entire beach length, Ocean Isle had about 1,794,000 cubic yards more sand in the active beach system than since the start of the project. (Information taken from *Ocean Isle Beach Nourishment Project: Inlet and Shoreline Monitoring Report No. 2, June 2005*)

From the initial project construction until the proposed winter 2009-10 project, no additional beach fill has been considered necessary west of Station 125. Included are selected profiles and surveys from the initial project, the 2006 project and the proposed 2009-10 nourishment project. (Figures 2b, 7a and 7b)

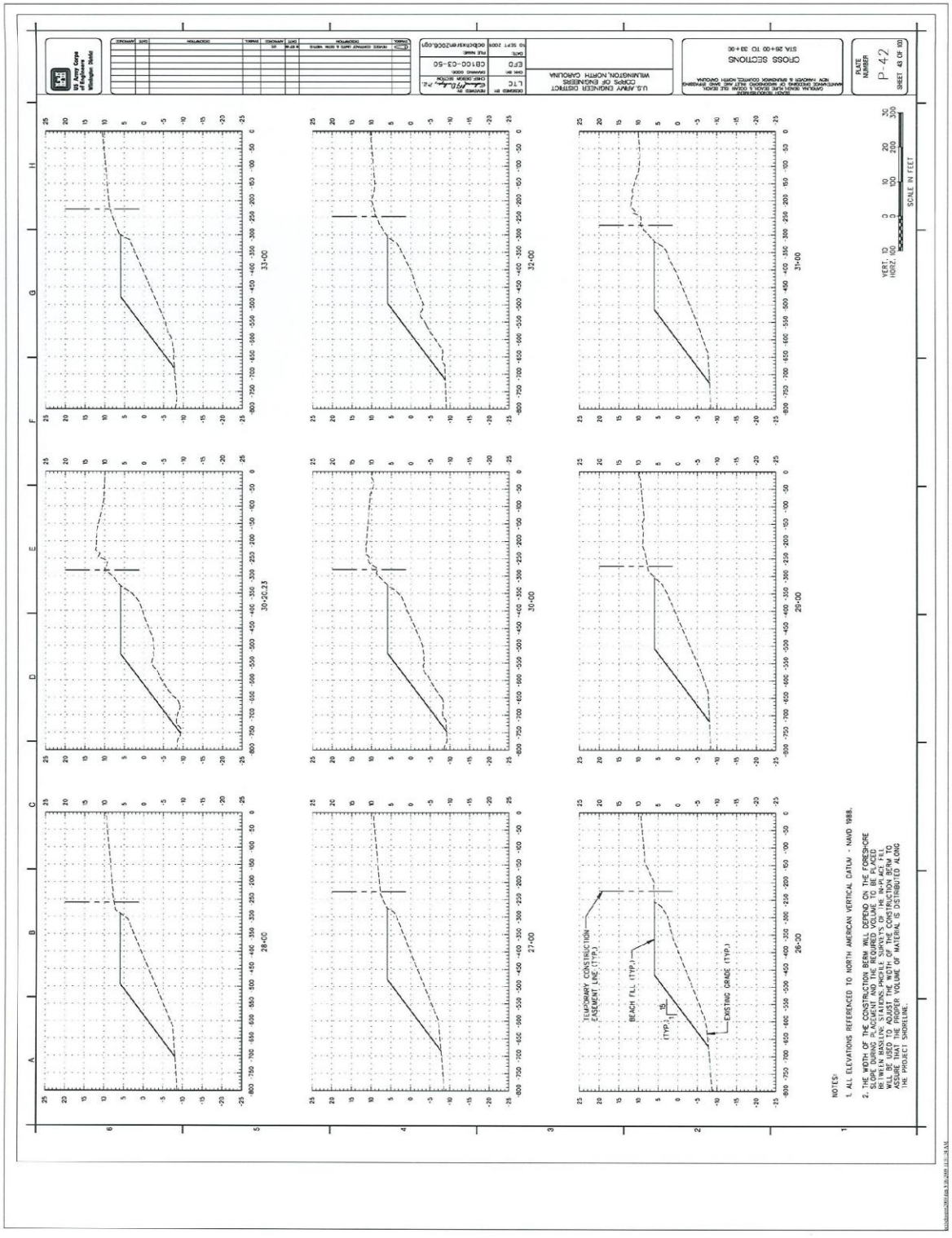

Figure 7a. 2006 Station Profiles.

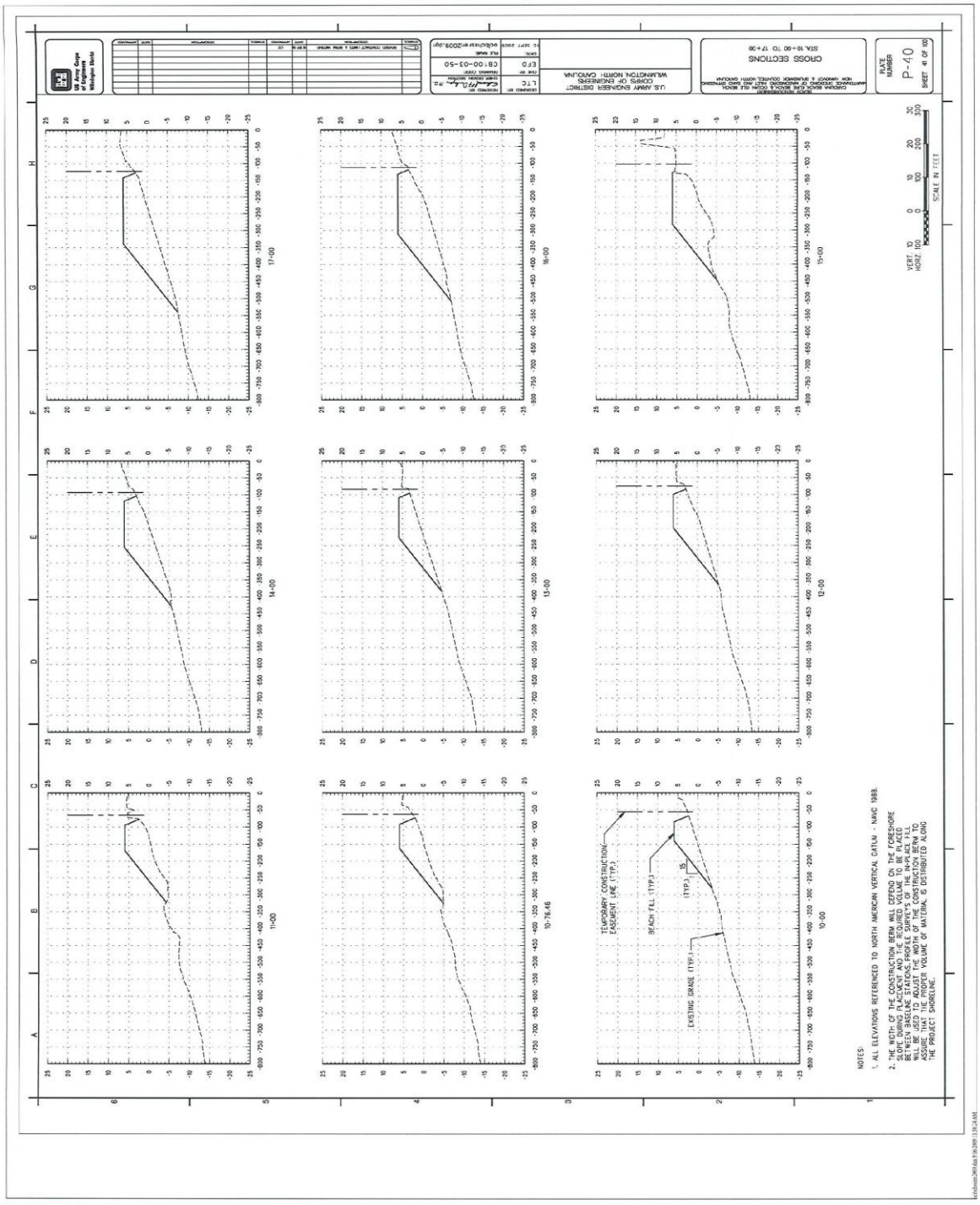

Figure 7b. 2009 Station Profiles.

C. Compatible Sediment
Third factor per 15A NCAC 7J.1202(d)(3)

The Town's report, specifically page 20, provides the following information about the availability of compatible sediment for future beach fill projects:

SHALOTTE INLET SEDIMENT TRAP/BORROW AREA.

The sediment trap/borrow area located in Shallotte Inlet, which has been used for the initial and subsequent projects is shown in Figure 6. The material contained in the vibracores for the projected 2009 project had the following composite characteristics:

Mean (M) = 2.03 (phi)
Silt = 2.4%
Shell = 4.1%

Approximately 1.6 million cubic yards of beach quality sand were available from the Shallotte Inlet for the initial project construction. There has been a sufficient amount of sand from Shallotte Inlet to handle the initial project construction, the subsequent maintenance project, and the 2009-10 planned maintenance. Shallotte Inlet has had good quality sand available to a maximum dredging depth of about 15 feet below NGVD. The average 3-year maintenance renourishment volume was estimated to be about 300,700 cubic yards, assuming a conservative overfill factor of about 1.2 The Corps' June 1997 EA (p.7) concluded that the 300,700 needed for the planned 3-year maintenance cycles should "be available from Shalotte Inlet being trapped between maintenance cycles." Based on the past performance of the sediment trap/borrow area, the material collected in Shallotte Inlet is sufficient to satisfy future nourishment needs of Ocean Isle Beach indefinitely.

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STAFF'S COMMENTS IN RESPONSE:

It is Staff's interpretation that the sediment standard of less than 10% fines used by the USACE for the Ocean Isle Beach 50-year storm protection project, and the limited role of the sediment compatibility rules considered for consistency determinations for federal projects (especially those approved prior to the sediment compatibility rules became effective), is acceptable for the purpose of this application. Shalotte Inlet has been compatible in the initial project and the one earlier maintenance project, and likely will continue to be compatible for the winter 2009-10 scheduled maintenance and all subsequent maintenance events from the inlet. In addition, Staff, based primarily on their review of the 1997 Corps' EA for the Town's project, is comfortable that there is likely a sufficient volume of sand accumulating in Shalotte Inlet to satisfy the proposed 3-year maintenance cycle for the life of the project (though not "indefinitely" as the Town concludes above). However, Staff notes that the Town had about 6 years between the initial project in the spring of 2001 and the first maintenance cycle in the winter of 2006-07 for the inlet to refill. The 2009-10 planned cycle is a return to the original 3-years cycle, and appears to have sufficient volume of sand. Also, Staff notes that Holden Beach (across Shalotte Inlet from the Town) has not historically used Shalotte Inset as a source for its small-scale nourishment projects (they have trucked sand from upland sources or Lockwoods

Folly Inlet), and is unlikely to use Shalotte Inlet as a source in the near future. Staff recommends that the Town has met the requirements of this factor.

Financial Resources-
Fourth factor per 15A NCAC 7J.1202(d)(4)

The Town's report, specifically pages 20-22 and the supplemental material provided at the request of Staff, provide the following information about the financial resources planned for future beach fill projects:

FINANCIAL PLAN.

Ocean Isle Beach has an established beach renourishment fund that is used to fund beach nourishment projects on Ocean Isle Beach. This fund is presently funded each year in the amount of $750,000.00 through contributions from the Town's General Fund ($400,000.00) and Accommodations Tax Fund ($350,000.00). In previous years it has also been funded by earmarking various amounts of property (ad valorem) tax collections. For example: one cent of the Town's 2009 tax rate may have been earmarked specifically for this fund. The present balance in this fund exceeds $2.1 million, even after the Town's share of non-federal local funds for the upcoming 1009-10 renourishment cycle was paid.

Since the Town's first renourishment project in 2001, the Town has been successful in obtaining Federal and State funds to cover cost of construction. This has been a 65% Federal and 35% Local cost share. The 35% local share has then been split between the State (75%) and the Town (25%). As we all know, federal funding for beach renourishment projects has been more difficult to obtain in recent years as more often than not these funds have not been included in the President's budget. As a result, local representatives have had to seek to add the funds to the House and Senate versions of the appropriations bill. However, the Corps of Engineers and Town of Ocean Isle Beach have again been successful in securing the 65% federal share of funds necessary for the scheduled 2009-10 periodic nourishment.

State funding for these projects, budgeted through the North Carolina Division of Water Resources, has been very reliable. The Town was successful in securing the State of North Carolina's share for the upcoming 2009-10 project, and both the State's and Town's portions have already been remitted to the Corps of Engineers.

Based on unforeseen future economics, the Town has developed three scenarios to continue funding of these projects.

Scenario 1:

> The Town's Beach Renourishment Project will continue to receive funding from the Federal Government and State of North Carolina at the same level as in past years. With this scenario, the Federal Government will cover 65% of the cost for periodic nourishment and non-federal interests are responsible for the remaining 35%. Of this 35%, the State of North Carolina would be responsible for 75% and the Town would be

responsible for the remaining 25% of the non-federal costs. This scenario assumes the State will contribute the maximum allowed under State Law or 75% of the non-federal costs which is equal to 26.25% of the total cost for periodic nourishment. The 25% local share of the non-federal cost is equivalent to 8.75% of the total cost of periodic nourishment.

Scenario 2:

This scenario assumes Federal funding support for the project will cease. The State of North Carolina will continue to contribute 75% of the normal 35% non-federal share or 26.25% of the total periodic nourishment cost. The Town of Ocean Isle Beach will fund the balance, or 73.75% of the periodic nourishment cost for the project.

Scenario 3:

This scenario assumes all Federal and State funding will end. The Town will assume responsibility for 100% of the cost of periodic nourishment for the Ocean Isle Beach project.

Under Scenario 1, sufficient funds will be available to continue nourishment of the Ocean Isle Beach project well beyond the 25 year requirement stipulated in 15A NCAC 07J. 1201. (This is based on the assumption that the Town's Renourishment Fund will continue to get the annual contribution totaling $750,000.00 [$400,000.00 from the General Fund and $350,000.00 from the Room Accommodation Tax Fund].) Projected renourishment cost for the Ocean Isle Beach project were estimated based on current year's awarded bid price for dredging and renourishment requirements with future costs inflated at an annual rate of inflation of 5%.

See "Ocean Isle Info for CRC Application" attached file, pp. 25-27 for more info.

For scenarios 2 and 3, the Town would utilize projected revenues from both funds available from occupancy tax as well as the Town's General Fund and taxing powers. The projections for accommodation tax takes into consideration the fact at present the Town collects 3% accommodation tax on gross rental income. The Town has the ability to increase this percentage an additional 2% for a total of 5% (Approved through Session Law 97-364). This equates to a 66% increase. These projected revenues would also assume that these revenues generated by the occupancy tax would grow at a rate of approximately 2% annually. Interest on this fund balance would also be realized at a range estimated between 1% - 4%. The Town could also use its taxing power ability to generate additional revenues necessary to ensure completion of the project.

Projected renourishment cost for the Ocean Isle Beach project were estimated based on current years awarded bid price for dredging and renourishment requirements with future costs inflated at an annual rate of inflation of 5%. Based on this estimate, the cost for Ocean Isle Beach's renourishment project could range from an estimated 5.9 million in 2009-10 to 19.1 in 2033 – 34, or the next 25 year period.

Based on these funding scenarios, the Town of Ocean Isle Beach Renourishment Project will continue to receive periodic nourishment well beyond the 25 years required for the static line exception.

See "Ocean Isle Info for CRC Application" attached file, pp. 28-37 for more info.

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STAFF'S COMMENTS IN RESPONSE:

Staff notes that since this project began in 2001, the Town has provided the local share for the three projects (initial project, 2006-07 maintenance, 2009-10 maintenance), using money from its beach nourishment fund which is funded by their general fund and from the room accommodation tax fund, currently taxed at 3%. After the 2009-10 maintenance costs had been paid, this fund has a balance of approximately $2.1 million dollars. The cost-sharing formula for the Town's projects has been 65% federal- 35% non-federal (75% of which has been funded by the State through the Division of Water Resources and 25% of which has been funded by the town's fund). If funding continues in this way, Staff is comfortable the Town can continue to pay the local share for the life of the federal project.

DCM feels that the financial requirement for project funding as per 07J.1200 has been met through the Town's current USACE 50-year storm protection project. However, because the Town presented two additional scenarios in its static line exception application, DCM wanted to identify the assumptions made by the Town in their financial projections and address DCM concerns about these assumptions in order to assist the CRC in its deliberations.

The Town also evaluated two other funding scenarios, being: **Scenario 2**- the federal share is gone and is assumed by the Town (or 73.75% of total cost) while the State share remains the same, and **Scenario 3-** where the Town funds 100% of the estimated costs(no federal or state monies). Based on these two scenarios, Staff have two primary concerns about whether the Town could fund the project for 25 more years if federal and/or state funding is reduced from present levels. First, Staff has concerns that the 5% cost inflation figure used by the Town in its analysis may be low, based on recent increases in mobilization costs that may continue into the future. Staff acknowledges the difficulty in predicting such costs. Second, the CRC should note that the numbers provided by the Town in both these scenarios also assumes a 5% room accommodation tax instead of the current rate of 3%, and also makes the assumption that a higher local property tax would be approved and implemented.

Considering all these factors, and noting that while 25 years of funding must be shown through this process, the Commission will have the opportunity to re-evaluate the static line exception and the necessary requirements every five years, and can address major changes in future funding, on balance Staff believes the Town has satisfied it's burden on this factor.

IV. Staff's Recommendation

The Commission, through 15A NCAC 7J.1202(a)(4), directs Staff to provide a recommendation to the Commission whether it should grant or deny the Petitioner's Static Line Exception Request. Based on the Town's report and additional exhibits attached, Staff recommends that the Commission **GRANT** the Town's Petition for a Static Line Exception, and authorize the use of the rules at 15A NCAC 7H.0306(a)(8).

ATTACHMENT C
Petitioner's Report

Petitioner's Initial Report is Attached as an electronic file titled "Town of OIB Static Line Exception Report" so that the report's photographs and diagrams can be viewed in color.

ATTACHMENT D
Petitioner's Supplemental Materials

Additional Materials supplied by Petitioner are included as additional electronic files. Additionally, the June 1997 Corps' General Reeevaluation Report and Environmental Assessment document, the Corps' April 2002 Operations and Maintenance manual, the Corps' December 2002 monitoring report, and the Corps' June 2005 monitoring report will be available at the CRC meeting for review as they are cited in this staff recommendation and are intended to be part of the official record considered by the CRC.

Ocean Isle Beach, NC
Static Line Exception Application Report

January 2010

Prepared by:
The Town of Ocean Isle Beach

TABLE OF CONTENTS

FIGURES

TABLES

Town of Ocean Isle Beach, NC
Static Line Exception Application Report

1. PURPOSE

The Town of Ocean Isle Beach (Town) is seeking an exception to the static vegetation line in accordance with the procedures outlined in 15A NCAC 07J .1201. The Town is not seeking the exception to allow development to move seaward of existing oceanfront development. The following report addresses all of the issues outlined in 15A NCAC 07J .1201 as requirements for the static line exception application.

2. PROJECT DESCRIPTION/AUTHORIZATION

The project for hurricane-flood control from Cape Fear to the North Carolina-South Carolina State Line, was authorized in House Document Number 511, Eighty-ninth Congress, by Section 203 of the Flood Control Act of 1966, Public Law 89-789, dated November 7, 1966 to provide hurricane protection, shore protection, and Federal participation in the cost of periodic nourishment for the first 10 years of project life at Holden Beach, Long Beach, Ocean Isle Beach, Sunset Beach, and Yaupon Beach in Brunswick County, NC.

Funding to initiate construction of the Ocean Isle Beach portion of the Brunswick County Beaches Project was provided by the Energy and Water Development Appropriations Act, 2000, Public Law 106-60, and House Report 253, Energy and Water Development Appropriations Bill, One-Hundred-Sixth Congress, First Session.

The initial project was to have a dune with a crown width 25 feet at an elevation of 9.5 feet NGVD extending for 5,150 feet. The dune was fronted by a berm with a width of 50 feet at elevation 7 feet NGVD for a distance of 5,150 feet, then, to its west, shall have a berm with a crown width of 50 feet at elevation 7 feet NGVD for a distance of 2,600 feet, and then a berm with a crown width of 25 feet at an elevation 7 feet NGVD for a distance of 2,400 feet. The dune and berm shall have transitions of 4,200 feet on the eastern end and 2,800 feet on the western end. The total project covered over 28,000 feet of shoreline (Figure 1).

Periodic beach nourishment was authorized by Section 934 of the Water Resources Development Act of 1986, Public Law 99-662, for a period that does not exceed 50 years after initiation of construction, for water resources development projects for which such nourishment has been authorized for a limited period. Construction of the Ocean Isle Beach project was initiated in 2001; therefore, Federal cost-sharing for beach nourishment is authorized to continue until 2051.

The 2001 initial nourishment will be used in this static line exception application as the project construction start date. Therefore, for the purposes of this application, the Ocean Isle Beach project has been in existence for 8 years and satisfies the minimum

requirement of 5 years as specified in 15A NCAC 07J .1201. Also as specified in 15A NCAC 07J .1201, this application will provide information that demonstrates the project will continue to be maintained until at least the year 2034 or 25 years from the date of the exception application. Given the existing federal authority that extends through 2051 and the likelihood the project could be reauthorized yet again, maintenance of the project is expected to continue well beyond 2034.

Figure 1. Ocean Isle Beach project limits and USACE Baseline Stations.

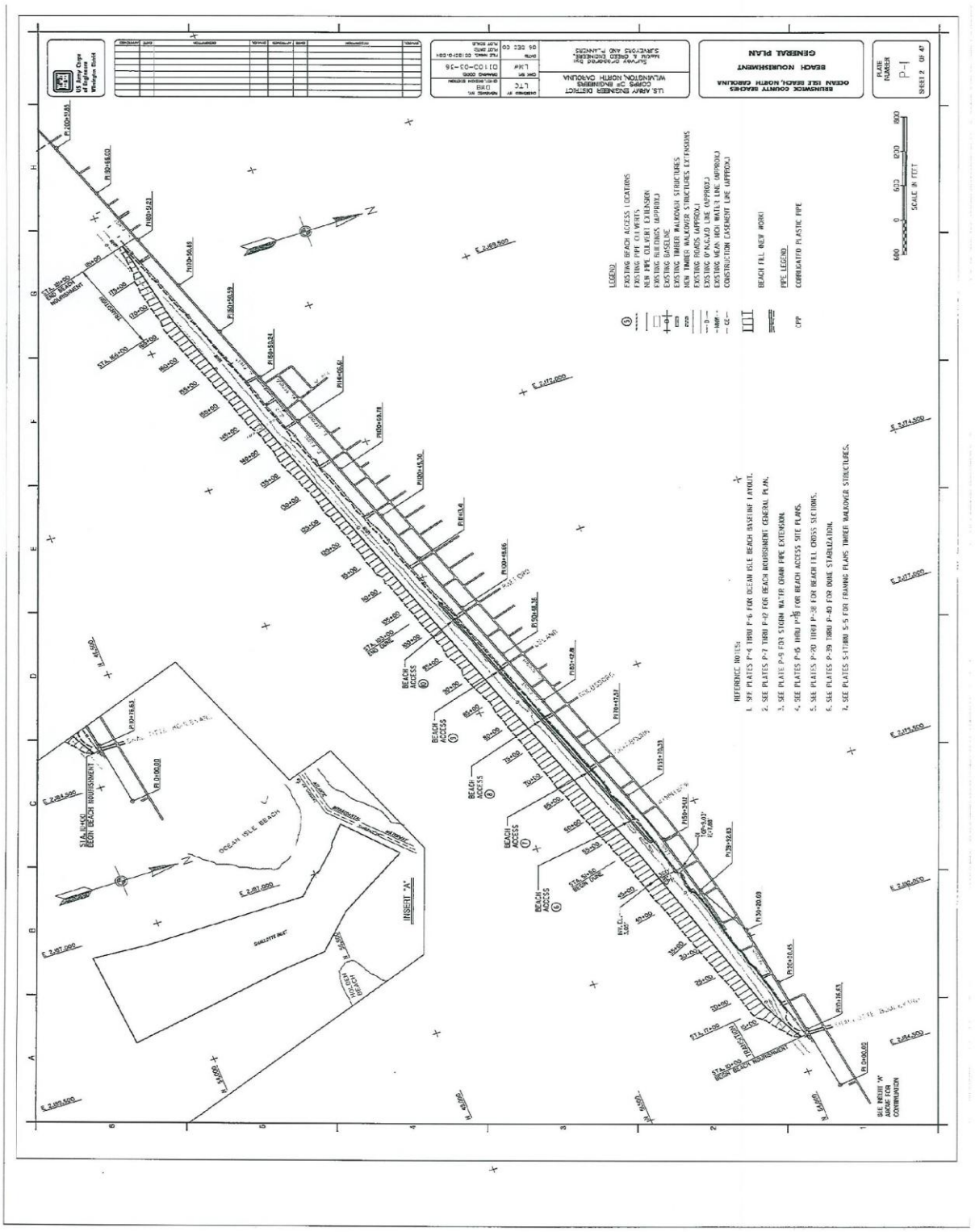

Figure 2a. 2001 General Plan.

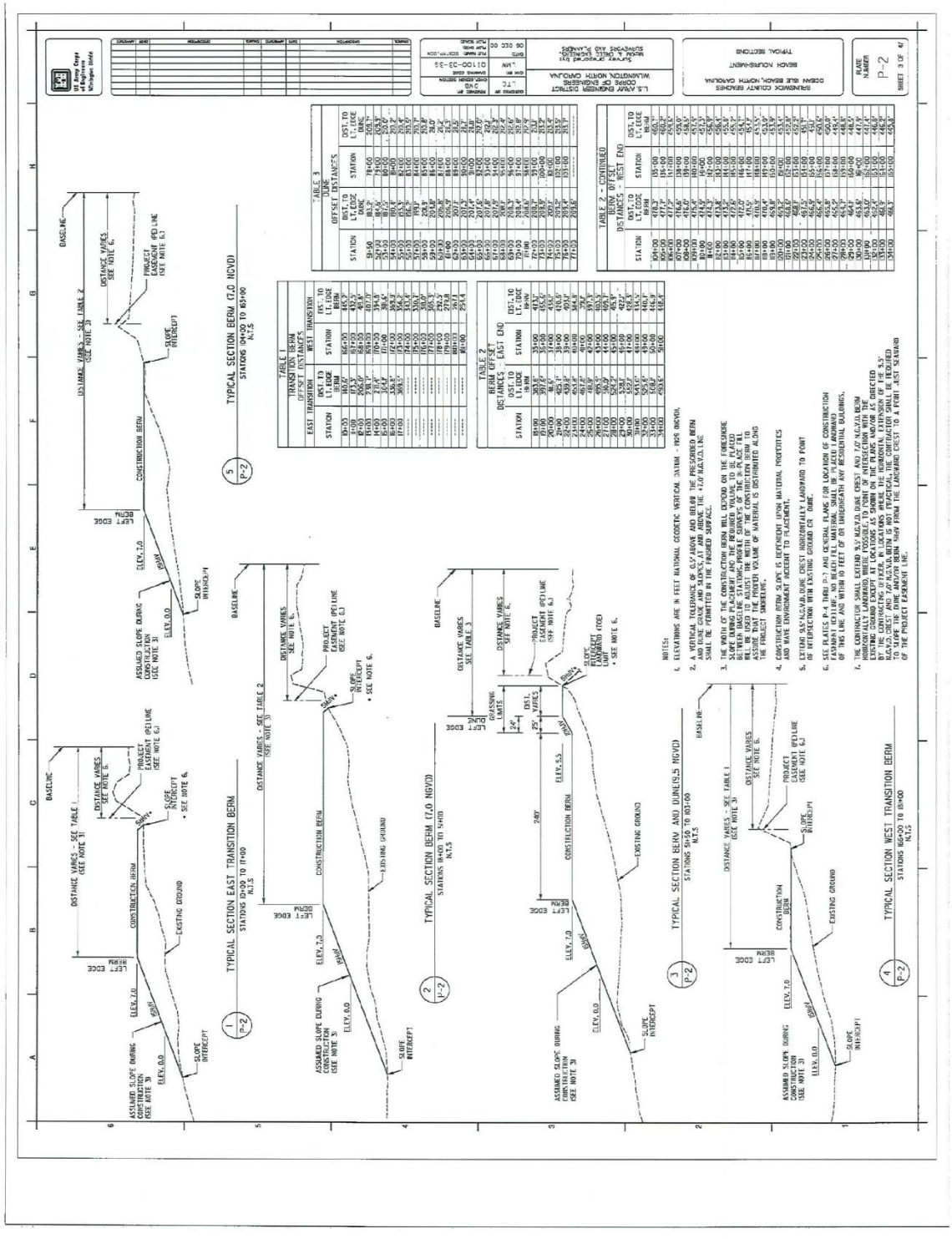

Figure 2b. Selected 2001 Profiles.

3. TOWN STATIC LINE AND EASEMENT LINE

One of the conditions for federal participation in the project was the assurance the beach would remain open to the public for the life of the project. Most all property within the project area was deeded to the Mean High Water Line (MHW) which created a problem for the U.S. Army Corps to initiate the project. Prior to the initial project, the U.S. Army Corps required that the Town obtain perpetual easements from the affected property owners in the project area. All easements necessary for the construction of the Ocean Isle Beach Nourishment Project were completed as of November 7, 2000. There were a total of 231 affected tracts.

The NC Coastal Resources Commission (CRC) adopted rules governing the establishment of a static vegetation line for beach communities that undertake a large-scale beach nourishment project. A large scale project is defined by the CRC as any volume of sediment greater than 300,000 cubic yards or any storm protection project constructed by the U.S. Army Corps of Engineers. The initial static line for Ocean Isle Beach was conducted in December 1999, but has since been altered. As stated in 15A NCAC 07H .0305(a)(7), *"Because the impact of Hurricane Floyd (September 1999) caused significant portions of the vegetation line in the Town of Oak Island and the Town of Ocean Isle Beach to be relocated landward of its pre-storm position, the static line for areas landward of the beach fill construction in the Town of Oak Island and the Town of Ocean Isle Beach, the onset of which occurred in 2000, shall be defined by the general trend of the vegetation line established by the Division of Coastal Management from June 1998 aerial orthophotography."* The location of the current static vegetation line for Ocean Isle Beach is shown in Figures 3a-3f.

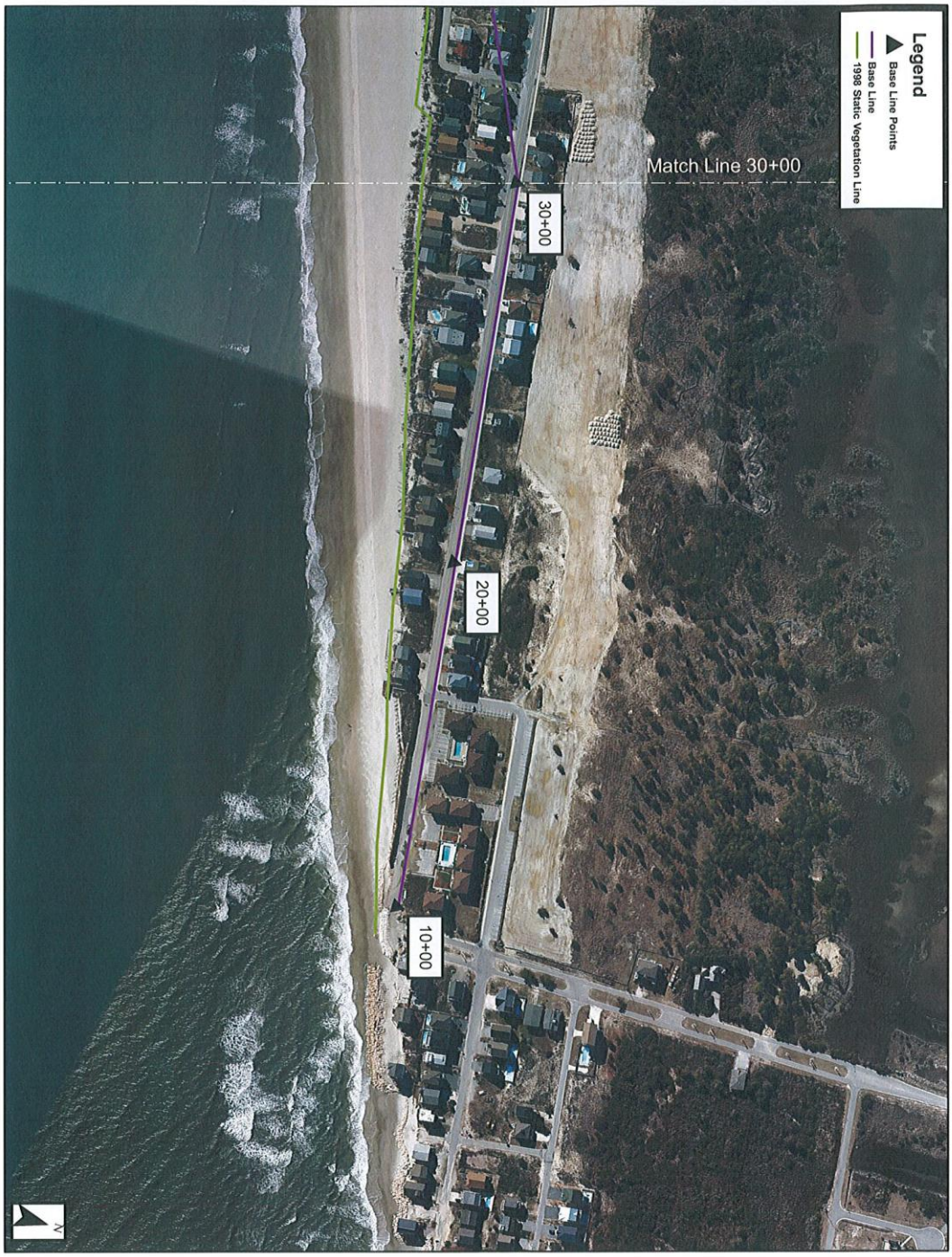

Figure 3a. Ocean Isle Beach Base and Static Vegetation Lines.

Figure 3b. Ocean Isle Beach Base and Static Vegetation Lines.

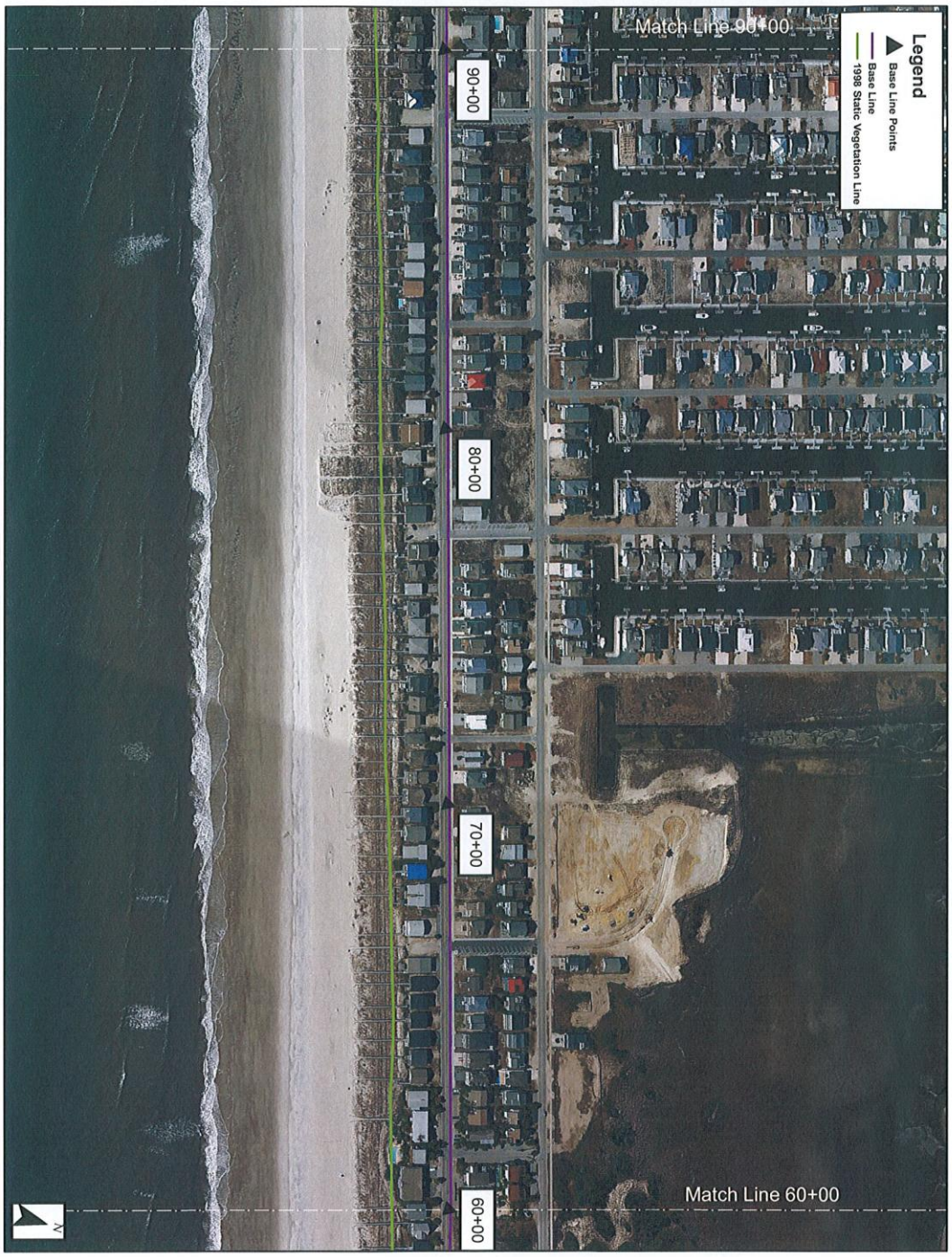

Figure 3c. Ocean Isle Beach Base and Static Vegetation Lines.

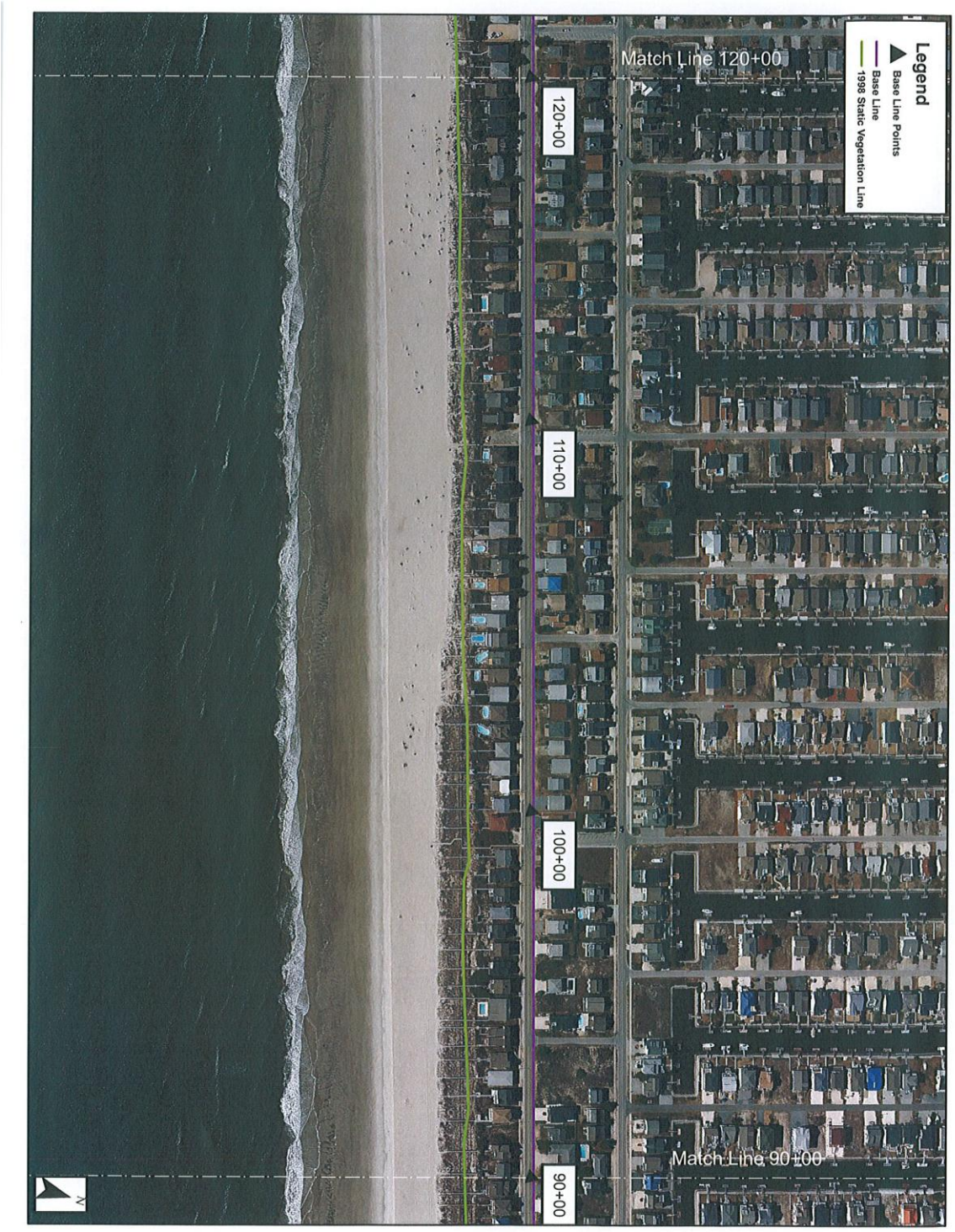

Figure 3d. Ocean Isle Beach Base and Static Vegetation Lines.

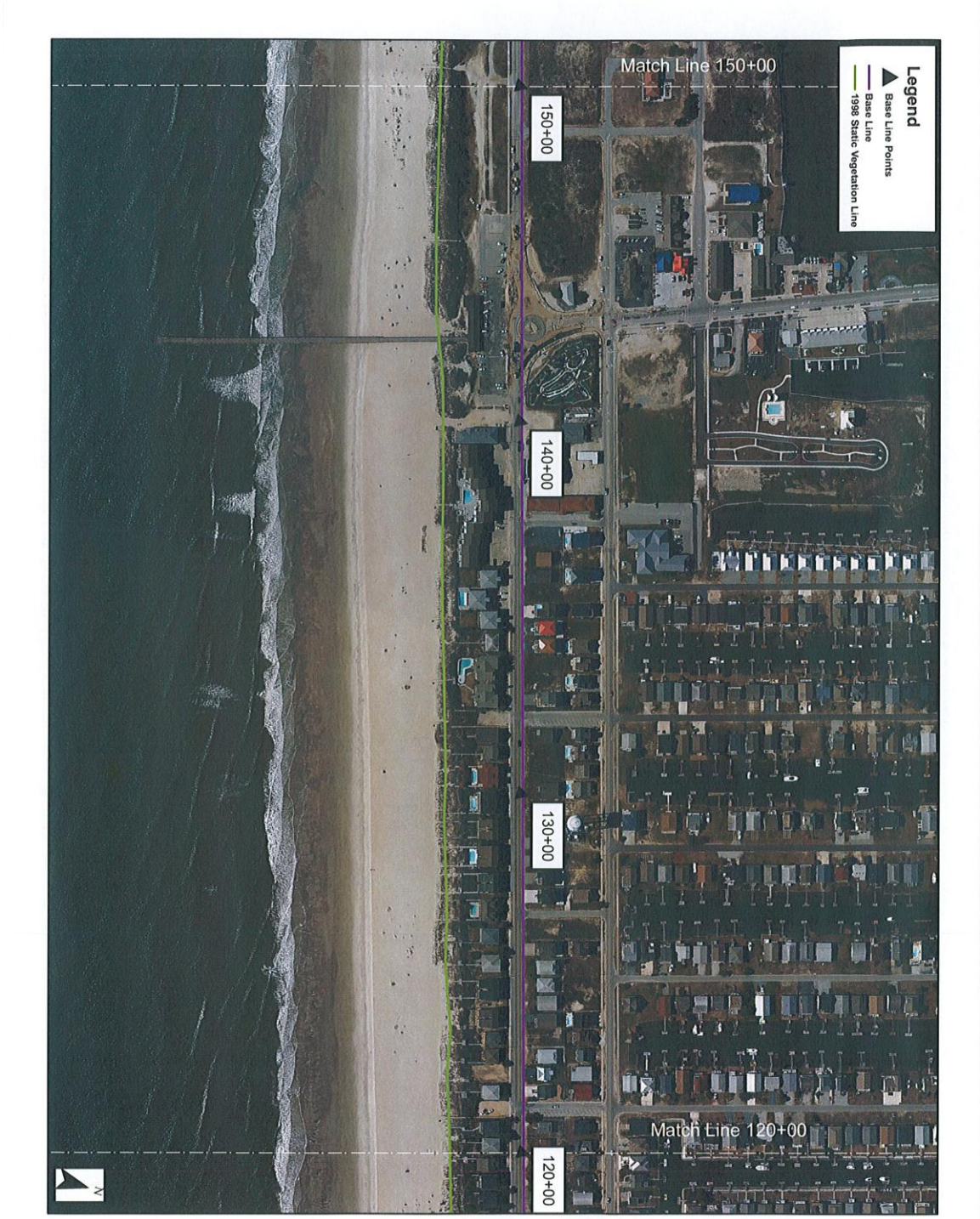

Figure 3e. Ocean Isle Beach Base and Static Vegetation Lines.

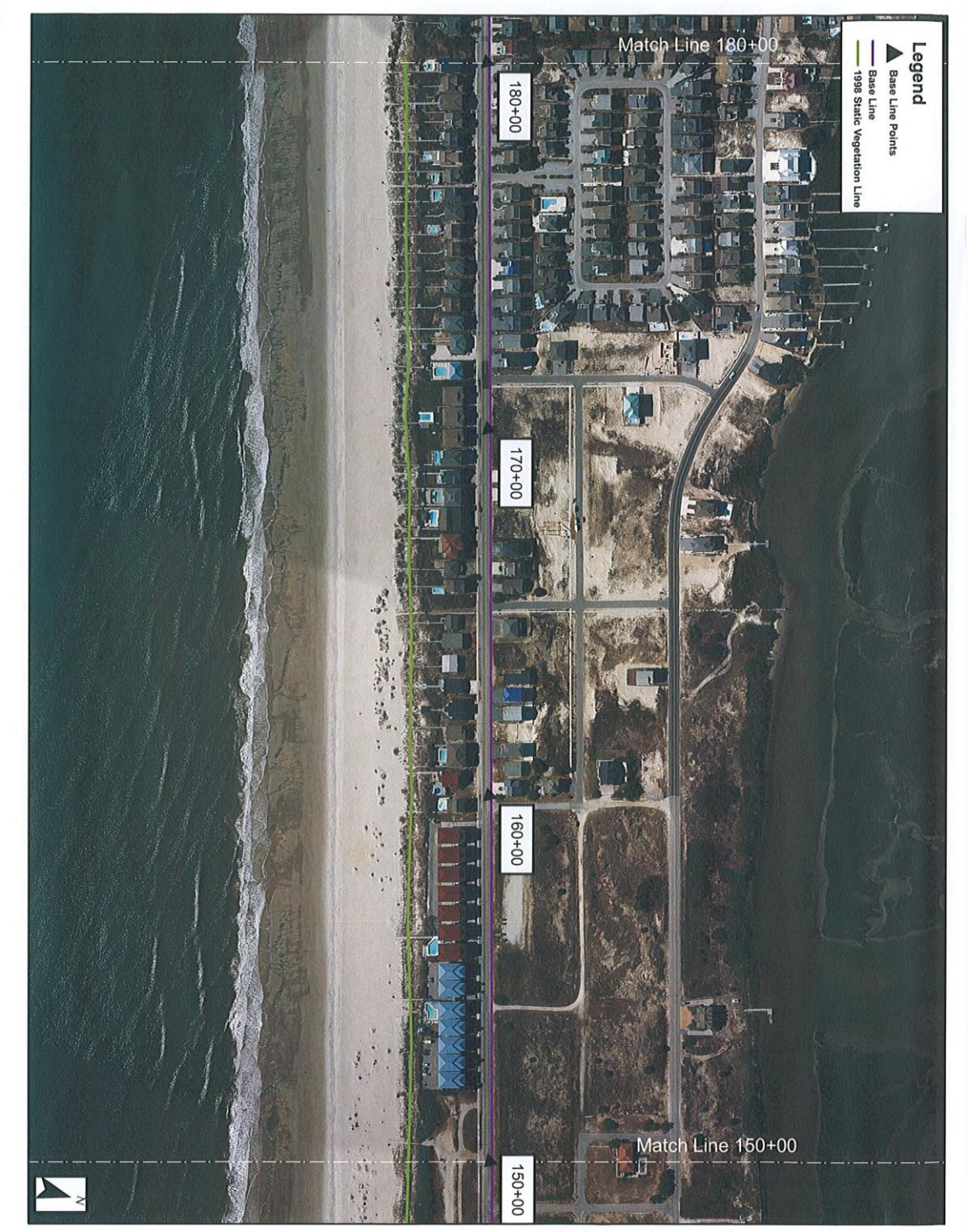

Figure 3f. Ocean Isle Beach Base and Static Vegetation Lines.

4. PROJECT NOURISHMENT HISTORY

a. 2001. The initial stage of construction for the project started in February 2001 and was completed on May 7, 2001. The project consisted of placing 1,952,600 cubic yards of fill over 28,000 feet of shoreline. The project protected approximately 3 ¼ miles of beach along Ocean Isle. The beach was increased in width by 125 feet in areas with a full construction profile. Advanced maintenance fill was also placed at the time of construction which added an additional 50 feet of width to the beach. (See Figure 2a-2b.)

Although the project is scheduled to be completed every 3 years, the initial project performed so well that the first periodical nourishment was not considered necessary until 6 years after the completion of the initial project construction.

b. 2006-2007. Beginning in November 2006 the first project maintenance dredging began. Approximately 409,530 cubic yards of sand was placed on the beach from Station 10 to Station 70 (Shallotte Boulevard to approximately Southport Street). (See Figure 4.)

c. 2009. We are currently scheduled for our second maintenance dredging to occur in the winter of 2009. This project is scheduled to place sand from Station 10 to Station 130. (See Figure 5)

d. Ocean Isle Beach Historic Funding Sources. The source of funds used for each of the nourishment events listed in Table 1 is provided in Table 2.

Table 1. Ocean Isle Beach Nourishment History

Nourishment Dates	Borrow Area[1]	Placement Area (Stas.)[2]	Pay Yardage (cy)	Cost of Operation	Cost Per Cubic Yard
Feb. 2001	Shallotte Inlet	10 to 180	1,952,600	$5,135,338.00	$2.63
Nov. 06– Dec. 06	Shallotte Inlet	10 to 72	540,347	$2,019,176.26	$4.94
Projected 2009-2010	Shallotte Inlet	10 to 125	509,200	$5,923,077.00	$7.00

[1] Borrow area shown on Figure 6.
[2] Stations in 100's feet (Figure 1).

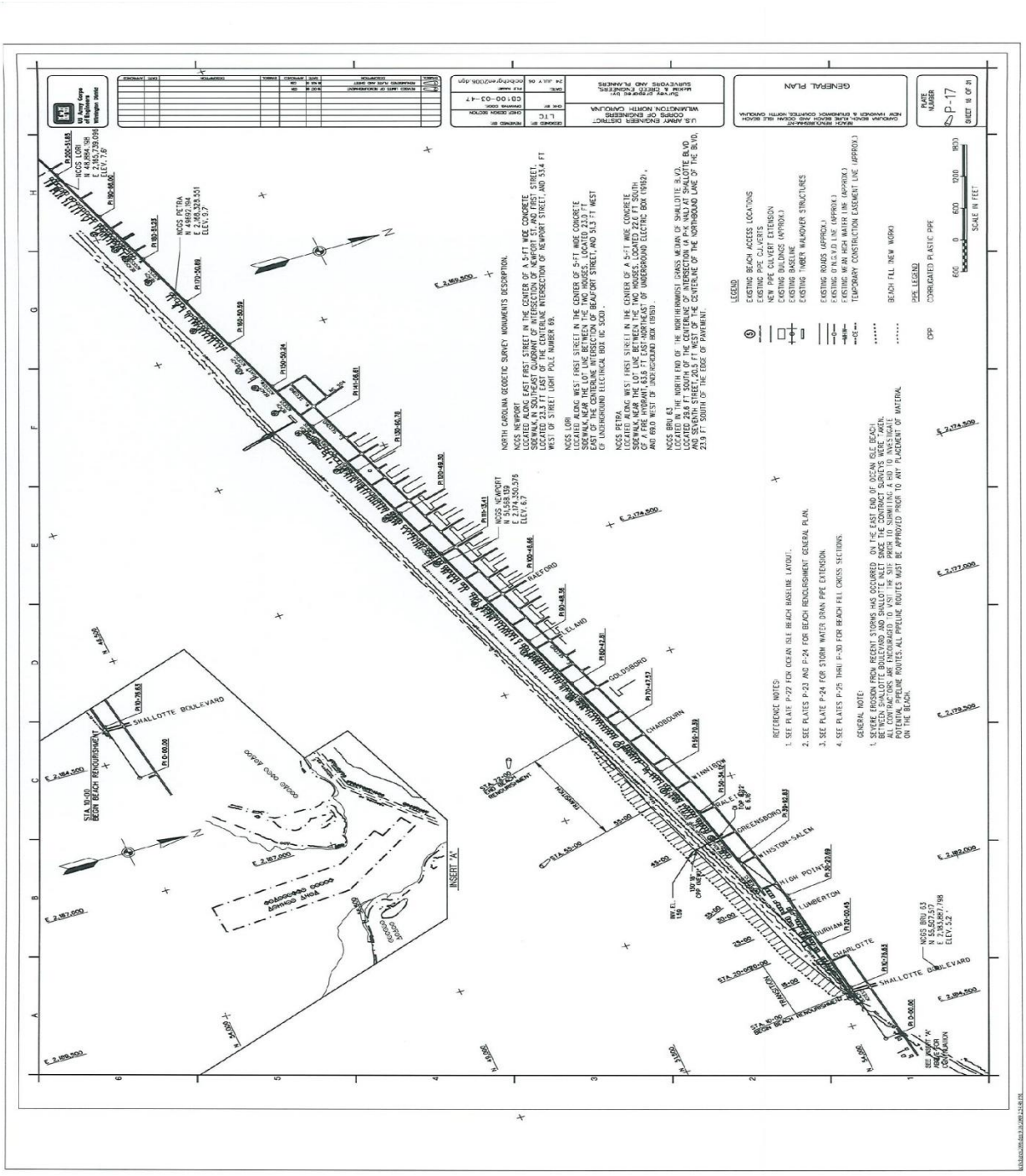

Figure 4. 2006 General Plan.

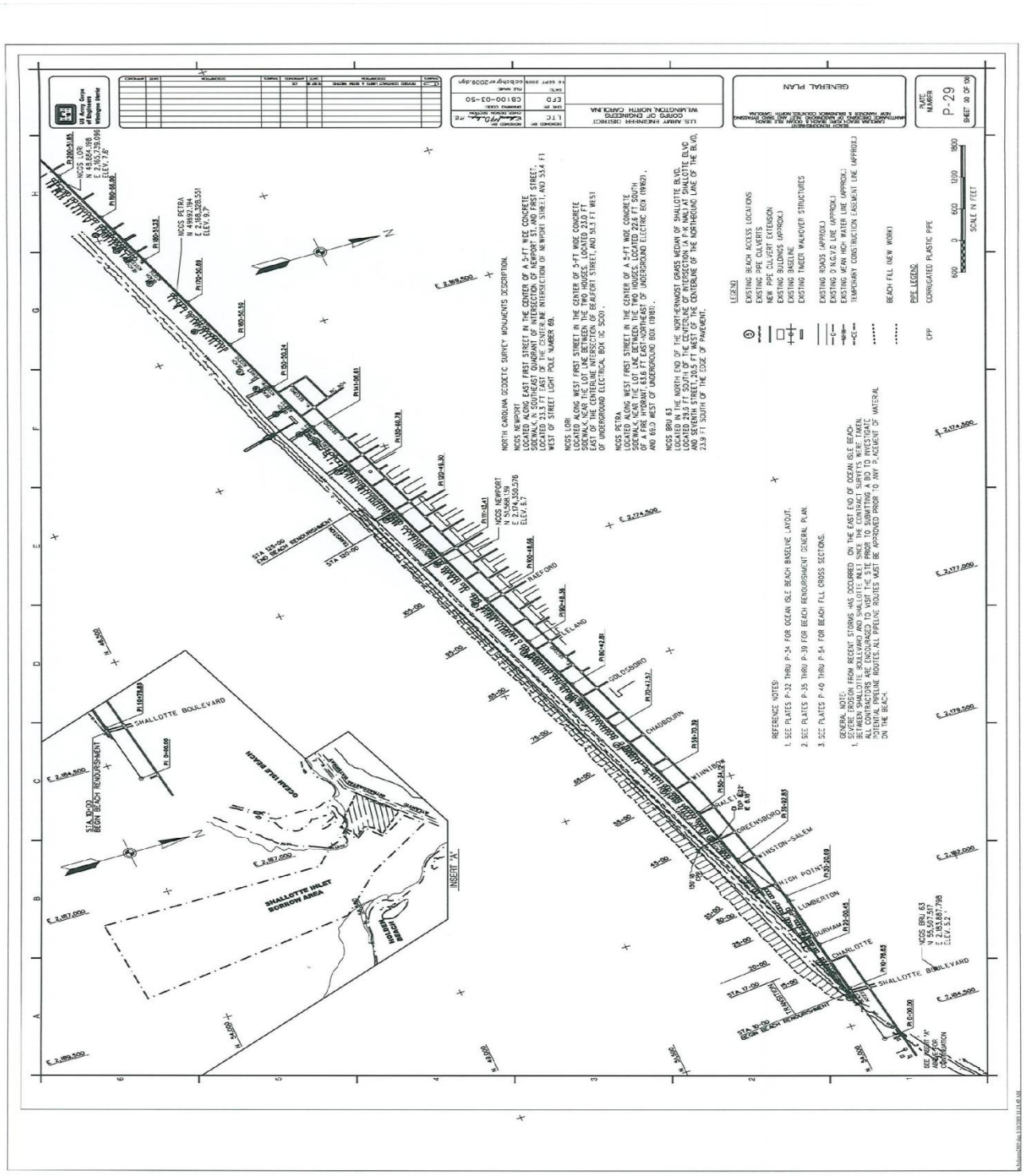

Figure 5. 2009-2010 General Plan.

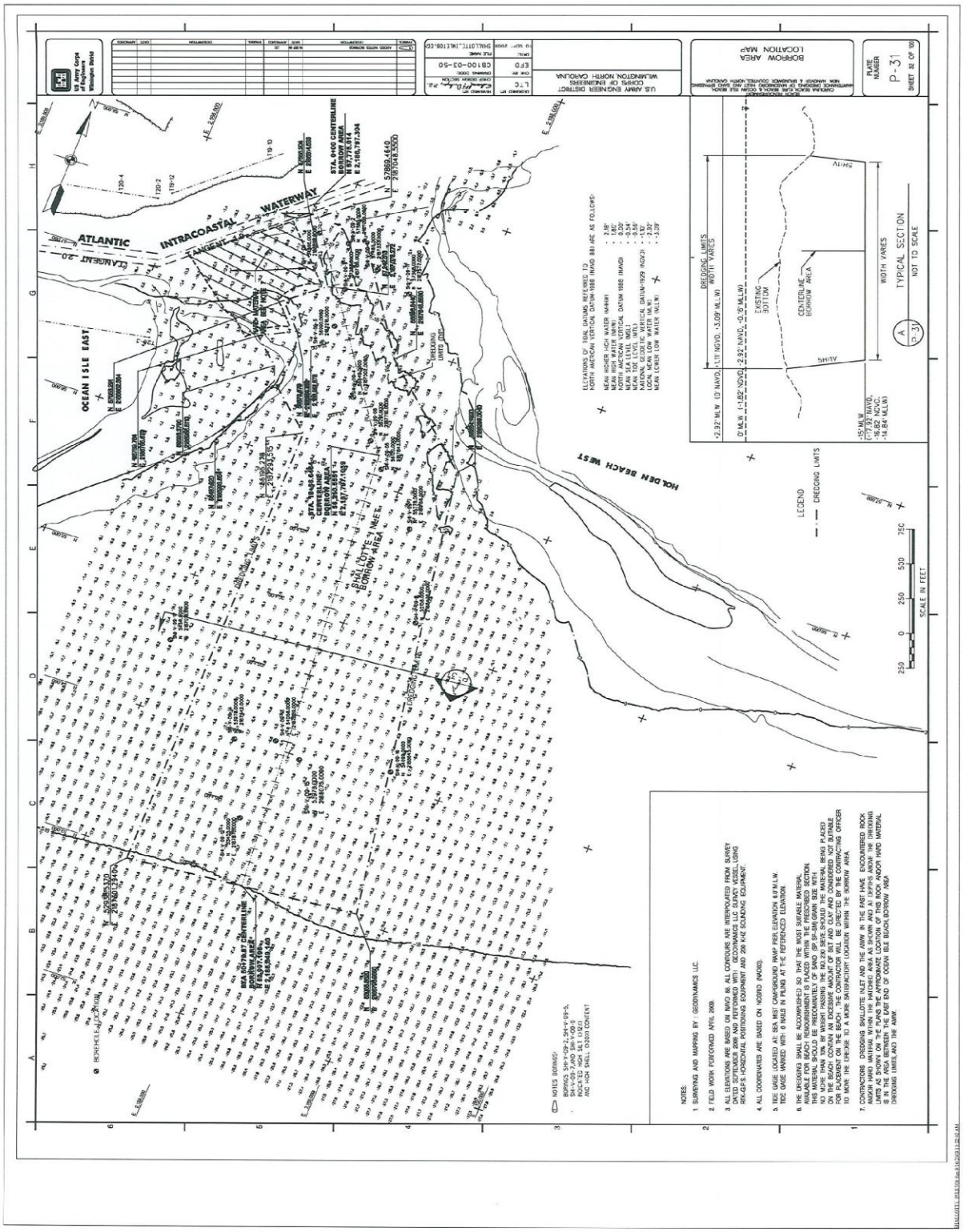

Figure 6. Shallotte Inlet Borrow Area.

Table 2. Ocean Isle Beach Funding Sources

Nourishment Dates	Federal Funding Source	Non-Federal	Cost of Operation
Feb. 2001	$3,337,969	$1,797,369	$5,135,338
Nov. 06– Dec. 06	$1,312,464.26	$706,712	$2,019,176.26
Projected 2009-2010	$3,850,000	$2,073,077	$5,923,077

5. PROJECT PERFORMANCE

Overall, the Town of Ocean Isle Beach Erosion Control and Hurricane Wave Protection Project has performed very well. The first Inlet and Shoreline Monitoring Report, prepared in December 2002 showed that approximately 262,000 cubic yards of beachfill was lost during the first year over the entire project area. This represented about 15% of the initial placement volume. Most of the area had experienced losses ranging from less than 50 cubic yards to over 21,000 cubic yards. Some of the larger losses occurred in reaches near the ends of the project, which was not unexpected. (Information taken from *Ocean Isle Beach Nourishment Project: Inlet and Shoreline Monitoring Report No. 1, December 2002*)

A May 2004 survey indicated that the east end of the beachfill placement (Stations 10-80) lost approximately 302,000 cubic yards, while the western part (Stations 90-180) gained 203,000 cubic yards. That represented a net loss of about 99,000 cubic yards over the original fill area between December 2001 and May 2004. In summing the volume changes along the entire beach length, Ocean Isle had about 1,794,000 cubic yards more in the active beach system than since the start of the project. (Information taken from *Ocean Isle Beach Nourishment Project: Inlet and Shoreline Monitoring Report No. 2, June 2005*)

After the initial project construction until the proposed winter 2009 project, no additional beach fill has been considered necessary west of Station 125. Included are selected profiles and surveys from the initial project, the 2006 project and the proposed 2009 nourishment project. (Figures 2b, 7a and 7b)

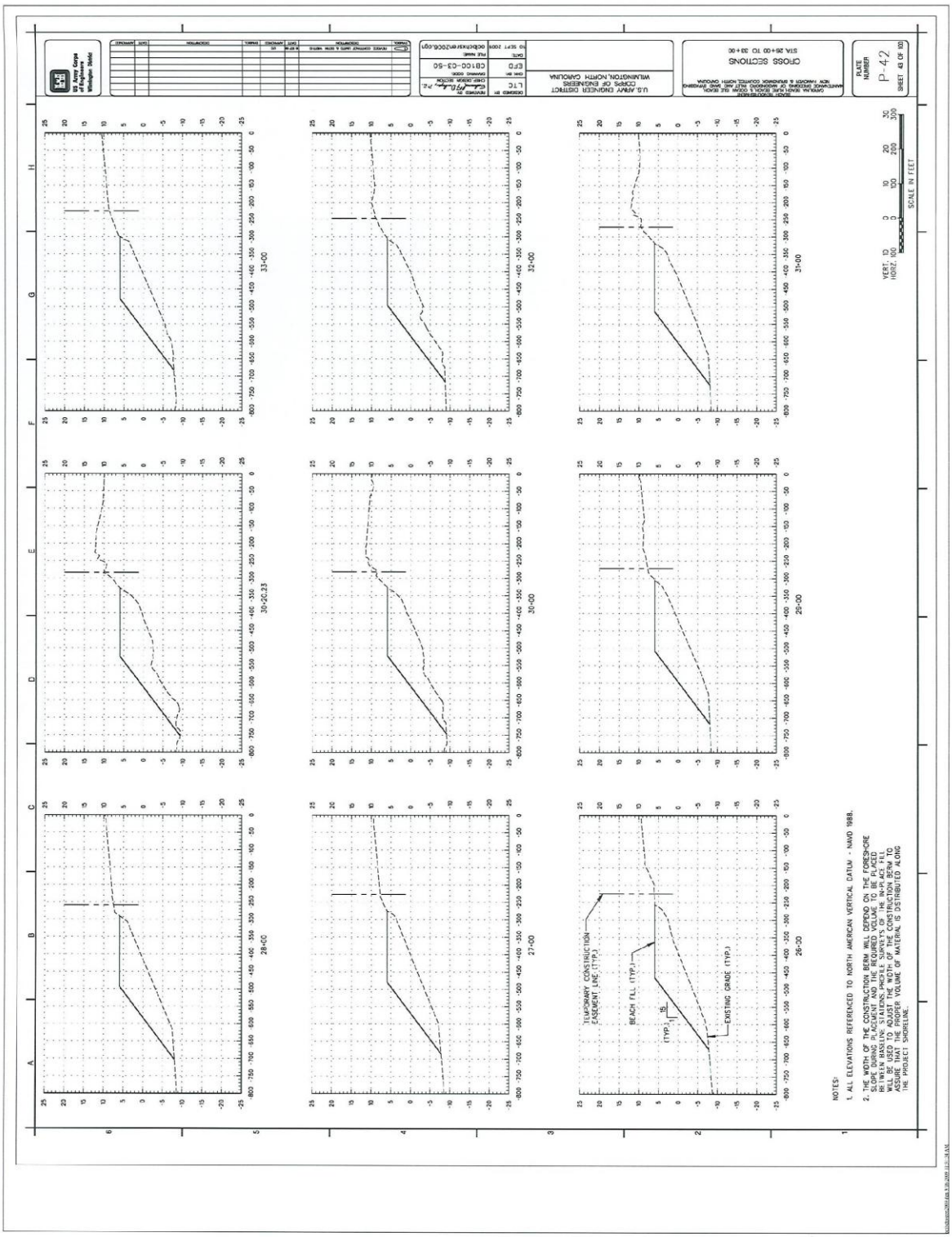

Figure 7a. 2006 Station Profiles.

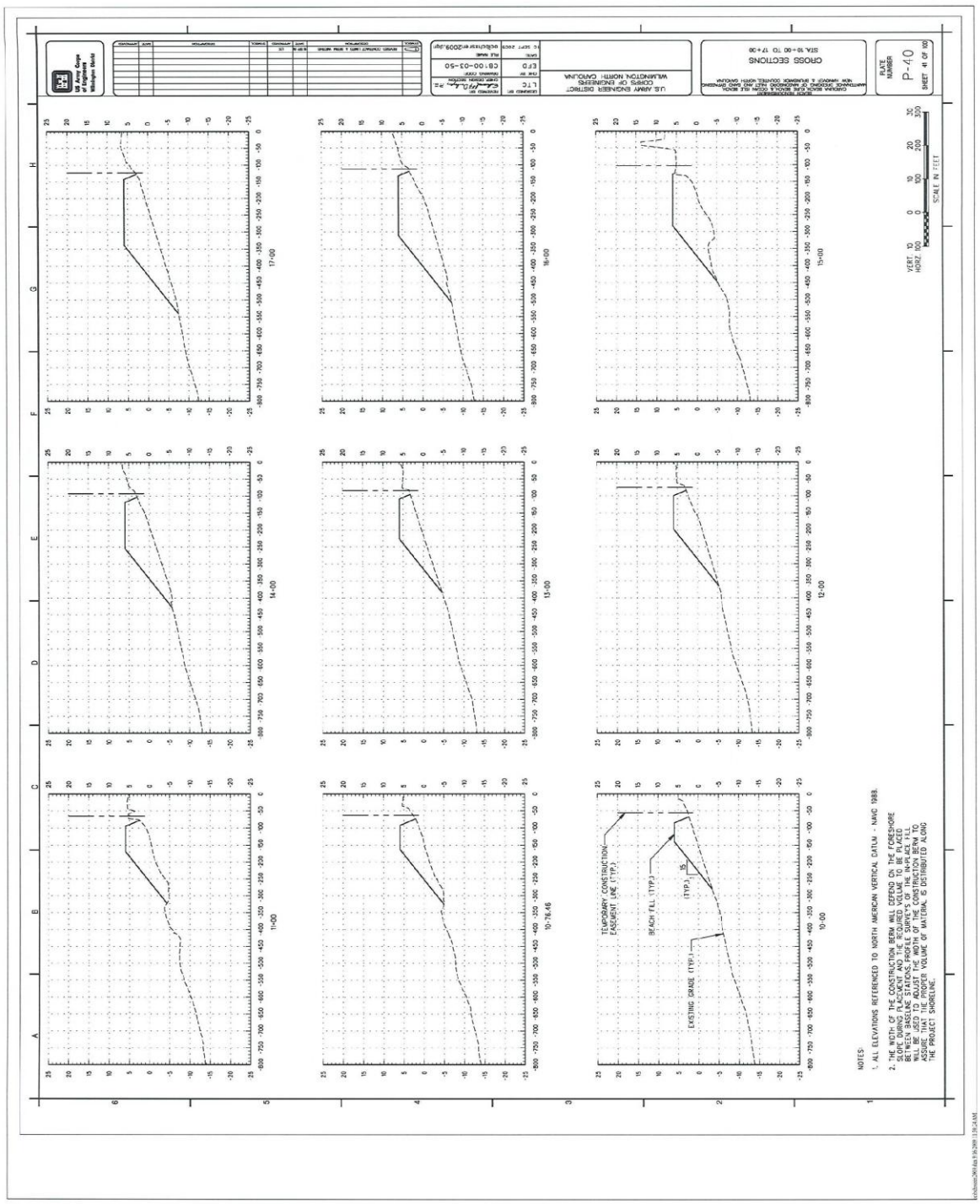

Figure 7b. 2009 Station Profiles.

6. SHALLOTTE INLET SEDIMENT TRAP/BORROW AREA.

The sediment trap/borrow area located in Shallotte Inlet, which has been used for the initial and subsequent projects is shown in Figure 6. The material contained in the vibracores for the projected 2009 project had the following composite characteristics:

Mean (M)	= 2.03 (phi)
Silt	= 2.4%
Shell	= 4.1%

The material taken from Shallotte Inlet and placed on Ocean Isle Beach meets the requirements of the State sediment criteria stipulated in 15A NCAC 07H .0312.

Approximately 1.6 million cubic yards of beach quality sand were available from the Shallotte Inlet for the initial project construction. There showed to be a sufficient amount of sand from Shallotte Inlet to handle the initial project construction and subsequent maintenance. Shallotte Inlet showed to have good quality sand available to a maximum dredging depth of about 15 feet below NGVD. The average 3-year maintenance renourishment volume was estimated to be about 370,000 cubic yards. Based on the past performance of the sediment trap/borrow area, the material collected in Shallotte Inlet is sufficient to satisfy future nourishment needs of Ocean Isle Beach indefinitely.

7. FINANCIAL PLAN

Ocean Isle Beach has an established beach renourishment fund that is used to fund beach nourishment projects on Ocean Isle Beach. This fund is presently funded each year through contributions from the Town's General Fund and Accommodations Tax Fund. In previous years it has also been funded by earmarking various amounts of property tax collections. For example one cent of the Town's 2009 tax rate may have been earmarked specifically for this fund. The present balance in this fund exceed $2.1 million after the Town's share of non-federal local funds for the upcoming 2010 renourishment cycle was paid.

Since the Town's first renourishment project in 2000, the Town has been successful in obtaining Federal and State funds to cover cost of construction. This has been a 65% Federal and 35% Local cost share. The thirty five percent local share has then been allocated 75% State and 25% Ocean Isle Beach. As we all know, federal funding for beach renourishment projects have been more difficult to obtain in recent years as more often than not these funds have not been indicated in the President's budget. As a result, local representatives have had to seek to add the funds to the House and Senate versions of the appropriations bill. However, the Corps of Engineers and Town of Ocean Isle Beach have once again been successful in securing the 65% federal share of funds necessary for the scheduled 2009-2010 periodic nourishment.
State funding for these projects, which is budgeted through the North Carolina Division of Water Resources, has been very reliable. The Town was also successful in securing

the State of North Carolina share for the upcoming 2009-2010 project and both the State and Town's portions have already been remitted to the Corps of Engineers.
Based on unforeseen future economics, the Town has developed three scenarios to continue funding of these projects.

Scenario 1:

The Town's Beach Renourishment Project will continue to receive funding from the Federal Government and State of North Carolina at the same level as in past years. With this scenario, the Federal Government will cover 65% of the cost for periodic nourishment and non-federal interest responsible for the remaining 35%. Of this 35% the State of North Carolina would be responsible for 75% with the Town covering the remaining 25% of the non-federal costs. This scenario assumes the State will contribute the maximum allowed under State Law or 75% of the non-federal costs which is equal to 26.25% of the total cost for periodic nourishment. The 25% local share of the non-federal cost is equivalent to 8.75% of the total cost of periodic nourishment.

Scenario 2:

This scenario assumes Federal funding support for the project will cease. The State of North Carolina will continue to contribute 75% of the normal 35% non-federal share or 26.25% of the total periodic nourishment cost. The Town of Ocean Isle Beach will fund the balance (73.75%) of the periodic nourishment for the project.

Scenario 3:

This scenario assumes all Federal and State funding will end. The Town will assume responsibility for 100% of the cost of periodic nourishment for the Ocean Isle Beach project.

Under Scenario 1, sufficient funds will be available to continue nourishment of the Ocean Isle Beach project well beyond the 25 year requirement stipulated in 15A NCAC 07J. 1201.

For scenarios 2 and 3, the Town would utilize projected revenues from both funds available from occupancy tax as well as the Town's General Fund and taxing powers. The projections for accommodation tax takes into consideration the fact at present the Town collects 3% accommodation tax on gross rental income. The Town has the ability to increase this percentage and additional 2% for a total of 5%. This equates to a .6666% increase. These projected revenues would also assume that these revenues generated by the occupancy tax would grow at a rate of approximately 2% annually. Interest on this fund balance would also be realized at a range estimated between 1% - 4%. The Town would also use its taxing power ability to generate additional revenues necessary to ensure completion of the project.
Projected renourishment cost for the Ocean Isle Beach project were estimated based on current years awarded bid price for dredging and renourishment requirements with future costs inflated at an annual rate of inflation of 5%. Based on this estimate, the cost for

Ocean Isle Beach's renourishment project could range from an estimated 5.9 million in 2009-2010 to 19.1 in 2033 – 2034, or the next 25 year period.
Based on these funding scenarios, the Town of Ocean Isle Beach Renourishment Project will continue to receive periodic nourishment well beyond the 25 years required for the static line exception.

8. SUMMARY

The Ocean Isle Beach project satisfies all of the requirements for the static line exception as stipulated in 15A NCAC 07J .1201. By virtue of this report, the Town of Ocean Isle Beach has demonstrated the project has been maintained for more than the required 5-year minimum, it has an identified source of beach compatible borrow material that will sustain the project for more than the minimum 25 years, and future funding of the project is guaranteed even in the absence of continued Federal and/or State support.

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Town of Ocean Isle Beach
3 West Third Street
Ocean Isle Beach, NC 28469
910-579-2166
www.oibgov.com

In both Scenario 2 and 3 the Town would fund the cost of the Renourishment Project by appropriating monies from both the Accommodation Tax and General Funds.

General Statute 160A-209 (c) (7) grants the Town authority to use property (ad valorem) taxes for Beach Erosion and Natural Disasters in order to provide for shoreline protection, beach erosion control and flood and hurricane protection. A copy of this statute is attached. Ad Valorem taxes would increase proportionately each year as needed to assure total project cost was funded in the current year budget that renourishment cycle occurred.

House Bill 426 enacted January 1, 1984 also authorized the Town to collect three percent accommodation tax on the gross proceeds from the rental of accommodations within the Town. Under Section 2B of this bill, specific authority is given to expend these funds for "tourism related expenses" which includes erosion control. (Copy Attached)

Also in 1997, House Bill 859 Section 11 (b) granted authority to the Town to collect an additional two percent (2%) tax on gross receipts derived from the rental of accommodations. This would allow for a total tax of five percent (5%). Section 10 (d) of this bill also grants specific authority to use these funds for the control and repair of waterfront erosion. (Copy Attached)

§ [redacted]

(a) Pursuant to Article V, Sec. 2(5) of the Constitution of North Carolina, the General Assembly confers upon each city in this State the power to levy, within the limitations set out in this section, taxes on property having a situs within the city under the rules and according to the procedures prescribed in the Machinery Act (Chapter 105, Subchapter II).

(b) Each city may levy property taxes without restriction as to rate or amount for the following purposes:

(1) Debt Service. – To pay the principal of and interest on all general obligation bonds and notes of the city.

(2) Deficits. – To supply an unforeseen deficiency in the revenue (other than revenues of any of the enterprises listed in G.S. 160A-311), when revenues actually collected or received fall below revenue estimates made in good faith in accordance with the Local Government Budget and Fiscal Control Act.

(3) Civil Disorders. – To meet the cost of additional law-enforcement personnel and equipment that may be required to suppress riots or other civil disorders involving an extraordinary breach of law and order within the jurisdiction of the city.

(c) Each city may levy property taxes for one or more of the following purposes subject to the rate limitation set out in subsection (d):

(1) Administration. – To provide for the general administration of the city through the city council, the office of the city manager, the office of the city budget officer, the office of the city finance officer, the office of the city tax collector, the city purchasing agent, the city attorney, and for all other general administrative costs not allocated to a particular board, commission, office, agency, or activity.

(2) Air Pollution. – To maintain and administer air pollution control programs.

(3) Airports. – To establish and maintain airports and related aeronautical facilities.

(4) Ambulance Service. – To provide ambulance services, rescue squads, and other emergency medical services.

(5) Animal Protection and Control. – To provide animal protection and control programs.

(5a) Arts Programs and Museums. – To provide for arts programs and museums as authorized in G.S. 160A-488.

(6) Auditoriums, Coliseums, and Convention Centers. – To provide public auditoriums, coliseums, and convention centers.

(7) [redacted] Disasters. [redacted] provide for shoreline protection, beach erosion control and flood and hurricane protection.

(8) Cemeteries. – To provide for cemeteries.

(9) Civil Defense. – To provide for civil defense programs.

(9a) Community Development. – To provide for community development as authorized by G.S. 160A-456 and 160A-457.

(10) Debts and Judgments. – To pay and discharge any valid debt of the city or any judgment lodged against it, other than debts or judgments evidenced by or based on bonds or notes.

(10a) Defense of Employees and Officers. – To provide for the defense of, and payment of civil judgments against, employees and officers or former

employees and officers, as authorized by this Chapter.

(10b) Economic Development. – To provide for economic development as authorized by G.S. 158-7.1 and G.S. 158-12.

(10c) Drainage. – To provide for drainage projects or programs in accordance with Chapter 156 of the General Statutes or in accordance with this Chapter.

(11) Elections. – To provide for all city elections and referendums.

(12) Electric Power. – To provide electric power generation, transmission, and distribution services.

(13) Fire Protection. – To provide fire protection services and fire prevention programs.

(14) Gas. – To provide natural gas transmission and distribution services.

(15) Historic Preservation. – To undertake historic preservation programs and projects.

(15a) Housing. – To undertake housing projects as defined in G.S. 157-3, and urban homesteading programs under G.S. 160A-457.2.

(16) Human Relations. – To undertake human relations programs.

(17) Hospitals. – To establish, support and maintain public hospitals and clinics, and other related health programs and facilities, and to aid any private, nonprofit hospital, clinic, related facility, or other health program or facility.

(17a) Industrial Development. – To provide for industrial development as authorized by G.S. 158-7.1.

(18) Jails. – To provide for the operation of a jail and other local confinement facilities.

(19) Joint Undertakings. – To cooperate with any other county, city, or political subdivision of the State in providing any of the functions, services, or activities listed in this subsection.

(20) Libraries. – To establish and maintain public libraries.

(21) Mosquito Control.

(22) Off-Street Parking. – To provide off-street lots and garages for the parking and storage of motor vehicles.

(23) Open Space. – To acquire open space land and easements in accordance with Article 19, Part 4, of this Chapter.

(24) Parks and Recreation. – To establish, support and maintain public parks and programs of supervised recreation.

(25) Planning. – To provide for a program of planning and regulation of development in accordance with Article 19 of this Chapter.

(26) Police. – To provide for law enforcement.

(26a) Ports and Harbors. – To participate in programs with the North Carolina Ports Authority and to provide for harbor masters.

(27) Public Transportation. – To provide public transportation by rail, motor vehicle, or another means of conveyance other than a ferry, including any facility or equipment needed to provide the public transportation.

(27a) Railroad Corridor Preservation. – To acquire property for railroad corridor preservation.

(27b) Senior Citizens Programs. – To undertake programs for the assistance and care of its senior citizens.

(28) Sewage. – To provide sewage collection and treatment services as defined in

G.S. 160A-311(3).

(29) Solid Waste. – To provide solid waste collection and disposal services, and to acquire and operate landfills.

(30) Streets. – To provide for the public streets, sidewalks, and bridges of the city.

(31) Traffic Control and On-Street Parking. – To provide for the regulation of vehicular and pedestrian traffic within the city, and for the parking of motor vehicles on the public streets.

(31a) Urban Redevelopment. – To provide for urban redevelopment.

(32) Water. – To provide water supply and distribution services.

(33) Water Resources. – To participate in federal water resources development projects.

(34) Watershed Improvement. – To undertake watershed improvement projects.

(d) Property taxes may be levied for one or more of the purposes listed in subsection (c) up to a combined rate of one dollar and fifty cents ($1.50) on the one hundred dollars' ($100.00) appraised value of property subject to taxation.

(e) With an approving vote of the people, any city may levy property taxes for any purpose for which the city is authorized by its charter or general law to appropriate money. Any property tax levy approved by a vote of the people shall not be counted for purposes of the rate limitation imposed in subsection (d).

The city council may call a referendum on approval of a property tax levy. The referendum may be held at the same time as any other city referendum or city election, but may not be otherwise held (i) on the day of any federal, State, district, or county election already validly called or scheduled by law at the time the tax referendum is called, or (ii) within the period of time beginning 30 days before and ending 10 days after the day of any other city referendum or city election already validly called or scheduled by law at the time the tax referendum is called. The referendum shall be conducted by the same board of elections that conducts regular city elections. A notice of referendum shall be published in accordance with G.S. 163-287. The notice shall state the date of the referendum, the purpose for which it is being held, and a statement as to the last day for registration for the referendum under the election laws then in effect.

The proposition submitted to the voters shall be substantially in one of the following forms:

(1) Shall the City/Town of _____ be authorized to levy annually a property tax at a rate not in excess of ____ cents on the one hundred dollars ($100.00) value of property subject to taxation for the purpose of _____?

(2) Shall the City/Town of _____ be authorized to levy annually a property tax at a rate not in excess of that which will produce $_____ for the purpose of _____?

(3) Shall the City/Town of _____ be authorized to levy annually a property tax without restriction as to rate or amount for the purpose of _____?

If a majority of those participating in the referendum approve the proposition, the city council may proceed to levy annually a property tax within the limitations (if any) described in the proposition.

The board of elections shall canvass the referendum and certify the results to the city council. The council shall then certify and declare the result of the referendum and shall publish a statement of the result once, with the following statement appended: "Any action or proceeding challenging the regularity or validity of this tax referendum must be begun within 30 days after (date of publication)." The statement of results shall be filed in the clerk's office and inserted in

the minutes of the council.

Any action or proceeding in any court challenging the regularity or validity of a tax referendum must be begun within 30 days after the publication of the results of the referendum. After the expiration of this period of limitation, no right of action or defense based upon the invalidity of or any irregularity in the referendum shall be asserted, nor shall the validity of the referendum be open to question in any court upon any ground whatever, except in an action or proceeding begun within the period of limitation prescribed herein.

Except for tax referendums on functions not included in subsection (c) of this section, any referendum held before July 1, 1973, on the levy of property taxes is not valid for the purposes of this subsection. Cities in which such referendums have been held may support programs formerly supported by voted property taxes within the general rate limitations set out in subsection (d) at any appropriate level and are not subject to the former voted rate limitation.

(f) With an approving vote of the people, any city may increase the property tax rate limitation imposed in subsection (c) and may call a referendum for that purpose. The referendum may be held at the same time as any other city referendum or election, but may not be otherwise held (i) on the day of any federal, State, district, or county election, or (ii) within the period of time beginning 30 days before and ending 30 days after the day of any other city referendum or city election. The election shall be conducted by the same board of elections that conducts regular city elections.

The proposition submitted to the voters shall be substantially in the following form: "Shall the property tax rate limitation applicable to the City/Town of _____ be increased from _____ on the one hundred dollars ($100.00) value of property subject to taxation to ____ on the one hundred dollars ($100.00) value of property subject to taxation?"

If a majority of those participating in the referendum approve the proposition, the rate limitation imposed in subsection (c) shall be increased for the city.

(g) With respect to any of the categories listed in subsections (b) and (c) of this section, the city may provide the necessary personnel, land, buildings, equipment, supplies, and financial support from property tax revenues for the program, function, or service.

(h) This section does not authorize any city to undertake any program, function, joint undertaking, or service not otherwise authorized by law. It is intended only to authorize the levy of property taxes within the limitations set out herein to finance programs, functions, or services authorized by other portions of the General Statutes or by city charters. (1917, c. 138, s. 37; 1919, c. 178, s. 3(37); C.S., s. 2963; 1921, c. 8, s. 1; Ex. Sess. 1921, c. 106, s. 1; 1947, c. 506; 1959, c. 1250, s. 3; 1971, c. 698, s. 1; 1973, c. 426, s. 31; c. 803, s. 2; 1975, c. 664, s. 7; 1977, c. 187, s. 2; c. 834, s. 2; 1979, c. 619, s. 5; 1979, 2nd Sess., c. 1247, s. 21; 1981, c. 66, s. 1; 1983, c. 511, ss. 3, 4; c. 828; 1985, c. 665, ss. 4, 7; 1987, c. 464, s. 6; 1989, c. 600, s. 8; 1989 (Reg. Sess., 1990), c. 1005, ss. 6, 7; 1991 (Reg. Sess., 1992), c. 896, s. 2; 2002-159, s. 50(b); 2002-172, s. 2.4(b); 2003-416, s. 2.)

A BILL HB 426

RELATING TO THE POWERS OF THE TOWN OF OCEAN ISLE BEACH TO AUTHORIZE THE LEVEYING OF AN ACCOMMODATIONS TAX AND TO PROVIDE FOR THE MANNER IN WHICH THE FUNDS GENERATED BY THE TAX MAY BE EXPENDED.

Be it enacted by the General Assembly of the State of North Carolina:

SECTION 1. The General Assembly finds that the Town of Ocean Isle Beach has a high concentration of tourism activity and is required to provide additional municipal services including but not limited to law enforcement, traffic control, public facilities and utilities, highway and street maintenance. The purpose of this act is not to provide additional source of revenue for the town which is required to provide service normally provided by a municipality, but to promote tourism and enlarge its economic benefits through providing those facilties and services which enhance the ability of the muncipality to attract and provide for tourists.

SECTION 2A. In addition to other powers granted the Town of Ocean Isle Beach in this act, the Town of Ocean Isle Beach may levy a tax not to exceed three percent of the gross proceeds from the rental of accomodatio within the corporate limits. The tax provided for in this section shall be collected by the Town's Tax Collector. The proceeds of the tax must be remitted annually to the muncipality. The owner of the property will provide the Town with a copy of his 1099 IRS Tax Form showing gross annual receipts for the preceding year, this shall be provided to the Town no later than February 28. It shall be the responsibility of the owner of any rental property to list such property with the Town's Tax Collector prior to June 1 of each and every year.

SECTION 2B. The Funds received by the municipality shall be allocated to a special fund and used only for tourism-related expenditures. The term "tourism related expenditures" includes the following; [redacted], public recreational facilities, beautification and tourism promotion to include brochures, advertising, and signs promoting Ocean Isle Beach. These funds shall not provide an additional source of revenue for the Town of Ocean Isle Beach to pay for services normally provided by the municipality on behalf of its citizens, and may be used only for the specific uses previously mentioned above. There must be an annual audit and accounting for all funds used.

SECTION 2C. The Town of Ocean Isle Beach may issue bonds for the purpose of financing all or a portion of the cost of constructing facilities for "tourism-related expenditures" as herein defined. The debt service of indebtedness incurred to finance such facilities may be provided from the funds received by the Town of Ocean Isle Beach from the accommodations tax.

SECTION 2D. All the penalty provisions that are applicable to the State sales tax collection prescribed in G. S. 105-164.30 shall apply with equal force for any failure to comply with the provision of this act.

SECTION 3. This act shall take effect January 1, 1984.

GENERAL ASSEMBLY OF NORTH CAROLINA
1997 SESSION

S.L. 1997-364
HOUSE BILL 859

AN ACT TO AUTHORIZE BRUNSWICK COUNTY TO LEVY A ROOM OCCUPANCY AND TOURISM DEVELOPMENT TAX, TO AUTHORIZE CERTAIN MUNICIPALITIES IN BRUNSWICK COUNTY TO LEVY OR INCREASE LOCAL OCCUPANCY TAXES, AND TO AUTHORIZE PERSON COUNTY TO LEVY A ROOM OCCUPANCY AND TOURISM DEVELOPMENT TAX.

Section 1. Brunswick County occupancy tax. (a) Authorization and scope. The Brunswick County Board of Commissioners may levy a room occupancy tax of one percent (1%) of the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3) and from the rental of private residences and cottages within the county that are exempt from the sales tax imposed under G.S. 105-164.4(a)(3) solely because they are rented for less than 15 days. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose, or to accommodations subject to a municipal room occupancy tax at the rate of six percent (6%).

(b) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 153A-155. The penalties provided in G.S. 153A-155 apply to a tax levied under this section.

(c) Distribution and use of tax revenue. Brunswick County shall, on a monthly basis, remit the net proceeds of the occupancy tax to the Brunswick Tourism Development Authority. The Authority shall use the funds remitted to it under this subsection to promote travel and tourism in Brunswick County. No more than ten percent (10%) of the funds remitted to the Authority under this subsection may be used for the Authority's administrative expenses, including salaries and benefits.

The following definitions apply in this subsection:

(1) Net proceeds. – Gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent (3%) of the gross proceeds.

(2) Promote travel and tourism. – To advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in the listed activities.

Section 2. Brunswick Tourism Development Authority. (a) Appointment and membership. When the board of commissioners of Brunswick County adopts a resolution levying a room occupancy tax under Section 1 of this act, it shall also adopt a resolution creating a county Tourism Development Authority, which shall be a public authority under the Local Government Budget and Fiscal Control Act. The Authority shall have 10 members appointed by the Brunswick County Commissioners as follows:

(1) Five individuals who are currently involved in the promotion of travel and tourism, selected by the Brunswick County Commissioners.

(2) Five individuals selected jointly by the South Brunswick Islands Chamber of Commerce and the Southport-Oak Island Chamber of Commerce.

The resolution shall provide for the members' terms of office and for the filling of vacancies on the Authority. The board of commissioners shall designate one member of the Authority as chair. Members of the Authority shall serve without compensation.

The Authority shall meet monthly and shall adopt rules of procedure to govern its meetings. The Finance Officer for Brunswick County shall be the ex officio finance officer of the Authority.

(b) Duties. The Authority shall expend the net proceeds of the tax levied under Section 1 of this act to promote travel and tourism in Brunswick County as provided in Section 1 of this act. The Authority shall promote travel, tourism, and conventions in the county.

(c) Reports. The Authority shall report quarterly and at the close of the fiscal year to the board of commissioners on its receipts and expenditures for the preceding quarter and for the year in such detail as the board may require.

Section 3. County administrative provisions. Section 3(b) of S.L. 1997-102, as amended by Section 2 of S.L. 1997-255 and Section 2 of ratified House Bill 337, 1997 General Assembly, is further amended by adding the phrases "Brunswick," and "Person," in their proper alphabetical order.

Section 4. Conforming change. Section 2(a2) of Chapter 664 of the 1991 Session Laws, as enacted by Chapter 617 of the 1993 Session Laws, is repealed.

Section 5. Municipal administrative provisions. (a) Article 9 of Chapter 160A of the General Statutes is amended by adding a new section to read:

"**§ 160A-215. Uniform provisions for room occupancy taxes.**

(a) Scope. – This section applies only to municipalities the General Assembly has authorized to levy room occupancy taxes. For the purpose of this section, the term 'city' means a municipality.

(b) Levy. – A room occupancy tax may be levied only by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto. A room occupancy tax shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.

(c) Collection. – Every operator of a business subject to a room occupancy tax shall, on and after the effective date of the levy of the tax, collect the tax. The tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records and shall be paid by the purchaser to the operator of the business as trustee for and on account of the taxing city. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The taxing city shall design, print, and furnish to all appropriate businesses and persons in the city the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business who collects a room occupancy tax may deduct from the amount remitted to the taxing city a discount equal to the discount the State allows the operator for State sales and use tax.

(d) Administration. – The taxing city shall administer a room occupancy tax it levies. A room occupancy tax is due and payable to the city finance officer in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the taxing city. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A room occupancy tax return filed with the city finance officer is not a public record and may not be disclosed except in accordance with G.S. 153A-148.1 or G.S. 160A-208.1.

(e) Penalties. – A person, firm, corporation, or association who fails or refuses to file a

room occupancy tax return or pay a room occupancy tax as required by law is subject to the civil and criminal penalties set by G.S. 105-236 for failure to pay or file a return for State sales and use taxes. The governing board of the taxing city has the same authority to waive the penalties for a room occupancy tax that the Secretary of Revenue has to waive the penalties for State sales and use taxes.

(f) Repeal or Reduction. – A room occupancy tax levied by a city may be repealed or reduced by a resolution adopted by the governing body of the city. Repeal or reduction of a room occupancy tax shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the resolution was adopted. Repeal or reduction of a room occupancy tax does not affect a liability for a tax that was attached before the effective date of the repeal or reduction, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal or reduction."

(b) This section applies only to the municipalities in Brunswick County.

Section 6. Shallotte occupancy tax. (a) Authorization and scope. The Board of Aldermen of the Town of Shallotte may levy a room occupancy tax of up to three percent (3%) of the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the town that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3) and from the rental of private residences and cottages within the town that are exempt from the sales tax imposed under G.S. 105-164.4(a)(3) solely because they are rented for less than 15 days. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(b) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

(c) Distribution and use of tax revenue. The Town of Shallotte shall, on a quarterly basis, remit the net proceeds of the occupancy tax to the Shallotte Tourism Development Authority. The Authority shall use at least one-half of the funds remitted to it under this subsection to promote travel and tourism in Shallotte and shall use the remainder for tourism-related expenditures.

The following definitions apply in this subsection:

(1) Net proceeds. – Gross proceeds less the cost to the town of administering and collecting the tax, as determined by the finance officer, not to exceed three percent (3%) of the first five hundred thousand dollars ($500,000) of gross proceeds collected each year and one percent (1%) of the remaining gross receipts collected each year.

(2) Promote travel and tourism. – To advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in the listed activities.

(3) Tourism-related expenditures. – Expenditures that, in the judgment of the Authority, are designed to increase the use of lodging facilities, meeting facilities, or convention facilities in the town or to attract tourists or business travelers to the town. The term includes tourism-related capital expenditures.

Section 7. Shallotte Tourism Development Authority. (a) Appointment and membership. When the Board of Aldermen of the Town of Shallotte adopts a resolution levying a room occupancy tax under Section 6 of this act, it shall also adopt a resolution creating a town Tourism Development Authority, which shall be a public authority under the Local Government Budget and Fiscal Control Act. The Authority shall have five members appointed by the board of aldermen. The resolution shall provide for the membership of the Authority, including the

members' terms of office, and for the filling of vacancies on the Authority. At least one-third of the members must be individuals who are affiliated with businesses that collect the tax in the town and at least three-fourths of the members must be individuals who are currently active in the promotion of travel and tourism in the town. The Board of Aldermen of the Town of Shallotte shall designate one member of the Authority as chair and shall determine the compensation, if any, to be paid to members of the Authority.

The Authority shall meet at the call of the chair and shall adopt rules of procedure to govern its meetings. The Finance Officer for the Town of Shallotte shall be the ex officio finance officer of the Authority.

(b) Duties. The Authority shall expend the net proceeds of the tax levied under Section 6 of this act for the purposes provided in Section 6 of this act. The Authority shall promote travel, tourism, and conventions in the town, sponsor tourist-related events and activities in the town, and finance tourist-related capital projects in the town.

(c) Reports. The Authority shall report quarterly and at the close of the fiscal year to the Board of Aldermen of the Town of Shallotte on its receipts and expenditures for the preceding quarter and for the year in such detail as the board may require.

Section 8. Caswell Beach occupancy tax changes. Section 1 of Chapter 664 of the 1991 Session Laws reads as rewritten:

"Section 1. Caswell Beach Occupancy Tax. (a) Authorization and Scope. The Board of Commissioners of the Town of Caswell Beach may ~~by resolution, after not less than 10 days' public notice and a public hearing held pursuant thereto,~~ levy a room occupancy tax of up to three percent (3%) of the gross receipts derived from the rental of accommodations within the town that are subject to sales tax imposed by the State under G.S. 105-164.4(a)(3) and from the rental of private residences and cottages within the town that are exempt from the sales tax imposed under G.S. 105-164.4(a)(3) solely because they are rented for less than 15 days.

(a1) Authorization of Additional Tax. In addition to the tax authorized by subsection (a) of this section, the Board of Commissioners of the Town of Caswell Beach may levy an additional room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this section. The Town of Caswell Beach may not levy a tax under this subsection unless it also levies the tax authorized under subsection (a) of this section.

(b) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

~~Collection. Every operator of a business subject to the tax levied by this act shall, on and after the effective date of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the town. The occupancy tax levied under this act shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the owner of the business. The town shall design, print, and furnish to all appropriate businesses in the town the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

~~(c) Administration. The town shall administer the occupancy tax levied under this act. A tax levied under this act is due and payable to the town tax collector in monthly installments on or before the fifteenth day of the month following the month in which the tax accrues. Every person, firm, or corporation liable for the tax shall, on or before the fifteenth day of each month, prepare and render a return on a form prescribed by the town. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied.~~

~~A return filed with the town tax collector under this act is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.~~

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this act shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional penalty of five percent (5%) for each additional month or fraction thereof until the tax is paid. The board of commissioners may, for good cause shown, compromise or forgive the additional tax penalties imposed by this subsection.~~

~~Any person who willfully attempts in any manner to evade a tax imposed under this act or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both.~~

~~(e)~~(c) Use of Proceeds. The town may use the proceeds of a tax levied under ~~this act~~ subsection (a) of this section only for tourism-related expenditures. As used in this ~~act,~~ section, the term 'tourism-related expenditures' includes the following types of expenditures: criminal justice system, fire protection, public facilities and utilities, health facilities, solid waste and sewage treatment, and the control and repair of waterfront erosion. These funds may not be used for services normally provided by the town on behalf of its citizens unless these services promote tourism and enlarge its economic benefits by enhancing the ability of the town to attract and provide for tourists.

The town may use the proceeds of a tax levied under subsection (a1) of this section only for beach renourishment and protection.

~~(f) Effective Date of Levy. A tax levied under this act shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. The Board of Commissioners of the Town of Caswell Beach may by resolution repeal a tax levied under this act. Repeal of a tax levied under this act shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this act does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.~~"

Section 9. Holden Beach occupancy tax changes. Section 1 of Chapter 963 of the 1987 Session Laws reads as rewritten:

"Section 1. Occupancy tax. (a) Authorization and scope. The Holden Beach Town Council may ~~by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto,~~ levy a room occupancy tax of no more than three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the town that is subject to sales tax imposed by the State under G.S. ~~105-164.4(3)~~ 105-164.4(a)(3) and on the rental of all private residences and cottages, regardless of whether the residence or cottage is rented for less than 15 days. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations.

(a1) Authorization of additional tax. In addition to the tax authorized by subsection (a) of this section, the Holden Beach Town Council may levy an additional room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this section. The Holden Beach Town Council may not levy a tax under this subsection unless it also levies the tax authorized under subsection (a) of this section.

(b) Administration. A tax levied under this section shall be levied, administered,

collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

~~Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the town. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The town shall design, print, and furnish to all appropriate businesses and persons in the town the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

~~(c) Administration. The town shall administer a tax levied under this section. A tax levied under this section is due and payable to the Holden Beach tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the town. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.~~

The tax collector may collect any unpaid taxes levied under this ~~act~~ section through the use of attachment and garnishment proceedings as provided in G.S. 105-368 for collection of property taxes. The tax collector has the same enforcement powers concerning the tax imposed by this act as does the Secretary of Revenue in enforcing the State sales tax under G.S. 105-164.30.

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid.~~

~~Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both. The town council may, for good cause shown, compromise or forgive the penalties imposed by this subsection.~~

~~(e)~~ (c) Distribution and use of tax revenue. The tax collector shall remit the proceeds of this tax to the town on a monthly basis. The ~~funds received by the town pursuant to this act~~ proceeds of the tax levied under subsection (a) of this section shall be allocated to a special fund and used only for tourism-related expenditures. As used in this act, the term 'tourism-related expenditures' includes the following types of expenditures: criminal justice system, fire protection, public facilities and utilities, health facilities, solid waste and sewage treatment, and the control and repair of water front erosion. These funds may not be used for services normally provided by the town on behalf of its citizens unless these services promote tourism and enlarge its economic benefits by enhancing the ability of the town to attract and provide for tourists.

The town may use the proceeds of a tax levied under subsection (a1) of this section only for beach renourishment and protection.

~~(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Holden Beach Town Council. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.~~"

[redacted] Part IX of Chapter 908 of the 1983 Session Laws, as amended by Chapter 985 of the 1983 Session Laws and Chapter 857 of the 1989 Session Laws, as it relates to the Town of Ocean Isle Beach only, is reenacted and rewritten as Section 11 of this act.

Section 11. Ocean Isle Beach occupancy tax. (a) Authorization and scope. The Board of Commissioners of the Town of Ocean Isle Beach may levy a room occupancy tax of up to three percent (3%) of the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the town that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3) and from the rental of private residences and cottages, whether or not the residence or cottage is rented for less than 15 days. This tax is in addition to any State or local sales tax.

(b) Authorization for additional tax. [redacted] levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this section. The town council may not levy a tax under this subsection unless it also levies the tax authorized under subsection (a) of this section.

(c) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

The tax collector may collect any unpaid taxes levied under this section through the use of attachment and garnishment proceedings as provided in G.S. 105-368 for collection of property taxes. The tax collector has the same enforcement powers concerning the tax imposed by this act as does the Secretary of Revenue in enforcing the State sales tax under G.S. 105-164.30.

(d) Distribution and use of tax revenue. The Town of Ocean Isle Beach may use the proceeds of the tax levied pursuant to subsection (a) of this section only for tourism-related expenditures. As used in this section, "tourism-related expenditures" includes any of the following expenditures: criminal justice system, fire protection, public facilities and utilities, health facilities, solid waste and sewage treatment, and the control and repair of waterfront [redacted] The term does not include, however, expenditures for services normally provided by the town on behalf of its citizens unless these services promote tourism and enlarge its economic benefits by enhancing the ability of the town to attract and provide for tourists.

The Town of Ocean Isle Beach may use the proceeds of the tax levied pursuant to subsection (b) of this section only for beach renourishment and protection.

Section 12. Sunset Beach occupancy tax changes. Section 1 of Chapter 956 of the 1987 Session Laws reads as rewritten:

"Section 1. Occupancy tax. (a) Authorization and scope. The Sunset Beach Town Council may ~~by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto,~~ levy a room occupancy tax of no more than three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the town that is subject to sales tax imposed by the State under G.S. ~~105-164.4(3)~~ 105-164.4(a)(3) and on the rental of all private residences and cottages, regardless of whether the residence or cottage is rented for less than 15 days. This tax

is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations.

(a1) Authorization of additional tax. In addition to the tax authorized by subsection (a) of this section, the Sunset Beach Town Council may levy an additional room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this section. The Town of Sunset Beach may not levy a tax under this subsection unless it also levies the tax authorized under subsection (a) of this section.

(b) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

~~Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the town. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The town shall design, print, and furnish to all appropriate businesses and persons in the town the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

~~(c) Administration. The town shall administer a tax levied under this section. A tax levied under this section is due and payable to the Sunset Beach tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the town. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.~~

The tax collector may collect any unpaid taxes levied under this ~~act~~ section through the use of attachment and garnishment proceedings as provided in G.S. 105-368 for collection of property taxes. The tax collector has the same enforcement powers concerning the tax imposed by this act as does the Secretary of Revenue in enforcing the State sales tax under G.S. 105-164.30.

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid.~~

~~Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both. The town council may, for good cause shown, compromise or forgive the penalties imposed by this subsection.~~

~~(e)~~ (c) Distribution and use of tax revenue. The tax collector shall remit the proceeds of this tax to the town on a monthly basis. The ~~funds received by the town pursuant to this act shall be allocated~~ town shall allocate the proceeds of the tax levied pursuant to subsection (a) of this section to a special fund and ~~used~~ shall use them only for tourism-related expenditures. As used in this act, the term 'tourism-related expenditures' includes the following types of

expenditures: criminal justice system, fire protection, public facilities and utilities, health facilities, solid waste and sewage treatment, and the control and repair of water front erosion. These funds may not be used for services normally provided by the town on behalf of its citizens unless these services promote tourism and enlarge its economic benefits by enhancing the ability of the town to attract and provide for tourists.

The town may use the proceeds of the tax levied pursuant to subsection (a1) of this section only for beach renourishment and protection.

~~(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Sunset Beach Town Council. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.~~"

Section 13. Yaupon Beach occupancy tax changes. Section 1 of Chapter 820 of the 1991 Session Laws reads as rewritten:

"Section 1. Yaupon Beach Occupancy Tax. (a) Authorization and Scope. The Board of Commissioners of the Town of Yaupon Beach may ~~by resolution, after not less than 10 days' public notice and a public hearing held pursuant thereto,~~ levy a room occupancy tax of up to three percent (3%) of the gross receipts derived from the rental of accommodations within the town that are subject to sales tax imposed by the State under G.S. 105-164.4(a)(3) and from the rental of private residences and cottages within the town that are exempt from the sales tax imposed under G.S. 105-164.4(a)(3) solely because they are rented for less than 15 days.

(a1) Authorization of Additional Tax. In addition to the tax authorized by subsection (a) of this section, the Board of Commissioners of the Town of Yaupon Beach may levy an additional room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this section. The Town of Yaupon Beach may not levy a tax under this subsection unless it also levies the tax authorized under subsection (a) of this section.

(b) Administration. A tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 160A-215. The penalties provided in G.S. 160A-215 apply to a tax levied under this section.

~~Collection. Every operator of a business subject to the tax levied by this act shall, on and after the effective date of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the town. The occupancy tax levied under this act shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the owner of the business. The town shall design, print, and furnish to all appropriate businesses in the town the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

~~(c) Administration. The town shall administer the occupancy tax levied under this act. A tax levied under this act is due and payable to the town tax collector in monthly installments on or before the fifteenth day of the month following the month in which the tax accrues. Every person, firm, or corporation liable for the tax shall, on or before the fifteenth day of each month, prepare and render a return on a form prescribed by the town. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied.~~

~~A return filed with the town tax collector under this act is not a public record as defined by~~

~~G.S. 132-1 and may not be disclosed except as required by law.~~

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this act shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional penalty of five percent (5%) for each additional month or fraction thereof until the tax is paid. The board of commissioners may, for good cause shown, compromise or forgive the additional tax penalties imposed by this subsection.~~

~~Any person who willfully attempts in any manner to evade a tax imposed under this act or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both.~~

~~(e)~~ (c) Use of Proceeds. The town may use the proceeds of a tax levied under ~~this act~~ subsection (a) of this section only for tourism-related expenditures. As used in this act, the term 'tourism-related expenditures' includes the following types of expenditures: criminal justice system, fire protection, public facilities and utilities, health facilities, solid waste and sewage treatment, and the control and repair of waterfront erosion. These funds may not be used for services normally provided by the town on behalf of its citizens unless these services promote tourism and enlarge its economic benefits by enhancing the ability of the town to attract and provide for tourists.

The town may use the proceeds of a tax levied under subsection (a1) of this section only for beach renourishment and protection.

~~(f) Effective Date of Levy. A tax levied under this act shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. The Board of Commissioners of the Town of Yaupon Beach may by resolution repeal a tax levied under this act. Repeal of a tax levied under this act shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this act does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.~~"

Section 14. Person County occupancy tax. (a) Authorization and scope. The Person County Board of Commissioners may levy a room occupancy tax of up to five percent (5%) of the gross receipts derived from the rental of any room, lodging, or accommodation furnished by a hotel, motel, inn, tourist camp, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3).

This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(b) Administration. Except as otherwise provided in this section, a tax levied under this section shall be levied, administered, collected, and repealed as provided in G.S. 153A-155. The penalties provided in G.S. 153A-155 apply to a tax levied under this section.

(c) Distribution and use of tax revenue. Person County shall, on a quarterly basis, remit the net proceeds of the occupancy tax to the Person Tourism Development Authority. Of the net proceeds that accrue during the first four years that a tax is levied under this section, the Authority may use up to two-thirds only for the following tourism-related expenditures: (i) constructing or operating the Person County Historical Museum, (ii) developing Lake Mayo for fishing tournaments, skiing tournaments, and other activities designed to attract tourists to the lake from outside the county, and (iii) supporting the May Festival and other festivals designed

to attract tourists from outside the county. The Authority shall use the remaining net proceeds that accrue during the first four years that a tax is levied under this section only to promote travel and tourism in Person County.

Of the net proceeds that accrue after this four-year period, the Authority shall use at least two-thirds of the funds remitted to it under this subsection to promote travel and tourism in Person County and shall use the remainder for tourism-related expenditures.

The following definitions apply in this subsection:

(1) Net proceeds. – Gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent (3%) of the gross proceeds.

(2) Promote travel and tourism. – To advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred by the Authority in engaging in the listed activities.

(3) Tourism-related expenditures. – Expenditures that, in the judgment of the Authority, are designed to increase the use of lodging facilities, meeting facilities, and convention facilities in a county or to attract tourists or business travelers to the county. The term includes tourism-related capital expenditures.

Section 15. Person Tourism Development Authority. (a) Appointment and membership. When the board of commissioners adopts a resolution levying a room occupancy tax under Section 14 of this act, it shall also adopt a resolution creating a county Tourism Development Authority, which shall be a public authority under the Local Government Budget and Fiscal Control Act.

The Authority shall be composed of six members, three appointed by the Person County Board of Commissioners and three appointed by the Roxboro City Council. One of the three members appointed by each governing body must be an owner or manager of a Person County hotel or motel. The remaining members must be individuals who are currently active in the promotion of travel and tourism in the county. The resolution shall determine the compensation, if any, to be paid to members of the Authority.

The initial terms of the members who are owners or managers of a hotel or motel shall be three years. Each governing body shall designate one of its remaining appointees to serve an initial term of two years and the other to serve an initial term of one year. Thereafter, all terms shall be three years. Vacancies shall be filled in the same manner as original appointments, and members appointed to fill vacancies shall serve for the remainder of the unexpired term.

At its first meeting and at the first meeting of each calendar year, the membership of the Authority shall elect one member to serve as chair until the first meeting of the following calendar year. The Authority shall meet at the call of the chair and shall adopt rules of procedure to govern its meetings. The Finance Officer for Person County shall be the ex officio finance officer of the Authority.

(b) Duties. The Authority shall expend the net proceeds of the tax levied under Section 14 of this act for the purposes provided in Section 14 of this act. The Authority shall promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county.

(c) Reports. The Authority shall report quarterly and at the close of the fiscal year to the board of commissioners on its receipts and expenditures for the preceding quarter and for the year in such detail as the board may require.

Section 16. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 6th day of August, 1997.

s/ Dennis A. Wicker
President of the Senate

s/ Harold J. Brubaker
Speaker of the House of Representatives

DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
P. O. BOX 1890
WILMINGTON, NORTH CAROLINA 28402-1890

IN REPLY REFER TO

March 10, 2006

Project Management Branch

Mrs. Carolyn Lucas Best
103 Argonne Drive
Durham, North Carolina 27704

Dear Mrs. Best:

This is in response to your February 22, 2006, letter regarding additional information concerning the East End of Ocean Isle Beach.

The Ocean Isle project was authorized for initial construction, which took place in 2001, with periodic nourishments every 3 years. The initial nourishment of Ocean Isle was to be accomplished in the January 2004 to April 2004 timeframe. However, during the preparation of the construction plans and specifications in the spring of 2003, we determined that the beach was in excellent health with the majority of the beachfill still intact. Therefore, after consultation with the Town of Ocean Isle Beach, we all agreed that the benefits of placing such a small amount of sand (approximately 150,000 cubic yards) on the beach did not justify the high cost of accomplishing the work. It was agreed that we would put off the work until the next fiscal year. In 2005, we were unable to come to terms with the two bidders on a fair and equitable price for accomplishing the work.

As I stated in my February 8, 2006, letter to you, we were unsuccessful in coming to terms with the lone bidder for the Ocean Isle Beach nourishment to do the work for a fair and equitable price this spring. We are now in the process of preparing plans and specifications to advertise the Ocean Isle Beach project with other upcoming work. We anticipate awarding a contract in August with the work to be accomplished starting in the November 2006 timeframe.

If I can be of further assistance, please let me know.

Sincerely,

John E. Pulliam, Jr.
Colonel, U.S. Army
District Commander

TOWN OF OCEAN ISLE BEACH

The following represents [redacted] as per the audited financial statements as of June 30th of each year.

YEAR	***General Fund Balance***	***Acc. Tax Fund Balance***
2008	$3,183,281	$166,664
2007	3,330,843	352,475
2006	3,638,149	691,102
2005	2,665,960	556,521
2004	2,603,418	671,347
2003	2,141,209	503,583
2002	1,744,231	383,322
2001	1,967,519	179,032

TOTAL # OF ACRES:	0
TOTAL # OF LOTS:	4,578
TOTAL # OF BUILDINGS:	0
TOTAL VALUATION ACRES/LOTS:	2,045,536,770
TOTAL VALUATION BUILDINGS:	662,529,790
TOTAL REAL PROPERTY:	2,708,066,560
TOTAL PERSONAL PROPERTY:	19,071,023
TOTAL VALUATION:	2,727,137,583
[redacted]	[redacted]
TOTAL TAX:	3,006,610.66
TOTAL EXEMPTIONS:	-76,953.72
TOTAL CITY TAX:	2,929,656.94
TOTAL DEFERMENTS:	0.00
TOTAL BALANCES:	1,509,632.49

TOWN OF OCEAN ISLE BEACH
CASH ON HAND CLOSE OF FISCAL YEAR 2001 - 2009
PROJECTED BALANCES FOR FISCAL YEAR 2010 - 2035

FISCAL YEAR ENDING	ACTUAL CASH ON HAND
6/30/2001	$936,798.51
6/30/2002	$1,071,559.24
6/30/2003	$1,410,098.86
6/30/2004	$1,803,322.38
6/30/2005	$1,390,341.81
6/30/2006	$1,735,660.04
6/30/2007	$1,252,396.52
6/30/2008	$1,827,583.74
6/30/2009	$2,557,359.14

Continued current contributions of $750,000.00 each fiscal year to Beach Renourishment as the current practice-cash revenues would be as follows through fiscal year 2035.

6/30/2010	$3,307,359.14
6/30/2011	$4,057,359.14
6/30/2012	$4,807,359.14
6/30/2013	$5,557,359.14
6/30/2014	$6,307,359.14
6/30/2015	$7,057,359.14
6/30/2016	$7,807,359.14
6/30/2017	$8,557,359.14
6/30/2018	$9,307,359.14
6/30/2019	$10,057,359.14
6/30/2020	$10,807,359.14
6/30/2021	$11,557,359.14
6/30/2022	$12,307,359.14
6/30/2023	$13,057,359.14
6/30/2024	$13,807,359.14
6/30/2025	$14,557,359.14
6/30/2026	$15,307,359.14
6/30/2027	$16,057,359.14
6/30/2028	$16,807,359.14
6/30/2029	$17,557,359.14
6/30/2030	$18,307,359.14
6/30/2031	$19,057,359.14
6/30/2032	$19,807,359.14
6/30/2033	$20,557,359.14
6/30/2034	$21,307,359.14
6/30/2035	$22,057,359.14
6/30/2036	$22,807,359.14

TOWN OF OCEAN ISLE BEACH
STATIC LINE EXCEPTION REQUEST – ADDITIONAL INFORMATION

(FINANCIAL ANALYSIS BASED ON SCENARIO 1)

With this scenario the Town will continue to receive both Federal and State funding and the project would be funded over the next 25 years as follows:

2013 Estimated Project Cost	6,856,703
65% Federal Share	4,456,857
35% Non-Federal Share	2,399,846
State Share (75%)	1,799,885
Town Share (25%)	599,962
2016 Estimated Project Cost	7,937,491
65% Federal Share	5,159,369
35% Non-Federal Share	2,778,122
State Share (75%)	2,083,591
Town Share (25%)	694,531
2019 Estimated Project Cost	9,188,638
65% Federal Share	5,972,615
35% Non-Federal Share	3,216,023
State Share (75%)	2,412,017
Town Share (25%)	804,006
2022 Estimated Project Cost	10,636,998
65% Federal Share	6,914,049
35% Non-Federal Share	3,722,949
State Share (75%)	2,792,212
Town Share (25%)	930,737

2025 Estimated Project Cost	12,313,655
65% Federal Share	8,003,876
35% Non-Federal Share	4,309,779
State Share (75%)	3,232,334
Town Share (25%)	1,077,445
2028 Estimated Project Cost	14,254,595
65% Federal Share	9,265,487
35% Non-Federal Share	4,989,108
State Share (75%)	3,741,831
Town Share (25%)	1,247,277
2031 Estimated Project Cost	16,501,476
65% Federal Share	10,725,959
35% Non-Federal Share	5,775,517
State Share (75%)	4,331,637
Town Share (25%)	1,443,879
2034 Estimated Project Cost	19,102,522
65% Federal Share	12,416,639
35% Non-Federal Share	6,685,883
State Share (75%)	5,014,412
Town Share (25%)	1,671,471

Presently the Town contributes $400,000 from its General Fund and $350,000 from its Accommodation Fund Revenues to the Beach Renourishment Fund each year. The attached report "CASH ON HAND -PROJECTED BALANCES FOR BEACH RENOURISHMENT FUND" represents adequate funding would be available for the Town's 25% allocation of the 35% non-federal share.

TOWN OF OCEAN ISLE BEACH
CASH ON HAND CLOSE OF FISCAL YEAR 2001 - 2009
PROJECTED BALANCES FOR FISCAL YEAR 2010 - 2035

FISCAL YEAR ENDING	PROJECT COST	ACTUAL CASH ON HAND
6/30/2001		936,798.51
6/30/2002		1,071,559.24
6/30/2003		1,410,098.86
6/30/2004		1,803,322.38
6/30/2005		1,390,341.81
6/30/2006		1,735,660.04
6/30/2007		1,252,396.52
6/30/2008		1,827,583.74
6/30/2009		2,557,359.14

ırrent practice was continued contributions of $750,000.00 each fiscal year to Beach ·ourishment from General Fund and Accommodation Tax Funds cash reserves would ıs follows through fiscal year 2035 minus payment of project.

6/30/2010		3,307,359.14
6/30/2011		4,057,359.14
6/30/2012		4,807,359.14
6/30/2013	599,962	4,957,397.14
6/30/2014		5,707,397.14
6/30/2015		6,457,397.14
6/30/2016	694,531	6,512,866.14
6/30/2017		7,262,866.14
6/30/2018		8,012,866.14
6/30/2019	804,006	7,958,860.14
6/30/2020		8,708,860.14
6/30/2021		9,458,860.14
6/30/2022	930,737	9,278,123.14
6/30/2023		10,028,123.14
6/30/2024		10,778,123.14
6/30/2025	1,077,445	10,450,678.14
6/30/2026		11,200,678.14
6/30/2027		11,950,678.14
6/30/2028	1,247,277	11,453,401.14
6/30/2029		12,203,401.14
6/30/2030		12,953,401.14
6/30/2031	1,443,879	12,259,522.14
6/30/2032		13,009,522.14
6/30/2033		13,759,522.14
6/30/2034	1,671,471	12,838,051.14
6/30/2035		13,588,051.14
6/30/2036		14,338,051.14

TOWN OF OCEAN ISLE BEACH
STATIC LINE EXCEPTION REQUEST – ADDITIONAL INFORMATION

(FINANCIAL ANALYSIS BASED ON SCENARIO 2)

With this scenario the Town will continue to receive State funding and the project would be funded over the next 25 years as follows:

2013 Estimated Project Cost	6,856,703
State Share (75% of original 35% non-federal match $2,399,846)	1,799,885
Town Share	5,056,818
Less Cash Reserve On Hand	5,056,818
Less Accommodation Tax	-
Less Ad Valorem Tax	-
2016 Estimated Project Cost	7,937,491
State Share (75% of original 35% non-federal match $2,778,122)	2,083,591
Town Share	5,853,900
Less Cash Reserve On Hand	500,541
Less Accommodation Tax	4,817,099
Less Ad Valorem Tax	536,260
2019 Estimated Project Cost	9,188,638
State Share (75% of original 35% non-federal match $3,216,023)	2,412,017
Town Share	6,776,621
Less Cash Reserve On Hand	-
Less Accommodation Tax	5,111,944
Less Ad Valorem Tax	1,664,677
2022 Estimated Project Cost	10,636,998
State Share (75% of original 35% non-federal match $3,722,949)	2,792,212
Town Share	7,844,786
Less Cash Reserve On Hand	-
Less Accommodation Tax	5,424,836
Less Ad Valorem Tax	2,419,950

2025 Estimated Project Cost	12,313,655
State Share (75% of original 35% non-federal match $4,309,779)	3,232,334
Town Share	9,081,321
Less Cash Reserve On Hand	-
Less Accommodation Tax	5,756,879
Less Ad Valorem Tax	3,324,442
2028 Estimated Project Cost	14,254,595
State Share (75% of original 35% non-federal match $4,989,108)	3,741,831
Town Share	10,512,764
Less Cash Reserve On Hand	-
Less Accommodation Tax	6,109,246
Less Ad Valorem Tax	4,403,518
2031 Estimated Project Cost	16,501,476
State Share (75% of original 35% non-federal match $5,775,517)	4,331,637
Town Share	12,169,839
Less Cash Reserve On Hand	-
Less Accommodation Tax	6,483,181
Less Ad Valorem Tax	5,686,658
2034 Estimated Project Cost	19,102,522
State Share (75% of original 35% non-federal match $6,685,883)	5,014,412
Town Share	14,088,110
Less Cash Reserve On Hand	-
Less Accommodation Tax	6,880,004
Less Ad Valorem Tax	7,208,106

Presently the Town contributes $400,000 from its General Fund and $350,000 from its Acc. Fund Revenues to the Beach Renourishment Fund each year.

TOWN OF OCEAN ISLE BEACH
CASH ON HAND CLOSE OF FISCAL YEAR 2001 - 2009
PROJECTED BALANCES FOR FISCAL YEAR 2010 - 2035

FISCAL YEAR ENDING	ACTUAL CASH ON HAND
6/30/2001	$936,798.51
6/30/2002	$1,071,559.24
6/30/2003	$1,410,098.86
6/30/2004	$1,803,322.38
6/30/2005	$1,390,341.81
6/30/2006	$1,735,660.04
6/30/2007	$1,252,396.52
6/30/2008	$1,827,583.74
6/30/2009	$2,557,359.14

If current practice was continued with contributions of $750,000.00 each fiscal year to Beach Renourishment from General Fund and Accommodation Tax Funds cash reserves would be as follows:

6/30/2010	$3,307,359.14
6/30/2011	$4,057,359.14
6/30/2012	$4,807,359.14
6/30/2013	$5,557,359.14
6/30/2014	$500,541.14
6/30/2015	$500,541.14
6/30/2016	$500,541.14

PROJECTED ACCOMODATION TAX REVENUE

Presently the Town collects 3% Accommodation Tax on gross rental accommodations within the Town of Ocean Isle Beach. The Town has the authority to collect up to 5% or an additional 2% tax. If needed, in order to fund the beach renourishment project, the Town could impose this additional 2% or an increase of .666. The following table represents the actual gross rentals for fiscal year 08/09 then accounts for a growth rate factor each year of two percent, based on a 5% collection rate.

FISCAL YEAR	GROSS RENTS (BASED ON GROWTH FACTOR OF 2% ANNUALLY)	REVENUE BASED On 5% TAX	3 YEAR CUMMULATIVE
FY 08/09	28,512,579.64		
FY 09/10	29,082,831.23	872,484.94 (Based on present F/Y 3% collection)	
FY 10/11	29,664,487.86	1,483,224.39	
FY 11/12	30,257,777.61	1,512,888.88	
FY 12/13	30,862,933.17	1,543,146.66	**4,539,259.93**
FY 13/14	31,480,191.83	1,574,009.59	
FY 14/15	32,109,795.67	1,605,489.78	
FY 15/16	32,751,991.58	1,637,599.58	**4,817,098.95**
FY 16/17	33,407,031.41	1,670,351.57	
FY 17/18	34,075,172.04	1,703,758.60	
FY 18/19	34,756,675.48	1,737,833.77	**5,111,943.95**
FY 19/20	35,451,808.99	1,772,590.45	
FY 20/21	36,160,845.17	1,808,042.26	
FY 21/22	36,884,062.07	1,844,203.10	**5,424,835.81**
FY 22/23	37,621,743.32	1,881,087.17	
FY 23/24	38,374,178.18	1,918,708.91	
FY 24/25	39,141,661.75	1,957,083.09	**5,756,879.16**
FY 25/26	39,924,494.98	1,996,224.75	
FY 26/27	40,722,984.88	2,036,149.24	
FY 27/28	41,537,444.58	2,076,872.23	**6,109,246.22**
FY 28/29	42,368,193.47	2,118,409.67	
FY 29/30	43,215,557.34	2,160,777.87	
FY 30/31	44,079,868.48	2,203,993.42	**6,483,180.96**
FY 31/32	44,961,465.85	2,248,073.29	
FY 32/33	45,860,695.17	2,293,034.76	
FY 33/34	46,777,909.08	2,338,895.45	**6,880,003.51**
FY 34/35	47,713,467.26	2,385,673.36	
FY 35/36	48,667,736.60	2,433,386.83	
FY 36/37	49,641,091.33	2,482,054.57	**7,301,114.76**

PROJECTED REVENUE FROM TOWN'S TAXING AUTHORITY
GRANTED BY GS 160A - 209(c)(7)

2009 VALUATION $2,641,633,488.00

Following Years calculated at 3% Annual Growth Factor. This growth factor is very conservative. Property tax values increase on average 196% or 19.6% per year during the period of 1996-2006.

Fiscal Year	Valuation	.01 Tax Revenue Produces	Pojected Additional Tax Increase Revenue Reserved for Project				Project Year
				Scenario 2		Scenario 3	
2010	2,720,882,492	272,088					
2011	2,802,508,967	280,251					
2012	2,886,584,236	288,658					
2013	2,973,181,763	297,318			3.5	1,040,614	
2014	3,062,377,216	306,238	1.0	306,238	3.5	1,071,832	
2015	3,154,248,532	315,425	1.0	315,425	3.5	1,103,987	2016
2016	3,248,875,988	324,888	1.0	324,888	4.0	1,299,550	
2017	3,346,342,268	334,634	2.0	669,268	4.0	1,338,537	
2018	3,446,732,536	344,673	2.0	689,347	4.5	1,551,030	2018
2019	3,550,134,512	355,013	2.0	710,027	4.5	1,597,561	
2020	3,656,638,547	365,664	2.5	914,160	5.0	1,828,319	
2021	3,766,337,704	376,634	2.5	941,584	5.0	1,883,169	2022
2022	3,879,327,835	387,933	2.5	969,832	5.5	2,133,630	
2023	3,995,707,670	399,571	3.0	1,198,712	5.5	2,197,639	
2024	4,115,578,900	411,558	3.0	1,234,674	5.5	2,263,568	2025
2025	4,239,046,267	423,905	3.5	1,483,666	6.0	2,543,428	
2026	4,366,217,655	436,622	3.5	1,528,176	6.5	2,838,041	
2027	4,497,204,185	449,720	3.5	1,574,021	6.5	2,923,183	2028
2028	4,632,120,310	463,212	4.0	1,852,848	7.0	3,242,484	
2029	4,771,083,919	477,108	4.0	1,908,434	7.0	3,339,759	
2030	4,914,216,437	491,422	4.0	1,965,687	7.0	3,439,952	2031
2031	5,061,642,930	506,164	4.5	2,277,739	7.5	3,796,232	
2032	5,213,492,218	521,349	4.5	2,346,071	8.0	4,170,794	
2033	5,369,896,985	536,990	5.0	2,684,948	8.0	4,295,918	2034
2034	5,530,993,894	553,099					
2035	5,696,923,711	569,692					

TOWN OF OCEAN ISLE BEACH
STATIC LINE EXCEPTION REQUEST – ADDITIONAL INFORMATION

(FINANCIAL ANALYSIS BASED ON SCENARIO 3)

With this scenario the Town will no longer receive Federal or State funding and the project would be funded over the next 25 years as follows:

2013 Estimated Project Cost	6,856,703
Less Accommodation Tax	1,299,344
Less Cash Reserve On Hand	5,557,359
Less Ad Valorem Tax	-
2016 Estimated Project Cost	7,937,491
Less Accommodation Tax	4,817,099
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	3,120,392
2019 Estimated Project Cost	9,188,638
Less Accommodation Tax	5,111,944
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	4,076,694
2022 Estimated Project Cost	10,636,998
Less Accommodation Tax	5,424,836
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	5,212,162
2025 Estimated Project Cost	12,313,655
Less Accommodation Tax	5,756,879
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	6,556,776

2028 Estimated Project Cost	14,254,595
Less Accommodation Tax	6,109,246
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	8,145,349
2031 Estimated Project Cost	16,501,476
Less Accommodation Tax	6,483,181
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	10,018,295
2034 Estimated Project Cost	19,102,522
Less Accommodation Tax	6,880,004
Less Cash Reserve On Hand	-
Less Ad Valorem Tax	12,222,518

Presently the Town contributes $400,000 from its General Fund and $350,000 from its Acc. Fund Revenues to the Beach Renourishment Fund each year.

TOWN OF OCEAN ISLE BEACH
CASH ON HAND CLOSE OF FISCAL YEAR 2001 - 2009
PROJECTED BALANCES FOR FISCAL YEAR 2010 - 2035

FISCAL YEAR ENDING	ACTUAL CASH ON HAND
6/30/2001	$936,798.51
6/30/2002	$1,071,559.24
6/30/2003	$1,410,098.86
6/30/2004	$1,803,322.38
6/30/2005	$1,390,341.81
6/30/2006	$1,735,660.04
6/30/2007	$1,252,396.52
6/30/2008	$1,827,583.74
6/30/2009	$2,557,359.14

If current practice was continued with contributions of $750,000.00 each fiscal year to Beach Renourishment from General Fund and Accommodation Tax Funds cash reserves would be as follows:

6/30/2010	$3,307,359.14
6/30/2011	$4,057,359.14
6/30/2012	$4,807,359.14
6/30/2013	$5,557,359.14

PROJECTED ACCOMODATION TAX REVENUE

Presently the Town collects 3% Accommodation Tax on gross rental accommodations within the Town of Ocean Isle Beach. The Town has the authority to collect up to 5% or an additional 2% tax. If needed, in order to fund the beach renourishment project, the Town could impose this additional 2% or an increase of .666. The following table represents the actual gross rentals for fiscal year 08/09 then accounts for a growth rate factor each year of two percent, based on a 5% collection rate.

FISCAL YEAR	GROSS RENTS (BASED ON GROWTH FACTOR OF 2% ANNUALLY)	REVENUE BASED On 5% TAX	3 YEAR CUMMULATIVE
FY 08/09	28,512,579.64		
FY 09/10	29,082,831.23	872,484.94	(Based on present F/Y 3% collection)
FY 10/11	29,664,487.86	1,483,224.39	
FY 11/12	30,257,777.61	1,512,888.88	
FY 12/13	30,862,933.17	1,543,146.66	**4,539,259.93**
FY 13/14	31,480,191.83	1,574,009.59	
FY 14/15	32,109,795.67	1,605,489.78	
FY 15/16	32,751,991.58	1,637,599.58	**4,817,098.95**
FY 16/17	33,407,031.41	1,670,351.57	
FY 17/18	34,075,172.04	1,703,758.60	
FY 18/19	34,756,675.48	1,737,833.77	**5,111,943.95**
FY 19/20	35,451,808.99	1,772,590.45	
FY 20/21	36,160,845.17	1,808,042.26	
FY 21/22	36,884,062.07	1,844,203.10	**5,424,835.81**
FY 22/23	37,621,743.32	1,881,087.17	
FY 23/24	38,374,178.18	1,918,708.91	
FY 24/25	39,141,661.75	1,957,083.09	**5,756,879.16**
FY 25/26	39,924,494.98	1,996,224.75	
FY 26/27	40,722,984.88	2,036,149.24	
FY 27/28	41,537,444.58	2,076,872.23	**6,109,246.22**
FY 28/29	42,368,193.47	2,118,409.67	
FY 29/30	43,215,557.34	2,160,777.87	
FY 30/31	44,079,868.48	2,203,993.42	**6,483,180.96**
FY 31/32	44,961,465.85	2,248,073.29	
FY 32/33	45,860,695.17	2,293,034.76	
FY 33/34	46,777,909.08	2,338,895.45	**6,880,003.51**
FY 34/35	47,713,467.26	2,385,673.36	
FY 35/36	48,667,736.60	2,433,386.83	
FY 36/37	49,641,091.33	2,482,054.57	**7,301,114.76**

PROJECTED REVENUE FROM TOWN'S TAXING AUTHORITY
GRANTED BY GS 160A - 209(c)(7)

2009 VALUATION $2,641,633,488.00

Following Years calculated at 3% Annual Growth Factor. This growth factor is very conservative. Property tax values increase on average 196% or 19.6% per year during the period of 1996-2006.

Fiscal Year	Valuation	.01 Tax Revenue Produces	Pojected Additional Tax Increase Revenue Reserved for Project				Project Year
				Scenario 2		Scenario 3	
2010	2,720,882,492	272,088					
2011	2,802,508,967	280,251					
2012	2,886,584,236	288,658					
2013	2,973,181,763	297,318			3.5	1,040,614	
2014	3,062,377,216	306,238	1.0	306,238	3.5	1,071,832	
2015	3,154,248,532	315,425	1.0	315,425	3.5	1,103,987	2016
2016	3,248,875,988	324,888	1.0	324,888	4.0	1,299,550	
2017	3,346,342,268	334,634	2.0	669,268	4.0	1,338,537	
2018	3,446,732,536	344,673	2.0	689,347	4.5	1,551,030	2018
2019	3,550,134,512	355,013	2.0	710,027	4.5	1,597,561	
2020	3,656,638,547	365,664	2.5	914,160	5.0	1,828,319	
2021	3,766,337,704	376,634	2.5	941,584	5.0	1,883,169	2022
2022	3,879,327,835	387,933	2.5	969,832	5.5	2,133,630	
2023	3,995,707,670	399,571	3.0	1,198,712	5.5	2,197,639	
2024	4,115,578,900	411,558	3.0	1,234,674	5.5	2,263,568	2025
2025	4,239,046,267	423,905	3.5	1,483,666	6.0	2,543,428	
2026	4,366,217,655	436,622	3.5	1,528,176	6.5	2,838,041	
2027	4,497,204,185	449,720	3.5	1,574,021	6.5	2,923,183	2028
2028	4,632,120,310	463,212	4.0	1,852,848	7.0	3,242,484	
2029	4,771,083,919	477,108	4.0	1,908,434	7.0	3,339,759	
2030	4,914,216,437	491,422	4.0	1,965,687	7.0	3,439,952	2031
2031	5,061,642,930	506,164	4.5	2,277,739	7.5	3,796,232	
2032	5,213,492,218	521,349	4.5	2,346,071	8.0	4,170,794	
2033	5,369,896,985	536,990	5.0	2,684,948	8.0	4,295,918	2034
2034	5,530,993,894	553,099					
2035	5,696,923,711	569,692					

OCEAN ISLE BEACH

December 21, 2009

Ms. Christine A. Goebel
Assistant Attorney General
PO Box 629
Raleigh, NC 27602

RE: Static Line Exception Request – Additional Information

Dear Ms. Goebel:

In response to your letter dated December 15, 2009 regarding a request for additional information pertaining to the Town of Ocean Isle Beach's request for a Static Line Exception we have included the following information:

- Information regarding taxing powers and evidence of authority
- Letter regarding the delay in the initial maintenance
- General Fund and Accommodation Tax Funds
- Tax Value Year 2009
- Cash on hand – Current contributions
- Financial Analysis – Scenarios 1, 2, and 3
- Copies of the federal authorization for the project
- Copy of an perpetual easement
- Copies of the 2002 and 2005 Monitoring Reports
- Copy of the Operation and Maintenance Manual
- Copy of the General Reevaluation Report and Environmental Assessment (GRR)

In response to your other questions there have been no additional easements required since the sand is only being pumped in the already established area. Approximately 70 homes and 10 vacant lots could potentially be affected by the Coastal Resources Commissions (CRC) granting of this exception.

In regards to other communities possibly using Shallotte Inlet as a sand source the Town feels that would be up to the U.S. Army Corps of Engineers to make that determination. The Town of Ocean Isle Beach currently has a Federally Funded 50 Year Beach Erosion

Control and Hurricane Wave Protection Project which identifies Shallotte Inlet as the Town's sand source.

If you need further information please contact our office. We hope this additional information will be processed efficiently and we will be recommended for approval at the January 2010 CRC Meeting.

Sincerely,

Justin W. Whiteside
Planning Director

Cc: Daisy L. Ivey, Town Administrator
Debbie S. Smith, Mayor

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
TOWN OF OCEAN ISLE BEACH, NORTH CAROLINA
FOR CONSTRUCTION OF THE
BEACH EROSION CONTROL
AND
HURRICANE WAVE PROTECTION,
BRUNSWICK COUNTY BEACHES, NORTH CAROLINA, PROJECT
OCEAN ISLE BEACH PORTION

THIS AGREEMENT is entered into this 9th day of JAN 2001, 200__, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Wilmington District, and the Town of Ocean Isle Beach, North Carolina (hereinafter the "Non-Federal Sponsor"), represented by the Mayor, Ocean Isle Beach, North Carolina.

WITNESSETH, THAT:

WHEREAS, the project for hurricane-flood control from Cape Fear to the North Carolina-South Carolina State Line, North Carolina, (hereinafter the "Authorized Project") was authorized substantially in accordance with the recommendations of the Chief of Engineers in House Document Number 511, Eighty-ninth Congress, by Section 203 of the Flood Control Act of 1966, Public Law 89-789, dated November 7, 1966 to provide hurricane protection, shore protection, and Federal participation in the cost of periodic nourishment for the first 10 years of project life at Holden Beach, Long Beach, Ocean Isle Beach, Sunset Beach, and Yaupon Beach in Brunswick County, North Carolina (hereinafter the "Brunswick County Beaches Project");

WHEREAS, periodic beach nourishment was authorized by Section 934 of the Water Resources Development Act of 1986, Public Law 99-662, for a period that does not exceed 50 years after initiation of construction, for water resources development projects for which such nourishment has been authorized for a limited period;

WHEREAS, funding to initiate construction of the Ocean Isle Beach portion of the Brunswick County Beaches Project was provided by the Energy and Water Development Appropriations Act, 2000, Public Law 106-60, and House Report 253, Energy and Water Development Appropriations Bill, One-Hundred-Sixth Congress, First Session;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for initial construction and periodic nourishment of the Ocean Isle Beach portion of the Brunswick County Beaches Project (hereinafter the "Project", as defined in Article I.A. of this Agreement);

WHEREAS, Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, and Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, provide that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, the Non-Federal Sponsor does not qualify for a reduction of the maximum non-Federal cost share pursuant to the guidelines that implement Section 103(m) of the Water Resources Development Act of 1986, Public Law 99-662, as amended; and

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the construction of the Project in accordance with the terms of this Agreement;

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I -DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean initial construction and periodic nourishment of the Selected Plan of Improvement at Ocean Isle Beach, North Carolina, as generally described in the General Reevaluation Report, Environmental Assessment and Finding of No Significant Impact for Beach Erosion Control and Hurricane Wave Protection, Brunswick County Beaches, North Carolina, Ocean Isle Beach Portion, dated October, 1997, and approved by Chief of Engineers on May 15, 1998 (hereinafter the "GRR").

B. The term "initial construction" shall mean the placement of suitable beach and dune fill to form a dune and berm as generally described as the Selected Plan of Improvement at Ocean Isle Beach, North Carolina, in the GRR. The dune shall be vegetated with a crown width of 25 feet at an elevation of 9.5 feet National Geodetic Vertical Datum (NGVD) extending for 5,150 feet. The dune shall be fronted by a berm with a width of 50 feet at elevation 7 feet NGVD for a distance of 5,150 feet, then, to its west, shall have a berm with a crown width of 50 feet at elevation 7 feet NGVD for a distance of 2,600 feet, and then a berm with a crown width of 25 feet at elevation 7 feet NGVD for a distance of 2,400 feet. The dune and berm shall have transitions of 4,200 feet on the eastern end and 2,800 feet on the western end. There shall be advance maintenance fill for the total 17,150 feet of the project.

C. The term "periodic nourishment" shall mean the placement, after the end of the period of initial construction, of suitable beach and dune fill material within the area of initial construction, or any functional portion of the area of initial construction, as generally described in the GRR.

D. The term "total project costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to initial construction and periodic nourishment of the Project. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: continuing planning and engineering costs incurred after October 1, 1985; advanced engineering and design costs; preconstruction engineering and design costs; engineering and design costs during construction; the costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XV.A. of this Agreement; costs of historic preservation activities in accordance with Articles XVIII.A. and XVIII.C. of this Agreement; actual construction costs; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas for which the Government affords credit in accordance with Article IV of this Agreement; and costs of audit in accordance with Article X of this Agreement. The term does not include any costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; or any costs of dispute resolution under Article VII of this Agreement.

E. The term "total costs of initial construction" shall mean that portion of total project costs allocated by the Government to initial construction.

F. The term "total costs of periodic nourishment" shall mean that portion of total project costs allocated by the Government to periodic nourishment.

G. The term "financial obligation for initial construction" shall mean a financial obligation of the Government, other than an obligation pertaining to the provision of lands, easements, rights-of-way, relocations, and borrow and dredged or excavated material disposal areas, that results or would result in a cost that is or would be included in total costs of initial construction.

H. The term "financial obligation for periodic nourishment" shall mean a financial obligation of the Government, other than an obligation pertaining to the provision of lands, easements, rights-of-way, relocations, and borrow and dredged or excavated material disposal areas, that results or would result in a cost that is or would be included in total costs of periodic nourishment.

I. The term "non-Federal proportionate share", with respect to initial construction, shall mean the ratio of the Non-Federal Sponsor's total cash contribution required in accordance with Article II.E.2. of this Agreement to total financial obligations for initial construction, as projected by the Government. The term shall mean, with respect to periodic nourishment, the ratio of the

Non-Federal Sponsor's total cash contribution required in accordance with Article II.H.2. of this Agreement to total financial obligations for periodic nourishment, as projected by the Government.

J. The term "period of initial construction" shall mean the time from the date the Government first notifies the Non-Federal Sponsor in writing, in accordance with Article VI.B. of this Agreement, of the scheduled date for issuance of the solicitation for the first construction contract to the date that the District Engineer notifies the Non-Federal Sponsor in writing of the Government's determination that initial construction of the Project is complete.

K. The term "authorized periodic nourishment period" shall mean a period of 50 years from the initiation of the period of initial construction for the Project.

L. The term "highway" shall mean any public highway, roadway, street, or way, including any bridge thereof.

M. The term "relocation" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other public facility, or railroad (excluding existing railroad bridges and approaches thereto) when such action is authorized in accordance with applicable legal principles of just compensation or as otherwise provided in the authorizing legislation for the Project or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant removal of the affected facility or part thereof.

N. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

O. The term "functional portion of the Project" shall mean a portion of the Project that is suitable for tender to the Non-Federal Sponsor to operate and maintain in advance of completion of the entire Project. For a portion of the Project to be suitable for tender, the District Engineer must notify the Non-Federal Sponsor in writing of the Government's determination that the portion of the Project is complete and can function independently and for a useful purpose, although the balance of the Project is not complete.

P. The term "betterment" shall mean a change in the design and construction of an element of the Project resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design and construction of that element.

ARTICLE II -OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter, the "Congress") and using those funds and funds provided by the Non-Federal

Sponsor, shall expeditiously construct the Project (including periodic nourishment at such times during the authorized periodic nourishment period as the Government, after consultation with the Non-Federal Sponsor, determines such placement to be necessary and economically justified), applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. The Government shall not issue the solicitation for the first construction contract until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the Project. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Non-Federal Sponsor with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, issuance of change orders, resolution of contract claims, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Government.

2. Throughout the period of construction, the District Engineer shall furnish the Non-Federal Sponsor with a copy of the Government's Written Notice of Acceptance of Completed Work for each contract for the Project.

3. As of the effective date of this Agreement, $9,859,000 of Federal funds have been appropriated for the Authorized Project. This amount is less than the Federal share of the projected total project costs and the Government makes no commitment to seek additional Federal funds for the Authorized Project. Notwithstanding any other provision of this Agreement, the Government's financial participation in the Project together with the Government's share of costs incurred for other elements of the Authorized Project shall not exceed the total amount of Federal funds that heretofore have been appropriated and hereafter may be appropriated or otherwise made available for the Project. In the event that funds sufficient to meet the Government's share of funds required to continue construction of the Project and other elements of the Authorized Project in the then-current or upcoming fiscal year are not made available for the Project, the Government shall notify the Non-Federal Sponsor of the insufficiency of funds and the parties, within the Federal and Non-Federal funds available for the Project, shall suspend construction or terminate this Agreement in accordance with Article XIV.B. of this Agreement. To provide for this eventuality, the Government may reserve a percentage of the total Federal funds available for the Project and an equal percentage of the total funds contributed by the Non-Federal Sponsor pursuant to paragraph E. or paragraph H. of this Article as a contingency to pay the costs of termination, including any costs of contract claims and contract modifications.

B. The Non-Federal Sponsor may request the Government to accomplish betterments during the period of initial construction. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

C. When the District Engineer determines that the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with an Operation, Maintenance, Repair, and Rehabilitation Manual (hereinafter the "OMR&R Manual") and with copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously. Upon such notification, the Non-Federal Sponsor shall operate, maintain, repair, and rehabilitate the entire Project or the functional portion of the Project in accordance with Article VIII of this Agreement.

D. The Government shall assign all costs to be included in total project costs and all contributions provided by the Non-Federal Sponsor to hurricane and storm damage reduction, to recreation, or to privately owned shores (where use of such shores is limited to private interests).

E. During the period of initial construction, the Non-Federal Sponsor shall contribute 35 percent of the total costs of initial construction assigned by the Government to hurricane and storm damage reduction, plus 50 percent of the total costs of initial construction assigned by the Government to recreation, plus 100 percent of the total costs of initial construction assigned by the Government to privately owned shores (where use of such shores is limited to private interests) (hereinafter the "non-Federal share of initial construction") in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for the initial construction, operation, and maintenance of the Project, and shall perform or ensure performance of all relocations that the Government determines to be necessary for the initial construction, operation, and maintenance of the Project.

2. If the Government projects that the value of the Non-Federal Sponsor's contributions under paragraph E.1. of this Article and of the Non-Federal Sponsor's contributions attributable to initial construction under Articles V, X, and XV.A. of this Agreement will be less than the non-Federal share of initial construction, the Non-Federal Sponsor shall provide an

additional contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to the non-Federal share of initial construction.

3. If the Government determines that the value of the Non-Federal Sponsor's contributions provided under paragraphs E.1. and E.2. of this Article and of the Non-Federal Sponsor's contributions attributable to initial construction under Articles V, X, and XV.A. of this Agreement has exceeded the non-Federal share of initial construction, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of the non-Federal share of initial construction. After such a determination, the Government, in its sole discretion, may provide any remaining initial construction lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas and perform any remaining initial construction relocations on behalf of the Non-Federal Sponsor.

F. The Non-Federal Sponsor may request the Government to provide lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or perform relocations on behalf of the Non-Federal Sponsor during the period of initial construction. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or performance of relocations by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

G. Upon completion of the period of initial construction, the Government shall perform a final accounting in accordance with Article VI.D. of this Agreement to determine the contributions provided by the Non-Federal Sponsor in accordance with paragraphs B., E., and F. of this Article and Articles V, X, and XV.A. of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs B., E., and F. of this Article.

H. For each iteration of periodic nourishment, the Non-Federal Sponsor shall contribute 35 percent of the total costs of periodic nourishment assigned by the Government to hurricane and storm damage reduction, plus 50 percent of the total costs of periodic nourishment assigned by the Government to recreation, plus 100 percent of the total costs of periodic nourishment assigned by the Government to privately owned shores (where use of such shores is limited to private interests) (hereinafter the "non-Federal share of periodic nourishment") in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for such iteration of periodic nourishment, and shall perform or ensure performance of all relocations that the Government determines to be necessary for such iteration of periodic nourishment of the Project.

2. If the Government projects that the value of the Non-Federal Sponsor's contributions under paragraph H.1. of this Article and of the Non-Federal Sponsor's contributions attributable to periodic nourishment under Articles V, X, and XV.A. of this Agreement will be less than the non-Federal share of periodic nourishment, the Non-Federal Sponsor shall provide an additional contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to the non-Federal share of periodic nourishment.

3. If the Government determines that the value of the Non-Federal Sponsor's contributions provided under paragraphs H.1. and H.2. of this Article and of the Non-Federal Sponsor's contributions attributable to periodic nourishment under Articles V, X, and XV.A. of this Agreement has exceeded the non-Federal share of periodic nourishment, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of the non-Federal share of periodic nourishment. After such a determination, the Government, in its sole discretion, may provide any remaining periodic nourishment lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas and perform any remaining periodic nourishment relocations on behalf of the Non-Federal Sponsor.

I. The Non-Federal Sponsor may request the Government to accomplish betterments during the authorized periodic nourishment period. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

J. The Non-Federal Sponsor may request the Government to provide lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or perform relocations on behalf of the Non-Federal Sponsor during the authorized periodic nourishment period. Such requests shall be in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall

be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or performance of relocations by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

K. For each iteration of periodic nourishment, the Government shall perform a final accounting in accordance with Article VI.F. of this Agreement to determine the contributions provided by the Non-Federal Sponsor towards the total costs of periodic nourishment and costs due to betterments performed during such iteration of periodic nourishment in accordance with paragraphs H., I., and J. of this Article and Articles V, X, and XV.A. of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs H., I., and J. of this Article.

L. In the event the completed initial construction, or any functional portion of the initial construction, is damaged or destroyed by a storm or other natural forces, the Government, subject to the availability of funds and Article II.A. of this Agreement, shall place suitable beach and dune fill material within the area of the completed initial construction, or the functional portion of the initial construction, as periodic nourishment. The costs of such placement shall be included in the total costs of periodic nourishment and shared in accordance with Article II.H. of this Agreement. In the event an uncompleted portion of the initial construction is damaged or destroyed by a storm or other natural forces, the Government, subject to the availability of funds and Article II.A. of this Agreement, shall place suitable beach and dune fill material within the area of the uncompleted initial construction as initial construction. The costs of such placement shall be included in the total costs of initial construction and shared in accordance with Article II.E. of this Agreement. Nothing in this paragraph shall relieve the Non-Federal Sponsor of its obligations under Article VIII of this Agreement. Nothing in this paragraph shall preclude the Government from using Public Law 84-99 to accomplish any emergency repair and restoration work of the completed initial construction, or a functional portion of the initial construction.

M. The Non-Federal Sponsor shall not use Federal funds to meet the non-Federal share of initial construction or the non-Federal share of periodic nourishment under this Agreement unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.

N. The Non-Federal Sponsor agrees to participate in and comply with applicable Federal floodplain management and flood insurance programs.

O. Not less than once each year, the Non-Federal Sponsor shall inform affected interests of the extent of protection afforded by the Project against ocean-storm surges, wave action, and storm tides in the sounds and other adjacent waters, and that, during hurricanes and severe northeast storms, all normal precautions, including evacuation, must be taken as advised by appropriate authority.

P. The Non-Federal Sponsor shall continue to enforce the flood plain regulations that comply with Federal Emergency Management Agency guidelines.

Q. The Non-Federal Sponsor shall provide and maintain public ownership, during the economic life of the Project, of an adequate width of beach for public use; with acceptable beach access, parking areas and other facilities necessary for realization of the benefits upon which Government participation is based.

R. The Non-Federal Sponsor shall adopt and enforce ordinances to provide for preservation of the Project and its protective vegetation.

S. The Non-Federal Sponsor shall control water pollution to the extent necessary to safeguard the health of bathers.

ARTICLE III -LANDS, RELOCATIONS, DISPOSAL AREAS, AND PUBLIC LAW 91-646 COMPLIANCE

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for the initial construction, periodic nourishment, operation, and maintenance of the Project, including those required for relocations, borrow materials, and dredged or excavated material disposal. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the end of the period of initial construction, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way required for the initial construction, operation, and maintenance of the Project set forth in such descriptions. Prior to the end of the authorized periodic nourishment period, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way required for the periodic nourishment, as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government contract for initial construction or periodic nourishment, the Non-Federal Sponsor shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that contract. For so long as the Project remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the proper disposal of dredged or excavated material associated with the initial construction, periodic nourishment, operation, and maintenance of the Project. Such improvements may include, but are not necessarily

limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions of such improvements in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with construction of such improvements. Prior to the end of the period of initial construction, the Non-Federal Sponsor shall provide all improvements required for initial construction, operation, and maintenance of the Project, set forth in such descriptions. Prior to the end of the authorized periodic nourishment period, the Non-Federal Sponsor shall provide all improvements required for the periodic nourishment, as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government contract for initial construction or periodic nourishment, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the proper disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications.

C. The Government, after consultation with the Non-Federal Sponsor, shall determine the relocations necessary for the initial construction, periodic nourishment, operation, and maintenance of the Project, including those necessary to enable the removal of borrow materials and the proper disposal of dredged or excavated material. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such relocations in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with such relocations. Prior to the end of the period of initial construction, the Non-Federal Sponsor shall perform or ensure the performance of all relocations required for the initial construction, operation, and maintenance of the Project as set forth in such descriptions. Prior to the end of the authorized periodic nourishment period, the Non-Federal Sponsor shall perform or ensure the performance of all relocations required for the periodic nourishment, as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government contract for initial construction or periodic nourishment, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all relocations the Government determines to be necessary for that contract.

D. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to paragraphs A., B., or C. of this Article. Upon receipt of such documents the Government, in accordance with Article IV of this Agreement and in a timely manner, shall determine the value of such contribution, include such value in total project costs, and afford credit for such value toward the non-Federal share of total costs of initial construction or the non-Federal share of periodic nourishment.

E. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987

(Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for the initial construction, periodic nourishment, operation, and maintenance of the Project, including those necessary for relocations, borrow materials, and dredged or excavated material disposal, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV -CREDIT FOR VALUE OF LANDS, RELOCATIONS, AND DISPOSAL AREAS

A. The Non-Federal Sponsor shall receive credit toward the non-Federal share of total costs of initial construction for the value of the lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Non-Federal Sponsor must provide for initial construction, operation, and maintenance of the Project pursuant to Article III of this Agreement, and for the value of the relocations that the Non-Federal Sponsor must perform or for which it must ensure performance for initial construction, operation, and maintenance of the Project pursuant to Article III of this Agreement. The Non-Federal Sponsor shall receive credit toward the non-Federal share of total costs of periodic nourishment for the value of the lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Non-Federal Sponsor must provide for periodic nourishment of the Project pursuant to Article III of this Agreement, and for the value of the relocations that the Non-Federal Sponsor must perform or for which it must ensure performance for periodic nourishment of the Project pursuant to Article III of this Agreement. However, the Non-Federal Sponsor shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that have been provided previously as an item of cooperation for another Federal project. The Non-Federal Sponsor also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas to the extent that such items are provided using Federal funds unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute.

B. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations, borrow materials, and dredged or excavated material disposal, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph B.3. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with paragraph B.2.a. of this Article, unless thereafter a different amount is determined to represent fair market value in accordance with paragraph B.2.b. of this Article.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, or the Non-Federal Sponsor chooses not to obtain a second appraisal, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph B.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph B.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph B.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor shall, prior to instituting such proceedings, submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60-day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60-day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with sub-paragraph B.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are required for the initial construction, periodic nourishment, operation, and maintenance of the Project, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five-year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with Article III.E. of this Agreement.

C. After consultation with the Non-Federal Sponsor, the Government shall determine the value of relocations in accordance with the provisions of this paragraph.

1. For a relocation other than a highway, the value shall be only that portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a relocation of a highway, the value shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of North Carolina would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. Relocation costs shall include, but not necessarily be limited to, actual costs of performing the relocation; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the relocation, but shall not include any costs due to betterments, as determined by the Government,

nor any additional cost of using new material when suitable used material is available. Relocation costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

D. The value of the improvements made to lands, easements, and rights-of-way for the proper disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to betterments, as determined by the Government.

ARTICLE V -PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the period of initial construction or during the authorized periodic nourishment period, as appropriate. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the period of initial construction or the authorized periodic nourishment period, as appropriate, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the Government's cost projections; final inspection of the initial construction or functional portions of the initial construction; final inspection of each iteration of periodic nourishment or functional portion of each periodic nourishment; preparation of the proposed OMR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the

recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

E. The costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provisions of this Agreement.

ARTICLE VI -METHOD OF PAYMENT

A. The Government shall maintain current records of contributions provided by the parties and current projections of total project costs, total costs of initial construction, total costs of periodic nourishment, and costs due to betterments. By October 1 of each year and at least quarterly thereafter, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of total project costs, of total costs of initial construction, of total costs of periodic nourishment, of total costs due to betterments during the period of initial construction or during the authorized periodic nourishment period, as appropriate, of the components of total project costs, of the non-Federal share of initial construction, of the non-Federal share of periodic nourishment, of the Non-Federal Sponsor's total cash contributions required in accordance with Articles II.B., II.E., II.F., II.H., II.I., and II.J. of this Agreement, of the non-Federal proportionate share, and of the funds the Government projects to be required from the Non-Federal Sponsor for the upcoming fiscal year. On the effective date of this Agreement, total project costs are projected to be $143,685,000, total costs of initial construction are estimated to be $9,485,000, and total costs of periodic nourishment are estimated to be $134,200,000. The Non-Federal Sponsor's contribution required under Article II.E.2. of this Agreement is projected to be $3,339,000 and the Non-Federal Sponsor's contribution required under Article II.H.2. of this Agreement is projected to be $46,970,000. Such amounts are estimates subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Non-Federal Sponsor shall provide the cash contribution required under Article II.E.2. of this Agreement in accordance with the provisions of this paragraph:

1. Not less than 45 calendar days prior to the scheduled date for issuance of the solicitation for the first construction contract for initial construction, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for initial construction through the first fiscal year of the period of construction, including the non-Federal proportionate share of financial obligations for initial construction incurred prior to the commencement of the period of initial construction. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Wilmington" to the District Engineer or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with

interest accruing to the Non-Federal Sponsor or presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of the period of initial construction, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for initial construction for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the Non-Federal Sponsor shall make the full amount of the required funds for that fiscal year available to the Government through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for initial construction incurred prior to the commencement of the period of initial construction; and (b) the non-Federal proportionate share of financial obligations for initial construction as they are incurred during the period of initial construction.

4. If at any time during the period of initial construction, the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the non-Federal proportionate share of projected financial obligations for initial construction for the current fiscal year, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required, and provide an explanation of why additional funds are required, and the Non-Federal Sponsor, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

C. In advance of the Government incurring any financial obligation associated with additional work under Article II.B., II.F., II.I., or II.J. of this Agreement, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to pay for such additional work through any of the payment mechanisms specified in Article VI.B.1. of this Agreement. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the Non-Federal Sponsor must provide additional funds to meet its cash contribution, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days thereafter, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

D. Upon completion of the initial construction or termination of this Agreement during the period of initial construction, and upon resolution of all relevant claims and appeals relevant to initial construction, the Government shall conduct a final accounting and furnish the Non-Federal

Sponsor with the results of the final accounting. The final accounting shall determine total costs of initial construction, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments during the period of initial construction and the Non-Federal Sponsor's cash contribution provided pursuant to Article II.B. of this Agreement during the period of initial construction.

1. In the event a final accounting shows that the total contribution provided by the Non-Federal Sponsor is less than the non-Federal share of initial construction plus costs due to any betterments provided in accordance with Article II.B. of this Agreement during the period of initial construction, the Non-Federal Sponsor shall, no later than 90 calendar days after receipt of written notice, make a payment to the Government of whatever sum is required to meet the non-Federal share of initial construction plus costs due to any betterments provided in accordance with Article II.B. of this Agreement during the period of initial construction by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. In the event a final accounting shows that the total contribution provided by the Non-Federal Sponsor exceeds the non-Federal share of initial construction plus costs due to any betterments provided in accordance with Article II.B. of this Agreement during the period of initial construction, the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

E. The Non-Federal Sponsor shall provide the cash contribution required under Article II.H.2. of this Agreement in accordance with the provisions of this paragraph:

1. Not less than 45 calendar days prior to the scheduled date for issuance of the solicitation for the first contract for each iteration of periodic nourishment, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for periodic nourishment through the first fiscal year of each iteration of periodic nourishment, including the non-Federal proportionate share of financial obligations for periodic nourishment incurred prior to the commencement of the authorized periodic nourishment period. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Wilmington" to the District Engineer or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor or presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of each iteration of periodic nourishment, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for periodic nourishment for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the Non-Federal Sponsor shall make the full amount of the required funds for that fiscal year available to the Government through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for periodic nourishment incurred prior to the commencement the authorized periodic nourishment period; and (b) the non-Federal proportionate share of financial obligations for periodic nourishment as they are incurred during the authorized periodic nourishment period.

4. If at any time during the authorized periodic nourishment period, the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the non-Federal proportionate share of projected financial obligations for periodic nourishment for the current fiscal year, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required, and provide an explanation of why additional funds are required, and the Non-Federal Sponsor, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

F. Upon completion of each iteration of periodic nourishment or termination of this Agreement during the authorized periodic nourishment period, and upon resolution of all relevant claims and appeals relevant to the periodic nourishment, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the results of the final accounting. The final accounting shall determine total costs of periodic nourishment, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments performed during the authorized periodic nourishment period and the Non-Federal Sponsor's cash contribution provided pursuant to Article II.I. of this Agreement during the authorized periodic nourishment period.

1. In the event a final accounting shows that the total contribution provided by the Non-Federal Sponsor is less than the non-Federal share of periodic nourishment plus costs due to any betterments provided in accordance with Article II.I. of this Agreement during the authorized periodic nourishment period, the Non-Federal Sponsor shall, no later than 90 calendar days after receipt of written notice, make a payment to the Government of whatever sum is required to meet the non-Federal share of periodic nourishment plus costs due to any betterments provided in accordance with Article II.I. of this Agreement during the authorized periodic nourishment period by delivering a check payable to "FAO, USAED, Wilmington District" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. In the event a final accounting shows that the total contribution provided by the Non-Federal Sponsor exceeds the non-Federal share of periodic nourishment plus costs due to any betterments provided in accordance with Article II.I. of this Agreement during the authorized periodic nourishment period, the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII -DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay 50 percent of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, AND REHABILITATION (OMR&R)

A. Upon notification in accordance with Article II.C. of this Agreement and for so long as the Project remains authorized, the Non-Federal Sponsor shall operate, maintain, repair, and rehabilitate the entire Project or the functional portion of the Project, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the OMR&R Manual and any subsequent amendments thereto.

1. At least annually, the Non-Federal Sponsor shall monitor the beach and dune profile to determine losses of nourishment material from the Project design section and provide the results of such monitoring to the Government.

2. The Non-Federal Sponsor shall grade and reshape the beach and dune profile using material within the Project area and maintain vegetation, fencing, dune cross-overs, and other Project features associated with the beach and dune as required in the OMR&R Manual.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. If an inspection shows

that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of notice, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. No completion, operation, maintenance, repair, replacement, or rehabilitation by the Government shall operate to relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE IX -INDEMNIFICATION

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from the initial construction, periodic nourishment, operation, maintenance, repair, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X -MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, and other evidence in accordance with these procedures and for a minimum of three years after the completion of the accounting for which such books, records, documents, and other evidence were required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, documents, records, and other evidence.

B. Pursuant to 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 7501-7507, as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in

accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the Project shall be included in total project costs and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement.

ARTICLE XI -FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army", and Section 402 of the Water Resources Development Act of 1986, as amended (33 U.S.C. 701b-12), requiring non-Federal preparation and implementation of flood plain management plans.

ARTICLE XII -RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

ARTICLE XIII -OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XIV -TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under Article II.B., II.E., II.F., II.H., II.I., II.J., VI, or XVIII.C. of this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the Project is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.D. or VI.F. of this Agreement.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13-week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3-month period if the period of delinquency exceeds 3 months.

ARTICLE XV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the initial construction, periodic nourishment, operation, and maintenance of the Project. However, for lands that the Government determines to be subject to the navigation servitude, only the Government

shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor or the Government during the period of initial construction for such investigations for hazardous substances shall be included in total costs of initial construction and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Non-Federal Sponsor or the Government during the authorized periodic nourishment period for such investigations for hazardous substances shall be included in total costs of periodic nourishment and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the initial construction, periodic nourishment, operation, and maintenance of the Project, the Non-Federal Sponsor and the Government shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until both parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate initial construction or any iteration of periodic nourishment of the Project, or, if already in initial construction or an iteration of periodic nourishment, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the initial construction, periodic nourishment, operation, and maintenance of the Project. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of total project costs. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary clean up and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE XVI -NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Town of Ocean Isle Beach
ATTN: Town Administrator
3 West Third Street
Ocean Isle Beach, NC 28469

If to the Government:

District Engineer, USAED, Wilmington
ATTN: CESAW-PM-C
P.O. 1890
Wilmington, NC 28402-1890

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVII -CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVIII - HISTORIC PRESERVATION

A. The costs of identification, survey and evaluation of historic properties shall be included in total project costs and shared in accordance with the provisions of this Agreement.

B. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of the total amount authorized to be appropriated for the Project.

C. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall be included in total project costs and shared in accordance with the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

BY: _____
James W. DeLony
Colonel, U.S. Army
District Engineer

DATE: 9 JAN 2001

TOWN OF OCEAN ISLE BEACH,
NORTH CAROLINA

BY: _____
Betty S. Williamson
Mayor

DATE: 9 JAN 2001

CERTIFICATE OF AUTHORITY

I, Elva L. Jess, do hereby certify that I am the principal legal officer of the Town of Ocean Isle Beach, North Carolina, that the Town of Ocean Isle Beach, North Carolina, is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the Town of Ocean Isle Beach, North Carolina, in connection with the Beach Erosion Control and Hurricane Wave Protection Project, Brunswick County Beaches, North Caroline, Project, Ocean Isle Beach Portion, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the Town of Ocean Isle Beach, North Carolina, have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this 9th day of January 2001.

Elva L. Jess
Attorney
Town of Ocean Isle Beach

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Betty S. Williamson
Mayor
Town of Ocean Isle Beach

DATE: 1-9-2001

STATE OF NORTH CAROLINA)
COUNTY OF BRUNSWICK)

RELEASE OF PARTIAL AREA FROM PERPETUAL EASEMENT FOR BEACH RENOURISHMENT

THIS DEED OF RELEASE, made and entered into this the 13th day of March, 2001 by and between the Town of Ocean Isle Beach, hereinafter referred to as "Grantor" and Willard T. Cox and wife, Jean M. Cox, hereinafter referred to as "Grantee;"

WITNESSETH;

WHEREAS, the Town of Ocean Isle Beach was granted an easement by Willard T. Cox and wife, Jean M. Cox on August 17, 2000, said easement having been recorded in Book 1398 at Page 588 of the Brunswick County Registry, said easement having been provided to the Town for purposes of providing land to be used for the placement of sand for a beach renourishment project; and

WHEREAS, the area to be used by the project was defined by the Corps of Engineers and the Town and the Grantees were provided with a description for the easement by the Town; and

WHEREAS said easement covers 7,368 square feet of which 874 square feet are located on Lot 16 Block 11 Section B OIB and 6,494 square feet are located on lands between said lot (with the side lot lines extended to the Mean High Water Line of the Atlantic Ocean) and the Mean High Water Line of the Atlantic Ocean; and

WHEREAS, the Corps has advised the Town that the project dimensions are to be modified in the area owned by the Grantee, such that the area necessary for the project has been reduced in size;

That the said Grantor by this document does hereby convey and release to the Grantee and their heirs and assigns, the following described tract or parcel of land;

that 874 square feet portion of the easement located on Lot 16 Block 11 Section B OIB.

That Grantor has recorded a revised plat made by WK Dickson & Co., Inc. certified and dated December 11, 2000 by David M. Edwards, RLS and recorded in the Brunswick County Registry in Map Book 24, Page 61, which plat is incorporated herein by reference and made a part and parcel hereof. Said parcel is labeled on said plat as tract sequence number 1575.

That said revised easement covers 6,494 square feet of which 0 square feet are located on Lot 16 Block 11 Section B OIB and 6,494 square feet are located on the lands between said lot (with the side lot lines extended to the Mean High Water Line of the Atlantic Ocean) and the Mean High Water Line of the Atlantic Ocean.

IN WITNESS WHEREOF, the undersigned Mayor of the Town of Ocean Isle Beach, with authority from the Board of Commissioners, hereunto sets her hand and the Town Seal, this the day and year first above written.

BY: Betty S. Williamson
Betty S. Williamson, Mayor
Town of Ocean Isle Beach

Attest:
Daisy Ivey
Town Clerk

State of North Carolina
County of Brunswick

Daisy Ivey, being first duly sworn, deposes and says that she is the Town Clerk for Ocean Isle Beach and that Mayor Betty S. Williamson executed the foregoing partial release of easement document on behalf of the Town of Ocean Isle Beach upon recommendation of the Corps of Engineers and adoption of said recommendation by the Ocean Isle Beach Board of Commissioners at its regular meeting on March 13, 2001.

This the 13th day of March, 2001.

TOWN OF OCEAN ISLE BEACH SEAL NORTH CAROLINA
(Municipal Seal)

Daisy Ivey
Daisy Ivey, Town Clerk

Sworn and subscribed before me this the 13th day of March, 2001.

NOTARY PUBLIC BRUNSWICK COUNTY, N.C.
(Notary Seal / Stamp)

Peggy K. Pelasara
Notary Public

My commission expires: 3-21-2004

TOWN OF OCEAN ISLE BEACH

BEACH RENOURISHMENT PROJECT

Project Cost over 25 year Period Assuming 5% Annual Rate of Inflation

5923077	296153.9	6219231	2011
6219231	310961.6	6530193	2012
6530193	326509.7	6856703	2013
6856703	342835.2	7199538	2014
7199538	359976.9	7559515	2015
7559515	377975.8	7937491	2016
7937491	396874.6	8334366	2017
8334366	416718.3	8751084	2018
8751084	437554.2	9188638	2019
9188638	459431.9	9648070	2020
9648070	482403.5	10130474	2021
10130474	506523.7	10636998	2022
10636998	531849.9	11168848	2023
11168848	558442.4	11727290	2024
11727290	586364.5	12313655	2025
12313655	615682.8	12929338	2026
12929338	646466.9	13575805	2027
13575805	678790.3	14254595	2028
14254595	712729.8	14967325	2029
14967325	748366.3	15715691	2030
15715691	785784.6	16501476	2031
16501476	825073.8	17326550	2032
17326550	866327.5	18192878	2033
18192878	909643.9	19102522	2034
19102522	955126.1	20057648	2035
20057648	1002882	21060530	2036
21060530	1053027	22113557	2037
22113557	1105678	23219235	2038
23219235	1160962	24380197	2039
24380197	1219010	25599207	2040
25599207	1279960	26879167	2041
26879167	1343958	28223125	2042
28223125	1411156	29634281	2043
29634281	1481714	31115995	2044
31115995	1555800	32671795	2045
32671795	1633590	34305385	2046
34305385	1715269	36020654	2047
26020654	1301033	27321687	2048
27321687	1366084	28687771	2049
28657771	1432889	30090660	2050

North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

CRC-10-02

December 18, 2009

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski
Scott Geis

SUBJECT: Wind Facilities - Draft Amendments to 15A NCAC 7H .0208 Use Standards, 7M .0400 Coastal Energy Policies and 7H .0106 General Definitions

At the October 2009 CRC meeting, staff presented draft rule language to incorporate the development of wind energy facilities into the Commission's rules. The draft rule language included a definition of wind energy facilities that would be considered water dependent structures, siting criteria, application requirements and a broadening of the coastal energy policies to encompass more than oil and gas development.

In developing the amendments, staff has used the recommendations of the Environmental Management Commission and draft bill S1068 as a guide. Following the October meeting, Staff circulated the draft language to DENR environmental agencies and others familiar with the issues to ensure the amendments adequacy in addressing relevant concerns. Comments were received from the Department of Defense, NC Wildlife Resources Commission, NC Division of Marine Fisheries, NOAA Coastal Fisheries and Habitat Research Center, and the Carteret County Shore Protection Office.

The comments were relatively minor covering the differences between use standards and policy statements, construction and operational conditions, as well as noticing requirements. In most cases, the comments are address by existing rules or through the normal permitting process. Changes to language presented at the last meeting are highlighted in the attached documents. One notable change came about through further discussion of the distance requirements that would trigger analyses of shadow flicker and noise from wind energy facilities. The distances are based on a 2007 report of the Renewables Advisory Board in the United Kingdom. The recommendations for shadow flicker are based on the flicker effects not being observable at a distance

400 Commerce Ave., Morehead City, NC 28557
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beyond 10 rotor diameters. Information provided by the NC Solar Center uses a Vestas V112 3.0 MW offshore wind turbine with a 112 meter rotor diameter as an example. Using the 10 rotor diameter standard, shadow flicker of a turbine located 1.12 km (0.69 mi) from shore would not be likely be an issue and therefore, no analysis would be required. Similarly, the UK guidance uses a three times the blade tip height as the standard by which any noise from the turbine would be diminished to point of being unnoticeable. Using the same Vestas V112 turbine with a blade tip height of 150 meters, the distance from shore would need to be 450 meters (0.28 mi). These distances have been rounded to 0.7 miles and 0.3 miles respectively and indicate how close to shore the turbine needs to be located before a shadow flicker and noise analysis is required.

Another notable change has been elimination of the bond requirement for decommissioning. As you are aware, the Commission currently does not have authority to require a bond. While the possibility still exists that the CRC may be granted such authority in the future, staff believes it to be prudent to proceed without the requirement. The rule would still require the decommissioning plan to discuss how the removal of the structures would be financed.

Staff is recommending that the Commission approve the incorporation of the siting and operation of wind facilities into its administrative rules for public hearing. Attached are proposed amendments to 15A NCAC 7H .0106 General Definitions, 15A NCAC 7H .0208 Uses Standards and 15A NCAC 7M .0400 Coastal Energy Facilities.

We look forward to discussing these amendments at the upcoming meeting in Raleigh.

15A NCAC 07H .0106 GENERAL DEFINITIONS

The following definitions apply whenever these terms are used in this Chapter:

(1) "Normal High Water" is the ordinary extent of high tide based on site conditions such as presence and location of vegetation, which has its distribution influenced by tidal action, and the location of the apparent high tide line.

(2) "Normal Water Level" is the level of water bodies with less than six inches of lunar tide during periods of little or no wind. It can be determined by the presence of such physical and biological indicators as erosion escarpments, trash lines, water lines, marsh grasses and barnacles.

(3) Unless specifically limited, the term structures includes, but is not limited to, buildings, bridges, roads, piers wharves and docks (supported on piles), bulkheads, breakwaters, jetties, mooring pilings and buoys, pile clusters (dolphins), navigational aids and elevated boat ramps.

(4) "Mining" is defined as:

(a) The breaking of the surface soil in order to facilitate or accomplish the extraction or removal of mineral, ores, or other solid matter.

(b) Any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, soils, and other solid matter from their original location.

(c) The preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use.

This definition applies regardless of whether the mining activity is for a commercial or noncommercial purpose, and regardless of the size of the affected area. Activities such as vibracoring, box coring, surface grab sampling, and other drilling and sampling for geotechnical testing, mineral resource investigations, or geological research are not considered mining. Excavation of mineral resources associated with the construction or maintenance of an approved navigation project in accordance with 15A NCAC 7B .0200 of this Chapter is not considered mining.

(5) "Wind Energy Facility" means the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that cumulatively, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of three megawatts or more of energy.

History Note: Authority G.S. 113A-102; 113A-107;
Eff. June 1, 1995;
Amended Eff. August 1, 1998; October 1, 1996.

SUBCHAPTER 7H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

15A NCAC 07H .0208 USE STANDARDS

(a) General Use Standards

(1) Uses which are not water dependent shall not be permitted in coastal wetlands, estuarine waters, and public trust areas. Restaurants, residences, apartments, motels, hotels, trailer parks, private roads, factories, and parking lots are examples of uses that are not water dependent. Uses that are water dependent ~~may~~ include: utility ~~easements; docks; wharfs; boat ramps; dredging; bridges and bridge approaches; revetments, bulkheads; culverts; groins; navigational aids; mooring pilings; navigational channels; simple access channels and drainage ditches.~~ crossings, wind energy facilities, docks, wharves, boat ramps, dredging, bridges and bridge approaches, revetments, bulkheads, culverts, groins, navigational aids, mooring pilings, navigational channels, access channels and drainage ditches.

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(13) "Wind Energy Facilities"

(A) An applicant for the development and operation of a wind energy facility shall provide:

(i) an evaluation of the proposed noise impacts of the turbines to be associated with the proposed facility, unless the turbines are located in sound or offshore waters at least a distance equivalent to three times the blade tip height or a minimum of ~~0.60~~ 0.30 miles from a shoreline;

(ii) an evaluation of shadow flicker impacts for the turbines to be associated with the proposed facility, unless the turbines will be located in sound or offshore waters at least a distance equivalent to 10 times the rotor diameter or a minimum of ~~1.6~~ 0.70 miles from a shoreline;

(iii) an evaluation of avian and bat impacts of the proposed facility;

(iv) an evaluation of viewshed impacts of the proposed facility;

(v) an evaluation of potential user conflicts associated with development in the proposed project area.

(vi) a plan regarding the action to be taken upon decommissioning and removal of the wind energy facility. The plan shall include estimates of monetary costs, time frame of removal and the proposed site condition after decommissioning.

(B) Development Standards. Development of wind energy facilities shall meet the following standards in addition to adhereing to the requirements outlined in this subparagraph (a)(13)(A).

(i) Natural reefs, coral outcrops, artificial reefs, seaweed communities, and significant benthic communities identified by the Division of Marine Fisheries or the WRC shall be avoided;

(ii) Development shall not be sited on or within 500 meters of significant biological communities identified by the Division of Marine Fisheries or the WRC; such as high relief hard bottom areas. High relief is defined for this standard as relief greater than or equal to one-half meter per five meters of horizontal distance;

(iii) Development shall not cause irreversible damage to documented archaeological resources including shipwrecks identified by the Department of Cultural Resources; and unique geological features that require protection from uncontrolled or incompatible development as identified by the Division of Land Resources pursuant to G.S. 113A-113(b)(4)(g);

(iv) Development activities shall be timed to avoid significant adverse impacts on the life cycles of estuarine or ocean resources, or wildlife;

(v) Development or operation of a wind energy facility shall not jeopardize the use of the surrounding waters for navigation or for other public trust rights in public trust areas or estuarine waters;

(vi) Development or operation of a wind energy facility shall not interfere with air navigation routes, air traffic control areas, military training routes or special use airspace and shall comply with standards adopted by the Federal Aviation Administration and codified under 14 CFR Part 77.13;

(C) Permit Conditions. Permits for wind energy facilities may be conditioned on the applicant amending the proposal to include measures necessary to insure compliance with the provisions guidelines for development set out in this Subchapter. Permit conditions may include monitoring to ensure compliance with all applicable development standards.

(D) Public Benefits Exception. Projects that conflict with these standards, but provide a public benefit, may be approved pursuant to the standards set out in Subparagraph (a)(3) of this Rule.

History Note: *Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-124;*
Eff. September 9, 1977;
Amended Eff. February 1, 1996; April 1, 1993; February 1, 1993; November 30, 1992;
RRC Objection due to ambiguity Eff. March 21, 1996;
Amended Eff. August 1, 1998; May 1, 1996.

SECTION .0400 – COASTAL ENERGY POLICIES
15A NCAC 07M .0401 DECLARATION OF GENERAL POLICY

(a) It is hereby declared that the general welfare and public interest require that reliable sources of energy be made available to the citizens of North Carolina. It is further declared that the development of energy facilities and energy resources within the state and in offshore waters can serve important regional and national interests. However, unwise development of energy facilities or energy resources can conflict with the recognized and equally important public interest that rests in conserving and protecting the valuable land and water resources of the state and nation, particularly coastal lands and waters. Therefore, in order to balance the public benefits ~~attached to~~ of necessary energy development ~~against~~ with the need ~~to~~ to; 1) protect valuable coastal resources, and 2) preserve access to and utilization of public trust resources, the planning of future ~~land uses,~~ uses affecting both land and public trust resources, the exercise of regulatory authority, and determinations of consistency with the North Carolina Coastal Management Program shall assure that the development of energy facilities and energy resources shall avoid significant adverse impact upon vital coastal resources or uses, public trust areas and public access rights.

(b) Exploration for the development of offshore and Outer Continental Shelf (OCS) energy resources has the potential to affect coastal resources. The Federal Coastal Zone Management Act of 1972, as amended, requires that ~~federal oil and gas~~ leasing actions of the federal government ~~US Department of the Interior~~ be consistent to the maximum extent practicable with the enforceable policies of the federally approved North Carolina Coastal Management Program, and that exploration, development and production activities associated with such leases comply with those enforceable policies. Enforceable policies applicable to OCS activities include all the provisions and policies of this Rule, as well as any other applicable federally approved components of the North Carolina Coastal Management Program. All permit applications, plans and assessments related to exploration or development of OCS resources and other relevant energy facilities ~~must~~ shall contain sufficient information to allow ~~adequate~~ analysis of the consistency of all proposed activities with these Rules and policies.

History Note: *Authority G.S. 113A-102(b); 113A-107; 113A-124;*
Eff. March 1, 1979;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. August 1, 2000.

15A NCAC 07M .0402 DEFINITIONS

(a) "Impact Assessment" is an analysis which fully discusses the potential environmental, economic and social consequences, including cumulative and secondary impacts, of a proposed project. At a minimum, the assessment shall include the following and for each of the following shall discuss and assess any effects ~~on any land or water use or natural resource of the coastal area,~~ the project will have on the use of public trust waters, adjacent lands and on the coastal resources of the coastal area, including the effects ~~within the coastal area~~ caused by activities outside the coastal area:

(1) a full discussion of the preferred sites for those elements of the project affecting ~~any land or water use or natural resource~~ the use of public trust waters, adjacent lands and the coastal resources of the coastal area:

(A) In all cases where the preferred site is located within an area of environmental concern (AEC) or on a barrier island, the applicant shall identify alternative sites considered and present a full discussion [in terms of Subparagraphs (a)(2) through (9) of this Rule] of the reasons why the chosen location was deemed more suitable than another feasible alternate site;

(B) If the preferred site is not located within an AEC or on a barrier island, the applicant shall present ~~reasonable~~ evidence to support the proposed location over a feasible alternate site;

(C) In those cases where an applicant chooses a site previously identified by the state as suitable for such development and the site is outside an AEC or not on a barrier island, alternative site considerations shall not be required as part of this assessment procedure;

(2) a full discussion of the economic impacts, both positive and negative, of the proposed project. This discussion shall focus on economic impacts to the public, not on matters that are purely internal to the corporate operation of the applicant. No proprietary or confidential economic data shall be required. This discussion shall include analysis of likely adverse impacts upon the ability of any governmental unit to furnish necessary services or facilities as well as other secondary impacts of significance;

(3) a full discussion of potential adverse impacts on coastal resources, including marine and estuarine resources and wildlife resources, as defined in G.S. 113-129;

(4) a full discussion of potential adverse impacts on existing industry and potential limitations on the availability ~~of natural~~ of, and accessibility to, coastal resources, ~~particularly~~ including beach compatible sand and water, for future ~~industrial~~ use or development;

(5) a full discussion of potential significant adverse impacts on recreational uses and scenic, archaeological and historic resources;

(6) a full discussion of potential risks ~~of danger~~ to human life or property;

(7) a full discussion of the impacts on the human environment including noise, vibration and visual impacts;

~~(7)~~(8) a full discussion of the procedures and time needed to secure an energy facility in the event of severe weather conditions, such as extreme wind, currents and waves due to northeasters and hurricanes;

~~(8)~~(9) other specific data necessary for the various state and federal agencies and commissions with jurisdiction to evaluate the consistency of the proposed project with relevant standards and guidelines;

(10) a plan regarding the action to be taken upon the decommissioning and removal of the facility and related structures. The plan shall include an estimate of the cost to decommission and remove the energy facility including a discussion of the financial instrument(s) used to provide for the decommissioning and the removal of the structures that comprise the energy facility. The plan shall also include a proposed description of the condition of the site once the energy facility has been decommissioned and removed. ~~The plan shall include a bond, guarantee, insurance, or other financial instrument to provide for the decommissioning.~~

~~(10)~~(11) a specific demonstration that the proposed project is consistent with relevant local land use plans and with guidelines governing land uses in AECs. Any impact assessment for a proposal for ~~oil or gas~~ energy exploration or development activities shall include a full discussion of the items described in Subparagraphs (a)(1) through ~~(9)~~ (10) of this Rule for the associated energy exploration or development activity, including all ~~reasonably~~ foreseeable assessments of resource potential, including the gathering of scientific data, exploration ~~wells~~ wells, and any delineation activities that are ~~reasonably~~ likely to follow ~~a discovery of oil or gas~~ development, production, maintenance and decommissioning.

(b) "Major energy facilities" are those energy facilities which because of their size, magnitude or scope of impacts, have the potential to affect any land or water use or ~~natural~~ coastal resource of the coastal area. For purposes of this definition, major energy facilities shall include, but are not necessarily limited to, the following:

(1) Any facility capable of refining petroleum products ~~oil~~;

(2) Any terminals (and associated facilities) capable of handling, processing, or storing ~~liquid propane gas, liquid natural gas,~~ petroleum products or synthetic ~~natural~~ gas;

(3) Any ~~oil or gas~~ petroleum storage facility that is capable of storing 15 million gallons or more on a single site;

(4) Gas, coal, oil or nuclear electric ~~Electric~~ generating facilities 300 MGW or larger;

(5) Wind energy facilities, including turbines accessory buildings, transmission facilities and other equipment necessary for the operation of a wind generating facility that cumulatively, with any other wind energy facility whose turbines area located within one-half mile of one another, capable of generating three megawatts or larger;

(6) Thermal energy generation;

(7) Major pipelines 12 inches or more in diameter that carry ~~crude~~ petroleum products~~, natural gas, liquid natural gas, liquid propane gas,~~ or synthetic gas;

(8) Structures, including drillships and floating platforms and structures relocated from other states or countries, located in offshore waters for the purposes of energy exploration, ~~exploration for, or~~ development or production; ~~production of, oil or natural gas;~~ and

(8) Onshore support or staging facilities related to offshore energy exploration, ~~exploration for, or~~ development or production ~~of, oil or natural gas~~.

(c) "Offshore waters" are those waters seaward of the state's three-mile offshore jurisdictional boundary in which development activities may impact any land or water use or natural resource of the state's coastal area.

History Note: *Authority G.S. 113A-102(b); 113A-107; 113A-124;*
Eff. March 1, 1979;
Amended Eff. October 1, 1988;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997.
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. August 1, 2000.

15A NCAC 07M .0403 POLICY STATEMENTS

(a) The placement and operations of major energy facilities in or affecting the use of public trust waters and adjacent lands or coastal ~~natural~~ resource of the North Carolina coastal area shall be done in a manner that allows for protection of the environment and local and regional socio-economic goals as set forth in the local land-use plan(s) and State guidelines in 15A NCAC 7H and 7M. The placement and operation of such facilities shall be consistent with state rules and statutory standards and shall comply with local land use plans and with ~~rules for land uses in~~ use standards for development within AECs, ~~AECs.~~ as set forth in 15A NCAC 07H.

(b) Proposals, plans and permit applications for major energy facilities to be located in or affecting any land or water use or ~~natural~~ coastal resource of the North Carolina coastal area shall include a full disclosure of all costs and benefits associated with the project. This disclosure shall be prepared at the earliest feasible stage in planning for the project and shall be in the form of an impact assessment prepared by the applicant as defined in 15A NCAC 7M .0402. If appropriate environmental documents are prepared and reviewed under the provisions of the National Environmental Policy Act (NEPA) or the North Carolina Environmental Policy Act (NCEPA), this review will satisfy the definition of "impact assessment" if all issues listed in this Rule are addressed and these documents are submitted in sufficient time to be used to review state permit applications for the project or subsequent consistency determinations.

(c) Local governments shall not unreasonably restrict the development of necessary energy facilities; however, they may develop siting measures that will minimize impacts to local resources and to identify potential sites suitable for energy facilities. This section shall not limit the ability of a city or county to plan for and regulate the siting of a wind energy facility in accordance with land-use regulations authorized under Chapter 160A and Chapter 153A of the General Statutes. Wind energy facilities constructed within the planning jurisdiction of a city or county shall demonstrate compliance with any local ordinance concern land use and any applicable permitting process.(d) Energy facilities that do not require shorefront access shall be sited inland of the shoreline areas. In instances when shoreline portions of the coastal zone area are necessary locations, shoreline siting shall be acceptable only if it can be demonstrated that there are no significant adverse impacts to coastal resources, ~~and~~ public trust waters, ~~will be protected~~ and the public's right to access and passage will not be unreasonably restricted, and all reasonable mitigating measures have been taken to minimize impacts to AECs. Whether restrictions or mitigating measures are reasonable shall be determined after consideration of, as appropriate, economics, technical feasibility, ~~areal~~ aerial extent of impacts, uniqueness of impacted area, and other relevant factors.

(e) The scenic and visual qualities of coastal areas shall be considered and protected as important public resources. Energy development shall be sited and designed to provide maximum protection of views to and along the ocean, sounds and scenic coastal areas, and to minimize the alteration of natural landforms.

(f) All energy facilities in or affecting the use of public trust waters and adjacent lands ~~any land or water use~~ or ~~natural~~ coastal resource of the coastal area shall be sited and operated so as to comply with the following criteria:

(1) Activities that could result in significant adverse impacts on resources of the coastal area, including marine and estuarine resources and wildlife resources, as defined in G.S. 113-129, and significant adverse impacts on ~~land or water uses~~ the use of public trust waters and adjacent lands in the coastal area shall be avoided unless site specific information demonstrates that each such activity will result in no significant adverse impacts on the use of public trust waters and adjacent lands ~~land or water uses~~ or ~~natural~~ coastal resources of the coastal area.

(2) For petroleum facilities, necessary ~~Necessary~~ data and information required by the state for state permits and federal consistency reviews, pursuant to 15 CFR part 930, shall completely assess the risks of ~~oil~~ petroleum release or spills, evaluate possible trajectories, and enumerate response and mitigation measures employing the best available technology to be followed in the event of a release or spill. The information must demonstrate that the potential for ~~oil~~ petroleum release or spills and ensuing damage to coastal resources has been minimized and shall factor environmental conditions, currents, winds, and inclement events such as northeasters and hurricanes, in trajectory scenarios. For facilities requiring an Oil Spill Response Plan, this information shall be included in such a plan.

(3) Dredging, spoil disposal and construction of related structures that are ~~reasonably~~ likely to have significant adverse impacts on ~~affect~~ the use of public trust waters and adjacent lands ~~any land or water use~~ or ~~natural~~ coastal resource of the coastal area shall be minimized, and any unavoidable actions of this sort shall minimize damage to the marine environment.

(4) Damage to or interference with existing or traditional uses, such as fishing, navigation and access to public trust areas, and areas with high biological or recreational value, such as those listed in Subparagraphs (f)(10)(A) and (H) of this Rule, shall be avoided to the extent that such damage or interference is ~~reasonably~~ likely to have significant adverse impacts on ~~affect~~ ~~any land or water use or natural resource~~ the use of public trust waters and adjacent lands of the coastal area.

(5) Placement of structures in geologically unstable areas, such as unstable sediments and active faults, shall be avoided to the extent that damage to such structures resulting from geological phenomena is ~~reasonably~~ likely to have significant adverse impacts on~~any land or water use or natural resource~~ the use of public trust waters, adjacent lands and natural resources of the coastal area.

(6) Procedures necessary to secure an energy facility in the event of severe weather conditions, such as extreme wind, currents and waves due to northeasters and hurricanes, shall be initiated sufficiently in advance of the commencement of severe weather to ensure that significant adverse impacts on the use of public trust waters, adjacent lands and natural resources of the coastal area shall be avoided.

(7) ~~Adverse~~ Significant adverse impacts on federally listed ~~species identified as~~ threatened or endangered species ~~on Federal or State lists~~ shall be avoided.

(8) Major energy facilities are not appropriate uses in fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, as defined in G.S. 113A-113(b)(4), such as parks, recreation areas, wildlife refuges, and historic sites.

(9) No energy facilities shall be sited in areas where they pose a threat to the integrity of the facility and surrounding areas, such as ocean front areas with high erosion rates, areas having a history of overwash or inlet formation, and areas in the vicinity of existing inlets.

(10) In the siting of energy facilities and related structures, significant adverse impacts to the following areas shall be avoided:

(A) ~~areas of high biological significance, including offshore reefs, rock outcrops and hard bottom areas , sea turtle nesting beaches, freshwater and saltwater wetlands, primary or secondary nursery areas and essential fish habitat habitat, areas of particular concern as~~

~~designated by the appropriate fisheries management agency, submerged aquatic vegetation beds, shellfish beds, anadromous fish spawning and nursery areas, and colonial bird nesting colonies;~~
areas of high biological significance, including offshore reefs, rock outcrops, hard bottom areas, sea turtle nesting beaches, coastal wetlands, primary or secondary nursery areas or spawning areas and Essential Fish Habitat Areas of Particular Concern as designated by the appropriate fisheries management agency, oyster sanctuaries, submerged aquatic vegetation as defined by the Marine Fisheries Commission, colonial bird nesting areas, and migratory bird routes;

(B) ~~Tracts~~tracts of maritime forest in excess of 12 contiguous acres and areas identified as eligible for registration or dedication by the North Carolina Natural Heritage Program;

(C) crossings of streams, rivers, and lakes except for existing readily-accessible corridors;

(D) anchorage areas and ~~congested~~ port areas;

(E) artificial reefs, shipwrecks, and submerged archaeological resources;

(F) dump sites;

(G) primary dunes and frontal dunes;

(H) established recreation or wilderness areas, such as federal, state and local parks, forests, wildlife refuges and other areas used in a like manner;

(I) military air space, training or target areas and transit lanes.

(J) cultural or historic sites of more than local significance;

(K) segments of Wild and Scenic River System;

~~(L) strategic habitat areas pursuant to the North Carolina Coastal Habitat Protection Plan.~~

(11) Construction of energy facilities shall occur only during periods of lowest biological vulnerability. Nesting and spawning periods shall be avoided.

(12) If facilities located in the coastal area are abandoned, habitat of equal value to or greater than that existing prior to construction shall be restored as soon as practicable following abandonment. For abandoned facilities outside the coastal area, habitat in the areas shall be restored to its preconstruction state and functions as soon as practicable if the abandonment of the structure is reasonably likely to affect any land or water use or natural resource of the coastal area.

~~(g) As used in this Section, an event that is "reasonable likely" to occur if credible evidence supports the conclusion that the event will likely occur.~~

History Note: *Authority G.S. 113A-102(b); 113A-107; 113A-124;*
Eff. March 1, 1979;
Amended Eff. April 1, 1992;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. August 1, 2000.

North Carolina Department of Environment and Natural Resources
Division of Coastal Management
Beverly Eaves Perdue, Governor **James H. Gregson, Director** Dee Freeman, Secretary

December 30, 2009

CRC-10-04

MEMORANDUM

TO: Coastal Resources Commission

FROM: M. Ted Tyndall

SUBJECT: Vegetation Line
15A NCAC 7H .0305(a)(5)

At the last CRC meeting, staff was asked to provide the Commission with information on the vegetation line which is used as the reference point for measuring oceanfront setbacks. The Commission's rule in 15A NCAC 7H.0305(a) describes the natural and man-made features that are found within the ocean hazard area of environmental concern. This includes the ocean beaches, the nearshore area, primary dunes, frontal dunes, the vegetation line as well as the static vegetation line.

7H .0305(a)(5) describes the vegetation line (FLSNV) as the first line of stable and natural vegetation and a line that represents the boundary between the normal dry-sand beach, which is subject to constant flux due to waves, tides, storms and wind, and the more stable upland areas. The rule states that the vegetation line is generally located at or immediately oceanward of the frontal dune or erosion escarpment.

In accordance with the rule, the Division of Coastal Management or Local Permit Officer determines the location of the stable and natural vegetation line based on visual observations of plant composition and density. If the vegetation has been planted, it may be considered **stable** when the majority of the plant stems are from continuous rhizomes rather than planted individual rooted sets. The vegetation may be considered **natural** when the majority of the plants are mature and additional species native to the region have been recruited, providing stem and rhizome densities that are similar to adjacent areas that are naturally occurring. When there is no stable natural vegetation, the rule allows for the establishment of the line by interpolation between the nearest adjacent stable natural vegetation by on ground observations or by aerial photographic interpretation.

Staff will present a short powerpoint presentation that attempts to illustrate application of the FLSNV rule. Staff hopes the Commission finds the information helpful and looks forward to answering any questions that the CRC may have.

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North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

MEMORANDUM **CRC-10-06**

To: The Coastal Resources Commission
From: Maureen Meehan Will, Morehead City District Planner
Date: December 29, 2009
Subject: Certification of the Onslow County Core Land Use Plan (January 13, 2010 CRC Meeting)

Staff Recommendation: Certification of the Onslow County Core LUP based on the determination that the document has met the substantive requirements outlined within the 2002 7B Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program.

A copy of the plan can be found on the Division of Coastal Management's website at the following link: http://www.nccoastalmanagement.net/Planning/under_review.htm

Overview

Onslow County is located in eastern North Carolina and is adjacent to Carteret County, Jones County, Duplin County, and Pender County. Major water bodies within the county include the Atlantic Ocean and the New River. The towns of Holly Ridge and Richlands are included in this LUP. The City of Jacksonville and Town of North Topsail Beach have prepared their own plans, which meet the CRC's planning requirements.

Onslow County has a permanent population of approximately 157,738. The county has had a higher population growth over the last 30 years than most neighboring counties due to the expansion of Camp Lejeune Marine Base. Further, the county is anticipating a large population increase in the next several years due to further expansion of the military base. Infrastructure and land needs have been forecasted to accommodate this anticipated growth.

There are 30 miles of beaches within Onslow County. Seasonal populations are not as significant in non-coastal portions of the county, yet there are recreational amenities throughout the county that attract visitors. The peak seasonal population is estimated to be 173,933.

The county's vision statement is the basis for policy statements in the plan. The vision focuses on balanced growth throughout the community and has four defining statements that include, managed growth, sufficient infrastructure, natural resource management, and quality of life measures for all citizens of the county.

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There are no policy statements that exceed State and federal permitting rules. Notable policy statements include:

P.48, pg. 183 *"Rural lands already devoted to active agricultural and forestry uses or having a high productive potential for such uses shall be conserves, to the extent possible, for appropriate agricultural and/or forestry uses."*

P.70, pg. 188 *"Onslow County will encourage the use of constructed wetlands to receive stormwater runoff."*

Onslow County Commissioners adopted the LUP by resolution, on October 19, 2009, after a duly advertised public hearing. The resolution adopting the plan is attached. The public had the opportunity to provide written comments on the LUP up to fifteen (15) business days prior to the CRC meeting. No comments were received.

If there are any questions about the plan please feel free to contact me by phone at 252-808-2808 or email at maureen.will@ncdenr.gov.

RESOLUTION OF THE BOARD OF COMMISSIONERS OF ONSLOW COUNTY, NORTH CAROLINA, RE-ADOPTING THE COUNTY'S COMPREHENSIVE PLAN (CAMA CORE LAND USE PLAN)

WHEREAS, the County's CAMA Core Land Use Plan was financed in part through a grant provided by the North Carolina Coastal Management Program through funds provided by the Coastal Zone Management Act of 1972, as amended, which is administered by the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration; and

WHEREAS, from July, 2005 through April, 2009, the County drafted a Land Use Plan with the assistance of its consultant, Holland Consulting Planners, Inc., and conducted a series of public workshops and meetings as part of a comprehensive public participation program under the leadership of the Land Use Plan Committee; and

WHEREAS, on September 17, 2008, the Land Use Plan Committee recommended adoption of the draft CAMA Core Land Use Plan; and

WHEREAS, at a duly advertised Regular Meeting on April 20, 2009, the Board of Commissioners held a public hearing on the draft CAMA Core Land Use Plan; and

WHEREAS, at the Regular Meeting on April 20, 2009, the Board of Commissioners of Onslow County, North Carolina found the policies in the draft CAMA Core Land Use Plan to be internally consistent; and

WHEREAS, at the Regular Meeting on April 20, 2009, the Board of Commissioners of Onslow County, North Carolina found the policies and Future Land Use Map in the draft CAMA Core Land Use Plan to be consistent with the County's desired vision for the future and unanimously approved to adopt the draft CAMA Core Land Use Plan as amended; and

WHEREAS, at the Regular Meeting on April 20, 2009, the Board of Commissioners of Onslow County, North Carolina found that policy statements and the Future Land Use Map have been evaluated, and determined that no internal inconsistencies exist; and

WHEREAS, an oversight in advertising protocol for the April 20, 2009 public hearing nullified the Board of Commissioners' adoption of the CAMA Core Land Use Plan at the State level; and

WHEREAS, re-adoption of the CAMA Core Land Use Plan by the Board of Commissioners is necessary in order to submit the Plan to the Coastal Resources Commission (CRC) for State certification; and

WHEREAS, Onslow County Planning and Development staff has proposed minor changes to the CAMA Core Land Use Plan in order to ensure greater harmony between land use classifications and corresponding zoning districts; and

WHEREAS, adoption of the proposed changes to the CAMA Core Land Use Plan will add greater flexibility to the Plan and is for the benefit of Onslow County's citizens; and

WHEREAS, the adopted Plan will be submitted as required by state law to the Morehead City District Planner for the Division of Coastal Management under the North Carolina Department of Environmental and Natural Resources and forwarded to the Coastal Resources Commission; and

WHEREAS, a presentation by the County to the Planning and Special Issues (P&SI) Committee of the Coastal Resources Commission will be scheduled; and

WHEREAS, the P&SI Committee will decide on a recommendation to the Coastal Resource Commission (CRC) at the meeting; and

WHEREAS, the P&SI Committee chairman will submit the recommendation to the CRC and the CRC will then vote on certification of the County's Land Use Plan; and

WHEREAS, a certified Onslow County CAMA Core Land Use Plan will be forwarded to the Office of Ocean and Coastal Resource Management (OCRM) for federal approval.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Commissioners of Onslow County, North Carolina, has unanimously adopted the draft CAMA Core Land Use Plan and the accompanying Plan revisions; and

BE IT FURTHER RESOLVED that the Planning Director of Onslow County is hereby authorized to submit the adopted CAMA Core Land Use Plan to the State for certification as described above.

Adopted this 19th day of October, 2009.

Onslow County
Board of Commissioners

W.C. Jarman, Chairman

ATTEST:

Jeffrey L. Hudson, Clerk

North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

MEMORANDUM **CRC-10-07**

To: The Coastal Resources Commission

From: John A. Thayer Jr. Manager, Local Planning Programs

Date: December 31, 2009

Subject: Certification of the Beaufort County Land Use Plan (January 13, 2010 CRC Meeting)

Staff Recommendation: Certification of the Beaufort County LUP based on the determination that the document has met the substantive requirements outlined within the 2002 7B Land Use Plan Guidelines and that there are no conflicts evident with either state or federal law or the State's Coastal Management Program. Included in this recommendation/determination is that *Policy 4.8* is not enforceable for state and federal consistency purposes.

A copy of the plan can be found on the Division of Coastal Management's website at the following link: *http://www.nccoastalmanagement.net/Planning/under_review.htm*

Overview

Beaufort County is located in eastern North Carolina and is adjacent to Craven, Martin, Pit, Hyde and Pamlico County. The Tar and Pamlico Rivers bisect the County as does Pamlico Sound. Two notable major state roadways also bisect the County: HWY 17 and HWY 264. Five (5) municipalities: Aurora, Belhaven, Chocowinity, Pantego, and Washington Park are included within the County LUP; the City of Washington and the Town of Bath are not part of this plan having developed their own.

Beaufort County has a permanent population of over 46,000. The population covered in the LUP is just over 32,000. The County is considered a slow growth County not subject to as stringent requirements between the future projects of growth and policy holding requirements per the 7B Guidelines. Notable recent developments within the County include the near completion of the HWY 17 Washington Bypass and the Potash Corp-Aurora (PCS Phosphate) expansion.

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Key to the County's growth assumptions covered on page II-3 through II-7 is job growth and second home-retirement assumptions.

Land Use Plan Policies

There are no notable policy statements that exceed State and federal permitting rules. The County does have a policy that is recognized as not enforceable for state and federal consistency purposes as follows:

> ***"Policy 4.8*** *Local governments in the planning area consider the proposed Outlying Field (OLF) or Military operation Area (MOA) over Beaufort County for performance of military training activities, or any similar land use, as incompatible and potentially hazardous. The proposed activities could have a negative impact on local farming activities, tourism, and wildlife, as well as present a hazard to the County and its residents. As such, the local governments continue to oppose designation of the County for this use. The county and planning area municipalities recognize that this is a local policy and that it may not be considered for federal and state consistency purposes."* (Page III-27)

Specific opposition statements that are intimate to specific state or federal facilities are acceptable in the local LUP, however for such statements to be enforceable policy similar treatment and other policies must not be specific to a project but likewise to other public and private facilities. For example airports, noise generating uses and activities and development that impacts wildlife and agriculture activities.

DCM staff recommends that in the CRC's certification that the non-enforceability of Policy 4.8 be recognized.

Similar to many other LUP's, more particularly for rural jurisdictions, the LUP's policies are dominated by statements that either simply support or defer to other state and federal agencies rules. Note deferring statements are not considered policy for state and federal consistency purposes; this likewise true where statements simply defer to local ordinances.

Beaufort County Commissioners adopted the LUP by resolution, on December 8, 2009. The public has had an opportunity to provide written comments on the LUP up to fifteen (15) business days prior to the CRC meeting. No comments were received.

If there are any questions about the plan please feel free to contact me by phone at 252-808-2808 or email at john.thayer@ncdenr.gov.

North Carolina Department of Environment and Natural Resources
Division of Coastal Management
Beverly Eaves Perdue, Governor James H. Gregson, Director Dee Freeman, Secretary

December 29, 2009

MEMORANDUM

TO: Coastal Resources Advisory Council

FROM: Dara Royal

SUBJECT: January and February 2010 CRAC Meetings

Greetings everyone, I hope you have had a safe and joyful holiday season.

We will not have a separate meeting in January, but will meet with the CRC in Raleigh on the 13th, followed by the Sea Level Rise Science Forum on the 14th and 15th. As usual, please review the CRC agenda for items of interest to you and your appointing bodies.

We will then have a very short turnaround to our February meeting, which will be in Wilmington on February 16th and 17th. The Advisory Council will meet separately on the 16th, and with the CRC on the 17th for discussion of the terminal groin draft report. Details will follow about hotel arrangements for the February meeting. Please get in touch with me if you have any items for our agenda.

Best wishes for a prosperous 2010!

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North Carolina Department of Environment and Natural Resources
Division of Coastal Management
Beverly Eaves Perdue, Governor James H. Gregson, Director Dee Freeman, Secretary

December 21, 2009

MEMORANDUM

TO: CRC & Interested Parties
FROM: Tancred Miller
SUBJECT: Rulemaking Update

Along with this memo is a spreadsheet that contains all of the Commission's rules that are currently in the rulemaking process—from those being proposed for initial action to those reviewed by the N.C. Rules Review Commission (RRC) since the last CRC meeting. Listed below is a description and recent history of the CRC's action on each rule. Complete drafts of rules scheduled for public hearing at this meeting will be available on the DCM website.

RULE DESCRIPTIONS

1. 15A NCAC 7B.0901 CAMA Land Use Plan Amendments
   Status: Effective November 1, 2009.
   This rule was amended to clarify that the public noticing and hearing requirements for land use plan amendments. Effective November 1, 2009, no further action required.

2. 15A NCAC 7H.0104 Development Initiated Prior to Effective Date of Revisions
   Status: Going to public hearing.
   The proposed amendments are to clarify how erosion rate setback factors for oceanfront development are to be applied. The amendments also establish limitations for new development that cannot meet the current setback, but could meet the setback based on the rate in effect when the lot was created. Public hearing anticipated in early 2010.

3. 15A NCAC 7H.0106 General Definitions (Wind Energy)
   Status: Proposed for amendment.
   The proposed amendment creates a definition for wind energy facilities.

4. 15A NCAC 7H.0205 Coastal Wetlands (Marsh Alteration)
   Status: Effective November 1, 2009.
   The amendments are for the Commission to begin regulating marsh mowing. CRC approved draft rule language in March. The rule has been through two public hearings and was adopted at the August meeting. Effective November 1, 2009, no further action required.

5. 15A NCAC 7H.0208 Estuarine System Use Standards (Docks & Piers provisions)
   Status: Eligible for adoption. Additional changes to be proposed at January meeting.
   This rule is being amended to make conforming changes to the CRC's shoreline stabilization and docks & piers rules. The public comment period closed on November 2nd, with no

comments received. Eligible for adoption at the January 2010 meeting, with a possible effective date of March 1st, 2010. Additional changes will be proposed at the January meeting for wind energy facilities.

6. 15A NCAC 7H.0309 Use Standards for Ocean Hazard Areas: Exceptions
   Status: Comment period open.
   This rule underwent one round of public comment to make the development limitations conform with changes to 7H.0306, and changes to the pier house section that allow construction and expansion of pier houses oceanward of the setback. Another round of public comment was necessary to incorporate additional changes related to allowing electrical transmission lines oceanward of the development setback. The public comment period closed on November 2nd, with no comments received. Eligible for adoption at the January 2010 meeting, with a possible effective date of March 1st, 2010.

7. 15A NCAC 7H.0310 Use Standards for Inlet Hazard Areas
   Status: Under Science Panel review.
   The CRC has seen the new inlet hazard area delineations prepared by its Science Panel on Coastal Hazards and had further discussion in July and November 2008. The CRC Science Panel and DCM staff continue to work on recommendations to bring to the CRC at a later meeting. Science panel work on this rule has been delayed by the Panel's focus on the terminal groin study and preparation of a sea level rise metrics report.

8. 15A NCAC 7H.1704-5 GP for Emergency Work Requiring a CAMA and/or Dredge & Fill Permit
   Status: Comment period open.
   Changes are being made to this rule to conform with newly-effective changes to 7H.0308, Use Standards for Ocean Hazard Areas. The changes primarily address general and specific use standards related to temporary erosion control structures. The public comment period closed on November 2nd, with no comments received. Eligible for adoption at the January 2010 meeting, with a possible effective date of March 1st, 2010.

9. 15A NCAC 7H.2300 GP for Replacement of Existing Bridges
   Status: Going to public hearing.
   These amendments are intended to streamline the process under which the Department of Transportation (DOT) replaces two-lane bridges on secondary roads. The changes will expand the applicability of the GP and shorten the project delivery time for bridge replacements. Public hearing scheduled for the January 2010 meeting.

10. 15A NCAC 7M.0400
    Status: Proposed for amendment.
    Amendments will be proposed in January to define policies for wind energy facilities.

COASTAL RESOURCES COMMISSION RULEMAKING STATUS - JANUARY 2010					
Item #	**Rule Citation**	**Rule Title**	**January '10 Status**	**January Action Required?**	**Next Steps**
1	15A NCAC 7B.0901	CAMA Land Use Plan Amendments	Effective	No	Effective November 1st. No further action required.
2	15A NCAC 7H.0104	Development Initated Prior to Effective Date of Revisions	Going to public hearing	No	Public hearing anticipated in early 2010.
3	15A NCAC7H.0106	General Definitions	Changes proposed	**Yes**	Changes will be proposed to insert a definition of "wind energy facilities."
4	15A NCAC 7H.0205	Coastal Wetlands	Effective	No	Effective November 1st. No further action required.
5	15A NCAC 7H.0208	Estuarine System Use Standards	Eligible for adoption	**Yes**	Public hearing held in September. Eligible for adoption at January 2010 meeting. Addi will be proposed in January for wind energy facilities.
6	15A NCAC 7H.0309	Use Standards for Ocean Hazard Areas: Exceptions	Eligible for adoption	**Yes**	Re-published for changes related to electrical transmission lines oceanward of the setb hearing held in September. Possible effective date is March 1st, 2010.
7	15A NCAC 7H.0310	Use Standards for Inlet Hazard Areas	Under Science Panel review	No	DCM and Science Panel continue to work on recommendations to CRC.
8	15A NCAC 7H.1704 & 1705	GP for Temporary Erosion Control Structures	Eligible for adoption	**Yes**	Public hearing held in September. Eligible for adoption at January 2010 meeting.

North Carolina Department of Environment and Natural Resources
Division of Coastal Management

Beverly Eaves Perdue
Governor

James H. Gregson
Director

Dee Freeman
Secretary

Terminal Groin Study Meeting Schedule

√	September 14, 2009-	Kick off Meeting in New Bern
√	September 29, 2009-	Science Panel Meeting / 2728 Capitol Blvd., Raleigh
√	October 29, 2009-	CRC Presentation and First Public Hearing / Atlantic Beach Sheraton
√	December 1, 2009-	Science Panel Meeting / McKimmon Center, Raleigh, 10:00 am
√	December 16, 2009-	Second Public Hearing/Kill Devil Hills Town Hall, 5:00 pm
	January 13, 2010-	CRC Presentation and Third Public Hearing / Hilton Raleigh North
	January 19, 2010-	Science Panel Meeting / 2728 Capitol Blvd., Rm. 1A224, Raleigh
	February 1, 2010-	Draft Report Due
	February 8, 2010-	Science Panel Meeting / 2728 Capitol Blvd., Rm. 1A224, Raleigh
	February 15, 2010-	Steering Committee Meeting to Develop Draft Recommendations for CRC / New Bern, Cooperative Extension Office, 10:00 am- 4:00 pm
	February 17, 2010-	CRC Meeting and Fourth Public Hearing / NH County Government Complex
	March 1, 2010-	Final Draft Report Due
	March 12, 2010-	Science Panel Meeting / 2728 Capitol Blvd., Rm. 1A224, Raleigh
	March 18, 2010-	Steering Committee Meeting to Develop Draft Recommendations for CRC / New Bern, Cooperative Extension Office, 10:00 am- 4:00 pm
	March 25, 2010-	CRC Presentation and Fifth Public Hearing / Sea Trail Plantation, Sunset Beach
	April 1, 2010-	Report to ERC Due

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North Carolina Department of Environment and Natural Resources
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CRC- Info Item

December 21, 2009

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Public Trust and Dry Sand Beach

A request was made at the October 2009 CRC meeting for information regarding public trust as it relates to the dry sand beach. The North Carolina Coastal Resources Law, Planning and Policy Center, directed by Joe Kalo prepared a series of articles which focused on the rights of oceanfront property owners. I have attached the series for reference. Joe Kalo and Dave Owens have also made presentations to the Commission on public trust doctrine and CAMA and CAMA and takings, respectively. I have attached the meeting minutes of their presentations as well. If you have need of any other resources on this topic, please let me know and I will direct you to them.

400 Commerce Ave., Morehead City, NC 28557
Phone: 252-808-2808 \ FAX: 252-247-3330 Internet: www.nccoastalmanagement.net

From the North Carolina Coastal Resources Law, Planning and Policy Center • Winter/Spring 2005

Welcome to the inaugural issue of *Legal Tides*, a publication from the new North Carolina Coastal Resources Law, Planning and Policy Center.

The center was established in 2004 through a cooperative agreement by the UNC School of Law, North Carolina Sea Grant and the UNC Coastal Studies Institute to provide timely and usable legal and planning information to coastal managers, communities, businesses and citizens. The center serves the citizens of North Carolina by bringing together the research resources of the law school, the research and outreach experience of the Sea Grant program, and the coastal connection provided by the Coastal Studies Institute to address contemporary coastal issues.

The increasing development pressure on coastal lands and waters raises issues that involve federal, state and local laws, regulations and ordinances. *Legal Tides* will explore legal and planning issues as they relate to North Carolina's coastal area and the Atlantic Ocean. Articles will present a balanced and informative analysis of issues. We also will attempt to keep our readers up-to-date on the latest publications, workshops and conferences that pertain to coastal and ocean law and policy.

Legal Tides is a free publication distributed to interested coastal citizens. Primarily written for a legal and policy audience, we hope to craft the publication to appeal to all readers. Please, let us know what you think.

If you would like to continue to receive Legal Tides, contact Walter Clark at *walter_clark@ncsu.edu* or (919) 515-1895. Or, write to: *Legal Tides*, North Carolina Sea Grant, Box 8605, N.C. State University, Raleigh N.C. 27695-8605. Also, please let us know if you would prefer receiving *Legal Tides* in electronic format.

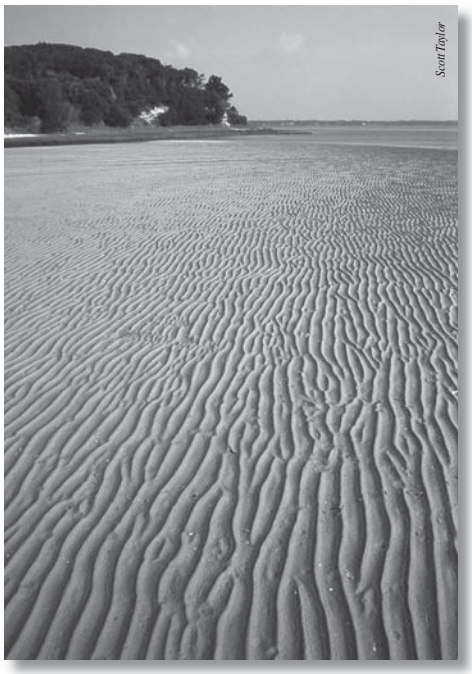
The Rights of Oceanfront Property Owners in the 21st Century

BY JOSEPH KALO AND WALTER CLARK

"Membership has its privileges" — and so does the ownership of waterfront property. With the ownership of waterfront property comes a set of unique property rights. But, unlike other types of property, waterfront property abuts a public resource infused with public-use rights. Consequently, the special rights accorded waterfront property owners must be balanced with such public rights as boating, swimming and fishing.

Identifying these special private rights of use is not always easy and has been the source of controversy since the founding of our nation. Nor is all waterfront property treated the same. The precise nature and scope of the private rights may vary depending on whether the waterfront property is oceanfront, inlet front, soundfront, riverfront or lakefront.

As we search for ways to respond to storms, coastal erosion and increasing demands upon our already crowded shores, an understanding of the scope and extent of the private and public rights in ocean and inlet shorelines is becoming more important and pressing.


Scott Taylor

In the next two issues of Legal Tides, *we will explain the nature and evolution of unique rights possessed by ocean- and inlet-front property owners. These rights, often referred to as littoral rights, have not been explored as thoroughly as riparian rights — a term that is often associated with landowners along rivers and sounds.*

In this first issue of Legal Tides, *Joseph Kalo, Graham Kenan Professor of Law at the University of North Carolina Law School, and Walter Clark, Coastal Communities and Policy Specialist at North Carolina Sea Grant, will begin the journey by explaining the origin and evolution of littoral rights. In the next issue we will examine how "artificial" additions to shorelines impact shoreline ownership and littoral rights.*

Introduction

For much of North Carolina's history, the rights of oceanfront property owners have been loosely defined. This was due in part to the slow pace of development of much of the state's oceanfront shoreline. Consequently, there were fewer opportunities for conflict between oceanfront property owners, the state and the general public. All that changed in the latter half of the 20th century. In the past 50 years, the barrier islands and ocean beaches have seen a marked increase in development. This has occurred in conjunction with severe erosion caused by hurricanes, nor'easters, sea level rise and man-made activities, such as dredging and building jetties.


Scott Taylor

For much of North Carolina's history, the rights of oceanfront property owners have been loosely defined. This was due in part to the slow pace of development of much of the state's oceanfront shoreline.

The waters of the Atlantic now are lapping at the foundations of million-dollar oceanfront homes, condominiums, hotels and businesses. The result is the demand that the state protect these investments by re-establishing erosion-prone beaches through beach nourishment projects or by permitting owners of threatened structures to build protective seawalls or otherwise harden the shoreline. In light of these ongoing changes, it is timely and appropriate to take a serious, detailed look at the littoral rights of oceanfront property owners and how those rights are balanced with the rights of other littoral owners and the needs of society.

The Origin of Littoral Rights

The concept of littoral and riparian rights is a product of evolving 19th century American jurisprudence. At the beginning of this evolution, waterfront property owners possessed no special rights.[1]

Owning waterfront property made it easier to gain access to the water, but access could be cut off by the state at any time without compensation

By the beginning to the 20th century, this had completely changed with the law supporting the view that waterfront property owners possessed unique and valuable rights of which they could not be deprived without compensation.

In 1903, the North Carolina Supreme Court, in Shepard's Point Land Co. v. Atlantic Hotel,[2] listed the rights associated with the ownership of North Carolina waterfront property as:

- The right to be and remain a littoral or riparian property owner and to enjoy the natural advantages conferred upon the land by its adjacency to the water;
- The right of access to the water, including a right-of-way to and from the navigable part;
- The right to build a pier or "wharf out" to the navigable water, subject to any state regulations;
- The right to accretions to land; and
- The right to make reasonable use of the water flowing past the land.

Coastal conditions have changed in the 100 years since the Shepard's Point decision. With these changes have come new court decisions and laws affecting the rights of coastal property owners. Consequently as we begin the 21st century, two important questions arise:

- Does the traditional list of rights enumerated in Shepard's Point accurately describe the rights of ocean- and inlet-front property owners in North Carolina today?
- Have modern uses of oceanfront property given rise to any new rights?

Who Is a Littoral Owner

The key to any discussion of littoral rights is an understanding of who is a littoral owner. It is not necessarily true to assume that anyone owning "oceanfront" or "inlet front" property is a littoral owner with littoral rights. Whether someone is a littoral property owner depends upon whether the ocean or inlet forms at least one boundary of the property. In order to be a littoral owner, the oceanfront owner's title must run to the mean high water mark.[3] If the mean high water mark is not one of the legal boundaries it is not littoral property and there are no littoral rights associated with it, even if the land appears to front the ocean or inlet.

If the property is littoral, then the property owner has the legal right of immediate and direct access to the ocean. It is this feature that commands the premium typically paid by investors for oceanfront property. But, this right exists only as long as the oceanfront property owner is a littoral owner. Therefore having and maintaining the mean high water mark as one boundary is important to ocean- or inlet-front property owners.

Littoral Ownership, Moving Shoreline

The ocean and inlet shorelines are in constant motion, expanding and contracting through natural cycles and processes. The high water mark may be in a very different location from the day the property is purchased to a few weeks or years later. Traditionally, title to the area landward of the mean high water mark is in the oceanfront owner and title to the area seaward of that mark is held by the state as public trust submerged lands.[4] So how is an ocean property line determined in this dynamic environment? As a general common law rule, when natural cycles and processes result in additions (accretions) to the beach, the increase belongs to the oceanfront owner to whose shoreline the accretions adhere; if the cycles result in erosion of the shoreline, then the oceanfront owner sustains the loss. In other words, the oceanfront property owner's boundary is never fixed, but is always a shifting, ambulatory boundary line — moving as

natural coastal processes change the contours of the shoreline and the intersection of the mean high water mark with the shore.

Exception to Common Law

Traditional common law rules do not always insure that the mean high water mark will remain the ocean- or inlet-front boundary. If the accretion or erosion of the shoreline is slow and gradual, the mean high water mark (as noted above) moves with those changes. But the traditional common law rule is different when shoreline change is the result of a sudden, dramatic shift brought about by the hammering of waves from a hurricane or nor'easter. In legal terms this shift is called avulsive change. According to common law, when sudden, powerful and natural forces cause a sudden and perceptible change in the contours of the shoreline, the seaward boundary of ocean- or inlet-front property does not move.

So what would this mean if, for example, during a storm fifty feet of sand is added to the beach? According to the traditional rule, the oceanfront owner would not own the new, expanded 50 feet of beach. Instead, the owner's oceanfront property line would remain where it was before the storm. In such a circumstance, the ocean no longer would be the seaward property boundary and technically, the owner no longer would be a littoral owner and would not possess any littoral rights. So, according to traditional common law, avulsive changes could result in the loss of arguably the most valuable feature of oceanfront property ownership — direct contact with (and access to) the ocean. The addition to the shoreline would belong to the state and be a part of the state's public lands consequently destroying the littoral owner's right of direct access to the ocean.

Legislative Changes, Traditional Rules

Fortunately, state legislation in the 20th century discarded the avulsion rule with respect to additions to the shorelines of ocean- and inlet-front property. North Carolina General Statutes (NCGS)146-6(a) and 77-20(a) create a uniform approach to all natural changes in ocean shorelines. NCGS 146-6(a), states:

If any land is…by any process of nature… raised above the high water mark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water…

Any "process of nature" includes hurricanes, nor'easters, wind and wave action and is not limited to slow, gradual additions to the shoreline. Therefore, this statute clearly changes the common law avulsion rule governing additions to shorelines.

But what happens when a storm erodes 50 feet of the shoreline? Under the traditional rule, the property line would be where it was before the storm — 50 feet out in the water and the ocean- or inlet-front owner would own 50 feet of submerged land. But this traditional rule no longer applies to oceanfront property. NCGS 77-20(a) states in plain, unambiguous language that the "seaward boundary of all property..., which adjoins the ocean, is the mean high water mark." In other words the mean high water mark remains the seaward boundary regardless of changes in the contours of the shoreline and regardless of whether the changes are the product of processes of erosion and accretion or the result of avulsion.

The ocean and inlet shorelines are in constant motion, expanding and contracting through natural cycles and processes. The high water mark may be in a very different location from the day the property is purchased to a few weeks or years later.

Standing alone section 77-20(a) may appear inapplicable to inlet front property because technically such property does not "adjoin the ocean." However, a 1998 legislative change in section 77-20 suggests that the word "ocean" now includes "ocean inlet waters." In 1998, the General Assembly amended section 77-20 by adding subsections (d) and (e). These sections define the term "ocean beaches" and affirm the public's common law right to use ocean beaches. Section 77-20(e) defines "ocean beaches" as "the area adjacent to the ocean and ocean inlets." This suggests that the General Assembly intended the term "ocean" as used in section 77-20(a) to include ocean inlet waters.

There is no reasoned basis to distinguish ocean- and inlet-front property, especially since the tidal waters of the Atlantic flow past each, both are subject to the same storm and wind action, and the demarcation between the two is a somewhat arbitrary determination of where the ocean ends and the inlet begins.[5] Therefore a uniform rule should be applicable to ocean- and inlet-front property.

If section 77-20(a) is not applicable to inlet front property, additions to the shoreline would belong to the owner of the inlet front property based on subsection 146-6(a) which does not distinguish between property adjoining the ocean and property adjoining inlets. Arguably, however, if 77-20 (a) does not apply, an avulsive loss of shoreline might leave the inlet property owner with title, subject to public trust rights, to newly created submerged lands.

The Loss of All Littoral Land and Rights

Sometimes gradual erosion, a hurricane, or a combination of both may result in ocean or inlet waters moving over and covering an entire lot. Unless the ocean- or inlet-front property owner can get permission from the state to fill and recover the land, title is likely lost with

the "former" owner losing all littoral rights. The owner of the next piece of property landward of the submerged land becomes the oceanfront owner and is vested with littoral rights. This is known as the rule of promotion.[6] If, in the future, there were natural additions to the shoreline, those additions would belong to the new littoral owner not the former one. The lot once lost is not resurrected by new additions to the shoreline.

Conclusion

As the 21st century begins and North Carolina confronts the challenges of increased development along erosion-prone beaches, the legal issues of determining private rights and delineating state responsibilities become increasingly complex. In some instances, the complexity of the issues has compelled the state to move beyond the traditional common law in search of uniform answers. Determining ownership boundaries for ocean and inlet shorelines is one of these instances. With the introduction of state legislation, a fairly consistent policy now exists to provide ocean- and inlet-front owners some assurance as to the seaward boundary of their property. Considering continuously shifting ocean and inlet shorelines, this is important, not only for oceanfront owners, but also for state managers as they attempt to ascertain the rights of the public to use one of the state's greatest resources — our ocean beaches.

End Notes

[1] John Lewis, A Treatise of the Law of Eminent Domain in the United States, sec. 94, p. 116-17 (1907).

[2] 132 NC 517, 44 SE 39, 46 (1903).

[3] It should be noted that ownership of the dry sand beach does not mean the owner has a right to exclude the public from the privately owned dry sand beach lying above the mean high tide line. The State of North Carolina contends that the public has the right to use all the natural dry sand beaches of the state. The validity of this contention is the subject of ongoing litigation. See Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C.L.Rev. 1869 (2000).

[4] A. Daniel Tarlock, *The Law of Water and Water Resources*, sec. 3:35, pp 3-55 – 3-59 (2003).

[5] The demarcation between the ocean and inlet is determined by the COLREGS (International Regulations Preventing Collisions at Sea). See Advisory Opinion concerning ownership of dredged fill and accretions on Bogue Banks at Bogue Inlet, Office of the Attorney General, September 15, 2003, n.1.

[6] North Carolina law is not totally clear on this issue. It appears that the state follows the majority common law rule that states that once a waterbody moves across the fixed boundary of non-littoral land that land is *promoted* to littoral status and fixed boundary no longer exists. *Gould on Waters*, section 255, p. 308 (3d Ed 1900). Application of the promotion rule is consistent with the reading of relevant statutes (NCGS 77-20) and sound policy.

In the Next Edition

In the next issue of Legal Tides *we will examine the effect of artificial additions to the shoreline on property ownership and littoral rights. With beach nourishment projects becoming more commonplace as a means of protecting oceanfront property, knowing the impact of artificial additions to property ownership and littoral rights is critical.*

Want to Know More?

For an in-depth legal analysis of the issues covered in this and the next edition of *Legal Tides,* look for the upcoming article in the North Carolina Law Review by Joseph J. Kalo. The article is titled *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the 21st Century*. It will appear in Volume 83, Issue 6 of the North Carolina Law Review to be published in early 2005. For additional reading on this subject, see Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C.L.Rev. 1869 (2000).

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From the North Carolina Coastal Resources Law, Planning and Policy Center • Summer/Fall 2005

Welcome to the second issue of *Legal Tides*, a publication of the North Carolina Coastal Resources Law, Planning and Policy Center.

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Rights of Oceanfront Property Owners in the 21st Century: Part II

BY JOSEPH KALO AND WALTER CLARK

In the the first issue of *Legal Tides,* we discussed the concepts of littoral (oceanfront) ownership and littoral rights, and how the seaward boundary of oceanfront property changes as the location of the mean high tide line changes due to the natural processes of erosion, accretion and avulsion.[i] In this issue, we will examine the legal effect of artificial additions to the shoreline. These additions occur when the beach is expanded and the shoreline is altered as the result of beach nourishment projects or other activities involving the deposit of sand.

As a foundation for examining the effect of these types of additions to the shoreline, three points should be kept in mind:

• As a general matter, all submerged land seaward of the mean high tide line is owned by the state. These submerged lands are typically referred to as public trust lands or, on occasion, as "sovereignty lands."

• Without permission from the state, no one has the right to fill state-owned public trust lands. In fact, an unauthorized filling of these lands is considered a trespass, and the person responsible for the filling is liable.

• If someone, without state permission, fills public trust lands and raises the submerged land above the mean high tide line, the person acquires no right or title to the land no matter how much time passes.[ii] The traditional doctrine of adverse possession is not applicable to claims involving public trust lands.

With these points in mind, we will examine the law of North Carolina in the 21st Century, as it relates to filling state-owned public trust lands for beach nourishment or other activities involving the deposit of sand.

Privately Funded Beach Filling Projects

If an oceanfront property has eroded as a result of natural causes, North Carolina General Statute (NCGS) 146-6(c), allows the property owner to fill and recover the beach. However, the property owner must first obtain a state Coastal Area Management Act (CAMA) permit and a federal permit from the U.S. Army Corps of Engineers. Before the state permit can be issued, CAMA regulations require the N.C. Division of Coastal Management to determine that the filling will not jeopardize the public's right of access or public trust rights or interests. Before the federal permit is issued, the Corps conducts a public interest review to determine that the filling is consistent with the Clean Water Act, the Endangered Species Act, and other federal legislation and will not interfere with, or impair, navigation.

Unlike unauthorized fillings, in authorized situations the oceanfront owner will have title to the raised land. The new seaward boundary of the property will be where the mean high tide line intersects the raised beach. Consequently, after the filling, the oceanfront property owner remains a littoral owner with full littoral rights. These rights include the ownership of any future natural

accretions to the raised beach[iii] and the right of direct access to the beach and ocean waters. This access is across the full breadth of the portion of beach lying between the owner's extended sideline property boundaries.

Publicly Funded Beach Filling Projects

Publicly funded beach nourishment projects can have a dramatic effect on the private property rights of an adjacent oceanfront property owner. In North Carolina, NCGS-146-6(f) clearly states that the "title to land … along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the state."

Due to the very high cost of beach filling projects, most require some type of public funding. This is particularly true with long-term Corps beach nourishment projects.

Beach nourishment projects sponsored by the Corps take years to plan. They require congressional approval, are site-specific and have a project life of 50 years. During these 50 years, additional nourishment is contemplated every five years after the initial work is completed. Because of the size of these projects, their time span and the periodic additional nourishment, they often cost millions. Currently, most of the funding for Corps projects comes from the federal government, with the remainder provided by state and local governments. It should be noted, that there are also less expensive short-term federal projects that involve a one-time deposit of sand to eroded beaches.

Regardless, both long- and short-term projects involve some form of hydraulic dredging or other depositions of spoil materials or sand on state-owned public trust lands. When these projects raise public trust land above the mean high tide line, title to the raised land remains with the state. Although this result makes sense — because the land is raised from state-owned property — it generates some important questions. For example, if the title is in the state, where is the seaward boundary of the adjacent oceanfront property? Is the oceanfront property owner still a littoral owner?

North Carolina Sea Grant Stock Photo

Both long- and short-term projects involve some form of hydraulic dredging or other depositions of spoil materials or sand on state-owned public trust lands.

After a nourishment project, the seaward boundary of oceanfront property is located where the mean high tide line was physically located prior to the project. The result is that the oceanfront property owner is no longer truly "oceanfront" because his or her property is separated from the water by a publicly owned nourished beach. The result is that the property owner no longer has littoral rights. She or he has no right to natural additions to the beach and, most importantly, has no littoral right of direct access to ocean waters. In other words, after a nourishment project, an adjacent property owner has no right of use of the beach that is different from, or superior to, the rights held by the general public.

A Case on Point: *Slavin v. Town of Oak Island* [iv]

Following the devastation caused by Hurricane Floyd in 1999, the beaches of Oak Island, North Carolina, were severely eroded. Most of the dunes and oceanfront houses were severely damaged or destroyed. A beach nourishment project was desperately needed and sand was available. These two circumstances combined to provide an avenue for an accelerated sand placement project. First, the Corps was about to begin a major dredging operation as part of the Wilmington Harbor Project. The project included dredging the channel of the mouth of the Cape Fear River, and the Corps needed a sand disposal site.

The second circumstance involved the Oak Island Turtle Habitat project. The dunes on Oak Island, like many of the dunes along the Carolina coast, provide nesting habitat for sea turtles. However, much of the important dune structure had been lost during the past twenty years as a result of storms. But under Section 1135 of the federal Water Resources Development Act of 1986, funds were available that could be used for the purpose of restoring sea turtle habitat by dredging sand from the Atlantic Intracoastal Waterway and placing it on Oak Island's shoreline.

Both projects involved the placement of sand seaward of the mean high tide line, leaving a narrow depression of submerged land between the landward boundary of the projects and the mean high tide line. Sand was placed in this location because placement landward of the original mean high tide line would have required that all the affected oceanfront property owners grant easements for the purpose of restoring sea turtle nesting grounds. Placement of sand seaward of the mean high tide line, however, did not require any private easements because the submerged land lying seaward of that line was state public trust submerged land.

Because one major objective of the Sea Turtle Project was protection of turtle habitat, the project agreement required the town to adopt a "Beach Access Plan." The plan called for fencing the length of the Sea Turtle Project's nourished beach and limiting access to the new dry sand beach via designated beach access points. As a result, affected property owners could no longer go directly from their beachfront homes to the dry sand beach. Instead, their access was limited to the public CAMA access points located approximately every quarter of a mile along the beach. This restriction upset many property owners, and some filed suit alleging that because they lost

their right of direct access they were entitled to compensation.

In February 2002, the trial court entered summary judgment in favor of the town. The plaintiffs appealed. In August 2003, the Court of Appeals of North Carolina handed down its decision in Slavin. The court upheld the restriction on the basis that an oceanfront property owner's littoral right of direct access is subordinate to public trust rights and interests. Therefore, among the possible implications of a beach project is loss of all littoral rights, which could include a loss of direct access to the beach itself.[v]

Beach Nourishment and the Easement Requirement

Unlike the Oak Island project, the contouring of most beach projects requires that sand be placed landward of the existing mean high tide line. This means that sand must be placed on privately owned oceanfront land, and permission from the oceanfront property owner is needed. Generally, this permission is in the form of an easement from the owner.

In addition to an easement, most federally funded projects require that the nourished beach be available for public use. This requirement is in return for use of public money. The nourished beach is generally defined as the full breadth of the beach from the "project line" to the post-project mean high tide line. The "project line" is the landward limit of the beach project, and it is determined prior to commencement of the nourishment work.

In most situations in North Carolina, this federal requirement has little significance for two reasons: First, in North Carolina the public is currently viewed as having the right, either as a matter of custom or as an incidental public trust right, to the full use of the natural dry sand beaches. Second, when waves are lapping at the decks of oceanfront homes or the remains of storm-ravaged dunes, most oceanfront property owners are interested in getting sand in front of their property, so they willingly grant the requested easements. Holding out could mean the loss of more land or even their homes.

An Interesting Exception to the Rules

Unfortunately, the rules of law are never as certain as we might like, and most are subject to exceptions. One of these exceptions applies to federal navigation structures or other projects that alter the natural movement of sand.

Sand moves in the water column along the shoreline via ocean currents, often termed "longshore currents." Structures placed in these currents tend to trap sand on the up-current side of the structure, and this can result in severe beach erosion on the down-current side. There is federal case authority that holds that the federal government may be liable to private oceanfront property owners whose beaches are eroding from actions stemming from a federally authorized structure. In addition, Congress has passed legislation that authorizes the Corps to take corrective action, including the deposition of sand, when a federal navigation structure is causing such erosion.

After a nourishment project, an adjacent property owner has no right of use of the beach that is different from, or superior to, the rights held by the general public.

Clyde Edgerton

This type of federal corrective action would involve public money. When this fact is combined with the language of NCGS 146-6(f) — which states that when public funds are used for beach nourishment projects, the raised beach belongs to the state — it presents a potential issue for the oceanfront property owner. If NCGS 146-6(f) is applied, the property owner's seaward boundary is the location of the mean high tide line prior to the corrective action. This result may seem unfair to the owner because it was the federal activity that caused the erosion, and the Corps is realistically taking corrective action for the benefit of the oceanfront owner, not for the benefit of the public.

For these reasons, it would seem more appropriate to apply NCGS 146-6(c) in these situations. Under this application, the oceanfront property owner's boundary would be the post-project mean high tide line. Consequently, this would fully preserve the owner's littoral rights. This result would be more in keeping with the purpose of the federal involvement.

Conclusion

In this time of increased demand for beach nourishment projects, it is important for oceanfront property owners to fully appreciate that the cost of public nourishment projects can go beyond monetary terms. The cost can include a loss of littoral rights.

For a more detailed examination of beach nourishment issues, see Joseph J. Kalo, North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-first Century, 83 North Carolina Law Review 1427-1506 (2005).

End Notes

[i]Statutes use the term *mean high water mark.* For tidal water bodies, the mean high water mark is the *mean high tide line*. The mean high tide line is an 18.6 year average of all tides. Therefore, determination of where the

mean high tide line is physically located on a beach requires knowledge of the tidal data and a survey. It does not coincide with the wave run-up line you may see as you walk along the beach.

[ii]North Carolina General Statute 1-45.1 prohibits adverse possession of public trust lands. In the context of this discussion, the submerged lands raised above the mean high tide line would be state-owned beaches, which are subject to public trust rights and therefore, whether submerged or filled, section 1-45.1 precludes acquisition of private rights through adverse possession.

[iii]The opposite is true if erosion occurs. In this situation, the property owner looses the ownership to any raised lands lost to erosion.

[iv]100 N.C. App. 57, 584 S.E. 2d 100 (2003).

[v]It is interesting to note that should shoreline conditions change, the former oceanfront owner might regain his or her status as a littoral owner. If erosion should cause the beach to recede, moving the mean high tide back to or beyond its location prior to the beach project, then the property owner would regain her or his littoral status and rights. This is true under the doctrine of promotion discussed in the prior issue of *Legal Tides*.

In the Next Edition

In the next issue of *Legal Tides,* we will discuss the current state of the law governing beach hardening structures, such as seawalls, riprap, bulkheads and similar structures. We will also analyze if oceanfront property owners have the right to pier out from their properties, or whether their rights of access are limited to simply having access to ocean waters.

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From the North Carolina Coastal Resources Law, Planning and Policy Center • Summer/Fall 2006

Welcome to the Summer/Fall issue of *Legal Tides*, a publication of the North Carolina Coastal Resources Law, Planning and Policy Center. The Center is a partnership of the UNC School of Law, North Carolina Sea Grant and the UNC Department of City and Regional Planning. The Center serves the citizens of North Carolina by bringing together the wealth of resources provided by its partners to address contemporary coastal issues.

The increasing development pressure on coastal lands and waters raises issues that involve federal, state and local laws, regulations and ordinances. *Legal Tides* explores legal and planning issues as they relate to North Carolina's coastal area and the Atlantic Ocean. Articles present a balanced and informative analysis of issues. We will attempt to keep our readers up to date on the latest publications, workshops and conferences that pertain to coastal and ocean law and policy.

Legal Tides is a free publication distributed to interested coastal citizens. Primarily written for a legal and policy audience, we hope to craft the publication to appeal to all readers interested in such issues. Please let us know what you think.

If you would like to continue to receive *Legal Tides* and haven't done so already, contact Walter Clark at *walter_clark@ncsu.edu* or at 919/515-1895.

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The Rights of Oceanfront Property Owners in the 21st Century: Part III

BY JOSEPH KALO AND WALTER CLARK

In this issue of Legal Tides, *we complete the discussion that we began in the first two issues of the newsletter regarding the littoral rights of oceanfront property owners in North Carolina. We continue the discussion with an explanation of why oceanfront property owners have no common law right to erect permanent erosion control devices, such as seawalls, to protect their shoreline property from erosion. We also explain why, unlike owners of waterfront property along lakes and rivers, oceanfront property owners have no common law right to pier into ocean waters.*

Seawalls and Other Erosion Control Devices

Many parts of North Carolina's coastline are experiencing significant erosion and beach migration. In several of the state's oceanfront communities, ocean waves crash at the base of homes threatening to undermine them. Faced with the loss of valuable seashore frontage and damage or destruction of expensive beachfront homes, it is not surprising that many oceanfront property owners want to protect their investments by placing seawalls, rip-rap or other erosion control structures along the shoreline. But most beach erosion control structures have been prohibited in North Carolina since 1985. That year, the Coastal Resources Commission (CRC), under the auspices of the Coastal Area Management Act (CAMA), adopted a regulation banning most oceanfront shoreline hardening. In 2003, the North Carolina General Assembly bolstered the CRC's regulation by embodying the ban in state law.

Spencer Rogers

This ocean bulkhead in Sandbridge, Virginia, is reminiscent of vertical walls built in North Carolina prior to the state's ban in 1985. Most bulkheads in North Carolina have since collapsed.

The reason for prohibiting erosion control structures lies in the significant adverse impacts these structures have on ocean beaches and adjacent coastal uplands. These structures prevent

the natural migration of the beach as it responds to sea level rise, as well as wind and wave action associated with coastal storms. Although homes and other buildings behind a beach erosion control structure may be protected, the shore in front of the seawall will continue to erode unabated until it completely disappears.

Spencer Rogers

A vertical wall fails on Oak Island during the early 1980s.

Erosion control structures can also affect adjacent coastal property. As the beach in front of a seawall disappears, waves strike the structure and are deflected toward each end, increasing erosion on adjacent properties. Consequently, these property owners are compelled to erect beach erosion control structures to protect their property. As this cycle continues, the public beach, the main attraction of the coast, is then lost.

Unfortunately, North Carolina's ban on most beach erosion control structures also means that many people who have invested in oceanfront property may see it wash away. The question inevitably arises, does the prohibition infringe upon some fundamental property right, and does the State have a legal obligation to compensate those whose property is lost to the sea? This question is more pronounced when out-of-town owners of the threatened oceanfront property are from states where such structures are both permitted and common.

In North Carolina, unlike some other coastal states, there is no fundamental common law right to construct beach erosion control structures to protect oceanfront homes and land. This position was affirmed in the North Carolina Court of Appeals in Shell Island Homeowners Association v. Tomlinson. In Shell Island, the court concluded, … "plaintiffs have failed to cite to the Court any persuasive authority for the proposition that a littoral … landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration."

It should be noted that in some states, oceanfront property owners have a common law right to erect seawalls and other erosion control structures. These states follow the "common enemy rule." Under this rule, water is viewed as the common enemy of all landowners and consequently the landowner is allowed to take whatever steps necessary to protect his land from harm — even if doing so leads to greater damage to neighboring land. Under this rule, it's every landowner for himself or herself. This difference in the law can be confusing to oceanfront property owners from other states where such structures are allowed.

Spencer Rogers

This stone revetment was built at Fort Fisher in 1996 by the Army Corps of Engineers to protect the civil-war era fort. It was the last revetment built in North Carolina.

The common enemy rule has never been part of North Carolina's law. In fact, until 1977, our state followed a modified version of the civil law, the polar opposite of the common enemy rule. Under civil law, a landowner would be liable for injury to neighboring land caused by any interference with the natural flow and movement of water.

In 1977, the North Carolina Supreme Court in Pendergrast v. Aiken departed from the civil law by adopting the "reasonable use" standard. The reasonable use rule allows the courts greater flexibility in determining liability by allowing for consideration of a number of factors to ascertain if a particular use is reasonable. These factors include: the purpose of the structure; the suitability of the structure for a particular watercourse; the economic benefit to the landowner; the extent of harm caused by the structure to others; the protection of existing watercourses; the impact on public trust uses; and other similar considerations. These factors are essentially the same as those used to determine whether a particular land use or activity is a nuisance. Consequently, following this standard, a waterfront property owner could erect an erosion control structure without facing liability if the structure constitutes a reasonable use or, using a similar line of thought, the structure is not a nuisance.

Therefore, the key to answering the question of whether oceanfront property owners have a common law property right to erect beach erosion control structures is whether, in the dynamic ocean beach environment, such structures are per se nuisances. Because erosion control structures change wave and water flow patterns in such a way as to increase the intensity of the wave and water action on neighboring coastal lands, a strong argument can be made that they are per se nuisances. This

is particularly true given the fact that the increased intensity of wave and water action generally increases the rate of erosion to neighboring lands and to the beach in front of these structures — the latter affecting the public's right to use those beaches. Because these significant harms are associated with ocean beach erosion control structures, it would be unreasonable to allow any oceanfront landowner to place such a structure along the shoreline.

Spencer Rogers

State regulations allow the use of sandbags to protect structures in emergency situations. Permits are required, and size and time limits apply.

It should be noted that the prohibition of erosion control structures on the oceanfront does not preclude all efforts to protect oceanfront property from erosion. Although state law and CAMA regulations prohibit the placement of permanent erosion control structures along the oceanfront, CAMA rules do permit oceanfront property owners to use temporary methods to protect homes and businesses while waiting for other solutions, including beach nourishment, re-location of the structure, or even the relocation of a migrating inlet.

Under CAMA rule 15A NCAC 7H.0308(a)(2) sandbags may be used to protect eminently threatened buildings, associated septic systems, and roads if a number of conditions are satisfied. Sandbags typically used are tan, plastic, seven to fifteen feet in length, three to five feet wide and stacked to form a protective wall. This wall may be up to 20 feet wide and no more than six feet high. Because such temporary structures present the same threats to the dry sand beach and adjacent lands as permanent structures, the regulation limits the time the sandbags can remain in place. For large structures — those with more than 5,000 square feet of floor area — the bags are allowed for up to five years. For small structures — those with 5,000 square feet or less — the sandbags must be removed after two years. If a beach nourishment project is planned for a community, a temporary erosion control structure may remain in place for up to five years regardless of the size of the structure — but only if the community in which the structure is located was actively pursuing a beach nourishment project as of October 1, 2001.

Many scientists are predicting more intense hurricane seasons and a continued rise in sea level. As coastal development moves forward, oceanfront property owners will likely experience serious economic consequences from beach erosion and shoreline migration. Other than temporary erosion control structures, property owners are left with little recourse. Without a common law right to erect protective structures, owners will need to look to their insurers and not the state for compensation associated with these natural processes.

Placing Piers in Ocean Waters

The final topic in this issue of *Legal Tides* addresses the question of whether oceanfront property owners have a common law right to pier out into ocean waters. There are no North Carolina cases directly on point, and the two state cases that do speak to the rights of oceanfront pier owners fail to conclusively find such a right. Without clear judicial guidance, one must turn to the practicality of exercising a littoral right to pier into the ocean and how regulatory agencies have dealt with the issue.

The placement of piers in ocean waters is a different matter than constructing piers in estuarine, river and sound waters. From a practical perspective, the dynamic nature of the ocean environment means that the cost of constructing, maintaining, and insuring ocean piers is substantial, so much so that few oceanfront property owners would attempt such a difficult endeavor. Presently, there are only 26 piers — most of them public — along the entire length of North Carolina's ocean shoreline, and that number appears to be declining.

In addition, federal and state government heavily regulates the placement of piers in ocean waters. To place a pier in ocean waters, a littoral oceanfront owner would need (at a minimum) a permit from the Army Corps of Engineers, an easement from the state of North Carolina, and a CAMA development permit. The CAMA permit will only be granted if the pier provides public access.

The ability to place piers in ocean waters is so constrained that realistically there is no common law right. It appears that, in North Carolina, the placement of piers in ocean waters is purely a matter of permission, not a right.

End Notes

[1] Winter/Spring 2005 and Summer/Fall 2005.

[2] 15A NCAC 07H .0308(a)(1)(B); 15A NCAC .0200(f).

[3] N.C. Gen. State. 113A-115.1(b) (2003); Also see N.C. Gen. State 113A-115.1(a)(1) that defines erosion control structures to include "a

breakwater, groin, jetty, revetment, seawall, or any similar structures."

[4] 134 N.C. App. 217, 517 S.E.2d 406 (1999).

[5] Id. At 228, 517 S.E.2d at 414.

[6] 293 N.C. 201, 236 S.E.2d 787 (1977).

[7] The reasonable use rule differs from the common enemy and the civil law rule in that both allow for little flexibility. Under the common enemy rule, no liability would ever exist; under the civil law rule, liability would always exist.

[8] Estuarine shorelines are currently treated differently than ocean shorelines. Under CAMA rules, in some circumstances estuarine shoreline owners may erect bulkheads and other erosion control structures.

[9] CAMA rule 15A NCAC 7H.0308(a)(1)(H), (I) and (J) contain very limited exceptions to the ban on permanent erosion control structures, allowing such structures when necessary to protect bridges to barrier islands, historic sites of national significance, and commercial navigation channels.

[10] 15A NCAC 7H.0308(a)(2)(F).

[11] The first case, Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968), turned on the issue of whether a fishing pier owner had a legal right to throw pop bottles at a surfboarder passing under the pier. The court concluded, that even if the pier owner had a common law right to construct the pier, that right did not include the right to control the waters below the pier. In the second case, Carolina Beach Fishing Pier v. Town of Carolina Beach, 277 N.C. 297, 177 S.E. 2d 513 (1970), the issue was whether the owner of a pier destroyed by a hurricane and other storms (which also resulted in the shoreline being completely eroded away) retained title to the area after a beach nourishment project raised the eroded land above sea level. The court concluded that because the purpose of the beach nourishment project was not to recover the lost lands for the pier owner's benefit, that title to the raised lands was in the state. Neither case provided any analysis or justification of the assumed right of an oceanfront property owner to construct piers extending into ocean waters. Despite some dicta in Capune and Carolina Beach Fishing Pier, the ability to place piers in ocean waters is so constrained that realistically there is no common law right.

[12] Because of oceanfront land values and the cost of repairing piers damaged in storms, there is pressure on pier owners to sell. This trend could result in declining public access to ocean waters. For an interesting article on this topic, see Pier Pressure, Morris, Bill, Wildlife in North Carolina, vol. 70, no 2, June 2006.

[13] 15A NCAC 7H.0309(d)(1).

In the Next Edition

The next edition of Legal Tides *will explore current legislation being considered by the North Carolina General Assembly that would create a committee to study the loss in diversity of uses along North Carolina's coastal shoreline. If enacted, the legislation would charge the NC Coastal Resources Law, Planning and Policy Center with assisting the Waterfront Access Study Committee in examining incentive-based and management tools to encourage the continued diversity of development and use along the shorelines of the state's coastal sounds and rivers. The legislation, Senate Bill 1352, is intended to address the concern that many of North Carolina's waterfront uses — such as public marinas, boat building and boat servicing companies, commercial fishing facilities, fish houses, and other commercial establishments that depend on water access — are being displaced by residential development. For more information about the study committee, contact Walter Clark at North Carolina Sea Grant, 919/515-1895 or* walter_clark@ncsu.edu.

Upcoming Workshop

October 27, 2006: The UNC School of Law and the North Carolina Coastal Resources Law, Planning and Policy Center will present a Continuing Legal Education (CLE) program on Coastal Development Issues. The program will be held at the Executive Development Center on the UNC-Wilmington campus and will cover such topics as the littoral rights of oceanfront property owners; rebuilding after coastal storms; the Coastal Area Management Act (CAMA) regulatory, permitting and appeals process; and current coastal issues. To learn more about the program and to register, contact Jackie Carlock, Director of Continuing Legal Education, UNC School of Law, 919/962-1679 or by email at *jcarlock@email.unc.edu.*

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Do Publicly Funded Beach Nourishment Projects Deprive Oceanfront Property Owners of Private Property Rights Without Just Compensation?

In 2009, the Supreme Court of the United States granted certiorari to review(1) *Walton County v. Stop The Beach Nourishment, Inc.* (2), a Florida beach nourishment case in which the plaintiffs claim that their private property rights are being taken without just compensation in violation of the Fifth Amendment to the United States Constitution. The outcome of this case could have important financial implications for beach nourishment projects around the country, including those in North Carolina.

Facts of the Florida Case

The essential facts of the case are these: A series of hurricanes — Opal (1995), Georges (1998), Isadora (2002) and Ivan (2004) — severely eroded beaches in the Florida Panhandle region. As a remedy, a beach nourishment project was initiated by Walton County and the City of Destin. As is typical in such projects, sand from offshore sources would be used to fill state-owned public trust submerged lands adjacent to the existing dry sand beach. Upon completion of the project, title to that part of the beach created by filling those submerged lands would be vested to the State of Florida, and those newly created beach lands would be open to public use. The dividing line between privately owned oceanfront property and this newly created beach would be the mean high water line (sometimes referred to as the mean high tide line), as it existed before the project began. To determine the location of that line, at the beginning of the project the existing mean high water line is identified and delineated by a survey. In Florida, this line is referred to as the erosion control line, or ECL. (3)

In the Florida case, the plaintiffs argue that the legal impact of the beach nourishment project upon the oceanfront property owners is that they are no longer common law littoral owners and no longer possess common law littoral rights. They further contend that the statutory rights provided are an inadequate substitute for their common law rights. More specifically, the plaintiffs claim that their common law littoral rights of direct contact to the water and to accretions have been taken without payment of just compensation, as required by the Fifth Amendment to the U.S. Constitution. What they are not claiming, however, is that their right of access to the water is being taken because the applicable Florida statutes expressly preserve that

right of access. In light of this case, the question is: what are the legal consequences of a beach nourishment project establishing a fixed land property line for adjacent private oceanfront lands?

Traditional Common Law

Understanding both the plaintiffs' claims and their flaws requires an appreciation of applicable traditional common law principles. Under these principles, normally littoral rights attach only to land that directly abuts the water. In the case of oceanfront property it means that one of the seaward property lines must be the existing mean high water line. However, after a publicly funded beach nourishment project, privately owned oceanfront property no longer abuts the ocean. It abuts the new beach created by the nourishment project, and the seaward line of the oceanfront property is no longer the existing mean high water line. Instead, it will be a fixed line landward of the existing mean high water line — a fixed line determined by where the mean high water line was before the project was undertaken. Therefore, one might reasonably conclude that the establishment of the fixed line and the separation of the privately owned oceanfront land from the water eliminate both the land's status as littoral property and associated common law littoral rights. However, there is some case law that would suggest otherwise.

Direct Contact With Water Is Not Always Essential To The Right of Direct Access

Perhaps one of the most instructive is *Tiffany v. Town of Oyster Bay*, (4) uses the term "riparian rights"; however, there is no substantive difference between riparian rights and littoral rights. Frequently, the generic term "riparian" is used for both.

In Tiffany, a waterfront property owner mistakenly believed he owned the adjacent submerged lands and filled them. Unfortunately for him, the court ruled that the town held title to the submerged lands both before and after that land was raised. Having title to the raised land, the town decided to make full use of the filled land and built 33 public bath houses on it. The waterfront property owner sued to enjoin the town's plan on the ground that it would interfere with his right of access. Although the town was not precluded from using the filled land as a public beach, it was prohibited from erecting structures which would interfere with the waterfront owner's direct access to the water "along the whole frontage" of his property. The court also stated that the waterfront owner's "rights as a riparian owner continue[d]." The conclusion to be drawn is that, if the filling of submerged lands through a mistake of fact by the adjacent waterfront owner or by a third person physically separates the property from the water, the property owner still retains her or his common law right of direct access to the water across the full frontage of his land. Although the property owner may no longer abut the water and be in direct contact and no longer have ownership of any future accretions to the filled lands, the right of direct access to the water continues to exist. (5)

When beach nourishment projects result in a similar separation of privately owned oceanfront property from the water, this general principle is acknowledged by statute, the project agreement or general understanding.

In the Florida case, the state's Beach and Shore Preservation Act incorporates this principle. By the terms of that Act, the oceanfront property owners' littoral access rights are expressly

preserved. However, the Act does state that the oceanfront property owners have no right to any future accretions to the newly created beach lying seaward of the fixed line established by the project. This means that they would no longer have direct contact with the water. There is nothing novel about this provision in the Act. In fact, when the first beach nourishment project took place in North Carolina at Wrightsville Beach in 1933, the North Carolina General Assembly passed a similar statute expressly preserving the right of access of oceanfront property owners being cut off from direct contact with the ocean. In essence, what such statutes do is to substitute statutory littoral rights for the common law ones.

The Common Law Right Is Direct Access, Not Necessarily Direct contact Or A Right To Accretions

Under some circumstances, the elimination of direct contact with the water and any claim to accretions is consistent with the common law of littoral rights. Under common law principles, the relevant common law right is the right of access to the waterbody. According to a 19th century authority,(6) the components of that right were:

(a) The right to maintain contact with the body of water

(b) The right to accretions

(c) The first right to purchase adjacent submerged lands if it is sold by the state

(d) If filling of submerged land is permitted by the state, the preferential right to fill adjacent submerged lands.

However, to focus upon these individual components is to lose sight of the forest for the trees. The justification for the components is to assure that the waterfront property owner does not lose the most valuable feature of her or his property — the right of direct access to the waterbody. Just as the cutting down of one or two trees does not eliminate the forest, in the context of a beach nourishment project the absence of a right to accretions or direct contact with the water does not eliminate the littoral right of continued direct access to the water. At the conclusion of the beach nourishment project, the oceanfront property owners continue to have direct access both legally and practically to the water. Legally, a private, constitutionally protected right to cross the nourished beach to reach the water exists as a matter of common law and is recognized by the Florida Act. As a practical matter, no physical barriers or hindrances prevent the oceanfront property owners from walking out the door, crossing the nourished beach and reaching the water's edge.

It is also important to note that littoral rights are not absolute and may be lost through natural events, such as hurricanes. Another common law principle is that, if there is a sudden addition to the shoreline as the result of an event such as a hurricane, a so-called change by avulsion, the physical location of the legal line dividing privately owned oceanfront property from state-owned public trust lands does not move as it would with gradual accretions to the shoreline. Instead, a quirk in the common law is that the pre-storm mean high water line would remain as the physical location of the seaward limit of privately owned oceanfront property. For example,

if a storm left an addition of 50 feet of sand to the beach, those 50 feet would be state-owned public trust lands. This means that privately owned oceanfront lands would no longer abut the water, and the oceanfront property owner would no longer have any common law littoral right of access or any of the component littoral rights. If the state decided to put up fences or other barriers seaward of the pre-storm mean high water line, the oceanfront property owner would have no claim that the fences or barriers infringed her or his rights as a littoral owner. Therefore, the Florida Act actually provides the oceanfront property owner with a higher level of access than the common law would. Under the Act, if additions to the shoreline take place, the property owner retains access to the water regardless of whether additions are the result of accretions, avulsion or artificially created.

The permanent loss of all littoral rights, and to all legal title to any oceanfront lands, also may take place if erosion is so severe that the entire area comprising a particular oceanfront parcel becomes submerged land. In that situation, once the mean high water line moves across all the boundary lines of an oceanfront tract, private title to that area is gone, lost forever. Under the common law rule of promotion, the property behind the original oceanfront tract would be promoted to littoral status, its seaward boundary would become the ambulatory mean high water line, and all traditional common law littoral rights would attach to that tract of land. Any later resurrection of the submerged area would not revive the title of the original oceanfront property owner. Of course, a beach nourishment project protects oceanfront property owners from just such a loss of title to valuable oceanfront property.

Assuming Loss Of The Right to Direct Contact And Accretions: So What?

If the plaintiffs lose ancillary rights to direct water contact and to accretions, then such a loss may be only temporary. The Florida Act itself provides that, if the restored beach is not maintained, then the ECL is cancelled and common law littoral owners are re-established. Even in the absence of the statute, if the restored beach was not maintained and the shoreline eroded past the pre-project mean high water line, then under the common law the littoral rights of the oceanfront property owners would be resurrected. Once the shoreline crossed the pre-project mean high water line, under the common law the oceanfront property owners would once again become littoral property owners, the fixed boundary line would be eliminated, and the mean high water line would once again become the seaward boundary of the privately owned oceanfront property. Therefore, there is no assurance that the oceanfront property owners' loss of direct contact or to accretions is a permanent loss of those ancillary rights. The duration of the loss depends upon public funding and maintenance of the restored beach.

Secondly, current predictions about the impact of climate change strongly suggest that erosion, and not accretion, is the more likely future of ocean beaches. Absent beach nourishment projects, the combination of predicted sea level rise and increased storm events are likely to eat away at ocean beaches. The reality is that any loss associated with the claim to accretions is more theoretical than real. Under the common law, the impact of the erosion rule is the flipside of the coin. If erosion gradually eats away at the shoreline and the mean high water line moves landward, the oceanfront property owner will lose title to any lands seaward of that moving mean high water line. Therefore, as a practical matter, the protection against loss of shoreline through

erosion afforded by a beach nourishment project probably more than offsets any "loss" of the right to accretions.

In addition, if the rights to direct contact and to accretions are being "taken," what exactly is the value of those rights? These rights are just two related sticks in a traditional bundle of littoral rights. As such, the value of the rights should be determined by the value of the property with the rights versus the value after the rights can no longer be exercised. In the setting of a beach nourishment project, the shoreline being nourished is already seriously eroding, perhaps with ocean waters even lapping at or near the foundations of oceanfront houses. If one takes the value of those houses prior to the project and the value after the project, the likelihood of any adverse financial impact is probably non-existent or minimal. More likely, the oceanfront property is worth more with a nourished beach lying in front of it — a beach that likely will continue to be nourished in the future — compared to a seriously eroded beach that may disappear all together and destroy the oceanfront property.

Finally, as a policy matter, why should the public pay oceanfront property owners for the loss of, at best, marginal rights when the public is already footing, through federal and state taxes, the lion's share of any beach nourishment project? An acceptance of the idea that, as part of a beach nourishment project, the government must pay oceanfront property owners for the "loss of the right to accretions," should stiffen already growing societal resistance to the public funding of such projects.(7)

Recognition of the claims of the Stop The Beach Nourishment plaintiffs would exhibit blindness to the fundamental purpose for the creation and acceptance of what we refer to as "littoral rights." Hopefully, the Supreme Court of the United States will approach this case with an understanding that the basic littoral right at issue here is the right of direct access, a right that the public, at its great expense, preserves and protects in beach nourishment projects.

Walton County v. Stop The Beach Nourishment, Inc., a Florida beach nourishment case in which the plaintiffs claim that their private property rights are being taken without just compensation in violation of the Fifth Amendment to the United States Constitution. The outcome of this case could have important financial implications for beach nourishment projects around the country, including those in North Carolina.

Footnotes

1. Docket number 08-1151. See Supreme Court of the United States Docket, at http://origin.www.supremecourtus.gov/docket/08-1151.htm (last accessed Sept. 4, 2009).
2. 998 So 2nd 1102 (Sept. 29, 2008).
3. The ECL is formally established by the Florida Trustees of the Internal Improvement Trust Fund (IITF). The IITF, comprised of the governor and cabinet, is vested and charged with the acquisition, administration, management, control, supervision, conservation, and disposition of state lands.
4. 234 N.Y. 15, 136 N.E. 224 (1922)
5. Another example would be the situation in which public trust submerged lands are illegally filled by a third party and removal of the fill would be not be possible because of possible

ecological or other harms. Title to the uplands created by the illegally filling would be in the state because the submerged lands filled were state-owned submerged lands. As in Tiffany, an unauthorized filling does not shift title to the filled area from the state to the adjacent waterfront property owner. However, at the same time, the unauthorized cutting off of the waterfront property from the water should not destroy the waterfront property owner's right of access to the water.
6. I. Farnham, Water and Water Rights §62 (1904).
7. If the costs of acquiring affected littoral rights of direct contact and to accretions are added to beach nourishment projects, one solution would be to assess the oceanfront property for those additional costs of such projects. The outcome would be a wash transaction.
1. Docket number 08-1151. See Supreme Court of the United States Docket, at http://origin.www.supremecourtus.gov/docket/08-1151.htm (last accessed Sept. 4, 2009).
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I & S Report

Bob Emory presented the minutes from the I & S Committee meeting. (SEE ATTACHMENT FOR WRITTEN REPORT).

The CRC took the following action:

Bob Emory made a motion to send 15A NCAC 07J .1200 to public hearing.

Bob Wilson made the suggestion to add to 07J .1201(d)(3) the following language: …location and volume of compatible sand as defined in 15A NCAC 07H .0312, *and the documented right to procure sand* necessary to construct. Jeff Warren asked if there could be latitude provided to staff in the motion for staff to work with this suggestion as long as it captured the spirit of this discussion. This was agreed upon.

Melvin Shepard made a motion to amend the rule sent to public hearing to include the additional language. Bob Wilson seconded this motion. The motion passed unanimously (Shepard, Old, Elam, Sermons, Emory, Peele, Langford, Wilson, Weld, Cahoon).

PUBLIC COMMENT AND INPUT

There were no public comments for this meeting.

PRESENTATIONS

Public Trust Doctrine, Riparian Rights and CAMA (CRC-07-07)
Dr. Joe Kalo

Dr. Kalo, Professor of Law at UNC, made a presentation addressing public trust doctrine, riparian rights and CAMA. Dr. Kalo stated that coastal waters, the natural resources in those waters and the submerged lands lying underneath those waters are public assets of the State of North Carolina and should be managed for the long-term benefit of all citizens of North Carolina for this generation and future generations. The origin of this public trust doctrine can be traced back to Roman Law. Roman Law viewed the sea as belonging to no one and the use of its waters and shores should be open to all. This was further refined in English Common Law by adding the idea that title to submerged lands was held by the King (in a trust for the public). Then in early Colonial State and Federal Law, the public trust doctrine was further adapted to the conditions in this country. It was extended to fresh water rivers, the Great Lakes and other fresh waters. There are three basic principles. First, all navigable waters are public waters and are incapable of being privately owned. If any part of the water body is navigable, all of the waters are navigable as per Full Breadth Doctrine. Second, the natural resources in these waters are all public resources to be managed for the public benefit. Third, legal title to the submerged lands is held by the State in a different capacity than they hold other State

lands. The submerged lands are held in a quasi-trust for the benefit of the people. Public trust rights are defined in NC General Statute to include, but not limited to swimming, hunting, fishing, and all recreational activities. Public trust rights have evolved to include environmental protection within the protected public trust interest. All power over the public trust lies with the General Assembly.

Riparian rights can only be held by riparian owners. To be a riparian owner, you must have fee title to land which abuts a waterbody and the waterbody has to be one of the described boundaries to that land. Riparian rights are not severable from the fee title. Riparian rights include consumptive (which are not important in the coastal context) and non-consumptive rights. Non-consumptive rights include access to the waterbody. Neither the State nor anyone else can build an impediment to block the owner's access to the waters edge. Nor can anyone build an impediment to deep water. The right to pier out is limited to docks, piers, wharfs, and related facilities. This is a result of Common Law to encourage water commerce, fishing, and water transportation and other water dependant activities. Common Law rights do not include the right to place non-water dependant structures over state public trust waters and lands. The legislative goals of CAMA are 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. CAMA is also charged with establishing policies, guidelines and standards for the protection, preservation and conservation of natural resources. Finally, CAMA is responsible for the protection of present common law and statutory public rights in the lands and waters of the coastal area. The General Assembly has set out a directive to the CRC (NCGS 113A-120) as to how to implement these goals in the CAMA permit process, the General Assembly stated that development that adversely impacted public trust rights and interests was not to be allowed. The CRC may make exceptions and allow non-water dependent structures to be placed in public trust waters. (Urban Waterfront rules are an example of a limited exception.) However, the general statutory mandate still applies to urban waterfronts—development shall not jeopardize public trust rights.

Inlet Hazard Areas (CRC-07-09)
Dr. Magery Overton and Jeff Warren

Dr. Overton, NCSU Professor, introduced the project addressing the inlet hazard areas. She stated that there has been a tremendous increase in how we map and the quality of mapping. This project brings high quality data. The report is still in its draft form. She stated that from this point, the report will be modified. Dr. Overton stated that we need to use what we see as scientists and implement that knowledge into policy. There is one specific rule within the inlet hazard zone. The shoreline positioning data can tell us about how to interpret the erosion rates in the inlet hazard zones.

Jeff Warren, DCM Coastal Hazards Specialist, stated that if the Commission were to embrace these new boundaries, the new rule language would refer to this report. The

barrier island and a lot of land that is below sea level. There are beaches and dunes. Dikes and dune reinforcement has been done through coastal engineering on the beachfront. Dams and levies are used as armored protection. Just about every waterway that goes in has some type of barrier to prevent the water from flooding inland. (A presentation was shown displaying Holland's engineering efforts).

The Commission could establish a policy position. The CRC will be looked to by the State of N.C, the citizens and residents of N.C., but also other states and countries that are struggling with what to do to figure out sea level rise. This is a good opportunity. There would be a need to tap the collective knowledge of everyone in the state (other agencies, private sector and conservation groups). There will be a need for a lot of public education. There will be a need for interagency cooperation. Interstate and federal cooperation would also be needed. There is probably also a need for legislative action and incorporate into the CRC's existing rules and policies (both marginal and substantial).

CAMA and Takings Issues
Dave Owens, Gladys Hall Coates Professor, UNC School of Government

The takings issue derives from this provision in the U.S. Constitution, "Nor shall private property be taken for public use without just compensation". The law of the land clause in the State Constitution incorporates the same requirements. Most of the law on this issue is federal constitutional law. There are three context issues that arise, focused largely on the third issue (1) involuntary acquisition (2) exactions related to development approval and (3) regulatory takings.

Involuntary acquisition is fairly straight forward. The government has the power to acquire people's property. If the government needs your land for a road, a prison, or a school and you are not willing to part with it, the government can seize your property and pay you a fair price for it. Dealing with that issue is where the taking clause comes from and that is why it is in the U.S. Constitution. The government did seize titled people's property for public use and this sets out a fair process and fair compensation. The government has to be taking your property for a public purpose. How broadly defined is public purpose? The Kelo case, a city in Rhode Island seized property for economic development purposes (assembling a large tract, demolishing the houses and constructing a hotel) is not an issue which arises in North Carolina because our legislature has not given local governments the authority to use condemnation, imminent domain for economic development purposes. The purpose has to be authorized by statute. If the Commission decided it would like to acquire somebody's land without that person's approval, the Commission would have to go to the statute to find some place that the General Assembly had explicitly given the authority to acquire the land and to use the condemnation power to do so. Then the issues are very straight forward. Were proper procedures followed? Is the amount of compensation proper? If a conclusion cannot be met, a jury will decide.

Exactions are the requirement that a person convey title to land or build improvements to property as a condition of development approval. We have long used this in government and subdivision regulation is the most common. If you build a new subdivision, you have to put in streets, water, and sewer lines and give them to the government as a condition of development approval. There are two major constitutional issues, the nexus issue and the proportionate scale. This is acquiring a new interest. If the public already has an interest in the land and you are

acquiring that existing property interest to be preserved or protected, it is not an exaction. An example would be a road that was not a public road; it was an accessway as part of development approval. If you wanted to acquire that road to be maintained, protected or dedicated to the public, you are not acquiring a new road. You are protecting an existing legal right of access. Often it is an intensive factual inquiry as to whether a prescriptive easement exists or whether the public has some right. You have to look at what existing property rights the public may have. If you are simply protecting an existing right, that is not an exaction and is not a taking. Assuming you are requiring somebody to donate land or construct an improvement, the two tests you have to meet are (1) a rational nexus: is the development you are approving causing the impact that you are getting the exaction to deal with? (2) Is there a reasonable relationship? The coastal case that brought this up in the U.S. Supreme Court was Nollan. Mr. and Mrs. Nollan had a small cottage between the road and a narrow stretch of beach in California. They wanted to demolish that cottage and put the development on the right hand side (looking from the ocean back on that lot). The State said there is a small beach with a seawall and we want as a condition of approval to demolish the house and build a new house that the Nollan's dedicate an easement to the public to allow people to walk up and down the beach along the shoreline in front of your house. Mr. and Mrs. Nollan said no. The Supreme Court agreed with them. The Supreme Court said if you tear down a house and put a larger house on it, that has nothing to do with the need for people to walk up and down the beach. These are unrelated issues and the fact that you have to get a permit to demolish a house does not give the State the right to acquire an unrelated easement laterally along the beach. If the State had said you have to build an observation deck on your lot because you are blocking the view with your new development that would be a different issue and there may be a rational nexus. Whatever you acquire as an exaction has to be no more than that which is roughly proportional to the impacts generated by that particular development. The U.S. Supreme Court case that illustrates this is a creek in Oregon. There was a hardware store on the site. The store wanted to expand into the adjacent lot. The city was agreeable and would give them the permit to do it, but they had to dedicate an easement along the creek to provide a greenway and walking path for the development. The Supreme Court said expanding a home improvement store has nothing to do with creating the need for a greenway and bike path along the creek. What they were asking for was not proportional to the impact generated by this development. If you wanted to require a turn-in off of the street or something related to the traffic generated by the development that would be fine. Another important issue with exactions is you have to have the statutory authority. If you are going to require as a condition of development approval that somebody convey a condition of interest in land to you, you must have authorization from the General Assembly. A classic example in North Carolina: local governments can require dedication of land for streets, public enterprise functions (water and sewer), but you cannot require a subdivider to dedicate land for a school site. You can require them to reserve the land for future purchase. It wouldn't be a constitutional problem if you have a 1,000-lot subdivision that would create the need for a school site to require them constitutionally to dedicate land for a school, but there is no statutory authority to do that.

Regulatory takings are an area where the law has been confused, but is increasingly clear. There was no such thing as a regulatory taking originally in the Constitution. The Court in 1922 adopted a rule that says a regulation of land can be so restrictive as to be the functional equivalent of seizing the title to the property. It is almost the same thing as acquiring that piece of property. The takings clause will require if the regulation goes too far, then compensation must be paid. The Supreme Court announced this decision in 1922 in a case involving removal of coal as a separate mineral right under property and promptly abandon the field for fifty years

leading to a great deal of confusion and uncertainty as to what they meant and how far is too far? The Supreme Court attempting to define this further in the 1970's, 1980's and 1990's, issued about a dozen decisions. This further confused the issue for about two decades. In the last five or six years, the Court has clarified things and things are coming together in a much more coherent fashion. The purpose of this rule is to prevent individuals from bearing a public burden that should be borne by the public as a whole. There are also non-legal dimensions, particularly as a regulatory body, in deciding this issue. What is fair, reasonable and appropriate as a public policy looking at economic impacts, fairness to land owners, fairness to neighbors, and good public policy? Mr. Owens stated that his experience in working in this field for the past thirty years is that local governments and state regulatory agents almost always reach the limits of what they think is appropriate from a policy standpoint well before they get to the legal limit of what is permissible as a Constitutional matter. What are the legal limits? There are two simple rules and one not-so-simple rule. The two simple rules are that compensation is always required if you have a physical invasion or your regulation renders the property completely worthless. A physical invasion example is the Loretto case from 1982. Mrs. Loretto had an apartment building and the City of New York adopted a regulation that said if you own an apartment building, then you have to allow someone to put a cable TV line on top of the building and small equipment about the size of a shoe box to let people have access to cable television within the building. Mrs. Loretto said you can't make me do that without paying me, you are physically invading my property with this power line and cable line and I want compensation for it. Clearly this was an economic issue that would benefit the property. The rule was that as a property owner she could get a cut of the cable company fees if she could negotiate with the cable company. The regulation took that ability away from her and allowed the company to put the cable on the roof. The Court said that even if it were a modest, minimal invasion, it would require compensation. The second rule that always requires compensation is if your regulation renders the property completely, totally valueless. In that situation, compensation is always required. The Courts said that this would be an extremely rare circumstance. This does not mean a substantial reduction in value this means no (zero) value. Even a ninety-five percent reduction in value is not the same as a total reduction in value. If your property cannot be sold or it would even be difficult to give it away, then you have a taking. This is an exceptionally rare circumstance. The Lucas case from South Carolina involving a setback regulation is an example. The setback line was on the rear of the property and the regulation allowed essentially no use of the property. By contrast, when North Carolina which adopted a setback regulation which was more restrictive than South Carolina's regulation, the Commission was very careful in adopting the setback regulation to look at what economically productive uses could be made of the property that were consistent with the purposes of the regulation. When you look at North Carolina's setback rule it says that it only restricts permanent, substantial structures and if you can do something like parking lots, tennis courts, gazebos, swimming pools, etc (some economic use of the property) this should be allowed. This allows the owner to make as much use of the property as possible in recognition of the Constitutional issue. There are two exceptions to the totally valueless rule. One is if the regulation is preventing a nuisance. You can prevent the use of the property in a way that will harm others. Even if their property is rendered totally valueless, this is not a taking. Second is if the regulation effects background principles of state property law. An example in North Carolina would be if your regulation were protecting public trust doctrine rights and even if the property were rendered totally valueless it would not be a taking. You are preventing them from doing something that they did not have the authority to do anyway by violating the public trust doctrine. If you do not have one of these two categories, you fall into the Penn Central analysis, which is where 99% of regulatory takings cases are going

to fall. Grand Central Station in New York City was the case that brought up the issue. Penn Station and a couple of other historic landmarks had been demolished and destroyed. The Penn Central Railroad Company owned the building, a national historic landmark, and to make more money they wanted to take the air rights above the building and construct a modern office building of 60 or 70 stories above Grand Central Station. The City adopted a historic preservation regulation that said you couldn't use the air rights above the building for this purpose. You have to leave the building in its current, grand state. There was substantial economic value in mid-town Manhattan to these air rights. The City had a provision that allowed some transfer of the development rights to other places, but it was unclear whether it was a real issue or not. When the case came to the Court, it was questioning whether the City could take away the railroad company's right to sell the air rights, recoup the money and use it elsewhere. The Court said this is the test, the analytic framework, we will use in analyzing whether the regulation that significantly diminishes the value of that property is a taking or not. We will look at balancing the economic impact of the regulation on the owner with the character of the governmental action with some particular focus on the regulation's impact on distinct investment backed expectations. The first factor is looking at the economic impact on the owner. One thing that is abundantly clear in this case is that the economic impact to be considered a potential taking must be severe. A moderate economic impact does not raise a takings issue. How severe is severe is not precise. Most cases indicate that until you get to 85 or 90% reduction in value, you do not have even a claim for a taking. There is clearly no Constitutional protection for the most economically productive use of a piece of property. The restriction of the value of a piece of property is not a taking. It is not a taking under any formulation of the Constitution. It may be a legitimate public policy argument, someone may say it is unfair or unreasonable to do it, but it is not unconstitutional. A significant reduction is not compensable. The character of the governmental action is also a factor in this analysis. An action taken to protect public health and safety will probably justify a more substantial impact on property values than something else. If you are protecting public health and safety the Court has generally upheld substantial reductions nearing complete reduction in value. If you are looking at something like an aesthetic objective or protecting character of the community – not public health and safety related, be more cautious about how far you go in substantially reducing a person's property value. The character of the governmental action analysis usually comes up in the notion of a bad faith action by the government. If the government is denying a permit over and over again as a pretext with no good reason (just holding up development or personal animosity towards the developer) or the government is trying to use the regulation to reduce the value of the property to buy it at a cheaper price. This kind of bad faith would lead to the Court saying that it is a taking. Lastly, you look at a person's reasonable investment backed expectations. This is an area where the law is still emerging. One of the key factors is how heavily regulated is the property? If you are an investor and you are investing in something that is heavily regulated, the Courts are going to say that you know there is some risk. You are making a speculative investment and the Courts are not going to protect the land investment business because it is not a regulated utility. You do not have a guaranteed rate of return and you know going into it that the rules may change. The examples the Court frequently uses are things like adult entertainment businesses, businesses selling alcohol and most coastal development. These are all heavily regulated activities. The notice factor is important. One of the issues where the takings claim is most likely to arise is when there is a dramatic and sudden shift in the regulations. In the Lucas case, South Carolina had essentially no setback regulations and they went to a fairly severe one. Property owners had already acquired the land, the houses on both sides were built, and they were ready to go with the permits then all of a sudden the regulations

changed. Effecting someone's expectations is an important factor. When a person buys land, how heavily regulated it is at the time they acquire it is also a factor. It is not determinative in and of itself, but it is an important factor. We had a recent Supreme Court case where a person owned some land, Rhode Island adopted coastal regulations that greatly restricted the development and wouldn't allow them to fill in a salt pond and some marsh land. The person brought a takings claim. In between the time the person first acquired it and the time the regulation was adopted, the form of ownership changed. But the Court said that since the title of the property changed, they would add that as a factor to be considered. In the North Carolina context, if someone acquired a piece of property on the oceanfront ten years ago that is subject to the setback regulations or the estuarine shoreline piece of property that has some limitations on the amount of development they can do, the fact that they bought it knowing there are regulations would be a factor and probably significantly reduce the chances that they could be successful in a takings claim. When you do this analysis, you consider the parcel as a whole and not just the regulated portion. For example with a buffer regulation you don't just look at the economic impact on the buffer, you look at the entire parcel of land over time. A temporary restriction, even if it is a total restriction such as a six-month development moratorium, does not raise a takings issue because you have the potential for future development and the Court will consider the potential for future development as giving value to the property. The North Carolina standard is substantially similar. Three key cases in North Carolina that address the same issue are the 1938 Parker case in which the Court said that a reduction in value is not a taking, but the bottom line was taken from the Responsible Citizens case in 1983 where an Asheville floodplain zoning case said the owner must have some practical use of the property to have some reasonable value left. The Finch case in 1989 was a down zoning case in Durham where the property was originally zoned for single family development, rezoned to allow commercial development, and then zoned back to single family. The owner said if I could develop it as a motel it is worth $500,000 to $700,000. If it is a single-family residence it is worth $25,000. The Supreme Court said that is not a taking.

ACTION ITEMS

Approval of CHPP 2007 Annual Report (CRC-07-11)

Jimmy Johnson stated the 2006-2007 annual report was provided to the Commission. This is a statutory requirement that the CHPP be reported to the Environmental Review Commission and the Seafood and Aquaculture Commission annually. The three commissions involved (EMC, CRC, and MFC) all need to approve the annual report. Mr. Johnson requested approval of the annual report from the CRC.

Doug Langford had concerns about the controversial stormwater rules proposed by DWQ and asked if by approving this document is the CRC endorsing these rules? Jimmy Johnson stated this is a reflection of the activity that has been going on.

Renee Cahoon requested that minutes of the CHPP steering committee meetings be provided to the Commission.

Melvin Shepard made a motion to approve the CHPP 2007 Annual Report. Jerry Old seconded this motion. The motion passed with ten votes (Shepard, Gore, Old, Peele, Emory, Bissette, Sermons, Elam, Weld, Wilson) and two against (Langford, Cahoon) (Leutze, Wynns absent for vote).

Takings

CHAPTER 24

The Fifth Amendment to the U.S. Constitution includes a deceptively simple requirement: "[N]or shall private property be taken for public use, without just compensation." Although the same language does not appear in the North Carolina constitution, the court has held that Article I, Section 19, of the state constitution, providing that no person shall be "deprived of his life, liberty, or property but by the law of the land," has the same functional impact as the federal taking clause.[1]

The compensation requirement is straightforward when the issue is seizing a private residence to quarter troops, as in the early days of the country's existence, or using private property for a public road, as in modern applications.[2] However, when a landowner alleges in an inverse condemnation suit[3] that land use regulations are so restrictive as to be the equivalent of a seizure or a taking of property, thereby mandating compensation to the owner, the legal issues become rather complex.[4]

Overview of Federal Decisions

The concept that there can be a *regulatory taking*—that a land use regulation can be so restrictive as to constitute a taking of private property—was first set forth in 1922 in *Pennsylvania Coal v. Mahon*.[5] The often-quoted conclusion of Justice Holmes in this case was, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6] The Court has confirmed that compensation, not just invalidation, is the appropriate remedy when there is a regulatory taking, even if the taking was temporary.[7]

Even modest physical invasions of property require compensation, as the right to exclude others from property is an essential attribute of property. For example, in *Loretto v. Teleprompter Manhattan CATV*

1. *See, e.g.,* Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); DeBruhl v. State Highway & Pub. Works Comm'n, 247 N.C. 671, 102 S.E.2d 229 (1958).

2. Even "physical occupation" cases can present difficult issues. For example, *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982), involved a motion to dismiss an inverse condemnation action based on aircraft overflights, brought by a plaintiff whose property was located under the end of a new runway at the municipal airport. The court ruled that the inverse condemnation claim could proceed and that there was a taking if there was material interference with the use and the enjoyment of a property so as to cause substantial diminution of its market value. *See also* Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

3. N.C. Gen. Stat. § 40A-51 provides a statutory framework for bringing an inverse condemnation suit.

4. The British solution to this dilemma was the addition of a compensation element to the land use regulatory system. In 1947 the government created a fund to compensate those whose existing use rights could not be put to reasonably beneficial use. See Daniel R. Mandelker, *Notes from the English: Compensation in Town and Country Planning*, 49 Cal. L. Rev. 699 (1961), for a discussion of this system. For a review of the considerable literature on compensable regulations and a detailed proposed alternative, see Windfalls for Wipeouts: Land Value Capture and Compensation (Donald G. Hagman & Dean J. Misczynski eds., 1978).

5. 260 U.S. 393 (1922). *See also* Dellinger v. City of Charlotte, 114 N.C. App. 146, 441 S.E.2d 626 (1994), *review granted*, 336 N.C. 603, 447 S.E.2d 388, *dismissed, review improvidently granted*, 340 N.C. 105, 455 S.E.2d 159 (1995). The Court has long ruled that land use regulations preventing noxious land uses and uses that are nuisances or threats to public health and safety are not takings, even if property values are substantially reduced. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (restricting quarry excavation even though preexisting mine was thereby rendered useless); Miller v. Schoene, 276 U.S. 272 (1928) (requiring destruction of diseased ornamental trees to protect apple orchards on other property); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (limiting property to residential uses even though a 75 percent reduction in property value resulted); Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (requiring removal of preexisting oil storage tanks near residences even though it rendered existing business impractical); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (requiring preexisting use mining clay and manufacturing bricks to be closed even though property value was reduced by more than 90 percent); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (requiring preexisting livery stable to be closed when city expanded around it); Murphy v. California, 225 U.S. 623 (1912) (outlawing use of property for billiard hall); Mugler v. Kansas, 123 U.S. 623 (1887) (outlawing use of preexisting brewery equipment lawfully in use before prohibition).

6. 260 U.S. at 415.

7. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987). On remand the California Court of Appeal ruled that the ordinance was not a taking. 258 Cal. Rptr. 893 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990). Section 1983 of the Civil Rights Act of 1871 allows suits against entities, including local governments, who deprive persons of their constitutional rights. 42 U.S.C. § 1983 (1998).

Corp.,[8] the Court held that a regulation requiring an apartment building owner to allow cable television cables to be placed on the roof was a taking, and in *Kaiser Aetna v. United States*[9] a requirement that members of the public be allowed access to and use of an upland pond proposed to be connected to navigable waters was held to be a taking.

Regulations that eliminate *all* economically beneficial uses of a property are also a taking. In *Lucas v. South Carolina Coastal Council*[10] the Court held that in those rare instances where property is rendered worthless by a regulation, a taking has occurred regardless of the fact that a legitimate governmental objective led to the regulation. The Court held that there are only limited exceptions to this rule in "total takings" situations. If the regulation prevents a use that would otherwise be forbidden under the state's background common law principles of nuisance and property law, there is no taking.[11]

However, determining just when a taking has occurred absent the extraordinary situations of a physical invasion or a total deprivation of value has proven elusive. The courts must examine each challenged regulation on a case-by-case basis to consider the character of the governmental action and the economic impact on the landowner.[12] Justice Brennan summarized the Court's analytic framework in these situations in *Penn Central Transportation Co. v. New York*:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.[13]

Where there is no physical invasion of the property and there is not a total, permanent elimination of the economic value of the property, this *Penn Central* framework is employed to assess whether a land use regulation constitutes a taking. Two cases illustrate its application.

In *Palazzolo v. Rhode Island*[14] the Court upheld state wetland regulations. The case involved a denial of a proposed bulkhead and the filling of eleven acres of coastal marshland. Palazzolo and several associates bought the land as a partnership in 1959 and developed and sold off most of the upland property. Palazzolo eventually bought out his partners and continued efforts to get permission to fill and develop this marshland. After a 1985 application was denied, he sought $3.15 million in damages as a taking (a calculation based on subdividing the wetland area into the seventy-four lots proposed in an early plat, although there was no town approval of such a development and there was testimony that such density would violate town zoning and waste disposal regulations). The state courts ruled against him on several grounds, including that his suit was not ripe, that he could not challenge regulations adopted prior to his assumption of sole ownership in 1978, and that since the property had at least $200,000 in development value for the small upland portion, there was no taking. The Court agreed in part but reversed several points. The court held that the claim was ripe for judicial determination, as the state had given him a final answer that the eleven wetland acres of the site could not be filled. The Court also held that the fact that Mr. Palazzolo took title to the property from the partnership after the effec-

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8. 458 U.S. 419 (1982). The court refused to extend this physical invasion takings rule to a statute restricting mobile home park rents and the park owner's ability to evict upon a transfer of mobile home ownership. Yee v. Escondido, 503 U.S. 519 (1992).

9. 444 U.S. 164 (1979). Total removal of a core property right, such as the right of descent, can also be a taking. Hodel v. Irving, 481 U.S. 704 (1987).

10. 505 U.S. 1003 (1992). In the *Lucas* context, consideration of investment-backed expectations is not required. Palm Beach Isles Assocs. v. United States, 213 F.3d 1354 (Fed. Cir. 2000).

11. *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied,* 510 U.S. 1207 (1994) (upholding denial of permit for seawall, noting state law on customary use of ocean beaches is part of background principles of state property law); Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania, 799 A.2d 751, 771–74 (Pa. 2002) (activity that pollutes state waters is a nuisance and not protected by takings clause); McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 119–20 (S.C. 2003), *cert. denied,* 540 U.S. 982 (2003) (upholding denial of bulkhead permits along canal where lots had eroded and reverted to tidelands subject to state ownership and the public trust doctrine, noting state property law precludes private ownership and fill of such lands). In addition to limiting nuisances, the federal navigational servitude has been held to be a background principle limiting property rights and providing a defense to a takings claim in a dredge and fill permit context. Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

12. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

13. 438 U.S. at 123–24 (citations omitted). See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) and *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), for discussion of what constitutes a reasonable investment-backed expectation. For an example of the character of the governmental action leading to takings, see *People ex rel. Dep't of Transportation v. Diversified Props. Co.*, 17 Cal. Rptr. 2d 676 (Cal. App. 1993) (regulation to depress price prior to condemnation a taking). Also see the discussion of amortization in Chapter 20.

14. 533 U.S. 606 (2001).

tive date of the state rules prohibiting wetland fill did not automatically prevent him from having a reasonable investment-backed expectation regarding use of the property (though the existence of the regulations at the time of acquisition is one factor to consider in determining the reasonableness of development expectations).[15] The Court held that since the owner had the right to build at least one residence on the upland portion of the property and this had an undisputed value of at least $200,000, there was no total deprivation of the economic value of the property and thus no automatic taking under the *Lucas* test. The court remanded the case for further proceedings as to whether the case might be considered a taking under the balancing test of *Penn Central*.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[16] involved development moratoria imposed on sensitive lands adjacent to Lake Tahoe while studies, planning, and development regulations were being prepared. There were two moratoria challenged in this suit, which together prevented development in the most sensitive portions of the Lake Tahoe watershed for thirty-two months (other moratoria not involved in this litigation effectively extended the moratoria to six years). The plaintiff urged the Court to hold that all moratoria, no matter how short or long, violated the constitutional prohibition on taking private property without just compensation. The Court refused to do so. The Court held that the *Penn Central* balancing test should be applied in virtually all cases contending that a regulation is a taking. The Court held that the *Lucas* "valueless" test cannot be applied to the period of the moratorium alone, further limiting the attempt of property owners to segment property interests when making a taking analysis.[17] Consideration of "fairness and justice" is critical, and here a careful analysis of all the factors involved led to a conclusion that there was no taking. The Court noted that temporary moratoria allow time for necessary studies, public participation, and deliberation and that the complexity of the management issues involved with developing a complex bistate management plan justified this moratorium. While noting that moratoria lasting longer than a year may well warrant special skepticism, the Court concluded that the longer period was justified in this situation.

The takings issue also arises when landowners are required to dedicate a property interest to the government as a condition of development approval. To avoid being an unconstitutional taking, these requirements, termed development "exactions," must meet two tests. First, there must be a substantial connection between the dedication and the need for it created by the development.[18] Second, the size of the exaction must not exceed that which is "roughly proportional" to the impacts generated by the development being approved.[19] The proportionality standard only applies in cases involving exactions, not to regulatory takings claims.[20]

At one time the Court had also stated that a regulation that does not substantially advance a legitimate governmental objective gives rise to a takings as well as a due process claim.[21] However, in *Lingle v. Chevron U.S.A., Inc.*,[22] the Court held that this is not an appropriate test for a takings claim.

North Carolina Application

The taking issue has not been frequently litigated in North Carolina state courts. Only a handful of cases have addressed the issue to any substantial degree. Three early decisions illustrate that the court will

15. In a case involving denial of bulkhead and fill permits for lots along a man-made canal, the South Carolina court held that long-standing preexisting permit requirements, coupled with a failure to seek permits in the face of ever more stringent regulatory requirements, indicated a lack of investment-backed development expectations. McQueen v. South Carolina Coastal Council, 580 S.E.2d 116 (S.C. 2000), *cert. denied*, 540 U.S. 982 (2003). The lots had eroded and reverted to wetlands. *See also* Rith Energy, Inc. v. United States, 247 F.3d 1355 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) (regulatory regime considered in determining reasonable investment-backed expectations).

16. 535 U.S. 302 (2002).

17. When undertaking a taking analysis, the property as a whole, not just the regulated portion or the time period of the regulation, must be considered. Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993); Machipongo Land & Coal Co. v. Commonwealth, 799 A.2d 751 (Pa. 2002).

18. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

19. Dolan v. City of Tigard, 512 U.S. 374 (1994). The Court noted that this is a special application of the doctrine of unconstitutional conditions, holding that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property. *See also* Pennell v. San Jose, 485 U.S. 1, 19–20. The North Carolina Court of Appeals relied on a similar test to hold that the exaction of land for a major road through a small subdivision was a taking, but the state supreme court reversed on other than constitutional grounds. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655 (1989), *cert. denied*, 496 U.S. 931 (1990).

20. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). See also Yee v. City of Escondido, 503 U.S. 519, 529–32 (1992) (rent control ordinance not a taking); Pennell v. City of San Jose, 485 U.S. 1 (1988). State courts have likewise limited the applicability of the nexus and rough proportionality standards to exaction cases. *See, e.g.*, Greater Atlanta Homebuilders Ass'n v. Dekalb County, 588 S.E.2d 694 (Ga. 2003) (*Dolan* inapplicable to facial challenge of tree protection ordinance); City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000) (*Nollan* and *Dolan* inapplicable to subdivision approval conditions); Bonnie Brair Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000) (rejecting allegation that rezoning of private golf course to open space zone must meet *Nollan* test).

21. Agins v. City of Tiburon, 447 U.S. 255 (1980). In a claim for monetary damages as a result of an alleged unconstitutional taking, a jury trial may be had on the mixed law and fact question of whether the permit denial was reasonably related to the justification offered by the government. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). The issue of whether the governmental objectives involved are legitimate and substantial is a legal question to be determined without a jury. Buckles v. King County, 191 F.3d 1127, 1141–42 (9th Cir. 1999). See Chapter 25 for additional discussion of due process issues.

22. 544 U.S. 528 (2005) (case involved challenge to Hawaii law limiting the rent that oil companies could charge dealers leasing company-owned service stations). The decision provides a helpful overview of takings case law in the zoning area.

uphold substantially restrictive regulations designed to protect public health and safety. In 1875 the court upheld a Goldsboro ordinance prohibiting wooden buildings and its application to a building already under construction,[23] ruling that no damages were due if the building was considered a nuisance because it was a fire hazard. In 1906 the court upheld a ban on discharges into water supply streams and noted that reasonable regulations to protect the public health, safety, and morals (including restrictions on land use and building) were not a taking.[24] In 1926 the court upheld a Winston-Salem ordinance prohibiting the sale of fresh meat or seafood in any location other than the city market, even when the ordinance was applied to preexisting businesses located elsewhere.[25]

In its first major review of a zoning restriction challenged as an unconstitutional taking, the court in 1938 examined a Greensboro setback ordinance involving the height of walls allowed on property lines. In *In re Parker*[26] the court found no taking, though the individual project involved might cause no harm and the operation of the ordinance might seriously depreciate the property's value. The court noted that an individual's right to use of his or her property was subordinate to the general welfare and "incidental damage to property resulting from governmental activities or laws passed in the promotion of the public welfare is not considered a taking of the property for which compensation must be made."[27]

The court elaborated on this point in a challenge to a Charlotte zoning requirement prohibiting a restaurant in a residential zoning district. Justice Sam Ervin wrote, "If the police power is properly exercised in the zoning of a municipality, a resultant pecuniary loss to a property owner is a misfortune which he must suffer as a member of society."[28] In 1954 the court confirmed that a change in zoning did not in and of itself give rise to a claim for compensation by landowners whose property values were affected by the change.[29]

Helms v. City of Charlotte[30] is as close as North Carolina courts have come to finding a taking in a zoning case. *Helms* involved two very small lots along a creek that had been rezoned from an industrial district to an exclusively residential district. The court held that reduction in value alone did not constitute a taking: "The mere fact that a zoning ordinance seriously depreciates the value of the complainant's property is not enough, standing alone, to establish its invalidity."[31] The court also held, however, that to avoid a taking claim, the ordinance must not preclude all practical use of the land, thereby rendering the property "valueless." In this instance the court was clearly concerned that the city was not allowing the business or commercial use of the lots for which they were suited but had limited use to a residence; there was no evidence on the record that a small "shotgun" residence on this particular site could be sold for more than its construction cost. The court remanded the case for findings on whether the ordinance left any reasonable and practical use of the lot.[32]

The court upheld Asheville's floodplain zoning ordinance in *Responsible Citizens v. City of Asheville*.[33] The test articulated for taking analysis was (1) whether the ends sought to be achieved were within the police power and (2) whether the means by which they were obtained were reasonable. Protecting public safety was held to be a permissible objective, and preventing floodway obstructions and requiring flood-proofing were held to be reasonable means of accomplishing this.

In *Finch v. City of Durham*[34] the court examined the taking issue in the context of reviewing a "down zoning" and reaffirmed the basic test

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23. Privett v. Whitaker, 73 N.C. 554 (1875).

24. Durham v. Eno Cotton Mills, 141 N.C. 615, 54 S.E. 453 (1906).

25. Angelo v. Winston-Salem, 193 N.C. 207, 136 S.E. 489, *aff'd*, 274 U.S. 725 (1927).

26. 214 N.C. 51, 197 S.E. 706, *appeal dismissed sub nom.* Parker v. City of Greensboro, 305 U.S. 568 (1938). In addition to being raised when zoning affects property values, the taking issue is raised when zoning or subdivision ordinances require dedication of land for roads, parks, utilities, or open space. In *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), the court ruled that the required conveyance of open space was not a taking because it was reasonably related to the valid purpose of preserving urban open space within a portion of the approved development. The issue is raised also by the termination of nonconforming uses, which is discussed in detail in Chapter 20.

27. 214 N.C. at 57, 197 S.E. at 710.

28. Kinney v. Sutton, 230 N.C. 404, 411–12, 53 S.E.2d 306, 311 (1949). The court reached the same conclusion in a case challenging restrictions on signs in Charlotte's zoning ordinance. Schloss v. Jamison, 262 N.C. 108, 136 S.E.2d 691 (1964). The court in *Schmidt v. City of Fayetteville* upheld the city's refusal to rezone a property zoned for single-family use to a more profitable professional office district, noting

> Zoning laws and land-use plans are adopted for the benefit of the citizenry as a whole. At times, that which results in an advantage to one citizen results in a disadvantage to another. This in one of the prices of living in an urban society.

568 F. Supp. 217, 221 (E.D.N.C. 1983), *aff'd*, 738 F.2d 431 (4th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985).

29. McKinney v. City of High Point, 239 N.C. 232, 79 S.E.2d 730 (1954).

30. 255 N.C. 647, 122 S.E.2d 817 (1961).

31. *Id.* at 651, 122 S.E.2d at 820.

32. In another taking case, *Roberson's Beverages, Inc. v. City of New Bern*, 6 N.C. App. 632, 171 S.E.2d 4 (1969), *cert. denied*, 276 N.C. 183 (1970), the court reviewed a challenge to New Bern's rezoning of a site previously used as a bottling plant (and as a warehouse for nine years) from a business-commercial zone to an office-institutional zone. The court held that depreciation of value did not render a rezoning a taking or otherwise unconstitutional. Because there was no showing that the building could not be converted to a permissible use, that it could not be razed and the property converted to a permissible use, or that the nonconforming warehouse use could not be continued, the rezoning was upheld. *See also* Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Michael v. Guilford County, 269 N.C. 515, 153 S.E.2d 106 (1967). A series of cases have also held that reasonable amortization provisions are not a taking. These cases are discussed in Chapter 20.

33. 308 N.C. 255, 302 S.E.2d 204 (1983). The court also held that regulating lands within the hazard zone, but not those outside it, did not violate the Equal Protection Clause because the distinction was a reasonable classification bearing a rational relationship to a permissible state objective.

34. 325 N.C. 352, 384 S.E.2d 8 (1989). This litigation involved the city's rezoning of a 2.6-acre undeveloped parcel adjacent to I-85 from an office-

for a taking: there is no taking unless the owner is deprived of practical use of the property and the property is rendered of no reasonable value. Deprivation of previously held development rights[35] and diminution of value do not in and of themselves constitute a taking. The court noted that the plaintiffs had exercised their option to purchase in the knowledge that the planning board had recommended a rezoning, in essence taking a speculative risk that the rezoning would fail. The court found that the ordinance had a reasonable nexus to the legitimate public objective of maintaining the integrity of the adjacent single-family residential neighborhood, that alternative rezonings such as clustered residential had been proposed by the city but not pursued by the owner, and that the property in any event retained practical use and reasonable value.[36]

The court again confirmed that a diminution in value resulting from a rezoning is not compensable in *Messer v. Town of Chapel Hill*.[37] In this case the plaintiffs had challenged a 150-acre rezoning to a residential zoning district that required 5-acre minimum lot sizes as a taking. While the appeal was pending, the property was sold for $1.5 million. The court dismissed the takings challenge, noting that the sale "establishes beyond preadventure that the property continued a 'practical use and a reasonable value' following the amendment to the zoning ordinance."[38] Likewise, in *Williams v. Town of Spencer*[39] the court upheld an ordinance provision that did not allow vacated lots in a mobile home park to be reoccupied by replacement manufactured housing units. The court ruled that there was no unconstitutional taking because the ordinance allowed the land occupied by the nonconforming mobile home park to be used for any of the uses allowed in an industrial zone. In *JWL Investments, Inc. v. Guilford County Board of Adjustment*[40] the court rejected a claim that residential zoning with a scenic corridor overlay was a taking, noting that the regulations did not deprive the owner of all economically beneficial or productive uses.

Cases challenging the application of other land use regulations have produced similar results in the court of appeals. In *Weeks v. North Carolina Department of Natural Resources and Community Development*[41] the court held that limitation of permissible pier length does not deprive riparian owner of all reasonable use of property and is thus not a taking. *King v. State*[42] involved the denial of state permits to the plaintiff, who wanted to place fill in wetlands in order to build a road and subdivide an 8-acre peninsula in Topsail Sound. The court held that the denial was not a taking because the state had established that practical development alternatives existed.[43] Likewise, in *Guilford County Department of Emergency Services v. Seaboard Chemical Corp.*[44] the court held that denial of a special use permit for a hazardous waste facility in a watershed area was not a taking because many other uses of the site were permissible.[45] In *Shell Island Homeowners Association, Inc. v. Tomlinson*[46] the court rejected a takings challenge to state regulations prohibiting permanent oceanfront erosion control structures, holding there was no property right to construct such structures. Further, the court noted that in any event the plaintiff was aware of this regulatory limitation prior to acquiring title or constructing the threatened hotel and condominium structure, and this prior knowledge foreclosed a taking or inverse condemnation claim.[47]

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institutional zone to a residential one. The plaintiffs contended that the rezoning reduced the value of the property from $550,000 (if used for a proposed motel) to $20,000 (if used as one single-family lot). The city contended that other valuable uses were available, including use as a church or a day care site or additional single-family lots. The jury concluded that there had been a taking but that the plaintiffs had suffered no damages. The trial court then granted a judgment notwithstanding the verdict as to damages, invalidated the rezoning, and awarded $150,937 in damages.

35. Plaintiffs must establish that they in fact have a protected property right. In *Adams Outdoor Adver. of Charlotte v. North Carolina Department of Transportation*, 112 N.C. App. 120, 434 S.E.2d 666 (1993), the plaintiff contended that DOT's planting of trees in the state right-of-way as part of a highway beautification project obscured the visibility of eleven of its billboards and was a compensable taking under the state's inverse condemnation statute. The court dismissed the complaint, finding no basis for a claim of a "right to be seen." In *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999) the court held that there was no property right to protect oceanfront property from erosion with permanent hardened structures (such as bulkheads), so denial of permits to build such could not be a taking.

36. Three dissenting members of the court concluded that although the use and the value of the property after the rezoning were not such as to constitute a taking as a matter of law, they were adequate to support a jury's finding of a taking. Courts in other states have applied *Penn Central* analyses to uphold regulations that significantly reduce but do not totally eliminate the value of property. *See, e.g.*, Animas Valley Sand & Gravel, Inc. v. Board of Comm'rs, 38 P.3d 59 (Colo. 2001).

37. 346 N.C. 259, 485 S.E.2d 269 (1997).

38. *Id.* at 261, 485 S.E.2d at 270.

39. 129 N.C. App. 828, 500 S.E.2d 473 (1998).

40. 133 N.C. App. 426, 515 S.E.2d 715 (1999), *review denied*, 251 N.C. 715, 540 S.E.2d 349 (2000).

41. 97 N.C. App. 215, 224–26, 388 S.E.2d 228, 233–35, *review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990).

42. 125 N.C. App. 379, 481 S.E.2d 330, *review denied*, 346 N.C. 280, 487 S.E.2d 548 (1997).

43. The court concluded that the *Lucas* test for a taking—a deprivation of all economically beneficial or productive use of the property—was similar to the *Finch* standard of determining whether the property was left with a practical use and a reasonable value. *Id.* at 386, 481 S.E.2d at 334.

44. 114 N.C. App. 1, 441 S.E.2d 177, *review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994).

45. The court also held that the cost of cleaning up previous contamination at the site was not to be a factor in determining whether practical uses of the site remained, as that cost would be incurred regardless of the disposition of the special use permit.

46. 134 N.C. App. 217, 517 S.E.2d 406 (1999).

47. The court cited the holding in *Lucas* that there is no taking if a logical antecedent inquiry into the nature of the owner's estate would reveal that the proscribed uses were not part of his title to begin with. 505 U.S. 1003, 1027 (1992). *See also* Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269, *review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997) (fisheries regulation prohibiting mechanical harvesting in primary nursery area not a taking of exclusive franchise to harvest shellfish in that area where rule was in place prior to issuance of franchise); Adams Outdoor Adver. of Charlotte v. North Carolina Dep't of Transportation, 112 N.C. App. 120, 434 S.E.2d 666 (1993) (adoption of statute authorizing planting of trees and shrubs within right-of-way prior to issuance of billboard permit precludes takings claim based on such vegetation blocking motorists' views of billboards).

Public and Private Rights In Coastal Lands and Waters

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Past and Current Projects

Legal and Policy Research for Waterfront Access Study Committee

Multi-Slip Docking Facility Study

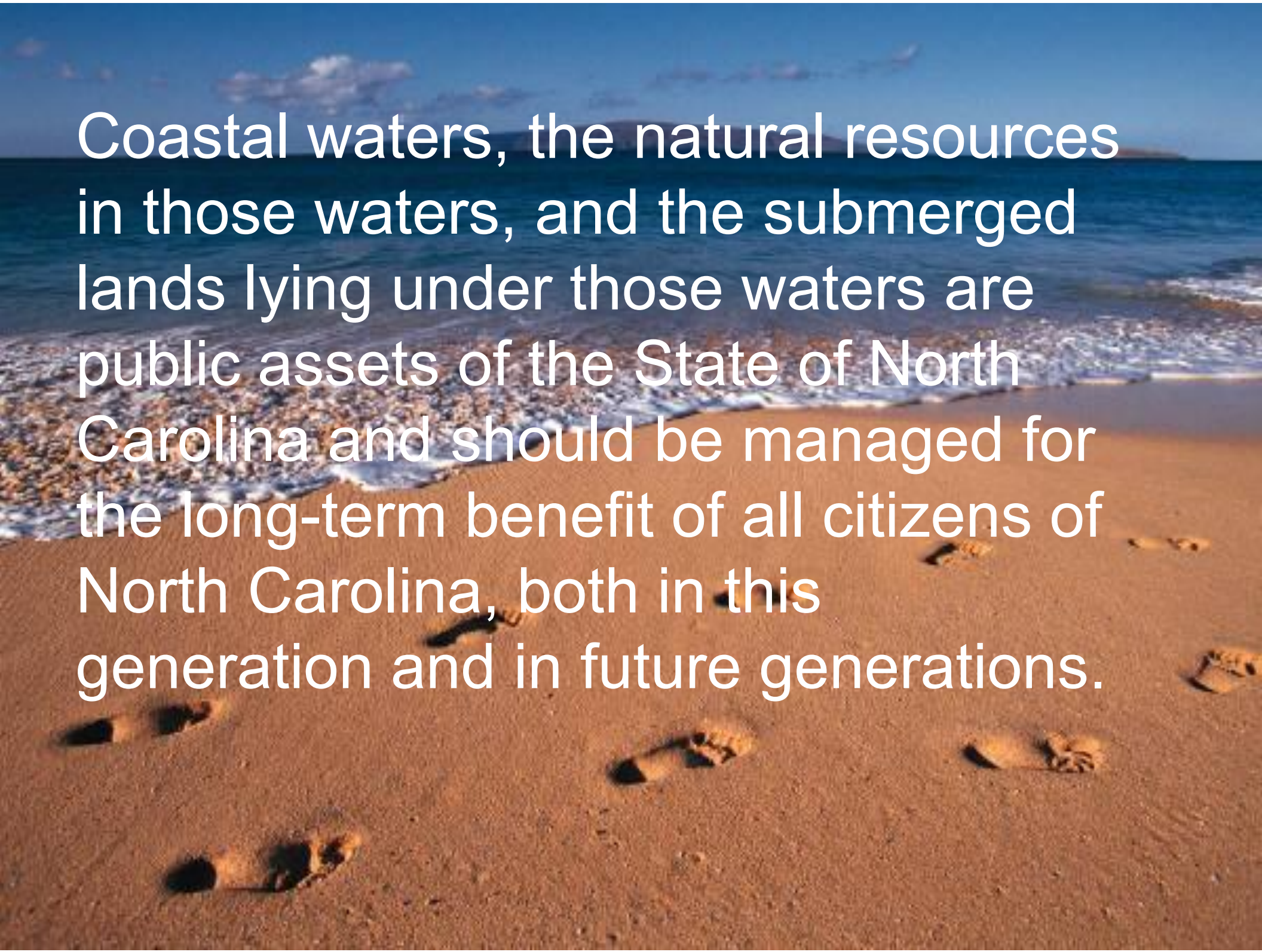
Ocean Policy Study (ongoing)

Publications

- Legal Tides (bi-annual newsletter)
- Reports and Articles
- Will be available on website

Continuing Education Programs

- Shape of the Coast 2007—New Bern
  - Friday, October 26th
- The Impact of Climate Change on Coastal Lands and Waters
- The Evolving Coastal Storm Water Rules
- All You Need To Know About Conservation Easements


Coastal waters, the natural resources in those waters, and the submerged lands lying under those waters are public assets of the State of North Carolina and should be managed for the long-term benefit of all citizens of North Carolina, both in this generation and in future generations.

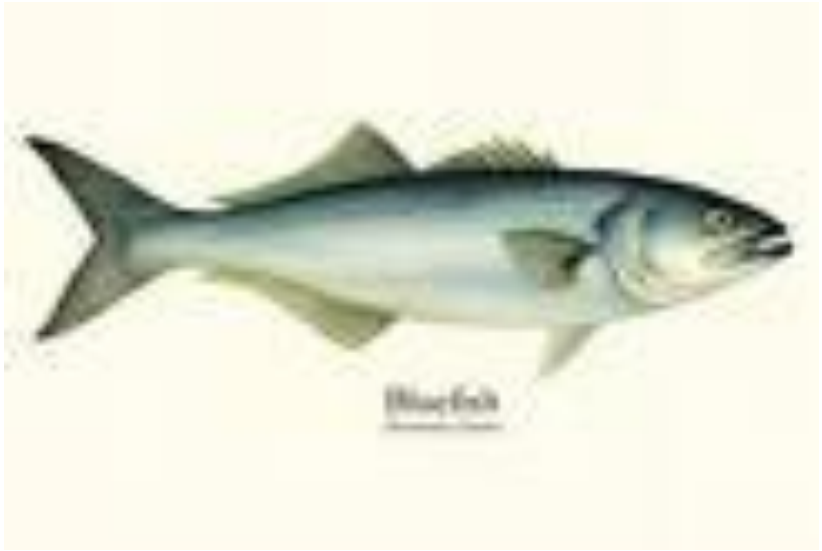
Public Trust Doctrine

Not A Novel Concept

- Origins in Roman Law
- Developed and Refined
  - English Common Law
  - Colonial and State Law
  - Federal Law

- All Navigable Waters are Public Waters
  - Navigable if navigable in fact by customary craft
  - Full Breadth Doctrine—if part navigable in fact, all is navigable in law

Natural Resources in Public Waters are Public Trust Resources to be managed for the Benefit of Citizens of North Carolina



Title to Public Trust Submerged Lands

Held by State in a special capacity—a quasi trust—as public trust submerged lands

Gwathmey v. State of North Carolina, 342 N.C. 387(1995)

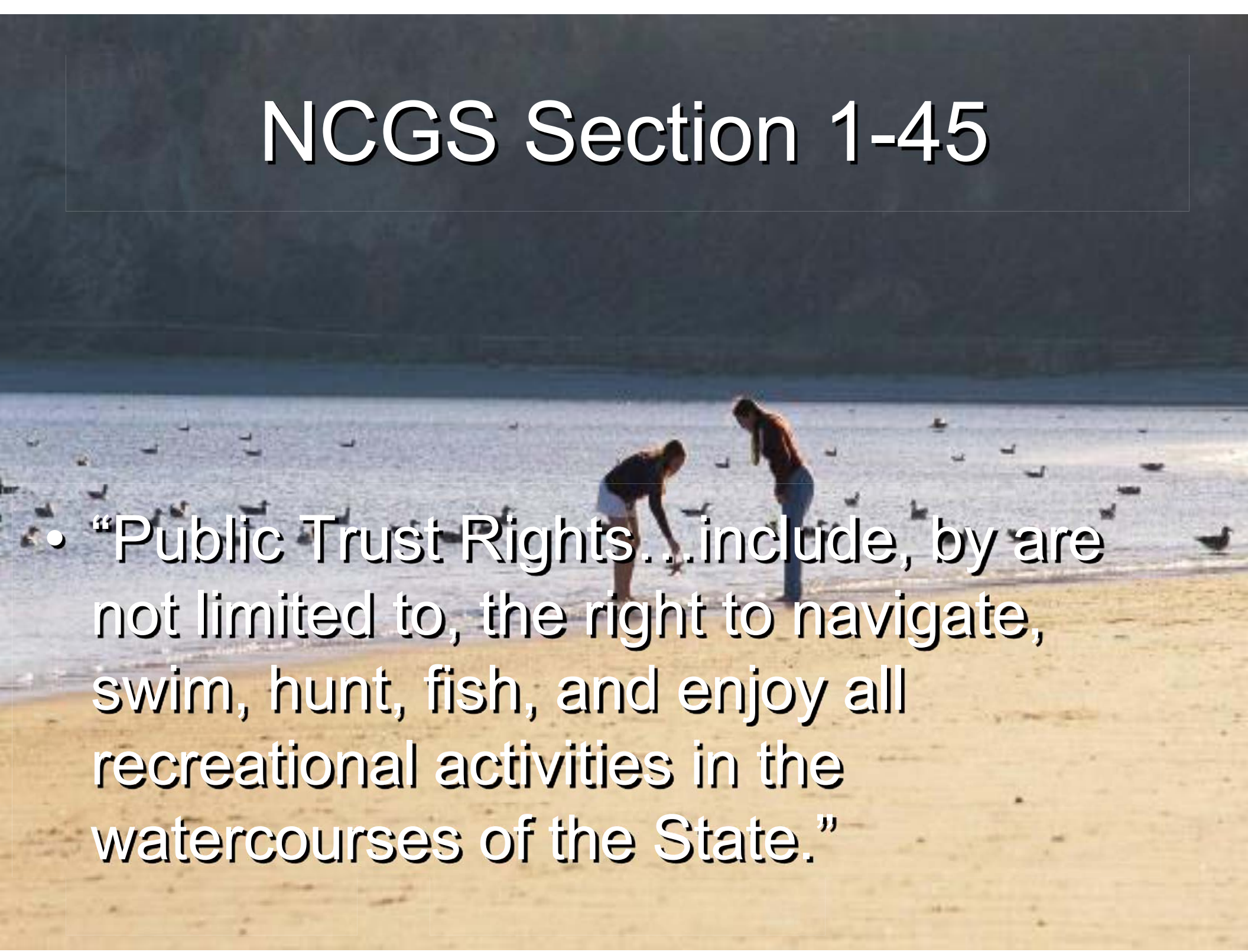
Strong Presumption—absent explicit authorization by General Assembly a purported fee conveyance of public trust submerged lands to private persons is treated as either

1. Invalid, or
2. Subject to all public trust use rights

Public Trust Uses

Navigation, Fishing, Water Commerce, and Recreational Water Uses

NCGS Section 1-45



- "Public Trust Rights….include, by are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State."

What Is A Public Trust Use Continues To Evolve

Environmental Protection

Open Space

Scenic Values

Relationship Between Public Trust and Private Property Rights

- Absent clear directive from General Assembly to the contrary, all private property interests in coastal waters, resources, and coastal submerged lands are subordinate to public trust rights and interests.
- Ultimate authority is in General Assembly

Riparian Rights

- Only Riparian owners
- Riparian owner only if
    - Fee title to
    - Land which abuts waterbody and
    - Waterbody is a described boundary
- Boundary Between Public Trust Lands/Waters and Riparian Land will be MHTL

Riparian Rights Only Exist for Riparian Property Owner

- Only the fee title holder of coastal land has riparian rights
- Riparian rights can not be created or transferred by the grant of an easement to a non-riparian property owner.
- Riparian Rights are not severable from the fee title

Rights of Riparian Owner

- Consumptive Rights
  - not of importance in the coastal context
- Non-Consumptive
  - Core is access to waterbody itself
    - No shoreline impediments block access to water
    - No impediments to go from shoreline to deep water

Right to Pier Out

- Ancillary right to place certain structures in public waters and upon public trust submerged lands

- Limited to dock, piers, wharfs and related facilities

Historical Perspective On Right To Pier Out

- English Common Law
  - Placement of structures in public waters unlawful
  - American Law
    - Eastern and Gulf States—common law riparian right to pier out recognized
    - Pacific Coast States—no common law riparian right to pier out—limited statutory right

Creation of Common Law Right To Pier Out

- Common law right created for a specific purpose—encouragement and development of support facilities, such as piers, wharfs, docks, for water commerce, water transportation, fishing, and other water dependent activities

Common Law Right Does Not Include

A right to place non-water dependent structures such as restaurants or condominiums in or over state public trust waters and lands.

Common Law Right Does Not Include

Even a right to place large scale marinas in public trust waters--***Walker v. NCDEHNR*** *111 N.C.App. 851(1993)*

Right To Pier Out

- Private Recreational Piers and Docks
- Commercial Wharfs and Piers
- Fish Houses
- Other Facilities Related to Water Commerce and Water Dependant Activities

Right To Pier Out

- Subject to Reasonable Regulation to Protect Public Trust Uses, Other Private Riparian Owners, and Other Matters of Legitimate State Concern.

Legislative Goals for CAMA

- 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*
- To establish policies, guidelines and standards for
  - Protection, preservation, and conservation of natural resources, including but not limited to water use,…and fish and wildlife…
- *Protection of present common law and statutory public rights in the lands and waters of the coastal area.*

General Assembly's Directive To CRC

NCGS Section 113A-120

- (a) [A]n application for a permit [***shall be denied***] upon a finding:
- * * *
  - (5) in the case of areas covered by 113A-113(b)(5) , that the development would ***jeopardize*** **the** ***public rights or interests*** specified in said subdivision.

NCGS Section 113A-113(b)(5) Areas of Environmental Concern

(5)…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…

Rewriting NCGS Section 113A-120(a)(5)

In the case of 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, an application for a permit shall be denied upon a finding that the development would jeopardize the public trust rights or interests.

NCAC 7H.0207(d)

- In the absence of an 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 shall be found to have in these areas *shall not be allowed…*

NCAC 7H.208(a)(1)

Uses which are *not water dependent shall not be* permitted in…public trust areas. Restaurants, residences, apartments, motels, hotels, trailer parks…are examples of uses that are not water dependent.

Non-Water Dependent Structures and Public Waters

General State Policy—Non-Water Dependent Structures, Such As Restaurants, Residences, Apartments, etc. Should Not Be Placed In, On, or Above Public Trust Waters.

Exceptions to General Policy

CRC may make exceptions and allow non-water dependent structures to be placed in public trust waters

Urban Waterfront rules are an example of a limited exception

Priority of Public Trust Rights

But the general statutory mandate still applies to urban waterfronts—development shall not jeopardize public trust rights


Public Trust Waters, Resources, and
Submerged Lands—A Public Asset
Of Present and Future Generations