

NC COASTAL RESOURCES COMMISSION

February 18-19, 2015

Hilton Double Tree

Atlantic Beach, NC

The State Government Ethics Act mandates that at the beginning of any meeting the Chair remind all the members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. If any member knows of a conflict of interest or potential conflict, please state so at this time.

Wednesday, February 18th

10:00 COASTAL RESOURCES ADVISORY COUNCIL MEETING (Atlantic-Hatteras Pamlico Rooms)

1:00 COMMISSION CALL TO ORDER* (Atlantic-Hatteras Pamlico Rooms) Frank Gorham, Chair

- Roll Call
- Chair's Comments

1:15 VARIANCES

- WineDucks, LLC (*CRC-VR-15-01*) Duck, 30' buffer Ron Renaldi, Christine Goebel
- US Life Saving Service, LLC (*CRC-VR-15-02*) Wrightsville Beach (tentative) Robb Mairs, Christine Goebel

1:45 ACTION ITEMS

- Adopt 15A NCAC 7K .0208 Single Family Residences Exempted
- §150B-21.3A - Periodic Review and Expiration of Existing Rules Jennifer Everett, DENR
- Periodic Review of 15A 7B CAMA Land Use Planning (*CRC-15-02*) Mike Lopazanski

2:15 CRC Rule Development

- State Ports Inlet Management AEC – Stakeholder Feedback Heather Coats
- Commission Discussion

3:15 BREAK

3:30 DCM Year in Review Braxton Davis

4:15 Sea-Level Rise Report – Update Tancred Miller

4:30 Presentation of Eure-Gardner Award to Bob Emory Frank Gorham, Chair

4:45 RECESS

Thursday, February 19th

9:00 COMMISSION CALL TO ORDER* (Atlantic-Hatteras Pamlico Rooms) Frank Gorham, Chair

- Roll Call
- Approval of December 17, 2014 Meeting Minutes Frank Gorham, Chair
- Executive Secretary's Report Braxton Davis
- Chairman's Comments Frank Gorham, Chair
- CRAC Report Debbie Smith, CRAC Chair

9:30 CRC Rule Development

- Static Vegetation Line Alternatives – Draft Rule Language (*CRC-15-01*) Commission Discussion Ken Richardson

11:00 BREAK

11:15 Sandbag Use for Beachfront Erosion Control

- Use of Sandbags for Temporary Erosion Control - Overview (*CRC-15-03*) Mike Lopazanski

- Inventory & Distribution of Temporary Erosion Control Structures

Ken Richardson

11:45 PUBLIC INPUT AND COMMENT

12:00 LUNCH

1:15 PUBLIC HEARING

- 15A NCAC 7H .1500 GP for Excavation of Upland Basins

Frank Gorham, Chair

1:30 Sandbag Use for Beachfront Erosion Control (continued)

- Temporary Erosion Control Structures Design Considerations
- Commission Discussion

Spencer Rogers

2:30 BREAK

2:45 OLD/NEW BUSINESS

Frank Gorham, Chair

3:00 CLOSED SESSION

- Ongoing Litigation Related to CAMA

3:30 ADJOURN

Executive Order 34 mandates that in transacting Commission business, each person appointed by the governor shall act always in the best interest of the public without regard for his or her financial interests. To this end, each appointee must recuse himself or herself from voting on any matter on which the appointee has a financial interest. Commissioners having a question about a conflict of interest or potential conflict should consult with the Chairman or legal counsel.

** Times indicated are only for guidance. The Commission will proceed through the agenda until completed.*



N.C. Division of Coastal Management

www.nccoastalmanagement.net

Next Meeting: April 29-30, 2015; Nags Head



State of North Carolina
Department of Justice

ROY COOPER
Attorney General

PO Box 629
Raleigh, North Carolina
27602

Reply to: Elizabeth Jill Weese
Environmental Division
Phone: (919) 716-6600
Fax: (919) 716-6767
jweese@ncdoj.gov

TO: Coastal Resources Commission

FROM: Elizabeth Jill Weese 
Assistant Attorney General

DATE: February 2, 2015 (for the February 18-19 CRC Meeting)

RE: **Variance Request by WineDucks, LLC (CRC-VR-15-01)**

Petitioner proposes to construct additions to an existing elevated wooden deck and to reposition an existing stairway leading to the deck on its property located in Duck, North Carolina. The Town of Duck Local Permit Officer denied the Petitioner's minor permit application because the proposed development was inconsistent with 15A NCAC 7H .0209(d)(10). The rule requires that new development within the Coastal Shoreline AEC must be located a distance of 30-feet landward of the normal high water level or normal water level ("Coastal Shoreline AEC buffer rule"), unless the proposed development meets an exception listed in 15A NCAC 07H.0209(d)(10)(A) through (J). For the reasons stated in Attachment C, Staff supports Petitioner's variance request.

The following additional information is attached to this memorandum:

Attachment A: Relevant Rules
Attachment B: Stipulated Facts
Attachment C: Petitioner's Positions and Staff's Response to Criteria
Attachment D: Stipulated Exhibits, including staff's Power Point presentation
Attachment E: Petitioner's Variance Request Materials

cc: Wyatt Booth, Esq., Attorney for Petitioner, electronically
Braxton Davis, DCM Director, electronically
Frank Jennings, DCM District Manager, electronically
Sandy Cross, Dare County LPO, electronically
Mary L. Lucasse, Special Deputy Attorney General, Counsel to CRC, electronically

RELEVANT RULES**ATTACHMENT A****15A NCAC 7H .0209****.0209 COASTAL SHORELINES**

(a) Description. The Coastal Shorelines category includes estuarine shorelines and public trust shorelines. Estuarine shorelines AEC are those non-ocean shorelines extending from the normal high water level or normal water level along the estuarine waters, estuaries, sounds, bays, fresh and brackish waters, and public trust areas as set forth in an agreement adopted by the Wildlife Resources Commission and the Department of Environment and Natural Resources [described in Rule .0206(a) of this Section] for a distance of 75 feet landward. For those estuarine shorelines immediately contiguous to waters classified as Outstanding Resource Waters by the Environmental Management Commission, the estuarine shoreline AEC shall extend to 575 feet landward from the normal high water level or normal water level, unless the Coastal Resources Commission establishes the boundary at a greater or lesser extent following required public hearing(s) within the affected county or counties. Public trust shorelines AEC are those non-ocean shorelines immediately contiguous to public trust areas, as defined in Rule 7H .0207(a) of this Section, located inland of the dividing line between coastal fishing waters and inland fishing waters as set forth in that agreement and extending 30 feet landward of the normal high water level or normal water level.

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

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

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in Paragraph (c) of this Rule. These uses shall be limited to those types of development activities that will not be detrimental to the public trust rights and the biological and physical functions of the estuarine and ocean system. Every effort shall be made by the permit applicant to avoid, mitigate or reduce adverse impacts of development to estuarine and coastal systems through the planning and design of the development project. In every instance, the particular location, use, and design characteristics shall

comply with the general use and specific use standards for coastal shorelines, and where applicable, the general use and specific use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section. Development shall be compatible with the following standards:

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

(A) Water-dependent uses as described in Rule 7H .0208(a)(1) of this Section;

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

(C) Post-or pile-supported fences;

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

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

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

...

Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-124;

STIPULATED FACTS

ATTACHMENT B

1. Petitioner, Wine Ducks, LLC, is a North Carolina limited liability company having a principal office address of 1174 Duck Road, Duck, North Carolina 27949. See Stipulated Exhibit #1.
2. Petitioner has owned a 0.815 acre parcel located at 1174 Duck Road in Duck, Dare County, North Carolina (“the Property”), since 2007. There is a single commercial structure on the Property, the first floor of which is a restaurant known as Aqua Restaurant (the “Restaurant”) owned and operated by Aqua S, LLC and the second floor of which is a spa facility known as Aqua Spa (the “Spa”) owned and operated by Aqua S Spa, LLC.
3. The Restaurant and Spa have operated on the Property since 2007 and are situated along the shoreline adjacent to the estuarine waters of the Currituck Sound.
4. The Property lies within the Coastal Shoreline Area of Environmental Concern (“AEC”) which extends 75 feet landward from the normal high water level.
5. Since August 1, 2000, new development within the Coastal Shoreline AEC is required to be located a distance of 30-feet landward of the normal high water level or normal water level (“Coastal Shoreline AEC buffer rule”), unless the proposed development meets an exception listed in 15A NCAC 07H.0209(d)(10)(A) through (J).
6. During the summer of 2014, the Town of Duck completed a sound front boardwalk project (“the Boardwalk”). The southern terminus of the Boardwalk and its appurtenant parking area are adjacent to and contiguous with the Property.
7. The existing structure on the property that houses the Restaurant and Spa, and the slatted wooden decking appurtenant thereto, were all constructed prior to implementation of the 30-foot Coastal Shoreline AEC buffer rule, and also predate the Town of Duck Boardwalk and its appurtenant parking. As currently built, there is an approximately six (6) foot wide gap between the northern appurtenant deck and the building itself. The current stairs leading down from the existing decking to the shoreline are oriented east to west. At the bottom of the existing stairs, there is an existing decorative wooden wall/bulkhead that does not serve as a functional retaining wall or bulkhead.

8. On November 24, 2014, Petitioner, through its agent Quible & Associates, P.C., applied for a CAMA Minor Permit to add an additional 251 square feet of elevated slatted wooden decking and to replace the existing stairs. Of the 251 square feet of proposed decking, 137 square feet are within the 30-foot vegetative buffer. The application also requested the addition of a 158 square foot sound front deck but the Petitioner is not seeking a Variance for construction of this deck and has removed it from the proposal. Furthermore, in this Variance Petition, Petitioner has reoriented the proposed replacement stairs to run in a north to south configuration. See Stipulated Exhibits 2, 3 and 4.
9. The proposed development does not meet the exception criteria set forth in 15A NCAC 7H.0209(d)(10) because the proposed decking and the existing decking exceeds 200 total square feet.
10. Notice was given to the adjacent owners and to the general public of the proposed development. No objections to the proposed development were received. See Attachment E, Petitioner's Variance Request Materials.
11. On December 2, 2014, the Town of Duck Local Permit Officer (LPO) denied Petitioner's application based on the proposed development being inconsistent with NCAC 7H.0209(d)(10). See Attachment E, Petitioner's Variance Request Materials.
12. On January 6, 2015, Petitioner submitted its Variance Petition to construct the proposed development to the Division of Coastal Management (DCM).

ATTACHMENT C

PETITIONER'S AND STAFF'S RESPONSE TO VARIANCE CRITERIA

- I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.**

Petitioner's RESPONSE: Yes.

Rule 15A NCAC 07H.0209 is designed to protect the public trust rights and the biological and physical functions of the estuarine systems in the Coastal Shoreline AEC. While there are exceptions to the rule, the proposed development does not fall within the 200 square foot exemption for decking as the existing decking on the Property is already in excess of the 200 square foot limit. However, the proposed decking is pervious and should allow all rainwater to pass through to the bare ground underneath, with negligible resultant impact on runoff on the Property.

Furthermore, the Petitioner has serious safety and ingress/egress concerns as they relate to the existing decking. There is an approximate 6-foot gap between a current portion of the existing deck and the building. Patrons and members of the general public often use the railing on this portion of the existing deck to enjoy watching the sunset or to listen to music from performers on the deck from time to time. Petitioner is concerned that the gap creates a serious fall hazard and would like to close this opening to eliminate the hazard. Additionally, the current configuration of the stairs and upper decking creates a choke point both at the top and the bottom. The additional proposed decking at the top of the stairs, as well as the reorientation of the stairs themselves, will ease congestion at both the top and the bottom, and direct foot traffic down and away from the building in the case of an emergency.

As a result of the foregoing, strict application of the rule creates an unnecessary hardship in that it prevents safety optimization of the existing decking and creates no additional concentrations of stormwater runoff that would adversely impact the adjacent estuarine systems.

Staff's Position: Yes.

Staff agrees that strict application of the 30-foot buffer rule would cause Petitioner an unnecessary hardship. Rule 15A NCAC 7H .0209 applies to both estuarine shorelines AECs and public trust shorelines AECs. The overriding management objective of this Coastal Shorelines category is to ensure that shoreline development is compatible with the dynamic nature of coastal shorelines as well as the values and the management objectives of the estuarine and ocean system. Other management objectives are to conserve and manage the important natural features of the estuarine and ocean system so as to safeguard and perpetuate their biological, social, aesthetic, and economic values; to coordinate and establish a management system capable of conserving and utilizing these shorelines so as to maximize their benefits to the estuarine and ocean system and the people of North Carolina.

Pursuant to subsection (d) of this Rule, acceptable uses shall be those consistent with these management objectives and limited to those types of development activities that will not be detrimental to the public trust rights and the biological and physical functions of the estuarine and ocean system. One of ways these goals are accomplished is by limiting the construction of impervious surfaces and areas not allowing natural drainage. 15A NCAC 7H .0209(d)(2). Petitioner seeks to add decking in two areas of the existing deck and to reorient an existing stairway leading to the deck. While the additional decking will collectively exceed 200 square feet and thus “violate” the 30 foot buffer rule, its surface is pervious, allowing rainfall to pass through to the ground. The increase in overall amount of pervious decking would likely result in only a minimal increase in runoff from the property. Also, as Petitioner points out, there is a legitimate safety concern in the area where railings surrounding an existing gap in the decking are used by the public as seating. The congestion at the top and bottom of the stairs is not only an inconvenience, but a potential safety issue as well. Orienting the stairway away from the building and adding decking at the top landing are reasonable ways of addressing these concerns with a minimum of new development.

II. Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.

Petitioner's RESPONSE: Yes.

The proposed development, and the resultant hardship created by the Permit denial, is dictated entirely by the current configuration of the decking, as well as the logical ingress and egress to and from the adjacent parking lot and Town of Duck Boardwalk. Furthermore, the existing structures were built prior to the implementation of the current 30-foot vegetative buffer rules, and the location and size of the existing structure is both the cause of the hardship and entirely peculiar to this Property.

Staff's Position: No.

Staff does not agree that the hardship results from conditions peculiar to this property because the condition of being within the 30-foot buffer is typical of many properties located within the Estuarine Shoreline AEC along North Carolina's coast.

III. Do the hardships result from actions taken by the petitioner? Explain.

Petitioner's RESPONSE: No.

The hardship does not result from actions taken by the Petitioner. The structures on the Property were built by the Petitioner's predecessor in title, and predate both the CAMA 30-foot vegetative buffer rule and the Town of Duck's construction of its soundfront Boardwalk. The Petitioner did not create the hardship and seeks to mitigate safety concerns on the Property. Petitioner contends that the proposed development is the most reasonable and practical solution to the identified concerns.

Staff's Position: No.

Staff agrees that the hardship does not result from actions taken by the Petitioner. The building and existing decking were built before the 30-foot buffer rule was enacted. It appears to staff that Petitioner has limited the proposed new development to address valid safety and convenience concerns.

- IV. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.**

Petitioner's RESPONSE: Yes.

The variance requested will be consistent with the spirit, purpose, and intent of the rules and orders of the Commission. The proposed development will be essentially pervious, and will not create any additional measurable impact on the adjacent estuarine systems. Furthermore, public safety and welfare will be enhanced in that identified safety concerns will be mitigated and/or eliminated by the proposed development. Finally, substantial justice will be preserved in that there have been no objections to the proposed development from neighboring owners, the public's interests in the Coastal Shoreline AEC will not be impacted, and the proposed development will enhance public safety and welfare.

Staff's Position: Yes.

Staff agrees that the variance requested by Petitioner will be consistent with the spirit, purpose, and intent of the rules or orders of the Commission; will secure public safety and welfare; and will preserve substantial justice. Since the denial of its CAMA permit application, Petitioner has scaled back its development plan by eliminating a 158 square-foot ground-level, soundfront deck. By removing the ground-level deck, Petitioner has reduced by approximately one-third the amount of additional decking that would be within the buffer. This variance request is limited to additional elevated wooden decking in two areas and to the replacement of (and reorienting away from the sound) an existing stairway used to access the deck. As discussed above, the additional decking and reorientation of the stairway are at least partially motivated by legitimate public safety concerns. For a relatively minor increase in total decking, both of these concerns could be resolved. For these reasons, granting this variance request would preserve substantial justice.

ATTACHMENT D

STIPULATED EXHIBITS

1. Copy of Secretary of State's Website Page regarding Wine Ducks, LLC; 1 page
2. CAMA Minor Permit survey dated 11/20/2014; 1 page
3. Revised survey dated 12/18/2014; 1 page
4. As-Built Survey of the Property dated 11/14/14; 1 page
5. Site photos (DCM Staff Powerpoint—9 slides).



Elaine F. Marshall
Secretary

North Carolina

**DEPARTMENT OF THE
SECRETARY OF STATE**

PO Box 29822 Raleigh, NC 27626-0622 (919)807-2000

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Date: 1/5/2015

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Corporation Names

Name	Name Type
NC WINE DUCKS, LLC	LEGAL
NC WINEDUCK LLC	PREV LEGAL

Limited Liability Company Information

SOSID:	1001127
Status:	Current-Active
Effective Date:	9/14/2007
Citizenship:	DOMESTIC
State of Inc.:	NC
Duration:	PERPETUAL
Annual Report Status:	CURRENT

Registered Agent

Agent Name:	VB BUSINESS SERVICES, LLC
Office Address:	TWO HANOVER SQUARE, SUITE 2000 434 FAYETTEVILLE STREET MALL RALEIGH NC 27602-2599
Mailing Address:	PO BOX 2599 RALEIGH NC 27602-2599

Principal Office

Office Address:	1174 DUCK RD. DUCK NC 27949
Mailing Address:	1174 DUCK RD. DUCK NC 27949

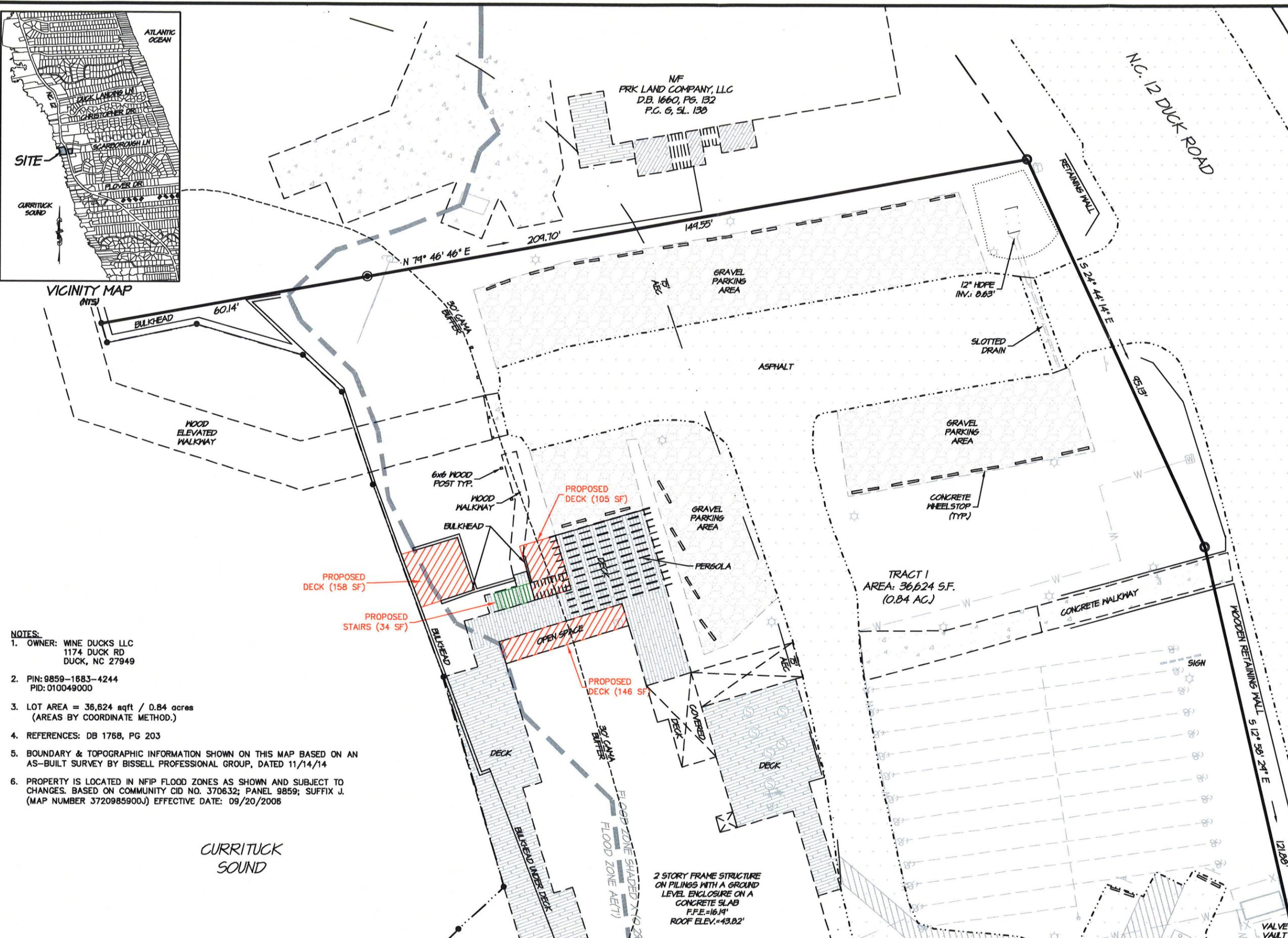
Officers/Company Officials

Title:	MANAGER
Name:	WESTERLUND ASSOCIATES LLC
Business Address:	3702 FAIRWAYS CRT. FREDERICKSBURG VA 22408
Title:	MANAGER
Name:	SUMNER LLC
Business Address:	105 CHICAHAWK TR. KITTY HAWK NC 27949

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VICINITY MAP (NTS)



- NOTES:**
- OWNER: WINE DUCKS LLC
1174 DUCK RD
DUCK, NC 27949
 - PIN: 9859-1683-4244
PID: 010049000
 - LOT AREA = 36,624 sqft / 0.84 acres
(AREAS BY COORDINATE METHOD.)
 - REFERENCES: DB 1768, PG 203
 - BOUNDARY & TOPOGRAPHIC INFORMATION SHOWN ON THIS MAP BASED ON AN AS-BUILT SURVEY BY BISSELL PROFESSIONAL GROUP, DATED 11/14/14
 - PROPERTY IS LOCATED IN NFIP FLOOD ZONES AS SHOWN AND SUBJECT TO CHANGES. BASED ON COMMUNITY CID NO. 370632; PANEL 9859; SUFFIX J. (MAP NUMBER 3720985900J) EFFECTIVE DATE: 09/20/2006

CURRITUCK SOUND

2 STORY FRAME STRUCTURE ON PILINGS WITH A GROUND LEVEL ENCLOSURE ON A CONCRETE SLAB
F.F.E.=16.14'
ROOF ELEV.=43.02'

Quible & Associates, P.C. SINCE 1959
ENGINEERING * CONSULTING * PLANNING
ENVIRONMENTAL SCIENCES * SURVEYING
NC License#: C-0208
PO Drawer 870, Kitty Hawk, NC 27949
Phone: (252) 491-8147
Fax: (252) 491-8146
E-Mail: administrator@quible.com

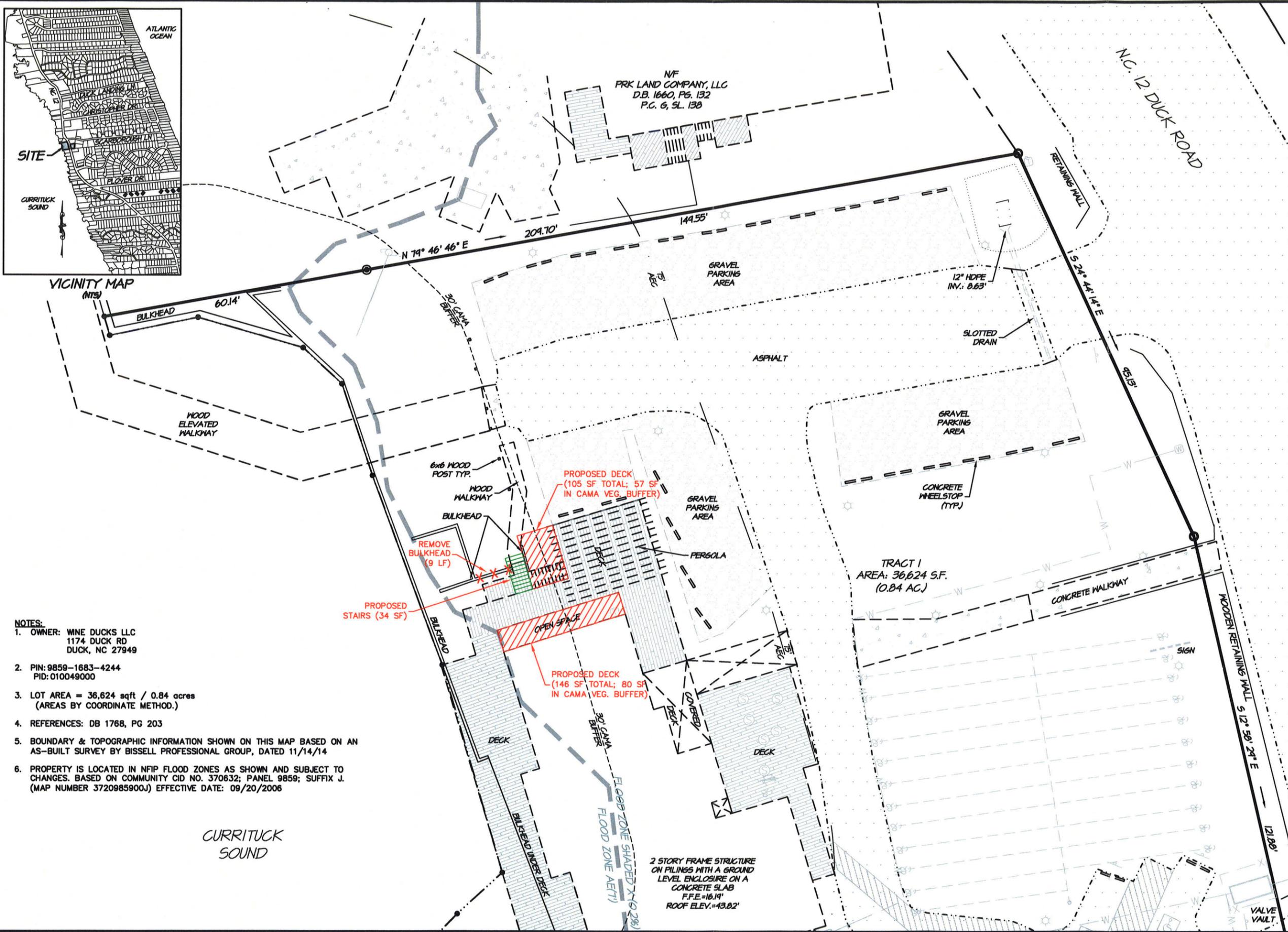
PRELIMINARY FOR CAMA PERMITTING ONLY

CAMA MINOR PLAN
AQUA RESTAURANT & SPA WINE DUCKS, LLC
TOWN OF DUCK
DARE COUNTY
ATLANTIC TOWNSHIP
NORTH CAROLINA
SCALE 1X
SCALE 2X
GRAPHIC SCALE IN FEET 1"=SCALE 1X

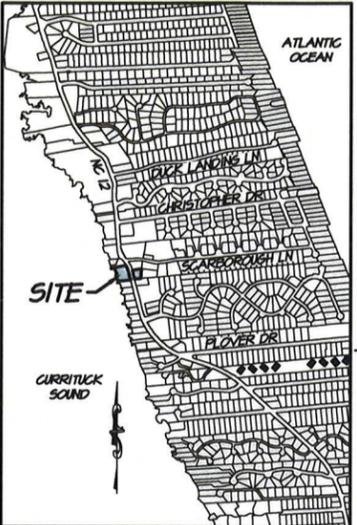
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PROJECT	P14116
DRAWN BY	JMH
CHECKED BY	BDR
DATE	11/20/14

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- NOTES:**
- OWNER: WINE DUCKS LLC
1174 DUCK RD
DUCK, NC 27949
 - PIN: 9859-1683-4244
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Quible & Associates, P.C.
SINCE 1959
ENGINEERING * CONSULTING * PLANNING
ENVIRONMENTAL SCIENCES * SURVEYING
NC License#: C-0208
PO Drawer 870, Kitty Hawk, NC 27949
Phone: (252) 491-8147
Fax: (252) 491-8146
E-Mail: administrator@quible.com

PRELIMINARY FOR CMA PERMITTING ONLY

CAMA MINOR PLAN #2
AQUA RESTAURANT & SPA WINE DUCKS, LLC
ATLANTIC TOWNSHIP
DARE COUNTY NORTH CAROLINA
TOWN OF DUCK
SCALE 1X
SCALE 2X
GRAPHIC SCALE IN FEET 1"=SCALE 1X

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PROJECT: P14116
DRAWN BY: JMH
CHECKED BY: BDR
DATE: 12/18/14

Wine Ducks L.L.C. Variance

Duck, NC



Aqua Restaurant

(2013 Aerial Photo)



Aqua Restaurant

(Photo Date: 01/16/2015)



Located At South End of The Town of Duck Boardwalk

(Photo Date: 01/16/2015)



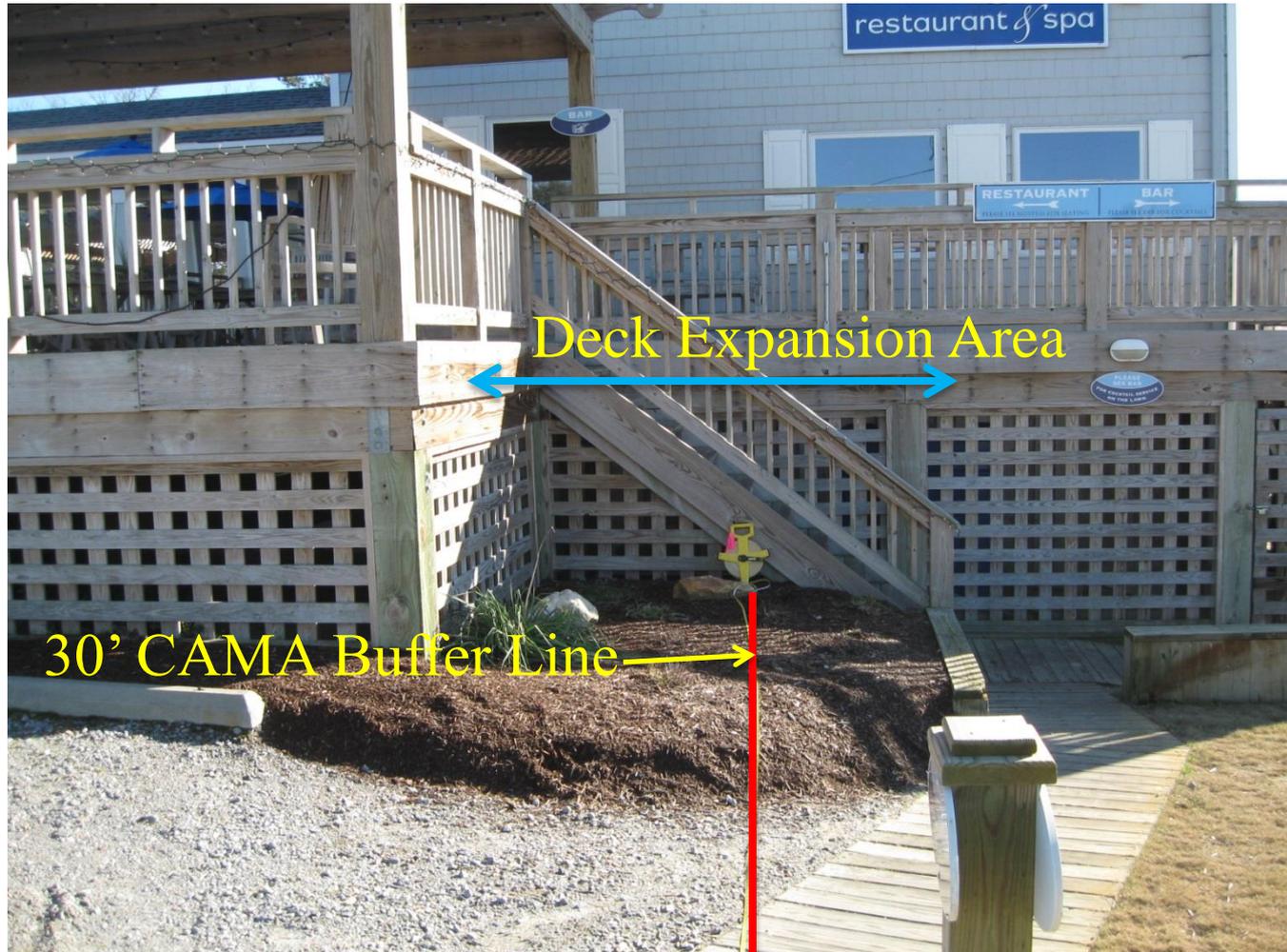
Proposed Development Area

(Photo Date: 01/16/2015)



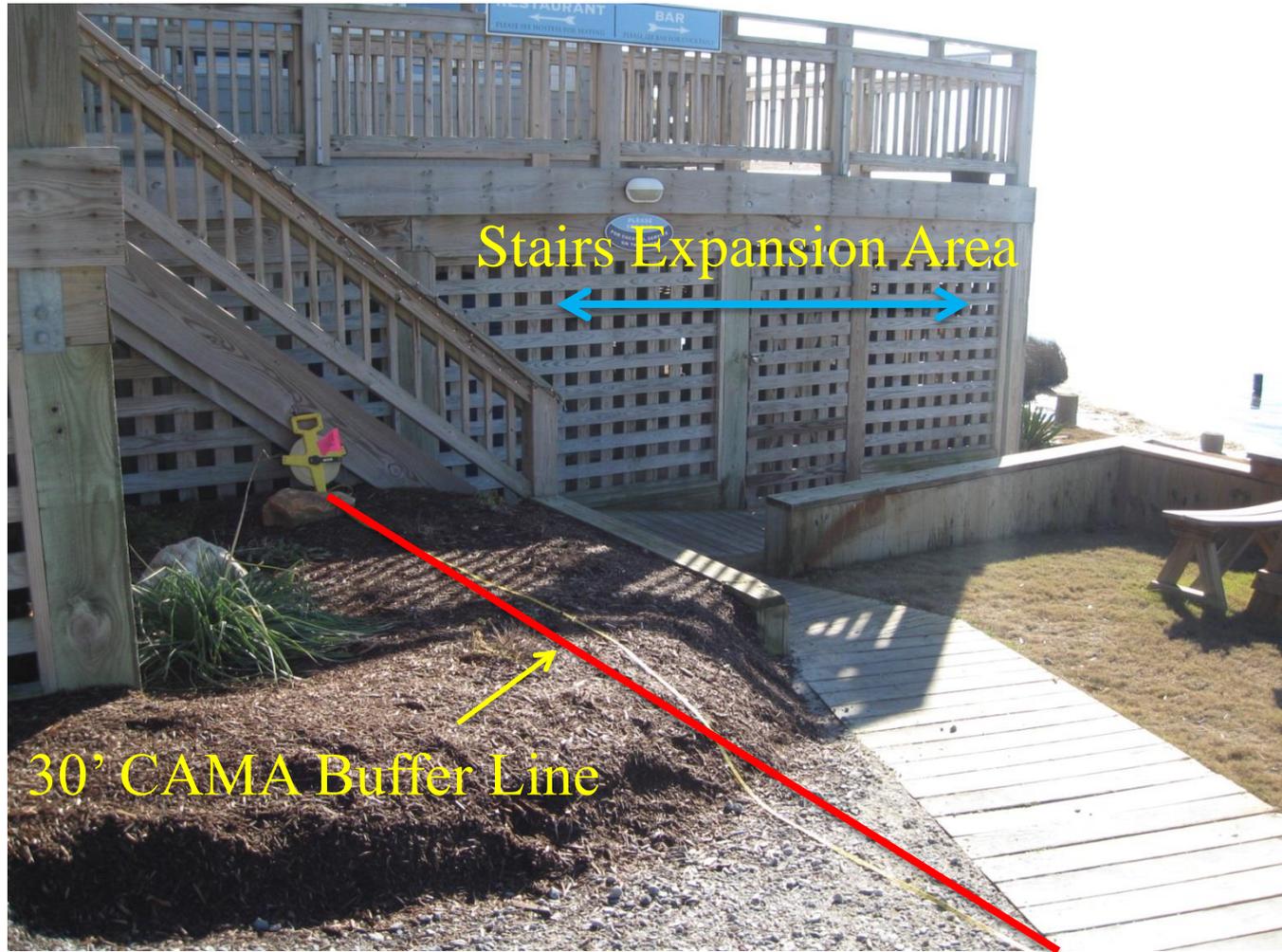
Proposed Development Area

(Photo Date: 01/16/2015)



Proposed Development Area

(Photo Date: 01/16/2015)



Proposed Development Area

(Photo Date: 01/16/2015)



Proposed Development Area

(Photo Date: 01/16/2015)



ATTACHMENT E

PETITIONER'S VARIANCE REQUEST

(PROPOSED FACTS AND PROPOSED EXHIBITS OMITTED)

STATE OF NORTH CAROLINA)	BEFORE THE NORTH CAROLINA
)	COASTAL RESOURCES COMMISSION
COUNTY OF DARE)	CRC-VR-_____
)	
)	
IN THE MATTER OF:)	
PETITION FOR VARIANCE)	VARIANCE PETITION
BY WINE DUCKS, LLC)	
)	

NOW COMES the Petitioner Wine Ducks, LLC, by and through counsel, and hereby petitions the Coastal Resources Commission (“the Commission”) for a variance from CAMA guidelines.

In support of this Petition, the Petitioner shows the Commission as follows:

1. The name and location of the development as identified on the permit application.

Wine Ducks, LLC
Application Number: D-2014-286
Project Address: 1174 Duck Road, Duck, Dare County, North Carolina

2. A copy of the permit decision for the development in question.

See attached Exhibit “A”. Blank CAMA appeal and variance forms omitted.

3. A copy of the deed to the property on which the proposed development would be located.

See attached Exhibit “B”.

4. A complete description of the proposed development including a site plan.

The subject property consists of two parcels (one soundfront and one on the west side of NC 12) in the Town of Duck, Dare County, North Carolina. The existing conditions are presented on the current As-Built Survey by Bissell Professional Group. This is a commercially developed and zoned property that contains Aqua Restaurant and Spa in downtown Duck. This property also includes the southern terminus of the Town of Duck elevated boardwalk that runs along the soundside along the downtown area. It should be noted that this downtown area essentially functions as an Urban Waterfront, but it is not designated as one at this time.

The proposed project includes expansion of an existing open elevated slotted deck and relocation of the existing access stairway as shown on the current plan dated

12/18/2014. A CAMA minor application package was submitted to the Town of Duck on 11/24/2014 (associated plan dated 11/20/2014) for the proposed expansion as well as an additional deck proposed at ground level (158 sq.ft.). This permit request was denied for reasons cited in the 12/02/2014 letter from Sandy Cross, Town of Duck LPO. Prior to submitting a permit and/or variance request, an on-site meeting was held on 10/15/2014 with Sandy Cross (Duck LPO), Joe Heard (Duck Planning Director), Judy Fisher (Aqua GM) and Brian Rubino (Quible & Associates, P.C.) to discuss the CAMA variance process. It was understood that the proposed project could not be permitted at this time due to buffer zone regulations and that a CAMA variance request was the most logical step to being able to permit. A similar variance that was granted at Blue Point Restaurant in Duck was also discussed with the Town by request of Mr. Rubino. Since permit denial, the owner has decided to pursue a variance request for elevated deck expansion and the relocation of the existing access stairway (34 sq.ft.) only and does not request the additional ground level deck that was similarly denied. In addition, the proposed stairway relocation has been rotated 90 degrees to further minimize buffer zone encroachment towards the sound. Of the 251 sq.ft. of decking proposed at this time, only 137 sq.ft. (57 sq.ft and 80 sq.ft.) is within the CAMA 30 ft buffer zone. On the enclosed plan, the proposed expansion areas are depicted in red and the stairway relocation is depicted in green.

It is important to note that the existing ground condition in the area of the deck expansion beside the building is bare sand and does not support vegetative growth due to its' location adjacent to the building, including excessive shade and kitchen employee foot traffic. All other portions of the building and associated decking located in the CAMA 30 ft buffer has been in place prior to implementation of the buffer rules.

5. A stipulation that the proposed development is inconsistent with the rule at issue.

The Petitioner stipulates that the proposed development is inconsistent with 15 NCAC 7H 0209 (d)(10)(F).

6. Proof that notice was sent to adjacent owners and objectors*, as required by 15A N.C.A.C. 07J .0701(c)(7).

See attached Exhibit "C". No objections to the proposed CAMA Minor Permit application by Petitioner were received.

7. Proof that a variance was sought from the local government per 15A N.C.A.C. 07J .0701(a), if applicable.

The proposed project is does not conflict with the current Town of Duck Zoning Ordinance, and therefore no variance from local government has been sought or is required.

8. Petitioner's written reasons and arguments about why the Petitioner meets the four variance criteria:

- a. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.

RESPONSE: Rule 15A NCAC 07H.0209 is designed to protect the public trust rights and the biological and physical functions of the estuarine systems in the Coastal Shoreline AEC. While there are exceptions to the rule, the proposed development does not fall within the 200 square foot exemption for decking as the existing decking on the Property is already in excess of the 200 square foot limit. However, the proposed decking is pervious and should allow all rainwater to pass through to the bare ground underneath, with negligible resultant impact on runoff on the Property.

Furthermore, the Petitioner has serious safety and ingress/egress concerns as they relate to the existing decking. There is an approximate 6-foot gap between a current portion of the existing deck and the building. Patrons and members of the general public often use the railing on this portion of the existing deck to enjoy watching the sunset or to listen to music from performers on the deck from time to time. Petitioner is concerned that the gap creates a serious fall hazard and would like to close this opening to eliminate the hazard. Additionally, the current configuration of the stairs and upper decking creates a choke point both at the top and the bottom. The additional proposed decking at the top of the stairs, as well as the reorientation of the stairs themselves, will ease congestion at both the top and the bottom, and direct foot traffic down and away from the building in the case of an emergency.

As a result of the foregoing, strict application of the rule creates an unnecessary hardship in that it prevents safety optimization of the existing decking and creates no additional concentrations of stormwater runoff that would adversely impact the adjacent estuarine systems.

- b. Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.

RESPONSE: The proposed development, and the resultant hardship created by the Permit denial, is dictated entirely by the current configuration of the decking, as well as the logical ingress and egress to and from the adjacent parking lot and Town of Duck Boardwalk. Furthermore, the existing structures were built prior to the implementation of the current 30-foot vegetative buffer rules, and the location and size of the existing structure is both the cause of the hardship and entirely peculiar to this Property.

c. Do the hardships result from actions taken by the petitioner? Explain.

RESPONSE: The hardship does not result from actions taken by the Petitioner. The structures on the Property were built by the Petitioner's predecessor in title, and predate both the CAMA 30-foot vegetative buffer rule and the Town of Duck's construction of its soundfront Boardwalk. The Petitioner did not create the hardship and seeks to mitigate safety concerns on the Property. Petitioner contends that the proposed development is the most reasonable and practical solution to the identified concerns.

d. Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.

RESPONSE: The variance requested will be consistent with the spirit, purpose, and intent of the rules and orders of the Commission. The proposed development will be essentially pervious, and will not create any additional measurable impact on the adjacent estuarine systems. Furthermore, public safety and welfare will be enhanced in that identified safety concerns will be mitigated and/or eliminated by the proposed development. Finally, substantial justice will be preserved in that there have been no objections to the proposed development from neighboring owners, the public's interests in the Coastal Shoreline AEC will not be impacted, and the proposed development will enhance public safety and welfare.

9. A draft set of proposed stipulated facts and stipulated exhibits. Please make these verifiable facts free from argument. Arguments or characterizations about the facts should be included in the written responses to the four variance criteria instead of being included in the facts.

See attached Exhibit "D".

10. This form completed, dated, and signed by the Petitioner or Petitioner's Attorney.

This the 6th day of January, 2015.


Wyatt M. Booth
N.C. State Bar No.: 28246
VANDEVENTER BLACK LLP
P.O. Box 2599
Raleigh, NC 27602-2599

Telephone: (919) 754-1171
Facsimile: (919) 754-1317
Email: nshear@vanblk.com
Attorney for Petitioner Wine Ducks LLC

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing VARIANCE APPLICATION upon the parties by the methods indicated below:

Braxton Davis, Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557
Via Federal Express
Adult Signature Required and
Facsimile (252) 247-3330

Roy Cooper
Attorney General
114 W. Edenton Street
Raleigh, NC 27603
Via Federal Express
Adult Signature Required and
Facsimile (919) 716-6767

SOZO, LLC
c/o Louis G. Paulson
1432 North Great Neck Rd, Suite 101
Virginia Beach, VA 23454
Via Federal Express
Adult Signature Required

Albrecht and Josephine Heyder
706 Small Drive
Elizabeth City, NC 27909
Via Federal Express
Adult Signature Required

This the 6th day of January, 2015.

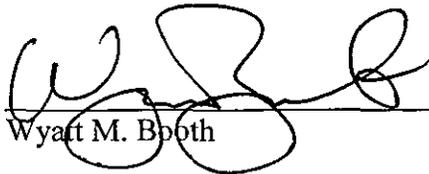

Wyatt M. Booth

Exhibit "A"



December 2, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Wine Ducks, LLC
c/o Judy Fisher, GM, Aqua Restaurant
1174 Duck Road
Duck, NC 27949

RE: DENIAL OF CAMA MINOR DEVELOPMENT PERMIT
APPLICATION NUMBER- D-2014-286
PROJECT ADDRESS- 1174 Duck Road

Dear Ms. Fisher:

After reviewing your application in conjunction with the development standards required by the Coastal Area Management Act (CAMA) and our locally adopted Land Use Plan and Ordinances, it is my determination that no permit may be granted for the project which you have proposed.

This decision is based on my findings that your request violates NCGS 113A-120(a)(8) which requires that all applications be denied which are inconsistent with CAMA guidelines. You have applied to construct a 409 square foot deck and stair addition partially within the 30' CAMA Buffer at 1174 Duck Road. Your property currently has 1,589 square feet of decking within the buffer. Your request to add additional decking would be inconsistent with 15 NCAC 7H 0209 (d)(10)(F), which states that *within the Coastal Shorelines category (estuarine and public trust shoreline AECs), new development shall be located a distance of 30 feet landward of the normal water level or normal high water level, with the exception of decks/observation decks limited to slatted, wooden, elevated and unroofed decks that shall not singularly or collectively exceed 200 square feet.*

As per our conversations regarding your application, you have the right to appeal my decision to the Coastal Resource Commission (CRC) or request a variance from that group. I am therefore, attaching the proper forms and other information you may require to pursue either option. You may also find information regarding these two options and the associated forms on the Division of Coastal Management website at <http://www.nccoastalmanagement.net/web/cm/90>.

Please note that a petition for variance must be received six (6) weeks before the next scheduled CRC meeting for it to be eligible to be heard at that meeting. The next scheduled meeting that would allow you enough time to submit your request would be February 18-19, 2015, location to be announced. You can also follow the meeting schedule online at <http://www.nccoastalmanagement.net/web/cm/90>. If your plan is to appeal my decision, the Division of Coastal Management in Raleigh must receive appeal notices within twenty (20) days of the date of this letter in order to be considered.

P. O. Box 8369 • Duck, North Carolina 27949
252-255-1234 • 252-255-1236 (fax) • www.townofduck.com

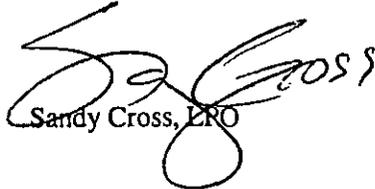
APPLICATION NUMBER- D-2014-286

PROJECT ADDRESS- 1174 Duck Road

December 2, 2014

Page 2

Respectfully yours,



Sandy Cross, ERO

Encl.

cc: Joe Heard, Town of Duck Director of Community Development
Ron Renaldi, Field Representative DCM
1367 US 17 South, Elizabeth City, NC 27909
Brian Rubino, Quible & Associates, P.C.

Exhibit “B”

UNOFFICIAL

Filed Book: 1752 Page: 415 Doc Id: 6232848
12/20/2007 04:41PM Receipt #: 197719
Doc Code: DEED NC Excise Tax pd: \$4400.00
BARBARA H GRAY, REGISTER OF DEEDS DARE CO, NC

DARE COUNTY REAL ESTATE TRANSFER TAX



LT 5033-07 \$22,000.00

6232848 Page: 1 of 2 12/20/2007 04:41P

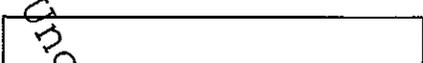
Land Transfer No: 5033-07 Recording Time, Book and Page
Excise Tax: \$4400.00
Land Transfer Tax: \$22,000.00

NORTH CAROLINA GENERAL WARRANTY DEED

Tax Lot No. _____ Parcel Identifier No. 010049000
Verified by _____ County on the _____ day of _____
by _____

Mail after recording to: Vandevanter Black LLP, P.O. Box 2, Kitty Hawk, NC 27949
This instrument was prepared by: Daniel D. Khoury, Esquire, Vandevanter Black LLP File Number: 326180001

Brief Description for the index



THIS DEED made this 8th day of November, 2007

GRANTOR	GRANTEE
LARRY M. HERRON and wife, DEBRA A. HERRON and RICHARD A. HERRON and wife, MARJORIE NANCY HERRON	WINE DUCKS LLC a North Carolina limited liability company 855 Herbert Perry Road Kitty Hawk, NC 27949

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g., corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the Town of Duck, Atlantic Township, Dare County, North Carolina and more particularly described as follows:

Beginning at an existing right of way concrete monument, said existing right of way concrete monument being located in and on the Western edge of the 60 foot right of way of N.C.S.R. 1200 known as "Duck Road", said right of way concrete monument being located where the Northernmost property line of that lot or parcel of land now or formerly owned by Eva R. Gard intersects the Western edge of the aforesaid right of way, said beginning point further being located North 89 deg. 45 min. 00 sec. West 62.89 feet from a concrete monument; thence from said beginning point along the Northern property line of that lot or parcel of land now or formerly owned by Eva R. Gard North 87 deg. 30 min. 00 sec. West 109.57 feet to a concrete monument; thence continuing North 87 deg. 30 min. 00 sec. West 62.90 feet to a concrete monument; thence continuing North 87 deg. 30 min. 00 sec. West 20 feet, more or less, to the mean highwater mark of the Currituck Sound; thence following the various meanderings of the mean highwater mark of the Currituck Sound in a generally Northernly direction to a point, said shoreline following the approximation of the following calls: North 35 deg. 54 min. 52 sec. West 47.03 feet to a point; North 00 deg. 56 min. 51 sec. East 159.68 feet to a point, said point being located on a certain wooden bulkhead which is the Southern property line of the lot or parcel of land now or formerly owned by L.D. Scarborough; thence running along the Southern property line of that lot or parcel of land now or formerly owned by L.D. Scarborough North 87 deg. 57 min. 04 sec. East 30.1 feet more or less to an iron pin; thence continuing along the Southern property line of that lot or parcel of land now or formerly owned by L.D. Scarborough North 87 deg. 57 min. 04 sec. East 149.55 feet to an existing iron pin, said existing iron pin being located in and on the Western edge of the aforesaid right of way; thence turning and running along the Western edge of the aforesaid right of way South 16 deg. 33 min. 56 sec. East 95.13 feet to an iron rod; thence continuing along the Western edge of the aforesaid right of way South 04 deg. 58 min. 48 sec. East 121.85 feet to the point and place of beginning.

Reference is hereby made to that map or plat entitled in part "Survey for Richard A. & Marjorie N. Herron & Larry M. & Debra A. Herron, a parcel of land in Duck, Atlantic Township, Dare County, North Carolina" by Kirk R. Foreman Land Surveying Company dated January 11, 1994 for a more complete and concise description of the land being herein conveyed.

This conveyance is a part of a tax deferred exchange undertaken in accordance with Section 1031 of the Internal Revenue Code of 1996 as amended and the regulations issued thereunder.

The property hereinabove described was acquired by Grantor by instrument recorded in Book _____, Page _____, Dare County Registry.

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whatsoever except for the exceptions hereinafter stated.

Title to the property hereinabove described is subject to the following exceptions:

Residual covenants, reservations, restraints, easements, right of way agreements and any other reservations applicable thereto of record in Dare County Registry.

All zoning ordinances and other land regulations applicable thereto.

Ad valorem taxes subsequent to 2007.

IN WITNESS WHEREOF the Grantor has hereunto set his hand, or if corporate, has caused this instrument to be signed in its corporate name by its duly authorized officers by authority of its Board of Directors, the day and year first above written.

Richard A. Herron (SEAL)
Richard A. Herron

Marjorie Nancy Herron (SEAL)
Marjorie Nancy Herron

Larry M. Herron (SEAL)
Larry M. Herron

Debra A. Herron (SEAL)
Debra A. Herron

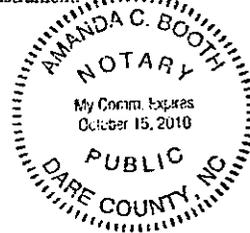
STATE OF NC
CITY/COUNTY OF Dare

I, the undersigned, a Notary Public of the County and State aforesaid, certify that Richard A. Herron and wife, Marjorie Nancy Herron, personally appeared before me this day and acknowledged the execution of the foregoing instrument.

Witness my hand and official stamp or seal, this the 3 day of December, 2007.

[Signature]
Notary Public

My commission expires: _____



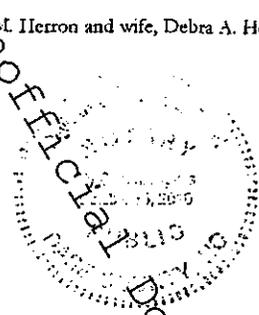
STATE OF NC
CITY/COUNTY OF Dare

I, the undersigned, a Notary Public of the County and State aforesaid, certify that Larry M. Herron and wife, Debra A. Herron, personally appeared before me this day and acknowledged the execution of the foregoing instrument.

Witness my hand and official stamp or seal, this the 3 day of December, 2007.

[Signature]
Notary Public

My commission expires: _____



6232848
Page: 2 of 2
12/20/2007 04:41P

Exhibit "C"

Quible

Quible & Associates, P.C.

ENGINEERING • ENVIRONMENTAL SCIENCES • PLANNING • SURVEYING
SINCE 1959

P.O. Drawer 870
Kitty Hawk, NC 27949
Phone: 252-261-3300
Fax: 252-261-1260
web: quible.com

November 24, 2014

Sandy Cross
Local Permit Officer for the Town of Duck
P.O. Box 8369
Duck, NC 27949

RE: CAMA Minor Permit Application
Aqua Restaurant and Spa

Ms. Cross:

Enclosed is the CAMA Minor submission for open deck improvements at Aqua Restaurant and Spa.

Enclosed is the following:

- \$100 Processing Fee Check and Photocopy
- CAMA Minor Application
- 2 copies of the Permit Plans (CAMA Plan and current as-built survey)
- Copies of letters sent to adjacent riparian land owners
- Photocopies of certified mail receipts

If you have any questions or if you need any additional information, please contact me at 252.261.3300 or at brubino@quible.com.

Sincerely,
Quible & Associates, P.C.



Brian Rubino

CC: Judy Fisher, GM, Aqua

RE: Agent Authorization for CAMA and Town Permitting
Aqua Restaurant and Spa

As property owner, I authorize Quible & Associates, P.C. to act as agent for the purpose
of Environmental and Town of Duck Permitting, including CAMA Permitting.



Authorized Signature

Name: Richard J. Westerland Date: 11/19/14

Locality _____ Permit Number _____

Ocean Hazard _____ Estuarine Shoreline _____ ORW Shoreline _____ Public Trust Shoreline _____ Other _____
(For official use only)

GENERAL INFORMATION

LAND OWNER

Name Wine Ducks, LLC

Address 1174 Duck Road

City Duck State NC Zip 27449 Phone 252.202.6774

Email judy@quadsbx.com

AUTHORIZED AGENT

Name Erion Rubino, Quible & Associates, P.C.

Address P.O. Drawer 870

City Kitty Hawk State NC Zip 27449 Phone 252.261.3100

Email brubino@quible.com

LOCATION OF PROJECT: (Address, street name and/or directions to site. If not oceanfront, what is the name of the adjacent waterbody?) Carroll's Sound
(1) Open area expansion: 409 sq. ft.

DESCRIPTION OF PROJECT: (List all proposed construction and land disturbance.) (2) relocate deck stairs

SIZE OF LOT/PARCEL: 36,624 square feet 0.84 acres

PROPOSED USE: Residential (Single-family) Multi-family Commercial/Industrial Other

COMPLETE EITHER (1) OR (2) BELOW (Contact your Local Permit Officer if you are not sure which AEC applies to your property):

(1) OCEAN HAZARD AEC: TOTAL FLOOR AREA OF PROPOSED STRUCTURE: _____ square feet (includes air conditioned living space, parking elevated above ground level, non-conditioned space elevated above ground level but excluding non-load-bearing attic space) N/A

(2) COASTAL SHORELINE AEC: SIZE OF BUILDING FOOTPRINT AND OTHER IMPERVIOUS OR BUILT UPON SURFACES: _____ square feet (includes the area of the roof/drip line of all buildings, driveways, covered decks, concrete or masonry patios, etc. that are within the applicable AEC. Attach your calculations with the project drawing.)
No new impervious surfaces proposed; open deck stairs only
STATE STORMWATER MANAGEMENT PERMIT: Is the project located in an area subject to a State Stormwater Management Permit issued by the NC Division of Water Quality?
YES NO

If yes, list the total built upon areas/impervious surface allowed for your lot or parcel: _____ square feet.

OTHER PERMITS MAY BE REQUIRED: The activity you are planning may require permits other than the CAMA minor development permit, including, but not limited to: Drinking Water Well, Septic Tank (or other sanitary waste treatment system), Building, Electrical, Plumbing, Heating and Air Conditioning, Installation and Energy Conservation, FIA Certification, Sand Dune, Sediment Control, Subdivision Approval, Mobile Home Park Approval, Highway Connection, and others. Check with your Local Permit Officer for more information.

STATEMENT OF OWNERSHIP:

I, the undersigned, an applicant for a CAMA minor development permit, being either the owner of property in an AEC or a person authorized to act as an agent for purposes of applying for a CAMA minor development permit, certify that the person listed as landowner on this application has a significant interest in the real property described therein. This interest can be described as: (check one)

I am owner or record title. Title is vested in Wine Ducks, LLC, see Deed Book 1768 page 203 in the _____ County Registry of Deeds.

I am owner by virtue of inheritance. Applicant is an heir to the estate of _____; probate was in _____ County.

I have other interest, such as written contract or lease, explain below or use a separate sheet & attach to this application.

NOTIFICATION OF ADJACENT PROPERTY OWNERS:

I furthermore certify that the following persons are owners of properties adjoining this property. I affirm that I have given ACTUAL NOTICE to each of them concerning my intent to develop this property and to apply for a CAMA permit.

- (1) S&D LLC 1077 Boblink Dr. Virginia Beach VA 23451 (Name) (Address)
- (2) Abrecht and Josephine Hylander 706 Small Dr. Elizabeth City NC 27909
- (3) _____
- (4) _____

ACKNOWLEDGEMENTS:

I, the undersigned, acknowledge that the land owner is aware that the proposed development is planned for an area which may be susceptible to erosion and/or flooding. I acknowledge that the Local Permit Officer has explained to me the particular hazard problems associated with this lot. This explanation was accompanied by recommendations concerning stabilization and floodproofing techniques.

I furthermore certify that I am authorized to grant, and do in fact grant, permission to Division of Coastal Management staff, the Local Permit Officer and their agents to enter on the aforementioned lands in connection with evaluating information related to this permit application.

This the 24TH day of NOV, 2014

Erion Rubino Erion Rubino, Quible & Associates, P.C. - AGENT
Landowner or person authorized to act as his/her agent for purpose of filing a CAMA permit application

This application includes: general information (this form), a site drawing as described on the back of this application, the ownership statement, the Ocean Hazard AEC Notice where necessary, a check for \$100.00 made payable to the locality, and any information as may be provided orally by the applicant. The details of the application as described by these sources are incorporated without reference in any permit which may be issued. Deviation from these details will constitute a violation of any permit. Any person developing in an AEC without permit is subject to civil, criminal and administrative action.

7013 1710 0000 2879 3915

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

ELIZABETH CITY NC 27709
OFFICIAL USE

14116	Postage	\$ 0.70	\$0.70
	Certified Fee	3.30	\$3.30
	Return Receipt Fee (Endorsement Required)	2.70	\$2.70
	Restricted Delivery Fee (Endorsement Required)		\$0.00
Total Postage & Fees		\$ 6.70	\$6.70

0449
 01
 KITT HAWK NC
 11/26/2014

Sent to: Ribeiro, Josephine Snyder
 Street, Apt. No.,
 or PO Box No. 706 Small Office
 City, State, ZIP+4 Elizabeth, NC 27709

PS Form 3800, August 2006 See Reverse for Instructions

7013 1710 0000 2879 3908

U.S. Postal Service
CERTIFIED MAIL RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

VIRGINIA BEACH VA 23451
OFFICIAL USE

14116	Postage	\$ 0.70	\$0.70
	Certified Fee	3.30	\$3.30
	Return Receipt Fee (Endorsement Required)	2.70	\$2.70
	Restricted Delivery Fee (Endorsement Required)		\$0.00
Total Postage & Fees		\$ 6.70	\$6.70

0449
 01
 KITT HAWK NC
 11/26/2014

Sent to: SOZO, LLC
 Street, Apt. No.,
 or PO Box No. 1237 Bobolink Drive
 City, State, ZIP+4 Virginia Beach VA 23451

PS Form 3800, August 2006 See Reverse for Instructions

Quible

Quible & Associates, P.C.

ENGINEERING • ENVIRONMENTAL SCIENCES • PLANNING • SURVEYING
SINCE 1959

P.O. Drawer 870
Kitty Hawk, NC 27949
Phone: 252-261-3300
Fax: 252-261-1260
web: quible.com

CERTIFIED MAIL

November 24, 2014

SOZO, LLC
1037 Bobolink Dr.
Virginia Beach, VA 23451

Sir/Madam:

This letter is to notify you, as an adjacent riparian landowner, that Quible & Associates, P.C., on behalf of the landowner, Wine Ducks, LLC (Aqua Restaurant and Spa), has applied for a CAMA Minor Permit for soundfront improvements associated with open decking expansion. Enclosed is a copy of the overall site plan with the proposed expansion work shown in color.

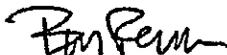
Should you have no objections to this proposal, please check the appropriate statement below, sign and date where indicated and return this letter, in the self-addressed envelope, as soon as possible.

If you have any questions or comments on the project as proposed, please contact Brian Rubino at 252.261.3300 or by mail at P.O. Drawer 870, Kitty Hawk, NC 27949. If you wish to file written comments or objections with the Town of Duck, you may submit them to:

Sandy Cross
Local Permit Officer for the Town of Duck
P.O. Box 8369
Duck, NC 27949

Written comments must be received within 14 days of receipt of this notice. Failure to respond within 14 days will be interpreted as no objection.

Sincerely,
Quible & Associates, P.C.


Brian Rubino

- [] I have no objection to the project as shown and hereby waive that right of objection.
[] I have objection to the project and have enclosed comments.

Signature

Date

Quible

Quible & Associates, P.C.

ENGINEERING • ENVIRONMENTAL SCIENCES • PLANNING • SURVEYING
SINCE 1959

P.O. Drawer 870
Kitty Hawk, NC 27949
Phone: 252-261-3300
Fax: 252-261-1260
web: quible.com

CERTIFIED MAIL

November 24, 2014

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1037 Bobolink Dr.
Virginia Beach, VA 23451

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Should you have no objections to this proposal, please check the appropriate statement below, sign and date where indicated and return this letter, in the self-addressed envelope, as soon as possible.

If you have any questions or comments on the project as proposed, please contact Brian Rubino at 252.261.3300 or by mail at P.O. Drawer 870, Kitty Hawk, NC 27949. If you wish to file written comments or objections with the Town of Duck, you may submit them to:

Sandy Cross
Local Permit Officer for the Town of Duck
P.O. Box 8369
Duck, NC 27949

Written comments must be received within 14 days of receipt of this notice. Failure to respond within 14 days will be interpreted as no objection.

Sincerely,
Quible & Associates, P.C.


Brian Rubino

I have no objection to the project as shown and hereby waive that right of objection.

I have objection to the project and have enclosed comments.


Signature

11-28-14
Date

Quible

Quible & Associates, P.C.

ENGINEERING • ENVIRONMENTAL SCIENCES • PLANNING • SURVEYING
SINCE 1959

P.O. Drawer 870
Kitty Hawk, NC 27949
Phone: 252-261-3300
Fax: 252-261-1260
web: quible.com

CERTIFIED MAIL

November 24, 2014

Albrecht and Josephine Heyder
706 Small Drive
Elizabeth City, NC 27909

Dear Dr. and Mrs. Heyder:

This letter is to notify you, as an adjacent riparian landowner, that Quible & Associates, P.C., on behalf of the landowner, Wine Ducks, LLC (Aqua Restaurant and Spa), has applied for a CAMA Minor Permit for soundfront improvements associated with open decking expansion. Enclosed is a copy of the overall site plan with the proposed expansion work shown in color.

Should you have no objections to this proposal, please check the appropriate statement below, sign and date where indicated and return this letter, in the self-addressed envelope, as soon as possible.

If you have any questions or comments on the project as proposed, please contact Brian Rubino at 252.261.3300 or by mail at P.O. Drawer 870, Kitty Hawk, NC 27949. If you wish to file written comments or objections with the Town of Duck, you may submit them to:

Sandy Cross
Local Permit Officer for the Town of Duck
P.O. Box 8369
Duck, NC 27949

Written comments must be received within 14 days of receipt of this notice. Failure to respond within 14 days will be interpreted as no objection.

Sincerely,
Quible & Associates, P.C.


Brian Rubino

I have no objection to the project as shown and hereby waive that right of objection.

I have objection to the project and have enclosed comments.

Signature

Date



January 8,2015

Dear Customer:

Proof-of-delivery letters are being provided for the following shipments:

772476711559

ELIZABETH CITY,NC

772476687491

VIRGINIA BEACH,VA

You may save or print this Batch Signature Proof of Delivery file for your records.

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1.800.GoFedEx 1.800.463.3339



January 8, 2015

Dear Customer:

The following is the proof-of-delivery for tracking number **772476711559**.

Delivery Information:

Status:	Delivered	Delivered to:	Residence
Signed for by:	J.HEYDEN	Delivery location:	706 SMALL DR ELIZABETH CITY, NC 27909
Service type:	FedEx 2Day	Delivery date:	Jan 8, 2015 12:35
Special Handling:	Deliver Weekday Residential Delivery Adult Signature Required		



Shipping Information:

Tracking number:	772476711559	Ship date:	Jan 6, 2015
		Weight:	0.5 lbs/0.2 kg

Recipient:
Albrecht and Josephine Heyder
706 Small Drive
ELIZABETH CITY, NC 27909 US

Shipper:
Cassie Anderson
Vandeventer Black LLP
434 Fayetteville St, Suite 2000
P.O. Box 2599
Raleigh, NC 27602 US
33581-0006.638

Reference

Thank you for choosing FedEx.



January 8, 2015

Dear Customer:

The following is the proof-of-delivery for tracking number **772476687491**.

Delivery Information:

Status:	Delivered	Delivered to:	Receptionist/Front Desk
Signed for by:	S.MCFARLAND	Delivery location:	1432 N GREAT NECK RD 101 VIRGINIA BEACH, VA 23454
Service type:	FedEx 2Day	Delivery date:	Jan 8, 2015 14:46
Special Handling:	Deliver Weekday Adult Signature Required		

Shipping Information:

Tracking number:	772476687491	Ship date:	Jan 6, 2015
		Weight:	0.5 lbs/0.2 kg

Recipient:
Louis G. Paulson, Registered Agent
SOZO, LLC
1432 North Great Neck Rd
Suite 101
VIRGINIA BEACH, VA 23454 US

Reference

Shipper:
Cassie Anderson
Vandeventer Black LLP
434 Fayetteville St, Suite 2000
P.O. Box 2599
Raleigh, NC 27602 US
33581-0006.638

Thank you for choosing FedEx.



North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

Donald R. van der Vaart
Secretary

CRC-15-02

February 4, 2015

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Periodic Review of Existing Rules – 15A NCAC 7B
Land Use Planning Guidelines

As you are aware, rulemaking by the Coastal Resources Commission and other state agencies is governed by NC Administrative Procedure Act (APA) (attached) which outlines the procedure for the adoption of administrative rules. State agencies are required to follow these procedures for conducting public hearings, adopting proposed rules and for filing the adopted rules for inclusion in the NC Administrative Code.

In 2013, the General Assembly enacted Session Law 2013-413 which added a “Periodic Review and Expiration of Existing Rules” section to the APA (G.S. § 150B-21.3A). This statute requires agencies to review all of their rules every 10 years under a process and schedule established by the Rules Review Commission. If an agency does not conduct the review, its rules will expire and be removed from the Administrative Code, unless the rule is required to implement or conform to federal law. Prior to 2013, rules did not expire.

Review Process

The new process requires agencies to review their exiting rules and classify them as:

- Necessary with substantive public interest - the agency has received public comment within the last two years; it affects property interest or a person might object to the rule.
- Necessary without substantive public interest – the agency has not received public comment within the last two years or the rules simply provide contact information.
- Unnecessary - the agency determined the rule is obsolete, redundant or otherwise no longer needed.

These classifications must be posted on the Office of Administrative Hearings (OAH) and DENR web sites. Public comments are to be accepted for a period of at least 60 days and agencies are required to respond to each public comment. After the comment period, agencies may amend the final classifications based on public comments, and send an approved final report and public comments received to the RRC.

The RRC will review the final report and public comments to determine if it agrees with the agency classification of its rules. The RRC may change a classification of a rule to “necessary with substantive public interest” but does not have the authority to declare a rule as “unnecessary.” The RRC sends a final report to the Joint Legislative Administrative Procedure Oversight Committee (APOC) for consultation. The final determination on an agency’s rules becomes effective when the APOC reviews the report or on the 61st day after having received the report from the RRC if the APOC does not meet. The APOC may disagree with the Commission’s determination and recommend to the General Assembly that the agency conduct a review of the rule the following year.

Effect of Final Determination

Rules designated as “necessary without substantive public interest” will remain in the NC Administrative Code and rules designated as “unnecessary” will be removed. Rules designated as “necessary with substantive public interest” must be re-adopted as if they were new rules following the usual rulemaking procedures. If the rules are not re-adopted, they will be removed from the Administrative Code.

Schedule for Review of CRC Rules

The Rules Review Commission has developed a schedule for the review of agency rules. The majority of the CRC rules are due for review by January 2018. However, the rules associated with the Land Use Planning Program (15A NCAC 7B CAMA Land Use Planning Requirements) are due for review by December 2015.

Since DCM Staff have re-written the 7B Land Use Planning Guidelines and the Commission has approved the amendments for public hearing, we have consulted with RRC staff regarding the public comment periods and how to avoid confusion. RRC Staff have recommended that the Division request that the RRC move the periodic review date from **December 2015 to June 2015**. This would enable the Commission to:

- Approve the initial determinations at the February 18-19, 2015 meeting.
- Initiate the required 60 day comment period (Feb 20 – Apr 26, 2015).
- Adopt the final determinations at the April 29-30, 2015 meeting.
- File with OAH before the May 15th deadline for June RRC review.

After the RRC review, the report will be submitted to APOC for consultation. Provided the APOC approves the report, the CRC will be able to publish the amended rules for public comment in September 2015, hold a public hearing and adopt the amend 7B

Land Use Planning Guidelines by the November 2015 Commission meeting. This will avoid having to re-adopt the rules based on the required Periodic Review.

Attached is the draft report with five rules designated as *Necessary With Substantive Public Interest*, one rule designated as *Necessary Without Substantive Public Interest* and two rules designated as *Unnecessary*. The rules designated as unnecessary (15A NCAC 7B .0602 Examples) cite illustrative examples and (15A NCAC 7B.0901 CAMA Land Use Plan Amendments) are process oriented and are incorporated into other sections of the revised Planning Guidelines. If the Commission agrees with these initial determinations, the report will be posted by OAH and DENR for public comments. The Commission will then review any public comments at the April 2015 CRC meeting before adopting it as final.

I will review the details of this process at our upcoming meeting in Atlantic Beach.

CHAPTER 150B
OF THE
GENERAL STATUTES OF NORTH CAROLINA

[The following excerpt contains the statutory provisions of the Administrative Procedure Act as amended by Session Law 2014-100; 2014-103; 2014-115; 2014-120 - OAH Revised 9/23/2014]

Article 1.
General Provisions.

§ 150B-1. Policy and scope.

(a) Purpose. -- This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. -- This Chapter confers procedural rights.

(c) Full Exemptions. -- This Chapter applies to every agency except:

- (1) The North Carolina National Guard in exercising its court-martial jurisdiction.
- (2) The Department of Health and Human Services in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.
- (3) The Utilities Commission.
- (4) Repealed by Session Laws 2011-287, s. 21(a), effective June 24, 2011, and applicable to rules adopted on or after that date.
- (5) Repealed by Session Laws 2011-401, s. 1.10(a), effective November 1, 2011.
- (6) The State Board of Elections in administering the HAVA Administrative Complaint Procedure of Article 8A of Chapter 163 of the General Statutes.
- (7) The North Carolina State Lottery.
- (8) Expired pursuant to Session Laws 2011-287, s. 21(a), effective June 13, 2011.

(d) Exemptions From Rule Making. -- Article 2A of this Chapter does not apply to the following:

- (1) The Commission.
- (2) Repealed by Session Laws 2000-189, s. 14 effective July 1, 2000.
- (3) Repealed by Session Laws 2001-474, s. 34 effective November 29, 2001.
- (4) The Department of Revenue, with respect to the notice and hearing requirements contained in Part 2 of Article 2A. With respect to the Secretary of Revenue's authority to redetermine the State net taxable income of a corporation under G.S. 105-130.5A, the Department is subject to the rule-making requirements of G.S. 105-262.1.
- (5) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- (6) The Division of Adult Correction of the Department of Public Safety, with respect to matters relating solely to persons in its custody or

under its supervision, including prisoners, probationers, and parolees.

- (7) The State Health Plan for Teachers and State Employees in administering the provisions of Article 3B of Chapter 135 of the General Statutes.
- (8) The North Carolina Federal Tax Reform Allocation Committee, with respect to the adoption of the annual qualified allocation plan required by 26 U.S.C. § 42(m), and any agency designated by the Committee to the extent necessary to administer the annual qualified allocation plan.
- (9) The Department of Health and Human Services in adopting new or amending existing medical coverage policies for the State Medicaid and NC Health Choice programs pursuant to G.S. 108A-54.2.
- (10) The Economic Investment Committee in developing criteria for the Job Development Investment Grant Program under Part 2F of Article 10 of Chapter 143B of the General Statutes.
- (11) The North Carolina State Ports Authority with respect to fees established pursuant to G.S. 136-262(a)(11).
- (12) The Department of Commerce and the Economic Investment Committee in developing criteria and administering the Site Infrastructure Development Program under G.S. 143B-437.02.
- (13) The Department of Commerce and the Governor's Office in developing guidelines for the One North Carolina Fund under Part 2H of Article 10 of Chapter 143B of the General Statutes.
- (14) Repealed by Session Laws 2011-145, s. 8.18(a), as amended by Session Laws 2011-391, s. 19, effective June 15, 2011.
- (15) Repealed by Session Laws 2009-445, s. 41.(b) effective August 4, 2009.
- (16) The State Ethics Commission with respect to Chapter 138A and Chapter 120C of the General Statutes.
- (17) The Department of Commerce in developing guidelines for the NC Green Business Fund under Part 2B of Article 10 of Chapter 143B of the General Statutes.
- (18) The Department of Commerce and the Economic Investment Committee in developing criteria and administering the Job Maintenance and Capital Development Fund under G.S. 143B-437.012.
- (18a) The Department of Commerce in developing criteria and administering the Expanded Gas Products Service to Agriculture Fund under G.S. 143B-437.020.

- (19) Repealed by Session Laws 2011-145, s. 8.18(a), as amended by Session Laws 2011-391, s. 19, effective June 15, 2011.
 - (19a) The Department of Commerce in administering the Film and Entertainment Grant Fund under G.S. 143B-437.02A.
 - (20) The Department of Health and Human Services in implementing, operating, or overseeing new 1915(b)/(c) Medicaid Waiver programs or amendments to existing 1915(b)/(c) Medicaid Waiver programs.
 - (22) The Department of Health and Human Services with respect to the content of State Plans, State Plan Amendments, and Waivers approved by the Centers for Medicare and Medicaid Services (CMS) for the North Carolina Medicaid Program and the NC Health Choice program.
 - (23) The Department of Cultural Resources with respect to admission fees or related activity fees at historic sites and museums pursuant to G.S. 121-7.3.
 - (24) Tryon Palace Commission with respect to admission fees or related activity fees pursuant to G.S. 143B-71.
 - (25) U.S.S. Battleship Commission with respect to admission fees or related activity fees pursuant to G.S. 143B-73.
 - (26) The Board of Agriculture in the Department of Agriculture and Consumer Services with respect to annual admission fees for the State Fair. The Board shall annually post the admission fee schedule on its Web site and provide notice of the fee schedule, along with a citation to this section, to all persons named on the mailing list maintained pursuant to G.S. 150B-21.2(d).
- (e) Exemptions From Contested Case Provisions. -- The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:
- (1) The Department of Health and Human Services and the Department of Environment and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).
 - (2) Repealed by Session Laws 1993 c. 501, s. 29, effective July 23, 1993.
 - (3) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
 - (4) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
 - (5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.
 - (6) Repealed by S.L. 2007-491, s. 2, effective January 1, 2008.
 - (7) The Division of Adult Correction of the Department of Public Safety.
 - (8) The Department of Transportation, except as provided in G.S. 136-29.
 - (9) The North Carolina Occupational Safety and Health Review Commission.
 - (10) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
 - (11) Hearings that are provided by the Department of Health and Human Services regarding the eligibility and provision of services for eligible assaultive and violent children, as defined in G.S. 122C-3(13aa) shall be conducted pursuant to the provisions outlined in G.S. 122C, Article 4, Part 7.
 - (12) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan with respect to disputes involving the performance, terms, or conditions of a contract between the Plan and an entity under contract with the Plan.
 - (13) The Teachers' and State Employees' Comprehensive Major Medical Plan with respect to determinations by the Executive Administrator and Board of Trustees, the Plan's designated utilization review organization, or a self-funded health maintenance organization under contract with the Plan that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon the information provided, does not meet the Plan's requirements for medical necessity, appropriateness, health care setting, or level of care or effectiveness, and the requested service is therefore denied, reduced, or terminated.
 - (14) The Department of Public Safety for hearings and appeals authorized under Chapter 20 of the General Statutes.
 - (15) The Wildlife Resources Commission with respect to determinations of whether to authorize or terminate the authority of a person to sell licenses and permits as a license agent of the Wildlife Resources Commission.
 - (16) Repealed by Session Laws 2011-399, s. 3, effective July 25, 2011.
 - (17) The Department of Health and Human Services with respect to the review of North Carolina Health Choice Program determinations regarding delay, denial, reduction, suspension, or termination of health services, in whole or in part, including a determination about the type or level of services.
 - (18) Hearings provided by the Department of Health and Human Services to decide appeals pertaining to adult care home resident discharges initiated by adult care homes under G.S. 131D-4.8.
 - (19) The Industrial Commission.
 - (20) The Department of Commerce for hearings and appeals authorized under Chapter 96 of the General Statutes.

(21) The Department of Health and Human Services for actions taken under G.S. 122C-124.2.

(f) Exemption for the University of North Carolina. -- Except as provided in G.S. 143-135.3, no Article in this Chapter except Article 4 applies to the University of North Carolina.

(g) Exemption for the State Board of Community Colleges. -- Except as provided in G.S. 143-135.3, no Article in this Chapter except Article 4 applies to the State Board of Community Colleges.

§ 150B-2. Definitions.

As used in this Chapter,

(1) "Administrative law judge" means a person appointed under G.S. 7A-752, 7A-753, or 7A-757.

(1a) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

(1b) "Adopt" means to take final action to create, amend, or repeal a rule.

(1c) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.

(1d) "Commission" means the Rules Review Commission.

(2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

(2a) Repealed by Session Laws 1991, c. 418, s. 3, effective October 1, 1991.

(2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.

(3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.

(4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized

to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.

(5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.

(6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

(7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

(7a) "Policy" means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency which is intended and used purely to assist a person to comply with the law, such as a guidance document.

(8) "Residence" means domicile or principal place of business.

(8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.

c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.

2. Orders establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits,

investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the Office of Information Technology Services applied to information technology as defined by G.S. 147-33.81.

(8b) Repealed by Session Law 2011-398, s. 61.2 effective July 25, 2011.

(8c) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed by Session Laws 1991, c. 418 s. 3, effective October 1, 1991.

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

(d) This section does not apply to the following:

- (1) Revocations of occupational licenses based solely on a court order of child support delinquency or a Department of Health and Human Services determination of child support delinquency issued pursuant to G.S. 110-142, 110-142.1, 110-142.2.
- (2) Refusal to renew an occupational license pursuant to G.S. 87-10.1, 87-22.2, 87-44.2 or 89C-18.1, based solely on a Department of Revenue determination that the licensee owes a delinquent income tax debt.

§ 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency. The agency shall prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling.

(a1) An agency shall respond to a request for a declaratory ruling as follows:

- (1) Within 30 days of receipt of the request for a declaratory ruling, the agency shall make a written decision to grant or deny the request. If the agency fails to make a written decision to grant or deny the request within 30 days, the failure shall be deemed a decision to deny the request.
- (2) If the agency denies the request, the decision is immediately subject to judicial review in accordance with Article 4 of this Chapter.
- (3) If the agency grants the request, the agency shall issue a written ruling on the merits within 45 days of the decision to grant the request. A declaratory ruling is subject to judicial review in accordance with Article 4 of this Chapter.
- (4) If the agency fails to issue a declaratory ruling within 45 days, the failure shall be deemed a denial on the merits, and the person aggrieved may seek judicial review pursuant to Article 4 of this Chapter. Upon review of an agency's failure to issue a declaratory ruling, the court shall not consider any basis for the denial that was not presented in writing to the person aggrieved.

(b) Repealed by Session Laws 1997-34, s. 1.

§§ 150B-5 through 150B-8: Reserved for future codification purposes.

Article 2.
Rule Making.

§§ 150B-9 through 150B-16: Repealed by Session Laws 1991, c. 418, s. 5, effective October 1, 1991.

§ 150B-17: Recodified as § 150B-4 by Session Laws 1991, c. 418, s. 4, effective October 1, 1991.

Article 2A.
Rules.
Part 1. General Provisions.

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with this Article.

§ 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
 - a. A service to a State, federal, or local governmental unit.
 - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
 - c. A transcript of a public hearing.
 - d. A conference, workshop, or course.
 - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Law 2011-398, s. 61.2 effective July 25, 2011.

§ 150B-19.1. Requirements for agencies in the rule-making process.

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Law 2014-120.

§ 150B-19.2. Repealed by Session Law 2013-413, s. 3.(c).

§ 150B-19.3. Limitation on certain environmental rules.

(a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the ~~following subdivisions of this subsection.~~ A rule required by one of the following subdivisions of this subsection shall be subject to the provisions of G.S. 150B-21.3(b1) as if the rule received written objections from 10 or more persons under G.S. 150B-21.3(b2):

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules.
- (3) A change in federal or State budgetary policy.
- (4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State.
- (5) A court order.

(b) For purposes of this section, "an agency authorized to implement and enforce State and federal environmental laws" means any of the following:

- (1) The Department of Environment and Natural Resources created pursuant to G.S. 143B-279.1.

- (2) The Environmental Management Commission created pursuant to G.S. 143B-282.
- (3) The Coastal Resources Commission established pursuant to G.S. 113A-104.
- (4) The Marine Fisheries Commission created pursuant to G.S. 143B-289.51.
- (5) The Wildlife Resources Commission created pursuant to G.S. 143-240.
- (6) The Commission for Public Health created pursuant to G.S. 130A-29.
- (7) The Sedimentation Control Commission created pursuant to G.S. 143B-298.
- (8) The North Carolina Mining and Energy Commission created pursuant to G.S. 143B-293.1.
- (9) The Pesticide Board created pursuant to G.S. 143-436.

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. -- A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) Time. -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule-making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b).

§ 150B-21. Agency must designate rule-making coordinator; duties of coordinator.

(a) Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator shall serve as the liaison between the agency, other

agencies, units of local government, and the public in the rule-making process. The coordinator shall report directly to the agency head.

(b) The rule-making coordinator shall be responsible for the following:

- (1) Preparing notices of public hearings.
- (2) Coordinating access to the agency's rules.
- (3) Screening all proposed rule actions prior to publication in the North Carolina Register to assure that an accurate fiscal note has been completed as required by G.S. 150B-21.4(b).
- (4) Consulting with the North Carolina Association of County Commissioners and the North Carolina League of Municipalities to determine which local governments would be affected by any proposed rule action.
- (5) Providing the North Carolina Association of County Commissioners and the North Carolina League of Municipalities with copies of all fiscal notes required by G.S. 150B-21.4(b), prior to publication in the North Carolina Register of the proposed text of a permanent rule change.
- (6) Coordinating the submission of proposed rules to the Governor as provided by G.S. 150B-21.26.

(c) At the earliest point in the rule-making process and in consultation with the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, and with samples of county managers or city managers, as appropriate, the rule-making coordinator shall lead the agency's efforts in the development and drafting of any rules or rule changes that could:

- (1) Require any unit of local government, including a county, city, school administrative unit, or other local entity funded by or through a unit of local government to carry out additional or modified responsibilities;
- (2) Increase the cost of providing or delivering a public service funded in whole or in part by any unit of local government; or
- (3) Otherwise affect the expenditures or revenues of a unit of local government.

(d) The rule-making coordinator shall send to the Office of State Budget and Management for compilation a copy of each final fiscal note prepared pursuant to G.S. 150B-21.4(b).

(e) The rule-making coordinator shall compile a schedule of the administrative rules and amendments expected to be proposed during the next fiscal year. The coordinator shall provide a copy of the schedule to Office of State Budget and Management in a manner proposed by that Office.

(f) Repealed by Session Laws 2011-398, s. 3, effective October 1, 2011, and applicable to rules adopted on or after that date.

Part 2. Adoption of Rules.

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. -- An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that

the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205
- (10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) The need for an agency to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:
 - a. Repealed by Session Laws 2000, Ch. 148, s.5, effective July 1, 2002.

b. Repealed by Session Laws 2000, Ch. 69, s.5 July 1, 2003.

(13), (14) Reserved.

(15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.

(16) Expired pursuant to Session Laws 2004-156, s. 1, effective July 13, 2004.

(17) To maximize receipt of federal funds for the Medicaid or NC Health Choice programs within existing State appropriations, to reduce Medicaid or NC Health Choice expenditures, and to reduce Medicaid and NC Health Choice fraud and abuse.

(a1) Recodified as subdivision (a)(16) of this section by Session Laws 2004-156, s. 1.

(a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(a3) Unless otherwise provided by law, the agency shall:

(1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.

(2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.

(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.

(4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.

(a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of G.S. 12-3.1. The statement must be signed by the head of the agency adopting the temporary rule.

(b) Review. -- When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the Rules Review Commission. Within 15 business day after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed

in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9. The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a panel of at least three members of the Commission. In reviewing the statement, the Commission or its designee may consider any information submitted by the agency or another person. If the Commission or its designee finds that the statement meets the criteria, listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9, the Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

(b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency and return the rule to the agency.

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

(b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) Standing. -- A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

(c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that

adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) **Effective Date and Expiration.** -- A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
- (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.

(e) **Publication.** -- When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register.

§ 150B-21.1A. Adoption of an emergency rule.

(a) **Adoption.** - An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with G.S. 150B-21.1(a3). The Department of Health and Human Services or the appropriate rule-making agency within the Department may adopt emergency rules in accordance with this section when a recent act of the General Assembly or the United States Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the emergency rule is necessary to implement the change in State or federal law.

(b) **Review.** - An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier of Rules.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may

supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(c) **Standing.** - A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) **Effective Date and Expiration.** - An emergency rule becomes effective on the date specified in G.S. 150B-21.3. An emergency rule expires on the earliest of the following dates:

- (1) The date specified in the rule.
- (2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.
- (3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.
- (4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.

(e) **Publication.** - When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register.

§ 150B-21.1B. Expired pursuant to Session Laws 2009-475, s.16, effective June 30, 2012.

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) **Steps.** - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
 - (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
 - (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
 - (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
 - (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.
- (b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (c) Notice of Text. – A notice of the proposed text of a rule must include all of the following:
- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
 - (2) A short explanation of the reason for the proposed rule.
 - (2a) A link to the agency's Web site containing the information required by G.S. 150B-19.1(c).
 - (3) A citation to the law that gives the agency the authority to adopt the rule.
 - (4) The proposed effective date of the rule.
 - (5) The date, time, and place of any public hearing scheduled on the rule.
 - (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
 - (7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.
 - (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
 - (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.
- (d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.
- (e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments

received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

§ 150B-21.3. Effective date of rules.

(a) Temporary and Emergency Rules. -- A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. -- A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section, or unless the agency that adopted the rule specifies a later effective date.

(b1) Delayed Effective Dates. -- If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill ratified by the General Assembly before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

(b2) Objection. - Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons, no later than 5:00 P.M. of the day following the day the Commission approves the rule, clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to G.S. 150B-21.2(c)(9), and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. The Commission shall notify the agency that the rule is subject to legislative disapproval on the day following the day it receives 10 or more written objections. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register. If

the Commission receives objections from 10 or more persons clearly requesting review by the legislature, and the rule objected to is one of a group of related rules adopted by the agency at the same time, the agency that adopted the rule may cause any of the other rules in the group to become effective as provided in subsection (b1) of this section by submitting a written statement to that effect to the Commission before the other rules become effective.

(c) Executive Order Exception. -- The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill ratified on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill ratified by the General Assembly is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill ratified by the General Assembly within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. -- Notwithstanding any other provision of this action, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

(d) Legislative Day and Day of Adjournment. - As used in this section:

- (1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.
- (2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution or by operation of law for more than 30 days.
- (3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. -- A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical change. -- A permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b) becomes effective on the first day of the

month following the month the rule is approved by the Rules Review Commission.

§ 150B-21.3A. Periodic review and expiration of existing rules.

(a) Definitions. – For purposes of this section, the following definitions apply:

- (1) Commission.—Means the Rules Review Commission.
- (2) Committee.—Means the Joint Legislative Administrative Procedure Oversight Committee.
- (3) Necessary with substantive public interest. – Means any rule for which the agency has received public comments within the past two years. A rule is also "necessary with substantive public interest" if the rule affects the property interest of the regulated public and the agency knows or suspects that any person may object to the rule.
- (4) Necessary without substantive public interest. – Means a rule for which the agency has not received a public comment concerning the rule within the past two years. A "necessary without substantive public interest" rule includes a rule that merely identifies information that is readily available to the public, such as an address or a telephone number.
- (5) Public comment.— Means written comments objecting to the rule, in whole or in part, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.
- (6) Unnecessary rule. – Means a rule that the agency determines to be obsolete, redundant, or otherwise not needed.

(b) Automatic Expiration. – Except as provided in subsection (d1) of this section, any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission pursuant to subsection (d) of this section.

(c) Review Process. – Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:

- (1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is (i) necessary with substantive public interest, (ii) necessary without substantive public interest, or (iii) unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:

- a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
- (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a). The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:
- a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - d. A summary of the Commission's determinations regarding public comments.
 - e. A determination that all rules that the agency determined to be necessary and without substantive public interest and for which no public comment was received or for which the Commission determined that the public comment was without merit be allowed to remain in effect without further action.
 - f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.
 - g. A determination that all rules that the agency determined to be necessary with substantive public interest or that the Commission designated as necessary with public interest as provided in this subdivision shall be readopted as though the rules were new rules in accordance with this Article.
- (3) Step 3: The final determination report shall not become effective until the agency has consulted with the Committee. The determinations contained in the report pursuant to sub-subdivisions e., f., and g. of subdivision (2) of this subsection shall become effective on the date the report is reviewed by the Committee. If the Committee does not hold a meeting to hear the consultation required by this subdivision within 60 days of receipt of the final determination report, the consultation requirement is deemed

satisfied, and the determinations contained in the report become effective on the 61st day following the date the Committee received the report. If the Committee disagrees with a determination regarding a specific rule contained in the report, the Committee may recommend that the General Assembly direct the agency to conduct a review of the specific rule in accordance with this section in the next year following the consultation.

(d) Timetable. – The Commission shall establish a schedule for the review and readoption of existing rules in accordance with this section on a decennial basis as follows:

(1) With regard to the review process, the Commission shall assign by assigning each Title of the Administrative Code a date by which the review required by this section must be completed. In establishing the schedule, the Commission shall consider the scope and complexity of rules subject to this section and the resources required to conduct the review required by this section. The Commission shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances. Except as provided in ~~subsection~~ subsections (e) and (f) of this section, if the agency fails to conduct the review by the date set by the Commission, the rules contained in that Title which have not been reviewed will expire. The Commission shall report to the Committee any agency that fails to conduct the review. The Commission may exempt rules that have been adopted or amended within the previous 10 years from the review required by this section. However, any rule exempted on this basis must be reviewed in accordance with this section no more than 10 years following the last time the rule was amended.

(2) With regard to the readoption of rules as required by sub-subdivision (c)(2)g. of this section, once the final determination report becomes effective, the Commission shall establish a date by which the agency must readopt the rules. The Commission shall consult with the agency and shall consider the agency's rule-making priorities in establishing the readoption date. The agency may amend a rule as part of the readoption process. If a rule is readopted without substantive change, the agency is not required to prepare a fiscal note as provided by G.S. 150B-21.4.

(e) Rules to Conform to or Implement Federal Law. – Rules adopted to conform to or implement federal law shall not expire as provided by this section. The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection.

(f) Other Reviews. – Notwithstanding any provision of this section, an agency may subject a rule that it determines to be unnecessary to review under this section at any time by notifying the Commission that it wishes to be placed on the schedule for the current year. The Commission may also subject a rule to

review under this section at any time by notifying the agency that the rule has been placed on the schedule for the current year.

§ 150B-21.4. ~~Fiscal notes and regulatory impact analysis on rules.~~

(a) State Funds. – Before an agency ~~adopts~~ publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes it must submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office of State Budget and Management and obtain certification from the Office of State Budget and Management that the funds that would be required by the proposed rule change are available. ~~The agency shall submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office at the same time as the agency submits the notice of text for publication pursuant to G.S. 150B-21.2.~~ The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Office of State Budget and Management must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(a1) DOT Analyses. – In addition to the requirements of subsection (a) of this section, any agency that adopts a rule affecting environmental permitting of Department of Transportation projects shall conduct an analysis to determine if the rule will result in an increased cost to the Department of Transportation. The analysis shall be conducted and submitted to the Board of Transportation when the agency submits the notice of text for publication. The agency shall consider any recommendations offered by the Board of Transportation prior to adopting the rule. Once a rule subject to this subsection is adopted, the Board of Transportation may submit any objection to the rule it may have to the Rules Review Commission. If the Rules Review Commission receives an objection to a rule from the Board of Transportation no later than 5:00 P.M. of the day following the day the Commission approves the rule, then the rule shall only become effective as provided in G.S. 150B-21.3(b1).

(b) Local Funds. – Before an agency ~~adopts~~ publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of State Budget and Management as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. – Before an agency ~~adopts~~ publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the

agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management. The agency must also obtain from the Office a certification that the agency adhered to the regulatory principles set forth in G.S. 150B-19.1(a)(2), (5), and (6). The agency may request the Office of State Budget and Management to prepare the fiscal note only after, working with the Office, it has exhausted all resources, internal and external, to otherwise prepare the required fiscal note. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change shall prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management shall review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency shall ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact. Failure to prepare or obtain approval of the fiscal note as required by this subsection shall be a basis for objection to the rule under G.S. 150B-21.9(a)(4).

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least one million dollars (\$1,000,000) in a 12-month period. In analyzing substantial economic impact, an agency shall do the following:

- (1) Determine and identify the appropriate time frame of the analysis.
- (2) Assess the baseline conditions against which the proposed rule is to be measured.
- (3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
- (4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.
- (5) For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

(b2) Content. – A fiscal note required by subsection (b1) of this section must contain the following:

- (1) A description of the persons who would be affected by the proposed rule change.
- (2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
- (3) A description of the purpose and benefits of the proposed rule change.
- (4) An explanation of how the estimate of expenditures was computed.
- (5) A description of at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected. The alternatives may have been identified by the agency or by members of the public.

(c) Errors. – An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

(d) If an agency proposes the repeal of an existing rule, the agency is not required to prepare a fiscal note on the proposed rule change as provided by this section.

§ 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) Amendment. -- An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address or a telephone number.
- (5) Correct a typographical error in the North Carolina Administrative Code.
- (6) Change a rule in response to a request or an objection by the Commission, unless the Commission determines that the change is substantial.

(b) Repeal. -- An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

- (1) The law under which the rule was adopted is repealed.
- (2) The law under which the rule was adopted or the rule itself is declared unconstitutional.
- (3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. -- The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. -- The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

- (1) A statement of the subject matter of the proposed rule making.
- (2) A short explanation of the reason for the proposed action.
- (3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.
- (4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3.

§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Law 1997-34, s 5, effective April 30, 1997

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.

§ 150B-21.7. Effect of transfer of duties or termination of agency on rules.

(a) When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency with authority over the rule amends or repeals the rule. When a law that authorizes an agency to adopt a rule is repealed and another law does not give the same or another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed. The agency that adopted the rule shall notify the

Codifier of Rules that the rule is repealed pursuant to this subsection.

(b) When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order. The agency that adopted the rule shall notify the Codifier of Rules that the rule is repealed pursuant to this subsection.

(c) When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code.

Part 3. Review by Commission.

§ 150B-21.8. Review of rule by Commission.

(a) Emergency Rule. -- The Commission does not review an emergency rule.

(b) Temporary and Permanent Rules. -- An agency must submit temporary and permanent rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a rule.

(c) Scope. -- When the Commission reviews an amendment to a permanent rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a permanent rule that is within its scope of review but is not changed by a rule amendment.

(d) Judicial Review. - When the Commission returns a permanent rule to an agency in accordance with G.S. 150B-21.12(d), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. -- The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The

Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. -- The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1.

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

§ 150B-21.11. Procedure when Commission approves permanent rule.

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval, and deliver the approved rule to the Codifier of Rules.

If the approved rule will increase or decrease expenditures or revenues of a unit of local government, the Commission must also notify the Governor of the Commission's approval of the rule and deliver a copy of the approved rule to the Governor by the end of the month in which the Commission approved the rule.

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. -- An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's

statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. -- When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. -- A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule.

§ 150B-21.14. Public hearing on a rule.

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission may call a public hearing on a rule that is not before it for review. Calling a public hearing on a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing.

§ 150B-21.15: Repealed by Session Laws 1995, c. 507, s. 27.8(i), effective December 1, 1995.

§ 150B-21.16: Repealed by Session Laws 2011-398, s. 9, effective October 1, 2011, and applicable to rules adopted on or after that date.

Part 4. Publication of Code and Register.

§ 150B-21.17. North Carolina Register.

(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

- (1) Temporary rules entered in the North Carolina Administrative Code.
 - (1a) The text of proposed rules and the text of permanent rules approved by the Commission.
 - (1b) Emergency rules entered into the North Carolina Administrative Code.
- (2) Repealed by Session Laws 2011-398, s. 10, effective October 1, 2011, and applicable to rules adopted on or after that date.
- (3) Executive orders of the Governor.
- (4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
- (5) Repealed by Session Laws 2011-330, s. 33(c), effective June 27, 2011, and by Session Laws 2011-398, s. 10, effective October 1, 2011, and applicable to rules adopted on or after that date.
- (6) Other information the Codifier determines to be helpful to the public.

(b) Form. -- When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal unless the Codifier determines that publication of the complete text is impractical. In publishing the text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed.

(c) The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Register.

§ 150B-21.18. North Carolina Administrative Code.

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may

publish the Code in other forms. The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Code. The Codifier must keep superseded rules.

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule.
- (5) Have complied with the provisions of G.S. 12-3.1, if the rule establishes a new fee or increases an existing fee.

§ 150B-21.20. Codifier's authority to revise form of rules.

(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code to do one or more of the following:

- (1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
- (2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
- (3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.
- (4) Rearrange definitions and lists.
- (5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.
- (6) Omit from the published rule a map, a diagram, an illustration, a chart, or other graphic material, if the Codifier of Rules determines that the Office of Administrative Hearings does not have the capability to publish the material or that publication of the material is not practicable. When the Codifier of Rules omits graphic material from the published rule, the Codifier must insert a reference to the omitted material and information on how to obtain a copy of the omitted material.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule, unless the rule was revised under subdivision (a)(6) of this section to omit graphic material. When a rule is revised under that subdivision, the official rule is the published text of the rule plus the graphic material that was not published.

§ 150B-21.21. Publication of rules of North Carolina State Bar, Building Code Council, and exempt agencies.

(a) State Bar. -- The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 30 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must

compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(a) Building Code Council. -- The Building Code Council shall publish the North Carolina State Building Code as provided in G.S. 143-138(g). The Codifier of Rules is not required to publish the North Carolina State Building Code in the North Carolina Administrative Code.

(b) Exempt Agencies. -- Notwithstanding any other provision of law, an agency that is exempted from this Article by G.S. 150B-1 or any other statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. These exempt agencies must submit a rule to the Codifier of Rules within 30 days after adopting the rule.

(c) Publication. -- A rule submitted to the Codifier of Rules under this section must be in the physical form specified by the Codifier of Rules. The Codifier of Rules must compile, make available for public inspection, and publish a rule submitted under this section in the same manner as other rules in the North Carolina Administrative Code.

§ 150B-21.22. Effect of inclusion in Code.

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate.

§ 150B-21.23: Repealed by Session Laws 2011-398, s. 13, effective October 1, 2011, and applicable to rules adopted on or after that date.

§ 150B-21.24. Access to Register and Code.

(a) Register. -- The Codifier of Rules shall make available the North Carolina Register on the Internet at no charge.

(b) Code. -- The Codifier of Rules shall make available the North Carolina Administrative Code on the Internet at no charge.

§ 150B-21.25. Paid copies of Register and Code.

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina Register and the North Carolina Administrative Code in amounts that cover publication, copying, and mailing costs. All monies received under this section must be credited to the General Fund.

Part 5. Rules Affecting Local Governments.

§ 150B-21.26. Office of State Budget and Management to conduct preliminary review of certain administrative rules.

(a) Preliminary Review. -- At least 60 days before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, the agency must submit all of the following to the Office of State Budget and Management for preliminary review:

- (1) The text of the proposed rule change.
- (2) A short explanation of the reason for the proposed change.
- (3) A fiscal note stating the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local

government and explaining how the amount was computed.

(b) Scope. -- The preliminary review of a proposed permanent rule change that would affect the expenditures or revenues of a unit of local government shall include consideration of the following:

- (1) The agency's explanation of the reason for the proposed change.
- (2) Any unanticipated effects of the proposed change on local government budgets.
- (3) The potential costs of the proposed change weighed against the potential risks to the public of not taking the proposed change.

§ 150B-21.27. Minimizing the effects of rules on local budgets.

In adopting permanent rules that would increase or decrease the expenditures or revenues of a unit of local government, the agency shall consider the timing for implementation of the proposed rule as part of the preparation of the fiscal note required by G.S. 150B-21.4(b). If the computation of costs in a fiscal note indicates that the proposed rule change will disrupt the budget process as set out in the Local Government Budget and Fiscal Control Act, Article 3 of Chapter 159 of the General Statutes, the agency shall specify the effective date of the change as July 1 following the date the change would otherwise become effective under G.S. 150B-21.3.

§ 150B-21.28. Role of the Office of State Budget and Management.

The Office of State Budget and Management shall:

- (1) Compile an annual summary of the projected fiscal impact on units of local government of State administrative rules adopted during the preceding fiscal year.
- (2) Compile from information provided by each agency schedules of anticipated rule actions for the upcoming fiscal year.
- (3) Provide the Governor, the General Assembly, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities with a copy of the annual summary and schedules by no later than March 1 of each year.

Article 3.

Administrative Hearings.

§ 150B-22. Settlement; contested case.

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

§ 150B-22.1. Special education petitions.

(a) Notwithstanding any other provision of this Chapter, timelines and other procedural safeguards required to be provided under IDEA and Article 9 of Chapter 115C of the General Statutes must be followed in an impartial due process hearing initiated when a petition is filed under G.S. 115C-109.6 with the Office of Administrative Hearings.

(b) The administrative law judge who conducts a hearing under G.S. 115C-109.6 shall not be a person who has a personal or professional interest that conflicts with the judge's objectivity in the hearing. Furthermore, the judge must possess knowledge of, and the ability to understand, IDEA and legal interpretations of IDEA by federal and State courts. The judges are encouraged to participate in training developed and provided by the State Board of Education under G.S. 115C-107.2(h).

(c) For the purpose of this section, the term "IDEA" means The Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400, et seq., (2004), as amended, and its regulations.

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party, an attorney representing a party, or other representative of the party as may specifically be authorized by law, and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article.

A business entity may represent itself using a nonattorney representative who is one or more of the following of the business entity: (i) officer, (ii) manager or member-manager, if the business entity is a limited liability company, (iii) employee whose income is reported on IRS Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least twenty-five percent (25%). Authority

for and prior notice of nonattorney representation shall be made in writing, under penalty of perjury, to the Office on a form provided by the Office.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9)(1) effective July 15, 1986.

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(a3) A Medicaid enrollee, or network provider authorized in writing to act on behalf of the enrollee, who appeals a notice of resolution issued by an LME/MCO under Chapter 108D of the General Statutes may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article. Solely and only for the purposes of contested cases commenced as Medicaid managed care enrollee appeals under Chapter 108D of the General Statutes, an LME/MCO is considered an agency as defined in G.S. 150B-2(1a). The LME/MCO shall not be considered an agency for any other purpose.

(a4) If an agency fails to take any required action within the time period specified by law, any person whose rights are substantially prejudiced by the agency's failure to act may commence a contested case in accordance with this section seeking an order that the agency act as required by law. If the administrative law judge finds that the agency has failed to act as required by law, the administrative law judge may order that the agency take the required action within a specified time period.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given by one of the methods for service of process under G.S. 1A-1, Rule 4(j) or Rule 4(j3). If given by registered or certified mail, by signature confirmation as provided by the United States Postal Service, or by designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, notice shall be deemed to have been given on the delivery date appearing on the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt. If giving of notice cannot be accomplished by a method under G.S. 1A-1, Rule 4(j) or Rule 4(j3), notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that

specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

(g) Where multiple licenses are required from an agency for a single activity, the Secretary or chief administrative officer of the agency may issue a written determination that the administrative decision reviewable under Article 3 of this Chapter occurs on the date the last license for the activity is issued, denied, or otherwise disposed of. The written determination of the administrative decision is not reviewable under this Article. Any licenses issued for the activity prior to the date of the last license identified in the written determination are not reviewable under this Article until the last license for the activity is issued, denied, or otherwise disposed of. A contested case challenging the last license decision for the activity may include challenges to agency decisions on any of the previous licenses required for the activity.

§ 150B-23.1. Mediated settlement conferences.

(a) Purpose. -- This section authorizes a mediation program in the Office of Administrative Hearings in which the chief administrative law judge may require the parties in a contested case to attend a prehearing settlement conference conducted by a mediator. The purpose of the program is to determine whether a system of mediated settlement conferences may make the operation of the Office of Administrative Hearings more efficient, less costly, and more satisfying to the parties.

(b) Definitions. -- The following definitions apply in this section:

- (1) Mediated settlement conference. -- A conference ordered by the chief administrative law judge involving the parties to a contested case and conducted by a mediator prior to a contested case hearing.
- (2) Mediator. -- A neutral person who acts to encourage and facilitate a resolution of a contested case but who does not make a decision on the merits of the contested case.

(c) Conference. -- The chief administrative law judge may order a mediated settlement conference for all or any part of a contested case to which an administrative law judge is assigned to preside. All aspects of the mediated settlement conference shall be conducted insofar as possible in accordance with the rules adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(d) Attendance. -- The parties to a contested case in which a mediated settlement conference is ordered, their attorneys, and other persons having authority to settle the parties' claims shall attend the settlement conference unless excused by the presiding administrative law judge.

(e) Mediator. -- The parties shall have the right to stipulate to a mediator. Upon the failure of the parties to agree within a time limit established by the presiding administrative law judge, a mediator shall be appointed by the presiding administrative law judge.

(f) Sanctions. -- Upon failure of a party or a party's attorney to attend a mediated settlement conference ordered under this section, the presiding administrative law judge may impose any sanction authorized by G.S. 150B-33(b)(8) or (10).

(g) Standards. -- Mediators authorized to conduct mediated settlement conferences under this section shall comply with the standards adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(h) Immunity. -- A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(i) Costs. -- Costs of a mediated settlement conference shall be paid one share by the petitioner, one share by the respondent, and an equal share by any intervenor, unless otherwise apportioned by the administrative law judge.

(j) Inadmissibility of Negotiations. -- All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(k) Right to Hearing. -- Nothing in this section restricts the right to a contested case hearing.

§ 150B-23.2. Fee for filing a contested case hearing.

(a) Filing Fee. -- In every contested case commenced in the Office of Administrative Hearings by a person aggrieved, the petitioner shall pay a filing fee, and the administrative law judge shall have the authority to assess that filing fee against the losing party, in the amount of one hundred twenty-five dollars (\$125.00), unless the Office of Administrative Hearings establishes a lesser filing fee by rule.

(b) Time of Collection. -- All fees that are required to be assessed, collected, and remitted under subsection (a) of this section shall be collected by the Office of Administrative Hearings at the time of commencement of the contested case except as may be allowed by rule to permit or complete late payment or in suits in forma pauperis.

(c) Forms of Payment. -- The Office of Administrative Hearings may by rule provide for the acceptable forms for payment and transmission of the filing fee.

(d) Waiver or Refund. -- The Office of Administrative Hearings shall by rule provide for the fee to be waived in a contested case in which the petition is filed in forma pauperis and supported by such proofs as are required in G.S. 1-110 and in a contested case involving a mandated federal cause of action. The Office of Administrative Hearings shall by rule provide for the fee to be refunded in a contested case in which the losing party is the State.

§ 150B-23.3. Electronic filing.

In addition to any other method specified in G.S. 150B-23, documents filed and served in a contested case may be filed and served electronically by means of an Electronic Filing Service Provider. For purposes of this section, the following definitions apply:

(1) Electronic filing means the electronic transmission of the petition, notice of hearing, pleadings, or any other documents filed in a contested case with the Office of Administrative Hearings, as further defined by rules adopted by the Office of Administrative Hearings.

(2) Electronic Filing Service Provider (EFSP) means the service provided by the Office of Administrative Hearings for e-filing and e-service of documents via the Internet.

(3) Electronic service means the electronic transmission of the petition, notice of hearing, pleadings, or any other documents in a contested case, as further defined by rules adopted by the Office of Administrative Hearings.

§ 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

§ 150B-25. Conduct of hearing; answer.

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed by Session Laws 1991, c. 35, s. 2, effective October 1, 1991.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence.

§ 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

§ 150B-27. Subpoena.

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an

agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed.

Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-28. Depositions and discovery.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Repealed by S.L. 2007-491, effective January 1, 2008.

§ 150B-29. Rules of evidence.

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a decision or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

§ 150B-30. Official notice.

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

§ 150B-31. Stipulations.

(a) The parties in a contested case may, by a stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

§ 150B-31.1. Contested tax cases.

(a) Application. – This section applies only to contested tax cases. A contested tax case is a case involving a disputed tax matter arising under G.S. 105-241.15. To the extent any provision in this section conflicts with another provision in this Article, this section controls.

(b) Simple Procedures. – The Chief Administrative Law Judge may limit and simplify the procedures that apply to a contested tax case involving a taxpayer who is not represented by an attorney. An administrative law judge assigned to a contested tax case must make reasonable efforts to assist a taxpayer who is not represented by an attorney in order to assure a fair hearing.

(c) Venue. – A hearing in a contested tax case must be conducted in Wake County, unless the parties agree to hear the case in another county.

(d) Reports. – The following agency reports are admissible without testimony from personnel of the agency:

- (1) Law enforcement reports.
- (2) Government agency lab reports used for the enforcement of motor fuel tax laws.

(e) Confidentiality. – The record, proceedings, and decision in a contested tax case are confidential until the final decision is issued in the case.

§ 150B-32. Designation of administrative law judge.

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(a1) Repealed by Session Laws 1985 (Reg. Session 1986), c. 1022, s. 1(15), effective July 15, 1986.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice.

§ 150B-33. Powers of administrative law judge.

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative

proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;
- (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
- (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
- (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
- (7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and
- (8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.
- (9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.
- (11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay
- (12) Repealed by Session Laws 2011-398, s. 17 effective January 1, 2012.

§ 150B-34. Final decision or order.

(a) In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the

agency with respect to facts and inferences within the specialized knowledge of the agency.

(b) Repealed by Session Laws 1991, c. 35, s. 6.

(c) Repealed by Session Laws 2011-398, s. 18 effective January 1, 2012.

(d) Except for the exemptions contained in G.S. 150B-1, the provisions of this section regarding the decision of the administrative law judge shall apply only to agencies subject to Article 3 of this Chapter, notwithstanding any other provisions to the contrary relating to recommended decisions by administrative law judges.

(e) An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with G.S. 1A-1, Rule 12(c), or summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case. Notwithstanding subsection (a) of this section, a decision granting a motion for judgment on the pleadings or summary judgment need not include findings of fact or conclusions of law, except as determined by the administrative law judge to be required or allowed by G.S. 1A-1, Rule 12(c), or Rule 56.

§ 150B-35. No ex parte communication; exceptions.

Unless required for disposition of an ex parte matter authorized by law, the administrative law judge assigned to a contested case may not communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

§ 150B-36. Repealed by Session Law 2011-398, s. 20 effective January 1, 2012.

§ 150B-37. Official record.

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
- (5) Repealed by Session Laws 1987, c. 878, s. 25.
- (6) The administrative law judge's final decision or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the administrative law judge's final decision to each party.

Article 3A.

Other Administrative Hearings.

§ 150B-38. Scope; hearing required; notice; venue.

(a) The provisions of this Article shall apply to:

- (1) Occupational licensing agencies.

(2) The State Banking Commission, the Commissioner of Banks, and the Credit Union Division of the Department of Commerce.

(3) The Department of Insurance and the Commissioner of Insurance.

(4) The State Chief Information Officer in the administration of the provisions of Article 3D of Chapter 147 of the General Statutes.

(5) The North Carolina State Building Code Council.

(6) The State Board of Elections in the administration of any investigation or audit under the provisions of Article 22A of Chapter 163 of the General Statutes.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

(c) Notice shall be given by one of the methods for service of process under G.S. 1A-1, Rule 4(j) or Rule 4(j3). If given by registered or certified mail, by signature confirmation as provided by the United States Postal Service, or by designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, notice shall be deemed to have been given on the delivery date appearing on the return receipt, copy of proof of delivery provided by the United States Postal Service, or delivery receipt. If notice cannot be given by one of the methods for service of process under G.S. 1A-1, Rule 4(j) or Rule 4(j3), then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases

consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.

§ 150B-39. Depositions; discovery; subpoenas.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;

- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the

position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.

§ 150B-41. Evidence; stipulations; official notice.

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under ~~G.S. 150B-30~~ subsection (d) of this section. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

§ 150B-42. Final agency decision; official record.

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party

to the proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or order shall be served upon each party by one of the methods for service of process under G.S. 1A-1, Rule 5(b). If service is by registered, certified, or first-class mail, by signature confirmation as provided by the United States Postal Service, or by designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the copy shall be addressed to the party at the latest address given by the party to the agency. Service by one of the additional methods provided in G.S. 1A-1, Rule 5(b), is effective as provided therein and shall be accompanied by a certificate of service as provided in G.S. 1A-1, Rule 5(b1). G.S. 1A-1, Rule 6(e), applies if service is by first-class mail. A copy shall be furnished to the party's attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

Article 4.
Judicial Review.

§ 150B-43. Right to judicial review.

Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any party or person aggrieved from invoking any judicial remedy available to the party or person aggrieved under the law to test the validity of any administrative action not made reviewable under this Article. Absent a specific statutory requirement, nothing in this Chapter shall require a party or person aggrieved to petition an agency for rule making or to seek or obtain a declaratory ruling before obtaining judicial review of a final decision or order made pursuant to G.S. 150B-34.

§ 150B-44. Right to judicial intervention when final decision unreasonably delayed.

~~Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. Failure of an administrative law judge subject to Article 3 of this Chapter or~~

failure of an agency subject to Article 3A of this Chapter to make a final decision within 120 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or by the administrative law judge. ~~The Board of Trustees of the North Carolina State Health Plan for Teachers and State Employees is a "board" for purposes of this section.~~

§ 150B-45. Procedure for seeking review; waiver.

(a) Procedure. – To obtain judicial review of a final decision under this Article, the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision. The petition must be filed as follows:

- (1) Contested tax cases. – A petition for review of a final decision in a contested tax case arising under G.S. 105-241.15 must be filed in the Superior Court of Wake County.
- (2) Other final decisions. – A petition for review of any other final decision under this Article must be filed in the superior court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, in the county where the contested case which resulted in the final decision was filed.

(b) Waiver. – A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition.

§ 150B-46. Contents of petition; copies served on all parties; intervention.

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

§ 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the Office of Administrative Hearings shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

§ 150B-48. Stay of decision.

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

§ 150B-49. New evidence.

A party or person aggrieved who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a final decision in the case, the court shall remand the case to the agency that conducted the administrative hearing under Article 3A of this Chapter. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a final decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and final decision. The additional evidence and any affirmation or modification of a final decision shall be made part of the official record.

§ 150B-50. Review by superior court without jury.

The review by a superior court of administrative decisions under this Chapter shall be conducted by the court without a jury.

§ 150B-51. Scope and standard of review.

(a), (a1) Repealed by Sessions Laws, 2011-398, s. 27 effective January 1, 2012 and applies to contested cases commenced after that date.

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

(d) In reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the

court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

§ 150B-52. Appeal; stay of court's decision.

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate.

§§ 150B-53 through 150B-57: Reserved for future codification purposes.

Article 5.

Publication of Administrative Rules.

§§ 150B-58 through 150B-64: Repealed by Session Laws 1991, c. 418, s. 5, effective October 1, 1991.

NC COASTAL RESOURCES COMMISSION (CRC)

December 17, 2014

NOAA/NCNERR Administration Building

Beaufort, NC

Present CRC Members

Frank Gorham, Chair

Renee Cahoon, Vice-Chair

Neal Andrew

Larry Baldwin

Suzanne Dorsey

Marc Hairston

Janet Rose

Harry Simmons

John Snipes

Bill White

Present Attorney General's Office Members

Christine Goebel

Brenda Menard

Mary Lucasse

CALL TO ORDER/ROLL CALL

Frank Gorham called the meeting to order reminding the Commissioners of the need to state any conflicts due to Executive Order Number One and also the State Government Ethics Act. The State Government Ethics Act mandates that at the beginning of each meeting the Chair remind all members of their duty to avoid conflicts of interest and inquire as to whether any member knows of any conflict of interest or potential conflict with respect to matters to come before the Commission. If any member knows of a conflict of interest or a potential conflict of interest, please state so when the roll is called.

Angela Willis called the roll. Commissioners Jamin Simmons and Greg Lewis were absent. Chairman Gorham stated that he had no known conflicts, but disclosed that he is the President of the Figure Eight Homeowners Association. No conflicts were reported by any of the duly appointed Commissioners present. Commissioner Janet Rose read her evaluation of statement of economic interest received from the State Ethics Commission which indicated that they did not find an actual conflict of interest, but only a potential for conflict. The potential conflict identified does not prohibit service.

MINUTES

Harry Simmons made a motion to approve the minutes of the October 22-23, 2014 Coastal Resources Commission meeting. Renee Cahoon seconded the motion. The motion passed unanimously (Andrew, Baldwin, Cahoon, Dorsey, Gorham, Hairston, Rose, H. Simmons, Snipes, White).

Harry Simmons made a motion to approve the minutes of the November 19, 2014 special meeting of the Coastal Resources Commission. Renee Cahoon seconded the motion. The motion passed unanimously (Andrew, Baldwin, Cahoon, Dorsey, Gorham, Hairston, Rose, H. Simmons, Snipes, White).

EXECUTIVE SECRETARY'S REPORT

Braxton Davis, DCM Director, gave the following report:

I would like to extend a special welcome to our newest commissioner, Janet Rose, who has been appointed to the Commercial Fishing seat. Commissioner Rose, the staff and I look forward to working with you and to meeting with you soon so that we can provide an overview of the Division of Coastal Management. Please let us know if you need anything at all to help you get up to speed on the work of the Commission.

It has only been about 6 weeks since our last meeting, including the Thanksgiving holiday, so I do not have much to report on Division activities outside of what you'll be hearing during today's meeting. We recently received a response from the National Oceanic and Atmospheric Administration which approved our request to review upcoming applications for federal permits related to offshore seismic surveys associated with oil and gas exploration. We anticipate seeing those permit applications next year, with surveys commencing in mid-2015. We've issued three emergency permits in response to the ongoing erosion issues at North Topsail Beach and Oak Island, two of which were authorized through emergency variance proceedings. Also I promised that we will keep you informed on the ongoing update to the National Estuarine Research Reserve's 5-year Management Plan. The Reserve program completed a series of public meetings and local advisory committee focus group meetings in November. Three public meetings were held (Corolla, Beaufort, Wilmington) where participants learned about the purpose of the Reserve and the management plan update, and provided comments on current and emerging topics. Four local advisory committee meetings were also held (for Currituck Banks, Rachel Carson, Masonboro Island, Zeke's Island). Currently we have three surveys underway: 1. A needs assessment for coastal decision-makers for the coastal training program; 2. A needs assessment for the K-12 teacher and student education program; and 3. A partner survey for those not represented on the local advisory committees. The next steps will be to evaluate the feedback received and draft the strategic plan, which will be shared with the local advisory committees in March.

We worked with the Executive Committee to plan today's agenda, which I'll run through briefly. First, we will be continuing work to reduce regulatory burdens by moving forward in the rulemaking process required by the NC Administrative Procedure Act. We'll be seeking your approval of a fiscal analysis for one of the rule changes proposed by staff this year involving the excavation of upland boat basins. Also, we will hold a public hearing for proposed changes that increase permit exemptions related to certain types of development along estuarine shorelines. We will be holding public hearings in all eight oceanfront counties for the removal of the High Hazard AEC. We will be seeking the CRC's approval to formally begin the rulemaking process for our proposed comprehensive revisions to the Land Use Planning rules in 15A NCAC 7B and

7L. I have seen and heard numerous positive comments on the rule change package that DCM staff put together. I think they did a great job in distilling input from regional meetings and other sources over the past two years, and hopefully that is reflected in the feedback that you have received to date.

After lunch you will hear updates on both of the studies that had been assigned to the Commission's Science Panel, the Sea Level Rise and Inlet Hazard Area studies. Both were done in response to the 2012 legislative requirements in HB 819. Staff are truly appreciative of the significant volunteer work that has gone into those efforts, the timeliness of deliverables, and the patience of the Panel as we have worked through public records requests and other sometimes challenging but important parts of the process.

Later we will discuss follow-up items related to your Inlet Management Study over the past year. You will be considering a significant policy change proposal involving the beachfront "Static Line," which determines how building setbacks are measured following a beach renourishment project. We appreciate the work of the subcommittee appointed at your last meeting in developing a detailed proposal for discussion today. There are essentially three different rule change proposals right now, and I would direct you to Memo 14-42 in your packet for a description of the DCM staff proposal as well as discussion and questions that we raised concerning other alternatives. We have included draft rule language for the DCM proposal. We will need more guidance from the Commission in order to draft specific rule language for other alternatives. I want to thank the subcommittee chaired by Commissioner Baldwin that has been focused on our proposed rule changes related to the delineation of coastal wetlands. I have heard very positive comments regarding the work of that subcommittee and look forward to hearing Commissioner Baldwin's report.

Staff News

I have two new hires to announce, Shane Staples recently joined DCM after transferring over to us after 7 years with the NC Division of Marine Fisheries. Shane will be working as our Fisheries Resource Specialist for the northern region out of the Washington Regional Office. Emily Woodward has joined DCM as a new Communication and Project Management Specialist working with the Reserve program here in Beaufort. Emily will be helping coordinate the update to the Reserve Management Plan and extension activities related to Living Shorelines, a focus area we'll be bringing to your attention in upcoming meetings. We are excited to have both Shane and Emily joining DCM. We are very sad to lose one of our Fisheries Resource Specialists, Jessi Baker, who is moving to Norfolk VA to begin a new federal career with the U.S. Navy in environmental permitting. Jessi had recently joined the Division after transferring over from the NC DMF, and she brought considerable fisheries expertise to our Division, she has been exceptional in customer service, and she has been a great colleague. We wish her the very best in her new career. Finally, today is the last Coastal Resources Commission meeting for

David Moye, the District Manager in our Washington Regional Office. David is retiring at the end of the month, and it is hard for us to believe. David has been with the Department for 30 years and the Division of Coastal Management for almost all of that time. David started his career with the Division of Marine Fisheries, and he has developed in-depth knowledge and understanding of the biology and ecology of the North Carolina coast. That knowledge, and his prior experience working as a field representative, has been invaluable to the Division and to the Commission over the years. We all lean on him regularly. David is also a man of great integrity and is a friend to everyone who knows him. Saying that he will be missed is a vast understatement, and we sincerely hope that he will continue to stay involved in coastal issues in whatever ways he is willing and able. We had a great time roasting him last night at a dinner in his honor, but today we want to honor him with a certificate in recognition of his service to the State of North Carolina.

At this time Director Davis presented David Moye a certificate of Appreciation from the Division of Coastal Management for 30 years of service.

Kelly Spivey will serve as the interim District Manager for the Washington District. We are planning for the next Commission meeting to be held in Atlantic Beach on February 18-19.

CHAIRMAN'S COMMENTS

Chairman Gorham stated we had a great meeting in October. At that meeting we promised the Governor a report on the action items for the CRC's priorities. This report has not been completed, but should be available for the next meeting. Chairman Gorham told Commissioners to advise Angela Willis if they are unable to attend a CRC meeting so we can ensure a quorum.

CRAC REPORT

Debbie Smith, CRAC Chair, stated John Hughes, engineer with the City of New Bern, has resigned from the CRAC. The CRAC has discussed other skills that would be an asset to the Council and we are considering several people. By the next CRC we hope to have another recommendation for you to consider. A resume for Frank Rush, Town Manager of Emerald Isle was provided to the CRC. He has served on the CRAC previously and is a proven asset. We recommend the CRC consider approving his appointment to the CRAC. The CRAC also discussed the static line issue and supports changes to that regulation. There is a general feeling that local input is valuable and one size does not fit all in every community. The CRAC feels a proper setback should be maintained. The CRAC also supports the amendments to the proposed CAMA Land Use Plan rules. These changes will be more economical for local communities and counties updating their plans.

Renee Cahoon made a motion to appoint Frank Rush to the Coastal Resources Advisory Council. Harry Simmons seconded the motion. The motion passed unanimously (Andrew, Baldwin, Cahoon, Dorsey, Gorham, Hairston, Rose, H. Simmons, Snipes, White).

VARIANCE REQUESTS

Hysong (CRC VR 14-14)

Heather Coats, Brenda Menard

Heather Coats, DCM field representative gave an overview of the site for the proposed development.

Brenda Menard of the Attorney General's Office represented staff. The Petitioners, James and Page Hysong are present and Mr. Hysong spoke on behalf of Petitioners on the variance request. Petitioners have owned an oceanfront lot on Oak Island in Brunswick County since 1997. In March 2002, the US Army Corps of Engineers completed a large-scale beach nourishment project, resulting in the implementation of a static line, based on the Commission's rules. In August 2014, Petitioners applied for a CAMA minor permit proposing to build a residential structure of 2,500 square feet that would not meet the 60-foot setback from the static line. Petitioner's permit application was denied in September 2014 based on its inconsistency with the applicable setback. Petitioners seek relief from the oceanfront erosion setback as measured from the static line. Ms. Menard reviewed the stipulated facts of this variance request and stated that staff and Petitioners disagree on all four variance criteria which must be met in order to grant the variance request. First, Staff does not agree that there is an unnecessary hardship because without a variance there remains a building envelope of 855.5 square feet resulting in a total floor area of 1,711 square feet which allows for reasonable use of the property. Second, Staff does not agree that any hardship results from conditions peculiar to the site. . Oak Island has not experienced major impacts from hurricanes since 2002 and while there is a significant distance between the actual vegetation line and the static line at this property; it is likely a temporary condition. Third, State asserts that any hardship is caused by Petitioner's preferred design and use. Finally, the spirit, purpose and intent of the setback rules is to protect life and property. The static line rule ensures that property owners don't get lulled into a false sense of security by a temporary condition. In order to receive an exception to the static line rules a town needs to come forward with a plan for long term beach nourishment that includes funding for the project. . Oak Island has not requested a static line exception.

Mr. Jim Hysong stated we purchased this property in 1997 and this has proven to be a stable and established section of the oceanfront of Oak Island. In 1999 Hurricane Floyd came along and took a portion of the dunes, but none of these properties were affected. The elevation of the lot is 18 or 19 feet which is one of the highest oceanfront property levels on the entire island. The current established line of vegetation would allow considerably more than what we are requesting. We have asked to be in line with the house next door. There was also a comment that the erosion has not occurred at this location because there hasn't been as much storm action. In your packet you will see a list of tropical storms and hurricanes that have been active in the Southport/Oak Island area since 2002. Perhaps we could build a structure with the footprint that has been approved, but in our eyes it would be inadequate, unsightly and a safety hazard from a parking standpoint. It would be a waste of our spectacular lot. In the absence of a variance no reasonable, practical or satisfactory use can be made of the property.

Harry Simmons made a motion that strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner an unnecessary

hardship. Larry Baldwin seconded the motion. The motion failed with four votes in favor (Baldwin, H. Simmons, Gorham, Rose) and six opposed (Hairston, Andrew, Cahoon, Dorsey, White, Snipes).

Harry Simmons made a motion that hardships result from conditions peculiar to the petitioner's property. Larry Baldwin seconded the motion. The motion failed with three votes in favor (Baldwin, H. Simmons, Gorham) and seven opposed (Hairston, Andrew, Cahoon, Dorsey, White, Rose, Snipes).

Harry Simmons made a motion that hardships do not result from actions taken by the Petitioner. Larry Baldwin seconded the motion. The motion failed with three votes in favor (Baldwin, H. Simmons, Gorham) and seven votes opposed (Hairston, Andrew, Cahoon, Dorsey, White, Rose, Snipes).

Harry Simmons 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. Larry Baldwin seconded the motion. The motion failed with three votes in favor (Baldwin, H. Simmons, Gorham) and seven opposed (Hairston, Andrew, Cahoon, Dorsey, White, Rose, Snipes).

This variance request was denied.

ACTION ITEMS

Fiscal Analysis 15A NCAC 7H .1500 GP for Excavation of Upland Basins (CRC 14-36)

Tancred Miller

Tancred Miller stated this General Permit is for the maintenance excavation and excavation of boat basins. This rule language was approved by the CRC earlier this year. These changes will allow the excavation of new boat basins plus bank stabilization structures under a single General Permit. This will save the applicant an additional application fee. The second change is to allow new basin excavation adjacent to primary nursery areas subject to consultation with the resource agencies. The third change is to extend the timeframe for this General Permit from 90 days to 120 days to be consistent with other General Permits. Staff has prepared the fiscal analysis and it has been approved by DENR and OSBM. The annual fiscal impact is about \$200 per year savings to permit applicants. The next step is for the CRC to approve the fiscal analysis to allow it to go to public hearing. The proposed effective date of this rule amendment is July 1, 2015.

Neal Andrew made a motion to approve the fiscal analysis for 15A NCAC 7H .1500 for public hearing. Renee Cahoon seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

Static Line Exception Reauthorization – Town of Ocean Isle (CRC 14-37)

Ken Richardson, Christine Goebel

Ken Richardson stated there is a five year waiting period following a large scale project. There is a minimum setback of 60 feet or 30 times the setback factor based on the erosion rate and measured from the first line of stable natural vegetation. There is a limit on the total floor area of

less than 2,500 square feet and in line with adjacent structures. There are no swimming pools allowed oceanward of the static vegetation line. For structures greater than 2,500 square feet the setback is measured from the most landward line or a measurement line, whichever is more restrictive. A reauthorization of a Town's static line exception is needed every five years. The Town of Ocean Isle Beach has requested a reauthorization of their static line exception. The static line in Ocean Isle Beach extends for approximately 3.2 miles. The erosion rate setback factor is two feet per year for 91% of the area. As you approach Shallotte Inlet, the rates go up to 4 and 6.5 feet per year. There are currently nine vacant residential lots that would benefit from having the exception. Since January 25, 2010, three new home permits have been issued and one permit to extend an open deck was issued under the static line exception. One beach nourishment project has taken place since the Commission granted the Town's first exception in January 2010. A project was constructed between December 2013 and April 2014 during which 800,000 cubic yards of sand was placed on the beach. Overall Ocean Isle's 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 just under 300,000 cubic yards of beach fill was lost in the first year over the entire project area. This represents about 15% of the initial placement of the volume. In May 2004, a survey indicated that the east end of the beach fill lost approximately 300,000 cubic yards while the western part gained approximately 200,000 cubic yards. The represented a net loss of about 99,000 cubic yards over the original fill area. It is estimated that Ocean Isle had just under two million cubic yards in the active beach system that it did not have prior to the project. Since the initial project was constructed, no additional beach fill has been considered necessary to the west. Beach compatible sediment came from the Shallotte Inlet borrow area, channel dredging and the area within the active nearshore system. Ocean Isle Beach has established a beach nourishment fund that is used to fund its projects. This fund is currently funded each year through contributions from the Town's General Fund and Accommodations Tax Fund. The General Fund contributes \$400,000 annually and there is an annual 2% occupancy tax and currently there is \$1,807,000 generated. The total beach nourishment reserve that the Town has is \$5,300,178. Based on the information submitted to the Division, Staff recommends to the Commission that the Town's static line exception should be renewed.

Harry Simmons made a motion to reauthorize the Static Line Exception issued to Ocean Isle Beach. Renee Cahoon seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

Local Government Comments on Proposed Amendments to 7B CAMA Land Use Plan Guidelines (CRC 14-38)

Mike Lopazanski

Mike Lopazanski stated at the last meeting proposed revisions were presented to the Commission. These revisions came about as a result of numerous meetings with the Commission and workshops held with local governments. The intention is to reduce the overall burden on local governments connected with CAMA land use planning. We focused on shifting the emphasis of the program to the development of local government policies that best serve their interests. We looked at procedural matters related to approving land use plans and amendments. We also looked at streamlining the overall process allowing local governments to change plans

more quickly by changing the delegation of certification authority from the Commission to the Division. The draft changes were sent out to all elected officials, the planners, and workshop participants in the coastal area to solicit their comments on the proposed changes. We received 15 comments from local governments and 3 interested parties. All of the comments are included in the CRC materials. We received positive feedback in the comments. Traditionally the Division has used the policies within the local plan to make decisions on Major Permits. We are now proposing to give the option to the local government to maintain this traditional Division review, make the determination themselves, or identify specific policies that they want DCM to apply when making permit decisions. Some technical changes have been made since the last meeting. Staff recommends these proposed changes be sent for public hearing. A fiscal analysis will be prepared and present to the Commission for approval at an upcoming meeting.

Harry Simmons made a motion to approve the amendments to 7B and 7L for public hearing. Larry Baldwin seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

LAND USE PLAN AMENDMENTS AND CERTIFICATIONS

City of Southport Land Use Plan Certification (CRC 14-39)

Mike Christenbury

Mike Christenbury stated the City of Southport is requesting certification of the Southport CAMA Land Use Plan update. This 2014 LUP update is an update to their current certified 2007 Land Use Plan. The Town is voluntarily updating its plan to capture the latest census data as well as changes within the community since 2007. The Town used the Cape Fear Council of Governments as a consultant. The City held a duly advertised public hearing and voted by Resolution to adopt the LUP update. Staff has reviewed the plan, determined that it meets the 7B LUP guidelines and that there are no conflicts with either state or federal law or CAMA, and recommends certification.

Renee Cahoon made a motion to certify the City of Southport Land Use Plan. Harry Simmons seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

Carolina Beach Land Use Plan Amendment (CRC 14-40)

Mike Christenbury

Mike Christenbury stated the Town of Carolina Beach is requesting certification of an amendment to their 2007 LUP to allow for dry stack facilities within the Town. This is consistent with the Town's harbor management plan. Staff has not received any comments from the public. Staff has reviewed the amendment and has determined that it meets the LUP guidelines, is consistent with state and federal law and the State's Coastal Management Program. Staff recommends certification.

Renee Cahoon made a motion to certify the Town of Carolina Beach Land Use Plan Amendment. Harry Simmons seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

15A NCAC 7H .0205 Coastal Wetlands – Occasional Flooding Criteria

Larry Baldwin

Larry Baldwin stated that he was assigned at the last CRC meeting to be chair of a Committee to look at the definition of coastal wetlands in the CAMA program. The Committee is focused on putting in place consistent procedures for delineating coastal wetlands. The committee was formed and we held two full day meetings. After the CRC reviews any proposed changes I have a panel of experts that I would like to review the changes as well. The original Dredge and Fill Law is referenced in the CRC rules. The original Dredge and Fill Law says that it shall be those areas upon which grow some, but not necessarily all, of the 10 species. The species are what determines coastal marsh. They work very well. It is amazing how consistent these lines are and how you can determine where coastal wetlands are located. CAMA lines have been fairly well done. A difficulty in the original definitions is when coastal wetlands are defined as marshland. Coastal wetlands are defined as salt marsh or other marsh subject to regular or occasional flooding by tides not including hurricane or tropical storm tides. This is one of the things we want to try to quantify. We could have a tropical storm that is much less than a nor'easter. Is the nor'easter included in these rules? We came up with a form that is similar to what the Corps uses for 404 wetlands. This initial routine evaluation form indicates whether coastal wetlands are found on the property and an official delineation had been performed. This form would also give the landowner the opportunity to appeal the delineation call to someone more senior within DCM. We also want to come up with a more quantitative form to be used when a property owner disagrees with the coastal wetlands determination. This comprehensive evaluation would use additional quantitative methods and data to determine coastal wetlands and especially questionable areas subject to occasional flooding by high tides or wind tides that do not include hurricane or tropical storm tides. We are still editing this document. We plan to finalize edits to the routine evaluation form, finalize input on the comprehensive evaluation data, have the CRC review the documents, and send it out to a panel of technical, legal experts for their review and input. Question, Does the CRC want to consider a variance or an appeals process if someone disagrees with a wetland delineation?

PUBLIC HEARING

15A NCAC 7K .0208 Single Family Residences Exempted

Mike Lopazanski stated this public hearing is for an exemption along estuarine shorelines. This amendment will remove the requirement to obtain a signed statement of no objection from adjacent property owners. Currently it is required. If the property owner is not able to obtain a signed statement of no objection, then a Minor Permit is required which does not require a signed statement. There is no fee associated with an exemption; however there is a \$100 fee for a Minor Permit. This amendment will also increase the exemption time frame to three years in order to be consistent with Major and Minor Permit expiration dates. It will also allow additional flexibility for property owners to construct a perpendicular house to water access and not limit it to an elevated, slatted wooden walkway.

No comments were received.

PUBLIC INPUT AND COMMENT

Bill Price addressed the Commission about the Science Panel and the ongoing Sea Level Rise Report.

OLD/NEW BUSINESS

Chairman Gorham proposed the Commission give the Eure Gardner Award to former CRC Chairman, Bob Emory.

Harry Simmons made a motion to give the Eure Gardner award to Bob Emory. Renee Cahoon seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

David Moye stated I would like to publically thank everyone that I have worked with over the years, the Commission and Staff. It has been a great pleasure to work with DCM. The advice I would give the CRC is to listen to the Staff. They have a lot of knowledge and there are folks that have seen the changes over the years and can give you a lot of help. To the Staff I would say thank you for making my job so much fun and make this a career, not a job. We want to protect the resources on the coast of North Carolina.

CRC Science Panel

Sea Level Rise report – Update

Dr. Margery Overton

Dr. Margery Overton reported this is an update on the pre-release draft report. The Science Panel met this week and the Panel looked at the entire written document and made comments. The basic content was unchanged following this meeting. A Sea Level Rise Assessment Report was completed in 2010. At the Commission's request, the Science Panel added an addendum in 2012. At the time of the original report, it was strongly suggested that literature be reviewed and the entire document updated every five years. In 2012, the State Law required this same update. For this pre-draft report the data is easily found in the literature and the analysis is straight forward and easy to duplicate. There is a lot of emphasis on the spatial variation of the relative sea level rise that we get from the NOAA tide gauges in North Carolina. The Charge from the CRC asked the Science Panel to focus on a 30-year timeframe. We added discussion that points to reasons that spatial variations occur in North Carolina. There are two big things, the geology and the oceanographic effect that impact the coast differentially in space. When we look forward in 30 years we use two scenarios from the most recent IPCC Report. We have provided these to the CRC with the ranges and spatial variation. The tide gauges that are still operational and supported by NOAA are Duck, Oregon Inlet Marina, Beaufort, Cape Fear in Wilmington, and Southport (but Southport is no longer operational). For NOAA to report sea level rise they have to have 30 years of data. The length of record can impact the rate. We said in our report that at this juncture we are going to work with these numbers. Moving forward, if there is a need to do a more refined analysis on this data to put it into a common timeframe then that would be done at the request of the Commission. We used the standard of analysis and data that was readily available and vetted. Another thing that impacts what we have is the gaps in the data. The gaps in the data increase uncertainty. All of this plays into the quality of data that you have to use in regional or local assessments in North Carolina. The first approach we can take in thinking about

what could happen in 30 years is to accept that this analysis of rate is reasonably represented in a linear fashion and multiply by 30 to get the elevation difference that will be seen in 30 years. One of the things we spent a lot of time with was trying to understand the spatial variation. We know how to understand relative sea level rise from a point gauge at any one location as compared to what is being said about the global. In North Carolina we have evidence from the geology of vertical land motion. If you put a gauge in and the water level stays the same, but the ground is subsiding, then it will look like rise of water. There is some evidence that is newly reported in the literature that we have a little bit of uplift to the south in the Wilmington/Southport area. In general we have subsidence that is being reported in the north which matches well with the conversations being had in the Norfolk area. In addition recent literature has come out about the oceanographic effects that are being caused by the cyclical oscillation in the ocean basin and the position and speed of the Gulf Stream. The next step was to decide a value to use for global sea level rise to try to differentiate global and local at each gauge. The Science Panel wanted to make some statements about the use of these projections. We want to remind you that we have presented this spatially, there is a high and a low, and if you are looking at the effects in 40 or 50 years then you have to use that as a factor with this as we used 30 years in the report. The Panel knows that we are all concerned about coastal sustainability. We know that what we do impacts the economic, social and environmental impacts of what we have and the work that we are doing on this is very important and will impact the State. There has been a lot of discussion about the decisions that get made relative to risk. When we were doing our work we recognized that the Corps has published standards for dealing with sea level rise for projects, but these would be constructed projects that may have design lives of a certain length of time. We did not use that because it is a standard for building something versus planning and management of development. To think about what you are putting in place relative to the risk that will be there once the standard is in place. State Law 2012-202 says that the CRC needs to consider looking at this in multiple regions. We have in our report a lifting of the graph from the BIMP. The Panel knows that part of the information from this graph came from the geologic framework and know that the geology that we have informed it. The Panel felt that there were far too many regions to really try to section it out. Going forward we hope to have support from, the CRC to influence anyone to continue to put out gauges and keep them active and take measurements where we need measurements. Enough issues have been raised about tide gauge data and the interval of time that it might be worth taking a look at it every five years.

Science Panel Inlet Hazard Area Study – Draft Final Report (CRC 14-41)

Ken Richardson

Ken Richardson stated SL 2012-202 was passed with the provision requiring the CRC to study the feasibility of eliminating the inlet hazard area AEC. As part of this process, the CRC asked the Science Panel to address specific questions related to the study. The Science Panel first looked at how hazards are different in inlet areas compared to other beach areas. These areas are not only influenced by erosion and accretion, but they are also influenced by tidal flows, inlet migration and engineering. Large storms can also displace a considerable volume of sediment from dry land areas adjacent to inlets and deposit that material in the ebb and flood tidal deltas. Channel location, movement or orientation can have an immediate impact on shorelines. Also, inlet erosion rates can vary 10-100 times faster than non-inlet shorelines. Inlets can persistently migrate in one direction. The Science Panel also looked at the best method to delineate the

greatest risk in an inlet area. The Panel generally agreed that this question was addressed as part of their 2010 Inlet Hazard Area Update Study. Those results were presented to the CRC. That study focused on defining areas of historic related processes that had dominated the geomorphic changes to the areas around the barrier islands that were adjacent to inlets. Boundary delineation was based on statistical shoreline, vegetation line and beach width changes. The Panel also looked at topography, shoreline geology, the bathymetry, and used the expertise of the Panel members. The Division made subtle adjustments to those boundaries to follow lot lines and public infrastructure. The 2010 proposed boundaries reflected areas that have been or could be influenced by inlet related processes. Not all areas inside the boundaries were the same as far as the risk was concerned. The Panel acknowledges that the risk is not spatially equal. If you are on the oceanfront your risk is not the same as if you are on the back of the boundary. At the end of the study in 2010, the Panel was looking at a concept of a 30-year risk line. The idea was to better define the risk inside the proposed box. The Panel recommends that the Commission conduct a comprehensive inlet study on a periodic basis to account for dredging, beach fill, and existing or future erosion control structures. The Panel recommends that the CRC use the best methods and data to calculate erosion rates on a periodic basis and to re-evaluate methods and future available data at a five year interval. The Ocean Hazard Area of Environmental Concern is comprised of oceanfront and inlet lands that connect the ocean to the sound. There are three subcategories within the Ocean Hazard AEC. The nature of the hazard is managed using varying siting and development standards designed to address the hazard in protecting property from the hazard. The Science Panel recognizes that the same strategy is needed for inlet hazard areas or areas of inlet influence. The physical processes affecting inlet areas are not the same as those on the oceanfront or the estuarine side of the barrier islands. Management of development in these areas should reflect the relative degree of risk. Since it would be difficult for the CRC to discuss the development of management plans for unique geographic regions without an area the Panel feels it would be good to have a defined boundary for management purposes. Adopting areas of inlet influence or using the 2010 IHA Update Report would allow the CRC to zone these areas based on based on specific hazards. The Panel recommends the CRC consider developing management strategies to address the hazard protection.

John Snipes made a motion to approve the Science Panel's Inlet Hazard Area Study. Renee Cahoon seconded the motion. The motion passed unanimously (Hairston, Andrew, Baldwin, H. Simmons, Cahoon, Gorham, Dorsey, White, Rose, Snipes).

State Vegetation Line Alternatives – Subcommittee Report (CRC 14-42) Rudi Rudolph

Rudi Rudolph stated in the early stages of the setback rules there were rules that applied to less than or greater than 5,000 square feet. The CRC changed the rules to a graduated setback. The static line applies with nourishment and goes into place if there is a large-scale nourishment project. The vegetation line just before nourishment becomes the static line in perpetuity. After the static line was in place and the beaches became wider due to nourishment and homes were found to be non-conforming the CRC came back and provided a static line exception which allowed use of the existing line of vegetation with a couple of qualifiers. The CRC authorized the static line exception and there is a five year review process. A subcommittee was formed and we looked at the static line alternative proposal. The proposal was to eliminate the static line and the

trigger for the static line. Towns, if they wanted to, could develop a development line and no development would be permitted seaward of the development line. The local government would be able to determine the development line and DCM would review it. The vegetation line would be used for setbacks in the absence of a development line and graduated setbacks would be maintained. The vegetation line and setback policy was a pioneering idea when most of the coast was undeveloped. Now that the coast is built out and the thoughts are very different. Preventing the seaward advance of a structure is something we all agree on. The static line is cumbersome to most and confusing to some. One of the issues with the static line is that certain communities were designing projects of less than 300,000 cubic yards to avoid the static line. The larger structures were still non-conforming and there was a negative connotation for real estate purposes. The big issue was that you could only rebuild up to 2,500 square feet. So how do we remove the static line but still achieve the goals of preventing the seaward advance of development and develop proper conforming/non-conforming thresholds? The subcommittee believes the local community towns can establish a detailed development line on the oceanfront. This development line would only be used to prevent the seaward encroachment of development. The development line should be incorporated into the governing documents of the town, such as an ordinance or land use plan). Staff has cautioned that this might not work if towns are not required to do a land use plan. The development line should follow existing development and allow all homes to be rebuilt up to the line. DCM or the CRC could approve the development line, but a standard for approval must be established. Once the development line is approved the static line would be removed and the CRC would resolve any conflicts. The actual stable, natural vegetation line would be used with 30-times the erosion rate setback factor to be considered conforming. In this scenario there will not be a graduated setback. The development line concept does not have a nourishment plan approval process. The issue of grandfathering non-conforming structures should also be reviewed.

Braxton Davis stated the Division has put forward a proposal. The static line concept has been around for a long time. The Chair's proposal and the staff's proposal are almost the same except that the Staff recommends that there continue to be a static line because we are concerned about using an artificial vegetation line after a renourishment project and we would also keep the exception process to ensure a plan for maintaining the beach. This is not included in the Chair's proposal. Depending on where the development line is drawn there could be the potential for additional expansion of development seaward following a renourishment project. You would still have to meet the setback, but there is a possibility that there will be seaward expansion of development. The proposal that was put forward by the subcommittee is more complicated and changes the graduated setbacks. These are significant changes.

Renee Cahoon stated that 300,000 cubic yards is a small project in today's world. This threshold should be increased.

After discussion, Chairman Gorham directed the staff to come back to the CRC with some proposed language on the two proposals.

State Ports Inlet Management AEC Discussion – Beneficial Use

Rudi Rudolph

Rudi Rudolph stated there is a need to have verbiage in the state port inlet AEC that pertains to the Morehead Harbor. The CRC needs to look at whether they want to segregate Morehead from the Cape Fear. This presentation will pertain to the Morehead City issue. The first navigation project was constructed in 1911 and has had a series of construction improvements and deepening since the 1930s. Almost all of the beach quality sand has gone offshore. Every third year Bogue Banks is getting the outer harbor sand. From a navigation standpoint, another challenge is the shoaling. Shackleford Banks over time has been migrating from the east to the west and into the channel. In May 2013 there was a dredging event and by August 2013 the sand was coming back. In March 2014 another dredging event took place and by September it was back. Because it is a federal channel the federal government pays 100% of the costs. They don't have enough money to keep the channel open without putting the sand in the right places. We have been putting some pressure on the State to help with funding for placing the sand. Several Statutes have attempted to have the sand placed on the beach; however the sand continues to go offshore. DCM also attempted to address this issue with the completion of the BIMP. With the State Inlet AEC coming around this is another chance to try and get the language right to get the Corps to do the right thing. The phrase "active nearshore area" has been deleted from the proposed language because there has been a lot of confusion over this term. "To the maximum extent practicable" has a lot of legal meaning when it comes to consistency. It provides the Corps the limited flexibility that they want.

Braxton Davis stated the Division will talk with the Corps and the State Ports about this and bring their feedback to the CRC.

Dredging Window Study Update

Frank Gorham

Frank Gorham stated Ken Wilson's group and Suzanne Dorsey's group has been looking at the various options for expanding the dredge window. A few of us met with the regional director for several states for the US Fish and Wildlife Service. The meeting was very encouraging that there would be consideration for expanding the dredging window. We will have a follow up meeting in January to talk about the conditions that they would require. Our goal is to have the follow up meeting in January and then bring in other federal agencies, including the Corps. We are hoping to identify two or three pilot projects with extra monitoring to see the impacts. We will follow up at the next meeting.

With no further business, the CRC adjourned.

Respectfully Submitted,



Braxton Davis, CRC Executive Secretary



Angela Willis, CRC Recording Secretary



North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

Donald R. van der Vaart
Secretary

CRC-15-01

February 2, 2015

MEMORANDUM

TO: Coastal Resources Commission
FROM: Mike Lopazanski, Ken Richardson
SUBJECT: Draft Development Line Rule

At the December 2014 CRC meeting, the Commission discussed two alternatives for utilization of a Static Vegetation Line for siting oceanfront development in areas following a large scale beach fill project. The first alternative proposed by the Commission Chair involves giving local governments the option to eliminate their static line by replacing it with a “development line” that they establish and the CRC approves. The general concept is that no new development or expansion of existing structures would be allowed seaward of the approved development line. In addition, new or replacement structures, and the allowable expansion of existing structures, would be determined based on the graduated setback from the existing vegetation line, or the development line, whichever is farther landward. This concept was further developed by a subcommittee appointed by the CRC Chair (Rudi Rudolph – CRAC, Spencer Rogers - CRAC, Steve Foster – Oak Island, Frank Rush – Emerald Isle, David Kellam – Figure Eight Island). The proposal envisions communities choosing between three alternatives:

- (1) ***Graduated setbacks associated with the Vegetation Line (existing rules)*** – for a community that does not have a static line, and has/will not receive large-scale beach nourishment, nor wants a Development Line.
- (2) ***Static line (existing rules)*** – for a community that has received large-scale beach nourishment in the past, has a static line that it wishes to keep, or does not yet have an approved Development Line.
- (3) ***Development Line (new rule)*** – for communities that have a static line and wish to replace it with a Development Line, or a community that receives initial large-scale beach nourishment that wishes to have a Development Line instead of a static line.”

The Subcommittee’s proposal also includes repealing the graduated setbacks based on structure size, only requiring that development be sited 30 times the erosion rate from the first line of stable and natural vegetation.

A second alternative was proposed by DCM staff focusing more narrowly on three amendments to the existing static line exception provisions. The CRC could 1) eliminate the 2,500 square foot maximum building size limit under the static line exception, 2) eliminate the five-year waiting period after an initial large-scale beach fill project (making areas immediately eligible to petition for the exception), and 3) increase the existing 300,000 yds³ volumetric trigger for the static line as the definition of “large-scale beach fill projects.” The trigger would change to a volume per linear foot along the beachfront, based on additional analysis and discussion with the Commission. Structure setbacks would continue to be based on the graduated setbacks from the first line of stable and natural vegetation and be sited no farther seaward than the landward-most adjacent structure. As is currently the case, local governments could petition the Commission to be granted the exception which would be approved based on demonstrating a commitment to long-term beach fill.

After discussing the details of the two proposals, DCM Staff was directed to draft rule language (attached) that incorporates the development line concept as well as DCM’s proposed amendments to the static line and static line exception procedures rules. Staff was further directed to retain the graduated setbacks and to change the trigger for a static line from 300,000 cubic yards to an average of 100 cubic yards per linear foot. The draft rule language defines the development line in 7H .0305(10) as a replacement for static lines in areas that have had a large scale beach fill project. Development is restricted from being seaward of the development line in 7H .0306(a)(2). A new rule has been drafted for development line procedures in 7H .1300 by which local governments may petition the Commission for approval of a development line. The draft requirements to petition for a development line include a detailed survey, record of local adoption and documentation of incorporation into local ordinances.

As a reminder, the current rule 15A NCAC 07H.0305(a)(7) requires that oceanfront development setbacks in areas that have received a large-scale beach fill project (greater than 300,000 cubic yards of sediment or any storm protection project constructed by the US Army Corps of Engineers (USACE)) be measured from the Static Vegetation Line, which is the vegetation line in existence within one year prior to the onset of the project. Exceptions to this rule are allowed, provided that the local government has received a Static Line Exception from the Commission. The origins and rationale for the Static Line were presented at the previous meeting and the background memo (CRC-14-34) is attached as reference.

With the incorporated draft provisions, the main difference between the proposed development line concept versus DCM’s proposed amendments to the existing static line rules is that local governments must demonstrate commitment to long-term beach fill under the static line rules. Communities without such a commitment have setbacks based on the vegetation line or the static line (pre-project vegetation line). Also, under the development line concept, structures would be allowed to encroach oceanward up to the approved development line whereas the existing rules require structures to be no further oceanward their landward-most adjacent neighbor.

It should be recognized that these are initial draft proposals that are intended for further discussion and exploration, DCM is not proposing either alternative for rulemaking at this time. We look forward to the discussions at your upcoming meeting as the Commission works to craft rule language that meets the management objective of minimizing losses of life and property resulting from storms and long-term erosion, preventing encroachment of permanent structures on the public beach, and preserving the natural conditions of the barrier dune and beach system to reduce public costs of inappropriately sited development.

15A NCAC 07H .0304 AECS WITHIN OCEAN HAZARD AREAS

The ocean hazard AECs contain all of the following areas:

- (1) Ocean Erodible Area. This is the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The oceanward boundary of this area is the mean low water line. The landward extent of this area is determined as follows:
 - (a) a distance landward from the first line of stable and natural vegetation as defined in 15A NCAC 07H .0305(a)(5) to the recession line that would be established by multiplying the long-term annual erosion rate times 60, provided that, where there has been no long-term erosion or the rate is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates are the long-term average based on available historical data. The current long-term average erosion rate data for each segment of the North Carolina coast is depicted on maps entitled "2011 Long-Term Average Annual Shoreline Rate Update" and approved by the Coastal Resources Commission on May 5, 2011 (except as such rates may be varied in individual contested cases, declaratory or interpretive rulings). In all cases, the rate of shoreline change shall be no less than two feet of erosion per year. The maps are available without cost from any Local Permit Officer or the Division of Coastal Management on the internet at <http://www.nccoastalmanagement.net>; and
 - (b) a distance landward from the recession line established in Sub-Item (1)(a) of this Rule to the recession line that would be generated by a storm having a one percent chance of being equaled or exceeded in any given year.
- (2) The High Hazard Flood Area. This is the area subject to high velocity waters (including hurricane wave wash) in a storm having a one percent chance of being equaled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development.
- (3) Inlet Hazard Area. The inlet hazard areas are natural-hazard areas that are especially vulnerable to erosion, flooding and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. This area extends landward from the mean low water line a distance sufficient to encompass that area within which the inlet shall migrate, based on statistical analysis, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet and external influences such as jetties and channelization. The areas identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, as amended in 1981, by Loie J. Priddy and Rick Carraway are incorporated by reference and are hereby designated as Inlet Hazard Areas except for:
 - (a) the Cape Fear Inlet Hazard Area as shown on the map does not extend northeast of the Bald Head Island marina entrance channel; and
 - (b) the former location of Mad Inlet, which closed in 1997.In all cases, the Inlet Hazard Area shall be an extension of the adjacent ocean erodible areas and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area. This report is available for inspection at the Department of Environment and Natural Resources, Division of Coastal Management, 400 Commerce Avenue, Morehead City, North Carolina or at the website referenced in Sub-item (1)(a) of this Rule. Photo copies are available at no charge.
- (4) Unvegetated Beach Area. Beach areas within the Ocean Hazard Area where no stable natural vegetation is present may be designated as an Unvegetated Beach Area on either a permanent or temporary basis as follows:
 - (a) An area appropriate for permanent designation as an Unvegetated Beach Area is a dynamic area that is subject to rapid unpredictable landform change from wind and wave action. The areas in this category shall be designated following studies by the Division of Coastal Management. These areas shall be designated on maps approved by the Coastal Resources Commission and available without cost from any Local Permit Officer or the Division of Coastal Management on the internet at the website referenced in Sub-item (1)(a) of this Rule.
 - (b) An area that is suddenly unvegetated as a result of a hurricane or other major storm event may be designated as an Unvegetated Beach Area for a specific period of time. At the

expiration of the time specified by the Coastal Resources Commission, the area shall return to its pre-storm designation.

*History Note: Authority G.S. 113A-107; 113A-107.1; 113A-113; 113A-124;
Eff. September 9, 1977;
Amended Eff. December 1, 1993; November 1, 1988; September 1, 1986; December 1, 1985;
Temporary Amendment Eff. October 10, 1996;
Amended Eff. April 1, 1997;
Temporary Amendment Eff. October 10, 1996 Expired on July 29, 1997;
Temporary Amendment Eff. October 22, 1997;
Amended Eff. May 1, 2014; February 1, 2013; January 1, 2010, February 1, 2006; October 1, 2004; April 1, 2004; August 1, 1998.*

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.

- (1) Ocean Beaches. Ocean beaches are lands consisting of unconsolidated soil materials that extend from the mean low water line landward to a point where either:
 - (A) the growth of vegetation occurs, or
 - (B) a distinct change in slope or elevation alters the configuration of the landform, whichever is farther landward.
- (2) Nearshore. The nearshore is the portion of the beach seaward of mean low water that is characterized by dynamic changes both in space and time as a result of storms.
- (3) Primary Dunes. Primary dunes are the first mounds of sand located landward of the ocean beaches having an elevation equal to the mean flood level (in a storm having a one percent chance of being equaled or exceeded in any given year) for the area plus six feet. The primary dune extends landward to the lowest elevation in the depression behind that same mound of sand (commonly referred to as the dune trough).
- (4) Frontal Dunes. The frontal dune is deemed to be the first mound of sand located landward of the ocean beach having sufficient vegetation, height, continuity and configuration to offer protective value.
- (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.

- (7) Beach Fill. Beach fill refers to the placement of sediment along the oceanfront shoreline. Sediment used solely to establish or strengthen dunes shall not be considered a beach fill project under this Rule. A large-scale beach fill project shall be defined as any volume of sediment greater than 300,000 average of 100 cubic yards per linear foot or any storm protection project constructed by the U.S. Army Corps of Engineers. The onset of construction shall be defined as the date sediment placement begins with the exception of projects completed prior to the effective date of this Rule, in which case the award of contract date will be considered the onset of construction.
- (8) Erosion Escarpment. The normal vertical drop in the beach profile caused from high tide or storm tide erosion.
- (9) Measurement Line. The line from which the ocean hazard setback as described in Rule .0306(a) of this Section is measured in the unvegetated beach area of environmental concern as described in Rule .0304(4) of this Section. Procedures for determining the measurement line in areas designated pursuant to Rule .0304(4)(a) of this Section shall be adopted by the Commission for each area where such a line is designated pursuant to the provisions of G.S. 150B. These procedures shall be available from any local permit officer or the Division of Coastal Management. In areas designated pursuant to Rule .0304(4)(b) of this Section, the Division of Coastal Management shall establish a measurement line that approximates the location at which the vegetation line is expected to reestablish by:
- (A) determining the distance the vegetation line receded at the closest vegetated site to the proposed development site; and
- (B) locating the line of stable natural vegetation on the most current pre-storm aerial photography of the proposed development site and moving this line landward the distance determined in Subparagraph (g)(1) of this Rule.
- The measurement line established pursuant to this process shall in every case be located landward of the average width of the beach as determined from the most current pre-storm aerial photography.
- (10) Development Line. The line established by local governments representing the seaward-most allowable location of oceanfront development. Development lines are approved by the Coastal Resources Commission in accordance with the procedures set forth in 15A NCAC 7J.1300. Areas that have received large-scale beach fill projects as defined in 15A NCAC 7H.0305A(7) will not have static vegetation lines if they have approved development lines.

(b) For the purpose of public and administrative notice and convenience, each designated minor development permit-letting agency with ocean hazard areas may designate, subject to CRC approval in accordance with the local implementation and enforcement plan as defined 15A NCAC 07I .0500, a readily identifiable land area within which the ocean hazard areas occur. This designated notice area must include all of the land areas defined in Rule .0304 of this Section. Natural or man-made landmarks may be considered in delineating this area.

History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124; Eff. September 9, 1977; Amended Eff. December 1, 1992; September 1, 1986; December 1, 1985; February 2, 1981; Temporary Amendment Eff. October 10, 1996; Amended Eff. January 1, 1997; Temporary Amendment Eff. October 10, 1996 Expired on July 29, 1997;

Temporary Amendment Eff. October 22, 1997;
Amended Eff. April 1, 2008; August 1, 2002; August 1, 1998.

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 Coastal Resources Commission'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.

(2) In areas with a development line, the ocean hazard setback line shall be set at a distance in accordance with sub-sections (a)(3) through (9) of this Rule. In no case shall development be sited seaward of the development line.

(3) The setback distance is determined by both the size of development and the shoreline erosion rate as defined in 15A NCAC 07H .0304. Development size is defined by total floor area for structures and buildings or total area of footprint for development other than structures and buildings. Total floor area includes the following:

- (A) The total square footage of heated or air-conditioned living space;
- (B) The total square footage of parking elevated above ground level; and
- (C) The total square footage of non-heated or non-air-conditioned areas elevated above ground level, excluding attic space that is not designed to be load-bearing.

Decks, roof-covered porches and walkways are not included in the total floor area unless they are enclosed with material other than screen mesh or are being converted into an enclosed space with material other than screen mesh.

(4) With the exception of those types of development defined in 15A NCAC 07H .0309, no development, including any portion of a building or structure, shall extend oceanward of the ocean hazard setback distance. This includes roof overhangs and elevated structural components that are cantilevered, knee braced, or otherwise extended beyond the support of pilings or footings. The ocean hazard setback is established based on the following criteria:

- (A) A building or other structure less than 5,000 square feet requires a minimum setback of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
- (B) A building or other structure greater than or equal to 5,000 square feet but less than 10,000 square feet requires a minimum setback of 120 feet or 60 times the shoreline erosion rate, whichever is greater;
- (C) A building or other structure greater than or equal to 10,000 square feet but less than 20,000 square feet requires a minimum setback of 130 feet or 65 times the shoreline erosion rate, whichever is greater;
- (D) A building or other structure greater than or equal to 20,000 square feet but less than 40,000 square feet requires a minimum setback of 140 feet or 70 times the shoreline erosion rate, whichever is greater;
- (E) A building or other structure greater than or equal to 40,000 square feet but less than 60,000 square feet requires a minimum setback of 150 feet or 75 times the shoreline erosion rate, whichever is greater;
- (F) A building or other structure greater than or equal to 60,000 square feet but less than 80,000 square feet requires a minimum setback of 160 feet or 80 times the shoreline erosion rate, whichever is greater;
- (G) A building or other structure greater than or equal to 80,000 square feet but less than 100,000 square feet requires a minimum setback of 170 feet or 85 times the shoreline erosion rate, whichever is greater;
- (H) A building or other structure greater than or equal to 100,000 square feet requires a minimum setback of 180 feet or 90 times the shoreline erosion rate, whichever is greater;
- (I) Infrastructure that is linear in nature such as roads, bridges, pedestrian access such as boardwalks and sidewalks, and utilities providing for the transmission of electricity, water, telephone, cable television, data, storm water and sewer requires a minimum setback of 60 feet or 30 times the shoreline erosion rate, whichever is greater;
- (J) Parking lots greater than or equal to 5,000 square feet requires a setback of 120 feet or 60

- times the shoreline erosion rate, whichever is greater;
- (K) Notwithstanding any other setback requirement of this Subparagraph, a building or other structure greater than or equal to 5,000 square feet in a community with a static line exception in accordance with 15A NCAC 07J .1200 requires a minimum setback of 120 feet or 60 times the shoreline erosion rate in place at the time of permit issuance, whichever is greater. The setback shall be measured landward from either the static vegetation line, the vegetation line or measurement line, whichever is farthest landward; and
- (L) Notwithstanding any other setback requirement of this Subparagraph, replacement of single-family or duplex residential structures with a total floor area greater than 5,000 square feet shall be allowed provided that the structure meets the following criteria:
- (i) the structure was originally constructed prior to August 11, 2009;
 - (ii) the structure as replaced does not exceed the original footprint or square footage;
 - (iii) it is not possible for the structure to be rebuilt in a location that meets the ocean hazard setback criteria required under Subparagraph (a)(2)(4) of this Rule;
 - (iv) the structure as replaced meets the minimum setback required under Part (a)(2)(4)(A) of this Rule; and
 - (v) the structure is rebuilt as far landward on the lot as feasible.
- ~~(3)~~(5) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune, ~~or~~ the ocean hazard setback, or development line, whichever is farthest from vegetation line, static vegetation line, ~~or~~ measurement line, whichever is applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located oceanward of the primary dune. In such cases, the development may be located landward of the ocean hazard setback but shall not be located on or oceanward of a frontal dune or the development line. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.
- ~~(4)~~(6) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal dune, ~~or~~ landward of the ocean hazard setback, or development line, whichever is farthest from the vegetation line, static vegetation line, ~~or~~ measurement line, whichever is applicable.
- ~~(5)~~(7) If neither a primary nor frontal dune exists in the AEC on or landward of the lot on which development is proposed, the structure shall be landward of the ocean hazard setback or development line, whichever is more restrictive.
- ~~(6)~~(8) Structural additions or increases in the footprint or total floor area of a building or structure represent expansions to the total floor area and shall meet the setback requirements established in this Rule and 15A NCAC 07H .0309(a). New development landward of the applicable setback may be cosmetically, but shall not be structurally, attached to an existing structure that does not conform with current setback requirements.
- ~~(7)~~(9) Established common law and statutory public rights of access to and use of public trust lands and waters in ocean hazard areas shall not be eliminated or restricted. Development shall not encroach upon public accessways, nor shall it limit the intended use of the accessways.
- ~~(8)~~(10) 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 if the beach fill project is not maintained. A development setback measured from the vegetation line ~~provides~~may provide 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 unless a development line has been approved by the Coastal Resources Commission.

~~(11)~~ 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 Subparagraphs (1) and ~~(2)(A)-(4)~~ 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. The static line exception applies to development of property that lies both within the jurisdictional boundary of the petitioner and 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)(4)~~ of this Rule;

~~(B)~~ Total floor area of a building is no greater than 2,500 square feet;

~~(C)(B)~~ Development setbacks are calculated from the shoreline erosion rate in place at the time of permit issuance;

~~(D)(C)~~ 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)(D)~~ 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)(E)~~ Development is not eligible for the exception defined in 15A NCAC 07H .0309(b).

(b) In order to avoid weakening the protective nature of ocean beaches and primary and frontal dunes, no development is permitted that involves the removal or relocation of primary or frontal dune sand or vegetation thereon which would adversely affect the integrity of the dune. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable. Any disturbance of these other dunes is allowed only to the extent permitted by 15A NCAC 07H .0308(b).

(c) Development shall not cause irreversible damage to historic architectural or archaeological resources documented by the Division of Archives and History, the National Historical Registry, the local land-use plan, or other sources with knowledge of the property.

(d) Development shall comply with minimum lot size and set back requirements established by local regulations.

(e) Mobile homes shall not be placed within the high hazard flood area unless they are within mobile home parks existing as of June 1, 1979.

(f) Development shall comply with general management objective for ocean hazard areas set forth in 15A NCAC 07H .0303.

(g) Development shall not interfere with legal access to, or use of, public resources nor shall such development increase the risk of damage to public trust areas.

(h) Development proposals shall incorporate measures to avoid or minimize adverse impacts of the project. These measures shall be implemented at the applicant's expense and may include actions that:

- (1) minimize or avoid adverse impacts by limiting the magnitude or degree of the action;
- (2) restore the affected environment; or
- (3) compensate for the adverse impacts by replacing or providing substitute resources.

(i) Prior to the issuance of any permit for development in the ocean hazard AECs, there shall be a written acknowledgment from the applicant to the Division of Coastal Management that the applicant is aware of the risks associated with development in this hazardous area and the limited suitability of this area for permanent structures. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development.

(j) All relocation of structures requires permit approval. Structures relocated with public funds shall comply with the applicable setback line as well as other applicable AEC rules. Structures including septic tanks and other essential accessories relocated entirely with non-public funds shall be relocated the maximum feasible distance landward of the present location; septic tanks may not be located oceanward of the primary structure. All relocation of structures shall meet all other applicable local and state rules.

(k) Permits shall include the condition that any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration as defined in 15A NCAC 07H .0308(a)(2)(B). Any such structure shall be relocated or dismantled within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach fill takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time. This permit condition shall not affect the permit holder's right to seek authorization of temporary protective measures allowed under 15A NCAC 07H .0308(a)(2).

*History Note: Authority G.S. 113A-107; 113A-113(b)(6); 113A-124;
Eff. September 9, 1977;
Amended Eff. December 1, 1991; March 1, 1988; September 1, 1986; December 1, 1985;
RRC Objection due to ambiguity Eff. January 24, 1992;
Amended Eff. March 1, 1992;
RRC Objection due to ambiguity Eff. May 21, 1992;
Amended Eff. February 1, 1993; October 1, 1992; June 19, 1992;
RRC Objection due to ambiguity Eff. May 18, 1995;
Amended Eff. August 11, 2009; April 1, 2007; November 1, 2004; June 27, 1995;
Temporary Amendment Eff. January 3, 2013;
Amended Eff. September 1, 2013.*

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 ~~30~~ **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.*

SECTION .1300 – DEVELOPMENT LINE PROCEDURES

15A NCAC 07J .1301 REQUESTING THE DEVELOPMENT LINE

(a) Any local government or community herein referred to as the petitioner that is subject to ocean hazard setback provisions pursuant to 15A NCAC 07H .0305, may petition the Coastal Resources Commission for a development line for the purposes of siting oceanfront development in accordance with the provisions of this Section.

(b) A development line request applies to the entire oceanfront jurisdiction of the petitioner.

(c) A development line request shall be made in writing by the petitioner. A complete development line request shall include the following:

(1) A detailed survey of the development line along the oceanfront jurisdiction; any local regulations associated with the development line; a record of local adoption of the development line including any meetings or public hearings; documentation of incorporation of development line into local ordinances;

(2) Surveyed development line spatial data shall be submitted to the Division of Coastal Management in a geographic information systems (GIS) format referencing North Carolina State Plane North American Datum 83 US Survey Foot, to include Federal Geographic Data Committee (FGDC) compliant metadata;

(3) Additional requirements????????????????

(e) A development line 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 development line 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 development line 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.

15A NCAC 07J .1302 PROCEDURES FOR APPROVING THE DEVELOPMENT LINE

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

(1) A representative for the petitioner shall orally present the report described in 15A NCAC 07J .1301. The Chairman of the Coastal Resources Commission may limit the time allowed for oral comments.

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

(b) The Coastal Resources Commission shall approve a development line request based on the information presented in 15A NCAC 07J .1301(c)(1) through (3). 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 development line 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.

15A NCAC 07J .1303 LOCAL GOVERNMENTS AND COMMUNITIES WITH DEVELOPMENT LINES

A list of development lines in place for petitioners and any conditions under which the development lines exist, including the date(s) the developments lines were approved, shall be maintained by the Division of Coastal

Management. The list of development lines 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



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

Pat McCorry
Governor

Donald R. van der Vaart
Secretary

(CRC-15-03)

January 30, 2015

MEMORANDUM

TO: Coastal Resources Commission

FROM: Mike Lopazanski

SUBJECT: Sandbag Overview

Through the Coastal Area Management Act and CRC rules, North Carolina prohibits most permanent erosion control structures along oceanfront beaches due to the likelihood of a gradual loss of the intertidal beach and the potential for increased erosion along adjacent and downdrift properties. However, temporary structures are allowed to provide sufficient time for the relocation of structures or to carry out an allowable erosion control measure (beach renourishment, inlet realignment, etc.). Since sand bags were first allowed as a temporary erosion control measure in 1985, the CRC has struggled with balancing the needs of property owners to protect oceanfront structures with protecting the public's use of the state's ocean beaches. Sand bags were intended to provide temporary protection to imminently threatened structures and were not envisioned as a permanent protective measure for chronic oceanfront erosion.

In reviewing the development and evolution of the CRC's sandbag rules, it is clear that the CRC has maintained an understanding that coastal property owners need a way to temporarily protect their homes from beach erosion. Over the years, the Commission has generally been accommodating of property owners and local government as more permanent solutions, such as beach nourishment or relocation of the structure has been pursued. This accommodation has often been perceived as a lack of enforcement of the temporary erosion control rules on the part of the Division and Commission. However, with the exception of inlet areas, many sandbags structures have become unnecessary as local governments have become more committed to beach nourishment and inlet relocation projects. At the upcoming meeting, Staff will present the location and distribution of existing sandbag structures.

As the CRC considers the establishment of the proposed "State Ports Inlet Management AEC," it should be noted that the current proposal includes provisions for the expanded use of sandbags in the new AECs, including removing the limits on the size of sandbags, expansion of the definition of "imminently threatened," and use of sandbags to protect natural features in addition to structures.

We hope that the following overview of the use of sandbags for temporary erosion control will be useful as the Commission works to achieve a balance between a homeowner's desire to protect private property and the public's right to use the state's beaches, and look forward to our discussion at the upcoming meeting in Atlantic Beach.

USE OF SANDBAGS FOR TEMPORARY EROSION CONTROL

1984-1985

As the CRC began development of rules prohibiting the placement of permanent shoreline stabilization structures along the oceanfront, sandbags were allowed to be used as a temporary means of protecting imminently threatened structures. This policy was in accordance with the 1984 recommendations of the CRC Outer Banks Erosion Task Force that stated:

“Temporary measures to counteract erosion, such as beach nourishment, sandbag bulkheads and beach pushing, should be allowed, but only to the extent necessary to protect property for a short period of time until threatened structures may be relocated or until the effects of a short-term erosion event are reversed. In all cases, temporary stabilization measures should be compatible with public use and enjoyment of the beach.”

The purpose of allowing the sandbags was to provide for the temporary protection of a structure until the owner could make arrangements to move the structure or until the beach and dune system could naturally repair itself. As the CRC developed the rule, it was noted that “temporary” would normally require time limits on projects. At that time, Staff explained that due to enforcement problems, limits on structural types, including the ephemeral nature of materials used for sandbags, was a more practical method of ensuring removal of the structure from the beach.

The original 1985 rule included some of the current provisions such as the definition of imminently threatened, the 20’ seaward limit, adjacent property owner notification and no interference with use of the beach. The rule also included a provision requiring removal if the sandbag structure remained exposed for more than six months. The only other limit on the dimension of the structure was that it be no more than 15’ wide and that it be above the high tide line.

1987

In March of 1987, the CRC requested information on the effects of sandbag structure design and placement were having on the beach.

1990-1995

During the early 1990’s, the Commission began hearing numerous complaints that sandbags were not being used as a temporary measure but as a permanent shoreline erosion measure. Many citizens complained that sandbags were blocking pedestrian access along the beach and in some cases sandbags were being fortified to become massive immovable structures. The temporary nature of sandbags was indirectly addressed in September 1991 when the CRC discussed the definition of threatened structures and considered requiring the relocation or demolition of a threatened structure 2-3 years from its designation.

A 1994 inventory of sandbags showed that approximately 15,000 linear feet of ocean shoreline were protected by sandbag structures with some of the structures being in place for as long as eight years. While most sandbag structures complied with the rules, some were installed without authorization and did not comply with the standards. Staff provided the CRC with an analysis of the problems associated with the sandbag rules including what types of structures can be protected by sandbags, when do sandbags interfere with the public use of the beach, monitoring burial, the limitation on width of the sandbag structure but not the height and most importantly, how long is temporary.

In 1995, the CRC amended the rules to address the size and physical location of sandbags, the types of structures that were eligible for protection, as well as the time they could remain in place if they were not covered by dunes with stable, natural vegetation. The rule was amended to allow a sandbag structure to remain in place up to two years if it was protecting a small structure (less than 5,000 square feet floor area) and up to five years for larger structures. The rule also allowed the sandbags to remain for five years if they were located in a community actively pursuing a beach nourishment project. Existing sandbags installed prior to May 1, 1995 were grandfathered and allowed the full time period prior to removal.

1996-1999

While most of the beachfront communities qualified for the five-year time period, some sandbags structures in unincorporated areas were subject to removal in 1997. However, due to Hurricanes Bertha and Fran in 1996, the CRC extended the deadline to May 1998 for those areas declared federal disasters. This deadline was again extended to September 1998 after Hurricane Bonnie.

In 1997, four sites in Dare and Currituck Counties were subject to having their sandbags removed. Several of the owners applied for variances from the CRC but their petitions were denied and all the sandbag structures were subsequently removed.

Over the next couple of years the CRC began to receive variance requests from property owners wanting their sandbag structures to remain in place. In Onslow County, six property owners were granted variances to allow their sandbags to remain in place until August 31, 2001.

2000

With the majority of sandbags subject to removal in 2000, the Division began preparing to notify property owners of the approaching deadline. Records indicated that 141 properties were to be subject to removal. The Division believed this number to be low since prior to 1995, the majority of sandbag permits were processed by local governments and their record keeping abilities varied greatly and in some cases, was nonexistent. A post Hurricane Floyd inventory revealed that 236 temporary sandbag structures had been permitted since the early 1980's.

In January 2000, Dare County submitted a Petition for Rule Making to the CRC requesting that properties protected by sandbags in communities pursuing beach

nourishment be given an additional extension to 2006. The Division consulted with the CRC Science Panel and received a recommendation to grant an extension, but only to sandbag structures that currently conform to the size limits. Given the time it takes for communities to complete the necessary steps for a beach nourishment project, the CRC granted a coast-wide extension on sandbag permits in these areas to May 2008. The CRC also refined what it meant for a community to be actively pursuing beach nourishment. A community is considered to be actively pursuing beach nourishment if it has:

1. been issued a CAMA permit, where necessary, approving such project, or
2. been deemed worthy of further consideration by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance Study, or an ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local money, when necessary, or
3. received a favorable economic evaluation report on a federal project approved prior to 1986.

The CRC further added the stipulation that if beach nourishment is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void and existing sandbags are subject to all applicable time limits.

2005

The majority of sandbag structures were located in areas included in beach nourishment projects or studies, however, some structures needed to be removed by their owners prior to the May of 2008 deadline. In North Topsail Beach, an area within the Coastal Barriers Resource Act (CoBRA) Zone containing a significant number of sandbag structures was dropped by the US Army Corps of Engineers from further study. North Topsail Beach applied for permits to conduct a privately funded nourishment project to cover this area as was the case on the east end of Ocean Isle Beach and in the vicinity of The Point in Emerald Isle.

At this time, staff reported to the CRC that 251 sandbag structures had been permitted since 1996, 146 of these since 2001. Prior to 1995, local governments permitted sandbag structures and there was some question as to the accuracy of record keeping. For this reason, staff estimated that there were approximately 320 sandbag structures on the coast.

2006

Staff reported that enforcement of the six-foot height limitation on structures had become an issue. Owners were allowed to maintain the six-foot height of the structure as the bags become damaged or sink into the sand. During erosion episodes, the submerged bags once again became exposed, greatly increasing the overall height of the structure. Enforcement was also further being complicated by the fact that the bags can become covered or exposed before any enforcement action can be taken. The CRC directed the DCM staff, to measure the height of the sandbag wall from the base

of the structure to the top rather than from the existing beach to the top, in order to ensure sandbag structures do not exceed six feet in height, unless otherwise permitted.

2007

With the May 2008 deadline approaching, the Division once again prepared to notify property owners of the requirement for removal. However, the situation along the ocean beaches was somewhat different than in 2000. The extensive beach nourishment that occurred along the coast during the intervening years presented a new set of challenges to ensuring compliance with the Commission's rules. Many sand bag structures were not removed prior to nourishment activities so the bags became covered with sand. Technically, these sand bag structures were out of compliance since the rule requires them to be covered and vegetated. It had also become typical to find sand bag structures where the bags are inter-laced across properties as adjoining properties become imminently threatened. Since the removal date is dictated by when the first bags are placed, long sand bag structures often have varying expiration dates across properties. Varying expiration dates could also be found when sand bags protecting large structures (5 years) are tied in with those protecting a small structure (2 years). Given the intricacies of ensuring compliance with the current rule, staff sought guidance from the Commission on how to address the upcoming deadline, the nuances of enforcement and compliance with the current rule and how aggressively to pursue removal of buried bags or bags that become exposed.

In addition to the current time limits and removal deadlines, the Commission discussed the possible utilization of degradable materials rather than polypropylene as a means of ensuring the eventual removal of sandbags from the oceanfront. DCM research revealed issues associated with the use of biodegradable textiles for sandbags, primarily concern over the length of time biodegradable bags can withstand the combination of elements present in the coastal environment. The complex nature of coastal beaches makes it difficult to predict how long a biodegradable sandbag would last, as a variety of assailants including; microorganisms, temperature, moisture, humidity, seawater composition and wave energy act upon beaches. In addition, pathogenic viruses, bacteria, and fungi are present in stormwater runoff. The combination of these reactants leads to the increased degradability of natural fibers used in sandbag installations.

The CRC ultimately decided that the current rule would be enforced and all uncovered sandbags would have to be removed in May 2008. Sandbag permits could still be applied for throughout this process and there was interest modifying the sandbag rules.

November 2007

DCM sent letters to 371 property owners with active sandbag structure permits in preparation for the May 1, 2008 deadline for the removal of certain sandbag structures.

March - 2008

DCM begins to inventory sandbag structures, to determine which ones will need to be removed. Sandbags structures subject to removal are prioritize based on how long they

have been in place, condition of the bags, and whether they are an impediment to the public's use of the beach. This prioritization is used to notify property owners that their sandbags must be removed.

The CRC receives a Petition for Rulemaking from the Landmark Hotel Group requesting amendments to the sandbag rules that would allow specific provisions for their use in protecting commercial structures and to allow indefinite maintenance of the structures. The CRC denied the petition.

May 2008

The CRC receives a Petition for Rulemaking from the law firm Kennedy Covington Lodbell & Hickman L.L.P. representing property owners from Figure Eight Island, Nags Head and Ocean Isle Beach. The petition requested amendments to the sandbag rules to remove the time limits on sandbags and change the "actively pursuing beach nourishment" provision to a long-term erosion response plan that is modeled after the proposed static line exception. The petition also created a new sandbag management strategy for the inlet hazard areas where the maintenance of sandbags would be tied to an inlet relocation plan or an inlet-monitoring plan. The Division was supportive of the request to create a new strategy inside inlet hazard areas due to limited effectiveness of beach fill project and while the petition was denied, the CRC directed staff to incorporate some provisions of the petition that would improve the current rule language.

Variance Requests:

By the May 2008 CRC meeting, the Division had received 29 sandbag variances requests.

Comprehensive Beach Management Task Force Subcommittee Report:

Recommendations from the subcommittee include conditioning certain CAMA permits to preclude the use of sandbags under the single-family exception and consideration of alternative sandbag structure design.

July 2008

The CRC approves amendments to the sandbag rules [15A NCAC 7H .0308(a)(2)] to allow sandbags to remain in place for eight years if the community is actively seeking an inlet relocation project; require sandbags to be removed when the structure is no longer threatened, when the structure is removed or relocated, or upon completion of an inlet relocation or beach nourishment project; and to allow structures to be protected more than one time in an inlet area. Additional language was also added to the criteria by which a community would be considered pursuing a beach nourishment or inlet relocation project.

September 2008

DCM sends 20 letters to property owners requesting removal of sandbag structures that have exceeded their time limits. In addition, the GIS map depicting sandbag locations is made available on the Division's web site.

October 2008

As a result of Hurricane Hanna and an unnamed storm, Senator Basnight's office submitted a letter to the CRC stating, "If a storm exposes sandbags that had been covered and vegetated, I believe the affected property owner should be allowed to return his or her property to its pre-storm condition." In response to the storms, the CRC, under the authority of the Secretary's Emergency General Permit that was issued September 29, 2008, allowed sandbags which were previously covered and vegetated that became exposed and were in compliance prior to either Hurricane Hanna or the unnamed storm, to be re-covered with sand under Emergency General Permit 15A NCAC 7H .2500.

January 2009

Administrative Law Judge dismissed a motion to stay enforcement by 18 recipients of sandbag removal letters. The homeowners sought permission to repair their sandbag structures while they pursue variance relief, and also sought to keep DCM from going forward with enforcement. After the ruling, the Division sent Notices of Violation to homeowners who received the first round of sandbag removal letters in September 2008.

August 2009

Session Law 2009-479 (House Bill 709) establishes a moratorium on certain actions of the Coastal Resources Commission (primarily enforcing time limits) preventing the removal of a temporary erosion control structure that is located in a community that is actively pursuing a beach nourishment project or an inlet relocation project. The moratorium did not prohibit the Commission from:

- Granting permit modifications to allow the replacement, within the originally permitted dimensions, of temporary erosion control structures that have been damaged or destroyed.
- Requiring the removal of temporary erosion control structures installed in violation of its rules.
- Requiring that a temporary erosion control structure be brought back into compliance with permit conditions.
- Requiring the removal of a temporary erosion control structure that no longer protects an imminently threatened road and associated right-of-way or an imminently threatened building and associated septic system.

While the imposition of the moratorium stopped enforcement action on sandbag structures due to time limits, it did not prevent the removal of sandbags that were out of compliance with other provisions of rules, such as structure dimensions and lack of necessity. Due to the large number of sandbag structures with expiring permits, the Division developed a protocol for prioritizing structures for removal in a rational and orderly manner. Structures were prioritized based on whether or not they were covered, vegetated, or impeded public access, as well as their age and physical condition.

Of the 19 structures with sandbags initially prioritized by the Division for removal (one of the 20 was a duplicate) prior to the moratorium:

- Five had been demolished.
- Two were relocated.
- Nine were condemned.
- One was abandoned and condemned.
- Two remained occupied.

2011 – Sandbag Stakeholder Committee

Division engage stakeholders which included representatives of the Commission, Advisory Council, local government, and property owner representatives in an effort to discuss how sandbag structures were being managed, nuances of the temporary erosion control structure rules and to facilitate possible changes in the implementation of the Commission's sandbag policy. The Committee focused on specific issues including the requirement for removal of sandbags prior to nourishment projects, the covered and vegetated requirements and the possible use of other criteria in the permitting and removal of sandbags such as beach elevation and shoreline recession.

Refinement of the issues led to discussions of FEMA and how insurance payouts related to the National Flood Insurance Program (NFIP) as well as building standards (piling depths) may be contributing to the problem. There was general agreement that while the focus has been on the sandbag structures protecting houses, it is houses on the public beach that continues to be the core issue. Since the NFIP does not pay the insurance claim until there is a loss, there is no incentive for the property owner to remove the structure prior to that event. Adding to the problem is the fact many of the structures are held by out of state owners or are owned by LLCs. In most cases it is the local government's responsibility to pursue removal of structures once they are condemned and there is considerable difficulty in locating owners, or the structures are simply abandoned. There has been little financial help for local governments as the state is under no obligation to assist the local government with removal of the structures from the public beach.

While many of the issues were more thoroughly considered during the stakeholder meetings, no specific recommendations were offered. See attached Sandbag Stakeholder Committee Summary Report (CRC-11-09).

August 2011

Recognizing that the state has had a great deal more experience with the timeframes involved in securing a beach fill project and the degree of effort and commitment involved on the part of the beach communities in securing the funding and easements, the CRC amended the sandbag rules to:

- Extend the eight-year timeframe to the oceanfront in communities actively pursuing a beach nourishment project.
- Remove the one time per property restriction for oceanfront structures (under the same conditions already applied in the Inlet Hazard Areas).

- Expanded the activities a community could be actively pursuing that would warrant an extended permit time limit to include an inlet stabilization project in accordance with G.S. 113A-115.1 (CAMA amendment associated with terminal groin legislation).
- Retained the two- and five-year timeframes for structures located outside of areas seeking nourishment projects.