

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

BEFORE THE SHELLFISH CULTIVATION  
LEASE REVIEW COMMITTEE  
25-2

IN THE MATTER OF THE THIRD-PARTY  
HEARING REQUEST BY:  
**MERLEON CREECH**

**RECOMMENDATION OF THE**  
**DIVISION OF MARINE FISHERIES**

**I. BACKGROUND**

Petitioner Merleon Creech (“Petitioner”) requests permission to file a petition for a contested case hearing as a third party pursuant to N.C.G.S. § 113-202(g). Petitioner seeks to challenge the April 15, 2025, decision by Kathy Rawls, Director of the NC Division of Marine Fisheries (“DMF”) to grant both a bottom shellfish lease and a water column lease (the “Lease Area”) to Jacob Milchuck (“Potential Lessee”). The Lease Area proposed by the Potential Lessee is located in Adams Creek near Merrimon in Carteret County. Petitioner owns property to the north and east of the Lease Area.

Under law, a third party may file a contested case hearing petition to challenge the approval of a shellfish bottom lease or water column lease to someone else only if the Shellfish Cultivation Lease Review Committee (“SCLRC”), established pursuant to N.C.G.S. § 143B-289.57(f), first determines that a contested case hearing is appropriate. N.C.G.S. § 113-202 (g) provides that along with being timely filed, the determination as to whether a hearing is appropriate should be based upon a consideration of whether a petitioner:

1. Has alleged that the decision is contrary to a statute or rule;
2. Is directly affected by the decision; and
3. Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous.

The SCLRC determines whether a third-party request for a hearing should be granted or denied. A third party whose hearing request is granted may file a contested case hearing petition with the Office of Administrative Hearings (“OAH”) and a third party whose hearing request is denied may seek judicial review. N.C.G.S. § 113-202(g).

## **II. FACTS**

A. The Potential Lessee is Jacob Milchuck, a North Carolina resident.

B. Petitioner owns an approximately 74-acre tract at 154 Harvell Lane, 158 Harvell Lane, and 415 Silver Dollar Road. Roughly 68 acres are classified as woodland, 1 acre is “waterfront primary” and 5 acres are marsh. Petitioner’s property does not include any structures and no water-dependent structures are present. Petitioner asserts that multiple activities have been performed on the property that qualify as development: “cut timber on the property; planted trees; constructed a road; and initiated the process of constructing a dock.” Petitioner has also indicated that has plans for future development on the property.

C. The Lease Area is approximately 6.17 acres in size and sits within Adams Creek and lies just southwest of Petitioner’s property. The Shellfish Lease Investigation Report, a copy of which is part of the Decision Record, indicates a water depth in the Lease Area of 1.5 meters (feet). The Lease Area is approximately 30 feet waterward from the edge of the marsh. Aerial and ground level photographs are attached showing the Lease Area and the distance from the setback of the navigational channel in Adams Creek. Screen shots from the DMF Shellfish Leasing Tool of the Lease Area are also attached.

Proposed Lease ID/Number: 24-005BL/24-006WC  
Jacob Milchuck

Date: 7/15/2024



D. The Potential Lessee was granted an additional shellfish bottom lease and a water column lease in Adams Creek in Craven County. These leases are currently being reviewed by the United States Army Corps of Engineers and have not been executed in contract. A screenshot of

the DMF GIS showing the distance from the Lease Area to the additionally granted leases is attached. The Potential Lessee does not hold any other shellfish leases.

E. No Coastal Area Management Act (“CAMA”) permits have been issued authorizing development for Petitioner’s property.

F. Based on a review of the limited development on Petitioner’s property, DMF Staff concluded that Petitioner’s property was not a developed shoreline and did not require a proposed lease to be 250 feet from the shoreline per 15A NCAC 03O .0201(a)(2) without the riparian owner’s approval.

G. There are no recognized submerged lands claims (as described in N.C.G.S. § 113-205 and -206) around the Lease Area, as shown on the DMF GIS delineation of recognized claims. A screenshot of the DMF GIS with the submerged lands layer is attached showing no recognized claims in the area at issue. Therefore, the submerged lands below mean high water are owned by the State, as is most often the case.

H. Adams Creek at the Lease Area is classified as Coastal SA Waters, High Quality Waters (HQW) and Nutrient Sensitive Waters (NSW) by the Environmental Management Commission (“EMC”). These waters are not classified as a Primary Nursery Area (PNA), a Secondary Nursery Area (SNA) or a Special Secondary Nursery Area (SSNA) by the Marine Fisheries Commission (“MFC”). These waters at the Lease Area are in the F2 Growing Area in the Central Region and are an Approved harvest area for shellfish harvesting. A screenshot of the DMF Shellfish Siting GIS tool is attached showing the Lease Area is open.

I. On or about March 4, 2024, the Potential Lessee, applied for a shellfish lease at the Lease Area. A copy of the application materials date-stamped as received on March 4, 2024, is part of the Decision Record.

J. The Lease Area was reviewed thoroughly as all proposed shellfish leases are, through a comprehensive review process. The shellfish lease application process is a multistep process that is dependent upon review and comment by DMF Staff from multiple sections and from outside agencies such as DCM and the Division of Water Resources (“DWR”). Requirements for shellfish leases including the application process are specified in N.C.G.S. § 113-201 and 202.2, and in the MFC rules at 15A NCAC 03O .0201 through -.0211. The shellfish lease application process includes an initial Internal Review Process where staff from various sections of DMF and other pertinent state and federal agencies review shellfish lease applications and provide comments back to DMF staff. In this case for the Lease Area, comments were received back from:

1. Tina Moore of the DMF Fisheries Management Section on November 5, 2024.
2. Officer Vernon J Parish of the DMF Marine Patrol on October 23, 2024.
3. Andrew Haines of the DMF Shellfish Sanitation Section on October 25, 2024.

Copies of Internal Review Process comments are part of the Decision Record. The Division of Coastal Management provided an MOU to DMF in May of 2023 pertaining to the materials and dimensions of acceptable marking poles for all proposed shellfish leases.

K. A Shellfish Lease application must also meet federal requirements promulgated by the U.S. Army Corps of Engineers (“Corps”) through their Nationwide Permit #48. The Shellfish Lease Application to DMF serves as a joint application with the Corps.

L. Also, as part of the shellfish lease application process, DMF Staff complete Biological Site Investigations, where they observe the proposed Lease Area and sample for the presence of Submerged Aquatic Vegetation (“SAV”) and natural shellfish beds and record other

pertinent information regarding the location. In this case, the Biological Site Investigation took place April 22, 2024. Staff found no presence of SAV and zero bushels per acre of natural shellfish.

M. Through a memo dated December 2, 2024, DMF Shellfish Lease staff, through DMF Habitat and Enhancement Section Chief Zach Harrison, summarized the Proposed Lease and Lease Area for DMF Director Kathy Rawls, a copy of which is attached. This memo summarized the findings to date, and following her review of that information, on February 12, 2025, Director Rawls decided to proceed with a 30-day public comment period followed by a public hearing for the Potential Lease.

N. On March 13, 2025, at 6:00 p.m., the public hearing was held for this Potential Lease at DMF's Central District Office in Morehead City and via WebEx. A link to a copy of the recording of the hearing is available on DMF's website as part of the Decision Record. Petitioner's daughter Terry Arthur, and Petitioner's Son-in-Law Richard Arthur submitted online public comment against the Potential Lease on March 13, 2025, and March 14, 2025, respectively.

O. As part of the public comment period regarding this shellfish lease, nine individuals, including Petitioner, submitted comments in opposition to this Proposed Lease, copies of which are part of the Decision Record.

P. Following the public hearing and public comment period, on April 14, 2025, Mr. Harrison summarized the information obtained about this Potential Lease in a memo to Director Rawls, a copy of which is attached. On April 15, 2025, Director Rawls made the decision to grant this Proposed Lease as proposed as indicated by her marking and signature on the April 14, 2025 memo. DMF Staff also mailed a notice letter dated April 16, 2025 to Mr. Milchuck notifying him of the shellfish lease decision, a copy of which is attached to the Decision Record.

Q. On May 15, 2025, DMF received Petitioner's third-party hearing request, a copy of which is attached. This was twenty-nine (29) days after the April 15, 2025 shellfish lease application final decision.

R. On May 28, 2025, Counsel for the Committee, Assistant Attorney General Sarah Zambon, wrote to Staff, the Potential Lessee, and Petitioner's Counsel with information about the process the SCLRC would use for deciding this matter, including a hearing date of June 25, 2025, as well as deadlines and details about requested submission. A copy of this letter is attached.

S. Staff did not receive a written response from the Potential Lessee by the June 4, 2025, deadline indicated by the Committee's Counsel in her letter of May 28, 2025.

T. A recent Final Decision of ALJ Lassiter in the 8 ½ Marina v. DEQ and Boyd contested case (17 EHR 1382) in May of 2018 is helpful to understanding how DMF applies the language of the shellfish statutes and rules, a copy of which is attached.

### **III. DMF'S RECOMMENDATIONS**

#### **A. Has the Petitioner Alleged that the Decision is Contrary to a Statute or Rule? Yes.**

Petitioner lists and argues that the Lease decision was contrary to two statutes and, indirectly, MFC rule 15A NCAC 03O .0201(b)(2):

1. G.S. 113-202(a)(3) Cultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing and recreation
2. G.S. 113-202(a)(4) Cultivation of shellfish in the leased area will not impinge upon the rights of riparian owners
3. G.S. 113-202.1(b) (1) Aquaculture use of the leased area must not significantly impair navigation; . . . (3) The leased area must not be within an area traditionally used and available for fishing or hunting activities incompatible with the activities proposed by the leaseholder, such as trawling or seining; (4) Aquaculture use of the leased area must not significantly interfere with the exercise of riparian rights by

- adjacent property owners including access to navigation channels from piers or other means of access;
4. G.S. 113-202(g) After consideration of the public comment received and any additional investigations the Secretary orders to evaluate the comments, the Secretary shall notify the applicant in person or by certified or registered mail of the decision on the lease application. The Secretary shall also notify persons who submitted comments at the public hearing and requested notice of the lease decision. . . .
  5. 15A NCAC 03O .0201(b) “in order to be deemed suitable for leasing for shellfish aquaculture purposes: . . . (2) the proposed shellfish lease area shall not be closer than 250 feet from a developed shoreline or a water-dependent shore-based structure, except no minimum setback is required when the area to be leased borders the applicant's property, the property of "riparian owners" as defined in G.S. 113-201.1 who have consented in a notarized statement, or is in an area bordered by undeveloped shoreline. For the purpose of this Rule, a water-dependent shore-based structure shall include docks, wharves, boat ramps, bridges, bulkheads, and groins;”
  6. 15A NCAC 03O .0201(b)(4) the proposed shellfish lease area, either alone or when considered cumulatively with other existing lease areas in the vicinity, shall not interfere with navigation or with existing, traditional uses of the area.

On Arguments 1, 2, 3, 5 and 6, Staff agrees that Petitioner has “*alleged* that the agency has made a decision that is contrary to a statute or rule” which is relevant to the shellfish lease decision *and within DMF’s jurisdiction*, and therefore meets the requirements of N.C.G.S. § 113-202(g).

On Argument 4, staff disagree. Whether Petitioner received adequate notice is not a sufficient basis to challenge the underlying lease decision. Petitioner has availed herself of the opportunity to challenge the lease decision through this request, which was timely filed. Staff contend that Petitioner in raising this statute does not meet the requirements of N.C.G.S. § 113-202(g).

On Argument 5, Staff agrees that MFC rule prohibits the siting of a lease within 250 feet of a developed shoreline; however, staff disagrees that Petitioner’s property adjacent to the lease includes a developed shoreline. For the purposes of G.S. 113-202(g), staff agree that Petitioner has met the threshold of alleging that the Lease was granted contrary to a statute and rule within the MFC’s authority.



**B. Is the Petitioner Directly Affected by the Decision? Yes.**

Petitioner makes several arguments on how she is directly affected by the lease approval: (1) that it hinders her ability to access open water or use the shoreline for recreational activities, or otherwise prevent Petitioner from engaging in fishing or hunting activities on or around the property; (2) that it will impinge on her riparian rights by impinging her ability to construct a dock or pier; (3) that it significantly interferes with navigation from her shoreline; (4) that Petitioner failed to receive adequate notice of the lease approval; and (5) that Petitioner's plans for future development of the property will be hindered by the lease.

**(1) The lease will impede access to open water or use of the shoreline for recreational activities or otherwise prevent Petitioner from engaging in fishing or hunting activities on or around the property.**

Petitioner first argues that the lease will affect her ability to use the property for recreational activities and impede her access to open water for those same activities. Petitioner did not assert that she has previously engaged in these recreational activities at the lease location, that others have, or otherwise provide support for her assertion that these recreational activities have historically been enjoyed on the property. Petitioner purchased the property in 2022 and as not demonstrated that she has utilized the lease area for any of the recreational activities she asserts will be impacted in the future. She only asserted that she would be hindered from doing so in the future. Petitioner asserts that she will present evidence at the hearing of the recreational activities historically enjoyed on the property but has not provided any further examples or evidence at this stage. Absent some further showing, staff disagrees that Petitioner has demonstrated that she is directly affected with respect to utilizing the lease area for recreational activities.

**(2) Petitioner's riparian rights will be impinged.**

Petitioner asserts that the lease will impinge on her riparian rights, primarily her right to construct a dock or pier extending from her property. Petitioner asserts that she recently obtained a quote to begin the process of constructing a dock. Petitioner has not received a CAMA permit and the dock has not been constructed. While Petitioner may have future plans for a water-dependent structure on the property, a riparian owner's prospective plans are not a sufficient basis to deny a proposed shellfish lease.

If Petitioner were to construct a dock in an area affected by the lease, the Division of Coastal Management would instruct DMF how to alter the shellfish lease based on the CAMA permit for the structure to provide Petitioner with sufficient space to access her dock. Because Petitioner has not exercised her riparian rights by constructing a dock or other water-dependent shore-based structure, and because there is a process in place to ensure that an existing lease will accommodate a dock should she build one in the future, staff disagree that Petitioner has demonstrated she is directly affected by the lease decision with respect to her riparian rights.

**(3) The lease will significantly interfere with navigation from Petitioner's shoreline.**

There are also portions of Petitioner's shoreline that are not adjacent to the lease area and could be used to access deep water. While the bulk of Petitioner's shoreline runs northwest, a portion runs north and then northwest that is not fronted by the lease area. Staff disagrees that Petitioner has demonstrated that she is directly affected with this argument.

**(4) Petitioner failed to receive adequate notice of the lease approval.**

Petitioner asserts that she was entitled to notice of the lease decision but failed to receive it. Staff agree that Petitioner was entitled to notice of the lease decision under G.S. 113-202(g) because she submitted a public comment at the public hearing and requested notification of the lease decision. DMF did not have a contact for Petitioner to notify them of the lease decision. Even

accepting Petitioner's assertion that the Division's attempt to provide notice of the lease decision was insufficient, Petitioner was not directly affected because she received actual notice of the lease decision as evidenced by her timely filing of this request. Even if Petitioner were directly affected by her purported inadequate notice, it would not constitute grounds to overturn the lease decision.

**(5) Petitioner's property is within the 250-foot setback required for a developed shoreline.**

Petitioner next asserts that she is directly affected because she owns property that is less than 250 feet from the lease area. Petitioner owns property that lies approximately 65 feet from the lease area. Petitioner asserts that this property constitutes a developed shoreline and that the 250-foot setback required under 15A NCAC 03O .0201(b)(2) applies. While staff disagrees that Petitioner's property constitutes a developed shoreline, it acknowledges that Petitioner's property lies closer than the 250-foot setback, and as a result, Petitioner is directly affected by the lease decision, including the Division's determination that Petitioner's property was not a developed shoreline.

For these reasons, Staff agree that Petitioner is directly affected based on her ownership of property within 250 feet of the lease. Staff disagree that her other arguments have demonstrated that she is directly affected by the lease decision. Staff note that even meeting this "directly affected" standard in this proceeding may not satisfy the elevated standard of harm employed at the OAH.

**C. Has the Petitioner Demonstrated that the Hearing Request is not Frivolous? No.**

Petitioner's arguments consist of the five issues noted in Sections A and B above and will be discussed separately below considering this statutory factor.

**1. Incompatible competing uses of the public trust resources**

Petitioner asserts that the shellfish lease approved is not compatible with the lawful utilization by the public of other marine and estuarine resources, including, but not limited to, navigation, fishing and recreation and that the lease is within an area traditionally used and available for fishing and hunting activity. Petitioner makes a blanket assertion that she and her family members will be restricted in their ability to use the area for these purposes by the lease. Petitioner states that she will present evidence of this at trial. Absent some further showing that Petitioner or others have traditionally used the lease area for fishing or hunting, or that the lease is not compatible with lawful utilization of marine and estuarine resources, staff disagrees that a hearing on the issue of compatibility of the lease with lawful utilization of other marine and estuarine resources, and the traditional use of the area for recreation would not be frivolous and therefore Petitioner has failed to meet the requirements of N.C.G.S. § 113-202(g)(3).

## **2. Petitioner's riparian rights will be impinged.**

Petitioner asserts that the potential shellfish lease will restrict her riparian rights, particularly with respect to a future dock and access from her property to open water. Staff disagree with Petitioner's assertions. First, any assertion that Petitioner has plans for a future dock are speculative. Second, as detailed in B.(2) above, Petitioner's right to construct a dock or pier is not restricted by the shellfish lease. A separate process exists to protect Petitioner's ability to construct a dock and utilize the dock to reach deep water. Finally, the lease area does not prohibit Petitioner from reaching deep water. The lease area does not extend to the southeastern corner of Petitioner's property, and thus a corridor between Petitioner's property and deep water remains intact. Because Petitioner retains access to deep water and his right to construct a dock or pier is preserved by the Division's amendment process, staff contend that a contested case on the issue of impingement of Petitioner's riparian would be frivolous.

**3. The lease will significantly interfere with navigation from Petitioner's shoreline.**

As discussed in B.(3) above, the lease does not prohibit or prevent Petitioner from reaching open water from her property. Although some portions of her shoreline may be more difficult to reach than others, she retains the ability to navigate from the southwest corner of her property to open water, and thus a hearing on this issue would be frivolous.

**4. Petitioner failed to receive adequate notice of the lease approval.**

As discussed in B.(4) above, even accepting Petitioner's assertion that the Division's attempt to provide notice of the lease decision was insufficient, Petitioner received actual notice of the lease decision as evidenced by her timely filing of this request. A hearing on the sufficiency of Petitioner's notice would be frivolous.

**5. Petitioner's property is a developed shoreline that requires a 250-foot setback**

Petitioner asserts that a 250-foot setback is required because her property constitutes a developed shoreline. Staff disagrees. Petitioner identified the following activities performed on her property to support her claim that it is a developed shoreline:

1. Cut timber on the property;
2. Planted trees;
3. Constructed a road; and
4. Initiated the process of constructing a dock by obtaining a quote for construction.

Although these activities are consistent with Petitioner's stated intention to develop the property, they do not represent a developed shoreline for the purposes of 15A NCAC 030 .0201(b)(2). As discussed above, Petitioner's property does not contain any structures and the only infrastructure present is a road. Given the absence of any structures and the very limited activities that have been completed on the property, it is unlikely that Petitioner can demonstrate that her property should be considered a developed shoreline. Petitioner's future plans for the property are

speculative and do not constitute a proper basis for the application of the 250-foot setback and a hearing on this issue would be frivolous.

#### **IV. CONCLUSION**

In conclusion, Staff believes that Petitioner has failed to meet the criteria justifying a contested case hearing. For the reasons stated herein, the DMF, through its undersigned attorney, recommends that Petitioner's Third Party Hearing Request be DENIED by the Committee.

This the 11th day of June 2025.

FOR THE DIVISION OF MARINE FISHERIES

\_\_\_\_/s/ M. Shawn Maier\_\_\_\_  
M. Shawn Maier  
Assistant General Counsel  
North Carolina Department of Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601  
(919) 707-8118  
Shawn.Maier@deq.nc.gov

#### **CERTIFICATE OF SERVICE**

This is to certify that I have served a copy of the attached Recommendation of the Division of Marine Fisheries on following people:

Jessica S. Humphries, Esq., Attorney for Petitioner, via email to:  
jhumphries@fsofirm.com

Jacob Milchuck, Lessee, via email to: jacob@geospecinc.com

Shellfish Cultivation Lease Review Committee, via email to: [MFC@ncdenr.gov](mailto:MFC@ncdenr.gov)  
Special Deputy AG Phillip Reynolds, SCLRC Counsel [preynolds@ncdoj.gov](mailto:preynolds@ncdoj.gov)  
Assistant AG Sarah Zambon, SCLRC Co-Counsel [szambon@ncdoj.gov](mailto:szambon@ncdoj.gov)

This the 11<sup>TH</sup> day of June, 2025.

/s/ M. Shawn Maier  
M. Shawn Maier  
DEQ Assistant General Counsel

## **LIST OF ATTACHMENTS TO THE STAFF RECOMMENDATION**

1. Aerial/Ground images of Lease Area (Fact C)
2. Map showing distance of 766 feet from Inter-Coastal Waterway setback (Fact C)
3. Aerial from lease tool showing distance of 30' waterward from shoreline (Fact C)
4. Aerial from lease tool showing distance from proposed lease to existing lease (Fact C)
5. Creech's parcel tax card (Fact F)
6. GIS showing Creech's parcel on Harvell Lane and Silver Dollar Road (Fact F)
7. Aerial from lease tool showing no recognized submerged lands claims in area (Fact H)
8. Aerial from lease tool showing nearby closure line (Fact I)
9. 1985 DOJ memo re: duck blinds (Fact K)
10. SL 1981-581 about waterfowl hunting in Carteret Co and Pamlico Co (Fact K)
11. 8.5 marina contested case- final decision (Fact Z)




Proposed Lease ID/Number: 24-005BL/24-006WC  
Jacob Milchuck

Date: 7/15/2024



Yards  
0 255 510

 Proposed Lease Area

**Acreage: 6.17**

Coordinate System: NAD 1983 2011 StatePlane North Carolina FIPS 3200 Ft US





















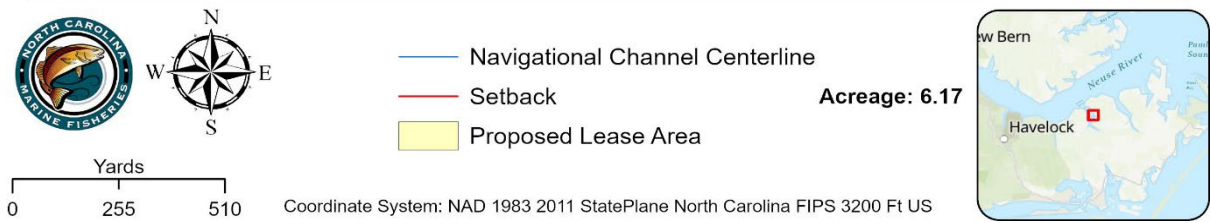






Proposed Lease ID/Number: 24-005BL/24-006WC  
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## Measurement



Feet

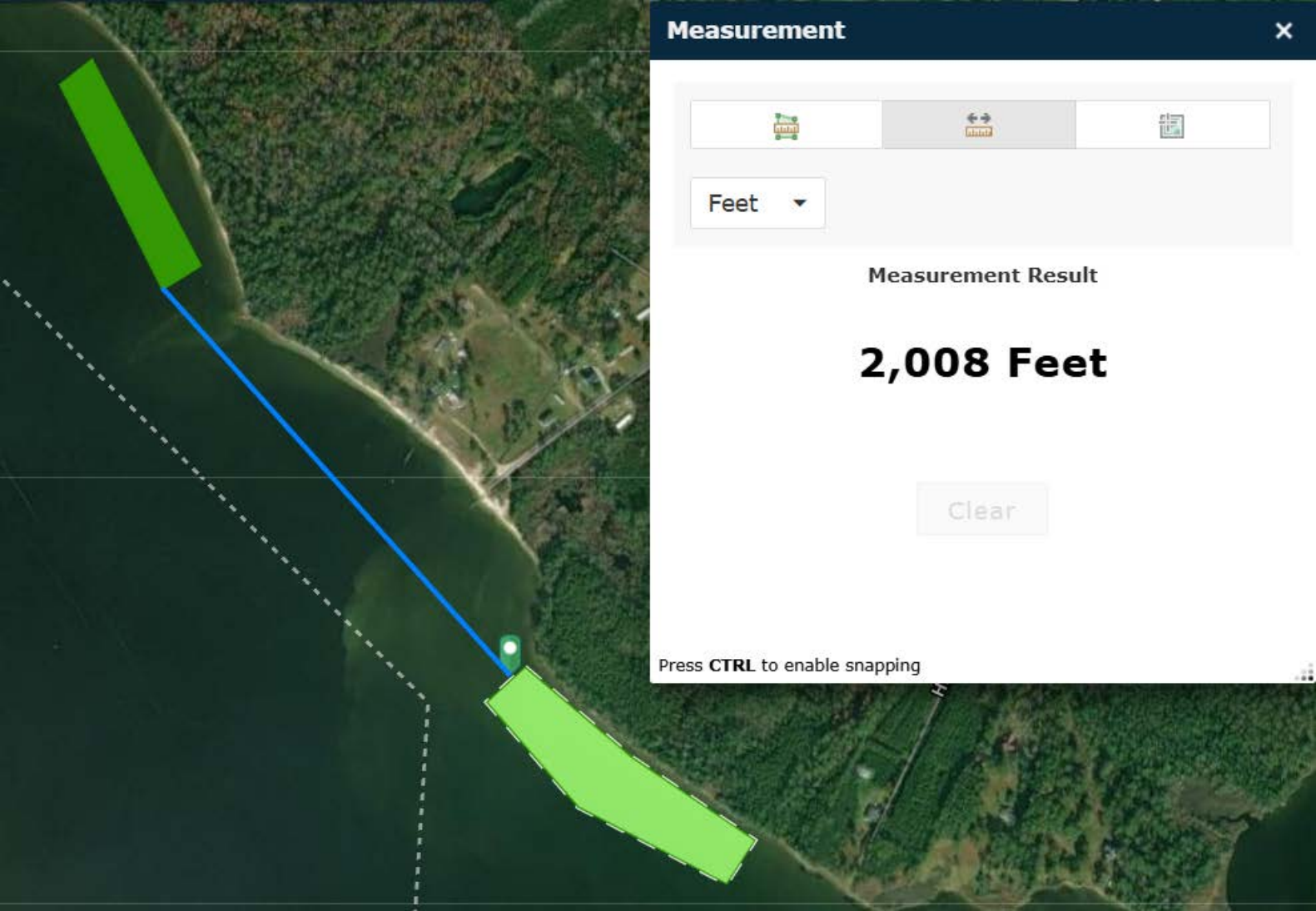


Measurement Result

**33.7 Feet**

Clear

Press **CTRL** to enable snapping



## Measurement



Feet ▼

Measurement Result

**2,008 Feet**



Clear

Press **CTRL** to enable snapping

















Map Layers

Layers



- Lease Applications - Point  
- Submerged Land  

Submerged Land
- NC1Map Parcels  
- Research Sanctuaries  
- Lease Marking Compliance Survey  
- Terminated Lease Verification 



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Jacob Milchuck

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# State of North Carolina

Department of Justice

P.O. BOX 629

RALEIGH

27602-0629

LACY H. THORNBURG  
ATTORNEY GENERAL

5 February 1985

## MEMORANDUM

TO: Mr. Vernon Bevill  
Executive Director  
Wildlife Resources Commission

FROM: J. Allen Jernigan *Allen Jernigan*  
Associate Attorney General

RE: Regulation of Hunting from Duck Blinds  
in Proximity of Occupied Dwellings

The Attorney General's Office recently received and responded to a citizen inquiry from a Mr. Leigh Winslow, Jr. of Hertford, concerning hunting from a duck blind located on the Perquimans River approximately fifty yards from his home. (Letter and response attached). In my response, I informed Mr. Winslow that my research uncovered no state laws, regulations or policies which prohibited duck hunting from blinds located in such proximity to occupied dwellings.

The purpose of this memorandum is to inform your office of this situation, and to forward to you a response from Joseph H. Henderson of the Department of Administration's State Property Office which expresses concern respecting this situation. The State Property Office regulates state-owned lands, including the submerged lands beneath the Perquimans River upon which the duck blind in question is located.

Thank you for your attention to this matter. If I may be of assistance, please do not hesitate to contact me at 3-9039.

/bs

Attachments

cc: Joseph H. Henderson  
Reggie Watkins  
Dan McLawhorn





504

State of North Carolina

Department of Justice

RUFUS L. EDMISTEN

ATTORNEY GENERAL

P. O. BOX 529

RALEIGH

27602-0529

4 December 1984



Mr. Leigh Winslow, Jr.  
Route 3, Box 66  
Hertford, North Carolina 27944

RE: Regulation of duck blinds

Dear Mr. Winslow:

Your letter of November 17, 1984 regarding the location of a duck blind in the Perquimans River near Hertford, was recently forwarded to me for response. As a matter of state law and long-standing policy, the Attorney General's Office provides legal counsel and advice only to its clients, the State of North Carolina, and its agencies and officials. This office, however, has researched the general question which your letter presented, and I am happy to provide you with the following information.

The issue your letter raises appears first to have arisen in the 1846 North Carolina Supreme Court case of Hatfield v. Grimsted, 29 NC 139 (1846). From that decision, it appears that a landowner may prevent persons from hunting from a duck blind, if he owns the land on which the blind is located. Under North Carolina law, however, lands beneath navigable waters such as the Perquimans River, are generally considered to be held by the State in public trust for the use and benefit of all the State's citizens. This common law principle has been applied in this State and most others which evolved from English colonial areas, and has been construed to include the hunting of waterfowl.

Although the Wildlife Resources Commission is authorized by statute to regulate hunting in North Carolina, the Commission does not, at this time, regulate or license duck blinds in Perquimans County. Only Currituck County, by virtue of special local legislation creating the Currituck

Mr. Leigh Winslow, Jr.

4 December 1984

Page 2

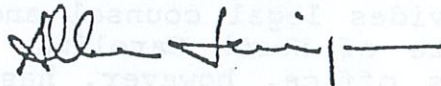
County Game Commission, issues licenses to control the location of duck blinds.

Generally, the regulation of "development" activities, including the construction of structures, in areas of environmental concern such as estuarine or navigable waters, is within the jurisdiction of the Coastal Resources Commission (CRC) under the Coastal Area Management Act (CAMA). (North Carolina General Statute 113A-100, et seq.) Currently, however, the CRC does not require CAMA permits for the construction of duck blinds. At this time, this office is not aware of any State law which prohibits the construction of duck blinds in the vicinity of occupied dwellings.

I hope this information is of assistance to you. Perhaps consultation with a private attorney could yield more positive results. If I may be of further assistance, please feel free to contact me.

Sincerely,

RUFUS L. EDMISTEN  
Attorney General



J. Allen Jernigan  
Associate Attorney General

JAJ/dw

cc: Preston Page  
Reggie Watkins  
Charles Holliday

NORTH CAROLINA GENERAL ASSEMBLY  
1981 SESSION

CHAPTER 581  
SENATE BILL 616

AN ACT TO PROVIDE FOR SAFE DISTANCES FOR HUNTING MIGRATORY  
WILD WATERFOWL IN CARTERET AND PAMLICO COUNTIES.

The General Assembly of North Carolina enacts:

**Section 1.** Except as provided in Section 2 of this act, it is unlawful to take migratory wild waterfowl within 500 yards of another person's permanently established hunting location.

**Sec. 2.** This act does not apply to a person taking migratory wild waterfowl:

- (1) On property of which he is the landholder or has the landholder's permission to hunt; or
- (2) Within the riparian water area of property of which he is the landholder or has the landholder's permission to hunt; or
- (3) If he comes within 500 yards of another person's permanently established hunting location only after legally shooting at migratory wild waterfowl and while in active pursuit of a visible, crippled bird.

**Sec. 3.** The definitions of Subchapter IV of Chapter 113 of the General Statutes apply in interpreting this act. A "permanently established hunting location" is a blind, float, raft, mat, or other buoyant craft or any other location, position, or device that is permanently established for hunting migratory wild waterfowl at a specific site by:

- (1) The landholder of the property; or
- (2) The riparian landholder, if the site is on or in water and hunting rights in that water are not controlled by someone other than the riparian landholder; or
- (3) A person who has written permission to establish the permanent site from a landholder who would qualify under subdivisions (1) or (2).

**Sec. 4.** Any person who violates this act is guilty of a misdemeanor. A first offense is punishable by a fine of not less than ten dollars (\$10.00) nor more than two hundred fifty dollars (\$250.00), imprisonment not to exceed five months, or both. A second offense is a misdemeanor punishable by mandatory revocation of the violator's hunting licenses and cancellation of all his hunting privileges for one year and by fine, imprisonment or both in the discretion of the court. The court must notify the North Carolina Wildlife Resources Commission of such revocation of licenses and cancellation of privileges.

**Sec. 5.** This act applies only to the counties of Carteret and Pamlico.

**Sec. 6.** This act is effective upon ratification.



In the General Assembly read three times and ratified, this the 15th day of June, 1981.

STATE OF NORTH CAROLINA  
COUNTY OF CARTERET

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
17 EHR 01382

8 1/2 Marina Village John F Matthews VP Petitioner,  v.  NC Department of Environmental Quality Respondent,  v.  Samuel G. Boyd Respondent-Intervenor.	<b>FINAL DECISION</b>
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This contested case was heard by Administrative Law Judge Melissa Owens Lassiter on September 20-22, 2017 and January 8-10, 2018, in Beaufort, North Carolina, pursuant to Petitioners filing a contested case petition on February 27, 2017, appealing Respondent's decision to issue a shellfish bottom lease and a water column lease to Respondent-Intervenor.

**APPEARANCES**

For Petitioners: Keith H. Johnson, Robert John Glowacki  
Poyner Spruill LLP, Raleigh, North Carolina

For Respondent: Scott A. Conklin, Thomas Hill Davis, Assistant Attorneys General  
North Carolina Department of Justice, Raleigh, North Carolina

For Respondent-Intervenor: Stevenson L. Weeks,  
Wheatly, Wheatly, Weeks, Lupton, & Massie  
Beaufort, North Carolina

**ISSUE**

Whether Respondent otherwise substantially prejudiced Petitioners' rights and acted erroneously, or acted arbitrarily or capriciously when it granted Respondent-Intervenor's application for a shellfish bottom lease and the associated water column lease?

**STATUTES AND RULES AT ISSUE**

N.C. General Statute, Chapter 113, Article 16  
15A NCAC 03O .0201- .0211 (Marine Fisheries)

### **EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioners: 1 - 8, 13, 17(A-DD), 20 - 28

For Respondent: 1 - 24

For Respondent-Intervenor: 2 - 11, 14 - 16, 16A, 17, 17A, and 18

### **WITNESSES**

For Petitioners: The Honorable Alfred Braswell Cooper, III; Thomas Edward Briley, Jr; James Hinton Pugh Bailey, Jr.; Adrian Tyndall; Rebecca Bunn Matthews; Charles Steven Smith; Mike Gurrera; John Heath; Floyd Cohoon; Christopher Hill; Leslie Clinton Collins

For Respondent: Stephen Murphey; Officer Joe Marlette; Captain Steven Anthony; Dr. Braxton Davis

For Respondent-Intervenor: David Sledge; John Hopkins; Sammy Boyd; Charles Steven Smith

### **FINDINGS OF FACT**

BASED UPON careful consideration of the preponderance of the evidence presented at the contested case hearing, including the undersigned's assessment of each witness' credibility and testimony, and the documents and exhibits admitted into evidence, the undersigned finds as follows:

### **PARTIES**

1. Petitioner 8½ Marina Village (8½ Marina) is the homeowners' association for a condominium development located on Bogue Sound in Atlantic Beach, North Carolina. Petitioner John F. Matthews was the Vice President of 8½ Marina at the time the contested case petition was filed, and is an owner of a residence at 8½ Marina.

2. Respondent North Carolina Department of Environment Quality, Division of Marine Fisheries (Division or DMF) is a state agency authorized to administer and implement the North Carolina laws and rules for the protection of marine and estuarine fisheries and habitats of the State.

3. Respondent-Intervenor Sammy G. Boyd (Respondent-Intervenor) is the holder of the approved shellfish bottom and water column lease at issue in this case.

## LEASE SITE

4. On June 2, 2016, Respondent-Intervenor applied for a shellfish bottom lease (181458) and associated water column lease (1871466) (hereinafter referred to collectively as the “lease”). (Resp. Exh. 6). The lease application included a management plan, a site map, a water column amendment application, and a site view map. (Resp. Exh. 6).

5. The lease site is located in Bogue Sound, east of the Atlantic Beach Bridge, between the navigation channel going out of 8½ Marina to the west, and the navigation channel going out of Triple S Marina to the east. The lease is approximately .690 miles to the northeast of the navigation channel as it enters 8½ Marina. (T p 669). (Resp. Exh. 1).

6. The lease site is not located in a marked navigation channel. (T p 758).

7. The lease site is located approximately 381 feet off the shore. (Resp. Exh. 1). The riparian owner to the south of the lease site is David Sledge. (T pp 942-45). 8½ Marina is not a riparian owner adjacent to the lease. (T p 668).

8. Respondent-Intervenor also applied for adjoining shellfish bottom leases and associated water column leases located to the east and west of the lease site, respectively. The Division denied these lease sites. (Resp. Ex. 1).

9. There is an approximate six-inch difference in depth between the northern boundary of the lease site and the southern boundary. (T p 759). At low tide, the depth of the water within the lease site is on average approximately two feet. (T p 760).

## REVIEW OF APPLICATION

10. When determining whether to grant or deny a lease, the Division determines whether the lease meets the minimum statutory criteria set forth in N.C. Gen. Stat. §§ 113-202 and 202.1. (T p 852).

11. One minimum statutory criteria of particular relevance to this case is that “[c]ultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources.” N.C. Gen. Stat. § 113-202(a)(3). The phrase “compatible with” under N.C. Gen. Stat. § 113-202(a)(3) is not further defined by statute or regulation. DMF does not interpret this standard to mean there can be no impact to other public uses. Instead, DMF interprets this minimum standard to mean that existing uses must be able to exist along with the shellfish lease within the general area at the same time. (T pp 604, 854-55).

12. Additionally, DMF “may not grant a new lease in an area heavily used for recreational purposes.” N.C. Gen. Stat. § 113-202(b). The phrase “area heavily used for recreational purposes” under N.C. Gen. Stat. § 113-202(b) is not further defined by statute or regulation. The Division interprets the phrase “area heavily used for recreational purposes” pursuant to this subsection as an area where recreational use is concentrated relative to the surrounding water body. (T pp 853-54). The Division makes this determination by examining

whether there is heavy recreational use concentrated within the lease footprint. (T pp 853-54). Usually, this is an area where people tend to congregate, such as a popular sandbar, beach, or particular fishing spot. (T pp 606-07).

13. Water column leases must also “not significantly impair navigation.” N.C. Gen. Stat § 113-202.1(b)(1). The phrase “significantly impair navigation” is not further defined by statute or rule. The Division does not interpret this minimum standard to require that there be no impact to navigation. The Division interprets “significantly impair navigation” under this subsection to exclude leases in marked channels or in unmarked channels if the unmarked channel is the only deep passage through the area. The Division also prohibits a lease from taking up more than a third of the water body in a smaller water body such as a creek, to allow plenty of access around the lease so that individuals can get by. (T pp 608-09).

14. After receiving Respondent-Intervenor’s lease application and determining that the application was complete, DMF provided Respondent-Intervenor with four laminated proposed lease signs, and instructed Respondent-Intervenor to put a sign on each corner of the proposed lease site. The signs make the public aware that the area is being considered for a shellfish lease and provides contact information for DMF. Respondent-Intervenor marked the lease site pursuant to DMF’s requirements. (T pp 613, 631-32).

15. After Respondent-Intervenor marked the lease site with signs, the Division performed a site investigation on July 14, 2016. During its investigation of the lease site, Division staff looked for submerged aquatic vegetation and shellfish. (T p 614, Resp. Exh. 7). The Division determined that there was no submerged aquatic vegetation during the site visit. (T p 660). It also determined that the site did not contain a natural shellfish bed. (T p 667).

16. After the site investigation, DMF staff developed maps showing the location of the site, and sent the maps for internal review within DMF to the Marine Patrol, the Fisheries Management Section, and Shellfish Sanitation. DMF also requested the Division of Coastal Management review the proposed lease site. (T pp 616-17).

17. The Fisheries Management Section within DMF has the responsibility of managing sustainable fisheries for the benefit of the people of North Carolina. The Division seeks input from the Fisheries Management Section to determine whether there may be an issue with traditional fishing gear use, or if the area is considered under some sort of management status. (T p 618). Trish Murphey with Fisheries Management opined that the proposed lease would be compatible with recreational, commercial fishing, and shellfishing interests in the area, and would not adversely affect navigation. (Resp. Exh. 9).

18. Shellfish Sanitation determined that the lease was in an area that is approved for the harvest of shellfish, and that the status of the area had not changed within the last year. (Resp. Exh. 9).

19. The Division's usual practice is to request comment from the Division of Coastal Management ("DCM") on leases because they are familiar with coastal development issues. The Division did not start requesting comments from DCM until early 2016. Therefore, comment from DCM is relatively new. The Comments provided by DCM for this lease site were general comments that DCM provides on nearly all water column leases and are not site-specific comments. (T p 624).

20. Out of the three commenting sections within the Division, Fisheries Management, Shellfish Sanitation, and Marine Patrol, the Marine Patrol is the section that usually has the most information pertaining to the public's recreational use of an area. This is because the Marine Patrol officer assigned to the specific area spends more time in that area than anyone else in the Division. (T p 623).

21. The shellfish leasing program sought input from Captain Steven Anthony from Marine Patrol. Captain Anthony is the District Captain for the Central District. Captain Anthony began working for DMF in 1995. Captain Anthony was a pilot and then chief pilot for the Division before becoming a captain over ten years ago. Captain Anthony oversees 12 field officers, 2 sergeants, and a pilot. His district includes Bogue Sound, Core Sound, Neuse River, Pamlico River, and part of the Pamlico Sound. (T pp 816-17).

22. Captain Anthony forwarded the request for comments to Officer Marlette, the local officer charged with patrolling the area in which the lease site is located. (T pp 817-18).

23. Officer Marlette has been a marine patrol officer for approximately ten years. Prior to working for the Division, Officer Marlette served in the military, worked for the Lenoir County and Carteret County sheriffs' offices, and ran a forty-passenger ferry. (T p 753).

24. Officer Marlette is specifically assigned to work the area around Morehead City, which is the area marked as 215 on Respondent's Exhibit 19. This area includes the specific area shown in Respondent's Exhibit 1, which includes the lease site. (T p 754). Officer Marlette has been assigned to this location for approximately nine and a half years. (T p 780).

25. Officer Marlette spends the majority of his patrol time within the area shown as Respondent's Exhibit 1, because there is a lot of activity in the Intracoastal Waterway and the State Port area. (T pp 754-55). Officer Marlette's patrol time includes weekends and nights. (T p 755). It is a necessary part of Officer Marlette's duties to know those areas within his patrol area where recreational users tend to congregate to ensure individuals in his patrol area are complying with the rules and laws pertaining to boat safety and fishery resources. (T pp 753, 756).

26. Officer Marlette visited the lease site before submitting comments. The lease site was clearly marked with poles and signs with the lease number and the applicant's name. (T p 757). Officer Marlette did not notice anything about the lease site that would distinguish it from the surrounding area in terms of recreational use. (T p 758). Based on his observations, Officer Marlette concluded that there was very minimal recreational activity in and around the lease area.

27. Officer Marlette has observed that the majority of boating traffic in the general vicinity uses the marked channels, including the Intracoastal Waterway. (T pp 756, 802). Officer Marlette had not noticed any particular concentration of boating within close proximity to the area where the lease is located prior to the time that the lease was granted. (T p 759).

28. Officer Marlette would occasionally see paddle boarders going up and down the shoreline within the general vicinity of the lease site but not many. (T p 811). Officer Marlette has seen some kayakers go up and down the shoreline within the general vicinity of the lease during the summer. (T p 758). Officer Marlette opined that there is still enough room for kayakers to paddle between the lease and the shoreline. (T p 763).

29. At night time, Officer Marlette has also seen flounder giggers around the shoreline within the general vicinity. However, fishing activities were not concentrated within close proximity to the lease site. (T p 758). Officer Marlette opined that individuals could still fish in the area around the lease site. (T p 764).

30. Officer Marlette has seen only a few jet skis in the general vicinity of the lease site. Officer Marlette may occasionally see a Hobie Cat sailboat on the outside of the lease site, but nothing within the lease site. He opined that the granting of the lease would not prevent future sailing activity within the general vicinity of the lease site. (T p 811).

31. Based on his knowledge of the lease site, Officer Marlette submitted the comments contained in Respondent's Exhibit 20. Specifically, Officer Marlette commented that:

- a) the lease would be compatible with fishing, boating, and other recreational interests, and that the proposal is not in a high traffic area;
- b) the lease would adversely affect navigation in the area, but is not in a channel;
- c) the lease would be compatible with commercial fishing and shellfishing interests in the area; and
- d) he had not received any public comment concerning the proposed lease.

(Resp. Exh. 20).

32. After completing the comment form marked as Respondent's Exhibit 20, Officer Marlette discussed the lease site and his answers on the form with Captain Anthony. Officer Marlette informed Captain Anthony that there was very minimal activity in and around the lease site. (T p 801).

33. Captain Anthony was somewhat familiar with the location of the lease site. Specifically, when Captain Anthony was a pilot for the Division, he would fly out of the Beaufort Airport and over the general area around the lease site. (T p 820). Further, Captain Anthony has passed by this area about ten or twelve times within the last year while going out in the field with officers in his office. (T p 821). The boat traffic Captain Anthony witnessed in the general area was mostly to the north of the lease site, and coming in and out of the channels to the marinas. In his opinion, Captain Anthony thought there was no reason the recreational activities he observed could not continue with the proposed lease in place. (T p 823).

34. Captain Anthony questioned Officer Marlette as to why he had commented that the proposed lease site would adversely affect navigation. (T p 819). Officer Marlette explained to Captain Anthony that anything that is put in the water is going to affect navigation, because boats would have to go around it. When Captain Anthony asked whether one could go around the lease, Officer Marlette explained that there was plenty of room to go around the lease site. (T p 766). Based upon this conversation, Captain Anthony changed the Marine Patrol's written comment to state that the lease would not adversely affect navigation, while commenting: "[n]ot in the channel but small boats do operate in the area." (T p 82). Officer Marlette agreed with this change. (T p 767). Captain Anthony submitted the comments contained in Respondent's Exhibit 21 on behalf of the Marine Patrol to the Respondent's shellfish program. (T p 819-20).

35. N.C. Gen. Stat. § 150B-34(a) provides that the undersigned shall "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

36. The undersigned finds the testimony by Officer Marlette to be particularly persuasive as to the level of recreational use in the general and specific areas where the lease site is located, as well as the lease's impact to recreational use and navigation. This weight is based, in part, upon Officer Marlette's years of experience as a marine patrol officer charged with enforcing safety and fishing regulations within the general area of Bogue Sound where the lease is located.

37. Dr. Braxton Davis is the Director of the North Carolina Division of Coastal Management. Dr. Davis also served as Director of the Division of Marine Fisheries from April 2016 to January 2018. (T p 847).

38. Dr. Davis has a great deal of experience in Coastal and Marine Science and Policy, including experience handling user conflicts relating to Marine Resources. This experience includes serving as the Director of the North Carolina's Division of Coastal Management, the Director of the Policy, and Planning Division with the South Carolina Coastal Management Program, and as a policy analyst with the National Oceanic and Atmospheric Administration. Dr. Davis' prior experience and education is summarized in Respondent's Exhibit 22.

39. Dr. Davis has experience with boats as he previously held a Captain's license from the Coast Guard, and previously owned a 30-foot sailboat, a 25-foot power boat, and a 23-foot power boat. Dr. Davis also owns kayaks and a paddle board.



40. Part of Dr. Davis' delegated authority as Director of Marine Fisheries (DMF) is to approve or deny shellfish leases. (T p 850). Dr. Davis has been involved with approximately 40 to 50 lease decisions during his time as Director of Marine Fisheries. (T p 850).

41. After the Fisheries Management Section, Marine Patrol, Shellfish Sanitation Section, and DCM submitted comments on the proposed lease, a memorandum from Mr. Stephen Murphey (Resp. Exh. 9) was sent to Dr. Davis. (T p 628).

42. Mr. Murphey is the current Director of the Division of Marine Fisheries as of January 1, 2018. (T p 593). Mr. Murphy began his employment with the Division of Marine Fisheries in 1987. In 1999, Mr. Murphey transferred to the Shellfish Sanitation section which was with the Division of Environmental Health at the time. In 2015, Mr. Murphey returned to the Division where he was employed as the Section Chief of the Habitat Enhancement Section within the Division. Mr. Murphey served as Section Chief until he was named Director of DMF in January 2018. (T pp 593-94).

43. The memorandum from Mr. Murphey (Resp. Exh. 9) was presented to Dr. Davis so Dr. Davis could determine whether to proceed with a public hearing. Dr. Davis decided to proceed with a public hearing. (T pp 628-29).

44. A Notice for the public hearing for the proposed lease and other proposed shellfish leases was published in the Carteret County News Times, the Jacksonville Daily News, and on the Division's website. In addition, the Division notified an individual at 8½ Marina about the public hearing. (T pp 629-30).

45. On January 18, 2017, DMF staff conducted a public hearing at DMF's central district office in Morehead City. The meeting minutes (Resp. Ex. 15) accurately reflect what was discussed at the public hearing. During the public hearing, the Division received comments both in favor and in opposition to the subject lease. (T pp 638-39, Resp. Exh. 15).

46. In addition to holding a public hearing, the Division also accepted written public comments. (T p 633). The majority of the written comments received by the Division were form letters, such as the letter introduced as Respondent's Exhibit 13. The second paragraph of that letter stated that the lease area is closed to shellfishing. This statement is incorrect as the lease site was not in an area closed to shellfishing. (T pp 633-64).

47. Some of the comments DMF received from the public pertained to concerns regarding the potential impact to recreational use in the general area. (Res Exh. 24).

48. The Division also received comments relating to the proposed leases' effect on the viewshed of the area. The letter introduced as Respondent's Exhibit 14 is an example of such a comment. Nonetheless, the Division does not consider impacts on viewshed as a basis for denying a shellfish lease, as this is not a criterion in the relevant statutes or rules pertaining to shellfish leases. (T pp 635-36).

49. After the public hearing and comment period, Dr. Davis received Mr. Murphey's memorandum that summarized the comments received by the Division during the public hearing. (Resp. Exh. 16). In addition to this Memorandum, Dr. Davis received the entire lease package which included internal comments, as well as the written public comments. (T p 639). Dr. Davis read all of the public comments prior to making his decision in this case. (T p 899). Mr. Murphey then met with Dr. Davis and discussed the lease site further. (T p 640).

50. Dr. Davis has driven his boats by the general area of Bogue Sound where the lease site is located, and hence, has a general familiarity with the boat traffic in that area and the width of the water body. (T pp 865, 928).

51. When determining whether to grant or deny a lease, Dr. Davis considers the minimum statutory criteria described in N.C. Gen. Stat. §§ 113-202 and 113-202.1. (T p 852).

52. In this case, Dr. Davis did not see sufficient evidence during the application review to conclude that there was a concentration of recreational activity within the specific footprint of the lease site. Based upon the evidence, Dr. Davis concluded that the lease site was not within an area heavily used for recreational purposes. (T p 862).

53. Dr. Davis further concluded that the lease would not significantly impair navigation as he did not see sufficient evidence during the application review that the lease site would be located within a navigation channel. He also determined that there would be plenty of area to maneuver around the lease. Dr. Davis also determined that the lease would be compatible with other public uses in the general area. (T p 863).

54. Taking into account public concerns regarding navigation and recreational use, Dr. Davis denied the outer two leases due to: (1) their proximity to the entrance channels to 8½ Marina and Triple S Marina, and (2) to reduce the footprint of the overall area that would be covered to ensure that the lease site would be compatible with recreational activities in the area. (T pp 867-68).

55. The lease site is not in an area that is any more heavily used by recreational users than other areas in which the Division has granted leases. (T p 642).

#### TESTIMONY FROM RESPONDENT-INTERVENOR'S WITNESSES

56. David Sledge has lived in Carteret County since 1951. (T p 943). Mr. Sledge owns and resides at the property directly in front of the lease site. (T pp 942-43). He has owned this property for over five years. (T p 943).

57. Mr. Sledge has an unobstructed view of the lease site from his house. Mr. Sledge has observed very little boat traffic between Triple S Marina and 8½ Marina. (T pp 944-45, 949). Mr. Sledge may see a boat go by that area once every three days. (T p 945).

58. Mr. Sledge has seen only about four kayaks in the area in front of his property in the seven or eight months preceding his testimony at the hearing on January 9, 2018. (T p 947). Mr. Sledge opined that there was limited kayak traffic because there is no nearby public access.

59. Mr. Sledge and his family own and use kayaks. Mr. Sledge also keeps a boat at Ft. Macon Marina. The proposed lease does not interfere with Mr. Sledge's use of the area around the lease site. (T pp 945-47).

60. John Hopkins has been living at 125 Island Quay Drive for over twenty years. Mr. Hopkins also has an unobstructed view of the lease site from his house. (T pp 959-60). Depending on the weather, Mr. Hopkins sees a tremendous amount of traffic in the Intracoastal Waterway. As Mr. Hopkins gets closer into shore and out of the Triple S, particularly the proposed oyster lease, he estimates that "less than one percent of the boat traffic he has viewed going east-west and west to east are -- are ever anywhere close to shore because it's so shallow there." (T p 961).

61. Mr. Hopkins has seen jet skis in the subject Bogue Sound area, but has not observed any jet skis riding through the lease site, and not that close to shore. (T pp 962, 964). Mr. Hopkins has never observed anyone pulling another individual on a tube behind a boat in the area where the lease site is located. Mr. Hopkins has pulled his son and his son's friends on a tube on numerous occasions, but does not use the area of the lease site as there is not enough water in the area for the outboard motor on his boat. (T p 962).

62. Respondent-Intervenor Boyd has lived in Morehead City for forty-seven years. (T p 969). Mr. Boyd has fished in Bogue Sound since he was about 12 or 13 years old. (T p 970).

63. Mr. Boyd visits the lease site about three times a week during the spring, summer, and fall. He has not seen any boating traffic at the lease site during the times that he has visited the site. (T p 981).

64. Mr. Boyd was familiar with the boat traffic in the area prior to obtaining the lease. The lack of boat traffic in the lease site, and the fact that he would not be infringing or impeding on anyone else, was the reason Mr. Boyd chose that area. (T p 985).

#### TESTIMONY FROM PETITIONER'S WITNESSES

65. The Town of Atlantic Beach (the Town) also challenged the issuance of the lease at issue in this case by filing a contested case petition (17 EHR 01564). The Town's challenge was consolidated with this contested case for hearing. The Town offered two witnesses in support of its case: The Honorable Alfred Braswell Cooper, III, Mayor of the Town, and Town Councilman Thomas Edward Briley, Jr. The undersigned dismissed the Town's contested case (17 EHR 01564) by Order dated November 3, 2017 for lack of standing pursuant to N.C. Rule of Civil Procedure 41(b) following the close of the Town's evidence. However, the undersigned Granted Petitioner's Motion to adopt the testimony of the Town's witnesses, Mayor Alfred Braswell Cooper, III and Town Councilman Thomas Edward Briley, Jr. as part of this contested case.

66. Atlantic Beach Town Mayor Alfred B. Cooper, III alleged that the Town was concerned about the lease based on potential conflicts with use of the waters of Bogue Sound by tourists. (T p 62). However, the Mayor's concerns were general and not specific to the use of the lease site. The Mayor did not claim any personal use of the lease site, and had not even been to the location for several years. (T p 83). Although the Mayor voiced concerns about potential loss of revenue from tourism and taxes, the Mayor could point to no evidence establishing any such losses, much less any such losses attributable to the lease site. (T pp 63-66).

67. Atlantic Beach Town Councilman Thomas Edward Briley, Jr. is familiar with the general area of the lease site. Despite fishing in the general area, Mr. Briley has never fished within the bounds of the lease site, and has never observed others fishing in the area of the lease site, except perhaps on the outer fringes. Yet, he has seen recreational fishing occur in deeper water offshore of the lease site. (T p 101). Despite the presence of signs marking the lease site since July 2016, Mr. Briley has not personally seen the lease site until after the public hearing on whether to approve the lease in January 2017. (T p 123). Mr. Briley typically passes the lease site on his way to somewhere else. He does not spend much time personally recreating in the area near or around the lease site. (T pp 108, 110). Mr. Briley thinks that boat traffic could still transit the area with the proposed lease in place. (T pp 107-09). He is not concerned with this lease site specifically, but is generally concerned with the potential for future leases in the waters surrounding the Town. (T pp 106, 125).

68. Petitioners offered nine witnesses in support of their case: four residents of 8½ Marina Village, two residents of Triple S Marina, the owner of a jet ski rental outfit, the owner of a local marina, and the technician who took photographs of the lease site on behalf of Petitioners.

69. James Hinton Pugh Bailey, Jr., is the owner of Anchorage Marina in the Town of Atlantic Beach and lives in a home that overlooks the area of Bogue Sound near the lease site. Mr. Bailey described his business and the use of the waters in the area by the boats that use his marina. Mr. Bailey generally explained about use of the waters in the vicinity of the lease site. Although testifying at length about general uses of the waters in the vicinity of the lease site, Mr. Bailey had never seen a boat within the lease site itself. (T pp 172-73). Mr. Bailey opined that there was no need for the boats traversing the general area to cut through the actual lease site. (T pp 174-75). Mr. Bailey similarly noted that the other activities occurring in the general area, such as kayaking, flounder-gigging, and fireworks viewing, do not occur in the lease footprint, and would not be prevented by the presence of the lease. (T pp 176-778).

70. Adrian Tyndall is the owner of Eastern Carolina Computers. At the request of Petitioners, and with Petitioners' knowledge, Tyndall installed a video recorder and digital camera to record activity in the area of the lease site from July 8, 2017 through September 6, 2017. This recording occurred after Respondent granted Respondent-Intervenor's lease, and before the contested case hearing in this matter. (T pp 214-15). On behalf of Petitioners, Mr. Tyndall selected images of east to west boat traffic in the general area of the lease. (Pet. Ex. 17A-17DD). (T pp 217-18). These pictures were selected with the specific purpose of showing boat traffic and other activity in the area and were not random samples. (T pp 236-37). All pictures were taken during the summer tourist season, and all but four of the pictures were taken on weekends. (T pp 235-

36). Much of the activity depicted in the photographs occurred outside the marked lease area. (T p 239).

71. Rebecca Bunn “Bunny” Matthews kayaks in the general area of Bogue Sound east of the Atlantic Beach Bridge, between the channel going out of 8½ Marina, the channel going out of Triple S Marina to the east, and the lease site. (T p 253). On September 20, 2017, the day Ms. Matthews testified in this case, she kayaked in the area between the shore and the southern portion of the lease area. (T pp 262-263).

72. Ms. Matthews has also witnessed small boat traffic in this general area of Bogue Sound. (T pp 258-59, 262). The presence of the lease site did not prevent or impede her continued kayaking in the water area at issue. (T p 263).

73. Charles Steven Smith has fished by wading along the marsh line within sight of the lease site. The majority of his fishing is basically limited to the shoreline and the sloughs in close proximity to 8½ Marina. (T pp 287-288). Mr. Smith has never fished within the lease itself, and the lease site did not affect his fishing. (T pp 284, 288). Although Mr. Smith expressed general concerns regarding small boat traffic, particularly jet skis, in the Bogue Sound area at issue, Mr. Smith does not own a jet ski, and, to his knowledge, no one at 8½ Marina owns a jet ski. He has personally never witnessed any problems with jet skis at the lease site, and there was ample room for jet skis to avoid the lease site. (T pp 285-86, 289).

74. Floyd “Chip” Cohoon owns a unit at 8½ Marina Village and resides there approximately five months during the year. Mr. Cohoon has observed small boat traffic in the lease site. He also cuts through the area on his own skiffs. Mr. Cohoon’s primary concern regarding the lease was for the safety of other users of Bogue Sound that lacked local knowledge and not for the residents of 8½ Marina. The general area of activity he is concerned about runs from the shoreline on the sound side of Atlantic Beach at the south, to roughly the Intracoastal Waterway at the north, and from the Atlantic Beach bridge on the west, to Spoils Island and the North Carolina State Port on the east in Morehead City. (T pp 382, 384). In Mr. Cohoon’s opinion, there is no reason that boaters cannot continue to use the area surrounding the lease site. He does not think the proposed lease will interfere with boat traffic transiting the area. (T pp 386-87). Mr. Cohoon has only seen one or two boats pass through the leased site daily, which he could see from his home at 8½ Marina. (T p 390).

75. Leslie Clinton Collins frequently transits the general area of the lease site in his boats, typically running from east to west along the shoreline when doing so. Mr. Collins drives his boats up and down the Bogue Sound, offshore, and as far north as Ocracoke. (T pp 427-28, 471). Mr. Collins has observed other general recreational activity in the area surrounding the lease site, including the area from the Atlantic Beach Causeway to the N.C. State Port. (T pp 468-69). The majority of the recreational and navigational activity described by Mr. Collins occurs outside of the specific lease site. (T pp 432-35, 472-74). Other than transiting the area and occasional tubing in the vicinity of the lease, Mr. Collins does not personally use the lease site or the surrounding area too much.

76. Mike Gurrera is the owner of AB Water Sports in Atlantic Beach. He is not a resident of 8½ Marina. The majority of AB Watersports' business is jet ski rentals; but it also rents kayaks, paddleboards, and offers parasailing. (T pp 298-99). AB Watersports limits jet ski rentals to the area between the Atlantic Beach causeway and the N.C. State Port. AB Watersports also offers guided tours outside of this area. (T pp 301-02, 312). Mr. Gurrera opined that the lease site is approximately half of one percent of the total riding area between the Atlantic Beach Causeway and the N.C. State Port. (T pp 320-21). Mr. Gurrera also thought that jet skiers could safely pass along the sides of the lease, both the side nearest the shoreline and the side nearest the Intracoastal Waterway. (T p 324).

77. John Heath and Christopher Hill own residences at Triple S Marina, a mobile home community on Bogue Sound on the opposite (eastern) side of the lease from 8½ Marina. (Resp. Exh. 1).

78. Mr. Heath and his family boat in the general area of the lease site between the Atlantic Beach Causeway and the N.C. State Port, and south of the Intracoastal Waterway. Mr. Heath has seen approximately one boat a day go through the lease site. (T p 351). One of Mr. Heath's chief concerns is that he does not want to see the oyster lease from his home. (T pp 353, 361, 366).

79. Mr. Hill and his family boat, tube, paddleboard, and swim in the general area of the lease site between the Atlantic Beach Causeway and the N.C. State Port, and south of the Intracoastal Waterway. (T pp 392-98). Mr. Hill can navigate his boat to the north and south of the lease site as necessary. (T p 407). Even with the PVC pipes marking the lease site, Mr. Hill has continued to tube straight through the lease site as of the date of the hearing. (T pp 408-09).

80. To the extent the testimony of Petitioners' witnesses regarding the general public's use of the waters (Bogue Sound) within and surrounding the lease area conflicts with the testimony of Officer Marlette, Captain Anthony, Mr. Sledge, and Mr. Hopkins, the undersigned finds the testimony of Mr. Sledge, Mr. Hopkins, Captain Anthony, and Officer Marlette to be more credible, even in the absence of any deference given to the demonstrated knowledge and expertise of Officer Marlette and Captain Anthony concerning existing uses of the area.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, and the preponderance of the evidence in the whole record, the undersigned concludes as follows:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to their given labels.

2. Petitioners bear the burden of proof by a preponderance of the evidence to show that Respondent otherwise substantially prejudiced Petitioners' rights and acted erroneously, or acted arbitrarily or capriciously when it granted Respondent-Intervenor's application for a shellfish bottom lease and an associated water column lease. N.C. Gen. Stat. § 150B-25.1(a).

3. North Carolina law presumes that a regulatory agency has properly performed the duties it has been delegated to perform. *Matter of Broad and Gales Creek Community Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. North Carolina State Bd. Of Registration for Professional Engineers and Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998).

4. The proper interpretation of a law or rule is a question of law, and an agency interpretation of a statute or rule is not binding on the undersigned. Nevertheless:

It is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers 'so [ ] long as the agency's interpretation is reasonable and based on a permissible construction of the statute.'

*County of Durham v. North Carolina Dept. of Environment and Natural Resources*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998), *dis. rev. denied*, 350 N.C. 92, 528 S.E.2d 361 (1999) (citations omitted).

5. "[W]here the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public." *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988).

6. The General Assembly has declared in N.C. Gen. Stat. § 113-201(a) that:

[I]t is the policy of the State to encourage the development of private, commercial shellfish cultivation in ways that are compatible with other public uses of marine and estuarine resources.

7. The Secretary of the Department of Environmental Quality (Secretary) may, in his discretion, authorize shellfish bottom and associated water column leases when he determines that the public interest will benefit from issuance of such a lease, and the proposed lease otherwise meets certain minimum standards set forth in N.C. Gen. Stat. §§ 113-202, 113-202.1. N.C. Gen. Stat. §§ 113-202(a), 113-202.1(a). 15A NCAC 03O .0203 states that:

the Secretary shall consider the lease application, the Division's proposed lease area analysis, and public comments, and may in his discretion lease or decline to lease the proposed lease area or any part thereof.

8. Pursuant to N.C. Gen. Stat. § 113-201(a), the Secretary has delegated his authority for issuing leases to the Director of the Division of Marine Fisheries. See N.C. Gen. Stat. § 143B-10.

9. N.C. Gen. Stat. § 113-202(a) declares:

To increase the use of suitable areas underlying coastal fishing waters for the production of shellfish, the Secretary may grant shellfish cultivation leases to persons who reside in North Carolina under the terms of this section when the Secretary determines, in accordance with his duty to conserve the marine and estuarine resources of the State, that the public interest will benefit from issuance of the lease. Suitable areas for the production of shellfish shall meet the following minimum standards:

- (1) The area leased must be suitable for the cultivation and harvesting of shellfish in commercial quantities.
- (2) The area leased must not contain a natural shellfish bed.
- (3) Cultivation of shellfish in the leased area will be **compatible with** lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing and recreation.
- (4) Cultivation of shellfish in the leased area will not impinge upon the rights of riparian owners.
- (5) The area leased must not include an area designated for inclusion in the Department's Shellfish Management Program.
- (6) The area leased must not include an area which the State Health Director has recommended be closed to shellfish harvest by reason of pollution.

(Emphasis added)

10. The phrase “compatible with” under N.C. Gen. Stat. § 113-202(a)(3) is not further defined by statute or regulation.

11. The undersigned finds that DMF’s interpretation of the phrase “compatible with” is reasonable, is consistent with, and supported by the plain language of the statute and statutory framework. For that reason, the undersigned defers to DMF’s interpretation of this minimum standard in determining the validity of Petitioners’ claims in this case. Even in the absence of deference, the undersigned independently adopts DMF’s interpretation of this minimum standard.

12. N.C. Gen. Stat. § 113-202(b) states that DMF “may not grant a new lease in an area heavily used for recreational purposes.”

13. The phrase “area heavily used for recreational purposes” under N.C. Gen. Stat. § 113-202(b) is not further defined by statute or regulation.



14. The undersigned finds that DMF's interpretation of the phrase "area heavily used for recreational purposes" is reasonable, consistent with, and supported by the plain language of the statute and statutory framework. Therefore, the undersigned defers to DMF's interpretation of this minimum standard in determining the validity of Petitioners' claims in this case. Furthermore, even in the absence of deference, the undersigned independently adopts DMF's interpretation of this minimum standard.

15. N.C. Gen. Stat § 113-202.1(b) states:

Suitable areas for the authorization of water column use shall meet the following minimum standards:

- (1) Aquaculture use of the leased area must not significantly impair navigation; . . .

16. The phrase "significantly impair navigation" is not further defined by statute or rule.

17. The undersigned finds that DMF's interpretation of the phrase "significantly impair navigation" is reasonable, consistent with, and supported by the plain language of the Statute and statutory framework. Therefore, the undersigned defers to DMF's interpretation of this minimum standard in determining the validity of Petitioners' claims in this case. Furthermore, even in the absence of deference, the undersigned independently adopts DMF's interpretation of this minimum standard.

18. When an agency follows the applicable law and procedure and makes a decision within its discretion, as is the case here, this decision can only be overturned if the agency acted arbitrarily and capriciously. See N.C. Gen. Stat. § 150B-23(a); See also *ACT-UP Triangle v. Commission for Health Services of the State of N.C.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (reviewing an agency's discretionary decision under the arbitrary and capricious standard and holding that "[t]he reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.").

19. "Administrative decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate 'any course of reasoning and the exercise of judgment.'" *ACT-UP Triangle*, 345 N.C. at 707, 483 S.E.2d at 393 (quoting *State ex re. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)).

20. When determining whether an agency acted arbitrarily and capriciously, a reviewing court should not "replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

21. N.C. Gen. Stat. § 150B-34(a) requires that an 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.”

22. In this contested case, Petitioners specifically challenge DMF’s determination that the lease site is not within a heavily recreated area, and is compatible with recreational uses in the area. To the extent Petitioners contend that DMF acted arbitrarily and capriciously in its evaluation of the lease application, Petitioners have failed to establish by the preponderance of the evidence that DMF acted “whimsically” or in “bad faith.”

23. The preponderance of the evidence demonstrates that: (1) DMF reasonably interpreted the minimum standards set forth in N.C. Gen. Stat. §§ 113-202 and 202.1, and (2) Director Davis reasonably and rationally determined that the lease met the aforementioned minimum standards based on a thorough evaluation of the relevant information before him.

24. Even if the undersigned were not to give deference to DMF or to the testimony of its employees, Petitioners nevertheless failed to establish by the preponderance of the evidence that the bottom and water column leases at issue in this case are: (1) not “compatible with lawful utilization by the public of other marine and estuarine resources;” (2) in “an area heavily used for recreational purposes;” (3) significantly impairs navigation; or (4) otherwise does not meet the standards set forth in N.C. Gen. Stat. §§ 113-202 and 202.1. For those reasons, Petitioners failed to meet their burden to show that DMF acted erroneously, or acted arbitrarily or capriciously in granting Respondent-Intervenor’s application for a shellfish bottom lease and the associated water column lease.

25. Furthermore, in order to succeed on their claims, Petitioners are required to prove by a preponderance of the evidence that an allegedly unlawful agency action “substantially prejudiced the petitioner’s rights.” See N.C. Gen. Stat. §§ 150B-23(a), 150B-29(a).

26. The “harm required to establish substantial prejudice cannot be conjectural or hypothetical,” rather it “must be concrete, particularized, and ‘actual’ or imminent.” *Surgical Care Affiliates, LLC v. N.C. Dept. of Health and Human Services, Div. of Health Service Regulation, Certificate of Need Section*, 235 N.C. App. 620, 631, 762 S.E.2d 468, 476 (2014), *disc. review denied*, 368 N.C. 242, 768 S.E.2d 564 (2015).

27. Petitioners failed to establish by the preponderance of the evidence that Respondent’s issuance of the applied-for lease would substantially prejudice (1) Petitioners’ and its members’ recreational use of the area around the lease site; (2) navigation in the general area around the lease site; (3) exercise of the riparian rights of adjacent shoreline property owners; or (4) would be a hazard to public safety in the general area of Bogue Sound at issue. Further, Petitioners failed to present persuasive evidence that their use of the lease area would be prevented or adversely impacted by the shellfish in the applied-for lease.

### **FINAL DECISION**

BASED UPON the above Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to grant the Respondent-Intervenor's application for a shellfish bottom and associated water column lease.

### **NOTICE OF APPEAL**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of N.C. Gen. Stat. § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review 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, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 11th day of May, 2018.



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Melissa Owens Lassiter  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 11th day of May, 2018.



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