

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:
COREY MCMAHON

RECOMMENDATION OF THE
DIVISION OF MARINE FISHERIES

I. BACKGROUND

Petitioner Corey McMahon (“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 10.5-acre tract at 198 Harvell Lane. One acre is classified as “waterfront primary” and the remaining 9.5 acres are considered “residual.” A copy of Petitioner’s property record card on file with Carteret County is included as an attachment. The property record card does not indicate the presence of any buildings or structures on the property.

C. Petitioner asserts that multiple activities have been performed on the property that qualify as development: “installed a septic system in 2004 or 2006; loggers cut timber on the property; cleared a homesite; and constructed a road and ditches. A forestry mulcher maintains the road, ditches, and grassy areas. Mr. McMahon has trees marked on the property for his reference in regard to CAMA regulations to determine boundaries allowed for development on the property; and Mr. McMahon has a camper he transports on to the property that he is able to drive onto the land and is able to utilize the septic system.” planted trees; constructed a road; and initiated the process of constructing a dock.” Petitioner has also indicated that he has plans for future development on the property.

D. 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 Leasee does not hold any other shellfish leases.

E. No Coastal Area Management Act (“CAMA”) permits have been issued authorizing development for Petitioner’s property. There may be other CAMA permits that had been issued for construction of the other structures on Petitioner’s property which were not located by Division of Coastal Management (“DCM”) staff, including a permit for the construction of the existing lodge building and associated accessory structures¹ which are noted on the attached tax cards. 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).

F. 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.

I. 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.

¹ Upland structures are usually issued CAMA Minor Permits by the Carteret County CAMA Local Permitting Officer, and related documents are held by the LPO and not by DCM.

J. 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.

K. Petitioner describes his use of the lease area in his Petition as follows: “the Lease is within an area traditionally used by Mr. McMahon for fishing or hunting activities incompatible with the activities proposed by the leaseholder. The property has traditionally been utilized for duck hunting, as evidenced by a duck blind that was installed in the waterway for at least four (4) years. The duck blind was destroyed a few years ago, and he has not yet had the opportunity to rebuild. Mr. McMahon planned to reconstruct the duck blind in the near future. The Lease will prevent him from proceeding as planned with his hunting activities and other activities traditionally enjoyed on the property.”

L. Petitioner also asserts that the lease area “significantly impairs Mr. McMahon’s navigation from his shoreline due to its scope and proximity to the shoreline. It hinders his access to open water on his vessel for boating, fishing, or other recreational activities.” Petitioner also asserts that “the Lease hinders navigation of Mr. McMahon’s vessel to and from his shoreline due to the Lease’s scope and proximity to his shoreline.”

M. Petitioner also asserts that “the Lease also hinders recreational activities from the shore, including, but not limited to, swimming, hunting, and fishing from the bank due to its proximity to the shoreline. Further, the Lease hinders duck hunting historically performed on the property. Mr. McMahon will no longer be able to operate a duck blind where traditionally located on his property. Mr. McMahon held a commercial fishing license from November 2002 through April 2012, which he utilized the shoreline crabbing in Adams Creek. In April of 2012 he obtained

his Lifetime Unified Sportsman/Coastal Recreational Hunting and Fishing License, for which he continues to utilize his property and shore to hunt and fish.”

N. 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 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.

O. 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.

P. 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.

Q. 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.

R. 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. The petitioner spoke against the Potential Lease.

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

S. 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.

T. 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.

U. 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.

V. Staff did not receive a written response from the Potential Lessee by the June 4, 2025, deadline indicated by the Committee’s Counsel in his letter of June 2, 2023.

W. 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, G.S. 113-202 and 113-202.1, and MFC rule 15A NCAC 03O .0201(b):

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;” . . . (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). While staff agree that Petitioner has *alleged* that the lease decision was contrary to these provisions, staff maintains that the lease decision was consistent with all legal requirements for a bottom and water column lease. Moreover, as discussed in section (C) below, staff disagrees with Petitioner’s assertion that the 250-foot setback required by 15A NCAC 03O .0201(b)(2) applies because he has failed to demonstrate that his property is a developed shoreline or that a water-dependent shore-based structure is present. Nevertheless, Petitioner has alleged that the lease decision was contrary to statutes and rules relevant to the shellfish lease decision and within DMF’s jurisdiction; therefore, staff agrees that Petitioner has met the requirement of G.S. 113-202(g)(1).

On Argument 4, staff disagree. Whether Petitioner received adequate notice is not a basis to challenge the underlying lease decision when Petitioner is currently availing himself 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).

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

Petitioner asserts that he is directly affected by the lease approval because (1) he has engaged in public trust activities that will be affected by the lease, (2) his property will be negatively impacted because the lease fails to meet the 250-foot setback required for a developed shoreline, (3) that he failed to receive adequate notice of the lease decision, and (4) that his riparian rights will be impinged by the lease. Staff agrees that Petitioner is directly affected by the lease decision with respect to arguments one and two but not three and four.

(1) Petitioner's public trust activities and navigation are negatively impacted by the lease decision.

Petitioner identifies several public trust activities that he engages in or has previously engaged in at or near the lease area that will be affected by the lease decision. Petitioner asserts that he uses the lease area and shoreline along the lease area to hunt and fish. Petitioner previously held a commercial fishing license and harvested crabs along the shoreline on Adams Creek. Petitioner now holds a lifetime hunting and fishing license and uses the property in the vicinity of the lease to hunt and fish. Petitioner previously had a duck blind on the property and will no longer be able to operate a duck blind on this location because of the lease. He also argues that the lease restricts recreational activities taking place from shore, including swimming, hunting, and fishing from the bank. Petitioner also asserts that the lease significantly impairs his ability to navigate to

and from his shoreline and to access open water due to the lease's scope and proximity to the shoreline. Based upon these assertions, staff agree that Petitioner has demonstrated that he is directly affected by the lease decision.

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

Petitioner next asserts that he is directly affected because he owns property that is less than 250 feet from the lease area. Petitioner owns property that lies approximately 35 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.

(3) Petitioner failed to receive notice of the lease decision.

Petitioner asserts that he 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 he submitted a public comment at the public hearing and requested notification of the lease decision. Staff attempted to call Petitioner on April 17, 2025, to inform them of the lease decision, but the phone call was not answered and had no voicemail. 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 he received actual notice of the lease decision as evidenced by his timely filing of this request. Even if Petitioner were directly affected by his purported inadequate notice, it would not constitute grounds to overturn the lease decision.

(4) Petitioner's riparian rights will be impinged by the lease decision.

Finally, Petitioner asserts that the lease will impinge on his riparian rights, primarily his right to construct a dock or pier extending from his property. Petitioner asserts that he has plans to construct a dock and pier on his property. 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. In the event that Petitioner chooses to build a dock or pier, he is not without recourse. 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. Because Petitioner's ability to exercise his riparian right to construct a dock or pier is safeguarded by the process of amending the shellfish lease, staff assert that Petitioner has failed to demonstrate that he is directly affected because his riparian rights have been impinged.

Staff note that 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?

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

1. Incompatible with competing public trust uses.

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 describes his own history of using the lease area to fish and hunt, including his use of a duck blind historically maintained on the property. He also describes his previous commercial fishing activities in the lease area and has alleged that these

uses are incompatible with the cultivation of shellfish in the leased area. Staff agree 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 met the requirements of N.C.G.S. § 113-202(g)(3).

2. The lease restricts Petitioner's riparian rights.

Petitioner asserts that the potential shellfish lease will restrict his riparian rights, particularly with respect to a future dock and access from his 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.(4) 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. Petitioner failed to receive adequate notice of the lease decision.

Petitioner asserts that he was entitled to notice of the lease decision but failed to receive it. 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 he received actual notice of the lease decision as evidenced by his timely filing of this request. Even if Petitioner were directly affected by his purported inadequate notice, it would not constitute grounds to overturn the lease decision and thus a hearing on this issue would be frivolous.

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

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

1. Installed a septic system in 2004 or 2006;
2. Cut timber on the property;
3. Cleared a homesite;
4. Constructed a road and ditches that are maintained by a forestry mulcher;
5. Had trees marked for reference in regard to CAMA regulations on development; and
6. Has a camper that Petitioner brings to the property and hooks up to the septic system.

The property does not include any permanent structures. The infrastructure is limited to a road and a roughly 20 year-old septic system. Petitioner utilizes a camper for temporary shelter on the property. Except for the road, ditches, and homesite, the property is wooded or vegetated. The activities described by Petitioner are not sufficient to be considered a developed shoreline. While Petitioner may have future plans to develop the property, its current state is not consistent with a developed shoreline. Furthermore, Petitioner's property does not include any water-dependent shore-based structures that would also require a 250-foot setback under 15A NCAC 03O .0201(b)(2). Based on 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 his 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 met 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 GRANTED 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 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

Special Deputy AG Phillip Reynolds, SCLRC Counsel

preynolds@ncdoj.gov

Assistant AG Sarah Zambon, SCLRC Co-Counsel

szambon@ncdoj.gov

This the 11th 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 the distance from proposed lease to existing lease (Fact C)
5. McMahon parcel tax card
6. GIS showing McMahon's parcel on Harvell Lane (Fact F)
7. Aerial from lease tool showing no recognized submerged land 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 County and Pamlico County (Fact K)
11. 8.5 marina contested case- final decision (Fact Z)