

DRAFT MINUTES

MEETING: COASTAL RESOURCES COMMISSION (CRC)

LOCATION: K. E. White Center
Elizabeth City, North Carolina

DATE: January 23-24, 2002

PRESENT: CRC Members

Eugene Tomlinson, Chair
Courtney Hackney, Vice Chair

Alton Ballance	Patricia Howe
Bob Barnes	Doug Langford
Bob Emory	Ernie Larkin
Peggy Griffin	Jerry Old
Mary Price Harrison	Larry Pittman

Coastal Resources Advisory Council (CRAC) Members

Wade Horne, Chair
Ginger Webster, Vice Chair

Natalie Baggett	Bill Morrison
Joe Beck	Jim Mulligan
Carlton Davenport	Spencer Rogers
Don Davenport	Bob Shupe
George Dobson	Lester Simpson
Tom Ellis	*Bill Smith
Webb Fuller	Mike Street
Renee Gledhill-Earley	Wayne Teeter
Rick Gardner	W. H. Weatherly
George Gilbert	Dave Weaver
Joe Lassiter	Calvin Wellons

*Representing Elwood L. Padrick

Wednesday, January 23, 2002

Chairman Tomlinson called the meeting to order at 10:00 a.m. The Chairman stated that Executive Order One mandates that the Chairman remind members of their duty to avoid conflicts of interest or the appearance of conflict and also to inquire whether any member had any known conflict or appearance of conflict with matters coming before the CRC at their meeting. Chairman Tomlinson asked members to state, as the roll was called, any conflict or appearance of conflict they might have with matters coming before the CRC at this meeting.

Eugene Tomlinson:	Present. No conflict.
Alton Ballance:	Present. No conflict.
Bob Barnes:	Present. No conflict.
David Beresoff:	Not present.
Bob Emory:	Not present. (NOTE: Mr. Emory arrived at 10:10 a.m. on January 23, 2002.)
Peggy Griffin:	Present. No conflict.

Courtney Hackney: Present. No conflict.
Mary Price Harrison: Present. No conflict.
Patricia Howe: Present. No conflict.
Doug Langford: Present. No conflict.
Ernie Larkin: Present. No conflict.
Jerry Old: Present. No conflict.
Bill Peele: Not present.
Larry Pittman: Present. No conflict.
Melvin Shepard: Not present.

Approval of the October Minutes

Mary Price Harrison moved that the minutes of the CRC's October 24-25, 2001, minutes be approved and her motion was seconded and unanimously approved (Alton Ballance, Bob Barnes, Peggy Griffin, Courtney Hackney, Mary price Harrison, Patricia Howe, Doug Langford, Ernie Larkin, Jerry Old, Larry Pittman).

Executive Secretary's Report

Donna Moffitt presented the Executive Secretary's Report. (SEE ATTACHMENT 1 FOR WRITTEN COPY OF REPORT.)

Ms. Moffitt then reviewed the changes to the CRC's agenda. Ms. Moffitt advised that the Koslow variance request had been resolved so it would not be heard today. Ms. Moffitt stated that in the Implementations and Standards (I&S) Committee the Civil Penalty Assessment Overview would be given by Kari Barsness with the Department of Environment and Natural Resources (DENR) instead of Scott Jones. Ms. Moffitt said that in the Planning and Special Issues (P&SI) Committee David Brower's presentation, Natural Hazard Area Acquisition and Other Management Alternatives, was being postponed. Ms. Moffitt reported that there were three public hearings scheduled for 4:30 p.m. today. She advised that the CRC could take action on the third scheduled hearing, General Identification and Description of Landforms, at tomorrow's meeting but the CRC could not take action on the first two because insufficient time had passed since notice in the North Carolina Register. Ms. Moffitt stated that the CRC would need to hold a telephone conference call to consider adoption of those two rules in the early part of February.

Shellfish Report

SEE ATTACHMENT 2 FOR WRITTEN COPY OF REPORT.

Variance Requests

Franklin, CRC-VR-01-24

Dave Heeter advised that he was with the North Carolina Attorney General's Office and he was here today representing the Division of Coastal Management (DCM). Mr. Heeter said this variance request was by Larry and Antoinette Franklin who owned a shoreline lot in the Scarboro Creek Subdivision on Roanoke Island. He stated that they had applied to the Dare County Local Permit Officer (LPO) for a Coastal Area Management Act (CAMA) minor development permit to construct a residence on their lot. Mr. Heeter reported that the permit application was denied for inconsistency with the CRC's 30 foot buffer requirement which prohibits all new non-water dependent development within 30 feet of any coastal shoreline. Mr. Heeter stated that before a CAMA permit could be granted, the CRC had to vary the 30 foot buffer requirement.

Mr. Heeter reviewed the Stipulated Facts listed in Attachment B of CRC V-01-24. Mr.

Heeter showed the CRC photographs of the Franklin's lot.

Mrs. Franklin advised that she and her husband hoped to retire to the Outer Banks. She stated that in February of 2000 they had purchased lot number 10 in Scarboro Creek after performing an overall site evaluation. Mrs. Franklin said it was determined that the lot elevation was 5 feet above sea level and that for FEMA and insurance the residence must be 9 feet above high-tide line for storm surge. Mrs. Franklin advised that the septic evaluation noted a requirement that it be located 50 feet from the water and a plat review indicated a 10 foot building line setback under CAMA. Mrs. Franklin stated that neighborhood covenants required a 2,000 square foot heated space with a concrete driveway when they reviewed preliminary house plans with local builders concerning construction on this lot.

Mrs. Franklin advised that in March of 2000 after reading a news article about proposed buffer changes they had contacted DENR themselves and also had their real estate agent call CAMA to see if the proposed changes also included any changes to their property and they had both gotten a negative response that they would be grandfathered under the changes. She said that based on these responses, they did not file for a CAMA permit at the existing 10 foot buffer before the 30 foot buffer went into effect. Mrs. Franklin stated they had contracted a design firm to draw house plans expecting that the house would be built last year and the design was started. Mrs. Franklin advised that in January of 2001 the design firm started detailed plans and informed them of the 30 foot buffer. She said they confirmed through the local CAMA office that indeed they were not grandfathered.

Mrs. Franklin said attempts were made to redesign the house to cut the house depth to fit the 35 foot available lot. She stated the redesigned 20% or 90 feet of the house over the buffer and ended up with 10% or 5 feet of the house over the buffer. Mrs. Franklin advised that they then developed alternatives for this variance to mitigate any negative effects of runoff into the estuary or to the adjacent landowners hiring a site engineer to help develop ideas and determine practicality. Mrs. Franklin said they developed arguments for the four variance requirements and filed a permit with no stormwater retention to start the variance process. Mrs. Franklin advised that in August of 2001 they had filed for a variance. Mrs. Franklin said that one alternative they had developed was to bulkhead the property but this was impractical primarily due to runoff onto adjoining properties. Mrs. Franklin said two alternatives were practical. She stated the first was to construct a dwelling with complete stormwater retention from the roofline for a 100 year rain and to sprinkle this rain water onto the property once the soil was dry enough to accept this water. Mrs. Franklin stated that this proposed system was not only practical but it also far exceeded by 229% the intent of the buffer and did eliminate house runoff onto the neighbor's property or into the buffer. She stated that the second alternative, the construction of a long narrow house, was practical but it did not meet the intent of the buffer and did not address runoff onto the neighbor's property. Mrs. Franklin said that the runoff from one side of the house would run onto the saturated ground and onto the buffer area and from the other side of the house onto the adjoining property.

Mrs. Franklin advised that they felt they had a strong case meeting the requirements for a variance with their unique shaped property but instead of requesting a simple variance, they were proposing a complete roof stormwater retention plan that would be a win/win situation for the state, for the environment, for the adjacent neighbors and for themselves.

CRC members asked questions concerning the proposed design of this residence and the impacts that might occur as a result of this design.

Dave Heeter reviewed the petitioner's and staff's response to the variance criteria contained in Attachment C of CRC V-01-24. Mr. Heeter pointed out that DCM staff was recommending that, if the CRC grants this variance request, the CRC attach a condition to the variance requiring that all stormwater runoff from the fill slope and landscaped yard be retained onsite.

Mr. Franklin and Charles Jones responded to questions from CRC members.

Bob Emory moved that the CRC approve the variance with the condition recommended by the staff that all stormwater runoff from the fill slope and landscaped yard be retained onsite and his motion was seconded.

After additional discussion of this variance request by CRC members, **the CRC voted in favor of Mr. Emory's motion to grant this variance request with the staff's recommended condition on the variance requiring that all stormwater runoff from the fill slope and landscaped yard be retained onsite by a vote of 10 in favor of granting the variance (Alton Ballance, Bob Barnes, Bob Emory, Peggy Griffin, Courtney Hackney, Mary Price Harrison, Patricia Howe, Ernie Larkin, Jerry Old, Larry Pittman) and 1 opposed (Doug Langford).**

Pate, CRC-VR-01-32

Dave Heeter advised that this variance request was from James and Dena Pate. He said the Pates owned a lot in the Town of Holden Beach and had applied to the Holden Beach LPO for a CAMA minor development permit to construct a residence on their lot. Mr. Heeter stated that the LPO denied their permit application for inconsistency with the buffer requirement that prohibits all new development within 30 feet of any coastal shoreline. Mr. Heeter said that before a permit could be granted, the CRC must vary the 30 foot buffer requirement. Mr. Heeter advised that this variance request was a little unusual in that he had cited two of the CRC's current rules (Attachment A). He said one was the CRC's rule establishing the buffer and the other was the CRC's current rule which allows an exemption for certain lots that were platted before June 1, 1999. Mr. Heeter said, also, he had cited some legislation (Attachment B) that would grant a further exemption.

Mr. Heeter reviewed the Stipulated Facts contained in Attachment C of CRC VR-01-24. Mr. Heeter provided the CRC with a plat of the Pates' lot and showed them pictures of the lot.

Ryke Longest stated that the CRC at their October 24-25, 2001, meeting had sent a temporary rule to rulemaking that struck the fourth variance criteria. Mr. Longest said this fourth criteria asked if the proposed development was consistent with the spirit, purpose and intent of CAMA. Mr. Longest stated that this particular variance request was filed after the CRC voted on that so he felt the CRC did not need to make a specific finding for the purposes of granting or denying this variance with respect to number four. Mr. Longest said he actually thought this was the only criteria there was a dispute with DCM staff over. Mr. Longest advised that this still stood in the statute as a guiding principle but it was no longer a required finding.

James Pate thanked the CRC for the opportunity to meet with them. Mr. Pate said he felt very good about the plan they had submitted. He stated he felt they had developed a plan that not only would prevent any sediment or excessive rain water runoff from getting into the canal but would also improve it from the state it was currently in by grading it a little back towards the street rather than the water having a chance to run towards the canal like it currently did. Mr. Pate referred the CRC to page 18 in their packets and he clarified some of the items shown on this drawing of his property.

Dave Heeter reviewed the petitioner's and staff's response to the variance criteria

contained in Attachment D of CRC VR-01-24.

Mr. Heeter and Mr. Pate responded to questions from CRC members. **Bob Emory moved that the CRC grant this variance request and his motion was seconded and approved by a vote of 10 in favor of granting the variance (Alton Ballance, Bob Barnes, Bob Emory, Peggy Griffin, Courtney Hackney, Patricia Howe, Doug Langford, Ernie Larkin, Jerry Old, Larry Pittman) and 1 opposed to granting the variance (Mary Price Harrison).**

Town of Atlantic Beach, CRC-VR-01-33

Dave Heeter advised that Mike Harvey was present today representing the Town of Atlantic Beach. Mr. Heeter circulated some additional photographs that had not been included in the CRC's packet.

Mr. Heeter said that the Town of Atlantic Beach had applied for a CAMA minor development permit to extend an existing public beach accessway over the dune system to protect it from foot traffic. He said the beach at Atlantic Beach had been expanded by a spoil deposition project. Mr. Heeter advised that prior to the project, the first line of stable, natural vegetation coincided with the bulkhead. Mr. Heeter said that under the CRC's rules, the bulkhead was now used to determine where the pre-project vegetation line was. Mr. Heeter stated that the permit application to expand the beach accessway was denied because the CRC's rules would prohibit it from extending seaward of the vegetation line. Mr. Heeter advised that the Town of Atlantic Beach was seeking a variance to allow them to extend the accesway seaward of the vegetation line.

Mr. Heeter reviewed the Stipulated Facts contained in Attachment B of CRC VR-01-26.

Doug Langford moved for approval of the variance and his motion was seconded and unanimously approved (Alton Ballance, Bob Barnes, Bob Emory, Peggy Griffin, Courtney Hackney, Mary Price Harrison, Patricia Howe, Doug Langford, Ernie Larkin, Jerry Old, Larry Pittman).

Brooks, CRC-VR-01-34

Merrie Jo Alcoke advised that Mr. Gerald Brooks was not present today. Ms. Alcoke advised that she was representing DCM in this matter. She stated this was a variance request filed by Gerald A. Brooks of Bath, North Carolina. Ms. Alcoke reported that Mr. Brooks was seeking a variance from the pier rules so he could construct a boathouse. Ms. Alcoke said that the CRC's rules require that boathouses not be permitted on lots with less than 75 linear feet of shoreline. Ms. Alcoke advised that the petitioner owned only approximately 50 feet of shoreline. Ms. Alcoke stated that staff recommends that this variance request be denied because the petitioner did not meet the statutory criteria.

Ms. Alcoke reviewed the Stipulated Facts contained in Attachment B of CRC-VR-01-34. Ms. Alcoke requested, since Mr. Brooks was not present, that CRC members read his responses to the variance criteria contained in Attachment C of CRC-VR-01-34. Ms. Alcoke then reviewed staff's response to the criteria contained in Attachment C of CRC-VR-01-34.

Courtney Hackney moved that the CRC deny this variance request and his motion was seconded and unanimously approved (Alton Ballance, Bob Barnes, Bob Emory, Peggy Griffin, Courtney Hackney, Mary Price Harrison, Patricia Howe, Doug Langford, Ernie Larkin, Jerry Old, Larry Pittman).

Contested Cases

Sammie Williams, CRC-CC-02-01

Ryke Longest advised that this item was different from the usual quasi judicial decisions the CRC make. He said that typically the CRC reviewed variance requests and under the variance provisions and statutes the CRC was sitting for the first time reviewing a record, preparing a record, asking questions of both parties and adding facts. Mr. Longest said in the variance process the CRC was building a record as the parties stood before them and, as long as both parties agreed that an item could be considered, under the variance process the CRC could consider the additional items. Mr. Longest said in the contested case process the CRC had a different role. Mr. Longest advised that the CRC was sitting in this case as a body reviewing a recommended decision made by an Administrative Law Judge (ALJ). He said that in this situation, DCM staff had denied a permit to a permit applicant and that permit applicant sought to petition the Office of Administrative Hearings (OAH) for a contested case. Mr. Longest stated that there was a hearing in the OAH and copies of that hearing transcript had been provided to each CRC member. Mr. Longest said, also, exhibits should have been provided to the CRC but there might be oversized exhibits that had not been provided to the CRC but would be referenced by the parties today as they stood before the CRC. Mr. Longest stated that the only thing the CRC could be considering in terms of the record and facts in the case were items contained in the transcript. Mr. Longest advised that in the Exceptions that were filed by the state in this case, there were extensive references to transcript pages and this was the reason for that. Mr. Longest said the person who was seeking to draw the CRC's attention to alleged errors made by the ALJ needed to show the CRC where the evidence was in the record that supports their contention. Mr. Longest said the general procedure was that the person who was seeking to challenge the ALJ's Recommended Decision presented their arguments first and that would be followed by the person who was seeking to uphold in whole or part the ALJ's Recommended Decision.

Doug Langford asked Mr. Longest what it was the CRC would be asked to decide, once both parties had the opportunity to present their evidence. Mr. Longest responded that the CRC had three options. He said the first was to uphold the Recommended Decision of the ALJ. Mr. Longest advised the second would be to take exception to the Recommended Decision of the ALJ in total or in part. Mr. Longest stated that the third option was that the CRC could make a specific finding with respect to the permit itself. Mr. Longest said basically a permit had been applied for and now that permit was before the CRC for review and after the CRC had made a decision regarding the ALJ's Recommended Decision the CRC could decide what to do about the permit. He said they could find that the permit should be granted, should be granted with certain conditions or should be denied. Mr. Longest responded to questions from CRC members on the contested case process.

Mr. Longest advised that the two parties before the CRC today were Sammie Williams represented by Lars Simonsen and the State of North Carolina represented by Merrie Jo Alcoke. Mr. Longest stated that the State was challenging the ALJ's Recommended Decision so under the general order of practice the State would present their arguments first.

Ms. Alcoke advised she was representing DCM in this matter that was a property dispute decision before the CRC regarding a contested case filed by Sammie Williams. Ms. Alcoke stated that the petitioner had applied for a permit and had been denied and she reviewed the details of that permit application denial.

Ms. Alcoke stated that she was here today on behalf of DCM to ask the CRC to overturn the ALJ's Recommended Decision in this case that the permit be issued in spite of DCM's call regarding coastal wetlands. Ms. Alcoke advised that the Decision found that the area in question did not constitute coastal wetland. She said the Decision found that even if it did constitute coastal wetlands, that petitioner's proposed commercial freezer building was a water dependent use and, therefore, was an acceptable use in coastal wetlands pursuant to the CRC's rules. Ms. Alcoke stated that the Decision also found that even if

the area was a coastal wetland that it was consistent with the Hyde County Land Use Plan.

Ms. Alcoke said that pursuant to the Administrative Procedures Act (APA) the CRC was the final decision maker. Ms. Alcoke stated that the CRC was the final decision maker because of its expertise and, therefore, she was before the CRC today to ask them to view the evidence in the record through the lens of their expertise, the expertise which they were chosen by the Governor to serve on the CRC, and to review the evidence and consider if the evidence supported the Findings of Fact and Conclusions of Law.

Ms. Alcoke advised there were three stipulated issues before the court. She stated that the first was whether or not this was coastal wetlands. Ms. Alcoke said if the area was not coastal wetlands then that would be the end of this case because a CAMA permit would not be required and development could be undertaken. Ms. Alcoke said there were two factors that argued for coastal wetlands. She stated one was the presence of one or more of the ten coastal species. Ms. Alcoke advised that at least five of those species were found in the disputed area. Ms. Alcoke stated that the presence of some coastal species was not contested by the petitioner. Ms. Alcoke stated that the second factor in determining coastal wetlands was the regular or occasional flooding by tides including wind tides but not including tropical storm tides. Ms. Alcoke reported that this definition had been present since the Dredge and Fill Law was enacted in 1969 and had been incorporated in the CRC's rules under the coastal wetland criteria and DCM had been applying it for many years. Ms. Alcoke advised that the type of flooding being talked about was regular or occasional flooding by tides including wind tides. Ms. Alcoke stated that DCM, specifically Field Representative David Moye under the supervision of his District Manager Terry Moore both determined that the property was coastal wetland based on the presence of these two factors. Ms. Alcoke reviewed the qualifications and credentials of Mr. Moore and Mr. Moye advising that both had been qualified by the court as experts in coastal wetland biology and coastal wetland delineation. Ms. Alcoke reviewed the testimony given by these two court certified experts verifying that the property in question was indeed coastal wetlands.

Ms. Alcoke advised that despite the evidence given by Mr. Moore and Mr. Moye regarding flooding on this property, the Finding of Fact in the Petition was that the property did not flood. Ms. Alcoke said the only testimony presented by the petitioner regarding flooding was provided by Mr. Williams himself who maintained that he had only seen this property flooded once and on that occasion he only knew it flooded because DCM showed him a picture of it. Ms. Alcoke advised that the petitioner's permit application was submitted under a cover letter by Kelly Davis who was listed as consulting biologist and forester. Ms. Alcoke said that Ms. Davis stated in her cover letter that:

Area residents attest that the site rarely floods, particularly during the growing season.

Ms. Alcoke said there were a few interesting things about that. Ms. Alcoke asked what the distinction was between "rarely" and "occasionally" flooding. She said she thought the most significant thing was that neither Ms. Davis nor any other area resident in fact came in and testified that the property did not flood. Ms. Alcoke said the expert testimony by David Moye and Terry Moore was not refuted by the evidence presented by the petitioner.

Ms. Alcoke stated that the next question before the CRC was whether or not, if the area was a coastal wetland, the petitioner's proposed activity was an acceptable use. Ms. Alcoke said the CRC's rules require that non-water dependent uses are not allowed in coastal wetlands or public trust areas. Ms. Alcocke reviewed the examples provided in the CRC's rules as acceptable and unacceptable land uses in coastal wetlands. Ms. Alcocke said it was not a mysterious question as to what were acceptable uses in coastal wetlands. She stated that only water dependent uses were acceptable uses. Ms. Alcoke said the

Recommended Decision in this case did not contain any facts regarding water dependency. Ms. Alcoke advised that the State maintained that the Recommended Decision erred in finding that the use was water dependent.

Ms. Alcoke said the final question was whether or not the proposed development was consistent with the Hyde County Land Use Plan (LUP). Ms. Alcoke stated that the only reason DCM found that it was inconsistent with the LUP was because of the filling of coastal wetlands for a non-water dependent use which would by definition be inconsistent with the LUP because the LUP could not purport to authorize development that was otherwise prohibited by the CRC's rules. Ms. Alcoke said this was not a subjective inquiry but rather was an objective inquiry. Ms. Alcoke stated that if this was filling of coastal wetlands for a non-water dependent use it was inconsistent with the CRC's rules and, therefore, inconsistent with the LUP. Ms. Alcoke said, thus, the Conclusion of Law in the Recommended Decision was an error of law because it stated that:

Even were the property coastal wetlands, respondent erred in determining that it would be inconsistent with the Hyde County Land Use Plan in that respondent did not consider the text of the Hyde County Land Use Plan and a clear statement of support for development such as that proposed by petitioners.

Ms. Alcoke said that respondent did not need to consider the statement of support for development in the Hyde County LUP because they did not need to go that far. She said it was inconsistent with the LUP because it was inconsistent with the CRC's rules.

Ms. Alcoke stated that she had chosen not to focus in her oral arguments on all of the exceptions she had made to the Findings of Fact and Conclusions of Law. Ms. Alcoke apologized for the density of her materials but explained that the reason for the density of her materials was that the ALJ adopted the proposed decision by the petitioner in all respects. Ms. Alcoke stated that the decision that was before the CRC was in all respects the language, findings and conclusions that were proposed by the petitioner's attorney and none of the proposed findings of fact and conclusions of law by the State, including the qualifications of Mr. Moore and Mr. Moye as experts, were adopted in the Recommended Decision. Ms. Alcoke stated she had only hit on the highlights of what she felt were the important things the CRC should consider.

Ms. Alcoke said there was one other Finding of Fact in the Recommended Decision that the State takes particular exception to and that was the Finding of Fact that stated that the petitioners proposed project would have no adverse effect on the environment. Ms. Alcoke stated that the record did not support this nor did the exhibits that were accepted by the ALJ support this. Ms. Alcoke said certainly the other resource agencies that took an opportunity to comment on the CAMA major permit did not agree with that proposition and she shared with the CRC what some of these other resource agencies had to say.

Ms. Alcoke stated that she had also not endeavored to make clarifications regarding any attempts to impugn the credibility and the methods of the State's witnesses. Ms. Alcoke said she did not believe they warranted a piecemeal response but she would implore the CRC if they had any questions to read the transcript of the State's witnesses in context and judge for themselves about the credibility of Terry Moore and David Moye and to judge for themselves whether the record supported the Recommended Decision.

Lars Simonsen advised that he was an attorney with the law firm of Pritchell and Burch in Windsor, North Carolina, and that he was here on behalf of the petitioner in this case, Sammie Williams and Williams Seafood, Inc. Mr. Simonsen said he was here to argue in support of the Honorable Beecher Gray's Recommended Decision in this case. Mr. Simonsen advised that the CRC's decision today was whether to accept or reject the Recommended Decision entered by Judge Gray. Mr. Simonsen stated that Judge Gray was a very

experienced judge who had heard a lot of these cases and his decision was well reasoned. Mr. Simonsen said Judge Gray had heard the facts and the testimony and had not entered into a rash or unconsidered opinion. Mr. Simonsen said the opinion went into great detail about the evidence that supported his findings and his conclusions and each of those findings and conclusions had references to the record and the evidence supporting those decisions and conclusions. Mr. Simonsen stated that those opinions were based on substantial evidence most of which was uncontested. Mr. Simonsen said the CRC should adopt this decision in whole.

Mr. Simonsen said there were two primary issues in this case. Mr. Simonsen stated the first was whether this proposed development was in an Area of Environmental Concern (AEC) and the answer was a clear no and if it was not in an AEC there was no jurisdiction and DCM and the CRC had no authority to condition or deny the petitioner's right to do this development activity. Mr. Simonsen stated that the second issue in this case was that even if it was in an AEC, a permit should have been issued. He said the goal and purpose of CAMA was not to prevent development but rather that law required sort of a balancing act. Mr. Simonsen said balancing environmental protection versus private property rights, public use and public resources versus private property rights and economic development versus environmental protection and it was clear under the circumstances of this case that balance weighed in favor of economic development and private property rights.

Mr. Simonsen reviewed what was stated in the CRC's rule 15A NCAC 7H .0102. He said the intent of this authority was not to stop development but rather to ensure the compatibility of development with the continued productivity and value of certain critical land and water areas. Mr. Simonsen showed the CRC a photograph stating that as the CRC could see, this land was in a developed area. Mr. Simonsen then showed the CRC a blow-up of the Hyde County tax map pointing out where the land at issue was. Mr. Simonsen said, as the CRC could see, at the time this photograph was taken there was a house on this land and a little outhouse. He said that house was no longer there but the footprint of that house was still there and was still visible in aerial photographs. Mr. Simonsen showed the CRC another photograph advising they could see the old driveway area and the footprint of where the house used to be. Mr. Simonsen said this was not a typical coastal wetland. He stated that typical coastal wetlands were not residential property. Mr. Simonsen said this was a highly disturbed piece of land and had clearly been filled. Mr. Simonsen reviewed additional exhibits contained in the record with the CRC.

Mr. Simonsen said the question in this case was whether this was really a coastal wetland. He stated that in order for it to be a coastal wetland it had to be vegetated by one or more of ten specific coastal wetland species. Mr. Simonsen advised that the petitioner agreed that there were some coastal wetland species on this lot but they disagreed that this lot met the second criteria for coastal wetlands and that was that the lot must be regularly or occasionally flooded by tides including wind tides but not including storms, tropical storms or hurricanes. Mr. Simonsen stated that there was absolutely no evidence in the record that this property was regularly or occasionally flooded by tide water and he reviewed the testimony in the record he felt supported the finding that there was no evidence that this property was regularly or occasionally flooded. Mr. Simonsen said there was only one documented case where this property had flooded and this was in February of 1998 when a photograph had been taken.

Mr. Simonsen stated that DCM had concluded that there would be no coastal wetland species on this property unless the property was regularly or occasionally flooded because they depended on the frequent inundation by salt water in order to survive. Mr. Simonsen said that was not correct and it was not enough or otherwise the rule would not require the second criteria. Mr. Simonsen stated there was another explanation as to why coastal species could thrive on a piece of property that was not regularly flooded and this was testified to by Terry Moore. Mr. Simonsen stated that he had asked Terry Moore if the

groundwater on this property would be brackish or have a high saline content and his response was there was a good chance of it so it did not require frequent flooding in order to support the growth of coastal wetland species. Mr. Simonsen said the property was wet and there was no doubt about it. Mr. Simonsen said all of Englehard was wet. He said it was a low lying county, it was a coastal county and that was a fact of life there but it was not enough that this property gets flooded by rain, it was not enough that this property was flooded by groundwater, it had to be flooded by tides and this was a very important distinction in this case. Mr. Simonsen advised that Terry Moore and David Moye had both stated in their testimony that they had seen this property flooded many times. He said they did not point out any specific instance of it except that one instance in February of 1998 when they had taken a photograph but neither of them said it was flooded by tides and neither of them could tell what the circumstances of that flooding were. Mr. Simonsen said if it was a flood because of a hurricane it did not count. He stated that if it was flooded because of a tropical storm it did not count. Mr. Simonsen advised that there was absolutely no evidence in the record that this property was flooded regularly or occasionally by tides. Mr. Simonsen reviewed additional excerpts from the transcript that he felt proved that there was no evidence presented that this property was flooded regularly or occasionally by tides. Mr. Simonsen stated that it was clear from the testimony of David Moye and Terry Moore that neither knew how frequently this property was flooded and without that knowledge they could not make a legitimate wetlands determination. He said they had to base their decision on evidence. Mr. Simonsen said this was not just the law but was also science. Mr. Simonsen reviewed additional evidence in the record he felt provided proof of the fact that this property was not flooded by tides on a regular or occasional basis.

Mr. Simonsen stated that Judge Gray's order was correct in finding that this property was not regularly or occasionally flooded and, therefore, was not a coastal wetland. Mr. Simonsen said this was based on the only evidence Judge Gray had upon which he could base his decision. Mr. Simonsen stated that Judge Gray had gone a step further, and he thought this was appropriate, and said that even if the land was a coastal wetland the permit should have been granted because the freezer house was an acceptable use and was a water dependent use. Mr. Simonsen stated that Judge Gray had found that DCM's interpretation of the water dependency criteria and rule was unreasonable and he based that upon the interpretation of that rule as testified to by Terry Moore. Mr. Simonsen read Mr. Moore's testimony from the transcript. Mr. Simonsen stated that Judge Gray had determined that the freezer building was a water dependent use. Mr. Simonsen explained why this was a very reasonable and appropriate determination.

Mr. Simonsen said there was also some findings by Judge Gray that this development was in the best interest of the public and he explained why he felt this was also a very appropriate finding.

Mr. Simonsen said he wanted to point out one rule that he felt was of great significance in this case and that rule was 15A NCAC 7H .0205. Mr. Simonsen said this addressed the question of the value of a wetland and what was and was not an important coastal wetland.

He advised that rule stated that the degree of importance appears to be variable from marsh to marsh depending primarily upon its frequency of inundation and inherent characteristics of the various plant species. Mr. Simonsen said the importance of a marsh depended on a large part on how frequently it was flooded. He said if it was infrequently flooded it did not perform any large degree of the normal functions of a wetland. Mr. Simonsen said the evidence in this case was that the property was very rarely if ever flooded by tides so the degree of importance even by the CRC's own rules was very low even if it was a wetland. Mr. Simonsen stated that the testimony, the exhibits, all of the evidence presented at trial shows that this property is not regularly or occasionally flooded. He said it was not his client's burden to show how often the property was flooded. Mr. Simonsen said his client was just required to prove that the decision that

was made by DCM was not made upon the appropriate amount of evidence and there was no evidence here to support that the property was regularly or occasionally flooded and so the decision was in error. Mr. Simonsen said he felt the evidence did go beyond that to show that flooding by tides, if it occurred, was a very rare event.

Mr. Simonsen said the next step in this process, if the CRC decides to overrule Judge Gray's decision, was that a superior court judge would hear this case and if that was necessary he felt very confident that the judge who hears this case in superior court would agree with Judge Gray. He said Judge Gray's decision was correct and was well reasoned and should be affirmed by the CRC. Mr. Simonsen said he should also point out that once the case got to superior court his client had the right to ask for the recovery of his attorney's fees. Mr. Simonsen pointed out that the CRC had already been ordered in a companion case to this one to pay in excess of \$8,000 to his client for his attorney's fees for the lot right across the street from this one. Mr. Simonsen said this was a much stronger case than the other one. Mr. Simonsen said that Judge Gray had made many very specific findings and he felt it was incumbent on the CRC to affirm that order. He said it was the right order, it was correct factually, legally and morally. Mr. Simonsen said his client should have the right to use his private property just like CAMA recognizes.

Mr. Simonsen and Merrie Jo Alcoke responded to questions from CRC members.

Courtney Hackney stated that as a certified wetland scientist he had to admit that he was surprised when he first came to North Carolina and saw the simplistic manner in which a coastal wetland was interpreted. Dr. Hackney said in the twenty some years since he had been impressed not only with how simplistic it was but how well it worked. Dr. Hackney advised that the prime reason it worked was because these plants were indicators of what was happening on a normal basis. Dr. Hackney said he did not know how frequently this site flooded but he was sure, based on the description in the record, that it did flood or it did get saline water to it on some sort of a regular bases or otherwise the plants would be displaced by a more competitive species. Dr. Hackney stated that the other side of this was that indicators were used on a regular basis and unless someone had the time to go out and record flooding it was the only way to practically do it. Dr. Hackney stated that he was not surprised that flooding had not been seen pretty regularly because there were lots of wetlands he worked in that he had never seen flooded either but he knew they were wetlands by the plants that were there and from the animals there. Dr. Hackney said any lack of certainty he had coming into this more or less ended after listening to the presentations. Dr. Hackney advised that he felt comfortable with the staff's interpretation of what these plants meant and so the real question was whether the CRC was going to change the way they did this or not because if the CRC stopped using the plants as indicators, then it would have to be done all over the place and that would be difficult to do. Dr. Hackney said he had read the evidence and was reasonably convinced that this was a wetland based on the plant species. Dr. Hackney said he could not agree with the defense for water dependency and the defense for compliance with the land use plan. He said he also could not base his decision on the continued amount of money this would cost the state but rather had to base his decision on his best judgment. Dr. Hackney responded to several questions from Doug Langford concerning the presence of the wetland species.

Ryke Longest said he would like to remind the CRC members of their three options. He advised the first was to adopt the ALJ's Recommended Decision and, in fact, in the absence of any action by the CRC that was what would happened as a matter of law. Mr. Longest stated the second option was to make a Recommended Final Decision that was different from the Recommended Decision and this was the process he described earlier where the CRC would have to look at claimed exceptions and accept them or reject them as they saw fit. He said the third item he did not think he was very clear on earlier but under 15A NCAC 7H .0208(a)(3) it was fairly clear there was some authority within the CRC to look at

measures to mitigate impacts to the project as well as the items Mr. Simonsen had pointed to, the public benefits. He said what the CRC did have a chance to do now was also take a fresh look at the permit application itself and say would you grant it in part, would you grant it in whole, deny it in whole, deny it in part, and take a fresh look at that decision. Mr. Longest said this was really the second part in the analysis if the CRC went through and found exceptions. Mr. Longest stated that if the CRC adopted the ALJ's Recommended Decision that would be the end of the inquiry because basically no CAMA permit was required in the ALJ's Recommended Decision.

Alton Ballance stated this was a very complex situation for the CRC. Mr. Ballance advised that he was familiar with the property since he was from Hyde County and had served on its commission for eight years. Mr. Ballance said he felt one thing the CRC did have to consider was the fact that it was in an area of the state where, in fact, there were a lot of wetlands. Mr. Ballance said he certainly recognized the expertise of Terry Moore and knew that Mr. Moore knew wetlands and was familiar with that area of the county. Mr. Ballance said, however, he did have, although not enthusiastically, some sympathy for the petitioner and particularly for their potential use of the property to enhance commercial fishing in one of the most depressed areas of North Carolina. He said the commercial fishing industry was hit extensively all the time and that was probably one of the bigger projects that had ever happened in Hyde County. Mr. Ballance stated this was a very difficult situation but he did want to express that. Mr. Ballance said it was a situation that he thought did have some merit for the petitioner's case.

Ms. Alcoke and Mr. Simonsen continued answering questions from CRC members.

A discussion then followed concerning whether there was a possibility to reach some type of compromise with the petitioner on the design of the petitioner's project so the CRC could issue a permit under the provisions provided in 7H .0208(a)(3) cited earlier by Mr. Longest that would satisfy the needs of the petitioner for his project as well as the need of the CRC to protect coastal wetlands. CRC members discussed the possibility of issuing a permit to the petitioner with the stipulation that the petitioner provide for wetland mitigation for any wetlands lost due to the petitioner's project. Mr. Simonsen advised that mitigation would not be acceptable to his client.

Bob Emory asked Mr. Longest, if the CRC accepted the ALJ's Recommended Decision, would this mean the CRC had made wetlands determinations for the future. Mr. Longest responded that the effect of the Recommended Decision of ALJ or Final Decision by the CRC did not constitute legally binding precedence such as a Court of Appeals decision would. Mr. Longest said it would be in the record and it obviously would be binding on this property and between the parties. Mr. Emory asked if it was correct that so far it was not binding from a precedent standing and Mr. Longest responded that was correct. Mr. Emory asked if it was correct that if the CRC did not accept the ALJ's opinion and the petitioner appealed, then the next legal proceeding could establish precedent. Mr. Longest responded that the question before the CRC was not whether anyone would have to pay anybody's attorney fees or whether or not the future outcome of this case in court had already been decided. Mr. Longest stated this was not what the CRC was charged with deciding. He advised that the CRC was charged with making a final decision in a contested case looking only backwards at what the ALJ did and whether or not that was supported in the record and whether the parties had convinced the CRC that it was not or that it was. Mr. Longest said with respect to precedence, superior court opinions did not have precedential value. He stated they did have value for individual cases and they were binding on future decisions. Mr. Longest advised that you really did not have historic cites until you got to a court of appeal. Mr. Longest advised that in the other Sammie Williams case there was now an opinion from the court of appeals which was a precedent for a historic cite. Mr. Longest said that decisions by the CRC and others were informative and they could be used and cited by parties but these were used more or less for persuasion. Mr. Emory

asked if it was correct that variances established no precedent and Mr. Longest responded that was correct.

Mary Price Harrison advised that she was persuaded by the AG's office arguments on exceptions to the Findings of Fact and Conclusions of Law. **Ms. Harrison moved that the CRC adopt the recommendations by the AG's office.** Ms. Harrison said she guessed the second part of that was what to do about the permit. Ms. Harrison stated that she did not know if adopting the recommendations from the AG's office would necessarily included permit denial or if there was the option to try to issue a modified permit under the provisions provided in .0208(a)(3) reviewed earlier by Mr. Longest. Mr. Longest responded that if the CRC was going to adopt the recommendations of the AG's office, then that would include denial of the permit outright. **Ms. Harrison's motion was seconded. The CRC voted in favor of Ms. Harrison's motion by a vote of 8 in favor of the motion (Bob Barnes, Bob Emory, Peggy Griffin, Courtney Hackney, Mary Price Harrison, Patricia Howe, Erne Larkin, Jerry Old) and 3 opposed to the motion (Alton Balance, Doug Langford, Larry Pittman).**

Public Input and Comment

Chairman Tomlinson asked if there was anyone present who wished to address the CRC on issues that were not already on the CRC's agenda. Nobody asked to address the CRC.

Public Hearings

15A NCAC 7H .1703 - Sandbag General Permit Fee

Chairman Tomlinson asked if there was anyone present who wished to address the CRC on rule 7H .1703, Sandbag General Permit Fee. Nobody present asked to address the CRC on this rule.

15A NCAC 7H .0203 - Private Bulkheads: Riprap and Piers Exempted - Repealed

Chairman Tomlinson asked if there was anyone present who wished to address the CRC on rule 7H .0203, Private Bulkheads: Riprap and Piers Exempted - Repealed. Nobody present asked to address the CRC on this rule.

15A NCAC 7H .0305 - General Identification and Description of Landforms (alt. Vegetation Line)

Chairman Tomlinson advised the third and final public hearing was regarding rule 7H .0305, General Identification and Description of Landforms (alt. Vegetation Line). The Chairman advised that two individuals had signed up to address the CRC.

Harry Simmons, Brunswick Beaches Consortium

SEE ATTACHMENT 3 FOR WRITTEN COPY OF MR. SIMMONS' REMARKS.

Jim Locke, Town of Oak Island

SEE ATTACHMENT 4 FOR WRITTEN COPY OF MR. LOCKE'S REMARKS.

Chairman Tomlinson asked if there was anyone else who had not signed the hearing register who wished to address the CRC regarding this rule.

Todd Miller, North Carolina Coastal Federation

Mr. Miller advised that he was the Executive Director of the North Carolina Coastal

Federation. Mr. Miller stated that the I&S Committee had just heard a very excellent presentation on dealing with estuarine shoreline erosion and in that presentation it was reported that the mid-Atlantic was looking at a sea level rise of between 12 and 15 inches in the last hundred years and that trend was going to continue. Mr. Miller said beach renourishment was alluded to in the CRC's rules as a temporary measure for erosion control not a permanent solution although it could last a number of years. He said the proposed rule before the CRC would result in more investment on the oceanfront that eventually could be at risk in terms of property damage. Mr. Miller stated that the proposed rule had been scrutinized by the CRC's Science Panel advising them on beachfront issues and that was where the 8 year recommendation came from. Mr. Miller urged the CRC to give careful consideration to the 8 year recommendation.

With no further business, the CRC adjourned their Wednesday session at 4:50 p.m.

Thursday, January 24, 2002

Chairman Tomlinson called the meeting to order at 8:30 a.m.

Presentations

Beach Nourishment Project Overview

Charles Jones presented this information item to the CRC. No action by the CRC was required on this presentation.

Mary Price Harrison asked about the sand compatibility requirement regarding the Pine Knoll Shores and Oak Island projects. Mr. Jones responded that both projects had been determined by their proponents to be more than 90% compatible.

Donna Moffitt stated that there had been considerable interest in the presentations given at this CRC meeting. Ms. Moffitt advised that DCM would put the PowerPoint presentations that were available on its web site.

Patricia Howe stated that she had a real interest in the issue of state ownership of sand and she had talked at length with Mr. Longest and Ms. Moffitt about this issue. She said it seemed to her, if you were going to permit for private mining of sand, that the state should require that the parties mining the sand should pay for the use of the sand because the sand did belong to the public. She advised that she understood that the CRC had no authority in this area and that it was the Department of Administration who handled everything. Ms. Howe said she also understood there was a great deal of red tape with the way these issues had been handled in the past. Ms. Howe said from what Mr. Longest had given her she did know that other states had legislation that controlled the ownership of sand and it might be something that the CRC should consider particularly since the state was currently under such a tight budget and the money was needed.

Chairman Tomlinson asked Mr. Longest if he felt this was something that could be accomplished. Mr. Longest responded that one of the reasons he had pointed out what other states had in the way of legislation was to point out that North Carolina did not have legislation in this state. Mr. Longest said that obviously the Department of Administration, as the controller of state property, was the one who granted easements. Mr. Longest stated that in terms of getting money back, he thought that would have to involve rule-making and/or statutory changes probably in the arena of the Department of Administration since this was their area of jurisdiction and not the CRCs. Chairman Tomlinson said DENR Assistant Secretary Robin Smith was present at the CRC's meeting this morning and he asked Ms. Smith if she would coordinate this effort with the Department of Administration. Ms. Smith responded that DENR would be happy to talk with the Department

of Administration about this if that was what the CRC would like for them to do. Chairman Tomlinson said the CRC would appreciate any assistance DENR could give them on this issue.

ECSU: Environmental Program and NOAA Grant

Dr. Ravi Sinha and Dr. Francisco San Juan presented this information item to the CRC. No action was required by the CRC on this information presentation.

CRAC and Committee Reports

CRAC Report

Wade Horne presented the report from the CRAC. SEE ATTACHMENT 5 FOR WRITTEN COPY OF COMMITTEE REPORT. There were no items that required action by the CRC.

Report from I&S Committee

Ernie Larkin presented the report from the I&S Committee. SEE ATTACHMENT 6 FOR WRITTEN COPY OF REPORT. The following items required action by the full CRC.

Temporary Rule: 30-Foot Buffer Rule Modification (I&S-02-03)

Dr. Larkin advised that I&S Committee had voted to send the proposed rule to the CRC for adoption as a temporary rule and to begin the process for permanent rule-making. Dr. Larkin moved that the CRC adopt the proposed rule as a temporary rule and to begin the process for permanent rule-making and his motion was seconded and unanimously approved.

Modifications to General Permits (I&S-02-04)

Dr. Larkin reported that the I&S Committee had voted to send the proposed changes to 15A NCAC 7H .1100 and .1101, 11200 and .1201, .1300 and .1301, .1400 and .1401, .2000 and .2001 and .2101, .2200 and .2201, and .2400 and .2401 to go to public hearing. **Dr. Larkin moved that the CRC send these changes to public hearing and his motion was seconded and unanimously approved (Bob Barnes, Bob Emory, Peggy Griffin, Mary Price Harrison, Patricia Howe, Ernie Larkin, Jerry Old, Larry Pittman).**

Report from P&SI Committee

Peggy Griffin presented the report from the P&SI Committee. SEE ATTACHMENT 7 FOR WRITTEN COPY OF REPORT. No items required action by the CRC.

ACTION ITEMS

Rules Adoption

15A NCAC 7H .0305, General Identification and Description of Landforms (Alt. Vegetation Line)

Chairman Tomlinson advised a public hearing had been held on this rule yesterday afternoon. Donna Moffitt reminded the CRC that they had a version of this rule that had previously gone to public hearing which contained DCM staff's recommendations. Ms. Moffitt said the CRC had then asked the Science Panel to look at the text of the rule and they had revised the text proposed by DCM staff. Ms. Moffitt stated that, in essence, the CRC had two versions of this rule that could be considered for adoption or the CRC could not adopt anything or they could modify one of the current versions of the rule. Ms. Moffitt and Charles Jones explained the basic differences in the two versions of the rule

and responded to questions from CRC members. Spencer Rogers explained the rationale for the Science Panel's version of the rule.

After discussion, **Ernie Larkin moved that the CRC adopt the version of the rule proposed by the CRC Science Panel and his motion was seconded and approved by a vote of 7 in favor of Dr. Larkin's motion (Bob Barnes, Bob Emory, Peggy Griffin, Patricia Howe, Ernie Larkin, Jerry Old, Larry Pittman) and 1 opposed (Mary Price Harrison).**

Old New Business

Shell Island Variance

Chairman Tomlinson stated that DCM staff had received a letter from the Mason Inlet Preservation Group requesting that DCM and the CRC permit the sandbag revetment at Shell Island Resort to remain in place until May 15, 2002.

Bob Emory moved, in light of the commencement of the inlet relocation project, that the CRC instruct DCM staff that there was no need to take further enforcement action on the Shell Island sandbag permit until May 15, 2002, or until the completion of the inlet relocation project, whichever comes first. Mr. Emory's motion was seconded and approved by a vote of 5 in favor of the motion (Bob Barnes, Bob Emory, Peggy Griffin, Jerry Old, Larry Pittman) and 3 opposed to the motion (Mary Price Harrison, Patricia Howe, Ernie Larkin).

Other Items

Mary Price Harrison requested that a presentation she heard recently by Pete Peterson on biological impacts of beach nourishment be presented to the CRC at their April meeting.

Ryke Longest asked that any extra copies of the Sammie Williams contested case materials be returned to him.

Patricia Howe asked that the CRC receive an update report on the changes made by the Rules Review Committee to the land use planning rules.

With no further business the CRC adjourned at 10:40 a.m.

Respectfully submitted,

Donna D. Moffitt, Executive Secretary

Mary Beth Brown, Recording Secretary