



PAT McCrory
Governor

DONALD R. VAN DER VAART
Secretary

TO: The Coastal Resources Commission

FROM: Christine A. Goebel, Assistant General Counsel

DATE: July 8, 2016 (for the July 12-13, 2016 CRC Meeting)

RE: **Variance Request by Kay P. Picha (CRC-VR-16-05)**

Petitioner Kay P. Picha (“Petitioner”) owns the westernmost lot on Ocean Isle Beach located at 149 Ocean Isle West Boulevard, adjacent to Tubbs Inlet. In 2007, Petitioner sought and was granted three CAMA General Permits (“GP”) authorizing the placement of sandbags along the oceanfront and inlet-front shorelines of her property after her home and the road were determined to be threatened structures. These authorized sandbags were authorized to remain for up to two years. In 2009, Petitioner got another CAMA GP authorizing additional sandbags for 5 years on the inlet and rear side of the property. All of these GPs authorized sandbag structures with the standard dimensions. On April 13, 2016, Petitioner applied for a CAMA Major Permit in order to add additional sandbags to the existing but expired sandbags, in order to increase the size of the structure beyond the Commission’s authorized size limits to 45’ base width, 53’ overall width, and a height of 12’ NGVD. On June 28, 2016, DCM denied Petitioner’s CAMA Major Permit application as the proposed sandbags structure would (1) exceed the maximum dimensions for sandbags found at 15A NCAC 7H .0308(a)(2)(K), (2) the bags have already exceeded the sandbag time limits provided by 15A NCAC 7H .0308(a)(2)(F) and (G), and (3) 15A NCAC 7H .0308(a)(1)(A) which states that erosion response activities “shall be consistent with the general policy statements of 15A NCAC 7M .0200.” Petitioner now seeks a variance from these regulations in order to increase the size of the existing, expired sandbag structure to a maximum of 45’ base width, 53’ overall width, and an elevation of 12’ NGVD. Petitioner requests that the sandbags remain for eight additional years (until 2024).

The following additional information is attached to this memorandum:

- Attachment A: Relevant Rules
- Attachment B: Stipulated Facts
- Attachment C: Petitioner’s Positions and Staff’s Responses to Variance Criteria
- Attachment D: Petitioner’s Variance Request Materials
- Attachment E: Stipulated Exhibits including powerpoint

cc(w/enc.): I. Clark Wright, Jr., Petitioner’s Attorney, electronically
Mary Lucasse, Special Deputy AG and CRC Counsel, electronically
Justin Whiteside, Town of OIB CAMA LPO, electronically

RELEVANT STATUTES OR RULES**APPENDIX A****15A NCAC 07H .0301 OCEAN HAZARD CATEGORIES**

The next broad grouping is composed of those AECs that are considered natural hazard areas along the Atlantic Ocean shoreline where, because of their special vulnerability to erosion or other adverse effects of sand, wind, and water, uncontrolled or incompatible development could unreasonably endanger life or property. Ocean hazard areas include beaches, frontal dunes, inlet lands, and other areas in which geologic, vegetative and soil conditions indicate a substantial possibility of excessive erosion or flood damage.

15A NCAC 07H .0302 SIGNIFICANCE OF THE OCEAN HAZARD CATEGORY

(a) The primary causes of the hazards peculiar to the Atlantic shoreline are the constant forces exerted by waves, winds, and currents upon the unstable sands that form the shore. During storms, these forces are intensified and can cause significant changes in the bordering landforms and to structures located on them. Ocean hazard area property is in the ownership of a large number of private individuals as well as several public agencies and is used by a vast number of visitors to the coast. Ocean hazard areas are critical, therefore, because of both the severity of the hazards and the intensity of interest in the areas.

(b) The location and form of the various hazard area landforms, in particular the beaches, dunes, and inlets, are in a permanent state of flux, responding to meteorologically induced changes in the wave climate. For this reason, the appropriate location of structures on and near these landforms must be reviewed carefully in order to avoid their loss or damage. As a whole, the same flexible nature of these landforms which presents hazards to development situated immediately on them offers protection to the land, water, and structures located landward of them. The value of each landform lies in the particular role it plays in affording protection to life and property. (The role of each landform is described in detail in Technical Appendix 2 in terms of the physical processes most important to each.) Overall, however, the energy dissipation and sand storage capacities of the landforms are most essential for the maintenance of the landforms' protective function.

**15A NCAC 07H .0303 MANAGEMENT OBJECTIVE OF OCEAN HAZARD
AREAS**

(a) The CRC recognizes that absolute safety from the destructive forces indigenous to the Atlantic shoreline is an impossibility for development located adjacent to the coast. The loss of life and property to these forces, however, can be greatly reduced by the proper location and design of structures and by care taken in prevention of damage to natural protective features particularly primary and frontal dunes. Therefore, it is the CRC's objective to provide management policies and standards for ocean hazard areas that serve to eliminate unreasonable danger to life and property and achieve a balance between the financial, safety, and social factors that are involved in hazard area development.

(b) The purpose of these Rules shall be to further the goals set out in G.S. 113A 102(b), with particular attention to minimizing losses to life and property resulting from storms and long term erosion, preventing encroachment of permanent structures on public beach areas, preserving the natural ecological conditions of the barrier dune and beach systems, and reducing the public costs of inappropriately sited development. Furthermore, it is the objective of the Coastal Resources Commission to protect present common law and statutory public rights of access to and use of the lands and waters of the coastal area.

15A NCAC 07H .0304**AECs WITHIN OCEAN HAZARD AREAS**

The ocean hazard AECs contain all of the following areas:

(1) Ocean Erodible Area. This is the area where there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The oceanward boundary of this area is the mean low water line. The landward extent of this area is the distance landward from the first line of stable and natural vegetation as defined in 15A NCAC 07H .0305(a)(5) to the recession line established by multiplying the long term annual erosion rate times 90; provided that, where there has been no long term erosion or the rate is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates are the long-term average based on available historical data. The current long-term average erosion rate data for each segment of the North Carolina coast is depicted on maps entitled "2011 Long-Term Average Annual Shoreline Rate Update" and approved by the Coastal Resources Commission on May 5, 2011 (except as such rates may be varied in individual contested cases or in declaratory or interpretive rulings). In all cases, the rate of shoreline change shall be no less than two feet of erosion per year. The maps are available without cost from any Local Permit Officer or the Division of Coastal Management on the internet at <http://www.nccoastalmanagement.net>.

(2) Inlet Hazard Area. The inlet hazard areas are natural hazard areas that are especially vulnerable to erosion, flooding, and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. This area extends landward from the mean low water line a distance sufficient to encompass that area within which the inlet migrates, based on

statistical analysis, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet, and external influences such as jetties and channelization. The areas on the maps identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, as amended in 1981, by Loie J. Priddy and Rick Carraway are incorporated by reference and are hereby designated as Inlet Hazard Areas, except for:

- (a) the Cape Fear Inlet Hazard Area as shown on the map does not extend northeast of the Bald Head Island marina entrance channel; and
- (b) the former location of Mad Inlet, which closed in 1997.

In all cases, the Inlet Hazard Area shall be an extension of the adjacent ocean erodible areas and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area. This report is available for inspection at the Department of Environmental Quality, Division of Coastal Management, 400 Commerce Avenue, Morehead City, North Carolina or at the website referenced in Item (1) of this Rule. Photocopies are available at no charge.

15A NCAC 07H .0308 SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

- (A) All oceanfront erosion response activities shall be consistent with the general policy statements in 15A NCAC 07M .0200.
- (B) Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, are prohibited. Such structures include bulkheads, seawalls, revetments, jetties, groins and breakwaters.
- (C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront properties without regard to the size of the structure on the property or the date of its construction.
- (D) All permitted oceanfront erosion response projects, other than beach bulldozing and temporary placement of sandbag structures, shall demonstrate sound engineering for their planned purpose.
- (E) Shoreline erosion response projects shall not be constructed in beach or estuarine areas that sustain substantial habitat for fish and wildlife species, as identified by natural resource agencies during project review, unless mitigation measures are incorporated into project design, as set forth in Rule .0306(i) of this Section.

- (F) Project construction shall be timed to minimize adverse effects on biological activity.
- (G) Prior to completing any erosion response project, all exposed remnants of or debris from failed erosion control structures must be removed by the permittee.
- (H) Erosion control structures that would otherwise be prohibited by these standards may be permitted on finding by the Division that:
- (i) the erosion control structure is necessary to protect a bridge which provides the only existing road access on a barrier island, that is vital to public safety, and is imminently threatened by erosion as defined in provision (a)(2)(B) of this Rule;
 - (ii) the erosion response measures of relocation, beach nourishment or temporary stabilization are not adequate to protect public health and safety; and
 - (iii) the proposed erosion control structure will have no adverse impacts on adjacent properties in private ownership or on public use of the beach.
- (I) Structures that would otherwise be prohibited by these standards may also be permitted on finding by the Division that:
- (i) the structure is necessary to protect a state or federally registered historic site that is imminently threatened by shoreline erosion as defined in provision (a)(2)(B) of this Rule;
 - (ii) the erosion response measures of relocation, beach nourishment or temporary stabilization are not adequate and practicable to protect the site;
 - (iii) the structure is limited in extent and scope to that necessary to protect the site; and
 - (iv) any permit for a structure under this Part (I) may be issued only to a sponsoring public agency for projects where the public benefits outweigh the short or long range adverse impacts. Additionally, the permit shall include conditions providing for mitigation or minimization by that agency of any unavoidable adverse impacts on adjoining properties and on public access to and use of the beach.
- (J) Structures that would otherwise be prohibited by these standards may also be permitted on finding by the Division that:
- (i) the structure is necessary to maintain an existing commercial navigation channel of regional significance within federally authorized limits;
 - (ii) dredging alone is not practicable to maintain safe access to the affected channel;

(iii) the structure is limited in extent and scope to that necessary to maintain the channel;

(iv) the structure shall not adversely impact fisheries or other public trust resources; and

(v) any permit for a structure under this Part (J) may be issued only to a sponsoring public agency for projects where the public benefits outweigh the short or long range adverse impacts. Additionally, the permit shall include conditions providing for mitigation or minimization by that agency of any unavoidable adverse impacts on adjoining properties and on public access to and use of the beach.

(K) The Commission may renew a permit for an erosion control structure issued pursuant to a variance granted by the Commission prior to 1 July 1995. The Commission may authorize the replacement of a permanent erosion control structure that was permitted by the Commission pursuant to a variance granted by the Commission prior to 1 July 1995 if the Commission finds that:

(i) the structure will not be enlarged beyond the dimensions set out in the permit;

(ii) there is no practical alternative to replacing the structure that will provide the same or similar benefits; and

(iii) the replacement structure will comply with all applicable laws and with all rules, other than the rule or rules with respect to which the Commission granted the variance, that are in effect at the time the structure is replaced.

(L) Proposed erosion response measures using innovative technology or design shall be considered as experimental and shall be evaluated on a case by case basis to determine consistency with 15A NCAC 7M .0200 and general and specific use standards within this Section.

(2) Temporary Erosion Control Structures:

(A) Permittable temporary erosion control structures shall be limited to sandbags placed landward of mean high water and parallel to the shore.

(B) Temporary erosion control structures as defined in Part (2)(A) of this Subparagraph shall be used to protect only imminently threatened roads and associated right of ways, and buildings and their associated septic systems. A structure is considered imminently threatened if its foundation, septic system, or right of way in the case of roads, is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no obvious erosion scarp may also be found to be imminently threatened when site conditions, such as a flat beach profile or accelerated erosion, increase the risk of imminent damage to the structure.

(C) Temporary erosion control structures shall be used to protect only the principal structure and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to the erosion setback requirement.

(D) Temporary erosion control structures may be placed seaward of a septic system when there is no alternative to relocate it on the same or adjoining lot so that it is landward of or in line with the structure being protected.

(E) Temporary erosion control structures shall not extend more than 20 feet past the sides of the structure to be protected. The landward side of such temporary erosion control structures shall not be located more than 20 feet seaward of the structure to be protected or the right of way in the case of roads. If a building or road is found to be imminently threatened and at an increased risk of imminent damage due to site conditions such as a flat beach profile or accelerated erosion, temporary erosion control structures may be located more than 20 feet seaward of the structure being protected. In cases of increased risk of imminent damage, the location of the temporary erosion control structures shall be determined by the Director of the Division of Coastal Management or their designee in accordance with Part (2)(A) of this Subparagraph.

(F) Temporary erosion control structures may remain in place for up to two years after the date of approval if they are protecting a building with a total floor area of 5000 sq. ft. or less and its associated septic system, or, for up to five years for a building with a total floor area of more than 5000 sq. ft. and its associated septic system. Temporary erosion control structures may remain in place for up to five years if they are protecting a bridge or a road. The property owner shall be responsible for removal of the temporary structure within 30 days of the end of the allowable time period.

(G) Temporary sandbag erosion control structures may remain in place for up to eight years from the date of approval if they are located in a community that is actively pursuing a beach nourishment project, or if they are located in an Inlet Hazard Area adjacent to an inlet for which a community is actively pursuing an inlet relocation or stabilization project in accordance with G.S. 113A-115.1 For purposes of this Rule, a community is considered to be actively pursuing a beach nourishment, inlet relocation or stabilization project if it has:

- (i) an active CAMA permit, where necessary, approving such project; or
- (ii) been identified by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance Study, General Reevaluation Report, Coastal Storm Damage Reduction Study or an ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local or federal money, when necessary; or
- (iii) received a favorable economic evaluation report on a federal project; or
- (iv) is in the planning stages of a project designed by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements and initiated by a local government or community with a

commitment of local or state funds to construct the project and the identification of the financial resources or funding bases necessary to fund the beach nourishment, inlet relocation or stabilization project.

If beach nourishment, inlet relocation or stabilization is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void for that section of beach or community and existing sandbags are subject to all applicable time limits set forth in Part (F) of this Subparagraph.

(H) Once the temporary erosion control structure is determined by the Division of Coastal Management to be unnecessary due to relocation or removal of the threatened structure, a storm protection project constructed by the U.S. Army Corps of Engineers, a large-scale beach nourishment project, an inlet relocation or stabilization project, it shall be removed by the property owner within 30 days of official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure.

(I) Removal of temporary erosion control structures is not required if they are covered by dunes with stable and natural vegetation.

(J) The property owner shall be responsible for the removal of remnants of all portions of any damaged temporary erosion control structure.

(K) Sandbags used to construct temporary erosion control structures shall be tan in color and three to five feet wide and seven to 15 feet long when measured flat. Base width of the structure shall not exceed 20 feet, and the height shall not exceed six feet.

(L) Soldier pilings and other types of devices to anchor sandbags shall not be allowed.

(M) An imminently threatened structure may be protected only once, regardless of ownership, unless the threatened structure is located in a community that is actively pursuing a beach nourishment project, or in an Inlet Hazard Area and in a community that is actively pursuing an inlet relocation or stabilization project in accordance with (G) of this Subparagraph. Existing temporary erosion control structures located in Inlet Hazard Areas may be eligible for an additional eight year permit extension provided that the structure being protected is still imminently threatened, the temporary erosion control structure is in compliance with requirements of this Subchapter and the community in which it is located is actively pursuing a beach nourishment, inlet relocation or stabilization project in accordance with Part (G) of this Subparagraph. In the case of a building, a temporary erosion control structure may be extended, or new segments constructed, if additional areas of the building become imminently threatened. Where temporary structures are installed or extended incrementally, the time period for removal under Part (F) or (G) of this Subparagraph shall begin at the time the initial erosion control structure is installed. For the purpose of this Rule:

- (i) a building and septic system shall be considered as separate structures.

(ii) a road or highway shall be allowed to be incrementally protected as sections become imminently threatened. The time period for removal of each section of sandbags shall begin at the time that section is installed in accordance with Part (F) or (G) of this Subparagraph.

(N) Existing sandbag structures may be repaired or replaced within their originally permitted dimensions during the time period allowed under Part (F) or (G) of this Subparagraph.

15A NCAC 07M .0201 DECLARATION OF GENERAL POLICY

It is hereby declared that the general welfare and public interest require that development along the ocean and estuarine shorelines be conducted in a manner that avoids loss of life, property and amenities. It is also declared that protection of the recreational use of the shorelines of the state is in the public interest. In order to accomplish these public purposes, the planning of future land uses, reasonable rules and public expenditures should be created or accomplished in a coordinated manner so as to minimize the likelihood of damage to private and public resources resulting from recognized coastal hazards.

15A NCAC 07M .0202 POLICY STATEMENTS

(a) Pursuant to Section 5, Article 14 of the North Carolina Constitution, proposals for shoreline erosion response projects shall avoid losses to North Carolina's natural heritage. All means should be taken to identify and develop response measures that will not adversely affect estuarine and marine productivity. The public right to use and enjoy the ocean beaches must be protected. The protected uses include traditional recreational uses (such as walking, swimming, surf-fishing, and sunbathing) as well as commercial fishing and emergency access for beach rescue services. Private property rights to oceanfront properties including the right to protect that property in ways that are consistent with public rights should be protected.

(b) Erosion response measures designed to minimize the loss of private and public resources to erosion should be economically, socially, and environmentally justified. Preferred response measures for shoreline erosion shall include but not be limited to AEC rules, land use planning and land classification, establishment of building setback lines, building relocation, subdivision regulations and management of vegetation.

(c) The replenishment of sand on ocean beaches can provide storm protection and a viable alternative to allowing the ocean shoreline to migrate landward threatening to degrade public beaches and cause the loss of public facilities and private property. Experience in North Carolina and other states has shown that beach restoration projects can present a feasible alternative to the loss or massive relocation of oceanfront development. In light of this experience, beach restoration and sand renourishment and disposal projects may be allowed when:

- (1) Erosion threatens to degrade public beaches and to damage public and private properties;
- (2) Beach restoration, renourishment or sand disposal projects are determined to be socially and economically feasible and cause no significant adverse environmental impacts;
- (3) The project is determined to be consistent with state policies for shoreline erosion response and state use standards for Ocean hazard and Public Trust Waters Areas of Environmental Concern and the relevant rules and guidelines of state and federal review agencies.

When the conditions set forth in this Paragraph can be met, the Coastal Resources Commission supports, within overall budgetary constraints, state financial participation in Beach Erosion Control and Hurricane Wave Protection projects that are cost-shared with the federal government and affected local governments pursuant to the federal Water Resources Development Act of 1986 and the North Carolina Water Resources Development Program (G.S. 143-215.70-73).

(d) The following are required with state involvement (funding or sponsorship) in beach restoration and sand renourishment projects:

- (1) The entire restored portion of the beach shall be in permanent public ownership;
- (2) It shall be a local government responsibility to provide adequate parking, public access, and services for public recreational use of the restored beach.

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

(f) Efforts to permanently stabilize the location of the ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed except when the project meets one of the specific exceptions set out in 15A NCAC 7H .0308.

(g) The State of North Carolina will consider innovative institutional programs and scientific research that will provide for effective management of coastal shorelines. The development of innovative measures that will lessen or slow the effects of erosion while minimizing the adverse impacts on the public beach and on nearby properties is encouraged.

(h) The planning, development, and implementation of erosion control projects will be coordinated with appropriate planning agencies, affected governments and the interested public. Maximum efforts will be made by the state to accommodate the interest of each interested party consistent with the project's objectives. Local, state, and federal government activity in the coastal area should reflect an awareness of the natural dynamics of the ocean front. Government policies should not only address existing erosion problems but should aim toward minimizing future erosion problems. Actions required to deal with erosion problems are very expensive. In addition to the direct costs of erosion abatement measures, many other costs, such as

maintenance of projects, disaster relief, and infrastructure repair will be borne by the public sector. Responses to the erosion should be designed to limit these public costs.

(i) The state will promote education of the public on the dynamic nature of the coastal zone and on effective measure to cope with our ever changing shorelines.

STIPULATED FACTS**ATTACHMENT B**

1. The Petitioner in this case is Kay P. Picha (“Petitioner”). Petitioner purchased the property located at 149 Ocean Isle West Boulevard (the “Lot”) in 2006 through a deed from her husband David Picha, recorded at Book 2414, Page 1081 of the Brunswick County Registry, a copy of which is attached as a stipulated exhibit. The couple originally purchased the Lot together in 2003 through a deed recorded at Book 1784, Page 139 of the Brunswick County Registry, a copy of which is attached as a stipulated exhibit.
2. As shown on the Plat recorded in Book Z, Page 16 of the Brunswick County Registry, the Lot extends from the Atlantic Ocean to Old Sound Creek, subject to an easement where Ocean Isle West Boulevard bisects the Lot. Ocean Isle West Boulevard is a private road, maintained by the homeowners in the Ocean Isle West Subdivision.
3. The Lot is bordered on the south by the Atlantic Ocean, on the west by Tubbs Inlet, on the north by Old Sound Creek, and on the east by a residential lot. The development proposed for the Lot is within the Ocean Erodible, Inlet Hazard, Public Trust Waters Areas of Environmental Concern (“AECs”). As such, N.C.G.S. § 113A-118 requires that any development on the Lot requires a permit issued pursuant to the Coastal Area Management Act (“CAMA”). As the fill for the sandbags is proposed to be taken from below mean high water, a Dredge and Fill Permit is also required from DCM.
4. The annual average erosion rate used for setback calculations in an Inlet Hazard AEC uses the rate in the adjacent Ocean Erodible AEC. At the Lot, the applicable rate is 2 feet per year. However, based on DCM shoreline data, the average erosion rate at the Lot is 4.3’ per year. There is no erosion rate established by the Commission for the Old Sound Creek shoreline on the Lot.
5. At the Lot, the waters of the Atlantic Ocean and Tubbs Inlet are classified as SB waters by the Environmental Management Commission and are open to the harvest of shellfish. The waters of Old Sound Creek are classified as SA waters and are open to the harvest of shellfish.
6. Existing development on the Lot includes a 3,775 square foot home (conditioned space, not Total Floor Area) which was built in 1998, according to the Brunswick County tax card for the Lot, a copy of which is attached as a stipulated exhibit. Other development on the Lot includes a swimming pool on the oceanfront side of the home, a beach access walkway on the oceanfront corner of the Lot and a dock on the Old Sound Creek side of the Lot. This development can be seen in the attached stipulated exhibits including the powerpoint presentation.
7. According to the 2016 Brunswick County Tax Information Sheet for the Property, a copy of which is attached as a stipulated exhibit, the total appraised real property value is listed as \$1,473, 610.
8. In 2008, Petitioner applied for and was denied a CAMA general permit in order to construct a rip-rap shore stabilization structure on the northwest corner of the Lot. Petitioner

appealed DCM's decision that the portion of the lot where the rip-rap was proposed did not "feature characteristics of the Estuarine Shoreline AEC" which is required by 15A NCAC 7H .1101 in order to allow a bulkhead within the Inlet Hazard AEC, which was the basis of the permit denial.

9. In May of 2009, Petitioner's contested case appeal of the rip-rap permit decision was settled by the parties; in the settlement agreement, it was determined that repair of a pre-existing rock revetment on the sound side of the Lot (permitted in 1989 by CAMA Major Permit No. 240-89, a copy of which is attached as a stipulated exhibit) as proposed was allowed as maintenance, and thus did not constitute development. The settlement agreement, a copy of which is attached as a stipulated exhibit, also resolved five outstanding Notices of Violation ("NOV") and Continuing Notices of Violation ("CNOV") issued to Petitioner, Ocean Isle West HOA and Erosion Control Specialists, LLC c/o Yogi Harper in February, March and September 2008, all of which were disputed by those parties.

10. Between October 2007 and June 2009, Petitioner applied for, and was granted four CAMA General Permits authorizing a series of connecting sandbag structures to protect most of the shoreline of the Lot, as well as an exemption determination for the rip-rap repair on Old Sound Creek. Specifically, the permits authorized (all sandbags were limited to the 6' by 20' limits of the Commission's rules):

a. CAMA General Permit #49157D, issued on October 30, 2007 and expiring November 30, 2007, authorized the installation of 102 linear feet of sandbags along portions of the Atlantic Ocean and Tubbs Inlet side of the Lot, pursuant to 15A NCAC 7H .1700 et seq.

b. CAMA General Permit #49198D, issued on November 14, 2007 and expiring November 30, 2007, authorized the installation of 149 linear feet of sandbags along the Atlantic Ocean portion of the Lot, pursuant to 15A NCAC 7H .1700 et seq. These bags tied in to the eastern side of the sandbags installed pursuant to the October 30, 2007 permit.

c. CAMA General Permit #49148D, issued on December 13, 2007 and expiring January 13, 2008, authorized the installation of 68 linear feet of sandbags along the road-end on the Tubbs Inlet side of the Lot and tied into the earlier-installed bags. This permit was actually issued to the HOA as the owner of the road easement, but the sandbags were paid for by Petitioner and were placed on her Lot. They were authorized pursuant to 15A NCAC 7H .1700 et seq.

d. CAMA Exemption Letter, dated May 9, 2009 and expiring August 9, 2009, authorized the maintenance and repair of approximately 110 linear feet of existing rip-rap originally permitted on December 13, 1989 and expiring December 31, 1992 through CAMA Major Permit No. 240-89.

e. CAMA General Permit #52423C, issued June 30, 2009 and expiring July 30, 2009, authorized the installation of 45 linear feet of sandbags along the Tubbs Inlet and

Old Sound Creek side of the Lot, pursuant to 15A NCAC 7H .1700 et seq. These bags tied in to those permitted through earlier permits.

Copies of these permits, associated sandbag removal notices, and the exemption letter are attached as stipulated exhibits.

11. Before the ongoing migration of Tubbs Inlet to the northeast, this inlet historically migrated to the west at a rate of 150 feet per year. This inlet was relocated by the US Army Corps of Engineers in 1970 approximately one kilometer to the east, to a more central location approximating the location of the inlet in 1938. Movement of the inlet over time can be seen in the attached PowerPoint with aerial and ground-level photographs of the Lot and Tubbs Inlet, as well as the Tubbs Inlet portion of Dr. Cleary's *Pictorial Atlas of North Carolina Inlets*, a copy of which is attached.

12. An exhibit created by DCM's Ken Richardson from DCM's historical shoreline data and overlain on a 2012 aerial photograph is attached as a stipulated exhibit in order to show the historical shorelines near the Lot.

13. In 2001, a project was proposed by a group of Town property owners, including the Smiths whom the Petitioner purchased the Lot from in 2003, proposing to relocate Tubbs Inlet away from the Town's inlet shoreline. The interaction with DCM was only in the SEPA process as the effort was abandoned when it was determined that an EIS would be required instead of a FONSI, after Sunset Beach raised objections to the project. The executive summary from the EA is attached as a stipulated exhibit.

14. Measurements of the distance between the sandbag revetment and the tidal channel between 2008 and 2016 were taken and recorded by Petitioner's contractors, Yogi Harper of Erosion Control Specialists, LLC, Ted Sampson, and North Carolina licensed engineer Bill Forman. These measurements are documented in various May 2016 correspondence from Mr. Harper, Mr. Sampson, and engineer Bill Forman. The Harper letter describes methods of measurement, and includes Mr. Harper's resume. Mr. Sampson has prepared an exhibit depicting measured distances between the westernmost edge of the existing sand bag revetments and the measured locations over time of the easternmost edge of the Tubbs Inlet channel. Copies of these documents are attached as stipulated exhibits.

15. Engineer Bill Forman prepared an exhibit which is an aerial photograph overlain with survey information, a copy of which is attached as a stipulated exhibit. The information for the survey was collected on April 25, 2016.

16. Petitioner contends that the measurements depict a rapid movement of the inlet channel to the west towards the Lot, which has the private road and Town utility lines underneath it.

17. On January 15, 2012, DCM Staff issued CAMA General Permit No.57596 authorizing dredging of 833 cubic yards from around the Petitioner's Pier and dredged spoil was used to cover the existing sandbags. A copy of this permit is attached as a stipulated exhibit.

18. On January 23, 2015, DCM Staff issued a Certificate of Exemption 01416-D, expiring April 23, 2015, authorizing repair of Petitioner's Existing sandbags. In reliance on this determination, Petitioner's contractor carried out the described repair work. A copy of this determination is attached as a stipulated exhibit. DCM Staff now stipulate that it is DCM's position that this exemption was issued in error, as the authorization allowing the sandbags on the Lot in 2007 and 2009 had already expired.

19. On April 13, 2016, Petitioner, through her agent Ted Sampson of Sampson Contracting, Inc., applied for a CAMA Major Permit/Dredge and Fill Permit in order to increase the size of the existing sandbag revetment along approximately 468 linear feet of ocean beach and inlet shoreline. The purpose of the increased size sand bag revetment is stated in the application materials as being to stop or retard the recent, accelerated northeast migration of the inlet and inlet channel, in order to protect the Picha Property and adjacent private street and public utilities. The proposal is to increase the sand bag base width from the existing 20 feet base width to up to 45 feet base width, a maximum overall width of 53 feet, and to raise the existing 6-foot height to 12 feet NAVD. The additional bags would be placed on a scour apron, and the location of the new bags are shown on a survey of the approximate mean high water survey, as dated March 31, 2016. With the application, Mr. Sampson indicated in the cover letter that it was his opinion that time was of the essence in processing this permit request due to the rate of migration of the inlet channel. A copy of Petitioner's April 13, 2016 CAMA Permit Application materials is attached as a stipulated exhibit.

20. Petitioner intends to use sand from below MHW within Tubbs Inlet and Old Sound Creek to fill the proposed sandbags. This would result in an approximate volume of 2,555 cubic yards to fill the bags proposed. The additional sandbags would have high-ground impacts of approximately 14,320 square feet in area.

21. In connection with Petitioner's CAMA Major Permit application, DCM Field Staff prepared a Field Investigation Report, dated April 19, 2016, to summarize the project, a copy of which is attached as a stipulated exhibit.

22. On April 19, 2016, DCM Staff forwarded the permit application materials and Field Investigation Report to the commenting agencies and federal agencies which participate in the CAMA Major Permit Review process. Also on this date, DCM Staff acknowledged receipt of the permit application and noted that the projected date for permit decision is June 27, 2016, though a letter, a copy of which is attached. On May 5, 2016, Mr. Sampson emailed DCM asking for an update on the permit application review, and asking who would represent DCM in the variance.

23. On May 12, 2016, the Corps of Engineers, through an email to Mr. Sampson, requested additional information for the federal permit review process. A copy of this email is attached as a stipulated exhibit. Mr. Sampson provided requested additional information on May 12, 2016 and again on May 20, 2016.

24. On May 24, 2016, the Corps of Engineers, through an email to its sister agencies, requested that the other federal commenting agencies provide any comments back to the Corps regarding this application in an expedited manner by June 7, 2016.

25. As part of the CAMA Major Permit Process, notice of the project was provided to Petitioner's adjacent riparian neighbors to the east, the Bells, and to the Town of Ocean Isle Beach. Notice was also posted on the Lot on April 29, 2016, and ran on April 21, 2016 in the Wilmington Star News. No comments were received from the adjacent riparian owners or other members of the public. Copies of the notice letters and certified mail receipts are attached as stipulated exhibits.

26. Also as part of the CAMA Major Permit Process, information about the project including the application materials and the field investigation report were forwarded to several state and federal resource agencies. DCM received comments from:

- the State Property Office, which noted easements may be required.
- the Wildlife Resources Commission, which raised concerns about nesting habitat for birds and sea turtles. They also raised concerns about the less-temporary nature of larger sandbag structures.
- DCM's Fisheries Resource Specialist raised concerns about impacts to the intertidal beach zone and its habitat value. He also raised concerns about the less-temporary nature of larger sandbag structures.
- DCM's Field Representative who noted which rules were a basis for denial
- DCM's District Planner who noted the proposed development was consistent with the Town's Land Use Plan
- The DWR-401 Wetlands unit noted that on June 3, 2016, the 401 Water Quality Certification was issued.
- The National Marine Fisheries Service noted concerns through a June 3, 2016 letter to the Corps.

Copies of these comments are attached as stipulated exhibits.

27. On June 10, 2016, Mr. Sampson sent a letter to DCM emphasizing the emergency nature of this permit request, a copy of which is attached. On June 20, 2016, Mr. Sampson sent an email to Director Davis asking for a response from him requesting a status update. On June 20, 2016, Director Davis responded that he was aware that Mr. Sampson, Petitioner's Counsel and Mr. Foreman had been in close contact with DCM staff and DEQ General Counsel working on permit review issues and the anticipated variance request. A copy of the June 10, 2016 letter, the June 20, 2016 email and the June 20, 2016 response are attached as stipulated exhibits.

28. On June 7, 2016, the US Fish and Wildlife Service sent a non-concurrence letter to the Corps, raising concerns about the project and the possible impacts to piping plovers and the red knot bird species. On June 14, 2016, Mr. Sampson responded to the US Fish and Wildlife's concerns in an email to the Corps. On June 16, 2016, the Corps acknowledged the June 7, 2016 non-concurrence letter from the US Fish and Wildlife Service and initiated formal consultation with Fish and Wildlife to address the concerns. On June 22, 2016, the National Marine Fisheries Service notified the Corps that the detailed response regarding EFH conservation recommendations was found to be acceptable to the National Marine Fisheries Service. Copies of this correspondence are attached as stipulated exhibits.

29. On June 24, 2016, the Corps notified DCM Staff that the NMFS comment would be the last of the federal comments on the application, and the Corps gave DCM Staff a verbal agreement that they were satisfied with the status of the coordination with US Fish and Wildlife, provided that certain reasonable measures requested by the US Fish and Wildlife Service (and included in the June 16, 2016 email from the Corps) are implemented.
30. On June 24, 2016, DCM notified Petitioner that additional time to process the permit application was necessary. A copy of this notice is attached as a stipulated exhibit.
31. On June 29, 2016, DCM denied Petitioner's CAMA Major Permit application as it was inconsistent with (1) the Commission's rules regarding sandbag structure size-limits at 15A NCAC 7H .0308(a)(2)(K), (2) the Commission's rules limiting the length of time sandbags may remain at 15A NCAC 7H .0308(a)(2)(F) and (G), and (3) the Commission rule at 15A NCAC 7H .0308(a)(1)(A) which prohibits sandbag structures which are inconsistent with the Commission's policy statements in 15A NCAC 7M .0200. A copy of the denial letter is attached as a stipulated exhibit.
32. On July 1, 2016, Petitioner requested that her forthcoming variance request be heard in an expedited hearing at the July 12, 2016 regular meeting of the Coastal Resources Commission (essentially seeking a variance from the Commission's rules for variance deadlines to file and to agree to facts). On July 2, 2016, the Chairman granted Petitioner's request through a written Order which set out a deadline schedule for the process. Copies of these letters are attached as stipulated exhibits.
33. On July 4, 2016, Mr. Sampson wrote to Petitioner discussing longer term planning issues for the temporary erosion control measures protecting her Property. A copy of the Sampson letter is attached as a stipulated exhibit. DCM Counsel notes that statements in this letter should not be considered by the Commission as part of Petitioner's legal argument, as Mr. Sampson is not an attorney.
34. On July 5, 2016, Petitioner filed her variance petition through legal counsel, seeking a variance from the Commission's rules outlined in the CAMA permit denial letter.
35. The surveys and drawings submitted to DCM and the other review agencies with the initial application were taken from data obtained on March 25, 2016, and are the controlling documents. However, since that time, Petitioner has had subsequent surveys and drawings made, including most recently, the April 25, 2016 survey. Petitioner notes the rapidly changing conditions on the property may require changes to the footprint of the revetment to be constructed. Depending on the degree of erosion existing if and when construction begins, the revetment may have to be shifted landward in some areas. However, Petitioner stipulated that at no point will the structure exceed 45' in base width, 53' in overall width, and 12' NAVD (which is an elevation from a fixed datum, and not a limit to the overall height of the structure above and below mean high water).

36. The Town of Ocean Isle Beach (“Town”) has noted its beach management plan, portions of which have been pursued over a 25-year period, and that the Town had a study done in 2015 formulating a 30-year beach management plan (“2015 Plan”). A copy of a letter from the Town’s mayor Debbie Smith describing the Town’s efforts is attached as a stipulated exhibit.

37. The Town of Ocean Isle Beach (“Town”) has a federally authorized beach nourishment project (“Federal Project”) for the middle 3.25 miles of the total 5.5-mile-long oceanfront beach within the Town. This Federal Project first placed nourishment on the beach in 2001, and then again in 2006-07, 2010 and 2014. The federal cost-share agreement is set to expire in 2051. The source of the nourishment sand is Shalotte Inlet bordering the east end of the Town. This project ends approximately 9,200 feet to the east of the Lot. This information was obtained in the Town’s March 2015 Final 30-year Beach Management Plan (“2015 Plan”), a copy of which is attached as a stipulated exhibit.

38. Since 2001, along the east end of the Town, east of the Federal Project, the Town, the Corps, and private interests have periodically deposited material outside of the bounds of the Federal Project.

39. The Town is currently pursuing authorization of a 750-foot terminal groin and 300-foot shore anchorage system and associated beach nourishment for the east end of the island at Shalotte Inlet. The Federal FEIS for this Project was released for public comment on April 29, 2016. DCM commented on the FEIS on issued on June 3, 2016. On June 10, 2016, the Town’s CAMA Major Permit Application was received as complete by DCM Staff, and is undergoing the review process now.

40. The Town is in the scoping and pre-application phase for a 30-year island-wide shoreline protection permit, based on the 2015 Plan. An inter-agency scoping meeting took place on October 1, 2015, and recently on June 30, 2016, the Town’s consultant had a pre-application meeting with DCM Staff for this island-wide permit application. However, no final permit application has been submitted and no permit issued. For the west end of the project, the plan and permit application documents do not specify dates for beach nourishment in front of or on Petitioner’s property. On page 11 of the March 2016 draft permit application, it notes that “based on existing shoreline conditions, the section of shoreline between baseline station 250+00 and Tubbs Inlet would not be included in the initial construction of the beach fill project along the west end of Ocean Isle Beach.”

41. No terminal groins are currently being pursued at Tubbs Inlet, on either the Town’s side near the Lot, or on the Sunset Beach side. No channel relocation project has been developed for Tubbs Inlet since the relocation which took place in the 1960’s, other than the proposal in 2001, noted in the stipulated facts above, and which was abandoned before a permit decision was made.

42. The parties note that the Commission is in the process of updating its sandbag rules to allow bags to remain up to 8 years; however, those changes are not in effect at this time. A copy of the CRC’s May sandbag agenda item which was noted in the State Budget provision which directs the Commission to pursue temporary rulemaking, is attached as a stipulated exhibit.

43. A PowerPoint presentation with ground-level and aerial photographs of the Lot and surrounding area is attached as a stipulated exhibit.
44. The existing revetment is functioning properly to preclude erosion of the shoreline when subjected to the energy from ocean waves. Site photos show no evidence that the existing revetment is being overtopped.
45. The Petitioner stipulates that the proposed project is inconsistent with those rules cited in the June 29, 2016 denial letter.
46. The Petitioner is represented by I. Clark Wright, Jr., of Davis, Hartman, Wright, PLLC of New Bern. The Respondent is represented by Assistant General Counsel Christine Goebel.

Stipulated Exhibits:

1. Picha Deeds: 2003 deed at 1784/139 and 2006 deed at 2414/1081
2. Brunswick County Tax Information Card for Picha Lot
3. 1989 Rip-rap CAMA Major Permit No. 240-89
4. CAMA General Permit #49157D
5. CAMA General Permit #49198D
6. CAMA General Permit #49148D
7. 2009 CAMA exemption letter for rip-rap maintenance
8. CAMA General Permit #52423C
9. Dr. Cleary Pictorial Atlas of NC Inlets, Tubbs Inlet Section
10. Historic Shorelines exhibit with shorelines overlain on aerial photo
11. Executive Summary from 2001 Tubbs Inlet proposal EA
12. Yogi Harper resume and evaluation letter
13. Ted Sampson resume and evaluation letter
14. Bill Foreman resume and evaluation letter
15. Bill Foreman exhibit with April 25, 2106 survey overlain on aerial
16. CAMA General Permit #57596 for dredging around pier
17. CAMA Exemption Letter 01416-D for sandbag repair in 2015
18. April 13, 2016 CAMA Major Permit Application package
19. April 19, 2016 DCM Field Investigation Report
20. April 19, 2016 letter to Petitioner acknowledging permit application receipt
21. May 5, 2016 email from Sampson to DCM seeking update
22. May 12, 2016 email from Corps to Sampson seeking additional information
23. May 12, 2016 and May 20, 2016 emails from Sampson to Corps
24. May 24, 2016 email from Corps to sister agencies seeking comment
25. State Property Office permit review response
26. WRC permit review response
27. Fisheries Specialist review response
28. DCM Field Staff proposed basis for denial

29. DCM District Planner permit review response
30. DWR-401 permit review response
31. NMFS letter of concerns to Corps
32. June 10, 2016 letter from Sampson to DCM
33. June 20, 2016 email from Sampson to Davis seeking update
34. June 20, 2016 response from Davis to Sampson
35. June 7, 2016 letter from USFWS to Corps with non-concurrence
36. June 14, 2016 response from Sampson to Corps
37. June 16, 2016 letter from Corps to USFWS initiating consultation
38. June 22, 2016 letter from NMFS to Corps
39. June 24, 2016 email from Corps to DCM with final comments
40. June 24, 2016 letter from DCM to Sampson extending review period
41. June 29, 2016 denial letter from DCM
42. July 1, 2016 request for expedited variance hearing
43. July 2, 2016 response from Chairman Gorham re: expedited hearing
44. July 1, 2016 letter from Mayor Debbie Smith to Petitioner's Counsel
45. OIB's 2015 Final Beach Management Plan
46. CRC's May agenda item re: sandbags noted in the Budget Bill
47. Powerpoint Presentation

PETITIONER'S and STAFF'S POSITIONS**ATTACHMENT C**

I. Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? If so, the petitioner must identify the hardships.

Petitioner's Position: Yes.

Introduction – Background from Petitioner

Ms. Kay P. Picha and her husband David have owned their ocean front beach home property at 149 Ocean Isle West Boulevard, Ocean Isle Beach 28469 since July 14, 2003. For family planning purposes, David Picha deeded the property to Kay Picha individually pursuant to the terms of a Special Warranty Deed, dated June 20, 2006; recorded June 22, 2006. [See stipulated facts/exhibits.] Kay Picha has owned the property continuously since. The west end subdivision in which the Pichas' beach home is located is part of the Town of Ocean Isle Beach (OIB). The road providing access to the home is private; the utilities serving the home are public. The Pichas' home is the westernmost home in OIB, bounded on the "front" by the Atlantic Ocean, on the west by Tubbs Inlet, and on the north by Old Sound Creek.

During 2008–2009, the Pichas actively sought multiple permits from the Division of Coastal Management (DCM) to install sand bags as temporary erosion control measures, and to repair a long-existing rock revetment protecting the Tubbs Inlet side of their property (and also protecting properties owned by neighboring home owners served by the private road, and also protecting public utilities owned and operated by the Town of OIB). A total of six permits and exemption letters were issued by DCM, allowing the Pichas to install and repair sandbags along the ocean front, Tubbs Inlet and Old Sound Creek sides of their property. Several NOV letters were issued by DCM in this same time period, and various disputes arose between the Pichas and DCM. A contested case was filed by the Pichas; the parties engaged in constructive mediation resulting in a settlement agreement and issuance of an exemption letter by DCM authorizing maintenance and repair to an adjoining rock revetment, payment of the sum of \$500.00 by the Pichas and dismissal of the NOVs. [See stipulated facts and exhibits for documentation].

It is the Picha's position that the permits and authorizations issued to them were extended by law when the North Carolina General Assembly enacted its permit extension acts, the latest of which was Session Law 2010-177, House Bill 683, ratified July 10, 2010, and approved by the Governor August 2, 2010. Under the terms of this legislation, the Pichas believe that the time periods contained in all permits and authorizations issued to them (and to the related homeowner's association), including sand bag removal time periods, were tolled through December 31, 2011, and thus using five years for the permits and approvals regarding the road, and for homes greater than 5,000 square feet total, the sand bag removal time periods applicable to their sand bag revetments should be extended through and including December 31, 2016. Petitioner had reason to believe that DCM staff also considered the sand bag removal dates

extended as recently as last year when DCM issued a repair and maintenance approval to Petitioner for work on the existing sand bags. [See stipulated facts and exhibits.]

DCM now appears to be taking the position that the permit extension acts only extended the time in which the Pichas were authorized to install their sand bags. Without regard to who is legally right, the Pichas request that the CRC consider the fact that DCM staff issued them repair permits as recently as last year, along with the overall intent of the Legislature to give private property owners breathing room by implementing the permit extension laws, and thus in the Commission's authorized discretion issue a variance order allowing Petitioner to install the requested larger sand bag revetment, and keep such bags in place for eight years – a time period much more fitting with the Town of OIB's long term beach management plan. [See stipulated facts and exhibits – specifically including OIB 30-year beach management plan; OIB draft March 2016 Major CAMA Permit Application and the January 23, 2015 DCM repair and maintenance permit issued to Petitioner.]

While the existing sand bags and rock revetments generally have performed well as erosion control measures, and while the threat to the ocean front portions of their property may not be as imminent as is the Tubbs Inlet and Old Sound Creek portions of their property, the Pichas now face a time critical, imminent threat of damage and destruction to their home, the private road, and the public OIB utilities serving their home and other nearby homes due to a dramatic acceleration in eastward movement of the Tubbs Inlet channel. The threat arises from the rapid and unknown changes in geomorphology along this westernmost shoreline of Ocean Isle Beach, which can bring the erosive forces of the inlet channel up against all portions of this shoreline.

During the time periods from June 2008 through October 2014, the inlet channel migrated in a northeast direction by an average rate of between 1.5 – 2.0 feet per month. From October 2014 through November of 2015, the migration rate accelerated to an average of 5.0 feet per month. Between late November 2015 and March 2016, the inlet channel northeasterly migration rate dramatically accelerated to an average of approximately 12 feet per month – this represented an over 200% increase in just three months, and placed the channel just 29 feet from the westernmost edge of the existing Picha sand bags. On April 11, 2016, David Picha measured this distance as ten feet. On June 19, 2016, Yogi Harper and Ted Sampson personally measured this distance as approximately three feet. [See stipulated facts and exhibits.]

In response to the more recent accelerated channel movements, the Pichas retained Sampson/Harper/Wright to commence an emergency, expedited permitting and variance request process designed to save their existing sand bags from destruction due to tidal channel impacts, and thus save their beach home. An emergency sand bag permit application package was hand delivered to DCM on April 13, 2016. DCM's denial letter issued June 29, 2016.

Unless the Pichas are allowed immediately to reinforce and expand their existing sand bag erosion control measures, the existing bags will soon fail, thereby exposing to the powerful tidal and water forces of the Inlet and Atlantic Ocean not only the Pichas' home, but also the private road and the public OIB utilities serving numerous other homes located at the far west end of the

Town. [See Stipulated Facts and Exhibits.] In response to this emergency situation, the Pichas have retained the services of Ted Sampson, Yogi Harper and the undersigned attorney to seek an time critical, expedited variance authorizing the Pichas to reinforce and expand their sand bag structures, and grant the Pichas eight years of protection for such work in light of recent enactments by the General Assembly, longstanding and ongoing beach management efforts of the Town of OIB.

Petitioner requests that the matters discussed in this introduction be incorporated by reference into and considered for purposes of evaluation of all four variance criteria, discussed individually below.

Individual Variance Criteria

Petitioner's position on the First Variance Factor

Yes. The CAMA rules that the Pichas seek a variance from are: (1) height and width of sand bags – 15A NCAC 07H .0308 (a)(2)(K); and (2) to the extent necessary due to language contained in DCM's June 29, 2016 denial letter regarding time periods for sand bag structures, also from 15A NCAC 07H.0308(a)(2)(G) [eight year time period where communities are actively pursuing beach nourishment] and 15A NCAC 07H.0308(a)(2)(F) [two and five year time periods for sand bag permits for homes and roads respectively]. The Pichas face unique hardships in that the current rules do not yet fully implement the intent of the Legislature as expressed in laws such as Session Law 2015-241, House Bill 97, Pages 206-207, dealing with erosion control structures [termination dates for permits is latest date for related permits], Session Law 2010-177, House Bill 683 [permit extension act, tolling the time periods in all of the Pichas' related permits through and including December 31, 2011], In addition, the Pichas face the unique hardship of the unanticipated, accelerated eastward movement of the Tubbs Inlet channel, thereby dramatically imperiling their home, the private road and the public utilities serving their home and other nearby homes.

To the extent that it is necessary to address this issue, the Pichas also face unique hardships in that the Town of OIB clearly and consistently has pursued a comprehensive beach management plan that includes the ocean beaches adjacent to the Pichas' property, even including a draft March 2016 Major Development CAMA Permit Application to implement this comprehensive plan – yet under the literal language of 7H.0308(a)(2)(G), DCM points out that, at the present time, the Town has not yet financed the various nourishment activities called for by the comprehensive plan, and has not specified exact dates as to when such activities would take place down at the west end (which in places has actually accreted in recent years; however, as noted in the plan and permit application, variations in the movement of Tubbs Inlet do represent a significant potential threat that the Town's plan intends to address). Thus the Pichas are caught between the fact that the Town clearly is actively implementing comprehensive, long term beach management for all of its beaches, including the west end all the way to Tubbs Inlet, which includes stabilization of the west end shoreline, yet there is not yet funding, permits or an acute need for nourishment on the ocean beach, yet the dramatic, recent eastward movements of the Tubbs Inlet channel are presenting a unique, emergency situation for the Pichas, and if not

addressed, soon will also imperil the private road and the Town's public utilities serving the area. It should be noted that the planning by the Town of OIB has identified the sand within Tubbs Inlet as a potential source for beach nourishment sand. If sand is to be dredged from Tubbs Inlet for beach nourishment purposes, the appropriate design of such dredging could alleviate the erosion threat of the inlet tidal channel upon the west end shoreline by reorienting the location of the tidal channel and retarding the easterly migration of the Inlet.

The ordinary six-foot limit on sand bag height and twenty-foot water ward limit on sand bag revetment location mean that the bags currently in place in front of, and on the inlet side of the Pichas' home soon will be ineffective to protect the home from the dramatic, recent advances of the inlet channel. This can be seen in the attached stipulated exhibit photographs and documents. Even though some of the existing sand bags remain covered by sand and some vegetation, they now are imperiled by the rapidly advancing tidal channel. This truly is a unique emergency situation where, without the granting of a variance by the CRC allowing the Pichas to expand and strengthen their existing sand bags to meet the dramatic movements eastward of the inlet tidal channel, all likely will be lost in this area – not only for the Pichas, but as can be seen with the dramatic difficulties up at North Topsail Beach, once waters end run sand bag revetments, serious additional damage is effected to roads, utilities, and thus to the ability of many property owners to use and enjoy their beach homes. The Pichas seek to protect their home; in so doing, their efforts also will help protect significant properties and assets owned by the homeowners' association, the Town of OIB and nearby neighboring beach homes.

Hardship also derives from the existing CAMA Rules having been developed with a single dimension description for erosion protection structures being applied to all situations that develop along the coast. The single dimension description does not take into account the greatly accelerated erosion that can take place adjacent to inlets, and it certainly does not take into account a situation such as is now experienced where a channel for the inlet dramatically has shifted eastward, imminently threatening homes, roads and utilities. Further, the existing CAMA Rules do not yet completely implement the will of the Legislature. Finally, the existing CAMA rules and CRC variance process clearly do not address situations where the rate of erosion is so dramatic that emergency action is needed [in the case at hand, simple denial of the Pichas' CAMA Permit application took over 75 days.] Not only do the current rules not provide imminently threatened property owners with an efficient, effective process, such rules equally are inadequate in addressing how certain accelerated erosion situations call for sand bags with greater dimensions than those currently allowed under the rules.

Staff's Position: No.

As an initial matter, Staff must address three issues that Petitioner has raised but that are beyond the scope of this variance hearing. The four criteria that the Commission considers during a variance hearing should only be evaluated based on the specific rules of the Commission that are cited in the permit denial letter (and how those rules are applied as the cause for the permit denial). Despite stipulating that the bases for the permit denial were proper, Petitioner has raised several additional issues as part of her argument. Staff contends that if Petitioner wishes to assert that DMC improperly processed the permit application, incorrectly interpreted the Commission's rules, or improperly denied the permit in any other way, the proper forum for such a challenge is a Contested Case Hearing challenging the permit denial or a Declaratory Ruling by the Commission on a rule interpretation. The three issues are (1) whether the appropriate process was followed by Staff in reviewing the CAMA Major Permit, (2) why the permit process took the amount of time it did, and (3) whether the Petitioner's existing sandbag permits are still active.

1. The CAMA Major Permit Process was the correct process for this application.

Throughout Petitioner's argument, she draws attention to the fact that her situation was an emergency and needed to be addressed as quickly as possible. Petitioner notes that G.S. § 113-118(f) "specifically contemplates the issuance of emergency permits for extraordinary situations in which structural property is in "imminent danger as a result of storms. . . or similar occurrence" and concludes that "the variance sought is the minimum necessary to preserve the Pichas' home and property – along with the adjacent private road and public Town utilities." Understandably, Petitioner is concerned about the safety of her home in the face of the shifting inlet channel. However, DCM had long interpreted this law as written- to only allow the "minimum [development] necessary" in order to address imminent danger, and not to use this authority to allow development beyond the scope of the Commission's rules or in excess of that authority, as the statute provides that "all further development shall be considered under ordinary permit procedures." G.S. § 113-118(f). In this case, Petitioner has had sandbags in place since 2007 when successive portions of the house and road structures became "imminently threatened" as defined by the Commission's rules. Site photographs also show that the existing sandbags have been offering the protection they were designed to provide and were not being overtopped or undermined in ways that significantly reduce their protective value. As such, these sandbags constitute the "minimum (development) necessary" to afford emergency protection for the house and road. For these reasons, DCM Staff determined that Petitioner's situation did not meet the standards for triggering a declaration by the Secretary of the Department of Environmental Quality for use of the CAMA emergency permit provisions.

Petitioner has compared her situation to the permitting which took place at North Topsail Beach in 2012 at the Topsail Reef Condominiums. In that case, the accelerated erosion of the oceanfront was dramatic and the oceanfront waves caused an erosion escarpment much or most of the way underneath the northernmost buildings in the development. No sandbags were in place under the northernmost buildings at the time the Emergency CAMA Permit was authorized by the Secretary, and once authorized, a CAMA Permit authorizing regular-sized sandbags was

issued in one day, with the request for "supersized" sandbags conditioned out of the permit. That provided a quick "permit decision" from which the Topsail Reef was able to seek a variance.

In this case, because existing sandbags were offering protection, DCM did not believe the CAMA Emergency Permit provisions should be utilized. Accordingly, Petitioner was required to proceed through the traditional CAMA Major Permit Process as outlined in G.S. 113A-118, coordinating with other resource agencies and providing notice and comment time for the public and adjacent neighbors, as well as coordination with federal review agencies.

2. The CAMA permit process took 77 days, and that was reasonable

Petitioner is correct that this permit review took 77 days, and Staff does not dispute that this passage of time may have foreclosed conducting work from the inlet-side of the sandbags. However, Staff notes that much of this processing time was not due to delays on the part of DCM Staff and instead is the responsibility of many parties.

A look at the process in detail reveals the following timeline:

Fall 2015	Petitioner notes in Mr. Harper's Evaluation that the inlet movement started to migrate at a faster rate
November 25, 2015	Mr. Harper measures the distance from the gazebo to the channel and its 147 feet
March 25, 2016	Mr. Harper measures the distance to the inlet from the gazebo to the channel again, and finds it is 77 feet.
April 13, 2016	Petitioner's consultant delivers application to DCM
April 14, 2016	DCM and DCM's Counsel made aware of forthcoming variance request
April 19, 2016	Permit app. sent to the Corps and other agencies for comment/review
May 12, 2016	Corps informs consultant more info is needed for them to process
May 12, 2016	Corps info received from consultant
May 24, 2016	Corps sent permit for other federal agency reviews (expedited to 15 days; until 6/7/16)
June 7, 2016	USFWS sends Corps notice of non-concurrence
June 14, 2016	consultant responds to USFWS concerns to Corps
June 24, 2016	Corps provides response to DCM
June 29, 2016	CAMA Major Permit denial issued (77 Days)

Staff contend that they were responsive to Petitioner and provided feedback when requested, as noted in the stipulated facts showing much of the correspondence between Petitioner's counsel, Petitioner's Consultant, Petitioner's Contractor and DCM Staff and Counsel.

As noted in responding to Issue 1, above, Petitioner compares this situation to that of the 2012 permitting of sandbags at Topsail Reef, and states that Petitioner's consultant and contractor assumed the timeline would be similar for receiving a permit decision. However, as also noted above, the CAMA Emergency Permit process is different from the traditional CAMA Major Permit Process used here, where the usual coordination with resource agencies is required by the

CAMA and the Commission's rules. Notably, there is no "emergency denial" provision in the CAMA. Even when it is clear that what an applicant proposes is outside the Commission's rules, the regular process must proceed so that sister agencies have an opportunity to raise their own objections or concerns that may not be apparent to DCM Staff or which DCM Staff have no jurisdiction to decide. In the Topsail Reef case, Petitioner proposed larger sandbags, but because the Emergency CAMA Permit authority was activated, only quick consultation was undertaken with the most relevant resource agencies before the Emergency CAMA permit was issued a day later but only authorized sandbags of a size consistent with the Commission's rules which was the "minimum [development] necessary" as required by the statute. Topsail Reef obtained a quicker "permit decision" from which to quickly seek a variance for larger sandbags that had been conditioned out of the Emergency CAMA Permit. In the Picha situation, because sandbags were already and had been there since 2007, there was no basis for an Emergency Permit to authorize the minimum protection necessary to protect against the imminent threat of erosion. With no avenue for an immediate "permit decision" from which to seek a variance, Petitioner proceeded through the traditional CAMA permit process. The permitting process time was not atypical for a project of this complexity and which received significant comments that needed to be addressed by Petitioners and the agencies. Staff believe this specific situation is more akin to the 2014 variance request where Oak Island owners (Golob et al) had sandbags already in place pursuant to their CAMA General Permits, and shortly thereafter, sought a CAMA Major Permit denial from which to seek a variance to increase the size of the revetment. In that case, the permitting time for the CAMA Major Permit was 86 days, 9 days longer than in this case.

3. Petitioner's 2007 and 2009 sandbag authorizations have expired

Finally, Staff must respond to Petitioner's argument in the introduction above, that

the permits and authorizations issued to them were extended by law when the North Carolina General Assembly enacted its permit extension acts, the latest of which was Session Law 2010-177, House Bill 683, ratified July 10, 2010, and approved by the Governor August 2, 2010. Under the terms of this legislation, the Pichas believe that the time periods contained in all permits and authorizations issued to them (and to the related homeowner's association), including sand bag removal time periods, were tolled through December 31, 2011, and thus using five years for the permits and approvals regarding the road, and for homes greater than 5,000 square feet total, the sand bag removal time periods applicable to their sand bag revetments should be extended through and including December 31, 2016.

Petitioner continues that

The Pichas request that the CRC consider the fact that DCM staff issued them repair permits as recently as last year, along with the overall intent of the Legislature to give private property owners breathing room by implementing the permit extension laws, and thus in the Commission's authorized discretion issue a variance order allowing Petitioner to install the requested larger sand bag

revetment, and keep such bags in place for eight years – a time period much more fitting with the Town of OIB’s long term beach management plan. [See stipulated facts and exhibits – specifically including OIB 30-year beach management plan; OIB draft March 2016 Major CAMA Permit Application and the January 23, 2015 DCM repair and maintenance permit issued to Petitioner.]

There is no legal basis for Petitioner's argument that a maintenance exemption issued in error as stipulated in Fact 18, somehow supersedes the Commission's rules which prescribe the length of time various sandbag structures are authorized to remain in place.

Petitioner is correct that DCM takes the position that the permit extension acts extended only the time in which development could be undertaken pursuant to a permit, and in the case of sandbag permits, did not also extend the time the sandbags could remain. As noted on the CAMA General Permits issued to Petitioner, 15A NCAC 7H 1702(e) provides that the work of installing the sandbags "must cease after 30 days from the date of issuance." In this case as in most sandbag situations, owners generally do not wait more than 30-day to install sandbags once their homes are deemed imminently threatened. While the permit extension act might have extended the development period window, the issue was moot as Petitioner had already installed her bags in 2007 and 2009 when authorized.

The General Permit Conditions in 15A NCAC 7H .1705(a)(7) allow sandbags authorized under the General Permit to remain in place for terms which mirror the Specific Use Standards rules at 7H .0308 that were the basis for denial- 2 years or 5 years depending on the size of the structure. There is no basis in the permit extension acts which would vary these removal dates and any argument to the contrary would have to be challenged in a contested case.

First Variance Factor- Staff's Position is Yes (on time) and No (on size).

Yes. Staff agrees with Petitioner that the Commission’s rules addressing time limitations for the removal of existing sandbag structures will cause the Petitioner unnecessary hardships. While the proposed project area does not currently fall within a community that is actively pursuing a beach nourishment project or an inlet relocation or stabilization project in accordance with G.S. 113A-115.1 (see 15A NCAC 07H.0308(a)(2)(G)), Staff acknowledge that the Town is in the process of applying for permits and identifying funds for an “island-wide” project that could deposit sand on at least a portion of the Petitioner’s property. It should also be noted that there are no current plans that examine either the relocation of Tubbs Inlet or the construction of a terminal groin at this inlet. However, there was a proposed project by a group of citizens to relocate Tubbs Inlet in 2001-2002, but this effort was abandoned before the required permits were applied for or obtained.

No. Staff disagrees that the strict application of the applicable development standards addressing the size limitation for sandbags cause the petitioner unnecessary hardship. The Petitioner's consultant stated in the permit application package that the existing sandbag revetment is functioning properly to protect the property from erosion of the shoreline due to ocean wave energy. The applicant also has room landward of the existing sandbags to place additional bags if necessary to protect the property from shoreline erosion from wave energy. The combination of allowing the existing sandbags to remain in place for an additional eight years as requested, along with the potential to add additional sandbags landward of the existing bags, clearly provides the applicant with an adequate level of protection for their property from erosion.

It is the position of Staff that Petitioner's plan to add the additional sandbags oceanward of the existing sandbags to prevent undercutting of the sandbag structure by the migration of the Tubbs Inlet channel is not a proper inlet management strategy, and is therefore not a proper response to any hardships the Petitioner's may face resulting from erosion. The Commission, through its rules, note that ocean inlets (such as Tubbs Inlet) are very dynamic areas that can exhibit drastic changes in inlet location over time. The dynamic nature of the Tubbs Inlet channel is supported by the long-standing designation of the proposed project area as an Inlet Hazard Area of Environmental Concern, the attempted effort in 2001-02 to relocate Tubbs Inlet away from the Ocean Isle Beach shoreline, the construction by a past property owner of the rock revetment on the back side of what is now Petitioner's property, the sandbag permits that were issued to Petitioner in 2007 and 2009, and the movement of the Tubbs Inlet shorelines through history. With this dynamic nature in mind, staff believe that, based upon the proposal to place the new sandbags oceanward of the existing sandbag revetment, and at the same base elevation as the existing sandbags, it is highly likely that the new sandbags could be quickly undercut by the inlet channel, causing these bags to be displaced along the shoulder of the inlet, if not into the inlet channel itself. Should such undercutting occur, the resulting dislocated sandbags could create what is in effect a hardened erosion control structure adjacent to the inlet channel, which would clearly conflict with the erosion response and inlet management strategies found within the Coastal Area Management Act and the rules of the Commission, specifically in the Commission's Shoreline Erosion Response Policies found at 15A NCAC 7M .0202 et seq. Removal of such displaced sandbags would be very difficult given the dynamic nature of the inlet, increasing the possibility that these sandbags would present a future navigational hazard within the inlet channel.

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

Petitioner's Position: Yes.

The hardship results from the fact that the dramatic movement of the adjacent Tubbs Inlet channel is indeed peculiar, with large, recent eastward movements occurring in a short period of time. Such movements are especially peculiar in that the general, long term expected movement of inlets in this area along the NC coast are in a westward/southern direction. The unusually rapid rate of movement of the adjacent inlet tidal channel is unusual and peculiar. This situation is different from the normal assessment of what type of protection is necessary to protect threatened structures, and how soon action must be taken. The accelerated channel movements are, in short peculiar and unusual – far different from the channel movements of the preceding 10-20 years.

The above peculiarity relating to the accelerated tidal channel movements (coupled with the 77 days it took to get a permit denial decision) have acutely heightened the need for immediate action to allow sand bag installation work to proceed. Now, unlike several months earlier, there is no room to work on the bags from the inlet side. Now, the logistics involved in installing the requested larger sand bag revetment will be more difficult, more costly – and more dangerous. Acute time pressures already face the Pichas' sand bag contractor, and each day of additional delay makes these factors that much more acute, peculiar and unusual. At this point, a single moderate storm could eliminate all possibility of being able to install the requested erosion protection structures.

Staff's Position: No.

Staff disagrees that Petitioner's hardship is caused by conditions peculiar to the subject property. Petitioner's property is the last lot on this barrier island, and is adjacent to Tubbs Inlet. Since 1979 when AECs were first defined by rule, this property was within the Inlet Hazard AEC and is also within the Ocean Hazard AEC. Staff notes that conditions on the Property are influenced by inlet processes. The Commission's rules note that inlets are especially volatile and are known to regularly move causing both erosion and accretion. The erosion present at this site is typical of inlets and the adjacent oceanfront shorelines. It is therefore difficult for Staff to agree that the movement of the Tubbs Inlet channel, an oscillatory inlet, is "dramatic" and "peculiar."

While Petitioner is generally correct that the "long term expected movement of inlets in this area along the NC coast are in a westward/southern direction," Dr. Cleary's Pictorial Atlas of North Carolina Inlets, published in 1999 notes that "the inlet has a complex migration history that includes an artificial relocation of the inlet (in 1970) and the dredging of Jinks Creek over the past 60 years." Additionally, DCM's mapping of historical shorelines digitized and rectified from historic aerial photographs show that the Site was underwater and the shoreline was east of the Site as recently as 1980. Finally, Petitioner's consultant Bill Foreman noted that this inlet channel has been moving eastward since 1999, before the 2004 date Petitioner purchased the

property, and there was a rock revetment on the property when they purchased it. So while the history of the Site since Petitioner's initial purchase in 2004 may seem more dramatic, Staff notes that this movement is the exact situation noted in 15A NCAC 7H .0304(1) in defining the Inlet Hazard AEC as one "where there exists a substantial possibility of excessive erosion and significant shoreline fluctuation." As the migration of the channel appears to be typical of inlets causing both increases and decreases in erosion to the adjacent shorelines over time, it is Staff's position that Petitioner's hardships do not result from conditions that are peculiar to this inlet-adjacent Property.

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

Petitioner's Position: No.

The Pichas certainly have done nothing to accelerate or otherwise aggravate the Tubbs inlet channel movements. Moreover, based on their experience with at least one, similar previous expedited sand bag variance request, the Pichas' contractors anticipated a much quicker turnaround time on processing the anticipated denial of the Pichas' larger sand bag revetment CAMA permit application. The Pichas mention this point to anticipate any questions or concerns regarding why they did not begin the application process sooner. Importantly, in addition to the above, the movements of the tidal channel did not accelerate until the fall of 2015, and once measurements confirmed this fact, the Pichas acted as quickly as possible under the circumstances.

Staff's Position: Yes.

While Staff agrees that Petitioner has done nothing to change the rate that the inlet channel has moved toward the east and the Petitioner's property, Staff are aware of no significant steps Petitioner had taken alone or in connection with the Town, to address the erosion problem on Site since Petitioner first installed sandbags eight years ago in 2007, ahead of the Fall of 2015 start of the current inlet channel movement. As the Commission's rules note

Erosion response measures designed to minimize the loss of private and public resources to erosion should be economically, socially, and environmentally justified. Preferred response measures for shoreline erosion shall include but not be limited to AEC rules, land use planning and land classification, establishment of building setback lines, building relocation, subdivision regulations and management of vegetation.

15A NCAC 7M .0202(b). Staff note that the Town focused had more pressing erosion issues on the east end of the Town's oceanfront in recent years. To address the east end erosion issues, the Town was involved in getting the terminal groin legislation passed, and currently has an active CAMA major permit application in for the proposed terminal groin on the east end of the Town's beach. Additionally, beginning with the initial nourishment in 2001, the Town has received periodic federal nourishment in the middle 3.25 miles of the town's 5.5-mile-long ocean beach. Finally, last year, the Town sponsored a study to protect portions of the town's western end as

part of a comprehensive "island-wide" Beach Management Plan. The Town is currently participating in pre-application meeting discussions with DCM and other resource agencies on this project. However, as the plan states and the parties stipulate in Fact 40, "no final permit application has been submitted and no permit issued" for the west-end. Additionally, the plan shows that Petitioner's property will be at the end of the project taper area, as it is the last lot on the island adjacent to the inlet, where sand can easily enter the inlet system. While there has been a focus of activity to address erosion issued on the east end of Ocean Isle Beach, and periodic nourishment in the federal project bounds in the center of the island, little substantive action have been evident to address the erosion issues on the west end at Tubbs Inlet, by Petitioner alone, or in conjunction with the Town.

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

Petitioner's Position: Yes.

G.S. § 113-118(f) specifically contemplates the issuance of emergency permits for extraordinary situations in which structural property is in "imminent danger as a result of storms. . . or similar occurrence." The variance sought is the minimum necessary to preserve the Pichas' home and property – along with the adjacent private road and public Town utilities. The Pichas here recognize that a core philosophy of the Coastal Area Management Act is to prohibit hardening of the shoreline, and the current variance request seeks to respect that core philosophy while at the same time respecting private property rights, and addressing an emergency acceleration of channel movements here. The larger sandbag structures that the Pichas request the Commission to allow will allow protection not only of the Pichas' home, but also the private road and public utilities serving the west end. The fact that DCM staff may argue that existing sand bag permits have expired, or that some of the existing bags remain covered with sand and vegetation do not detract from the fundamental point, now emphasized by the Legislature in recent enactment, that private property owners should be allowed to utilize sand bags to protect their properties longer and under more circumstances than perhaps some within DCM would like. It is in some respects a difficult dilemma. The Pichas respectfully contend that allowing more use of sand bags to protect private properties helps to take pressure off of DCM staff and the Commission to allow more hardened erosion control measures.

Another important factor from the Pichas' perspective is that the Town of OIB has been actively pursuing beach nourishment and management plans encompassing the entire Town limits. While current efforts are focused on the east end and related terminal groin application processes, the express terms of the 2015 beach management plans and the March 2016 draft Major CAMA Permit Application being put together by the Town and its experts confirm that the Town is actively pursuing beach management for all of its ocean beaches – including all the way down to Tubbs Inlet and the stabilization of the west end of the Town. The ambiguous definitions of "actively pursuing" a stabilization project, as contained in the current CAMA rules, allow this

standard to be met by a Town that is planning a project with persons meeting the State occupational licensing requirements “with a commitment of... funds to construct the project and the identification of the financial resources or funding bases necessary to fund the beach nourishment, inlet relocation or stabilization project.” Planning for a viable beach management plan, by its very nature, requires the examination of needs, and decisions on specific actions to be taken, after which the amount of funding needed can be identified and committed. The wording of these CRC Rules surely did not intend that beach management planning start with the identification and commitment of funding before the amount of funding needed could be identified. The more rational reading of this Rule is that the planning for the stabilization embraces a commitment and identification of the necessary funds, and the final paragraph of this Rule allows the permit time associated with the benefit of planning for stabilization to be negated if the Town subsequently rejects the stabilization (i.e., fails to commit the necessary funding). The existence of these planning efforts by the Town show that buying time to protect the Pichas’ home, the private road, and related public utilities is not being requested in a vacuum, but rather in the context of credible, serious, active and ongoing beach nourishment and management activities that include the west end being undertaken by the Town of OIB.

Importantly, Petitioner’s positions as stated above do not have to be accepted by the Commission as the proper interpretation of the relevant CAMA rules – far from it. As required by variance rules and law, for purposes of this variance request, Petitioner has stipulated noncompliance with the rules and rules interpretations as stated by DCM in its denial letter. Petitioner offers the reasoning and positions as stated above as being part of a proper analysis by the Commission of the fourth variance factor, where the Commission is authorized to consider and evaluate all aspects of the CAMA program and the situation facing Petitioner, including the context in which the Town of OIB has been working diligently on beach management planning and permitting for all of the Town’s beaches, including all the way westward to and including Petitioner’s Property.

In sum, Petitioner respectfully contends that the balance should tip towards allowing her the opportunity to install a larger sandbag revetment, and to keep that revetment in place for eight years.

Request for Expedited Hearing

Pursuant to G.S. § 143-318.12(f), the Petitioners respectfully requests that the Coastal Resources Commission consider this as an expedited variance request, shortening the standard time periods contained in the rules so that this matter may be heard at the Commission’s regularly scheduled July 12, 2016 meeting. Petitioner is grateful for the expedited July 2, 2016 letter response from Chairman Gorham granting, on specified conditions, her July 1, 2016 expedited hearing letter request.

Staff's Position: Yes/No/No.

Petitioner is seeking variances from several of the Commission's rules, including those limiting the time sandbag structures are allowed to remain (15A NCAC 7H .0308(a)(2)(F) and (G)), the size limits for sandbag structures (15A NCAC 7H .0308(a)(2)(K)), and for proposing a sandbag structure which is not consistent with the general policy statements of 7M .0200 per 15A NCAC 7H .0308(a)(1)(A). Staff address each of these below.

1. 15A NCAC 7H .0308(a)(2)(F) and (G)

First, Staff agrees that despite not taking actions for the first eight years the sandbags were in place to address the erosion threat at the Petitioner's property specifically and the west end generally, the Town has at least now begun to formulate a plan which includes the west end as part of an overall plan for addressing erosion within the Town. However, Staff notes its continuing concern that only a small amount of sand is proposed for the Site at the very end of the taper, and that this proposal is not yet permitted and is only in the pre-application meeting stage of the process. While the Petitioner's Lot did not meet the rule's requirements for getting an 8-year initial period for sandbags by being located in a community pursuing beach nourishment, inlet relocation or stabilization found at 15A NCAC 7H .0208(a)(2)(G), Staff acknowledge that with the beginnings of a Town-sponsored plan for nourishment that may place some sand at the Site, granting a variance in order for Petitioner to keep the existing sandbags for eight more years would be within the spirit, purpose, and intent of the Commission's rules, standards, and orders. Staff believe it would protect public safety and welfare to allow the existing sandbags to remain for eight more years in order to continue offering effective protection to the Site as they have since 2007. Finally, Staff believes that allowing the existing sandbags to remain for eight more years would preserve substantial justice as the Town begins to address erosion issues at the west end.

2. 15A NCAC 7H .0308(a)(2)(K)

Staff disagrees that granting a variance to the sandbag size requirements is within the spirit, purpose and intent of the Commission's rules. This situation is distinguishable from most "supersized" sandbag variances considered by the Commission in the past, where the sandbags constructed within the dimensions prescribed by the Commission's rules were installed, and then overtopped by normal conditions, prompting the requests for a larger sandbag structure. In this case, the bags are not regularly overtopped, as evidenced by many of the bags being covered and vegetated and the area just landward of the bags being largely undisturbed. Petitioner's request is quite clear in that these additional sandbags are proposed to fortify the existing bags in order forestall the eastward migration of the channel at the Site. Staff are very concerned that the proposed larger sandbag alignment will be undercut and slump down into the channel, creating a very tall wall of sandbags along the Petitioner's shoreline. The proposal appears to be creating a hardened structure wall, which is not the intent of the Commission's sandbag rules, and which is prohibited by statute. For this reason, Staff believe that granting a variance from the Commission's sandbag structure size limits rules would not be within the spirit, purpose and intent of the Commission's rules. Further, Staff believes that the larger sandbag structure may

well have impacts to navigation if additional sandbags are allowed to slump into the channel. These possible hazards to navigation could remain for a significant amount of time, as there is no plan to realign the channel of Tubbs Inlet or stabilize this inlet with a terminal groin. Finally, it would not preserve substantial justice to allow oversized sandbags for the purposes of stopping inlet migration when the larger bags would become a hardened structure wall circumventing the ban on such structures in the Commission's rules and in the law.

3. 15A NCAC 7H .0308(A)(1)(a)

Finally, Petitioner seeks a variance from 15A NCAC 7H .0308(A)(1)(a), which requires that All oceanfront erosion response activities shall be consistent with the general policy statements in 15A NCAC 07M .0200. These general policy statements (reproduced on pp. 9-11 above) specific to sandbags require that

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

(f) Efforts to permanently stabilize the location of the ocean shoreline with seawalls, groins, shoreline hardening, sand trapping or similar protection devices shall not be allowed except when the project meets one of the specific exceptions set out in 15A NCAC 7H .0308.

In this case, where Petitioner's plan appears to create a hardened wall along the inlet channel, Staff believe the proposed enlargement of the existing sandbags is not within the spirit, purpose and intent of these rules, which attempt to set limits on the use of sandbags- in size, in function, and duration. In this case, the sandbags have been in place nine years since 2007, and Petitioner is seeking to keep them an additional eight years.

In addition, Petitioner proposes a much larger sandbag structure, not to prevent the overtopping of oceanfront waves, but in order to hold back the inlet channel. While Staff is comfortable that granting a variance to allow the sandbags to remain eight more years in order to allow implementation of the Town's west-end nourishment project. Staff believe allowing a variance also to increase the size of the structure and to design it to slump and become a taller wall structure to hold back the inlet is not within the spirit, purpose and intent of this rule and the incorporated sandbag policies of the Commission.

Likewise, Staff believe it would not protect public safety and welfare to have such a large structure and to allow it to remain, impacting the public's use of the inlet by creating a hazard to navigation, and the beaches around the Site. Staff believe it would not preserve substantial justice to grant variances in order to remove all limitations on sandbags provided for in the rules in an effort to halt the migration of Tubbs Inlet.

**ATTACHMENT D:
PETITIONERS' VARIANCE REQUEST MATERIALS**

CAMA VARIANCE REQUEST FORM

DCM FORM 11

DCM FILE No.: _____

PETITIONER'S NAME: **Kay P. Picha**

COUNTY WHERE THE DEVELOPMENT IS PROPOSED: **BRUNSWICK**

Pursuant to N.C.G.S. § 113A-120.1 and 15A N.C.A.C. 07J .0700 *et seq.*, the above named Petitioner hereby applies to the Coastal Resources Commission (CRC) for a variance.

VARIANCE HEARING PROCEDURES

A variance petition will be considered by the CRC at a regularly scheduled meeting, heard in chronological order based upon the date of receipt of a complete petition. 15A N.C.A.C. 07J .0701(e). A complete variance petition, as described below, must be *received* by the Division of Coastal Management (DCM) a minimum of six (6) weeks in advance of the first day of a regularly scheduled CRC meeting to be eligible for consideration by the CRC at that meeting. 15A N.C.A.C. 07J .0701(e). The final set of stipulated facts must be agreed to at least four (4) weeks prior to the first day of a regularly scheduled meeting. 15A N.C.A.C. 07J .0701(e). The dates of CRC meetings can be found at DCM's website: **www.nccoastalmanagement.net**

If there are controverted facts that are significant in determining the propriety of a variance, or if the Commission determines that more facts are necessary, the facts will be determined in an administrative hearing. 15A N.C.A.C. 07J .0701(b).

VARIANCE CRITERIA

The petitioner has the burden of convincing the CRC that it meets the following criteria:

- (a) Will strict application of the applicable development rules, standards, or orders issued by the Commission cause the petitioner unnecessary hardships? Explain the hardships.
- (b) Do such hardships result from conditions peculiar to the petitioner's property such as the location, size, or topography of the property? Explain.
- (c) Do the hardships result from actions taken by the petitioner? Explain.
- (d) Will the variance requested by the petitioner (1) be consistent with the spirit, purpose, and intent of the rules, standards or orders issued by the Commission; (2) secure the public safety and welfare; and (3) preserve substantial justice? Explain.

Please make your written arguments that Petitioner meets these criteria on a separate piece of paper.

The Commission notes that there are some opinions of the State Bar which indicate that non-attorneys may not represent others at quasi-judicial proceedings such as a variance hearing before the Commission. These opinions note that the practice of professionals, such as engineers, surveyors or contractors, representing others in quasi-judicial proceedings through written or oral argument, may be considered the practice of law. Before you proceed with this variance request, you may wish to seek the advice of counsel before having a non-lawyer represent your interests through preparation of this Petition.

For this variance request to be complete, the petitioner must provide the information listed below. The undersigned petitioner verifies that this variance request is complete and includes:

- _____ The name and location of the development as identified on the permit application;
- _____ A copy of the permit decision for the development in question;
- _____ A copy of the deed to the property on which the proposed development would be located;
- _____ A complete description of the proposed development including a site plan;
- _____ A stipulation that the proposed development is inconsistent with the rule at issue;
- _____ Proof that notice was sent to adjacent owners and objectors*, as required by 15A N.C.A.C. 07J .0701(c)(7);
- _____ Proof that a variance was sought from the local government per 15A N.C.A.C. 07J .0701(a), if applicable;
- _____ Petitioner's written reasons and arguments about why the Petitioner meets the four variance criteria, listed above;
- _____ A draft set of proposed stipulated facts and stipulated exhibits. Please make these verifiable facts free from argument. Arguments or characterizations about the facts should be included in the written responses to the four variance criteria instead of being included in the facts.
- _____ This form completed, dated, and signed by the Petitioner or Petitioner's Attorney.

**Please contact DCM or the local permit officer for a full list of comments received on your permit application. Please note, for CAMA Major Permits, the complete permit file is kept in the DCM Morehead City Office.*

Due to the above information and pursuant to statute, the undersigned hereby requests a variance.

_____ Signature of Petitioner or Attorney	_____ Date		
_____ Printed Name of Petitioner or Attorney	_____ Email address of Petitioner or Attorney		
_____ Mailing Address	_____ Telephone Number of Petitioner or Attorney		
_____ City	_____ State	_____ Zip	_____ Fax Number of Petitioner or Attorney

DELIVERY OF THIS HEARING REQUEST

This variance petition must be **received** by the Division of Coastal Management at least six (6) weeks before the first day of the regularly scheduled Commission meeting at which it is heard. A copy of this request must also be sent to the Attorney General's Office, Environmental Division. 15A N.C.A.C. 07J .0701(e).

Contact Information for DCM:

By mail, express mail or hand delivery:

Director
Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

By Fax:

(252) 247-3330

By Email:

Check DCM website for the email address of the current DCM Director
www.nccoastalmanagement.net

Contact Information for Attorney General's Office:

By mail:

Environmental Division
9001 Mail Service Center
Raleigh, NC 27699-9001

By express mail:

Environmental Division
114 W. Edenton Street
Raleigh, NC 27603

By Fax:

(919) 716-6767

Kay P. Picha Variance

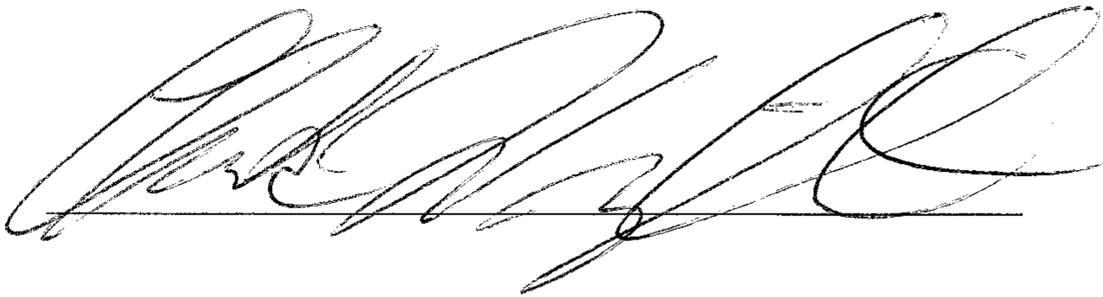
July 1, 2016

Stipulation re Non-compliance with CAMA Rules from Which Variance is Requested

Pursuant to 15A NCAC 07J.0701(c)(6), Variance Petitioner Kay P. Picha, through the undersigned counsel, stipulates that the development activities described in her April 13, 2016 Major Development CAMA Permit Application do not comply with 15A 07H.0308(a)(2)(K) regarding size of proposed sand bags. In addition, because of the interpretations and positions taken by DCM in its June 29, 2016 denial letter, and for the sole purposes of this variance proceeding, Petitioner further stipulates that her described development activities do not comply with the provisions of 15A NCAC 308(a)(2)(F) and (a)(2)(G).

This the 1st day of July, 2016.

Kay P. Picha, by and through legal counsel Clark Wright:

A handwritten signature in black ink, appearing to read "Clark Wright", is written over a horizontal line. The signature is cursive and somewhat stylized.



SAMPSON CONTRACTING, INC.

Marine Construction And Environmental Consulting Services

125 Hunters Trail West, Elizabeth City, North Carolina, 27909 USA
Tel: 252 548 4292 – Fax: 866 793 4261
tedsr@sampsoncontracting.com www.sampsoncontracting.com



CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 1, 2016

Robert and Sharon Bell
186 Heimatsweg Road
Chapin, SC 29036

Re: Kay P. Picha; erosion control project; at 149 Ocean Isle W
Boulevard, in Ocean Isle Beach, NC; notice of variance petition

Dear Mr. and Mrs. Bell:

Our company has been retained by a neighboring property owner of yours, Kay P. Picha, to assist in obtaining the needed permits and conduct the intended work along the shoreline of their property. Mrs. Picha must obtain a Variance from the Coastal Resources Commission (CRC) to carry out the work she proposes, i.e., to enlarge the existing sandbag revetment to address the encroachment of the tidal channel of Tubbs Inlet onto the existing sandbag revetment. This channel is now within 3-ft of the sandbag revetment, and has migrated more than 70-ft closer to the existing sandbag revetment over the course of the past 7 months. When this tidal channel migrates to the base of the existing sandbag revetment, the existing revetment will become undermined and negate its existing protective value.

One of the documents that must be filed with the CRC is a notification of neighboring property owners that such a Variance is being sought.

Please accept this letter as the required notification of Mrs. Picha's efforts to obtain a Variance for the work that was previously described to you when the Riparian Notification was provided in support of her permit application.

Thank you for your kind attention to this matter. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Sampson', written over a light blue horizontal line.

Ted Sampson
Project Manager

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

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

CHAPIN, SC 29036

OFFICIAL USE

Postage	\$3.30
Certified Fee	\$2.70
Return Receipt Fee (Endorsement Required)	\$0.00
Restricted Delivery Fee (Endorsement Required)	\$0.00
	\$0.47
Total Postage & Fees	\$6.47

0909
07

Postmark
Here

07/01/2016

Sent To

Robert & Sharon Bell
186 Heimatsweg Road
Chapin, SC 29036

PS Form 3800, July 2014

See Reverse for Instructions

7014 3490 0001 4367 4450



SAMPSON CONTRACTING, INC.

Marine Construction And Environmental Consulting Services



125 Hunters Trail West, Elizabeth City, North Carolina, 27909 USA
Tel: 252 548 4292 – Fax: 866 793 4261
tedsr@sampsoncontracting.com www.sampsoncontracting.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

July 1, 2016

Mayor Debbie S. Smith
Town of Ocean Isle Beach
Three West Third Street
Ocean Isle Beach, NC 28469

Re: Kay P. Picha; erosion control project; at 149 Ocean Isle W
Boulevard, in Ocean Isle Beach, NC; notice of variance petition

Dear Mayor Smith:

Our company has been retained by a resident of your Town, Kay P. Picha, to assist in obtaining the needed permits and conduct the intended work along the shoreline of their property. Mrs. Picha must obtain a Variance from the Coastal Resources Commission (CRC) to carry out the work she proposes, i.e., to enlarge the existing sandbag revetment to address the encroachment of the tidal channel of Tubbs Inlet onto the existing sandbag revetment. This channel is now within 3-ft of the sandbag revetment, and has migrated more than 70-ft closer to the existing sandbag revetment over the course of the past 7 months. When this tidal channel migrates to the base of the existing sandbag revetment, the existing revetment will become undermined and negate its existing protective value.

One of the documents that must be filed with the CRC is a notification of neighboring property owners that such a Variance is being sought.

Please accept this letter as the required notification of the Town, which holds a utility easement across the Picha property.

Thank you for your kind attention to this matter. Please feel free to contact me if you have any questions.

Sincerely,

Ted Sampson
Project Manager

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

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

OCEAN ISLE BEACH, NC 28469

OFFICIAL USE

7014 3490 0001 4367 4443

Postage	\$3.00
Certified Fee	\$2.70
Return Receipt Fee (Endorsement Required)	\$0.00
Restricted Delivery Fee (Endorsement Required)	\$0.00
Total Postage & Fees	\$0.70
	\$6.47

0909
07

Postmark
Here

07/01/2016

Sent To

Mayor Debbie S. Smith
Town of Ocean Isle Beach
Three West Third Street
Ocean Isle Beach, NC 28469

Street & Apt. No.
or PO Box No.

City, State, ZIP+

PS Form 3800, July 2014

See Reverse for Instructions

DAVIS HARTMAN WRIGHT PLLC
ATTORNEYS AT LAW

ASHEVILLE NEW BERN WILMINGTON

MICHAEL SCOTT DAVIS
J. MICHAEL GENEST
MARK SPENCE HARTMAN
SHANNON ("MISSY") S. SPAINHOUR
I. CLARK WRIGHT, JR.

209 POLLOCK STREET
NEW BERN, NC
28560
PHONE 252-514-2828
FAX 252-514-9878
ICW@DHWLEGAL.COM

July 1, 2016

VIA ELECTRONIC MAIL

The Hon. Frank Gorham, Chairman
Coastal Resources Commission
c/o Division of Coastal Management
400 Commerce Avenue
Morehead City, NC 28557

RE: Request for Expedited Review.
Variance Request – Kay and David Picha

Dear Chairman Gorham:

The purpose of this letter is to request, per NCGS 143-318.12(f), expedited processing and Commission review of Kay and David Pichas' expedited variance request, seeking permission from the Commission to vary from the applicable CAMA rules governing temporary erosion control structures (sand bags), to allow the Pichas to protect their ocean front home, located at the far west end of the Town of Ocean Isle Beach, and immediately adjacent to Tubbs Inlet, from recent, dramatically accelerated movements to the northeast of the Tubbs Inlet tidal channel. If granted, the requested variance would allow the Pichas to install a larger sand bag revetment than allowed by current CAMA rules, and specify an appropriate time period for such enhanced sand bags to remain in place while the Town continues its ongoing process of permitting and financing its 30 year ocean beach management plan.

More specifically, the Pichas respectfully request that this matter be heard at the Commission's regularly scheduled July Meeting (July 12, 2016), with stipulated facts and the complete variance request package filed no later than July 7, 2016, with the package then circulated to Commission Members no later than July 8, 2016. It is my sincere intent and desire to file the Pichas' complete variance request package earlier than July 7; I am grateful to Attorney Christy Goebel for working with me, Mary Lucasse and the Chair to allow this emergency matter to potentially be heard at the regular July 12, 2016 Commission meeting.

As is explained in more detail in the April 13, 2016 expedited CAMA permit application filed by the Pichas' consultants, an accelerated eastward movement in the Tubbs Inlet channel now immediately imperils the Pichas' existing sand bag revetment, thereby immediately imperiling

not only the Pichas' beach home, but also the private road and public utilities serving not only the Pichas' residence, but also a number of other west end ocean front beach homes. Between November 25, 2015 and June 19, 2016, the tidal channel has moved approximately 77 feet closer to the western edge of the Pichas' existing sand bag revetment. This movement represented an increase of several hundred percent over prior years' average monthly movements. More acutely still, as of June 19, 2016, the tidal channel is located only **three feet** from the sand bags.

Should you need or desire additional information, please do not hesitate to call me on my mobile phone at 252-229-5900.

Many thanks to you, Ms. Lucasse, Ms. Goebel and DCM staff for expedited consideration of this urgent matter.

Yours truly,

A handwritten signature in black ink, appearing to read 'I. Clark Wright, Jr.', written in a cursive style.

I. Clark Wright, Jr.

ICW:icw

cc: Mary Lucasse (via e-mail)
Braxton Davis (via e-mail)
Christy Goebel (via e-mail)
Ted Sampson (via e-mail)
Yogi Harper (via e-mail)
Kay and David Picha (via e-mail)

**North Carolina
Coastal Resources Commission**

July 2, 2016

I. Clark Wright, Esq.
Davis Hartman Wright PLLC
209 Pollock Street
New Bern, NC 28560

Re: Request for expedited hearing on Picha Variance Request

Dear Mr. Wright:

I have reviewed the July 1, 2016 letter you submitted on behalf of Kay and David Picha in support of their request for an expedited hearing on a petition which has not yet been submitted. I understand that Mr. and Mrs. Picha plan to submit a petition requesting a variance from the Commission's rules which would allow them to expand an existing sandbag revetment adjacent to Tubbs Inlet at 149 Ocean Isle West Boulevard, in Ocean Isle Beach, Brunswick County. Taking the information you provided at face value, I note that information provided in support of an expedited hearing alleges that "an accelerated eastward movement in the Tubbs Inlet channel now immediately imperils the Pichas' existing sand bag revetment." In addition, you allege that "[b]etween November 25, 2015 and June 19, 2016, the tidal channel has moved approximately 77 feet closer to the western edge of the Pichas' existing sand bag revetment." And, "as of June 19, 2016, the tidal channel is located only three feet from the sand bags."

N.C.G.S. § 143-318.12(f) provides that an issue may be considered on an emergency basis in situations where "generally unexpected circumstances" are present requiring "immediate consideration by the public body." Given the information provided, I have decided to schedule a hearing on the Pichas' variance request during the Commission's July 12, 2016 meeting provided certain conditions are met. Specifically, the Commission will hear the variance request as long as the petition seeking a variance is submitted by close of business on July 5, 2016, and the stipulated facts are finalized by July 7, 2016. This will allow DCM to prepare a staff recommendation and allow the package of materials relating to the variance petition to be sent to the Commission members for review by close of business on July 8, 2016.

This decision is limited to the finding that an expedited hearing is justified and should not be read by anyone as an indication of how the Coastal Resources Commission will ultimately decide Mr. and Mrs. Pichas' request for a variance.

If the deadlines set forth above are not met, then I expect the request for a variance would be heard during the next regularly scheduled Commission meeting. Commission counsel, Mary L. Lucasse, Esq. will stay in contact with you and DCM's counsel to ensure that the parties have notice of the schedule relating to the hearing on this issue.

Sincerely,

Frank D. Gorham III

Frank D. Gorham, III

Division of Coastal Management
Department of Environmental Quality
400 Commerce Ave., Morehead City, North Carolina 28557
Phone 252-808-2808 FAX 919-733-1495



PAT MCCRORY
GOVERNOR

FRANK GORHAM
CHAIRMAN

RENEE CAHOON
VICE CHAIR

NEAL ANDREW
SECOND VICE CHAIR

GWEN BAKER

LARRY BALDWIN

DENISE GIBBS

MARC HAIRSTON

GREG LEWIS

PHIL NORRIS

RUSSELL RHODES, JR.

BEN "JAMIN" SIMMONS

JOHN SNIPES

BILL WHITE

BRAXTON C. DAVIS
EXECUTIVE SECRETARY

