



PAT MCCRORY
Governor

DONALD R. VAN DER VAART
Secretary

MEMORANDUM

TO: ENVIRONMENTAL REVIEW COMMISSION
The Honorable Jimmy Dixon, Co-Chairman
The Honorable Chuck McGrady, Co-Chairman
The Honorable Trudy Wade, Co-Chairman

FROM: Mollie Young, Director of Legislative Affairs

SUBJECT: Oyster Restoration Permitting Study

DATE: May 1, 2016

Pursuant to S.L. 2015-241, section 14.10A.(a), The Division of Marine Fisheries and Division of Coastal Management of the Department of Environment and Natural Resources shall, in consultation with representatives of nongovernmental conservation organizations working on oyster restoration, create a new permitting process specifically designed for oyster restoration projects that apply to oyster restoration projects instead of a major development permit under G.S. 113A-118. The Department shall submit its report, including recommended legislation, to the Environmental Review Commission no later than May 1, 2016.

If you have any questions or need additional information, please contact me by phone at 919-707-8618 or by email at mollie.young@ncdenr.gov.

cc: Tom Reeder, Assistant Secretary for Environment, NCDEQ
Mariah Matheson, ERC Assistant, NCGA
Jeff Hudson, ERC Counsel, NCGA
Jennifer McGinnis, ERC Counsel, NCGA



**N.C. Department of Environmental Quality
Division of Coastal Management
and
Division of Marine Fisheries
Simplify Oyster Restoration Project Permitting
May 1, 2016**

Legislative History

Section 14.10A of *The Current Operations and Capital Improvements Appropriations Act of 2015* (Session Law 2015-241) directed the N.C. Division of Marine Fisheries and the N.C. Division of Coastal Management of the Department of Environmental Quality to create, in consultation with representatives of nongovernmental conservation organizations, a new permitting process for oyster restoration projects instead of a major development permit under G.S. 113A-118.

Statutory and Regulatory Authority

Proposed development activities or proposed dredging or filling projects falling within a designated permit jurisdiction area (Area of Environmental Concern) within North Carolina's 20 coastal counties fall under the regulatory authority of the N.C. Coastal Area Management Act (§ 113A-113-116) and the North Carolina Dredge and Fill Law (§ 113-229). The N.C. Coastal Resources Commission is responsible for enacting regulations to implement these laws, and the Division of Coastal Management is the state agency charged with implementing these regulatory programs. Under these authorities, most oyster restoration projects require permits from the Division of Coastal Management. Exceptions to this permit requirement exist for certain shellfish lease activities that are managed by the Division of Marine Fisheries. Additionally, the placement of shell material by or under the authority of the Division of Marine Fisheries specifically for the purpose of oyster culture is also exempt from the permit requirements of the Coastal Area Management Act and the North Carolina Dredge and Fill Law.

Existing Permit Process

The process for obtaining a major development permit requires that the applicant develop, often in cooperation with Division of Coastal Management staff, a permit application package that provides sufficient detail to allow for a review of the potential impacts and benefits of the proposed project. The Division of Coastal Management submits the permit application package to multiple state and federal review agencies, who provide comments on the project. These agency comments aid the Division of Coastal Management in assessing the possible use conflicts associated with a proposed project. Any concerns over potential impacts to coastal resources,

which include fisheries spawning and nursery areas, wildlife habitat, water quality, recreational use of state waters, riparian and public trust rights, and traditional navigational uses, are balanced with the rights and needs of the applicant during the permitting decision process.

A major development application submitted to the Division of Coastal Management also initiates the permit review for the U.S. Army Corps of Engineers (USACE) permits as well as the review for a water quality certification from the N.C. Division of Water Resources. This single entry point for multiple permit review processes provides significant benefits to the applicant, who only needs to prepare a single permit application rather than preparing separate application packages. Additionally, significant efficiencies exist due to long-standing permit processing agreements between the Division of Coastal Management and the USACE. Under these agreements, the issuance of a major development permit by the Division of Coastal Management will usually also convey federal permit approvals to the applicant. Without this joint review process, the federal approval process would proceed independently and would likely take significantly longer.

Coordination between the N.C. Division of Coastal Management and the N.C. Division of Marine Fisheries

The assessment of developing a new permit process for oyster restoration projects in accordance with Section 14.10(A) of Session Law 2015-241 involved staff with the divisions of Marine Fisheries and Coastal Management. The agencies considered developing a new general permit for oyster restoration projects, a complete exemption of oyster restoration from all state regulatory reviews, and development of a new oyster restoration leasing program within the Division of Marine Fisheries that is similar to the division's existing shellfish leasing program.

The agencies also considered an option that the divisions believed would allow for the quickest state approval process for oyster restoration projects, while allowing for at least a minimum acceptable level of agency review. Under this option, oyster restoration projects would be added as an activity exempted from Coastal Area Management Act permitting requirements under 15A NCAC 07K Section.0200. Criteria for oyster restoration activities exempted using this process would be defined in new Coastal Resources Commission rule language. In the exemption process, the Division of Coastal Management would review projects for navigation, riparian corridor issues, and public trust rights, while the Division of Marine Fisheries would review projects for viability, site suitability, and fisheries resource impacts. If the project satisfies the definition of oyster restoration and there are no issues identified by either division, the Division of Coastal Management would issue the project proponent an exemption letter. If any issues are identified by either division, or the project doesn't meet the definition of an oyster restoration project, a major development permit application may be required.

The benefits of this option include a more rapid state approval process for the applicant. The level of information necessary from the applicant should also be significantly reduced in comparison to the informational requirements of the existing major permit application process. Concerns with this exemption process involve the elimination of the public notice component of

the review process, as well as concerns about how eliminating the requirement to obtain a major development permit could impact permitting requirements of the Army Corps of Engineers.

Nongovernmental Conservation Organization Coordination

On February 1, 2016, a meeting was held with representatives of the N.C. Coastal Federation, the Nature Conservancy, and the University of North Carolina – Wilmington. Also in attendance were representatives of the Army Corps of Engineers, the National Marine Fisheries Service and the Division of Water Resources (see Appendix A for attendee list).

Following presentations of the various options, the USACE indicated that for oyster restoration projects that do not go through the major development permit application review process, federal regulation of oyster restoration projects would likely take place through one or more Nationwide Permits, which would require project applicants to submit a “Preconstruction Notification” to the Army Corps of Engineers for review. The Army Corps of Engineers further indicated that the Nationwide Permit review process would likely take just as long if not longer than the state’s current major permit application process. For more complex oyster restoration projects, an individual permit application could be required — a process that is generally more extensive and time-consuming than the existing joint state/federal review process.

Based upon this discussion, the nongovernmental conservation organizations determined that simply exempting oyster restoration projects from the major development permit review process would not simplify or expedite the ability to receive federal approval for these efforts. Based upon this finding, these organizations recommended that the major permit review process for oyster restoration be reviewed and clarified to ensure its consistent and predictable application (see Appendix B for comments submitted by these organizations). The divisions of Coastal Management and Marine Fisheries share the concerns expressed by the nongovernmental conservation agencies.

Recommendations

While the development and adoption by the Coastal Resources Commission of an exemption process for oyster restoration projects would expedite state approvals of such projects, it would not negate the requirement of an Army Corps of Engineers review through one or more Nationwide Permits. The Nationwide Permit review process would likely take just as long if not longer than the state’s current major permit application process. More complex oyster restoration projects may require an individual permit (IP) from the Corps, which would be more extensive and time-consuming than the existing joint state/federal review process.

Both the state and federal agencies, as well as the nongovernmental conservation organizations, believe that exempting oyster restoration projects from the major development permit review process would not simplify or expedite the ability to receive federal approval for these efforts.

Instead, these organizations recommended that the major permit review process for oyster restoration be reviewed and clarified to ensure consistent and predictable applications and outcomes.

Appendix A

Attendee List for February 1, 2016 Coordination Meeting

- Division of Coastal Management
 - Doug Huggett
 - Daniel Govoni
 - Courtney Spears
 - Gregg Bodnar
- Division of Marine Fisheries
 - Anne Deaton
 - Tere Barrett
 - Trish Murphey
 - Garry Wright
- Division of Water Resources
 - Jim Gregson
 - Robert Tankard
 - Anthony Scarbraugh
- U.S. Army Corps of Engineers
 - Josh Pelletier
 - Raleigh Bland
- National Marine Fisheries Service
 - Ken Riley
- North Carolina Coastal Federation
 - Lexia Weaver
 - Todd Miller
 - Rob Lamme
- The Nature Conservancy
 - Aaron McCall
 - Christine Higgins
 - Will Morgan
- University of North Carolina – Wilmington
 - Troy Alphin

Appendix B

Correspondence Received from The Nature Conservancy and the North Carolina Coastal Federation

From: Todd Miller <toddm@nccoast.org>

Sent: Tuesday, February 23, 2016 3:16 PM

To: Deaton, Anne

Cc: Spears, Courtney; Aaron J. McCall; allieshef@gmail.com; Troy Alphin; Bland, Raleigh; Gregson, Jim; Scarbraugh, Anthony; Tankard, Robert; josh.pelletier@usace.army.mil; Huggett, Doug; Bodnar, Gregg; Govoni, Daniel; Barrett, Teresa; Wright, Garry L; Murphey, Trish; Murphey, Steve; Rob Lamme; Ken Riley - NOAA Affiliate (ken.riley@noaa.gov); Daniel, Louis; Davis, Braxton C; Lexia Weaver; Erin Fleckenstein; Ted Wilgis

Subject: Re: "Simplifying Oyster Restoration Project Permitting" meeting Feb 1 NOAA, Pivers Island

Attachments: CAMA Use Standard Changes Recommended to Facilitate Coastal Restoration Projects.docx; ATT00001.htm; image002.jpg; ATT00002.htm

Dear Anne and Doug,

Please consider these findings and recommendations on behalf of The Nature Conservancy and the North Carolina Coastal Federation in follow-up to our meeting on regulating oyster restoration that was held on February 1. We are making these recommendations as suggestions, and hope they will be a good starting point for further discussions about how to regulate oyster restoration in a way that provides adequate environmental protection without impeding or discouraging coastal restoration activities.

Because of the lengthy amount of time that it takes to adopt new administrative rules through normal rule-making procedures under the Administrative Procedures Act, we recommend that final suggestions for changes in formal use standards be included in your report to the N.C. General Assembly. Including these ideas in your report will provide the opportunity for lawmakers to amend statutes to implement these suggestions much more quickly if they decide they have merit.

Background:

Eastern oysters (*Crassostrea virginica*) have declined dramatically in North Carolina since the early 1900's. Over-harvesting, destruction of habitat, and hydrologic modifications of coastal watersheds causing poor water quality has led to the decline of oysters and limits their ability to be resilient against changing environmental coastal conditions. Oysters are a vital part of our coastal economy, cultural heritage, and estuarine ecosystem. TNC and the Coastal Federation have worked to restore oysters by partnering with state and federal agencies for the past couple of decades.

The 2003 Oyster Forum, sponsored by the Coastal Federation, brought together stakeholders to assess the state of oysters in North Carolina. From this forum an *Oyster Restoration and Protection Plan for North Carolina: Blueprint for Action* was first developed. This blueprint has been updated twice since the summit, and has remained a living document that has guided oyster restoration work. One strategy contained in the blueprint is the need to “streamline the approval process for environmental restoration.”

In 2015, the N.C. General Assembly passed legislation that will help facilitate the recovery of oysters. In specific, one aspect of this legislation included a requirement to help facilitate oyster restoration permitting. The legislature stated that: *The Division of Marine Fisheries and Division of Coastal Management of the Department of Environment and Natural Resources shall, in consultation with representatives of nongovernmental conservation organizations working on oyster restoration, create a new permitting process specifically designed for oyster restoration projects that apply to oyster restoration projects instead of a major development permit under G.S. 113A-118. The Department shall submit its report, including recommended legislation, to the Environmental Review Commission no later than May 1, 2016.*

The reasoning and intent of this legislation was to bring oyster restoration partners and permitting agencies together to consider and implement a consistent and clearly defined permitting process that would encourage and expedite oyster restoration projects, with the broader goal of making it easier to restore coastal habitat and water quality.

As required by lawmakers, the Divisions hosted a meeting that included our non-profit conservation organizations as well as representatives of state and federal permitting agencies. This meeting resulted in a productive discussion that evaluated various permitting options for restoration projects. As a result of this meeting, our organizations are submitting these findings and recommendations that we encourage you to include in your report to lawmakers.

No Need to Exempt Oyster Restoration from State Regulation:

One option examined at the meeting was the N.C. Division of Coastal Management proposal that would exempt many types of oyster restoration from the Coastal Area Management Act (CAMA) major permit requirements. Projects that fit the Division’s proposed definition of oyster restoration would be exempt under CAMA. The consequence of this exemption would be to leave regulation of oyster restoration projects largely to federal agencies. The U.S. Army Corps of Engineers (COE) would regulate oyster restoration through several of its Nationwide Permits. Nationwide Permits require project applicants to submit a “Preconstruction Notification” to the COE, and that review process would take just as long if not longer than the current CAMA major permit application process. The COE would also have

the option to regulate restoration projects through its individual permit application process if it determined that more extensive and time-consuming review is needed.

Based upon this discussion, meeting participants arrived at the conclusion that simply exempting oyster restoration from the major CAMA permit review process would not simplify or expedite the ability to receive federal approval for these efforts. Based upon this finding, our groups recommend that the CAMA permit review process for oyster restoration be reviewed and clarified to ensure its consistent and predictable application.

Enhance and Simplify the Major CAMA Permit Process to Promote Oyster Restoration:

Based upon the finding that a CAMA exemption would not expedite restoration projects, our organizations recommend that steps be taken to streamline and standardize the CAMA major permit application for oyster and other types of restoration projects. This application process is a joint review for both state and federal agencies that is coordinated by the N.C. Division of Coastal Management. To accomplish this objective, we recommend that formal supportive policies and simplified rules for restoration be included as part of the Coastal Resources Commission's development standards. Currently, there are no specific policies or rules for restoration projects, and these activities are being regulated as if they were traditional development projects. Attached in a word document are our specific recommendations for policy and rule changes. We have included recommendations for oyster restoration, stormwater retrofits, and wetland restoration to cover the array of coastal restoration activities that would help to restore oysters in N.C

Please do not hesitate to contact any of us if you have questions or need clarification on any of these suggestions.

Best regards, TNC and Coastal Federation

Specific Policy and Rule Recommendations
Proposed by the North Carolina Coastal Federation
and The Nature Conservancy
February 23, 2016
(red type highlights proposed changes)

1. Adoption of the following proposed policy in Section 7M of the Coastal Resources Commission's Guidelines: **Section .1300 Policy on Coastal Restoration**

15A NCAC 07M.1301 DECLARATION OF GENERAL POLICIES

- (a) The estuarine system of the coastal area is a valuable natural and economic resource of statewide significance. Traditionally these waters and their associated habitats have been used for such activities as commercial and recreational fishing, swimming, hunting, boating and commerce. These activities depend upon the quality of the water and the productivity of the estuarine system. Due to the importance of these activities to the life and economic well-being of the coastal area, it is vital to restore degraded or impaired coastal water quality and habitats that have been degraded by previous land and water use practices.
- (b) It is further recognized that enhancement of degraded coastal water quality and habitats requires the cooperation of many federal, state and local governmental agencies, as well as the participation of landowners, businesses, non-profit conservation organizations, and the general public. It is the policy of the Coastal Resources Commission to support and facilitate coastal restoration efforts and partnerships among these stakeholders.
- (c) Coastal restoration projects are in the public interest, and should be regulated in a manner that ensures that practicable precautions are taken to protect and enhance the coastal environment while not imposing impediments or potential liabilities that discourage or prevent projects from being undertaken and make them more expensive than necessary.

15A NCAC 07M .1302 Policy Statements

- (a) Coastal restoration has long-term positive environmental benefits for the quality and natural productivity of coastal waters and habitats.
- (b) Restoration efforts should take all practicable precautions to minimize short-term environmental impacts associated with constructing these projects. Practicable precautions are mitigation measures that are available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(c) Use standards should recognize that the long-term environmental benefits of restoration projects offset short-term, unavoidable environmental impacts that result from working in and around the marine environment.

2. Adoption of the amendments and additions to the following state guidelines for restoration projects that are undertaken in Areas of Environmental Concern

15A NCAC 07H .0203 MANAGEMENT OBJECTIVE OF THE ESTUARINE AND OCEAN SYSTEM

It is the objective of the Coastal Resources Commission to conserve, manage and restore estuarine waters, coastal wetlands, public trust areas, and estuarine and public trust shorelines, as an interrelated group of AECs, so as to safeguard and perpetuate their biological, social, economic, and aesthetic values and to ensure that development occurring within these AECs is compatible with natural characteristics so as to minimize the likelihood of significant loss of private property and public resources. Furthermore, it is the objective of the Coastal Resources Commission to protect present common-law and statutory public rights of access to the lands and waters of the coastal area.

15A NCAC 07H .0205 COASTAL WETLANDS

(c) Management Objective. It is the objective of the Coastal Resources Commission to conserve, manage and restore coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values, and to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource essential to the functioning of the entire estuarine system.

(d) Use Standards. Suitable land uses are those consistent with the management objective in this Rule. Highest priority of use is allocated to the conservation of existing coastal wetlands. Second priority of coastal wetland use is given to those types of development activities that restore the quality and productivity of wetlands. The third priority is given to those activities that require water access and cannot function elsewhere.

15A NCAC 07H .0206 ESTUARINE WATERS

(c) Management Objective. To conserve, manage and restore the important aesthetic, and economic values; to coordinate and establish a management system capable of conserving, restoring and utilizing estuarine waters so as to maximize their benefits to man and the estuarine and ocean system.

(d) Use Standards. Suitable land/water uses shall be those consistent with the management objectives in this Rule. Highest priority of use shall be allocated to

the conservation of estuarine waters and their vital components. Second priority of estuarine waters use shall be given to those types of development activities that restore the quality and productivity of estuarine waters. The third priority is for those development activities that require water access and use which cannot function elsewhere such as simple access channels; structures to prevent erosion; navigation channels; boat docks, marinas, piers, wharfs, and mooring pilings. In every instance, the particular location, use, and design characteristics shall be in accord with the...

15A NCAC 07H .0208 USE STANDARDS

(a) General Use Standards

(7) Restoration projects that enhance coastal water quality and habitats and are designed to provide long-term environmental benefits are in the public interest. The CRC will approve restoration projects that demonstrate that all reasonable and practical measures to mitigate short-term adverse impacts of the project have been incorporated into the project design.

(b) Specific Use Standards

(14) Oyster Restoration Projects

(A) Development Standards. Oyster restoration projects shall meet all of the following standards:

- (i) Submerged Aquatic Vegetation. Affect no more than ½-acre of submerged aquatic vegetation, or affect no more than an area of submerged aquatic vegetation that is 1/10 of a project site, whichever is less.
- (ii) Riparian Landowner Notification. Notify any waterfront landowner with riparian rights for swimming, boating, and dockage within the footprint of the restoration project. The project shall not conflict with any legal riparian rights of adjacent waterfront property owners unless those rights are waived by the property owner.
- (iii) Navigation. (a) No activity may cause more than a minimal adverse effect on navigation. (b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.
- (iv) Suitable Material. No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).
- (v) Project location and boundary. Project location and boundary shall encompass the area required to construct the project. Each corner of project's boundaries shall be identified using lat/long coordinates (degrees, minutes, seconds to the hundredth place (i.e.: 35°42'50.85"N). Natural expansion of a living oyster reef is not defined by the permit application.

- (vi) Monitoring requirements: Copies of monitoring reports required by project funders must also be submitted to the N.C. Division of Coastal Management.
- (vii) Shellfish Sanitation: Restoration sites will be adequately posted with shellfish harvest restrictions if located within an area that is permanently closed by shellfish harvest for public health reasons.
- (viii) Siting: Sites are deemed acceptable for oyster restoration projects unless the N.C. Division of Marine Fisheries makes a written finding (in consultation with federal resource agencies) that a proposed restoration site is unsuitable due to significant user conflicts, salinity characteristics, existing concentrated shellfish populations, and/or existing fish habitat values that should not be altered.

(15) Stormwater Retrofits

(A) Development Standards. Stormwater retrofit projects shall be exempt from permit requirements unless:

- (i) The retrofit would alter or affect the design of a previously permitted stormwater systems required by any federal, state, or local authority.
- (ii) The retrofit design complies with all federal, state and local regulatory requirements.

(16) Wetland restoration

(A) Development Standards. Wetland restoration projects that affect coastal wetlands shall be exempt from permit requirements when:

- (i) The project is authorized by the U.S. Army Corps of Engineers.
- (ii) The final restoration design when constructed restores affected coastal wetlands.