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OFFICE OF ADMINISTRATIVE HEARINGS
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STATE OF NORTH CAROLINA

COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 EHR 04440

Kenneth McBride Petitioner, v. NC Department of Environmental Quality, Division of Coastal Management Respondent.	FINAL DECISION

THIS CONTESTED CASE was heard by Administrative Law Judge Melissa Owens Lassiter on April 11 and 12, 2022, in Bayboro, Pamlico County, North Carolina, pursuant to Petitioner filing a contested case petition on October 18, 2021, appealing Respondent's decision to issue General Permit No. 79884B, pursuant to the Coastal Area Management Act of 1974 ("CAMA"), to Richard Baxter for development of a six-foot by sixteen-foot pier at 217 Matthews Road, Bayboro, North Carolina.

On June 24, 2011, Respondent filed a proposed Final Decision. On July 8 and 11, 2022, Petitioner filed a Response to Respondent's proposed Final Decision. Based upon the pleadings, testimony, documents admitted into evidence, and a preponderance of the evidence, the Undersigned **AFFIRMS** Respondent's DCM's decision to issue CAMA General Permit No. 79884B to Richard Baxter for the development of a six-foot by sixteen-foot pier at 217 Matthews Road, Bayboro, North Carolina as follows:

APPEARANCES

For Petitioner: Kenneth McBride*, Pro Se*

For Respondent: Mary L. Lucasse, Special Deputy Attorney General
Mary S. Crawley, Assistant Attorney General
North Carolina Department of Justice

ISSUES

1. Whether Petitioner proved by a preponderance of the evidence that Respondent deprived him of property and/or substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule by issuing CAMA General Permit No. 79884B?

2. Whether Respondent appropriately applied the CAMA requirements and the Rules for General Permits 15A NCAC 07H .1200 *et seq*. by issuing CAMA General Permit No. 79884B?

3. Whether Petitioner proved by a preponderance of evidence that the permitted pier interferes with navigation or use of the creek under 15A NCAC 07H .1204(c)?

STATUTES AND RULES AT ISSUE

N.C. General Statute, Chapter 77, Article 2 N.C.G.S. §§ 77-12 through 14
N.C. General Statute, Chapter 113A, Article 7, Coastal Area Management Act of 1974
15A NCAC 07H .1200 *et seq.*, General Permit for Construction of Piers and Docking Facilities in Estuarine and Public Trust Waters and Ocean Hazard Areas

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits:

1. Respondent's Prehearing Statement
2. DCM Staff Recommendation and attachments
3. 1998 Attorney General advisory opinion regarding navigation-in-fact
4. Channel Section, from North edge of Baxter Dock by surveyor Comer Lyons
5. Channel Section, from South edge of Baxter Dock by surveyor Comer Lyons
8. Elevation points taken by surveyor Comer Lyons (same as Respondent's Exhibit 44)
10. 10, 10A, & 10B three photos taken on August 20, 2017 by Waylon Crocker
11. NC Board of Examiners for Engineers Surveyors print out regarding Comer Lyons, P.E.
12. Email from Kelly Spivey regarding upland basin
13. Email from Kelly Spivey
14. Definition of "Navigable"
15. Definition of "Channel"
16. Letter to Mr. McBride from attorney regarding harassment and stalking
17. Limited power of attorney to Kevin McBride
18. A & B videos
19. Petitioner's Revised Prehearing Statement filed March 14, 2022
20. Respondent's Response to Petitioner's First Discovery Requests dated April 8, 2022

Respondent's Exhibits:

1. 15A NCAC 07H .1200 *et seq*. General Permit for Construction of Piers and Docking Facilities in Estuarine and Public Trust Waters and Ocean Hazard Areas
2. 2A - Vicinity map of Baxter Site overlain on March 2019 Google Earth pics with property lines
   2B - Zoomed in on Baxter Site using March 2019 Google Earth pics with property lines
3. GIS vicinity map showing Vandemere Wildlife Resources Commission ("WRC") boat ramp
4. August 17, 2021 photo taken by Kent Vaughn on Baxter Property
5. CAMA General Permit No. 79883B (Bulkhead permit) issued on August 18, 2021 authorizing the development of a bulkhead at 217 Matthews Road in Bayboro, Pamlico County
6. CAMA General Permit No. 79884B (Pier permit) issued on August 26, 2021 authorizing the development of a six-foot by sixteen-foot pier at 217 Matthews Road in Bayboro, NC
7. September 8, 2021 E-mail to Kent Vaughn from Kevin McBride regarding pier
8. 8A & 8B two photos taken September 9, 2021 by Kent Vaughn on Baxter Site showing bulkhead and platform during construction
9. 9A & 9B two photos taken September 14, 2021 by Kent Vaughn on Baxter Site showing two pilings have been removed
10. January 5, 2022 photo taken by Kent Vaughn of pier and Mr. Baxter's boat during site visit
11. Kent Vaughn's notes from January 5, 2022 site visit (mislabeled 1/6)
12. 12A through 12E five photos taken February 18, 2022 at County boat ramp (low water) by Kent Vaughan
13. March 7, 2022 photo of County boat ramp taken by Kelly Spivey during Kent Vaughan and Kelly Spivey's site visit
14. E-mail chain including Kevin McBride, Kent Vaughn, and Kelly Spivey on September 9 & 10, 2021
15. E-mail communication from Kelly Spivey to Braxton Davis on September 9 & 10, 2021
16. Kelly Spivey's notes from November 10, 2021 site visit to McBride property
17. 17A through 17G seven photos taken March 7, 2022 by Kelly Spivey during Kent Vaughan and Kelly Spivey's site visit
18. Kelly Spivey's notes from March 7, 2022 site visit
19. Resume of Braxton D. Davis, Ph.D., Director of the NC Division of Coastal Management
20. N.C.G.S. §113A, Article 7, Coastal Area Management Act
21. Credentials for Master Officer Scott Tylor Ingle
22. Photo taken by Master Officer Scott Tylor Ingle on December 1, 2021
23. A & B Warranty Deeds for McBride Property filed in Pamlico County Register of Deeds

24. Petitioner's Response to Respondent's First Set of Requests for Admissions, Interrogatories, and Requests for Production to Petitioner Kenneth McBride dated March 4, 2022
25. Screenshot of Mr. McBride's Bayrider in canal dated April 3, 2016
26. Photo of Mr. McBride's Bayrider dated September 9, 2018
27. A & B two photos of Mr. McBride's Avenger in the canal and on the trailer
28. Photo taken on September 9, 2021, showing Mr. McBride's Avenger passing Mr. Baxter's pier with a boat tied up
29. Screenshot dated October 12, 2020, showing Mr. McBride in his boat at his pier
30. September 9, 2021 E-mail from Kevin McBride to Kent Vaughn and Kelly Spivey with link to video
31. General Warranty Deed to Mr. Baxter recorded in Pamlico County Register of Deeds
32. E-mail chain between Kelly Spivey and Mr. Baxter on October 1, 2021 regarding size of the pier
33. 2021-09-09 movie taken on Baxter property showing Mr. McBride's Avenger passing Mr. Baxter's pier with a boat tied up
34. Photo taken on February 18, 2022 showing low water conditions (downstream)
35. Photo taken on February 18, 2022 showing low water conditions (upstream)
36. Photo taken on March 11, 2022 showing low water conditions (downstream)
37. Photo taken on March 11, 2022 showing low water conditions (upstream)
38. 38A through 38G seven photos taken on November 28, 2021, during survey
39. Video of surveyor on November 28, 2021
40. Video of surveyor on November 28, 2021
41. Video of surveyor on November 28, 2021
42. Video of surveyor on November 28, 2021
44. Survey showing elevation points taken by surveyor Comer Lyons (same as Petitioner's Ex 8)
45. Computer data from surveyor Comer Lyons
46. A & B Tax Record for Kevin and Kenneth McBride property
48. Specifications for Avenger and Suzuki motor
49. N.C.G.S. § 77-12 through 14 (Obstructions to navigation)
50. Master Officer Scott Tyler Ingle's notes from site visit to Baxter/McBride properties
51. Letter from Braxton Davis to Mr. Baxter regarding appeal
52. Deposition transcription of Comer Lyons
53. Kent Vaughan Captain license issued by US Coast Guard

PRELIMINARY MATTERS

1. On April 11, 2022, before the contested case hearing on the merits, Administrative Law Judge ("ALJ") Lassiter conducted a site visit at Permittee Richard Baxter's home at 217 Matthews Road, Bayboro, North Carolina ("Site") and at the community boat ramp at the end of Matthews Road. Petitioner, Petitioner's son Kevin

McBride, Respondent DCM representatives Dr. Braxton Davis, Kent Vaughan, and Kelly Spivey, and Respondent's attorneys also attended.

2. On April 11, 2022, before the hearing on the merits, the Tribunal heard arguments on Respondent's Motion in Limine Limiting the Role of Petitioner's Son, Mr. Kevin McBride as Petitioner's advocate during the hearing. The Tribunal held that Kevin McBride could not question witnesses or argue legal issues during the hearing as he was not a petitioner in this case and was not licensed to practice law in North Carolina. The Tribunal allowed Kevin McBride to assist his father within the noted limits because Petitioner was appearing *Pro Se*. Mr. Kevin McBride had been significantly involved in dealing with Respondent's employees on behalf of his father on the issues of this case. (T p 24-29)

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at hearing, stipulations by the parties, documents admitted into evidence, having weighed all the evidence and assessed the credibility of the witnesses by the appropriate factors for judging credibility, including but not limited to the demeanor of each witness; any interest, bias or prejudice each witness may have; the opportunity for each witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of each witness is reasonable; whether such testimony is consistent with all other believable evidence in the case, and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable rules and laws, the undersigned finds as follows:

Parties

1. Petitioner Kenneth McBride owns non-adjacent riparian property located at 111 Mathews Road, Bayboro, Pamlico County, NC, on Newton Creek up-stream from the permitted Site at 217 Matthews Road. Petitioner's son, Mr. Kevin McBride, has been significantly involved in dealing with Respondent's employees on behalf of his father on the matters at issue in this case.

2. Respondent North Carolina Department of Environmental Quality, Division of Coastal Management (Division or DCM) is a state agency authorized to administer and implement the North Carolina law and rules for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

Procedural Background

3. On August 26, 2021, Respondent DCM issued General Permit No. 70884B ("CAMA Permit") to Richard Baxter to develop a six-foot by sixteen-foot pier at 217 Matthews Road, Bayboro, Pamlico County, North Carolina, alongside a replacement bulkhead on the property ("the Site"). Respondent had issued General Permit No. 79883 to Mr. Baxter on August 18, 2021 permitting Baxter to build a replacement bulkhead on the property. That permit is not being contested in this case.

4. Under the CAMA, a third party may file a contested case petition to challenge the issuance or denial of a CAMA permit to someone else only if the Coastal Resources Commission ("CRC" or "Commission") first determines that a contested case hearing is appropriate. N.C.G.S. § 113A-121.1(b). The CRC has delegated the authority to its Chair to determine whether a third-party request for a hearing should be granted or denied. 15A NCAC 07J .0301(b). A third party whose hearing request is granted may file a contested case hearing petition with the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 113A-121.1(b).

5. On September 28, 2021, pursuant to N.C.G.S. § 113-121.1(b) and 15A NCAC 07J .0301(b), the Chair of the Commission granted Petitioner's third-party hearing request challenging the issuance of the CAMA Permit to Mr. Baxter on the sole issue "whether the permit is consistent with the Commission's rule authorizing General Permits for docks and piers – 15A NCAC 07H .1200 *et seq.*"

6. On October 18, 2021, Petitioner filed a contested case petition with the Office of Administrative Hearings challenging Respondent's issuance of the CAMA General Permit No. 70884B to Mr. Baxter on the grounds that the proposed pier and use of such pier:

> [W]ill delay, obstruct, reduce, or otherwise inhibit riparian access to and from their property, will violate the navigation of public trust waters and have adverse effects on the value and enjoyment of their property.

(Petition, p. 1) Petitioner alleged that issuance of the subject CAMA Permit would violate N.C.G.S. §§ 77-12, and 77-13, 33 USC Chapter 9 Section 406, 15A NCAC 07H .0207(c), 15 NCAC 07H .0208(a)(2)(G), 15 NCAC 07H .1202 and .1204, and 15 NCAC 07H .0601. (Petition, pp. 2-4).

The Site and Petitioner's Property

7. The 217 Matthews Road Site is adjacent or riparian to Newton Creek and is approximately 1.23 acres in size with the northeast boundary along Newton Creek. A single-family home, a shed, a pole shelter, and another shelter are located on the Site. An existing basin is located along the shoreline of the Site.

8. Petitioner's property at 111 Matthews Road is upstream and adjacent to or riparian to Newton Creek. There are two lots located between Petitioner's property and the Site. Petitioner's property is approximately three-quarters of an acre in size and has four accessory storage structures on the property.

Petitioner's Evidence

Wayne Crocker

9. On August 20, 2017, Kevin McBride navigated Petitioner's Bay Rider 2260 up Newton Creek under outboard power to Petitioner's 111 Matthews Road property.

Waylon Crocker was a passenger in Petitioner's boat. Kevin McBride stopped the boat at Petitioner's property, picked up Petitioner, and then navigated back down Newton Creek under outboard power. (T pp 37-38, 42) Mr. Crocker observed that Bay Rider was idling along at one or two miles per hour and thought he could walk faster than the boat was going. (T p 43) During their ride, Mr. Crocker saw a flat bottom boat at the Willis dock. (T pp 40-41; Pet Exh 10) He also took three photographs of the area during their ride. (T pp 36-37, 39-40; Pet Exh 10, 10A, 10B)

10. Mr. Crocker has seen Newton Creek when the water was low, but he has never been on a boat in the creek when the water was low. (T p 42) Mr. Crocker has never attempted to navigate up Newton Creek and has been unable to do so because of other boats or docks, shoaling, or other natural conditions. (T pp 42-43) Mr. Crocker has not been on a boat on Newton Creek since 2019. (T p 41)

11. Kevin McBride owns an Avenger AV-24 Bay boat. This boat is a V hull bottom boat of overall length of 24 feet 8 inches, a beam of 8 ½ feet, and a 14-inch draft. (Resp Exh 48)

Taren Lee

12. Taren Lee is Kevin McBride's fiancé. Ms. Lee has ridden as a passenger on the Kevin McBride's Avenger AV-24 going up Newton Creek but has never driven a boat up Newton Creek. (T p 48, 62)

13. Ms. Lee's testimony established that the McBrides do not launch the Avenger from Petitioner's boat ramp, because the Avenger is too large and too long to go into the water at Petitioner's property. (T pp 58-59, 64-65; Resp Exhs 38E, F, & G, and 48 - photos of McBride boat ramp)

14. Ms. Lee has never been on a boat that was unable to navigate up Newton Creek. (T p 48)

15. There have been only two times Ms. Lee was on a boat in Newton Creek when they had to move a boat out of the way to get past the boat. Both times this occurred, there were boats tied up at the Willis oyster dock. (T pp 50, 55; Resp Exh 9A and 9B - photos showing the Willis oyster dock in the distance; Resp Exh 34 photos with low water)

a. The first time occurred in 2017 when Ms. Lee and Kevin McBride had to push a V hull type boat, tied to the Willis oyster dock, out of the way because the back of the boat was tied incorrectly and had floated out horizontally across the creek. (T pp 51-53)

b. The second time occurred sometime before September 2018, when they had to push a 24-foot, 75 to 80 inch wide, flat-bottom skiff, tied to the Willis oyster dock, out of the way because it was tied up incorrectly and the back of the skiff had floated out horizontally across the creek. (T pp 54-55)

16. The last time Ms. Lee traveled up and down Newton Creek was before Christmas, and she was riding in the Avenger with Kevin McBride. (T p 55) At that time, Mr. Baxter's small flat bottom boat was tied to Mr. Baxter's current dock. (T p 56) Ms. Lee and Kevin McBride were able to get past Baxter's boat using the trolling motor. (T p 56)

17. Ms. Lee has never experienced any difficulty navigating past Mr. Baxter's current dock even when a boat was tied up at the dock. (T p 58) Respondent's Exhibit 29 is a photo of Kevin McBride's Avenger navigating past Baxter's permitted dock without any interference. Respondent's Exhibit 33 is video footage on September 9, 2021 showing Kevin McBride's Avenger navigating past Baxter's permitted dock without any interference. This video footage was taken from a camera located on Mr. Baxter's dock.

Surveyor Comer Lyons

18. Mr. Comer Lyons is a licensed surveyor in North Carolina who has a bachelor's degree in civil engineering from Georgia Tech. (T p 73)

19. On November 28, 2021, Mr. Lyons performed survey work for Petitioner at the Site. (T p 78) Mr. Baxter's fiberglass boat was tied to Mr. Baxter's dock when Mr. Lyons conducted his survey. (T pp 73-74)

20. Mr. Lyons only occasionally surveys the bottoms of creeks. (T p 78; Resp Exh 52) Less than five percent of the surveys Mr. Lyons performs consist of surveying the bottom of water bodies. (T p 78; Resp Exh 52)

21. Mr. Lyons has conducted five surveys of the bottom of water bodies for CAMA permitting. (T p 78) During those five surveys, Mr. Lyons used a fifty-foot grid and point elevations along that grid to create a survey. (T p 79) However, Mr. Lyons did not use that methodology in his survey of Newton Creek on November 28, 2021. (T p 79)

22. Mr. Lyons has also conducted another type of survey to determine the characteristics of streams. (T p 79) During those surveys, he sets survey elevation points every fifty feet in a stream or every time the channel of the stream changes. If the stream is less than fifty feet, the elevation points will be on a tighter grid. (T p 79) However, Mr. Lyons did not perform a survey to determine the actual characteristics of Newton Creek. (T p 83; Resp Exh 52, p 61)

23. The information Mr. Lyons provided at the hearing is a snapshot in time, specific to conditions on November 28, 2021. (T p 80) Mr. Lyons' survey does not provide any information about conditions in Newton Creek on other days. (T pp 79, 80)

24. In performing his survey at the Site, Mr. Lyons used a base receiver at Petitioner's property as a control point. The heights were relative to that control point. (T pp 89-90, 101-02) The largest negative number on his elevation points represented the deepest point. (T p 90; Resp Exh 44) Mr. Lyons identified the base receiver set up at Petitioner's property in photographs taken on November 28, 2021. (T p 102; Resp Exh

38E-G) The margin of error for Mr. Lyons' survey of Newton Creek is roughly one to one and a quarter inch. (T p 80)

25. Mr. Lyons took elevation points in five transacts of the creek along Mr. Baxter's bulkhead. (T p 87) These elevation points are represented on Respondent's Exhibit 44. (T pp 97, 114-15; Resp Exh 44) Mr. Lyons provided Respondent with a computer printout of all the data he collected during the survey. (T pp 90-91; Resp Exh 45) Mr. Lyons also provided a diagram of elevations taken at the north and south end of Mr. Baxter's dock. (Pet's Exh 4 &5) The elevations reported on Respondent's Exhibit 44 are recorded in NAVD88, North American Vertical Datum of 1988, which are considered standardized heights for survey purposes. (T p 89; Resp Exh 44)

26. To take elevation points, Mr. Lyons used a fiberglass pole with a three-inch foot on the bottom and a GPS device on the top. He tried to the best of his ability to hold the pole upright. (T p 93)

27. Mr. Lyons did not notice the water level at the boat ramp at Petitioner's property or take any measurements of the width or the elevation of the creek at the Petitioner's property or by his platform. (T pp 83-84, 102)

28. Mr. Lyons' survey of Newton Creek did not extend to the shore across from Mr. Baxter's dock. (T p 91) Mr. Lyons did not recall how close he surveyed to the far side of the creek. (T pp 91, 97)

29. Mr. Lyons' evaluation of the creek was limited to elevation points taken along five transacts out from the bulkhead on Mr. Baxter's property. The transacts do not extend all the way to the opposite side of the creek. (T p 108)

30. Mr. Lyons does not know where the normal water level line is on the far side of the creek opposite Mr. Baxter's dock. (T p 92) Mr. Lyons did not have any information about the absolute width of the channel. (T p 92)

31. Mr. Lyons does not have any information about varying water levels in Newton Creek other than what he observed on November 28, 2021. (T p 107) Mr. Lyons does not have any information about whether Mr. McBride is unable to navigate his boat in Newton Creek under some conditions. (T p 107)

32. Mr. Lyons has no opinion on whether there is adequate water in Newton Creek throughout the year to navigate a boat. (T p 107) However, he personally would not take anything bigger than a Jon boat up Newton Creek if there is only one (1) foot to one and one-half (1 1/2) feet of water in the creek. (T p 112)

Respondent's Evidence

N.C. Wildlife Officer Scott Ingle

33. North Carolina Wildlife Master Officer Scott Tyler Ingle has been a North Carolina Wildlife Officer for approximately seven years. (T p 132) In that capacity, Officer Ingle is responsible for ensuring all the hunting, fishing, trapping and boating laws of the State are followed and enforced. (T p 132)

34. Officer Ingle has received law enforcement training, hands-on training in driving boat vessels and in the law enforcement duties of pulling over vessels. He has received specialized training for boating and navigation including tactical boat driving school, crash re-creation for vessels, and GPS forensics. (T pp 133-34; Resp Exh 21)

35. Officer Ingle's patrol area includes Craven, Pamlico, and Carteret Counties. (T pp 134-35) Officer Ingle has been assigned to this area for approximately six years. (T p 135) The boating traffic in his patrol area is one of busiest boating areas in the State. (T p 135) He patrols the Bay River area and focuses on that area during fall and summer. (T pp 135-36) During a work week, Officer Ingle patrols this area at least twice a week, and about every day during the summer. (T p 135)

36. Based on Officer Ingle's knowledge, skill, experience, and training as a Wildlife officer working in the waters of eastern North Carolina and patrolling Craven, Carteret and Pamlico Counties, Officer Ingle was qualified as an expert in boating, navigation and the coastal waters of eastern North Carolina in Craven, Carteret, and Pamlico Counties. (T pp 139-41)

37. Officer Ingle has operated and navigated boats most of his life and grew up in North Carolina. Most of his years navigating and operating boats have been in coastal North Carolina, both recreationally and professionally. He has operated boats in the Atlantic Ocean, Gulf of Mexico, creeks, rivers, and sounds. (T p 136) Officer Ingle operates V hull bottom Bay boats, aluminum Jon boats, and flat bottom boats such as a Bay Rider on a regular basis. He also operates deep V hull boats such as a Parker. (T p 137)

38. As a Wildlife Resources Officer, Officer Ingle is assigned a 23-foot-long Bay Rider, a V hull Bay boat, and a 21-foot-long Parker, a deep V hull boat. (T pp 137-38) He also has a personal boat that is a 20-foot-long aluminum semi-V hull express fishing boat. (T pp 137-38)

39. Officer Ingle uses different boats for different purposes and water conditions. (T p 137) As a Wildlife Resources Officer, Officer Ingle uses flat bottom boats in more shallow waters, and he typically takes the deep V hull Parkers out in the middle of the Neuse River or down in Morehead around the ports to handle rougher water. (T p 137) V hull boats are useful for stability in the water, mainly rough water conditions for a smoother ride. (T p 138) Officer Ingle will not operate a V hull in shallow water. (T p 138)

40. The draft of a vessel is how deep it sits down in the water. (T p 138) The heavier the vessel, the more water it takes to float the vessel. (T p 138) The weight of the vessel and the outboard affect the draft and water necessary to operate the boat. A big heavy outboard engine on a bass boat will cause the back end of the boat to sit lower in the water. A flat bottom boat can be navigated in shallower water than a V hull bottom boat. (T p 139)

41. While working, Officer Ingle uses the Vandemere boat ramp, particularly during duck season and trout seasons. He uses the Vandemere boat ramp to access Newton Creek. (T pp 142-43; Resp Exh 3) It takes approximately ten minutes to get from Matthews Road to the Vandemere boat ramp, with or without pulling a boat on a trailer. (T pp 143; Resp Exh 3)

42. It is a necessary part of Officer Ingle's duties as a Wildlife officer to know the characteristics of the different types of water bodies he patrols and the type and sizes of boats to use to navigate the different types of water bodies. (T pp 137, 144-45)

43. Officer Ingle described Newton Creek as a narrow creek. As Newton Creek approaches the headwaters, it narrows to a ditch. Water levels in Newton Creek are wind driven. In wind-driven creeks like Newton Creek, water levels fluctuate depending on wind or excessive rain, and water levels can vary greatly through the course of a day. Strong winds from a certain direction will blow large amounts of water out of Newton Creek. (T p 144)

44. Newton Creek and the Site are in the Bay River Area that Officer Ingle patrols. (T pp 135-36, 142; Resp Exh 2, 3) However, Officer Ingle has not operated a boat in Newton Creek. (T p 147)

45. Officer Ingle frequently patrols, by boat, surrounding creeks in Pamlico County and Carteret County that have conditions like those in Newton Creek, and he navigates a boat in creeks like Newton Creek on a regular basis. (T p 144)

46. When navigating shallow, narrow creeks like Newton Creek, Officer Ingle uses smaller boats. (T p 145) He uses an 18-foot aluminum flat bottom Jon boat, because it is a lighter boat that does not require as much water to float and is not as long or wide as other vessels he operates. (T pp 145, 173-74) He does not use the V hull Bay boat he has been assigned in creeks like Newton Creek because it is harder to navigate a longer vessel in narrow creeks, and it takes more water to float. (T p 145)

47. The minimum water depth Officer Ingle requires to run the 18-foot aluminum flat bottom Jon boat "up on plane" or on top of the water, is one to one and a half feet. He would not want to operate it in less than a foot to a foot and a half of water. (T p 146)

48. Kevin McBride's Avenger and Officer Ingle's 23-foot Bay Rider are both V hull bottom Bay boats. (T pp 146-47; Resp Exh 48) The minimum water depth Officer Ingle requires to run his 23-foot-long Bay Rider up on plane, is three feet. He would not run his Bay boat up on plane in less than three feet of water. (T pp 146-47)

49. In December 2021, Officer Ingle went to Petitioner's property at 111 Matthews Road in response to Kevin McBride's phone call to investigate illegal deer carcasses dumped in Newton Creek near Petitioner's property. (T pp 147-48; Pet Exh 2A)

50. When Officer Ingle arrived at Petitioner's property, Kevin McBride began discussing ongoing issues he was having with his neighbors. (T p 149) Officer Ingle informed Mr. McBride that the Sheriff's office would be the agency to investigate the trail camera on the Willis property. (T p 150) When Kevin McBride pulled out a file about the CAMA permits, Officer Ingle informed Kevin McBride he was not there to deal with CAMA permits, and he was not a representative of CAMA. (T pp 150-51) Kevin McBride complained that Mr. Baxter's new dock made it difficult to navigate his boat on Newton Creek. (T p 150) Officer Ingle advised Kevin McBride that he would visit the neighbor's property to investigate whether anything was blocking navigation of the creek and to ensure the creek was not being blocked. (T pp 150-51)

51. When Officer Ingle was at Petitioner's property, he observed that the water depth in Newton Creek at Petitioner's property was no deeper than a foot to a foot and half. (T pp 149-50)

52. Officer Ingle's duties include enforcing the boating laws and rules in the State of North Carolina, including statutes governing obstruction of navigation and the passage of boats. (T pp 151-52) N.C. Gen. Stat. §§ 77-12 and -13 are the relevant statutes governing the obstruction of streams. (T p 152; Resp Exh 49).

53. When investigating whether a passage is blocked or obstructed in violation of N.C. Gen. Stat. § 77-12 or § 77-13, Officer Ingle uses a reasonable person standard to assess whether something is obstructing passage and to determine what is a reasonable use of the waterway. Officer Ingle considers the reasonable use of the specific waterway and looks to see if someone could in fact get by in the creek. (T p 155) He uses his experience to determine if there is an obstruction. (T p 153)

54. After meeting with Kevin McBride, Officer Ingle visited Richard Baxter's property at 117 Matthews Road to investigate whether there was a violation of N.C. Gen. Stat. § 77-12. (T p 153) Officer Ingle was at the Site for approximately one hour. (T p 153)

55. Officer Ingle informed Mr. Baxter he was there to investigate a report that his dock caused an obstruction of the creek. (T p 154) Officer Ingle and Mr. Baxter walked down to Baxter's dock on Newton Creek. (T p 154) Mr. Baxter's boat was tied to the dock. (T p 154) Officer Ingle confirmed that Mr. Baxter owned the property, the dock, and the boat tied to the dock. (T p 154) Officer Ingle took pictures of Mr. Baxter's boat tied up alongside Mr. Baxter's dock in Newton Creek. (T p 154; Resp Exh 22)

56. Officer Ingle considered the reasonable use of Newton Creek when making his determination whether Mr. Baxter's boat interfered with navigation of Newton Creek.

(T p 155; Resp Exh 22) Based on the conditions he saw that day, Officer Ingle opined that other vessels could navigate past Mr. Baxter's boat tied at his permitted dock. (T p 155; Resp Exh 22) Officer Ingle would have taken enforcement action if Mr. Baxter's boat was obstructing navigation of Newton Creek. (T p 156) However, he did not take enforcement action because he determined Mr. Bater's boat was not obstructing the creek. (T p 156; Resp Exh 50)

57. Officer Ingle observed that Newton Creek is much narrower at Petitioner's property than it is at Mr. Baxter's property (T pp 156-57) and appeared shallower at Petitioner's property than the water at Mr. Baxter's property. (T p 160) Officer Ingle credibly testified that the water level in the photograph he took of Mr. Baxter's boat tied alongside his dock was probably normal water level. (T p 160)

58. Debris such as sticks, or limbs can affect navigation and are not unusual to see in creeks like Newton Creek. (T pp 158-59) In Officer Ingle's experience as a Wildlife Officer, a defined channel is a marked channel that allows a boat to navigate through deeper water. (T pp 159,194) On average, creeks like Newton Creek rarely have defined channels and rarely have channel markers. (T pp 159) Officer Ingle could see the creek bottom at Mr. Baxter's dock. (T p 150) He did not observe a defined channel in Newton Creek at Mr. Baxter's property. (T p 159)

59. In Officer Ingle's experience navigating creeks like Newton Creek, when a boat has a bigger motor, it takes more water to float the vessel. (T p 161) To navigate a bigger boat with a bigger motor in shallow water, the vessel's motor and propeller must be trimmed up. (T p 161) Based on his experience, Officer Ingle opined that depending on the water levels, a 16 to 17-foot flat bottom boat would be the largest boat a person could reasonably operate in Newton Creek. (T p 162)

60. Kevin McBride's Avenger V hull Bay boat is the same boat shown in the manufacturer's specifications in Respondent's Exhibits 27A, 27B, and 48, except Kevin McBride's Avenger does not have a T-top. (T pp 163-64; Resp Exh 27A, 27B, 48) The manufacturer specifications for Kevin McBride's Avenger are: 24 feet 8 inches in length, a beam of 8 feet 6 inches, a draft of 14 inches of water, a dead rise of 15 degrees, the back of the boat transom height of 25 inches, a dry weight of 2,800 pounds, fuel capacity of 81 gallons, a maximum capacity of eight people or 1,200 pounds, and a 300-horsepower motor. (T pp 164; Resp Exh 48) Kevin McBride's Avenger has a Suzuki 300 horsepower engine which is a four-stroke engine matching the Suzuki manufacturer specifications. (T pp 164-65; Resp Exh 24, at Interrogatory 2, Resp Exh 48)

61. Officer's Ingle considers the 300 horsepower Suzuki engine on Kevin McBride's Avenger to be bigger than is needed to navigate a creek like Newton Creek. (T p 165)

62. Based on Officer Ingle's training, knowledge, and experience, just because a boat can be navigated into an area sometimes, does not mean that such navigation is a reasonable expectation for use of a creek. (T p 193) In Officer Ingle's expert opinion, based on his training, knowledge, and experience, it would not be reasonable for

Petitioner or Kevin McBride to expect they would be able to take Kevin McBride's Avenger through Newton Creek 365 days a year. (T pp 167, 171, 193) It is not reasonable to navigate such a boat in shallow water, and if the wind blows the water out of the creek, you're not going to float that boat. (T pp 168, 171) Based on Officer Ingle's experience, driving a heavy boat like Kevin McBride's Avenger up Newton Creek, is not reasonable as it could end up sitting on the bottom or picking up sedimentation in the outboard engine. In Officer Ingle's experience, 300 horsepower Yamaha engines typically run about $30,000.00, and Officer Ingle would not want to ruin an expensive motor. (T p 168)

63. Petitioner currently owns a 22-foot KenCraft Bay Rider 2460. (T p 169; Resp Exh 24) The KenCraft Bay Rider is a flat bottom hull style boat. (T p 170) Officer Ingle uses a 23-foot flat bottom 2260 Bay Rider built by KenCraft to patrol in his assigned area. (T pp 163, 170) Based on his experience and observations, Officer Ingle would not navigate a boat the length of his 23-foot Bay Rider flat bottom up to Petitioner's property because the creek is too narrow. (T p 172) In his expert opinion, he would not use or run the 300 horsepower Suzuki engine in Newton Creek at the Site or past the Site to Petitioner's property where Newton creek is even narrower. (T pp 171-72) He also would not launch his 2260 Bay Rider flat bottom patrol boat from Petitioner's property. (T p 171)

64. Based on Officer Ingle's experience and observations, he would not navigate a boat like the Avenger 24, the 2260 Bay Rider flat bottom, or the 2460 Bay Rider flat bottom boat up Newton Creek and dock it at Petitioner's property. (T pp 172-73) To access the Bay River in a boat like the Avenger 24, or the 2260 flat bottom, or the 2460 flat bottom boat, Officer Ingle would launch from the Vandemere boat ramp. (T p 173)

65. In Officer Ingle's expert opinion, a 115-horsepower engine is the biggest, reasonable engine to use on a boat to navigate a creek like Newton Creek. (T p 173) In Officer Ingle's expert opinion, based on his observations of Newton Creek at Mr. Baxter's property, a person in a small reasonable vessel could navigate past Mr. Baxter's property. (T p 174)

66. Based on Officer Ingle's experience, he can look at the width of a creek and determine if it's navigable. (T p 186)

Permit Holder Richard Baxter

67. The property located at 217 Matthews Road on Newton Creek is Mr. Baxter's primary residence. (T p 203)

68. Mr. Baxter served in the Navy for twenty-three years working on aircraft carriers and on submarines. (T pp 204-05) Mr. Baxter received an honorable discharge from the Navy. (T p 204) Mr. Baxter obtained a bachelor's degree from Southern Illinois University, and a master's degree from Webster University. (T p 230) After retiring from the Navy, Mr. Baxter worked in the field of information technology. (T pp 204-06) Mr. Baxter gained experience with security wiring and data privacy working as chief technical analyst. (T pp 205-06).

69. Mr. Baxter installed security cameras around his property and a security camera on his dock. (T p 206) Mr. Baxter checks the accuracy of the security camera on his dock, including the time and date and he has it set up for alerts. (T p 206). Mr. Baxter's dock camera has a motion sensor. When the sensor detects motion, it sends an alert to Mr. Baxter's phone, and he can see what alerted the camera. (T p 206) Since the construction of his new dock, Baxter's camera has recorded passing boats. (T p 206)

70. A video recorded by Mr. Baxter's dock security camera on the night of September 9, 2021 shows Kevin McBride navigating his largest boat, the Avenger, past Mr. Baxter's dock. (T pp 207-10; Resp Exh 33) The video Kevin McBride navigating the Avenger past Mr. Baxter's dock easily without slowing down. (T p 209; Resp Exh 33)

71. A photograph provided by Mr. McBride also shows Kevin McBride's Avenger navigating without interference by Mr. Baxter's dock with a boat tied to the dock. (Resp Exh 28)

72. On November 28, 2021, Mr. Baxter received an alert, walked out to his dock, and saw Comer Lyons and Mr. McBride in a boat on Newton Creek by his dock. (T p 223) Four photographs taken by Mr. Baxter's dock security camera that day show surveyor Comer Lyons and Mr. McBride easily navigating an aluminum Jon boat with a push pole around Mr. Baxter's dock and boat, and farther downstream by Mr. Baxter's bulkhead. (T pp 222-23; Resp Exh 38)

73. Mr. Baxter is not aware of any instance in which Petitioner, or his son were not able to navigate a boat past Mr. Baxter's new dock. (T p 222)

74. Mr. Baxter attended the Site Visit of his property the morning of the hearing in this case. During that visit, the attendees saw his new dock, the shelter, the new bulkhead, the boathouse on his property, the Willis oyster dock, and the Tippet dock across from the Willis oyster dock, and the community boat ramp on Matthews Road where Newton Creek widens out. (T pp 1, 197)

75. There are cleats on Mr. Baxter's dock that he uses to put bait traps in the water and to tie up his small boat. (T p 198) Mr. Baxter does not tie up bigger boats to his dock. (T p 221)

76. On the south end of Mr. Baxter's dock and downstream, the amount of mud visible and the waterline mark on his bulkhead give Mr. Baxter an indication of the water level. (T p 199) There is a hole in the area around the dock that he estimates is around 18 inches by 18 inches, which is visible when the water is very low. (T p 199) When Mr. Baxter looks at the edge of the wetlands across the creek, he can assess whether the water is deep enough to use his boat. (T p 200)

77. Mr. Baxter wanted a dock that would stick out six feet in that location because there is a shoal along the bulkhead, and he needed to be past the shoal to get in the boat and get out of the creek. (T p 202)

78. Mr. Baxter has navigated his 17-foot flat-bottom skiff through the mouth of Newton Creek where there is shoaling and shallower water which is marked with PVC markers. (T pp 197-98, 210) His boat has gotten stuck in the shoaling, but he backed up and maneuvered around it. (T p 211) When Mr. Baxter has tried to turn his boat around upstream of the dock (towards Petitioner's property), he churned up mud into his outboard cooler lines. (T p 200)

79. Mr. Baxter opined that the water levels in Newton Creek are unpredictable. (T p 211) He has observed the water much lower than it was during the Site visit before the hearing. (T p 211) Mr. Baxter has observed occasions when the creek is so low, that he can see muck from the upstream end of the Willis property to downstream past the Tippet dock. (T pp 211-12)

80. Photographs taken by Mr. Baxter on February 18, 2022 show very low water where the shoaling downstream of the dock is visible and a 17-foot flat bottom Carolina skiff tied to the oyster dock is partly sitting on the creek bottom. The creek bed is visible upstream, and there is only a small water in the creek. (T pp 212-15; Resp Exh 34, 35)

81. Photographs taken by Mr. Baxter on March 11, 2022, show very low water. He pointed out that the photos show that the remaining water in the creek beside Mr. Baxter's dock is toward the middle of the creek bed, at the opposite bank of the creek on the Willis side, and in a hole near the upstream dock piling (T pp 216-17; Resp Exh 36, 37)

DCM Staff

82. Kent Vaughan is a field representative for the North Carolina Division of Coastal Management. (T p 242) He received a B.S. degree in marine biology from the University of North Carolina at Wilmington in 1995. (T p 242) He has been a DCM field representative in the Washington regional office since 2020. (T p 243) He was an environmental specialist for the North Carolina Division of Soil and Water in the Washington regional office from 2003 to 2020, working on a conservation easement program covering twenty-two counties in North Carolina from Surry County down to Carteret County, including Pamlico County. (T p 243) Mr. Vaughan was a fisheries technician for the North Carolina Division of Marine Fisheries from 1996 to 2003, conducting anadromous fish studies and independent sampling in the Albemarle Sound, Roanoke River area. (T pp 242-43) He was also a research technician with the Skidway Institute of Oceanography attached to the University of Georgia. (T p 242)

83. Based on Mr. Vaughan's experience, training, skills, and knowledge Mr. Vaughan was qualified as an expert witness in boating, navigation, and the waters of North Carolina. (T p 310)

84. Mr. Vaughan began boating when he was 12 or 13 years old. (T p 303) Mr. Vaughan has held a U.S. Coast Guard Captain's License since 2008. (T pp 303-04; Resp Exh 53) In order to take the exam for a U.S. Coast Guard Captain's License, a person must have been in control of a vessel at sea for 365 days with 90 days offshore. He had

to go through rigorous trainings, pass medical exams, background checks and drug testing. (T pp 304-05) To renew such license, Mr. Vaughn was required to have at least another 365 days of sea time, update all his medical conditions, and show he is actively using the license. (T p 305) Mr. Vaughan's OUPV Captain's license allows him to carry up to six passengers in shore and up to 100 miles offshore. (T p 306) There is no limitation on the type of vessel. (T p 306) The requirements for the U.S. Coast Guard Captain's license are codified in federal regulations and federally regulated and enforced by the U.S. Coast Guard. (T p 306)

85. In North Carolina, Mr. Vaughan has operated vessels from the Currituck Sound up to the Roanoke River and all the way to Weldon. (T p 306) He has run the Pamlico Sound, Pamlico River, Neuse River, the Intracoastal Waterways all the way up the Cape Fear River. (T p 306) He has operated vessels in ocean waters for the entire transition from Cape May, New Jersey to Key West, Florida. (T p 306) He has operated vessels in tributary systems of the Roanoke River, Pamlico River, Neuse River, and Cape Fear River. (T p 307) He has operated in several different types of tributary systems including those with wind driven tides, weather effect tides, and lunar tides. (T p. 307) Mr. Vaughan has operated boats where there are massive lunar tide swings throughout the day and where there are strictly wind driven tides, where they may blow out for days. (T p 307) Mr. Vaughan has operated vessels in depths ranging from six inches to 1,000 feet. (T p 307)

86. Since 2013, Mr. Vaughan has a charter business for in-shore fishing and duck hunting in Pamlico Sound, the Pamlico River, the Alligator River, the Neuse River, and tributaries of those rivers. (T p 308) Prior to that he worked for someone else operating charters in the Currituck Sound starting in 2008. (T p 308) On average, Mr. Vaughan runs charters 75 to 100 days per year. (T pp 308-09) Mr. Vaughan operates a 23-foot center console open boat with a semi-V hull on a regular basis. (T p 309) His boat is specifically set up for shallow running, and drafts twelve inches. He also operates eighteen and 19-foot flat bottom boats and 16-foot Jon boats. (T p 309) Jon boats are much lighter flat bottom, skiff style, shallow draft vessels that ride higher in the water. (T pp 309-10) Larger vessels need larger engines with more horsepower, whereas the smaller boats can utilize lighter motors with smaller horsepower. (T p 310) The largest boat Mr. Vaughan has ever operated is a 60-foot Sportfish during deliveries and during tournaments. (T p 310)

87. As a DCM Field Representative, Mr. Vaughan's assigned geographic area covers the Pamlico County region and the northern side of Neuse River in Craven County. (T p 244) He is responsible for administering the CAMA and the Dredge and Fill Act and is responsible for permitting, educating, and monitoring shoreline development in his geographic area. (T pp 244-45) Mr. Vaughan issues CAMA General Permits and is involved with CAMA major permit applications. (T p 244)

88. Mr. Vaughan spends two to three days each week in the field, conducting site visits for general and major permits, meeting with contractors or landowners on site to administer General Permits, and meeting with property owners to educate them about options to approach certain situations that they may have problems with on their

properties. (T pp 245-46) In the field, he uses range finders, tape measurers, both long and 100-foot tapes, depth probes made of PVC pipe marked to determine depths, tear sheets for General Permits to submit to the landowner, and cell phones with cameras, maps, and different databases such as the Division of Marine Fisheries database for primary nursery areas, or inland waters. (T pp 246-47)

89. When he is not in the field, Mr. Vaughan reviews major permit applications, fields phone calls, and conducts historical research for permits he is writing or preparing. (T p 246) He often uses Google Earth to look at site imagery over time to determine what was historically at a site, to take measurements to estimate what he may see on site, or to see other structures in the area that may not be visible when he is on site. (T p 248)

90. In the Washington Regional Office, there are two other DCM field representatives and the DCM district manager. Mr. Vaughan and the other DCM staff in the Washington Regional Office consult with one another about issues or questions that arise to ensure the staff issue permits and answer questions correctly and uniformly. (T p 248) Mr. Vaughan consults with his district manager if he sees something out of compliance on a site visit, something built without a permit, if he receives questions or concerns from adjacent landowners, if contractors or landowners want to do things not spelled out in the permit, or to determine if a project needs to be kicked up to a major permit. (T pp 248-49)

91. When Mr. Vaughan became a DCM field representative, he received training from his district manager, Kelly Spivey, whom Mr. Vaughan shadowed on site visits for a couple of months, observing the permitting process. (T p 249) Mr. Vaughan also shadowed the other Washington regional office field representative on site visits. After a few months, Mr. Vaughan began issuing permits with his manager's oversight. (T p 249)

92. The first step required in the CAMA General Permit process is to provide notice of the proposed development to the adjacent riparian landowners. (T pp 249-50) Next, Mr. Vaughan conducts a site visit to ensure the proposed project meets the general conditions and specific conditions for the applicable type of development. If the proposed project meets the conditions for a General Permit, Mr. Vaughan draws the proposed development on the permit tear sheet. After the permit fee is paid, Mr. Vaughan issues the General Permit. (T p 250)

93. General Permits are used for specific types of development that occur frequently and for which the impacts are known. The conditions, limitations of size, dimensions, and locations of the specific types of development in General Permits have been vetted and signed off by the Commission and other agencies. (T p 250) General Permits are good for 120 days and the permitted development must be completed within that timeframe. (T pp 251-52)

94. General Permits do not require a survey. (T p 272)

95. The General Permit process is quicker than the Major Permit process. (T p 250) Unlike General Permits, Major Permits are required to have scale drawings and must be reviewed by federal and state commenting agencies. Major Permits require more vetting, documentation, and must allow up to seventy-five days for comments before the permit issues. Major permits are initially good for a three-year period and can be renewed. (T p 251)

96. The CRC's rules for General Permits for docks and piers are contained in 15 NCAC 07H .1200 *et seq.* (T p 252; Resp Exh 1) Docks and piers are administered under the same rule and include general and specific conditions specified in 15A NCAC 07H .1200 *et seq.* (T pp 252-53; Resp Exh 1)

97. The specific conditions applicable to the CAMA permit for Mr. Baxter's dock are:

a. 15A NCAC 07H .1205(f) which requires the maximum size of Baxter's dock shall not exceed 400 square feet,

b. 15A NCAC 07H .1205(p) which requires that piers and dock facilities shall in no case extend more than one-quarter the width of a natural water body, human-made canal, or basin, and

c. 15A NCAC 07H .1205(r) which requires piers and docking facilities shall provide docking space for no more than two boats. (T pp 253-54; Resp Exh 1)

98. The general condition applicable to the General Permit for Mr. Baxter's dock is 15A NCAC 07H .1204(c) which requires that there shall be no interference with navigation or use of the water by the public by the existence of piers and docking facilities. (T pp 254-55; Resp Exh 1) This refers to interference by the actual structure in the navigational waters. (T p 255)

99. DCM assesses whether a requested structure meets the general conditions required for issuing a permit at normal water level. (T p 318) All determinations and measurements are based upon normal water levels. (T p 255) DCM determines whether a structure can be permitted consistent with 15A NCAC 07H .1204(c) at normal water level. (T p 318) DCM determines normal water based on environmental field indicators on site. (T p 255) Field indicators include a barnacle line on pilings, a stain line on bulkheads, in beach areas a discoloration in the sand. (T p 255) Field indicators also include a cut bank in the marsh where the water sits most of the time. (T pp 255-56) When there is vegetation, it would be the base of the vegetation where the vegetation meets the sediment. (T p 256)

100. A General Permit only authorizes the construction of the solid structures included in the permit. (T p 257) The rules for General Permits do not restrict the ability to issue a permit based on what may hypothetically be tied up to a dock in the future. (T p 256)

101. Mr. Vaughan has visited the Site at Mr. Baxter's property nine times since August 2021. (T p 257) The first site visit occurred on August 17, 2021 to stake flags for the alignment of where the new bulkhead would be constructed. (T p 258-261) He also met with Mr. Baxter and the contractor for approximately thirty to forty-five minutes. He discussed the alignment of the new bulkhead and the existing floating pier with Mr. Baxter. (T p 260-262) Mr. Vaughan also advised Mr. Baxter that he would need to remove the existing floating pier. (T p 262)

102. Mr. Vaughan also informed Mr. Baxter that if he wanted a dock, he would need a CAMA permit and it must be less than a one-quarter width of the creek. (T p 262) Mr. Vaughan took measurements that day and determined the maximum one-quarter width for a pier structure at the Site. (T p 262) Mr. Vaughan understood that Mr. Baxter wanted some type of pier for unloading and loading a boat. (T p 263) Mr. Baxter wanted the pier to extend away from the shoreline as it was shallow along the edge of the bulkhead. (T p 263)

103. Mr. Vaughan observed the creek at Mr. Baxter's property was a shallow, narrow stream. (T p 258-261) He took a photograph of the site at Mr. Baxter's property on August 17, 2021, showing the old bulkhead and an unpermitted floating pier structure. (T pp 258-59, 261; Resp Exh 4) Mr. Vaughan observed that the L-shape floating pier structure extended into the creek beyond one-quarter of the width of the creek and was out of compliance with the Commission's rules. (T p 261; Resp Exh 4)

104. Mr. Vaughn described the water level that day as a little bit low, not quite normal water level. (T p 264; Resp Exh 4) Mr. Vaughan identified field indicators in the photograph showing the water level, including soil visible in the marsh on the opposite bank, some edging, and exposed soil near where he was standing. (T p 263; Resp Exh 4)

105. On August 18, 2021, Mr. Vaughan issued CAMA General Permit No. 79883B to Mr. Baxter to install approximately 180 feet of new bulkhead along the flagged shoreline. (T pp 266-67; Resp Exh 5) Mr. Vaughan's drawing on this permit is to a 1 to 30 scale. (T p 267; Resp Exh 5)

a. Mr. Vaughan recorded where he flagged the normal water level and the bulkhead alignment as points along the line representing the bulkhead in the permit drawing. (T p 267; Resp Exh 5)

b. He noted existing structures for reference, where the bulkhead is cut behind coastal marsh, and the existing basin where the bulkhead ends. (T p 267; Resp Exh 5)

c. Mr. Vaughan listed the adjacent property owners on the drawing, Ms. Green upstream to the left side, and Mr. Tippet downstream to the right. (T p 268; Resp Exh 5) The Tippet property line is not referenced in the drawing as it is beyond the scale of the drawing. (T pp 268-69; Resp Exh 5)

d. The contractor on Site that day told Mr. Vaughan the name of the creek was Barnes Creek, so Mr. Vaughn listed that as the name of the creek on Baxter's General Permit. (T p 266; Resp Exh 5)

e. The new bulkhead alignment is dug slightly landward from the old bulkhead and widens the creek at the Site. (T p 268)

106. After his site visit, Mr. Vaughan contacted his district manager Kelly Spivey. They discussed the existing L-shaped floating pier structure that went beyond one-quarter width. Mr. Vaughan indicated that the current structure was being removed to construct the bulkhead. (T p 270) Mr. Vaughan and Mr. Spivey also discussed Mr. Baxter's options to construct a new pier structure conforming to the quarter-width condition, where the pier would go, and permittable dimensions. (T p 270)

107. After Mr. Vaughan issued the CAMA General Permit for the bulkhead, he was contacted by the contractor with questions about the bulkhead alignment. (T p 270)

108. On August 26, 2021, Mr. Vaughan conducted his third visit to Mr. Baxter's property and discussed permitting a pier with Mr. Baxter. (T p 271) During that visit, Mr. Vaughan was able to see the creek bottom all the way across. (T p 271) Mr. Vaughan did not observe a formalized channel. (T p 272) Mr. Vaughan observed that the creek was shallow, he could see the bottom plainly, there was no submerged aquatic vegetation ("SAV"), and no obstructions. (T p 272) Mr. Vaughan estimated the water depth based on some of the new pilings that were being put in place, to be between one and a half to two feet. (T p 272)

109. At Mr. Baxter's property, Newton Creek is estuarine waters and a public trust area, and is not a primary nursery area. (T pp 265-66). Because the Site is not a primary nursery area, water depths are not required or necessary for the General Permit process. (T pp 271-72) The General Permit conditions did not require a survey for the proposed project because the Site was not a primary nursery area and there were no other site conditions that would require a survey. (T pp 271-72) As a result, Mr. Vaughan did not take depth measurements or require a survey from Mr. Baxter for development of his pier. (T p 272)

110. Mr. Baxter informed Mr. Vaughn how he intended to use the structure including that he did not leave his boat in the water all the time, he would just leave his boat tied up when he was there and he was fishing, and he was going to use the dock to load his boat with supplies. They also discussed Mr. Baxter's plans for the boat basin. (T p 273)

111. Mr. Vaughan took width measurements and determined the total allowable width for the pier. (T p 271) Mr. Baxter requested a permit for a six-foot by sixteen-foot pier which was less than could have been permitted. (T p 271) After the adjacent landowners did not object, Mr. Vaughan issued CAMA General Permit No. 79884B to Mr.

Baxter to construct a six-foot by sixteen-foot pier along the bulkhead. (T p 271; Resp Exh 6)

112. Mr. Vaughan evaluated the request for a dock permit using the relevant specific conditions in 15A NCAC 07H .1205 (f), (p), and (r). (T pp 273-74) Mr. Vaughan determined the requested permit was consistent with the specific conditions because the structure did not exceed the maximum size, it was less than one-quarter width of the creek, and the structure which would be considered to include a boat slip, resulted in a total of two boat slips at the property, including the existing boathouse. (T pp 273-75)

113. Mr. Vaughan also evaluated the request for a dock permit using the relevant general condition in 15A NCAC 07H.1204(c). (T p 274) Mr. Vaughan determined the requested permit was consistent with the general conditions. (T p 274) Specifically, Mr. Vaughan noted there was no marked channel in the creek. (T p 274) Mr. Vaughan could see the bottom of the creek all the way across the creek. He did not observe any visual depth changes, and he did not observe any kind of major depth change that would constitute a channel system in the creek. (T pp 271, 274) When Mr. Vaughan measured the width of the creek that day, with a range finder, as twenty-seven feet. (T pp 274-75). He determined that the six-foot pier left quite a bit of room and did not interfere with navigation. (T p 274)

114. After Mr. Vaughn issued the General Permit for Mr. Baxter's dock, Kevin McBride contacted Mr. Vaughan with concerns about navigating up the creek to Petitioner's property. (T p 275; Resp Exh 7) On September 8, 2021, Mr. Vaughan emailed and spoke to Kevin McBride on the phone. (T pp 275-76; Resp Exh 7) Mr. Vaughan told Kevin McBride that he would visit the Site to verify the dock structure complied with the CAMA Permit. (T pp 276-77, Resp Exh 7) Mr. Vaughan informed his district manager, Kelly Spivey, that an upstream landowner had concerns about the project. (T p 277)

115. Mr. Vaughan inspected the Site on Mr. Baxter's property on September 9, 2021 for approximately forty-five minutes to one hour. (T p 277) The contractor was present during the site inspection. (T p 277) Mr. Vaughan measured the size of the dock from the face of the new bulkhead to verify the dock complied with the one-quarter width condition and size of the actual structure. He also took new measurements across the width of the creek for one-quarter width measurements. (T pp 277-78) Mr. Vaughan determined that the pier structure was slightly over six feet wide by a few inches but was still less than one-quarter width of the creek based on the 6.75 feet recorded on the permit. (T p 279)

116. Mr. Vaughan observed two pilings placed adjacent to the dock that were not authorized by the CAMA Permit. (T p 278; Resp Exh 8A) Mr. Vaughan took a photograph of the Site of the completed bulkhead, the new permitted dock, and two pilings placed adjacent to the dock. (T pp 277-78; Resp Exh 8A) Mr. Vaughan informed the contractor that the two pilings would need to be removed. (T p 278) The pilings were not a violation because the CAMA Permit was still active, but the pilings needed to be taken removed to become compliant with the active permit. (T p 278) Mr. Vaughan observed the water level was below normal water level that day. (T p 278) Mr. Vaughan also observed the bottom

of the creek, the shallow water, and debris on the bottom was visible above the water. (T pp 279-80; Resp Exh 8A)

117. Mr. Vaughan observed the water was shallower on the downstream side of the pier from the bulkhead to the centerline of the creek. (T p 280) Mr. Vaughan took a photograph of the water downstream from Mr. Baxter's property showing two flat-bottom skiffs tied up to the Willis oyster dock. (T p 280; Resp Exh 8B) Mr. Vaughan estimated one skiff was approximately sixteen feet and the other skiff around twenty-four feet long. (T p 280; Resp Exh 8B) Mr. Vaughan identified field indicators for normal water level in the photograph, including stain lines on the white PVC pilings next to the skiffs and discoloration on the right creek bank. (T p 280; Resp Exh 8B)

118. Mr. Vaughan returned to Mr. Baxter's property on September 14, 2021 and confirmed the contractor had removed the two pilings placed adjacent to the dock. (T p 281) Mr. Vaughan took two photographs showing the completed pier structure and bulkhead, and that the pilings had been removed. (T p 281; Resp Exh 9A, 9B) Mr. Vaughan observed the water level that day was slightly lower than when he was there on September 9th. He identified field indicators of lower water in the photographs, i.e., a lot more of the bank was exposed and visible shoaling downstream from the dock along the bulkhead. (T p 282; Resp Exh 9A, 9B) These photographs also showed boats tied up at the Willis dock, and Mr. Baxter's boathouse. (*Id.*)

119. On January 5, 2022, Mr. Vaughn visited the Site with Dr. Braxton Davis, Director of DCM, and the legal staff from the DEQ General Counsel's office and the Attorney General's Office. (T p 282) Mr. Vaughan took photographs showing Mr. Baxter's boat tied up to the completed dock. (T p 282; Resp Exh 10) The photograph depicted the water level as higher that day, and was at or even an inch above, normal water level. (T p 282; Resp Exh 10)

120. On January 5, 2022, Mr. Vaughan used a range finder to measure water depths and recorded them in his field notes. (T p 282; Resp Exh 11) Mr. Vaughan measured twenty-nine feet as the width of the creek from normal water level at the new bulkhead. (T pp 286, 288; Resp Exh 11) Mr. Vaughn measured the distance from the far edge of the boat to the far bank as sixteen feet. (T p 287; Resp Exh 11) Because the water level was high, and vegetation was hanging over, he was not able to see exactly where the normal water level was on the opposite bank. (T p 302; Resp Exh 10) The practice used at DCM is to measure width under conditions when vegetation is hanging over, and to shoot to a vegetation line, then estimate knowing the vegetation line is not the actual normal water level because the water level would be further into the vegetation. (T pp 302-03)

121. On January 5, 2022, Mr. Vaughan took water depth measurements around the edges of the pier and the bulkhead, which ranged from one and a half feet to two feet. (T p 286; Resp Exh 11) Mr. Vaughan recorded in his notes that the water was two to four inches high that day. (T p 286; Resp Exh 11) The normal water depth would be around one and a half feet. (T pp 286-87; Resp Exh 11)

122. Mr. Vaughan visited the vicinity of the Site after extreme weather blowout conditions and the water was extremely low everywhere around Pamlico County. (T pp 288, 300) That day, Mr. Vaughan took five photographs at the community boat ramp on Newton Creek at the end of Matthews Road showing Newton Creek in extreme low water conditions. (T p 288; Resp Exh 12A-12E)

123. At hearing, Mr. Vaughn identified and marked normal water level field indicators shown in the five photographs. (T pp 289-98; Resp Exh 12A-12E) The photographs show the water was drawn off the banks, and parts of the creek bottom sediment were exposed and visible. (T pp 289-98; Resp Exh 12A-12E) Mr. Vaughan observed that the width of the remaining water in the creek narrowed as it went upstream toward Mr. Baxter's property. (T p 298; Resp Exh 12E) At the boat ramp that day, Mr. Vaughan observed the bottom of the creek all the way across the creek. (T p 296; Resp Exh 12E) The water was shallow, less than six inches deep. (T p 298; Resp Exh 12D) Mr. Vaughan did not observe a channel and saw that the creek bed was uniform without any change in topography. (T p 298; Resp Exh 12D)

124. On March 7, 2022, Mr. Vaughan and Kelly Spivey visited the Site on Mr. Baxter's property for approximately two hours. Mr. Baxter was present. (T p 299) Mr. Vaughan and Mr. Spivey took measurements of depths and distances, and they re-measured the pier diameters. (T pp 299-300) Mr. Spivey took photographs. (T p 300; Resp Exh 17A–17G)

125. Over the course of nine visits from August 17, 2021 to April 11, 2022, Mr. Vaughan observed that the water level in Newton Creek fluctuates based on weather conditions and wind factors and is not predictable. (T pp 300-01) Most of the time, the water level at the Site has been low with the exception that the water was high on January 5, 2022. (T pp 301-02; Resp Exh 10) During Mr. Vaughan's eight trips to the site from August 17, 2021 to April 11, 2022, he observed Mr. Baxter's boat tied to his dock one time - on January 5, 2022. (T p 301)

126. Mr. Vaughan characterizes Newton Creek as a very shallow non-tidal creek with wind driven tide. (T p 311) The bottom sediment is a very loose. It is not a hard bottom or a shell bottom. Mr. Vaughan has navigated a boat in creeks with the same characteristics as Newton Creek. (T p 311)

127. Based on Mr. Vaughan's his knowledge and experience, and in his expert opinion, a small, shallow draft vessel is needed to navigate up Newton Creek. In any type of low water event, larger vessels would not be able to safely maneuver in Newton Creek. (T p 311) Mr. Vaughan describes larger vessels as any vessel that drafts more than twelve inches. (T p 311) In any extreme wind event, the creek would not be navigable at all, short of a vessel with a surface drive mud motor. (T pp 311-12) At normal water level or slightly lower than normal water level, Mr. Vaughan does not consider it reasonable, short of an extreme emergency, to use a vessel drafting more than twelves inches in Newton Creek. (T p 312)

128. Over the course of Mr. Vaughan's visits to Newton Creek, all the boats he saw were flat bottom skiffs. (T p 312) They have a shallow draft, and the transom height is smaller so the prop does not stick down as far and can use an engine with less horsepower. (T p 312)

129. The weight of a vessel and how much water it displaces and pushes down depends on the type of hull configuration. (T p 312) A flat bottom hull can carry more weight and rides higher in the water. (T pp 312-13) V hull boats ride lower in the water and are designed for rougher water conditions. (T p 313) There are boats that are a blend of the two hull types, like Kevin McBride's Avenger. (T p 313) Kevin McBride's Avenger is designed to go in slightly shallower waters than a deep V hull boat, but it is still not designed to go in shallow water like the flat bottom skiffs Mr. Vaughan saw in Newton Creek. (T p 313)

130. Debris in a water system like Newton Creek obstruct the ability to maneuver any vessel. It is easier to push debris and maneuver it out of the way in a smaller vessel than in a larger vessel. (T pp 313-14)

131. Mr. Vaughan observed the other piers and structures downstream of Mr. Baxter's property. In Mr. Vaughn's expert opinion, Mr. Baxter's pier has no different impact than the other existing structures on Newton Creek. (T p 314) Mr. Vaughan also observed the natural conditions of Newton Creek and in his expert opinion, Mr. Baxter's dock has no greater impact than other naturally occurring conditions of the creek. (T p 314)

132. In creeks like Newton Creek with a loose sediment bottom, the creek bottom shifts over time. Different things can cause creek beds to shift. Boat traffic and continuous use in the same area may alter the bottom if the props churn up the bottom. (T p 315) Based on Mr. Vaughan's multiple visits to Mr. Baxter's property and his observations of Newton Creek, Mr. Vaughan did not see any indication there was a channel in Newton Creek. (T pp 316, 343)

133. In creeks like Newton Creek, there is no way to reliably estimate where the deeper water is without seeing the creek bottom. Determining where to drive a boat is based upon visual inspection of features such as things sticking out of the water, visible substrates, and ripples in the water versus areas of less movement. (T pp 315-16)

134. In Mr. Vaughan's expert opinion, it is not reasonable to expect to be able to take a large boat like Kevin McBride's Avenger through Newton Creek 365 days of the year. (T p 316-17) Water depth restricts use and access to the creek. There are days no vessel of any kind can navigate in Newton Creek. On days with normal conditions and any time there is enough water, even in a low flow event, it is reasonable to expect to navigate in and out of Newton Creek with a small flat bottom skiff or a Jon boat, sixteen, seventeen feet or smaller with a lighter motor. (T p 317)

135. Mr. Vaughan opined that the Commission's quarter width rule at 15A NCAC 07H .1205(p) is independent of, and separate from, the general condition in 15A NCAC

07H .1204(c) which requires no interference with navigation. Not all structures that are consistent with the quarter width rule in 15A NCAC 07H .1205(p) are consistent with general rule in 15A NCAC 07H.1204(c). (T p 340)

136. In Mr. Vaughan's expert opinion, based on his visual observations of the creek, Mr. Baxter's dock does not interfere with navigation in Newton Creek. (T p 317-18) Mr. Vaughan determined Mr. Baxter's pier is consistent with the requirements of the Commission's rules for issuing General Permits. (T p 318) Mr. Baxter's boat stored alongside the dock does not interfere with navigation and does not exceed half of the creek width. (T pp 321, 343)

137. Mr. Vaughan measured the constructed dock and determined it is six feet two inches wide at the upstream end and six feet six inches wide at the downstream end. (T p 352) The constructed dock as measured is still within the Commission's quarter width rule set forth at 15A NCAC 07H .1205(p) and does not interfere with navigation at normal water level in Newton Creek. (T p 352)

Kelly Spivey

138. Kelly Spivey has been the District Manager for DCM's Washington Regional Office since January 2020. He received a Bachelor of Science in Geology from Elizabeth City State University in 1996. (T p 354) Mr. Spivey has been employed with the North Carolina Department of Environmental Quality (and its predecessors) since 1996. He was a field representative for DCM in the Washington Regional Office from 2003 to 2020, a technician for the Division of Land Resources Land Quality Section in the Washington Regional office from 2000 to 2003, and with the Division of Environmental Management from 1996 to 2000. (T pp 354-55)

139. During the time Mr. Spivey has been the District Manager, the area for which he is responsible has changed. The DCM Washington Regional Office is responsible for Washington County, Tyrrell County, Hyde County, Beaufort County, Pamlico County and the north shore of the Neuse River, and Craven County. (T p 357) Mr. Spivey has been responsible for the area where Newton Creek and Mr. Baxter's pier are located since January of 2020. (T p 357-58)

140. Mr. Spivey oversees three DCM field representatives, including Mr. Vaughan. (T pp 356, 359) Mr. Spivey and the DCM field representatives are responsible for enforcing CAMA and the State's Dredge and Fill law. (T p 355) Mr. Spivey is responsible for overseeing operations in the Washington Regional Office and supervising and training the DCM field representatives. (T pp 355-59) Mr. Spivey trained Mr. Vaughan. (T p 359)

141. Mr. Spivey reviews CAMA major permit applications and CAMA General Permits after DCM field representatives issue such Permits to ensure such permits are issued consistently and in accordance with the Commission's rules. (T p 356) Mr. Spivey meets weekly with DCM Director Dr. Braxton Davis, legal counsel for DCM, and the District Managers of the other DCM regional offices to discuss unusual circumstances or

issues that arise to ensure consistency among the four DCM regional offices. (T pp 355-56, 358)

142. Mr. Spivey has extensive experience observing and permitting structures on many small tributaries and creek systems like Newton Creek that are subject to wind tides in the Pamlico, Chowan, Albemarle, and Neuse. (T p 357-59)

143. Mr. Spivey was in the courtroom when Mr. Vaughan testified and heard Mr. Vaughan's testimony. (T p 360) Mr. Spivey agrees with Mr. Vaughan's description of the process for issuing a CAMA General Permit. (T p 360) Mr. Spivey reviewed CAMA General Permit No. 79884 issued to Mr. Baxter for construction of Mr. Baxter's dock. (T p 360)

a. Mr. Spivey agrees with Mr. Vaughan that the Commission's rules in 15A NCAC 07H .1200 *et seq.* describe the requirements for General Permits for the type of structure and permit issued to Mr. Baxter for construction of the dock. (T p 360)

b. Mr. Spivey agrees with Mr. Vaughan that specific conditions in 15A NCAC.07 H. 1205(f), .1205(p), .1205(r) and general condition 15A NCAC 07H .1204(c) were required for the CAMA General Permit issued to Mr. Baxter for construction of the dock. (T pp 360-61)

c. Regardless of which nontechnical term of pier, dock, or platform is used to refer to the structure in CAMA General Permit No. 79884 issued to Mr. Baxter, the same General Permit rules in 15A NCAC 07H .1200 *et seq.* apply. (T p 361)

d. Mr. Spivey reviewed the Baxter permit, visited the Site, and agreed with Mr. Vaughan that the General Permit for Mr. Baxter's pier is consistent with the Commission's General Permit rules for docks and piers. (T pp 360-63)

144. After Respondent issued the subject permit, Mr. Vaughan informed Mr. Spivey that he had received a complaint that Mr. Baxter's dock interfered with navigation. After talking with Mr. Vaughan, Mr. Spivey spoke to Kevin McBride, advising Mr. McBride that DCM had issued a General Permit to Mr. Baxter to construct a dock on the Site. The first email correspondence Mr. Spivey received from Kevin McBride was on September 9, 2021 3:08 AM. (T p 365; Resp Exh 14)

145. After speaking with Kevin McBride, Mr. Spivey sent an email to Dr. Braxton Davis, his supervisor, on September 9, 2021, informing him that DCM had issued a General Permit for construction of Mr. Baxter's dock, and that he had also received a complaint from a non-adjacent riparian property owner with concerns about navigation. Mr. Spivey attached the pictures Kevin McBride had sent and included Kevin McBride's September 9, 2021 email, in his email to Dr. Davis. (T p 366; Resp Exh 15) Mr. Spivey's general practice is to inform Dr. Davis when DCM receives a complaint. (T p 366)

146. The same day, Mr. Spivey informed Kevin McBride that he would contact Mr. McBride after Mr. Vaughan visited the Site and DCM staff had discussed the issue. (T p 365; Resp Exh 14)

147. On September 10, 2021, Mr. Spivey received a second email from Kevin McBride. (T p 366; Rep Exh 14) In that email, Kevin McBride stated he was not concerned about Mr. Baxter's small flat bottom boat. Instead, given there are two pilings next to Baxter's dock, Mr. McBride was concerned Mr. Baxter may tie up larger boats to his dock and that may create an issue. (Resp Exh 14)

148. Two pictures of the Site taken by Mr. Vaughan on September 14, 2021 show the two pilings Mr. McBride reference had been removed. (Resp Exh. 9A, 9B)

149. After Mr. Spivey speaking with Mr. Baxter regarding that the structure exceedance of the permitted width, and legal counsel to determine the best course of action, Mr. Spivey emailed Mr. Baxter on October 1, 2021. (T p 368) Mr. Spivey informed Mr. Baxter that DCM would delay any compliance action for the portion of the platform that exceeds the six-foot permitted distance until after the contested case hearing process. (T p 368; Resp Exh 32) In this situation, where the structure exceeds the six-foot permitted width, a structure would be either brought into compliance with the permit or the permit would be modified and issued following notification to adjoining riparian property owners. (T pp 368-69) It is also possible for DCM to take enforcement action including a fine but that would not necessarily require the structure be removed. (T p 369)

150. On March 7, 2022, Mr. Spivey and Mr. Vaughn visited the Site to take additional pictures and measurements. (T p 370; Resp Exh 18, 18A, 17A-G) They were at the Site for approximately two hours, along with Mr. Baxter. (T p 370) Mr. Spivey used a laser range finder to take distance measurements. In Mr. Spivey's experience, distance measurements are most accurate when the normal water level is clearly visible on both sides of the water body. (T p 415)

a. On March 7, 2022, the water was low, and the face of the coastal wetland substrate and the normal water level was visible. (T pp 373-75, 415; Resp Exh 17A-17G) The coastal wetland substrate is where the wetland stems emerge from the soil, and it is a field indicator for the normal water level. (T pp 373-74, 404)

b. Standing on the pier looking downstream, the bottom of the creek along the bulkhead was exposed with vegetative debris sticking up out of the water, as shown by the photograph. (T p 387-88; Resp Exh 17C) Mr. Spivey took each of his distance measurements to the visible normal water level line on the opposite side of Newton Creek. (T pp 373, 380, 386, 415)

151. Mr. Spivey recorded the measurements in a diagram in his field notes and noted the locations of the new bulkhead, the dock, and a basin with boat rails (T p 370; Resp Exh 18, 18A) Mr. Spivey's photos from the site visit show the points where he took the distance measurements and the points where he took the depth measurements. (T pp 372, 374-75, 386; Resp Exh 17A, 17B, 17C)

a. At the upstream end of Mr. Baxter's property, at the end of the bulkhead, the distance from the face of the bulkhead across to the coastal wetlands' substrate on the opposite side of the creek was 10 yards. (T pp 372-75; Resp Exh 18, 18A, 17A, 17B)

b. Immediately upstream of the pier and immediately downstream of the pier, the distance from the face of the bulkhead across to the coastal wetlands' substrate on the opposite side of the creek was 11 yards. (T p 378-79, 385; Resp Exh 18, 18A, 17A)

c. The distance from the waterward edge of the pier across to the coastal wetlands' substrate on the opposite side of the creek was 9 yards. The distances at the upstream waterward corner of the pier, at the middle of the waterward edge of the pier, and at the downstream waterward corner of the pier were also 9 yards. (T pp 380-84, 406; Resp Exh 18, 18A, 17A)

d. On the bulkhead downstream at the turn back towards the basin, the distance from the face of the bulkhead across to the coastal wetlands' substrate on the opposite side of the creek was 9 yards. (T pp 386-87; Resp Exh 18, 18A, 17C)

152. Mr. Spivey was able to see the bottom of the creek on March 7, 2022. (T p 377) He observed the creek bottom was uniform across the width of the creek. Mr. Spivey did not see any channel in the creek. (T p 378)

153. Mr. Spivey used a small PVC pipe marked with electrical tape at one-foot intervals to take depth measurements at the waterward end of the platform and recorded them in his filed notes. (T pp 391-92; Resp Exh 18) The water depth at the point in the middle of the waterward end of Mr. Baxter's pier was one foot, two inches. (T pp 392-93, 414; Resp Exh 18, 17A) Mr. Spivey noted that the water level was approximately one foot low that day. (T p 392; Resp Exh 18) At Mr. Baxter's downstream property line with the Tippet property, staining on the white PVC post in the water and exposed barnacles on a piling of the Tippet dock indicated the water level was approximately one foot below normal water level. (T pp 389-90; Resp Exh 17G) Mr. Spivey opined that the normal water level depth at this point would be approximately two feet, based on his depth measurement and his visual estimation of how much below normal water level the water was that day. (T p 394)

154. Mr. Spivey and Mr. Vaughan measured the width of Mr. Baxter's small flat bottom skiff on the trailer. (T p 395; Resp Exh 18) The boat measured 76 inches in width. (T p 396; Resp Exh 18) Mr. Spivey did not ask Mr. Baxter to put his boat in the water that day because the water was at a low level, and he did not want Mr. Baxter to damage his boat or the motor. (T pp 388-89, 395)

155. On March 7, 2022, Mr. Spivey also took a photograph at the community boat ramp on Matthews Road showing the creek level, the creek bottom, the existing boat

ramp, and the launch pier with a parallel dock beside the ramp. (T p 397; Resp Exh 13) Mr. Spivey opined that the water level was low. (T p 397) The photograph showed the creek bottom was visible, there was staining on the boat ramp, and a rack line, also known as a trash line, on the boat ramp left by a higher normal water level. (T p 397; Resp Exh 13)

156. During the Site visit before the April 11, 2022 hearing, Mr. Spivey observed that the water was below normal water level. At the property line of Mr. Baxter's property and the Tippet property, Mr. Spivey saw exposed barnacles on the existing piling of the Tippet dock. Based on the exposed barnacles, Mr. Spivey estimated that the water was at least six inches lower than the normal water level, but it was not as low as when he visited the site on March 7, 2022. Mr. Spivey could see the creek bottom on April 11, 2022, but he did not see a channel. (T p 398)

157. Mr. Spivey has experience boating recreationally, and he currently has a 19-foot flat-bottom boat. He boats recreationally in the Pamlico River and the creeks in the area. The Pamlico River is a wind-driven system like Newton Creek. Mr. Spivey will take his flat-bottom boat in the Pamlico River system. Once he can see the bottom, he looks for a way to turn the boat around. (T p 399)

158. After reviewing the CAMA permit, and visiting the site, Mr. Spivey determined the pier does not interfere with navigation. (T p 400) Mr. Spivey's opinion was that the limiting factor for navigation in Newton Creek is the natural wind driven tides which lower the water level in the creek. (T p 400)

159. A General Permit issued pursuant to the Commission's rules at 15A NCAC 07H .1200 *et seq.* is a permit for the structure being built. (T pp 416-17) The general condition described in 15A NCAC 07H .1204(c) addresses interference with navigation and focuses on whether the structure being permitted will interfere with navigation. (T p 417) If the individual requesting the permit indicates what type of vessel will be docked at a structure, DCM takes that into consideration. (T pp 417-18)

160. The issue whether Mr. Baxter's use of the permitted structure to park his boat interferes with or obstructs navigation is a law enforcement issue enforced by NC Wildlife officers, not a permitting issue to be addressed by DCM. (T pp 151-50, 418; Resp Exh 49)

161. Based on his knowledge, experience, skill, and training, Dr. Braxton Davis, Director of the North Carolina Division of Coastal Management ("Director" or "Dr"), was qualified as an expert in coastal management including the North Carolina Coastal Management program under CAMA and the North Carolina Coastal Resources Commission's rules implementing that program. (T p 424)

162. Dr. Davis has been the Director of the North Carolina Division of Coastal Management since 2011. (T p 422) He has a Bachelor of Arts degree in environmental sciences from the University of Virginia, a master's degree in biological sciences from

Florida International University, and a Ph.D. in marine affairs, with a focus in coastal management policy, from the University of Rhode Island in 2003. (T p 422)

163. Dr. Davis has a great deal of experience in coastal issues, management, and policy,including experience handling user conflicts. This experience includes serving as the Director of the North Carolina's Division of Marine Fisheries, the Director of the Policy, and Planning Division with the South Carolina Coastal Management Program from 2006 to 2011, and as a policy analyst with the National Oceanic and Atmospheric Administration. Dr.Davis' prior experience and education is summarized in Respondent's Exhibit 19.

164. Dr. Davis' professional life has focused on coastal issues including coastal management. For the last approximately 25 years, he has worked with nonprofit organizations, in academia, and for state and federal agencies on coastal issues. (T p 423) Based on his knowledge, skill, experience, and training, the Tribunal also accepted Dr. Davis as an expert under Rule 702 in boating and navigating boats in coastal North Carolina. (T pp 426-27)

165. Dr. Davis is approaching 30 years of boating experience. (T p 424) He started boating in college and trained in navigation and seamanship on a 125-foot schooner. (T p 424). Dr. Davis has experience with a wide variety of vessels including private personal vessels. He has owned sailboats, powerboats–including 25-foot and 21-foot powerboats, and he currently owns a variety of smaller watercraft including paddleboards, kayaks, and micro skiffs that are a combination of outboard and paddling. (T pp 424-25)

166. Dr. Davis has taken courses in navigation, seamanship, and the Coast Guard auxiliary course. (T p 425) He was trained by the National Park Service as a motorboat operator instructor, and he obtained a captain's license from the United States Coast Guard but has allowed it to expire. (T p 425)

167. Dr. Davis has navigated vessels in South Carolina, Florida, the Bahamas, and in North Carolina, where he mainly navigates around Carteret County, Cape Lookout National Seashore, and the surrounding waters of Carteret County. (T pp 424, 426) Dr. Davis has spent a considerable amount of time navigating in intertidal creeks that are affected by wind, low pressure, flooding, and other factors. (T p 426)

168. The North Carolina Coastal Management program is a regulatory and planning program for the twenty coastal counties of North Carolina. (T p 428) As Director of DCM, Dr. Davis is involved in and provides oversight for all aspects of this program. (T pp 427-28)

169. The DCM program includes permitting for different types of development ranging from federal activities in offshore waters, energy, and gas exploration issues, to oceanfront construction, setbacks, and shoreline development, to anything happening in the water. DCM does direct permit issuance for shoreline structures, including docks,

piers, bulkheads, and boat ramps. DCM is also involved in commenting on shellfish leases. (T p 428)

170. DCM also has responsibility for a wide variety of non-regulatory programs including working with local governments in land use planning, coastal hazards, resilience planning, and managing more than 44,000 acres of property under the North Carolina Coastal Reserve Program for state and federal sites for protection, research, and education activities. (T p 428)

171. As Director, Dr. Davis has experience handling conflicts between users over public trust resources. When considering user conflicts under the federal Coastal Zone Management Act and CAMA, he balances economic development, environmental protection, and use conflicts in many different scenarios. (T pp 428-29)

172. DCM is also a hub for other agencies to comment and weigh in on projects with overlapping issues and different concerns including cultural resources, environmental, and navigation. DCM is the agency responsible for making the final balancing act decision. (T p 429) DCM handles user conflicts, ranging from concerns about views, or impacts to navigation, to access to property, all the time. (T p 429)

173. The user conflict at issue here is a very routine type of conflict that DCM handles on a weekly basis concerning navigation impacts and the use of public trust resources in estuarine waters and other different scenarios along the coast of North Carolina. (T pp 429-30) In determining whether the proposed activity impacts or interferes with navigation, DCM evaluates each proposed activity on a case-by-case basis. Where possible, DCM works to find a solution that satisfies everyone. (T p 430)

174. Dr. Davis is generally aware of the limited influence of lunar tides in the sounds, the relative importance of wind tides, and the predominance of wind in affecting water levels in the northern stretches of our coast and sounds. He also talked to Kent Vaughan and Kelly Spivey about what they observed on the Site. (T p 430)

175. Dr. Davis opined that any structure constructed in coastal waters will have an impact on navigation. (T p 430) If all impacts to navigation were restricted, there would not be any docks and piers in navigable waters of the state. (T p 442) In considering whether the proposed development will interfere with navigation, DCM considers the type of boats that can reasonably be expected to navigate in a body of water. (T pp 445-46) DCM must balance whether the riparian owner's right to pier out to public trust waters is reasonable, whether there is space to navigate past the structure in the public trust waters, and whether there is interference with navigation. (T pp 430-31)

176. The CRC has delegated authority to its staff at DCM to approve permits. (T p 431) DCM currently issues over 3,000 General Permits a year, the majority are for docks, piers, and bulkheads. (T p 431) General Permits are used for routine projects where the different commenting agencies at the federal level and the state level with an interest have already considered possible impacts and determined what is permittable. (T p 432) General Permits can be expedited because the other agencies have signed off

in advance if the proposed development is consistent with certain requirements. (T pp 432, 444) DCM does not require licensed surveys or detailed drawings for General Permits. (T p 444) General Permits can be done with less refined drawings and measurements. (T p 444) Water depth measurements are not required for all pier and docking facility General Permits. When water depths are taken, they are not required to be survey grade. (T p 443)

177. DCM also issues minor permits and major permits. Minor permits are for upland development not in the water and are typically processed by local governments. On average the program issues 800 minor permits per year with approximately 200 of those issued directly by DCM staff. Major permits are for large scale projects that do not meet the pre-existing standards for General Permits. Major permits require case-by-case review by either federal agencies or other state agencies. DCM processes an average of 175 major permits per year. (T p 432)

178. Dr. Davis directly oversees and supervises the district managers and the major projects coordinator. The district managers and Dr. Davis have weekly meetings and discuss anything that might be controversial, complicated, or unique, including cases that raise rule interpretation questions, site specific scenarios, cases where parties have objected, or where another agency has raised a concern that needs to be discussed. Dr. Davis routinely reviews issues relating to General Permits during the district manager meetings. (T p 433)

179. When DCM receives an objection after issuing a permit, Dr. Davis and the district managers review the objection and try to resolve it. (T pp 434-35) When that is not successful, DCM directs the objecting party to the third-party appeal process. (T p 435)

180. Dr. Davis first became involved with the CAMA General Permit for Mr. Baxter's dock when he received an email from Mr. Spivey forwarding concerns raised by Mr. Kevin McBride about the CAMA permit that had already been issued. (T p 434; Resp Exh 15). Dr. Davis advised Mr. Spivey to direct Mr. McBride to the third-party appeal process. (T p 435)

181. On January 5, 2022, Dr. Davis visited the Site with legal counsel from the DEQ's General Counsel's office and the Attorney General's Office, Kent Vaughan, and Mr. Baxter. (T p 435) It was a rainy day.

182. Dr. Davis walked on Baxter's dock and could see the bottom all the way across Newton Creek. The creek bottom was typical organic material with various detritus. (T p 436) Dr. Davis observed shoaling south of the dock along the bulkhead and in and around the boat basin. (T p 437) Mr. Baxter's boat was tied to the dock. (Resp Exh 10) Dr. Davis observed that the Willis dock, south of Mr. Baxter's dock, had a vessel tied up which looked generally to leave the same amount of room for navigation in the creek. (T pp 436-47)

183. Because the Site is not a primary nursery area, it was not necessary, under the Commission's rules, to measure the depth of Newton Creek for the General Permit. (T pp 443-44) Because Kent Vaughan could see the creek bottom during his site visit when he issued the CAMA permit, water depths were not necessary to determine the reasonable use of the creek. (T pp 444-45)

184. Based on his Site inspection and review of the CAMA permit conditions, Dr. Davis determined Mr. Baxter's permit was issued in compliance with CAMA and the Commission's rules and that there was nothing about the permitted dock that conflicted the Commission's General Permit requirements. (T pp 437-48)

185. At hearing, Dr. Davis agreed with Mr. Vaughan's testimony describing the General Permit rules. (T p 438). Dr. Davis agreed that the question on navigation is two parts. 15A NCAC 07H .1205(p) requires that the permitted dock not exceed one-quarter width of the creek. 15A NCAC 07H .1204(c) requires that the permitted dock not interfere with navigation even if the dock complies with the quarter width rule. (T p 438) Dr. Davis determined that in this case, the permitted dock does not exceed one-quarter of the width of the creek and does not interfere with navigation. (T p 438)

186. Dr. Davis reviewed Mr. Lyons' survey of Newton Creek at the location of the permitted dock. (T p 441; Resp Exh 44) Looking at the survey itself, Dr. Davis did not see a sustained deep-water channel running along the dock and noted that the upstream transect shows depths that are less than the deeper spot at the dock. (T p 441) Dr. Davis reviewed all the elevation points that Mr. Lyons collected in Newton Creek on November 28, 2021, noting the elevations reflect very small variations. (T pp 441, 446) He noted that the elevation points do not clearly indicate how far across the width of creek measurements were taken. (T pp 446-47) The water depths upstream of the permitted dock are shallower than some of the water points indicated around the dock, consistent with Dr. Davis' visual observations at the site. (T p 446) Dr. Davis did not see a discernable channel in the minor variations in depth reflected by Mr. Lyons' survey. (T p 447)

187. During his January 5, 2022 visit to the Site, Dr. Davis did not observe any channel in Newton Creek–that is a deeper area that goes from one location to another and is clearly defined. (T p 440) Dr. Davis did not see a discernable channel in the data Mr. Lyons collected and he did not see a discernable channel visually at the site. (T p 441) Dr. Davis reviews channels frequently for dredging projects, reviews high-resolution surveys of channels on a regular basis, and he also frequently navigates in shallow areas. (T p 440) Deep portions of water are often visible by color, and channels are visible in many cases. Dr. Davis has also identified channels in water bodies on Google Earth when there is a difference in color. (T p 441)

188. Dr. Davis credibly testified that Newton Creek is public trust waters, open to the public to go up and down the full stretch of the creek with any kind of boat that reasonably can navigate in the creek without doing resource damage. (T p 445) The reasonable expectation of use in Newton Creek is to navigate with shallow-draft vessels,

such as a small skiff or Jon boat size vessel. (T pp 445, 447) It is not reasonable to expect to take a V hull, deeper draft boat into a small shallow creek like Newton Creek. (T p 445)

189. Dr. Davis determined there is plenty of width available for a reasonable, suitable vessel to navigate by the permitted dock. (T p 445) A user of public trust waters with a deep drafted boat that is too big for the shallow creek may want to find every possible inch, but the extra few inches here and there do not constitute a channel that would restrict other users from being able to have a pier. (T p 441)

190. DCM assesses permit applications using the normal water level. (T p 447) When DCM considers whether a proposed development will interfere with navigation as proscribed by the Commission's rules, DCM considers the size and type of boats that can reasonably expect to navigate in the body of water at normal water level. (T pp 445-47)

191. Dr. Davis determined that the General Permit issued to Mr. Baxter for the dock is consistent with the Commission's rules. (T p 447) Dr. Davis concluded there was no interference with navigation with, or without, Mr. Baxter's boat tied alongside the dock. (T p 448) The long side of the dock is considered a slip under the General Permit rules, and the slip is consistent with the Commission's rules at 15A NCAC 07H .1205(r). (T pp 448-49) In addition, Respondent considered the size of Mr. Baxter's boat when issuing the subject permit. (T p 448).

192. Dr. Davis reviewed the photograph and movie of Kevin McBride navigating upstream past the permitted dock with Mr. Baxter's boat tied to the dock. (T pp 449-50; Resp Exh 28, 33) In Dr. Davis' opinion, the photographic and the video evidence show that Kevin McBride was able to navigate without interference past the dock while Mr. Baxter's boat tied alongside. (T p 451; Resp Exh 28, 33) Dr. Davis credibly testified that even though Kevin McBride drove his Avenger in Newton Creek does not make navigating with the larger vessel a reasonable use of the creek. (T pp 450-51) In Dr. Davis' opinion, the photograph and video evidence confirm his conclusion that the permitted dock does not interfere with navigation in the creek. (T p 451)

193. Dr. Davis credibly opined that because Mr. Spivey took measurements when the creek was low, he was able to shoot more accurately under the overhanging coastal wetlands, resulting in a wider dimension of the creek at the pier location that is greater than the measurement included on the permit. The permit was issued using a narrower measurement and even then, the permitted dock met the one-quarter width requirement. Using the wider measurement, the allowable one-quarter width would be larger. (T p 453)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels. *Charlotte v. Heath,* 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington,* 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. All parties have been correctly designated, and there is no question as to misjoinderor non-joinder.

Burden of Proof

4. N.C. Gen. Stat. § 150B-25.1(a) requires that Petitioner has the burden of proving by a preponderance of evidence that Respondent agency deprived Petitioner of property and/or substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule, in violation of N.C. Gen. Stat. § 150B-23(a), when it issued CAMA General Permit No. 79884B.

Statutes At Issue

5. The Coastal Area Management Act provides a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina. N.C.G.S. § 113A-102(a). The goals of this plan include insuring "the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation." N.C.G.S. § 113A-102(b)(3).

6. Under CAMA, the Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider the size and impact of the proposed development, how often this type of development is conducted, and the need for oversight and public review. N.C.G.S. § 113A-118.1.

7. The Commission's General Permit for construction of pier and docking facilities in estuarine and public waters and ocean hazards areas is set forth at 15A NCAC 07H .1200 et seq.

8. Under 15A NCAC 07H .1202 Approval Procedures, the DCM shall "determine . . . if the proposed project can be approved by a General Permit." Any proposed development permitted through the General Permit process must met the General and Specific Conditions established by the Commission in its rules. *See* 15A NCAC 07H .1204 and .1205.

9. The Commission's General Conditions for a General Permit for a dock or pier require, among other things, that "Piers and docking facilities shall provide docking space for no more than two boats" and that "[t]here shall be no interference with navigation or use of the waters by the public through the existence of piers and docking facilities." 15A NCAC 07H .1204 (a) & (c).

10. The Commission's Specific Conditions for a General Permit for a dock or pier require, among other things, that "[t]he maximum size of any individual component of the docking facility authorized by this General Permit shall not exceed 400 square feet," that "piers and docking facilities shall in no case extend more than 1/4 the width of a natural water body" with the measurement "made from the waterward edge of any coastal wetland vegetation which borders the water body," and "shall provide docking space for no more than two boats." 15A NCAC 07H .1205 (f), (p), and (r).

11. N.C.G.S. § 77-12 established that "If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a Class 1 misdemeanor."

12. Similarly, N.C.G.S. § 77-13 provides:

> If any person, firm, or corporation shall fell any tree, or put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, stream, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, or whereby the navigation of such stream may be impeded, delayed, or prevented, the person, firm, or corporation so offending shall be guilty of a Class 2 misdemeanor.

13. While Petitioner voiced concerns in his pre-hearing statement as to whether the permitted dock interfered with navigation in violation of the Commission's rules, he failed to present any physical, photographic, or scientific evidence to support this claim.

14. However, neither Petitioner nor his son Kevin McBride testified at the hearing. Petitioner called two fact witnesses to testify regarding navigation in Newton Creek. However, neither witness provided testimony that the permitted dock interfered with navigation. Specifically, Waylon Crocker has not been in a boat on Newton Creek since 2019. (T p 41) Because the permit at issue here was not issued until 2021, Mr. Crocker's testimony is not relevant to the question of whether the permitted dock interferes with navigation on Newton Creek.

15. Taren Lee has ridden on a boat that has navigated on Newton Creek; however, the last time she did so was in 2021. Ms. Lee did not identify any instances, during those boat rides, when the boat was unable to navigate on Newton Creek because of Mr. Baxter's permitted pier. In fact, during two boat rides, Ms. Lee observed boats at the Willis oyster dock were not properly tied up and drifted into the stream. On those occasions, Ms. Lee explained that they simply pushed the drifting boats out of the way. This testimony fails to carry Petitioner's burden to show the issuance of the permit was improper

16. The exhibits admitted into evidence clearly reflect that even when Mr. Baxter's boat was tied up at the dock, the permitted dock does not interfere with navigation on Newton Creek. See Resp Exh 29 and 33. Petitioner's son, Kevin McBride, concedes that he is not concerned about Mr. Baxter's small flat bottom boat; rather, his concern is

that two pilings set next to Mr. Baxter's dock may be used to tie up larger boats and *may* create an issue. (Resp Exh 14) This concern was eliminated when the two unauthorized pilings were removed. (Resp Exh. 9A, 9B)

17. Professional Surveyor Comer Lyons, L.S., P.E. took elevation points in Newton Creek along the bulkhead on Mr. Baxter's property. (T p 88; Resp Exh 44) Mr. Lyons did not survey the characteristics of the creek, did not have any information regarding the creek at any time other than the date he surveyed, and did not know what the CAMA's requirements are for issuing a permit. (T pp 79-80, 83, 107-08, 110) Furthermore, Mr. Lyons did not survey from one side of the creek to the other at the Site. (T p 98) Mr. Lyons conducted his survey from a boat and the evidence reflects that the permitted dock did not interfere with navigation on Newton Creek on the day of the survey. (T p 95) For these reasons, the elevation points recorded by Mr. Lyons were accurately reflected the elevations in Newton Creek on the date of Lyons' survey.

18. Mr. Lyons' testimony regarding the navigability of the creek or whether the permitted dock interferes with navigation in Newton Creek was beyond the scope of his expertise and not based on the evidence.

19. Respondent presented evidence that before Respondent issued CAMA General Permit No. 79884B, DCM field representative Kent Vaughan conducted a Site inspection, reviewed the proposed dock, and determined that the proposed dock met all the requirements for issuance of a CAMA General Permit. DCM district manager Kelly Spivey and DCM Director Dr. Braxton Davis also reviewed and confirmed that the CAMA General Permit No. 79884B met the requirements for a CAMA General Permit.

20. Dr. Braxton Davis credibly opined that assuming a skiff, such as Mr. Baxter's boat, is tied to the permitted dock, based on Respondent DCM's interpretation of what is a reasonable vessel to use in Newton Creek, there is no interference with navigation in Newton Creek caused by the permitted dock.

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

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

> [I]t is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers 'so [ ] long as the agency's interpretation is reasonable and based on a permissible construction of the statute.'

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

23. The phrase "interference with navigation" is not defined by statute or rule. The preponderance of the evidence presented at hearing proves that Respondent's interpretation of the phrase "interference with navigation" is reasonable, consistent with, and supported by the plain language of the rules and statutory framework. Therefore, the Undersigned defers to DCM's application of the language in the Commission's rule in determining the validity of Petitioner's claims in this case. Furthermore, even in the absence of deference, the undersigned independently adopts DCM's interpretation of this standard.

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

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

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

27. N.C. Gen. Stat. § 150B-34(a) requires that an Administrative Law Judge "shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

28. In this contested case, Petitioner challenged DCM's determination that the permitted dock and its intended use, to include tying up a skiff, is compatible with individual rights to use the public trust creek. To the extent Petitioner contends that DCM acted arbitrarily and capriciously in its evaluation of the General Permit application, Petitioner has failed to establish by the preponderance of the evidence that DCM acted "whimsically" or in "bad faith."

29. To succeed on his claims, Petitioner is required to prove by a preponderance of the evidence that an allegedly unlawful agency action "substantially prejudiced the petitioner's rights" to reasonable use of the creek. See N.C. Gen. Stat. §§ 150B-23(a), 150B-29(a).

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

31. Petitioner failed to establish by the preponderance of the evidence that Respondent's issuance of the CAMA General Permit No. 79884B would substantially prejudice (1) Petitioner's use of the creek; or (2) interfere with navigation in the creek around the permitted pier. Further, Petitioner failed to present persuasive evidence that his reasonable use of the creek would be prevented or adversely impacted by the permitted pier.

32. Petitioner failed to prove by a preponderance of the evidence that Respondent substantially prejudiced Petitioner's rights, exceeded Respondent's authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. Instead, the preponderance of the evidence showed that Respondent fairly and carefully considered the facts surrounding issuance of the CAMA General Permit No. 79884B and applied the applicable law and rules regarding the General Permit as required by law.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **AFFIRMS** Respondent DCM's decision to issue CAMA General Permit No. 79884B to Richard Baxter for the development of a six-foot by sixteen-foot pier at 217 Matthews Road, Bayboro, North Carolina.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**.

In conformity with 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. §

150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated to ensure the timely filing of the record.

SO ORDERED, this the 8th day of August, 2022.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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This the 8th day of August, 2022.

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