

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 5826

PAUL & ELIZABETH WINCHELL,  
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENTAL QUALITY<sup>1</sup>  
DIVISION OF COASTAL MANAGEMENT,  
Respondent,

and

ELIZABETH LETENDRE,  
Respondent-Intervenor.

**FINAL DECISION**

The above captioned matter was heard on December 14-15, 2015 at the Dare County Courthouse, Manteo, North Carolina before the Honorable Julian Mann, III, Chief Administrative Law Judge. The contested case petition challenged the July 9, 2015 decision of the Division of Coastal Management (DCM) to issue a minor modification to Coastal Area Management Act (CAMA) Major Development Permit No. 25-14, authorizing the development of a woodchip dune crossover at 1441 Ocean Pearl Road in the off-road area of Corolla, North Carolina (the Site). The Site is owned by Elizabeth Letendre. On May 5, 2016 the undersigned issued an "Interim Order and Stay." The terms of that Order are incorporated herein by reference.

**APPEARANCES**

For Petitioners Paul & Elizabeth Winchell:

Paul Winchell, Pro-se  
211 Moore Street  
Beaufort, NC 28516

For Respondent DEQ- DCM:

Christine A. Goebel, Asst. AG  
North Carolina Department of Justice  
114 West Edenton Street  
Raleigh, NC 27602

For Intervenor-Respondent Letendre:

Gregory E. Wills, Esq.  
Gregory E. Wills, P.C.  
6541 Caratoke Highway  
Grandy, NC 27939

<sup>1</sup> Effective September 18, 2015, the North Carolina Department of Environment and Natural Resources was renamed the North Carolina Department of Environmental Quality. Pursuant to Rule 25(f)(1) of the North Carolina Rules of Civil Procedure, DEQ is automatically substituted as party.

## **ISSUES**

Did Respondent deprive Petitioners of property, and act erroneously in issuing the July 9, 2015 minor modification to CAMA Major Permit No. 25-14, as alleged in Petitioners' Petition for a Contested Case?

Specifically, it is stipulated by the parties in the Prehearing Order, signed December 14, 2015, that the issues to be decided are:

(1) Whether the proposed location of the crossover will negatively impact the primary dune sand and vegetation which stabilizes the dune, including whether the design and construction will result in a negligible or significant alteration on the primary dune and whether the proposed accessway will diminish the dune's capacity;

(2) Whether the proposed development will require relocating, grading and cutting the primary dune and thereby significantly impact the integrity of the primary dune; and,

(3) Whether the proposed development meets a public purpose or need that cannot otherwise be met.

## **TESTIFYING WITNESSES**

The following witnesses testified in this contested case hearing:

Witness for Petitioners:

1. Paul Winchell, Petitioner

Witnesses for Respondent and Respondent-Intervenor:

1. Ronald Renaldi, DCM Field Representative, Elizabeth City
2. George Wood, Consultant for Respondent-Intervenor
3. Frank A. Jennings, III, DCM District Manager, Elizabeth City

## EXHIBITS

The parties, as part of the Prehearing Order, stipulated and agreed that each of the stipulated exhibits are a genuine, true and correct copy of the original, are relevant and may be received into evidence without further identification or proof. The exhibits are identified as follows:

1. Minor Modification to CAMA Permit 25-14 dated July 9, 2015,
2. General Warranty Deed (Bk 1198, pg 290-292) for Permittee Letendre,
3. Plat map dated July 7, 1978 and tax card for Permittee Letendre,
4. General Warranty Deed (Bk 491, pg 84-85) for Petitioner Winchell,
5. May 8, 2015 letter to DCM from George Wood requesting refinement of Permit 25-14 and enclosed attachments including a plan for the proposed dune crossover,
6. May 21, 2015 Memo to Daniel Govoni from Ron Renaldi re: Request for Modification
7. U.S. Postal Service, Certified Mail Receipt dated April 20, 2015 providing notice to adjacent riparian landowners and tracking information,
8. May 13, 2015 objection from Paul Winchell to proposed modification of Permit 25-14,
9. Third-Party Hearing Request Petition dated July 21, 2015 including 1 page attachment and email from Petitioners forwarding Petition,
10. July 21, 2015 ltr to Permittee Letendre from B. Davis re: request for third party hearing
11. August 3, 2015 Final Agency Decision of the CRC granting the Winchell 3rd Party Hearing Request, with cover letter

The parties, as part of the Prehearing Order, stipulated and agreed that each of the exhibits identified below is a genuine, true and correct copy of the original. The following exhibits have been received into evidence.

### Petitioner's admitted exhibits as limited, noted in the record (T pp. 31-144)

1. Final Decision Coastal Resources Commission, dated Aug. 3, 2015
2. Currituck County GIS Online Mapping
3. Division of Coastal Management, Field Investigation Report, dated July 17, 2013
4. NCDENR Memorandum, dated July 18, 2013
5. NCDENR Memorandum, dated July 19, 2013
6. Environmental Professionals May 8, 2015 letter and scaled attachment
7. NCDENR Modification Memorandum dated May 21, 2015
8. Minor Modification permit dated, July 9, 2015
9. Major Development Permit, with attachments dated March 17, 2014
10. Various Photographs of subject property
11. Calculations
12. Drawings (minus page 12-1) (T pp. 145-46)
13. E-mail from Kyle Barnes at USACE dated November 9, 2015
14. CAMA Minor Development permit dated December 22, 2000
15. Email to Mary Lucasse dated July 27, 2015 (minus page 15-1) (T pp. 145-46)
16. Site Plans of subject property- sheet 2 and 3 of 4 dated 11, 28 2013

Respondent's admitted exhibits:

6. CAMA Minor Permit issued to Winchell in 2000 (T p. 276) Same as P's Ex. 14
7. DCM Field Report by Ron Renaldi for original permit, dated 7/3/13 (T pp. 164, 304)
12. CAMA Minor Permit November 22, 2002 to the Longs for a Hatteras Ramp (T p. 304)
15. A-E- Five Site photos of the Long's Driveway (T pp. 177, 304)
16. A-C- Three Site photos of the ramp north of the Site (T pp. 179, 304)
17. A, D, E, F, G, H, I- Seven Site photos (T pp. 171-73, 304)
18. A copy of 15A NCAC 7H .0300 et seq. (T p. 304)

Respondent-Intervenor's admitted exhibits:

1. GIS photograph marked up by George Wood (T p. 236-43, 302)
2. GIS photograph marked up by George Wood (T p. 236-43, 302)

**SITE VISIT**

Pursuant to the November 25, 2015 written motion and the November 23, 2015 oral motion of Respondent, and considering the November 26, 2015 reply of Petitioner, and following the December 7, 2015 notice for a hearing on the Motion, the undersigned granted Respondent's Motion for a Site Visit orally at the beginning of the hearing on December 14, 2015. (T pp. 7-14) This was followed with a Proposed Order sent to the undersigned on December 17, 2015. The Order was signed and filed on December 18, 2015. The Site Visit was held on the afternoon of December 15, 2015 with the undersigned along with Ms. Goebel, Mr. Renaldi and Mr. Jennings present for the Respondent, and Mr. Wills and Mr. Mancuso present for the Intervenor-Respondent. Petitioners chose not to be present at the site visit. (T pp. 12-14)

**PREHEARING ORDER**

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-hearing conference was held on December 14, 2015. Paul and Elizabeth Winchell appeared pro-se as Petitioners, Christine A. Goebel, Asst. Attorney General appeared for Respondent, and Greg Wills, Esq. appeared for Respondent-Intervenor. At that time, Judge Mann signed and approved for filing, the final Prehearing Order. (T pp. 6-7)

**MOTION FOR A DIRECTED VERDICT**

At the close of Petitioners' case, Respondent, joined by Respondent-Intervenor, moved the court for a directed verdict pursuant to Rule 50. (T pp. 147-55) This motion was based on Petitioners failure to show that the permit issuance would deprive Petitioners of property, would cost them an undetermined amount of money, and that DCM acted erroneously in issuing the permit. (T pp. 147-50) Petitioner responded that it is his belief the dune will be compromised by the proposed accessway because it is located at the narrowest part of the dune so is more susceptible to being blown out in storms. (T p. 152) Petitioner also responded that the dune will be further compromised without the use of a Hatteras Ramp. (T p. 152) Petitioner also responded that the accessway's location five feet from Petitioners' property line will impact "their" dune. (T p. 154) The Court

denied this motion in part, and granted the motion “insofar as [Petitioners] asked for any monetary relief, those – that motion will be allowed” as there was no evidence presented about monetary damage to Petitioners’ property. (T p. 155)

Based upon careful consideration of the applicable law, testimony, and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

## **FINDINGS OF FACT**

### The Parties

1. Petitioners are Paul & Elizabeth Winchell. They own property at 1445 Ocean Pearl Road, which is adjacent to and just north of the Site of the permitted development. They have owned this property since 2000, based on the deed recorded at Book 491, Page 84 of the Currituck County Registry. Petitioners’ property is approximately 3 acres in area and has a residence on the property. (PHO, Stip. Fact 1)
2. Mr. and Mrs. Winchell proceeded Pro-se at the hearing. (T pp. 10-11)
3. Respondent is the North Carolina Division of Coastal Management, part of the Department of Environmental Quality. (PHO, Stip. Fact 2)
4. The Division of Coastal Management (“DCM”) is charged with enforcement of the Coastal Area Management Act (“CAMA”), N.C. Gen. Stat. § 113A-100 et seq., and the State Dredge and Fill Law, N.C. Gen. Stat. § 113-229, and the rules of the Coastal Resources Commission, primarily found in Title 15A, Subchapter 7H of the North Carolina Administrative Code (“NCAC”).
5. Mr. Ronald Renaldi is a Field Representative for DCM. (T p. 157) Mr. Renaldi has a B.S. in Wildlife and Fisheries Biology and Management from the University of Wyoming. (T p. 157) He moved to the Outer Banks in 2004 and worked as a gill net technician for the North Carolina Division of Marine Fisheries from 2004 until 2008. (T p. 158) In February of 2008, Mr. Renaldi started working for DCM as a Field Representative, and covers the area including Knotts Island, mainland Currituck County, Currituck Outer Banks, the Town of Duck, the Town of Southern Shores and the Town of Kitty Hawk. (T p. 158) As a field representative, he implements and enforces the CAMA and the State Dredge and Fill Laws. (T p. 159)
6. Mr. Frank Jennings is the Elizabeth City District Manager for DCM. (T p. 261) Mr. Jennings has extensive experience with the Outer Banks, being a fourth-generation beach cottage owner and owning a cottage in Kitty Hawk for 40 years. (T p. 261) His parents also built a cottage in Kitty Hawk and earlier generations built in Nags Head. (T p. 261) Mr. Jennings served with the Coast Guard as a commissioned officer, and then as a reserve officer stationed in Elizabeth City and staffing the many stations along the Outer Banks. (T p. 262) He has been vacationing in the Outer Banks his entire life except while away

in the service. (T p. 262) Mr. Jennings is a 1971 graduate of UNC with a political science degree. (T p. 263) He joined the Coast Guard in 1972 and left in 1975 to return home to farm in Tyrrell and Pasquotank Counties for 20 years. (T p. 264) He began working with DCM, first as a field representative for 11 years [with duties similar to Mr. Renaldi and Mr. Wood] and then as District Manager for a total of about 20 years with DCM. (T pp. 264-65) As District Manager, Mr. Jennings supervises the territory from the Virginia line to Hatteras Inlet and through the Alligator River and up the Chowan River, and supervises four field representatives, a DOT representative, a district planner, and an office administrator. (T pp. 265-66) Mr. Jennings trained Mr. Renaldi and has supervised him since Mr. Jennings became District Manager. (T p. 267)

7. The Respondent-Intervenor is Elizabeth E. Letendre of Rockport, MA. Ms. Letendre owns property at 1441 Ocean Pearl Road in the off-road area of Corolla, Currituck County (the "Site"). The Permittee has owned this property since April of 2012, according to the deed recorded at Book 1198, Page 290 of the Currituck County Registry. (PHO, Stip. Fact 3)
8. Ms. Letendre named both Bernie Mancuso of Mancuso Development (for the 2014 Permit) and George Wood of Environmental Professionals, Inc. (for the 2015 Modification) as her authorized agents in the CAMA permit review process. (PHO, Stip. Fact 4)

#### The Site

9. The Site is approximately 3 acres in size, extending from the Atlantic Ocean to Ocean Pearl Road, based on the plat map and tax card. (PHO, Stip. Fact 5)
10. The property immediately north of the Site is owned by Petitioners. Petitioners developed a Hatteras Ramp on their property in 2000. (T p. 43) The ramp was in place for eight years. (T pp. 43-44) There were several conditions on their CAMA Minor Permit authorizing the Hatteras Ramp which were not rules of CAMA, and which Mr. Jennings guessed the CAMA Local Permit Officer who issued the permit added, including the requirement for a gate and to remove the driveway once Ocean Pearl Road was accessible. (T pp. 270-74, 284-85; R's Ex. 6)
11. The property immediately to the south of the Site is owned by the Longs. (T pp. 33, 174) The Longs have an accessway to their property from the beach that does not have a Hatteras Ramp. (T pp. 174-77; R's Ex. 15A-E) Mr. Renaldi testified that the Longs' driveway is going over the same frontal dune system as the proposed accessway on the Site. (T p. 193)
12. The west or landward side of the property is bordered by a north-south road known as Ocean Pearl Road. (T p. 33) Ocean Pearl Road is unimproved and can have deep ruts with standing water in them. (T p. 243) An east-west road north of the Site called Munson Lane connects to Ocean Pearl Road, and Petitioners access Ocean Pearl Road via Munson Lane. (T pp. 33, 36, 241-42; R-I's Ex. 2) Mr. Wood recently got stuck on Munson Lane. (T pp. 242-43)

13. Mr. Wood testified that south of the Site, there is an east-west road called Malvin (or Malbon) Drive. (T pp. 239-41; R-I's Ex. 1) Mr. Wood testified that it is his understanding that Malvin Drive is no longer an available access to Ocean Pearl because he worked with Mr. Malvin's two lots near Malvin Drive, as well as another owner's lot in the area in the past, and that Mr. Malvin denied Mr. Wood access to the private and blocked Malvin Drive to access the neighbor's lot about a year ago. (T pp. 240-41) Prior to Malvin Drive being blocked, Mr. Wood said it was the preferred way to gain access to the Site. (T p. 241)
14. At the time of the modification request in 2015, Mr. Renaldi was aware that Ocean Pearl Road could be blocked off at times, as could access to Ocean Pearl Road from the beach road. (T pp. 190-92) Mr. Renaldi acknowledged this could block access to the Site without an accessway. (T pp. 192)
15. There is an east-west accessway located to the north of the Site which has a wooden Hatteras Ramp. (T pp. 177-79, 193; R's Ex. 16A-C) Mr. Renaldi testified that this accessway is going over the same frontal dune system as the proposed accessway on the Site. (T pp. 193-94)
16. In preparation for this hearing, Mr. Renaldi reviewed aerial photography of the 4x4 area of the Currituck Outer Banks and found that in the "southern half of the 4x4 area" using 2013 photos, there were six private dune accessways going from the beach road to private homes. (T pp. 187-88) During this review, Mr. Renaldi also noted that there was one north-south road landward of the beach road, which he understands is called Ocean Pearl Road and that it is a dirt road which snakes around puddles and obstacles, and that it is not maintained by Currituck County. (T p. 188) Mr. Renaldi noted that in the northern half of the 4x4 area of the Currituck Outer Banks (from the 3 mile mark to the Virginia Border), 2014 aerial photos show there are two or three private accessways and about thirteen public accessways that go over the dune to a much more maintained road system in North Carolina which has three roads west of the dune which run north/south and are maintained by Currituck County through a service district. (T pp. 188, 191) Mr. Jennings heard Mr. Renaldi's testimony about the roads and accessways within the four-wheel area and agreed with it. (T p. 276)
17. Mr. Jennings testified that the houses in the area of the Site within the four-wheel area and without accessways now would all be eligible for accessway permits, unless there was a county prohibition of some type. (T pp. 288-89) Mr. Jennings believes that if there were multiple crossovers on the dune near the Site, if the technique of installation is used as DCM permits, there would be no diminution of the protective nature of the dune especially in areas where the dunes are large like the dune at the Site. (T p. 289)
18. The area where the dune crossover was authorized by the 2015 Modification is within the Ocean Erodible and High Hazard Flood sub-categories of the Ocean Hazard Area of Environmental Concern ("AEC"). N.C. Gen. Stat. § 113A-118 requires that the permit applicant obtain a CAMA permit before work on the proposed project takes place. (PHO, Stip. Fact 6)

19. The Base Flood Elevation for the Site is 12 feet above sea level. (T pp. 162, 268; R's Ex. 7) The Base Flood Elevation for the Site is used as part of the definition of a primary dune, and it represents the anticipated flood water elevation during a 100-year storm. (T pp. 268-69)
20. There are primary and frontal dunes on the Site, as those terms are defined by the CRC's rules at 15A N.C.A.C. 07H .0305(a)(3) & (4). (T p. 162; R's Ex. 7) A primary dune is defined by adding 6 feet above a particular base flood elevation, so it would be 18 feet at this Site. (T p. 162. 269; R's Ex. 7)
21. At the time of the 2013 DCM Field Investigation Report for the initial permit, Mr. Renaldi stated that the dune varied in width from 112' to 162' as measured from the first line of stable natural vegetation landward, but did not now recall where those measurements were taken as it is intended to be a general description of the site for other resources agencies to review. (T pp. 207-213; Stip. Ex. 5) Mr. Renaldi testified that the narrowest part of the dune at the Site in 2015 was at the location of the proposed crossover based on his review of elevation points, which would minimize the impact on the dune. (T pp. 209-11)
22. Respondent's Exhibits 17A, D, E, F, G, H, and I are a series of photos of the Site taken by Mr. Renaldi around May of 2015. (T pp. 164-74)

#### The Initial Permit Issuance

23. Mr. Renaldi's first interaction related to the permit at issue was reviewing preliminary plans with the Respondent-Intervenor's consultant GeorgeWood, for the structures authorized under the initial permit issuance. (T p. 159)
24. Mr. Renaldi completed the DCM Field Investigation Report in 2013 for the initial permit application. (T p. 161; R's Ex. 7) To complete the Field Investigation Report, Mr. Renaldi reviewed materials provided by the applicant including site plans, and by completing a March 21, 2013 site visit to compare those materials to conditions on the Site and to aerial photography. (T pp. 161-63) At the site visit, Mr. Renaldi staked the "first line of stable and natural vegetation or FLSNV." (T p. 163) As Mr. Renaldi's supervisor, Mr. Jennings reviewed the Field Investigation Report to make sure the necessary information was included so that information needed by resource agencies was included. (T p. 267)
25. Mr. Wood was asked to review the site for wetlands by Mr. Mancuso, who is the contractor for the project, and then worked with the engineers and surveyors retained by Mr. Mancuso to formulate the design and construction of the home. (T p. 234) Mr. Wood submitted the CAMA permit application for the 2014 Permit. (T p. 234)
26. On March 17, 2014, DCM issued the 2014 Permit [CAMA Major Permit No. 25-14] for the development of the three cosmetically-attached but structurally-detached structures, pool with deck, retaining wall, gazebo, well, septic drain field, sand driveway and parking area, after the proposed development was evaluated through the CAMA major permit review process. (PHO, Stip. Fact 7)



27. During the 2013-14 CAMA major permit review process, Petitioners were provided notice of the project as adjacent riparian property owners. According to usps.gov tracking information, Petitioners received notice on December 27, 2013. Petitioners did not submit written objections to DCM at that time. The Longs, adjacent riparian property owners to the south, marked the box on the form indicating that they objected to the project. Neither the Petitioners nor the Longs filed a Third-Party Hearing Request [per G.S. 113A-121.1(b)] for the 2014 Permit. (PHO, Stip. Fact 8)

#### Permit Modification Request

28. Once construction of the home was underway, Mr. Mancuso contacted Mr. Wood in 2015 regarding Mr. Mancuso's concerns about whether there would be continued, reliable access to Ocean Pearl Road and asked him about possible alternative access for construction traffic or emergency vehicles to the Site. (T pp. 234-35; Stip. Ex. 3)
29. On or about May 8, 2015, Ms. Letendre, through her authorized agent George Wood of Environmental Professionals Inc., requested a modification to the 2014 Permit in order to undertake the development of a dune crossover. (PHO, Stip. Fact 9) Mr. Wood submitted a request letter and site plan drawing depicting and describing what was being requested. (T p. 180; Stip. Ex. 5) The proposed accessway was approximately 195-feet by 10-feet and would be graded and wood chipped. (T pp. 185; Stip. Ex 5, 6) No gate was proposed at the beach-end of the proposed accessway. (T p. 258-59)
30. Mr. Wood testified that the CAMA rules provide little guidance with regard to design of accessways, but that there are a number of these driveway accesses over the dunes in this part of Currituck County and it is a fairly straightforward process to obtain approval. (T pp. 244, 248)
31. To make the drawing attached to the modification request, Mr. Wood used the 2012 data that had already been collected in connection with the 2014 Permit process, along with data he collected from the Site, and amended the 2012 drawings some based on the updated data including the current FLSNV, measured where the top of the dune was and the toe of the dune was at the narrowest part of the dune. (T pp. 245-47) Mr. Wood testified that topographical surveying data was not required for the modification request because the CAMA regulations are limited, and extensive surveying data would have been "superfluous and not supporting or helpful in the decision-making process. . . particularly in light of the fact that this construction was going to proceed with minimal impact to the dune, essentially running with the lay of the land." (T p. 248) Mr. Wood's drawing for the modification request is a combination of the historic data they had from 2013 and the data he collected in May 2015, and that the depiction is "intended to show the salient points of what we intend to do as it relates to the regulations. (T p. 248) Mr. Wood testified that an elevation survey with controls would be a considerable cost. (T pp. 254-55)

32. Mr. Renaldi testified that on the site drawing submitted by Mr. Wood for the modification, the landward toe of the dune follows the 11-foot contour. (T p. 214) Mr. Wood confirmed this was correct during his testimony. (T p. 254)
33. Petitioner argued that the drawing that was submitted in connection with the permit modification request was inaccurate. (T p. 61) Petitioner read the drawing [Stip. Ex. 5] to show the toe of the frontal dune was located along a surveyors line that connected the north and south property lines instead of following the 11-foot contour as Mr. Renaldi understood the drawing. (T pp. 213-15) Mr. Renaldi testified that there is nothing which prohibits hand-drawn site plans for a permit modification. (T p. 216) Mr. Jennings testified that the CAMA rules require a site plan and a description of what the proposal is, and at this level, very little information is required because these types of projects are minor in nature. (T p. 282)
34. The accessway was proposed to be used for construction and emergency access and the request noted that it was being made due to the uncertain conditions of Ocean Pearl Road. (T pp. 185, 189, 255-56; Stip. Ex 5, 6)
35. Mr. Renaldi did a Site visit on May 19, 2015 in connection with the modification request. (T p. 185; Stip Ex 6) As part of the site visit, Mr. Renaldi used his tape measure to measure off 195' from the eastward toe of the dune in the location of the proposed accessway. (T pp. 199, 215, 218-19) The landward end of Mr. Renaldi's tape measure fell short of and was not within 404 wetlands. (T pp. 199, 215-16)
36. When Mr. Renaldi receives a modification request, he reviews the request, confers with his District Manager and with the DCM Major Permits Staff in Morehead City to decide if the modification should be processed as a refinement, a minor modification or a major modification. (T pp. 180, 244) In this case, if there had not been an active major permit to modify, the requested accessway would have only required a CAMA minor permit authorization by the Currituck County CAMA Local Permitting Officer. (T pp. 181, 193) Accordingly, this modification was treated as a minor modification, though because of the earlier objection to the 2014 Permit by the adjacent riparian owners, DCM required that Mr. Wood re-notice the Longs and the Petitioners about the modification request, which is not usually required for a minor modification (T pp. 181-82, 244-45, 282)
37. As part of the CAMA minor modification process, notice of the modification request for the dune crossover was given to the two adjacent riparian neighbors-- Petitioners and the Longs. Based on tracking information from usps.gov, Petitioners received notice on July 6, 2015 and the Longs received notice on April 23, 2015. Both Petitioners and the Longs returned the adjacent riparian owner forms having checked the box indicating they had objections to the project. (PHO, Stip. Fact 10; T p. 183; Stip. Ex. 8)
38. Based on the nature of the modification request, notice of the request was sent to the DENR Division of Water Resources - Stormwater and Aquifer Protection Sections, Division of Energy, Minerals, and Land Resources, the U.S. Army Corps of Engineers based on their jurisdiction over 404 wetlands, and the Currituck County Local Permitting Officer. No

objections were received by DCM from these agencies. (PHO, Stip. Fact 11; T pp. 182-83)

39. As part of the modification process, Mr. Renaldi drafted a memo to DCM Major Permits Staff in Morehead City with his recommendation concerning the modification request. (T pp. 184-85; Stip. Ex. 6) In this case, Mr. Renaldi recommended that the modification be issued as it met the rules, specifically 15A N.C.A.C. 07H .0306. (T pp. 185-86; Stip. Ex. 6) Mr. Renaldi's District Manager and Supervisor Frank Jennings reviewed the recommendation memo before it was sent to DCM Major Permits Staff. (T p. 186; Stip. Ex. 6)
40. Mr. Renaldi testified that the CAMA regulations allow accessways over dunes. (T p. 194) Mr. Renaldi testified that the use of a Hatteras Ramp on an accessway will arrest the dune in place whereas an accessway without a ramp will allow the dune to grow. (T p. 194) Mr. Renaldi testified that having a woodchip accessway is different than a Hatteras Ramp following a storm event where the ramp will be undermined and scattered on the beach and requires a new ramp to be laid, where with wood chips, new wood chips would just have to be placed, and are less impactful to the dune. (T p. 195)
41. Mr. Wood testified that he remembers the discussion while with DCM, about how to safely get people to their property over the dunes, and that Hatteras Ramps were new at that time about 30 years ago. (T pp. 251-52) An early problem identified with Hatteras Ramps is that after a storm when the ramps often were damaged, people would bypass the ramps, and so when they work, they work well, but when damaged they cause problems. (T pp. 251-52) Mr. Wood testified that he believed that the wood chips cause less impact than a Hatteras Ramp in the long run. (T p. 253) Mr. Wood testified that the CAMA regulations allow the use of wood chips and that in this case where limited use is anticipated, the packed sand and wood chips were a better option. (T p. 253) Mr. Wood testified that the use of wood chips would allow more flexibility with regards to the changing elevation of the dune compared to a Hatteras Ramp. (T p. 257)
42. Mr. Jennings testified that while the use of wood chips for beach accessways was new, we know they will not become debris like Hatteras Ramps can and they will be similar to clay, packed sand or gravel that has been permitted for some time. (T pp. 290-91) While we can't be sure about the degradation on the face of the frontal dune long term, he feels confident that the degradation will be minimal and that the dune will still continue to have this protective capability. (T pp. 290-91)
43. On July 9, 2015, DCM issued a minor modification to CAMA Major Permit No. 25-14 ("2015 Modification") for the development of the crossover for construction and emergency use, as proposed. (PHO, Stip. Fact 12; Stip. Ex. 1)
44. Also on July 9, 2015, notice was sent to the Longs and Petitioners that the 2015 Modification was issued, and includes information about the administrative appeals process. (T p. 187)

### Administrative Appeal Process

45. On July 21, 2015, Petitioners filed a third-party hearing request pursuant to G.S. 113A-121.1(b). (PHO, Stip. Fact 13)
46. The Chairman of the Coastal Resources Commission granted Petitioners' request to file a contested case hearing. This Order was signed on August 3, 2015. Based on the "green card", Petitioners received a copy of this Order on August 18, 2015. (PHO, Stip. Fact 14)
47. The Office of Administrative Hearings received an incomplete petition from Petitioners on August 11, 2015. On August 12, 2015, OAH returned the petition in order to have Mr. Winchell complete his signature on the form along with Mrs. Winchell's signature. OAH filed the completed petition on August 21, 2015. (PHO, Stip. Fact 15)
48. Elizabeth Letendre was granted the right to intervene as a Respondent-Intervenor on October 22, 2015. (PHO, Stip. Fact 16)

### Testimony at the Hearing

49. Mr. Winchell was not admitted as an expert witness. (T pp. 44-46) Mr. Winchell has a college degree in civil engineering with a minor in math. He has done work designing roads, bridges, dams, structural steel buildings, concrete, water, and wastewater treatment systems. (T p. 45) Mr. Winchell operated a business for 30 years where they designed, engineered and manufactured products that improve the safety and productivity of their employees. (T p. 45)
50. Mr. George Wood, President of Environmental Professionals, Inc. testified but was not offered as an expert witness. (T pp. 228-60) Mr. Wood started his company 28 years ago. (T p. 229) Mr. Wood's company specializes on water quality testing, environmental assessments, wetlands delineation, permitting, and expert witness consultation. (T p. 229) Mr. Wood has been qualified before as an expert in the Coastal Area Management Act and in state regulations in both administrative cases and state court. (T p. 229) Before starting his company, Mr. Wood worked for DCM, first in Raleigh as a permits coordinator and then as a field representative in the Elizabeth City office for nine years, doing the same work Mr. Renaldi does now. (T p. 230) Mr. Wood has a BS in Biology and a Masters in Biology from ECU. (T p. 231) He is also a professional wetlands scientist- a certification to delineate federal wetlands, and is a certified environmental professional. (T p. 231)
51. Mr. Wood's experience with the area near the Site began when he worked for DCM, covering the Currituck Outer Banks area for four or five years. (T p. 232) In private practice, Mr. Wood has done several projects in the area near the Site including 40-50 construction sites and 10-15 subdivision sites. (T pp. 232-33) He worked to get the Longs' home and driveway permitted. (T p. 233) During his 28 years, he has been stuck on the unimproved section of the road four times, including two times trying to get to or traverse Ocean Pearl Road. (T p. 233)

52. Mr. Renaldi testified that he knew Mr. Wood had worked for DCM prior to starting his own consulting business, and that he is “very knowledgeable about the CAMA rules and regulations, and he’s very easy to work with.” (T p. 179) Mr. Renaldi said that the quality of Mr. Wood’s work is “very good” and that they have worked on between five and ten projects together during Mr. Renaldi’s tenure with DCM. (T p. 179) Mr. Jennings has a high opinion of George Wood based on interacting with him professionally about 100 times, and confers with him often regarding CAMA issues. (T pp. 276-77)
53. Mr. Renaldi testified that if sand was moved during the construction of the accessway, that sand is required by rule to remain within the AEC dune system. (T p. 196) Mr. Renaldi’s understanding about the construction method to be used was a simple scraping of the dune to even it out and then spreading woodchips on it. (T p. 197)
54. Mr. Wood testified that his understanding about how the driveway would be installed from Mr. Mancuso is that they would “just scrape the top of the sand to level it to a small degree to prepare for the wood chips, and that there was no indication that a large amount of sand would be either removed or brought in, and that the crest of the dune would remain the same height. (T p. 249)
55. Mr. Jennings has been to the Site twice in connection with this case, but has been by the Site many times as it is in the lower Currituck Outer Banks 4x4 area. (T pp. 266-67)
56. Mr. Jennings testified that DCM does not typically get requests for dune crossovers in areas that are serviced by hard paved roads. (T p. 2374) Dune crossovers are more typically requested in the Park Service land on Hatteras Island or by a town for emergency vehicle access to the beach. (T p. 274) The four-wheel drive area of Currituck is a special, unique situation where there are no state roads. NC 12 ends and so these owners have no dedicated state access to their property. (T pp. 274-75)
57. Mr. Jennings testified that during the war [World War II], Marston mats were used which are metal mats, and after the war, this surplus of mats were used. (T p. 275) These mats would rust easily and could be undermined. (T p. 275) When the CAMA rules came about, they preferred the use of wooden ramps instead of metal ramps, and now he is seeing the use of plastic mats, along with geoweb and wood chips. (T p. 275)
58. Mr. Jennings testified that the CAMA rules, specifically those found at 15A N.C.A.C. 07H .0309 require most development to be set back a prescribed distance from the vegetation line which DCM staff delineates. (T pp. 277-78) However, the rules allow some development to be built waterward of the setback but behind the vegetation line, including “driveways and parking areas with clay, packed sand or gravel. (T p. 278) Mr. Jennings believes that this rule authorizes the use of wood chips as a substitute product that serves a similar function. (T pp. 278-79)
59. Mr. Jennings testified that while the modification request and permit noted that the accessway was for construction and emergency vehicle use, DCM’s enforcement ability to regulate the use of a permitted structure is limited, as DCM permits structures with DCM

input front-end loaded. (T pp. 280-81) Mr. Jennings testified that he doesn't believe DCM has authority to regulate the use of the accessway in this case. (T pp. 281, 296-97) In 15A N.C.A.C. 07H .0308(c), there is no limitation language only allowing the use of structural accessways by emergency vehicles. (T pp. 297-99) Mr. Jennings testified that if the Petitioners or the Letendres in this case had proposed a dune accessway without limitations on the type of use, the permit would have been allowed under the CAMA rules. (T p. 301)

60. Mr. Jennings noted that with all CAMA permits issued, including CAMA minor permits, the division has a responsibility to monitor the development activity and has enforcement authority if the development is out of compliance with the CAMA permit. (T pp. 294-96)

## CONCLUSIONS OF LAW

### I. Jurisdiction and Burden of Proof

1. It is stipulated that all parties are properly before the Office of Administrative Hearings and that OAH has jurisdiction of the parties and the subject matter. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.Gen. Stat. § 113A-121.1(b) and N.C.G.S. § 150B-23. (PHO, p. 1)
2. It is stipulated that Petitioners bear the burden of proof per N.C.G.S. § 150B-23. (PHO pp. 1-2) Judge Mann acknowledged that Petitioners bear the burden of proof. (T p. 30)
3. Under N.C. Gen. Stat. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioners have met their burden in showing that the agency substantially prejudiced petitioners' rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995). In their Petition for a Contested Case, Petitioners alleged that Respondent deprived them of property with the damage amount "to be determined", and acted erroneously in issuing the July 9, 2015 minor modification to CAMA Major Permit No. 25-14.

### II. Other Conclusions of Law

4. Respondent DCM regulates the coastal areas of the State pursuant to authority conferred upon it by the CAMA, N.C. Gen. Stat. § 113A-100 *et seq.*, and the State Dredge and Fill Law, N.C. Gen. Stat. § 113-229, and various regulations promulgated thereunder by the Coastal Resources Commission. Under these laws and rules, all "development" in an AEC must be permitted. N.C.Gen. Stat. § 113A-103, -107, -113, -118.

5. The Site is adjacent to the Atlantic Ocean, and is within the Ocean Erodible Area of Environmental Concern (AEC); and, as such, DCM has administrative permitting authority over development within the AEC on the Site. N.C. Gen. Stat. §§ 113A-103, -107, -113, and -118.
6. Respondent-Intervenor's proposed project to add a beach crossover or accessway over the dune from the beach road to their property requires a CAMA Permit. N.C. Gen. Stat. § 113A-118. While such development is within the scope of a CAMA minor permit as that is defined by N.C. Gen. Stat. § 113A-118(d)(2), it was pursued through a modification of the existing, active CAMA Major Permit No. 25-14, which had authorized the development of the residential structures. (Stip. Facts 7, 9, 12; FOF 26, 36)
7. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where these primary and frontal dunes are over 100 feet in width, extend for several lots north and south of the Site, and have elevations of 20 feet or more in an area with a base flood level of 12 feet. The construction of the accessway is not anticipated to require significant lowering of the existing dune elevation. The use of wood chips is not anticipated to harm the existing dune system. No significant alteration on the primary dune is anticipated and the authorized accessway is not anticipated to diminish the dune's capacity. (Stip. Ex. 5; R's Ex. 7, 15, 17; FOF 11, 19, 20, 21, 22)
8. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where the permit did not authorize trespass onto their property by others in authorizing the development of the dune accessway. (Stip. Ex. 1, 5; FOF 29)
9. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where the drawing submitted with the modification request satisfied the requirements of 15A N.C.A.C. 07J .0203. (Stip. Ex 1, 5; FOF 29, 30, 31, 32, 33)
10. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where the authorized development is projected not require significant relocating, grading and cutting of the primary dune. (FOF 29-31, 35, 38-43, 50-54, 56-58)
11. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where, due to the unreliable access to the Site via Ocean Pearl Road, alternative access was requested over the primary dune in the four wheel drive area of the Currituck Outer Banks where there is no maintained state road. (FOF 7, 9-14, 16, 17, 28, 34, 51, 56, 59)
12. The Respondent's issuance of the 2015 Modification was not erroneous and did not deprive Petitioners of property where several other oceanfront lots in the southern part of the four wheel drive area and in the vicinity of the Site, have been authorized to develop dune crossovers, beach accessways, driveways, with or without Hatteras Ramps, in order to access their property, including Petitioners and the Longs to the immediate south of the

Site. (FOF 10-14, 16, 17, 30, 51, 56-59)

13. Petitioners are entitled to strict compliance with all requirements of the dune crossover permit issued by Respondent which will be constructed and maintained by Respondent-Intervenor. It is Respondent's obligation to ensure full compliance with the permit's terms and conditions in the construction and maintenance of the dune crossover and all requirements that enure to the benefit of the other adjacent landowners, the Petitioners, Respondent-Intervenors, and the public at large.

### **DECISION**

Based on the foregoing findings of fact and conclusions of law, Respondent's issuance of CAMA Major Permit No. 25-14 as modified on July 9, 2015 is AFFIRMED. This is the final decision in this contested case, in accordance with N.C. Gen. Stat. § 150B-34(a). Petitioners have not met their burden of proof in showing that Respondent deprived Petitioners of property, 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 in issuing the permit modification at issue, as alleged in Petitioners' petition for a contested case hearing.

### **NOTICE**

Pursuant to N.C. Gen. Stat. § 150B-37(c), a copy of this final decision will be sent to each of the parties. Pursuant to N.C. Gen. Stat. § 150B-43, any party or person aggrieved by this final decision is entitled to judicial review of this decision, pursuant to the requirements of N.C. Gen. Stat. § 150B-45.

This the 29th day of July, 2016.

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Julian Mann  
Chief Administrative Law Judge



STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 05826

PAUL & ELIZABETH WINCHELL,  
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENTAL QUALITY  
DIVISION OF COASTAL MANAGEMENT,  
Respondent,  
and

ELIZABETH LETENDRE,  
Respondent-Intervenor.

**ORDER  
AMENDING DECISION**

**PURSUANT** to 26 NCAC 3.0129, for the purpose of correcting a clerical error, **IT IS HEREBY ORDERED** that the above-captioned Final Decision, issued from this Office on July 29, 2016, is amended to correct the Notice in the above-captioned case as follows:

**NOTICE**

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statutes Chapter 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing 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 for Judicial Review within 30 days after being served with a written copy of this Amended Final Decision.**

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. N. C. Gen Stat. §150B-46 describes the contents of the Petition for Judicial Review, and requires service of the Petition for Judicial Review on all parties. 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 in order to ensure the timely filing of the record.

Except for the above amendment, the Final Decision issued on July 29, 2016 remains in effect.

**IT IS SO ORDERED.**

This the 3rd day of August, 2016.

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Julian Mann III  
Chief Administrative Law Judge