

STATE OF NORTH CAROLINA
COUNTY OF PENDER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 EHR 02397

Ronald Sheffield Petitioner, v. NCDMF Respondent.	FINAL DECISION
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This contested case was heard by Administrative Law Judge Donald W. Overby on July 14, 2016 at the Brunswick County Government Complex in Bolivia, North Carolina. Based upon the pleadings, testimony, items admitted into evidence, and all other matters before it, the Court makes the following Final Decision:

APPEARANCES

For Petitioner: Kurt B. Fryar
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Wilmington, NC 28401

For Respondent: Scott A. Conklin
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ISSUE

Whether the Respondent deprived the petitioner of property or has otherwise substantially prejudiced the 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 as required by N.C.G.S. § 150B-23 when it denied the Petitioner's shellfish bottom lease and associated water column lease?

EXHIBITS

The Petitioner offered the following exhibits into evidence, which were received and accepted into evidence: Exhibits numbered 1 – 8. Exhibit 7 was accepted into evidence and is to be given the weight the finder of fact deems appropriate.

The Respondent offered the following exhibits into evidence, which were received and accepted into evidence: Exhibits numbered 1 – 5, 7 – 8, 10. Exhibit 1 is a statute for which official notice was given. Exhibit 7 was accepted into evidence and is to be given the weight the finder of fact deems appropriate.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following Findings of Fact. In making the Findings of Fact, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether such testimony is consistent with all other believable evidence in the case.

PROPOSED LEASE APPLICATIONS AND LEASE SITE

1. On October 14, 2015, the Petitioner applied for a shellfish bottom lease and associated water column lease (hereinafter referred to collectively as the “proposed lease”). (Pet.’s Exhs 1 and 2)
2. Page 6 of Respondent’s Exhibit No. 3 is a satellite photograph which shows a very general overhead view of the proposed lease site and surrounding area. The lease site is to the southwest of New Topsail Inlet. Topsail Beach is to the northeast of the inlet.
3. Respondent’s Exhibit No. 4 is an aerial close-up of the proposed lease site and immediately surrounding area. This includes a main channel, which begins at the middle-bottom of the exhibit, and opens into the New Topsail Inlet. In the exhibit, Lea Island is seen to the left of the main channel, and boats are anchored along the beach on Lea Island.
4. As can be seen in Exhibit 4, this so called main channel does not open to any other body of water visible in the picture other than New Topsail Inlet. In the top left of the picture, boats can be seen either anchored or tied off so that the visitors to the island may walk across to the ocean. Very few boats go that far up the channel.
5. In the middle of Exhibit 4, a sandbar to the right of the main channel is visible with three boats anchored close by. This sandbar is on the end of a marsh island and is almost if not entirely under water at high tide. The three boats are anchored on the opposite side of the small marsh island from Petitioner’s proposed lease site.
6. Directly in front of this sandbar is another channel veering off to the right from the main channel, referred to hereinafter as the “cut-through.” The cut-through connects back into a channel or creek to the south. That channel and the cut through do not open into any other significant water. It does not open to any water that opens to the ocean or the Intercoastal Waterway.

7. The entrance into the area designated as the “Proposed Lease Site” and the cut-through are barely navigable if at all on low tide due to the sand bars. At best the area is navigable to flat bottom boats and skiffs, as well as personal watercraft or jet skis.

8. Lea Island has heavy recreational use during the summer months. Fishing continues in the area throughout most of the rest of the year. (T pp 260-261) The main channel can get congested during the summer months. (T pp 129, 261) According to one witness, on rare occasions on weekends and holidays, boats may line up two deep around Lea Island, whereas during the week there will be 10 or less boats in the area. (T p 261)

9. As evidenced by the boaters who go to the far end of that channel and walk over to the ocean, the main channel remains open even during the heaviest days of use.

10. Also visible in the photograph of Respondent’s Exhibit No. 4 is the Petitioner’s existing lease, which has been in existence since 2008. The existing lease has posed no significant problems for tourist, boaters, crabbers or fishermen or anyone else who continue to use that area.

11. The designation of “proposed Lease site” superimposed onto the photograph in Exhibit 4 is misleading in that it would lead one to think the equipment Petitioner proposes to use will be almost to where the cut-through widens once one crosses the sand bar to the leeward side of the marsh.

12. Respondent’s Exhibit 5 is a better representation of the location of the site. Although faint in the photograph, the poles placed by Petitioner are visible. It can readily be seen that the placement of the bags by Petitioner would not have any infringement on the cut through.

13. Respondent’s Exhibit 5 also clearly shows the boats tied up to walk over to the ocean as well as Petitioner’s existing lease area.

14. The proposed lease site is approximately one acre and is three to four feet deep, even at low tide. (T p 28)

15. There is some credible evidence that the proposed lease site may be a productive location for fishing. (T pp 182, 189, 223) The evidence is also clear that Petitioner’s lease would still permit fishing around his equipment just as is currently done on his existing lease. Fishing and crabbing would not be prohibitive because of Petitioner’s use of the lease site.

16. According to Wildlife Officer Simon Sabella, since 2008 when Petitioner was granted his existing lease the population in the vicinity has increased significantly. A new NC Wildlife boat ramp was opened north of the town of Hampstead on the Intercoastal Waterway, contributing perhaps to an increase of recreational boating. (T p 204) There is a water route between Topsail Inlet and the Intercoastal Waterway at Hampstead.

17. The Petitioner uses floating bags referred to as “grow-out bags” in a portion of his current lease in order to grow juvenile oysters. These bags are hard structures that are never totally

submerged. Respondent's Exhibit No. 8 shows a number of the floating bags used in the Petitioner's current lease. (T pp 72, 72, 86)

18. According to Petitioner, each floating bag is approximately three feet by two-and-a-half feet, and the bags are arranged on 80-foot ropes with buoys attached. (T pp 24, 88) Four-foot long submerged screw anchors hold the ropes in place. (T p 90) Floats are placed on the ends of all rope ends.

19. As part of an application for a shellfish and water column lease, the applicant must submit a management plan for the area to be leased. As part of the management plan, the applicant must state the methods through which the applicant will cultivate and produce shellfish. 15A N.C.A.C. 03O.0202(b). In the application for the proposed lease in this case, the Petitioner stated his intent to employ a system that is substantially the same as the floating bag system used in his current lease, which is shown in Respondent's Exhibit 8, with the possibility of bags and cages in future years. (Pet.'s Exh. 1, page 7 of 18, Pet.'s Exh. 2, page 6 of 20).

REVIEW OF APPLICATION AND RESPONDENT'S EVIDENCE

20. As is standard practice with all lease applications, the Petitioner's applications were reviewed internally by three separate and distinct sections of the Division of Marine Fisheries: the Shellfish Sanitation, the Fisheries Management, and the Marine Patrol. (T pp 140, 144-147)

21. The Shellfish Lease Investigation Report is Respondent's Exhibit 3. Page 1 of the report notes that the "exposure" is "protected." Page 1 of the report also notes that Mr. Samuel Corbett, a commercial crab pot fisherman, had stated that there might be complaints on the lease site.

22. The report also includes three emails which are referenced in the letter from Steve Murphey to Director Louis Daniel, dated February 10, 2016 which became the denial letter for Mr. Sheffield. Mr. Murphey erroneously states that the three emails are opposed to this lease.

23. Clearly reading the first two emails, they are referring to any potential expansion of Mr. Sheffield's current lease, and not the lease under consideration. It may reasonably be assumed that the authors of the first two emails have a familial relationship, although that is of no consequence since their complaint is not with this proposed lease.

24. The third email is a generic opposition to Mr. Sheffield leasing any area where that person's family spends its free time.

25. The Shellfish Sanitation Section is primarily concerned with the public health aspect of the lease. (T p 145) The Shellfish Sanitation Section is not asked to provide an opinion as to whether a lease will interfere with other activities or uses of the proposed lease site. (T pp 145, 169-170)

26. In this case, the Shellfish Sanitation Section determined that the proposed lease is in an area currently approved by that section for the harvest of shellfish, that the status of the area has not changed in the last year, and that the status of the area is not expected to change in the near future. (Resp.'s Exh. 4, p 7)

27. The Fisheries Management Section had very specific questions to answer which were very much on point to the current controversy:

- i. Question 1: “Would this lease be compatible with fishing, boating and other recreational interest in the area?” Answer: “Yes. The relatively small footprint of this lease should not pose any major conflicts.”
- ii. Question 2: “Would this lease adversely affect navigation in the area?” Answer: “No. The lease is located out of the main channel and behind a small marsh island.”
- iii. Question 3: “Would this lease be compatible with commercial fishing and shell-fishing interests in the area?” Answer: “Yes. “Would probably only interfere with crab pots, but the small footprint of the lease makes that impact minimal.” (Resp.’s Exh. 4, p 8)

28. The Fisheries Management Section also noted that it had received no public comments concerning this proposed lease and that this lease is located across the channel from another larger existing lease.

29. Marine Patrol is the only section which provided comments stating that the lease would create user conflict. (Resp.’s Exh. 4, page 9)

30. Officer Simon Sabella provided comments on behalf of the Marine Patrol on the proposed lease application. Officer Sabella has been a Marine Patrol officer for the Division of Marine Fisheries for approximately twelve years and has a longstanding familiarity with the area. (T p 197) Officer Sabella patrols the area around Topsail Inlet. In the warmer months, Officer Sabella will patrol the area at least two or three times a week. (T p 198) Officer Sabella is familiar with the proposed lease site, and has seen the poles marking the site. (T p 199)

31. Officer Sabella has seen boats and swimmers in the proposed lease site. In particular Officer Sabella testified that he has seen individuals fish for trout and drum in the proposed lease site, often using a trolling motor. (T pp 201-202) Officer Sabella has also seen more boats pass through the cut-through.

32. Officer Sabella also states that he sees a few jet skis per week pass through the proposed lease site during the summer months. (T p 217) According to Officer Sabella, he was on the lease site on Saturday, July 9, 2016—the weekend after the 4th of July holiday—and saw zero boats on the lease site. He offered no evidence of anyone in the lease area for any reason on that date. According to Officer Sabella, access to the area of the proposed site even by jet skiers was dependent on the tide. (T pp 205-206)

33. Officer Sabella was concerned that the floating gear would restrict access to the proposed lease site and cut-through for boaters, swimmers, jet skis, and fishermen. (T pp 200, 209) However, when looking at the location of the lease site as opposed to the channel for the cut-

through, the lease would not restrict use of the cut-through.

34. Officer Sabella was also concerned that recreational boats and jet skis may run into the gear and poles that would be placed in the proposed lease site. (T pp 201, 216-217)

35. It is true that a boat could be damaged if it ran into or over the floating bags or associated ropes present in the current lease and described in the management plan for the proposed lease. (T p 73) However, these structures are readily visible to boaters and anyone in the immediate vicinity. The damage caused by hitting these structures are no more, and probably less, than would be to a likewise inattentive water craft operator who runs into a sandbar or piling or other obstruction in the water. The operator has an affirmative duty to see what should be seen.

36. People cannot always be protected from their own stupidity and/or inattention with consequences. This location is about as hidden as it could possibly be and still be accessible and usable just about any purpose. The area is not easily accessible, especially at low tide.

37. In Officer Sabella's opinion there would be potential conflict between the lease and recreational boaters and swimmers, especially in the summer months. He expressed concern for potential conflict with crab pot fishermen and hook and line anglers that fish the area as well as some navigation problems. (Resp.'s Exh. 4, p 9) His comments and concerns of potential problems are completely speculative.

38. Officer Sabella confirmed that Mr. Samuel Corbett was the "commercial crab pot fisherman" to whom he spoke and is referenced in his report on behalf of Marine Patrol division. Mr. Corbett is likewise the commercial fisherman referenced in the Shellfish Lease Investigation Report in finding of fact number 21 above. (Resp.'s Exh. 3, p 1)

39. Mr. Corbett is the only commercial fisherman of any kind that anyone spoke with who is involved in any regard with these lease applications during the review process, including Officer Sabella.

40. Samuel Corbett is a commercial fisherman who has fished the area for approximately 51 years. Mr. Corbett is also the chairman of the North Carolina Marine Fisheries Commission. (T pp 177-178)

41. Mr. Corbett works crab pots in the area of the proposed lease site approximately 150 to 175 days a year. (T p 180) During those days, Mr. Corbett works his crab pots in the area surrounding the proposed lease site for about 30 to 40 minutes. (T p 180)

42. Mr. Corbett informed Officer Sabella during the review process that he would not object to the proposed lease but that he has seen people in the lease site and that he believed that there would be complaints if the proposed lease applications were approved. (T p 186)

43. Mr. Corbett testified that he sees about 10 to 15 recreational boats and another 10 to 15 commercial boats in the proposed lease site per year. (T pp 182, 183) That is the equivalent of approximately two boats per month, which should not be cause for alarm.

44. One boat that Mr. Corbett specifically mentioned during the hearing was the Oak Winds. Mr. Corbett testified that the Oak Winds fishes with gillnets in the proposed lease site and works the site from “maybe the middle of October to the middle of November.” (T p 182) It is not known if the Oak Winds is a commercial fisherman or an individual fisherman. This is further indication that there is minimal use by either recreational fishermen or commercial fishermen.

45. Officer Sabella seems to question Mr. Corbett’s observations, contending that he sees a significant number of boats in the lease area, mostly passing through. In comparing the number of days that Mr. Corbett is in the area as compared to Officer Sabella, it seems Mr. Corbett is in the area more often than Officer Sabella. As a commercial fisherman with 51 years of experience, as well as chair of North Carolina Marine Fisheries Commission, Mr. Corbett is entitled to significant more deference than Officer Sabella who has 12 years of experience and who’s attention while on the water would be most directed at boater and water safety and violations.

46. Mr. Corbett further mentioned that he has seen individuals fish for drum and speckled trout in the proposed lease site. (T p 182-183) Those fish are not generally found to be in the same locations for much of the year. While they are desirable fish, there is no evidence that the lease would prohibit anyone from fishing for those particular fish in and around the Petitioner’s gear.

47. Mr. Corbett also testified that the proposed lease would make it “a lot tougher” to place crab pots in the lease site. (T p 181) However, Mr. Corbett acknowledged that he could put crab pots in the area and that he has done so around Petitioner’s current lease site.

48. Mr. Corbett is the only commercial fisherman about or from whom there is evidence concerning the proposed lease, and Mr. Corbett is not opposed to the lease. He stated “I don’t care if he puts a lease in there. . .” a position he has repeated often. (T-180)

49. Mr. Corbett observed that recreational use in the area has increased since 2008, but he did not think that recreational use specifically in the Petitioner’s current lease had increased because of the bags already floating in the site. (T p 184-185) If that logic is to hold true, then once the Petitioner’s bags are in the water, then the recreational use should decrease in the proposed lease site. Just as with the current lease site, boat traffic would not be hampered for those wanting to use the cut-through when tides allow.

50. Mr. Corbett observed that he had received complaints from swimmers in the area who were injured by his crab pots and that recreational fishermen had gotten tangled in his pots. There is no evidence that he has quit putting his crab pots out, and he acknowledges that people could still fish around Petitioner’s gear should the lease be granted. (T 188, 192).

51. After receiving internal comment and passing initial review, the Division sent notice of a public hearing and solicited public comment. (T 147-148)

52. The Division received comments from the public at the public hearing as well as three emails. As noted in the Memorandum from Steven Murphey to Director Louis Daniel, dated February 10, 2016, all who appeared at the public hearing and spoke were in favor of the lease.

(Resp.'s Exh 3, p.19) Also attached to the memo are the three emails referenced above in Findings of Fact 22, 23, and 24; two of which do not speak to this lease, and the third which is in essence against Petitioner having any lease in some undefined area. (Resp.'s Exh. 3, pp 11-18, including unnumbered page between 14 and 15)

53. Steven Smith, a Commissioner for Topsail Beach, commented on the lease during the public comment period. (T p 254) Mr. Smith questioned the amount of notice in that he had only seen it in the local newspaper the night before and that his town hall apparently did not even know about the meeting.

54. Mr. Smith was shown the map on page 6 of Respondent's Exhibit 3 at the public hearing and is familiar with the Area. (T pp 147, 259) From that map it is practically impossible to discern with any degree of certainty where the boundaries of the lease are located. One may at best get an idea of the general location of the lease.

55. At the public hearing, Mr. Smith observed that the proposed lease is in a high traffic area from May through October. (Resp.'s Exh. 3, unnumbered page between page 14 and 15) Mr. Smith also observed that he is in favor of anything that will bring back the oysters and clams that have been in decline for many years. While Mr. Smith did not object to the lease, he commented that he was concerned that the proposed lease would create conflicts by visitors to the area tampering with Petitioner's equipment. (*Id.*)

56. Mr. Smith has seen kayaks and rafts as well as fishermen using their trolling motors going up and down through the cut-through. (T pp 257-258)

57. According to Mr. Smith, even during the non-summer months, when there is very little tourist traffic there is still "always somebody in there. I don't think I've ever been by there I haven't seen somebody back there doing something, whether it's fishing or netting or crabbing. There is always somebody, and that's a good area." (T pp 260-261)

58. In Mr. Smith's sworn testimony, he is primarily concerned with the prospect that the visitors to the area's curiosity would cause damage to Petitioner's gear. His concern is different from the conflict with which Officer Sabella was concerned. In his sworn testimony, Mr. Smith continues to be in favor of the lease.

59. Dr. Louis Daniel served as the Director of the Division of Marine Fisheries from February 1, 2007 to March 1, 2016. (T p 220)

60. Dr. Daniel reviewed the application packet, public hearing comments, public meeting comments summary, information from Fisheries Management and Marine Patrol, and discussed all of these materials with Steve Murphey, Section Chief for the Habitat Enhancement Section of the Division of Marine Fisheries, and Mr. Corbett prior to making a decision on whether to approve or deny the lease application. Dr. Daniel stated that this was "the level of detail" that he reviewed prior to making his decision. (T p 221)

61. When specifically asked "why did you deny the application," Dr. Daniel launched into a

description of a whole host of reasons why he denied Petitioner's application, specifically:

- a) That this lease is not in the "best interests of aquaculture"
- b) That there are moratoriums in Brunswick and Carteret Counties which are based on conflicts with this same type of equipment (This proposed lease is in Pender County and there is no moratorium)
- c) That putting in the oyster gear will render the site less photogenic
- d) That "this" is going to cause "substantive problems throughout North Carolina" (presumably using this type of gear in the oyster leases)
- e) That he has started receiving complaints about this type of gear in front of people's homes, obstructing their view. (T pp 222-223)

62. Dr. Daniel admits that he was not just looking at the Petitioner's lease, but the cumulative effect of complaints that he has heard from across the state. According to Dr. Daniel the foregoing litany in finding of fact number 60 "weighed significantly in my decision-making, along with the observations of Officer Sabella." (T. pp 223, 248-250)

63. Dr. Daniel completely discounts the report from Ms. Murphey and Fisheries Management, speculating that they did not actually go to the proposed lease site, was unfamiliar with the location, and had based their recommendations on the size of the lease alone. There is no evidence whether anyone from Fisheries Management actually went to the site, although their duty would have been to actually visit the site. Dr. Daniels does not know whether they did or not. Dr. Daniels contention that he relies heavily on the recommendations of his staff is obviously not true, except to the extent that he apparently relied almost exclusively on Officer Sabella. (T pp 224-225, 247)

64. Dr. Daniel also opines that he would have approved the lease but for the water column component, an option which was available to Dr. Daniel but not offered to Petitioner. (T. p 225)

65. Of all the lease applications in any given year, approximately 10% are for the same type of gear as requested in this application; i.e., the floating bag type. Dr. Daniel has never denied a permit request using the same gear as in this proposal. (T. p 251)

66. Dr. Daniel also acknowledges that he gets very few comments against shellfish leases. (T. p 225) That begs the question of where, from whom and when has he received the myriad of complaints that was instrumental in forming his decision as noted in Findings of Fact #60 and 61 above.

67. Although Dr. Daniel had been out in the general area with Mr. Corbett approximately 10 to 11 times, from Dr. Daniel's testimony, it is not clear if he is even aware of the exact location of the proposed lease at the times that he has physically been in the area. (T. p 228, 233)

68. In coming to his decision, Dr. Daniel states that he relied heavily on the comments from Officer Sabella and the comments from Mr. Corbett that there would be complaints about the lease. (T p 238)

69. Dr. Daniel states that he has been around water column leases that use the floating bag method. He acknowledges that one can navigate around such leases, but speculates that one might lose fishing tackle around the structures, especially if a sizeable fish is on the line. (T p 223)

70. The undersigned has been in, on and under the coastal waters of North Carolina for more than fifty years, including as a boat owner, a certified SCUBA diver and having fished in marlin tournaments for more than 20 years. As a recreational fisherman, the undersigned is of the opinion that most fishermen are not going to fish in a place where there are obvious obstructions which pose a problem for losing tackle, or at the very least be extremely cautious. It might also depend on what type of fish one is fishing for and thus the type of tackle used. For example, submerged structures are more apt to cause loss of tackle especially for someone using bottom rigs. It would not be a surprise that Petitioner would find fishing tackle caught in his gear, but it would not be an indication that the lease would be prohibitive to fishing and should be denied.

71. Dr. Daniel also says that he took into account that the general area is heavily used by the recreational fishing and boating community. (T p 224) There is no evidence to support the contention that the general area is “heavily” used by recreational fishermen. There is some evidence of commercial fishing from the one commercial fisherman Dr. Daniel spoke to, but the evidence does not support a finding that such use is “heavy.” The evidence is that one crab fisherman and perhaps one gill-netter use this particular area with any degree of regularity.

72. Dr. Daniel denied the lease application “due to significant user conflict and traditional use by commercial and recreational constituents.” (Emphasis added) (Resp.’s Exh. 3, p 19) (T p 226) There was no acknowledgement that Petitioner’s existing lease has been in use since 2008 without conflict or complaint.

73. Dr. Daniel’s decision was communicated to Petitioner by letter from Valerie Wunderly, Program Manager Shellfish Leasing, dated February 19, 2016. Ms. Wunderly’s letter mirrors Dr. Daniel’s decision by stating that “the site was determined to have significant user conflict and traditional use by commercial and recreational constituents.” (Emphasis added) (Resp.’s Exh. 7)

74. While an option to Petitioner was to work with the Respondent to try to find an alternate site, he only had 20 days within which to exercise his right of appeal to the Office of Administrative Hearings. Dr. Daniel’s testimony indicates that he was of a mind at that time to not approve any floating bag leases because of state-wide problems. Even though Petitioner would not have been aware of that rationale, it is obvious from his testimony that Dr. Daniel would not have approved this type of lease anywhere.

TESTIMONY FROM PETITIONER’S WITNESSES

75. The Petitioner claims that the proposed lease would not interfere with boats. He acknowledged when asked hypothetically what would happen if a boat drove over one of the floating bags in his current lease, that it was quite possible that the nylon line could wrap around the propeller and probably shut the engine down.” (T p 74)

76. Interestingly, there is no evidence that anyone has run into his current lease bags in the 8

years they have been in existence. It is inconceivable to the undersigned, as an experienced boater, that an even quasi-vigilant boater would run into the floating bags where they would be located in the proposed site. Beyond that, you cannot protect everyone from their own stupidity.

77. The Petitioner also claims that the proposed lease would not interfere with kayakers. This contention is confirmed by Jay Styron who testified that kayakers typically avoid his shellfish lease sites that have floating bags like those Petitioner intends to use at the proposed lease. (T p 98)

78. Based on the evidence presented, there is no evidence that boaters and kayakers access to the area will be hampered other than to go to the specific area of the lease. Access to the cut through will have no impediment. Naturally, waders and swimmers would be deterred from the specific area where the bags are located. However, there is little to no evidence of actual swimming or wading in the area where the bags are located. Some few boats may pull up to the small island separating this lease area and the channel for Lea Island, especially during low tide, but the small island is almost totally marsh area, not exactly ideal for traditional beach activities.

79. There will indeed be sharp objects on the bottom of the proposed lease (T p 76), and Petitioner has had to warn a family that was walking through his current lease site (T pp 70-71). These areas are clearly marked and the bags are obvious. The Petitioner is in the area almost daily and has used the bags as teachable moments to the curious.

80. Jay Styron is the Director of Marine Operations for the University of North Carolina Wilmington. He has been with the University for 24 years in various capacities. He is also the President of the North Carolina Shellfish Growers Association.

81. Mr. Styron only visited the proposed lease site one time about two years prior. (T p 95) Mr. Styron's attention was focused mainly on the Petitioner's existing lease, and he estimated that he spent only about 10 to 15 minutes looking in the general direction of the proposed lease site, since that site had not been even proposed at that time. (T p 97)

82. Mr. Styron has a lease near Cedar Island in Carteret County, North Carolina. (T p 97) When asked whether boaters go through his lease, Mr. Styron testified that "most reasonable people wouldn't be going through the lease to start with when they see floating gear all around because they don't want to get entangled in it." (T pp 97-98)

83. Mr. Styron also stated that he has commercial crabbers and commercial gillnetters who set close to his bags as well. (T. p 93)

84. Romulus McCoy testified on behalf of Petitioner. He has been fishing in the area behind Lea Island one to two times per week since 2012. He has not seen any recreational fishermen in the lease area. He has seen recreational fishermen fishing further up the creeks. He has seen Mr. Corbett's crab pots in the lease area.

85. According to Mr. McCoy, he currently fishes in the proposed lease area. He also stated that if the floating bag system is used in the proposed lease site that it would not affect his fishing in the site. When he fishes in the Petitioner's current lease site, Mr. McCoy does not go into the

current lease site and fishes only on the outer perimeter because he does not want to get hung up on the “baskets.” (T pp 107-08) That is only common sense.

86. Two other witnesses testified on behalf of the Petitioner, Kenneth Garvey and James Milne. Mr. Garvey testified that he fishes the “back creek” and goes to Lea Island with his family. When asked whether he has observed anyone in the proposed lease site, Mr. Garvey testified that he has never seen anybody “in that particular area.” (T pp 110, 111) Mr. Milne testified that he travels to Lea Island to recreate in the area, but is not a big fisherman. (T p 118) Mr. Milne testified that the proposed lease site is fairly close to the main boating channel, but that he has not observed anyone in the site. (T p 117, 121, 121)

CONCLUSIONS OF LAW

1) The Office of Administrative hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. 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 their given labels.

2) The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that the Respondent erred when it denied the Petitioner’s shellfish lease and associated water column lease by exceeding its authority or jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily or capriciously, or failing to act as required by law or rule. *See* N.C. Gen. Stat. § 150B-23(a); *See also Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007) (“unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases”).

3) “[W]here the waters covering land are navigable in law, those lands are held in trust by the State for the benefit of the public.” *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988).

4) The Secretary of the Department of Environmental Quality may, in his discretion, authorize shellfish bottom and associated water column leases when he determines that the public interest will benefit from issuance of such a lease and the proposed lease otherwise meets certain minimum standards. N.C. Gen. Stat. §§ 113-202(a), 202.1(a) The Administrative Code provides in 15 N.C.A.C. 03O .0203 “the Secretary shall consider the lease application, the Division’s proposed lease area analysis, and public comments, and may in his discretion lease or decline to lease the proposed lease area or any part thereof.”

5) The Secretary has delegated his authority for issuing leases to the Director of the Division of Marine Fisheries. *See* N.C. Gen. Stat. § 143B-10; (T p 165).

6) Absent conflicting provisions, the procedures and requirements pertaining to shellfish bottom leases apply to water column leases as well. N.C. Gen. Stat. § 113-202.1(h).

- 7) One minimum standard a shellfish lease must meet before it can be approved by the Secretary is that “[c]ultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing, and recreation.” N.C. Gen. Stat. § 113-202(a)(3).
- 8) At issue in this particular contested case is whether or not the proposed shellfish lease is “compatible” with the other uses of the area for navigation, fishing and recreation.
- 9) Neither the general statutes nor associated Marine Fisheries Commission regulations define or indicate how much use within a proposed lease site must be present in order for the lease to warrant denial as being incompatible with those public uses. There is no definition to define what constitutes the area of the lease, or how it might actually impact navigation, fishing or recreational use.
- 10) There is no question that Lea Island itself is a heavy recreated area, especially during summer months. There is not sufficient evidence to show that the proposed lease sight is heavily recreated at any time. Although just across the main channel from Lea Island, the proposed lease area is tucked away behind a small marsh island, not subject to the heavy tourist traffic visiting Lea Island. It is hard to imagine a more secluded, and protected area that could still be accessible to a potential lease holder. The mere fact that the site is relatively close to a heavily used area is not sufficient in and of itself to designate this area as heavily used.
- 11) Petitioner’s current lease which is roughly 100 yards away from the proposed site is completely open and easily accessible, much more so than the proposed lease site. There has been very little to no problems between Petitioner’s current lease and other visitors to the area.
- 12) There is some evidence that a single commercial fisherman/crabber, Mr. Corbett, puts his pots in the area, but that one fisherman says that he has no objection to the lease and that he will still be able to put crab pots in the area. That same one commercial fisherman is the only person upon whom Dr. Daniel and Officer Sabella relied, and he testified in-person in this contested case hearing. The only direct evidence also offers that gill-netters can still fish around this gear.
- 13) There is no substantial evidence that this lease would interfere with recreational fishing to any significant degree. In fact, the most direct evidence is to the contrary. Mr. Corbett states that one can indeed still fish around the type of gear proposed in this lease request.
- 14) There is no substantial evidence that this lease would interfere with navigation. The proposed site is tucked in behind a marsh island and away from the main channel running beside Lea Island. Nothing about this proposed site interferes with the boaters’ access to Lea Island. There is a cut through beside the proposed site that leads to other creeks, and the proposed site does not interfere with use of that cut-through
- 15) The letter from Ms. Wunderly to Petitioner dated February 19, 2016 is the letter from Respondent formally denying Petitioner’s request for a lease. (Resp Exhibit 7) The letter states that the proposed site was determined “to have” conflicts, phraseology which means in actuality

not speculation. The only evidence in this contested case hearing of any conflict is totally speculative.

16) Ms. Wunderly's letter goes on to state that the conflict is with commercial and recreational users and that the conflict is "significant." The evidence does not support a finding that any conflict was significant. The only evidence concerning commercial fishing comes from Mr. Corbett, who's testimony is essentially that it will pose no problem for him. The evidence is that gill-netters will continue to be able to use the area. Concerns were expressed by Mr. Corbett that the recreational folks might tamper with Petitioner's equipment is belied by the fact that his current lease is completely open and available with very little to any problems. Concern for jet-skiers is not well founded in that the actual numbers of users is not known but apparently relatively small, and they have a duty to see whatever is to be seen as with any other obstruction in the water.

17) Ms. Wunderly's letter articulates the only reasoning given to Petitioner as to why his applications were denied. It is obvious that Dr. Daniel, the decision maker, relied upon a whole host of reasons for denying the applications, reasons that apparently were not known to anyone else in the State of North Carolina except Dr. Daniel.

18) Dr. Daniel's reliance on factors not contained in the denial letter is a blatant denial of procedural due process. Perhaps over-simplified but the essence of procedural due process is that when the government is going to take or deny a property interest, then the process must be fair. It is the essence of the Administrative Procedure Act. There was no way for Petitioner to defend against reasons for denying his application that were not known to him until they were testified to in the course of this hearing.

19) The question becomes whether or not Dr. Daniel, acting in the stead of the Secretary, has absolute discretion in making his decision. The answer to that question is a resounding "no."

20) *In Maines v. Greensboro*, 300 N.C. 126, 265 S.E.2d 155, 158-9 (1980), the North Carolina Supreme Court held that "an ordinance which vests unlimited or unregulated discretion in a municipal officer is void." The United States Supreme Court has explained that "[d]iscretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496 (1953).

21) In this present contested case, the statute itself, N. C. Gen. Stat. 113-202, vests discretion to the Secretary of the Department, and sets out what is to be considered in making the decision. The statute is not unconstitutionally vague. What is problematic in this contested case is the application of the statute. A rule for application of the discretionary decision-making has been promulgated, 15A NCAC 03O .0203. The statute and the rule directs the Secretary in what is to be considered. The rule states that there "shall" be an inspection of the site by agents of the Division. Once the application is determined to be "consistent with all applicable requirements" then public notice is given in order to get feedback from any interested parties. A process was in place wherein the Director, acting for the Secretary, received information from three sections within his division, as well as the public comment.

22) In this contested case, the Director, Dr. Daniels, was given discretion but the discretion

was not unbridled and unregulated so that he could do anything that he wanted to. There was statutory regulation and rule, as well as a process in place, to guide him in the decision making process.

23) The Petitioner reasonably followed the process. There was nothing in the process to reasonably put him on notice of what the Respondent now says were the reasons for which his applications were denied because the discretionary decision making went far beyond those parameters set forth in the statute and rule. The defined criteria or standards applicable to the decision making in this process are there to provide an applicant with reasonable notice of what is expected and to govern the process. The denial letter is to specifically detail why Petitioner's applications were denied. It did not.

24) Respondent claims that it has discretion, and it does, but complete discretion without criteria renders a decision as arbitrary. There is nothing that demonstrates the accuracy of the information upon which Dr. Daniels claims to have made his decision. It is completely anecdotal. If that process is allowed, then the Director can continue to allow or deny applications for whatever reasons he or she might desire.

25) In *Lewis v. City of Kinston*, the Court of Appeals invalidated a public employment policy on North Carolina constitutional grounds when the challenged policy contained no standards or criteria, which essentially afforded the city manager "practically unlimited discretion. . ." *Lewis v. City of Kinston*, 127 N.C. App. 150, 155; 488 S.E.2d 274, 277 (1997). The Court explained that "[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void." *Id.* at 154, 488 S.E.2d at 277.

26) Here, there are standards and criteria and process, and thus are not "unlimited or unregulated." Dr. Daniel went beyond the scope of those regulations and criteria to render his decision as though he had complete and unbridled discretion.

27) "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Venters v. Albritton*, 184 N.C. App. 230, 234, 645 S.E.2d 839, 842 (2007), citing *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

28) "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Treants v. Onslow County*, 94 N.C. App. 453, 458, 380 S.E.2d 602 (1989), quoting *City of Mesquite v. Aladdins*, 455 U.S. 283 (1982) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). A vague regulation "fails to inform those to whom it is directed of its application to them and therefore violates due process of law." *Connally v. General*, 269 U.S. 385, 391 (1926). It is equally a violation of due process to have guidance in rule and law, and then not follow it. The process that Respondent used is flawed.

29) It is recognized that the contested case hearing at the Office of Administrative Hearings is ultimately the "due process" hearing guaranteed to the Petitioner; however, Petitioner should have been provided at least a modicum of procedural due process in the steps that gets him to this hearing, and he was not.

30) A decision is arbitrary when it is not predicated upon a fair consideration of all necessary facts and factors. Courts have defined arbitrary and capricious as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *Blacks Law Dictionary* 96 (5th ed. 1979). See *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Arbitrary is defined as "without adequate determining principle . . . [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance... decisive but unreasoned.." *Id.*; *Flower Cab Co. v. Petite*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached "without adequate determining principle or was unreasoned."); *U.S. v. Euordif S.A.*, 555 U.S. 305, 316 at n.7 (2009)("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Watts-Hely v. U.S.*, 82 Fed. Cl. 615, 615 (Claims Court, 2008)("the very definition arbitrary and capricious action is decision making that ignores the relevant factors critical to the decision.")

31) Respondent's actions in denying Petitioner's application were predicated upon arbitrary factors and considerations. The totality of the facts and circumstances demonstrate that Petitioner was needlessly and arbitrarily denied his shellfish applications.

32) "Administrative decisions may 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 *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The decision by Dr. Daniel reciting reasons beyond the denial letter and beyond the scope of any rule or law indicates "a lack of fair and careful consideration."

33) The APA requires that an Administrative Law Judge "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a). There is no evidence in this case that recites facts and inferences that require any specialize knowledge of the agency or anyone else. The agency is not entitled to any particular special consideration or regard above the ordinary.

34) The evidence shows that certain areas close to the proposed site are more heavily used than the exact footprint of the proposed lease site. Fact that there is heavy traffic nearby the proposed lease does NOT necessarily make that area inappropriate for leasing, just as his existing lease has co-existed for all these years. The evidence shows that very few boats go through that cut through, quite possibly because one can obviously just as easily go around the marsh islands harboring the proposed site without the possibility of running aground. The law does not require an area to be traffic free to be approvable because it would not make any sense and would be an almost impossible requirement to meet.

35) It is the policy of the State of North Carolina to encourage the development of private and commercial shellfish cultivation so long as it is done in a manner compatible with other public uses of the marine and estuarine resources. The evidence is substantial that this proposed lease in compatible with the other uses. The evidence before Dr. Daniel was not substantial evidence that

this area was incompatible with the other uses but relied primarily on the opinion of Officer Sabella who hypothesizes that there will be problems. The other person upon whom he relied is Chair of the Marine Fisheries Commission and he had no objection to the lease. Dr. Daniel off-handedly rejected the opinion of a section of his own agency who had a statutory duty to visit the site and render a report. Most troubling is that Dr. Daniel relied in large degree upon factors known only to himself.

36) The Petitioner met his burden of showing that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule as required in N.C. Gen. Stat. § 150B-23(a) when denying the Petitioner's lease applications.

FINAL DECISION

BASED UPON the Findings of Fact and Conclusions of Law above, the undersigned makes the following decision:

The Respondent's decision to deny the Petitioner's Application for Lease of Shellfish Bottom and an Application for Lease of Water Column is **REVERSED**. Respondent is directed to issue Petitioner shellfish leases for which he applied and are at issue herein.

NOTICE

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 the Office of Administrative Hearings' Rule 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 the date it was placed in the mail as indicated by the date on 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 in order to ensure the timely filing of the record.

This the 5th day of October, 2016.

Donald W Overby
Administrative Law Judge