RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0507, .0508, and .0509; 15A NCAC 07I .0702; 15 NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15A NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

X Failure to comply with the APA

Extend the period of review

COMMENT:

Permanent rulemaking and the protections it affords the citizens of North Carolina is the preferred method of administrative rule promulgation. Temporary rulemaking is an exception provided only in certain limited circumstances. As such, the APA requires agencies seeking to adopt temporary rules to meet a two-part threshold prior to the adoption of a temporary rule. G.S. 150B-21.1(a) (2023). "An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest **and** that the immediate adoption of the rule is required by one or more of" a statutorily enumerated list of circumstances or events. *Id*. (emphasis added).

Brian Liebman
Commission Counsel

When it submits temporary rules to RRC for approval, an agency must also prepare and submit to RRC a "written statement of its findings of need for a temporary rule" explaining why the rule meets the two-part threshold laid out in G.S. 150B-21.1(a). G.S. 150B-21.1(a4). The RRC is explicitly tasked with reviewing the agency's statement and the rule "to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9." G.S. 150B-21.1(b). In making this determination, the statute allows that the RRC "may consider any information submitted by the agency **or another person.**" *Id.* (emphasis added). If the RRC finds that the statement does not meet the criteria listed in 150B-21.1(a), the Commission must immediately notify the head of the agency, which may "supplement its statement of need with additional findings or submit a new statement . . . ." G.S. 150B-21.1(b1). Thus, the agency's findings of need must be substantiated in its statement, and the RRC's examination of the statement exceeds a mere review of whether the agency has alleged the necessary items.

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Here, the CRC's statement of findings of need is largely conclusory and conflates the arguments for the two prongs of the G.S. 150B-21.1(a) test.[1] The CRC states the absence of these rules from the Code prevents the State from making permitting and enforcement decisions, and has resulted in the NC Coastal Management Program losing "the ability to protect coastal lands and waters." However, this is contradicted by multiple public comments in opposition to these rules. Cedar Point Developers allege that public records show "at least twenty CAMA major permits" have been issued since the equivalent permanent rules were removed from the Code on October 5, 2023. Pub. Comment of Cedar Point Developers, LLC, p. 5. The North Carolina Homebuilders Association include in their comment communication between the Division of Coastal Management and a CRC member stating that "DCM issued 42 Major Permits in the period between Oct. 5, 2023 to Jan. 5, 2024 while the Commission's rules were vacated . . . . *There were no permits that we could not issue because the rules were vacated*

[1] The agency lays out its arguments for the second prong of the test in Box 6 of the Statement of Findings of Need Form, and its arguments for the first prong in Box 7. However, the CRC "incorporates the explanation provided" in Box 6 in its response in Box 7. Thus, to the extent staff can read the agency's intent, staff has attempted to apply the agency's specific reasoning for why immediate adoption is required by a recent act of the General Assembly or by a serious and unforeseen threat to the public health, safety, and welfare to the question of why adherence to the notice and hearing requirements of permanent rulemaking are contrary to the public interest.

because CAMA requires us to accept, process, and issue or deny permit applications[.]" Pub. Comment of the N.C. Homebuilders Ass'n., pp. 3-4 (emphasis added).

Similarly, the CRC states that it can no longer review "certain federal projects for consistency with State law based on these rules." Neither the rules themselves nor the statement makes clear what federal projects are impacted or how the rules before the Commission relate to those federal projects. It is equally unclear from the statement why the CRC's inability to review these projects makes adherence to the notice and hearing requirements of G.S. 150B-21.2 contrary to the public interest. Moreover, when the equivalent permanent rules that were removed from the Code went through the first step of the periodic review process in 2017 and 2018, the CRC declined to designate any of these rules as necessary to "implement or conform to federal regulation." The result of that designation could have prevented those rules from expiring should CRC have failed to meet its readoption deadlines. G.S. 150B-21.3A. Thus, to the extent that CRC now argues that these rules *are* necessary to implement or conform to federal regulation, their argument is unconvincing, and the time to make that designation has passed. *See* G.S. 150B-21.3A(d)(1) (giving the Commission the authority to set the timeline for completion of the periodic review process).

That said, in its public comment, the Southeastern Environmental Law Center ("SELC") states that each of the sixteen rules before the Commission are vital to "North Carolina's ability to fully participate in the federal Coastal Zone Management Act program." Pub. Comment of the Southeastern Environmental Law Center, Attachment A, p. 2. According to the SELC, under the CZMA a state must submit its coastal management plan to the National Oceanic and Atmospheric Administration ("NOAA") for approval, and receives federal funding and "the right to review federal actions for their consistency with enforceable state policies." *Id.* Specifically, an applicant for a federal permit for an activity affecting the coastal zone must provide the State with a certification that "the proposed activity complies with the *enforceable policies* of the state's approved program and that such activity will be conducted in a manner consistent with the program." *Id.* The SELC alleges that without these sixteen rules, which "articulate the 'enforceable policies' that form the basis of CZMA consistency determinations for federal actions affecting North Carolina's coastal resources," the State will "lose the right to review federal agency activities under the CZMA based on these rules." *Id.* at p.4. While the SELC's comment provides much more information than the CRC's statement, it continues to suffer from the same defect; there is no specific allegation as to how these sixteen rules relate

to any proposed federal project or activity that the CRC would otherwise be able to block, or how temporary rulemaking, as opposed to permanent rulemaking, is necessary for the public interest.

The CRC points to "numerous public comments [received] with the significant majority in favor of adopting the temporary rules" as the only explicit justification offered for why adherence to the permanent rulemaking notice and hearing requirements is contrary to the public interest. Far from justifying temporary rulemaking, it would appear that intense public concern for a particular set of rules indicates that permanent rulemaking, with a more robust publication requirement and longer mandated comment period, is more appropriate than temporary rulemaking.

Moreover, the agency's ability to extend the public comment period from the fifteen business days mandated by G.S. 150B-21.1(a3)(3) to sixty-four calendar days (in excess of the sixty-day comment period required for permanent rulemaking by 150B-21.2(f)) cuts against any argument that adherence to the notice and comment provisions of G.S. 150B-21.2 should be avoided.[2] The explicit statutory purpose of temporary rulemaking is to expedite the rulemaking process when circumstances so require. While the agency claims that temporary rulemaking is necessary, it purposely extended the public comment period to more than sixty days and waited eighty-five days to formally adopt the rules. This extended timeline belies the apparent urgency expressed in the statement of findings of need.

Finally, in her April 4, 2024 memo to the Commission, counsel to the CRC Mary Lucasse responds to public comment and provides additional information regarding the adoption of these rules. To the extent that these arguments are intended to assert additional grounds in support of the CRC's contention that adherence to the permanent rulemaking notice and hearing requirements would be contrary to the public interest, staff is of the opinion they are unpersuasive. First, the CRC asserts that the temporary rules "include changes to address objections raised by the RRC and counsel to the RRC." As of the date of Ms. Lucasse's memo, the Commission has not objected to these temporary rules. The rules to which the Commission objected were returned to the agency and removed from the Code in October 2023, and are the subject of pending litigation. The APA contains no mechanism for "addressing objections" *after*

[2] Staff would note that the CRC's efforts to extend the public comment period "in order to widely solicit comments" are commendable. Staff's opinion in no way intends to discourage any agency from taking any reasonable measure to solicit public input during the administrative rulemaking process.

the rules have been removed from the Code other than by pursuing judicial review of the Commission's decision in Wake County Superior Court, as the CRC has already elected to do.[3] Session Law 2023-134, s. 21.2(m) ("If a rule is returned to the agency under this section, the agency may file an action for declaratory judgment within 30 days after the rule is returned to the agency in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."). Moreover, G.S. 150B-21.1(a) does not recognize satisfying a previously lodged objection as a ground for temporary rulemaking.

Second, the CRC states that "Counsel for the RRC suggested that the CRC use the temporary rule process", claiming that during the hearing for the CRC's request for a temporary restraining order, counsel for the Commission and for the Codifier "suggested to the trial court that a TRO was unnecessary as the CRC had the option of proceeding with emergency or temporary rulemaking." Ms. Lucasse also draws attention to a letter issued by the Commission's outside counsel "reiterating this suggestion."[4] Review of this letter indicates that outside counsel merely reminded the CRC that it could mitigate any alleged harm by pursuing either emergency or temporary rulemaking of "new rules" which contain "provisions in the Returned Rules to which the RRC did not object," and that the CRC "is entitled to draft its proposed rules in a way that places rule provisions over which the RRC did not previously object in one set of proposed rules[.]" Throughout the letter, counsel was clear that this suggestion was not a "forecast[] [of] the RRC's position on specific rules," that "any rules promulgated [must] meet the statutory criteria", that "the RRC would obviously have to conduct an independent analysis" of any rules submitted, and "such separation *is not a guarantee that the RRC would not object to them"* (emphasis added). Thus, it is inaccurate to state that the RRC "suggested" that the CRC readopt nearly identical rules to those that were removed from the Code. In any event, neither the letter nor any of outside counsel's statements at the TRO hearing, on their own, provide the CRC with the authority or justification to pursue temporary rulemaking.

Finally, the CRC's memo points to the number of public comments received in favor of these rules, and to the fact that the CRC unanimously voted to adopt these rules. As noted

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[3] It is staff's opinion that due to the pending litigation, it would be inappropriate and inadvisable to discuss the substance of the objections lodged against the returned rules in an open session of the Commission.

[4] The November 8, 2023 letter from John Branch to Ms. Lucasse is attached at the end of this opinion for reference.

earlier, the intensity of support for these rules does not adequately justify deviating from the preferred permanent rulemaking process, and in fact, the Commission is barred from "consider[ing] questions relating to the quality or efficacy of the rule." G.S. 150B-21.9(a).

Based on the foregoing, staff recommends that the Commission find that the CRC has not met its burden of showing that "adherence to the notice and hearing requirements of G.S. 150B-21.1 would be contrary to the public interest" and that the Commission object to the above-captioned rules on that basis.

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As stated earlier, the temporary rulemaking threshold in G.S. 150B-21.1(a) is a two-part test. Because the agency has not met its burden on the first prong of the test, we need not consider whether the CRC has met the second prong. However, assuming *arguendo* that the CRC has met its burden on the first prong of the G.S. 150B-21.1(a) test, staff is also of the opinion that the CRC also has failed to meet its burden on the second prong, in that it has not shown that the immediate adoption of the rules is required by one of the enumerated list of triggering events in G.S. 150B-21.1(a).

As an initial matter, it is important to note that the relevant language of the APA does not provide that adoption of the rules be a consequence of one of the events listed in G.S. 150B-21.1(a), but that immediate adoption of the rules be "*required by*" one of those events. G.S. 150B-21.1(a). Thus, the agency must establish a specific and direct connection between the triggering event and the propounded temporary rules.

The CRC asserts two grounds justifying the immediate adoption of the rules. First is that the rules are required by a "serious and unforeseen threat to the public health, safety, and welfare." Second is that the rules are required by the "effective date of a recent act of the General Assembly or the United States Congress." The CRC cites Section 21.2(m). of Session Law 2023-134 as the relevant act of the General Assembly.

The CRC's statement of findings of need avers that "removal of the rules [following the legislative changes in Session Law 2023-134] causes a serious threat to public safety and welfare because without this rule, the NC Coastal Management Program has lost the ability to protect coastal lands and waters[.]" It cannot be that the legislative act requiring the return and consequent removal of these rules from the North Carolina Administrative Code constitutes an unforeseen threat to the public's health, safety, or welfare. Based on the specific language of the Session Law, the General Assembly commanded the Commission to return the

rules. "The Legislature is presumed to know the law." *Purnell v. Page*, 133 N.C. 125, 130, 45 S.E. 534, 536 (1903) Thus, the necessary consequence of the return would be to remove these rules from the Code pursuant to the unchanged provisions of the APA. In this way, an act of the General Assembly cannot be the kind of "unforeseen threat" that allows an agency to avoid the requirements of permanent rulemaking under the APA.

Rather, there must be some factual basis related to the substance of the rules, such as a threat to the environment that the CRC is charged with protecting. As noted above, the statement of findings of need and the various public comments received allege no specific threat to the environment, and merely state in general terms what might happen in the absence of regulation. The CRC's assertion that they are unable to protect coastal lands and waters insinuates that there *is* a threat but does not specifically identify that threat. As a result, the Commission cannot assess whether it is serious or unforeseen, or whether temporary rulemaking is required by that threat.

Even if the CRC was correct that the Session Law created a serious threat, the timeline of events suggests that the consequences of its passage were not "unforeseen." The RRC objected to the original set of rules at its September 15, 2022 meeting, and renewed its objection at the February 16, 2023 meeting. The General Assembly ratified Session Law 2023-134 and presented it to the Governor on September 22, 2023, and the Session Law thereafter became law without his signature 10 days later, on October 3, 2023. While the CRC was certainly entitled to rely on the language in the APA requiring them to request return of the rules before they could be removed from the Code, it strains credulity to believe that the CRC had no level of awareness that their rules were threatened when they had been subject to objection for over a year by the time the General Assembly ratified the Session Law. Moreover, as the Commission had issued detailed staff opinions for each rule, the CRC was on notice as to what specific portions of their rules required change. Thus, it is staff's opinion that the CRC has failed to show that immediate adoption of the rules is "required by" a serious and unforeseen threat to the public health, safety and welfare.

Alternatively, the agency asserts that the language of Session Law 2023-134 requiring return of the rules and consequent removal from the Code requires the immediate adoption of the rules through temporary rulemaking. This argument fails for several reasons. First, the language of Section 21.2(m). of Session Law 2023-134 provides the CRC with no rulemaking authority, does not direct the CRC to adopt rules, and does not change the CRC's relevant

statutes in a way that would necessitate rulemaking. Second, as noted above, the natural consequence of the language was to remove nearly identical rules from the Code. To say that the Session Law *requires* the immediate adoption of rules which are largely unchanged from those removed from the Code, is fundamentally inconsistent with the language of the Session Law.

Based on the foregoing, staff recommends objection to all rules in this package pursuant to G.S. 150B-21.1(b)(1) on the basis that the CRC has not met its burden under G.S. 150B-21.1(a) of showing that adherence to the notice and hearing requirements of G.S. 150B-21.2 is contrary to the public interest.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.
(2) It is clear and unambiguous.
(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

. . . .

(7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

. . . .

(8a) Rule. – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.
2. Orders establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed G.S. 150B-2 Page 3 by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

§ 150B-19.1. Requirements for agencies in the rule-making process.

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

(1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.

(2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.

(3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.

(4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.

(5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).

(6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

(1) The text of a proposed rule.

(2) An explanation of the proposed rule and the reason for the proposed rule.

(3) The federal certification required by subsection (g) of this section.

(4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.

(5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

(1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.

(2) Post the certification on the agency Web site in accordance with subsection (c) of this section.

(3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) The effective date of a recent act of the General Assembly or the United States Congress.
(3) A recent change in federal or State budgetary policy.
(4) A recent federal regulation.
(5) A recent court order.
(6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
(7) The need for the Wildlife Resources Commission to establish any of the following:
    a. No wake zones.
    b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
    c. Hunting or fishing bag limits.
    d. Management of public game lands as defined in G.S. 113-129(8a).
(8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
(9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
(10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
(11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
    a. In accordance with the provisions of G.S. 163-22.2.
    b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
    c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
(12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
(13), (14) Reserved.
(15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
(16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

(17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

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November 8, 2023

RE: *NC DEQ et al. v. NC RRC et al.*
CRC Post-TRO Hearing Options

Dear Ms. Lucasse,

At the hearing yesterday, you averred on behalf of the Coastal Resources Commission ("CRC") that the public and North Carolina's coastal resources are in peril in the absence of the rules returned by the Rules Review Commission ("RRC") to the CRC on October 5, 2023 (the "Returned Rules"). As you are aware, the effect of the Returned Rules being returned to the CRC is that they have been removed from the Administrative Code and are no longer in effect. Regardless of the CRC's litigation against the RRC, the RRC continues to stand ready (as it has over the last several months) to work with the CRC in the event that the CRC seeks to promulgate new rules addressing the subject matter of the Returned Rules.

Without forecasting the RRC's position on specific rules or specific provisions within rules which we have not yet seen, the RRC reminds your client that, to the extent that the CRC wishes to mitigate any alleged harm to itself, its regulatory partners, or the regulated public, and assuming any rules promulgated meet the statutory criteria, the CRC may consider either emergency rulemaking under G.S. 150B-21.1A, or temporary rulemaking under G.S. 150B-21.1. Both of these alternatives provide the CRC with the opportunity to enter rules into the North Carolina Administrative Code under an expedited timeline. Forms for each of these options may be found as listed below:

- Temporary Rulemaking Flowchart may be found here: https://www.oah.nc.gov/documents/rules/rulemaking-chart-temporary-rule/download

- Temporary Rule Form (0700) may be found here: https://www.oah.nc.gov/rules-form-0700-proposed-temporary-rule-publication-oah-website

- Proposed Temporary Rulemaking Findings of Need (0500) may be found here: https://www.oah.nc.gov/rules-form-0500-temporary-rulemaking-findings-need

- Emergency Rulemaking Flowchart may be found here: https://www.oah.nc.gov/documents/rules/rules-rulemakingchart-emergencyrule-0/download

- Emergency Rulemaking Findings of Need may be found here: https://www.oah.nc.gov/rules-form-0600-emergency-rulemaking-findings-need

- Other resources (including electronic filing instructions) for potentially preparing the rules can be found in the "Information for Rulemaking Coordinators" section of the RRC's website, here: https://www.oah.nc.gov/rules-division/information-rulemaking-coordinators

A number of arguments were made at the hearing yesterday about provisions in the Returned Rules, to which the RRC did not object, no longer being operative because the entire rule was returned to the CRC. The RRC notes that, as part of the potential emergency, temporary, or permanent rulemaking process, the CRC is entitled to draft its proposed rules in a way that places rule provisions over which the RRC did not previously object in one set of proposed rules, whereas the CRC could draft a separate set of proposed rules to which it is on notice that the RRC is more likely to object. The RRC would obviously have to conduct an independent analysis of these rules (if applicable) and such separation is not a guarantee that the RRC would not object to them, but given the concerns raised by the CRC at the hearing the RRC notes that separating proposed rules in that way could assist narrowing the issues.

Please let us know if you have any additional questions about this process.

Best regards,

John E. Branch III

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The Executive Director of the Board of Elections shall issue written opinions to candidates, the communications media, political committees, referendum committees, or other entities upon request, regarding filing procedures and compliance with this Article. Any such opinion so issued shall specifically refer to this paragraph. If the candidate, communications media, political committees, referendum committees, or other entities rely on and comply with the opinion of the Executive Director of the Board of Elections, then prosecution or civil action on account of the procedure followed pursuant thereto and prosecution for failure to comply with the statute inconsistent with the written ruling of the Executive Director of the Board of Elections issued to the candidate or committee involved shall be barred. Nothing in this paragraph shall be construed to prohibit or delay the regular and timely filing of reports. The Executive Director shall file all opinions issued pursuant to this section with the Codifier of Rules to be published unedited in the North Carolina Register and the ~~North Carolina Administrative Code.~~State Board of Elections website.

This section applies to ~~Articles and~~ Article 22M of ~~the General Statutes~~ this Chapter to the same extent that it applies to this Article."

SECTION 21.2.(*l*) Any pending proposed temporary rule submitted to the Rules Review Commission pursuant to G.S. 150B-21.1 on or before the day immediately prior to the effective date of this act shall be returned to the agency by the Commission if:

(1) The Commission has notified the agency that the agency's statement of its findings of need does not meet the criteria listed in G.S. 150B-21.1(a) or that the rule does not meet the standards in G.S. 150B-21.9 or Article 2A of Chapter 150B of the General Statutes;

(2) The agency has not supplemented its statement of need with additional findings or submitted a new statement that meets the criteria listed in G.S. 150B-21.1(a) or that the rule meets the standards in G.S. 150B-21.9 or Article 2A of Chapter 150B of the General Statutes, as determined by the Commission; and

(3) More than 60 days have passed since the Commission first notified the agency that the statement does not meet the criteria listed in G.S. 150B-21.1(a) or that the rule does not meet the standards in G.S. 150B-21.9 or Article 2A of Chapter 150B of the General Statutes.

If a rule is returned to the agency under this section, the agency may file an action for declaratory judgment within 30 days after the rule is returned in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes and G.S. 150B-21.1(b2).

SECTION 21.2.(m) Any pending proposed permanent rule submitted to the Commission pursuant to G.S. 150B-21.2 on or before the day immediately prior to the effective date of this act shall immediately be returned to the agency if:

(1) The Commission has notified the agency that it has objected to the proposed permanent rule.

(2) The agency has not submitted a change to the rule to satisfy the Commission's objection.

(3) More than 60 days have passed since the Commission first notified the agency of the Commission's objection to the proposed rule.

If a rule is returned to the agency under this section, the agency may file an action for declaratory judgment within 30 days after the rule is returned to the agency in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

SECTION 21.2.(n) Subsection (e) of this section is effective when it becomes law and applies to rules adopted on or after that date. Subsections (j) and (k) of this section are effective when they become law and apply to filings on or after that date. The remainder of this section is effective when it becomes law.