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From: Millis, Chris <CMillis@nchba.org>
Sent: Thursday, December 12, 2024 4:38 PM
To: rrc.comments; Jeanette.k.doran@gmail.com; jakeparkerrrc@gmail.com; bwl@ocrlaw.com; wboyles@aol.com; jhahn@mayerbrown.com; jeff.hyde@aestheticimages.net; overton.ro@gmail.com; William W. Nelson; ppowell@apbev.com; Liebman, Brian R
Cc: Everett, Jennifer; Burgos, Alexander N
Subject: [External] RRC Comments - Agenda Item IV.6. - Coastal Resource Commission Permanent Rules
Attachments: NCHBA Comments to RRC-121224 Item IV 6 CRC.pdf

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Commission Members and Commission Staff, please find attached to this email comments regarding the proposed permanent rules by the Coastal Resources Commission (CRC), as outlined in Agenda Item IV-6 for your December 19, 2024 meeting.

Please also find this email as a request to speak in opposition to the permanent rules when considered by the Commission next Thursday.

Thank you for your service and your consideration of our comments.

All the best,

Chris Millis, PE
Director of Regulatory Affairs
North Carolina Home Builders Association
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December 12, 2024

Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

**RE: Written Comment on Proposed Permanent Rules
Coastal Resources Commission - 15A NCAC 07J .1401-.1405, .1501-.1503**

Dear Members of the Rules Review Commission and Commission Staff,

On behalf of the North Carolina Home Builders Association (NCHBA), representing over 16,000 member firms, we submit the following comments regarding the proposed permanent rules by the Coastal Resources Commission (CRC), as outlined in Agenda Item IV-6 for your December 19, 2024 meeting.

We strongly oppose these proposed permanent rules and wish to highlight significant deficiencies in the public notice process that deprived our organization and other stakeholders of the opportunity to provide timely input during the public comment period.

Given these deficiencies and substantive concerns, we respectfully request the Commission reject these proposed rules under your authority pursuant to G.S. 150B-21.9.

Failure to Provide Adequate Public Notice

The CRC failed to meet the statutory public notice requirements outlined in NCGS 150B-19.1 and 150B-21.2. Specifically:

1. **Failure to Notify Interested Parties According to NCGS 150B-21.2(d):** The CRC failed to comply with NCGS 150B-21.2(d), which requires agencies to send notice of rulemaking actions to their interested parties list.

NCGS 150B-21.2(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected.

After reaching out to various stakeholders outside of our organization, it is clear to us that the CRC failed to comply with NCGS 150B-21.2(d) as notice of rulemaking was not given to individuals who previously requested to be on the agency's rulemaking notice mailing list.

By not directly notifying these stakeholders, the CRC effectively excluded a significant portion of the regulated community from participating in the rulemaking process. This oversight is particularly concerning given the implications of the proposed rule changes on the regulated community.

The lack of proactive communication contributed to a widespread lack of awareness about the rulemaking action, leaving many stakeholders, including NCHBA, uninformed and unable to provide meaningful feedback. As a result, it is our understanding that only one comment in opposition was submitted before the CRC voted on the rule package (Cedar Point), highlighting the detrimental impact of the CRC's lack of transparency and failure to comply with procedural requirements. This limited input undermines the integrity of the rulemaking process and raises questions about the legitimacy of the CRC's actions.

2. **Failure to Comply with NCGS 150B-19.1(c): Lack of Website Posting for Public Rulemaking**

Notice: While the CRC "may" have posted the notice for the September 25, 2024 hearing for the rule set of interest (15A NCAC 07J .1401-.1405, .1501-.1503), the Commission only did so within the Department's (Department of Environmental Quality "DEQ") website. This process appears to violate the plain reading of NCGS 150B-19.1(c). According to this statute, public notice of such actions must be provided explicitly on "each agency's" webpage.

NCGS 150B-19.1(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.*

Instead of posting the rulemaking notice on the agency's (CRC or possibly DCM's) webpage, it was buried within weblinks that diverted to DEQ's webpage. This placement diminishes the notice's accessibility and visibility to the public.

3. **No Mention in Meeting Schedules or Minutes:** Although the CRC discussed the Coastal Area Management Act (CAMA) permitting process during its August 27-28, 2024 meeting, there was no mention of the public comment period or the September 25, 2024 hearing in its minutes.

Impact of Deficient Notice on NCHBA

Had NCHBA received proper notice of the public comment period and public hearing according to NCGS 150B-19.1(c) and 21.2(d) as outlined above, we would have submitted comments addressing concerns over the potential negative impacts of these rules on our industry. NCHBA's inability to participate in this process due to the CRC's failure to provide notice effectively disenfranchises our organization and its members, who represent the cornerstone of residential construction in this state.

Substantive Concerns with the Proposed Rules

NCHBA has substantial concerns about the proposed permanent rules, including:

1. **Overreach:** Several provisions of the proposed rules are unclear and exceed the authority granted to the CRC under CAMA. The rules appear to give external agencies influence over permit decisions without clear statutory support. We attest that these rules are in direct

violation of NCGS 150B-21.9(a) since the proposed rules are not within the authority delegated to the agency by the General Assembly.

2. **Failure to Address Prior Objections:** The CRC has not adequately addressed concerns raised during previous rulemaking iterations, including objections from the Rules Review Commission itself concerning both overreach [NCGS 150B-21.9(a)(1)] and ambiguity [NCGS 150B-21.9(a)(2)].

Regarding the specific issues raised about the proposed rules, we fully support the detailed points outlined in Cedar Point's November 4, 2024, letter to the CRC. This letter examines the statutory violations in-depth and further demonstrates the CRC's failure to comply with the requirements of NCGS 150B-21.9.

Request for Action

Given these significant procedural and substantive deficiencies, NCHBA respectfully requests that the Rules Review Commission:

1. **Reject the Proposed Permanent Rules:** The CRC's failure to meet the statutory notice requirements outlined in NCGS 150B-21.2(d) and 19.1(c), coupled with unresolved substantive concerns in violation of NCGS 150B-21.9, clearly warrants the outright rejection of these rules.
2. **Mandate Proper Notice and Public Input:** Require the CRC to restart the rulemaking process, ensuring compliance with NCGS 150B-21.2(d) and 19.1(c), affording all stakeholders, including NCHBA, an opportunity to participate meaningfully.

We appreciate your attention to these concerns and your commitment to ensuring transparency and fairness in the rulemaking process. NCHBA stands ready to provide further input or clarification as needed.

Sincerely,



Chris Millis
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Burgos, Alexander N

Subject: FW: [External] Proposed Permanent Rules – 15A NCAC 07J .1401-.1405, .1501-.1503, Processing Coastal Area Management Act (CAMA) Permits
Attachments: Cedar Point Developers Comment Letter to RRC - Permanent Rulemaking.pdf

From: Laura Boorman Truesdale <lauratruesdale@mvalaw.com>
Sent: Thursday, December 12, 2024 4:21:14 PM
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Cc: Mary Katherine Stukes <marykatherinestukes@mvalaw.com>; Steven Kellum <StevenKellum@qcenc.com>; 'James Maides' <JamesMaides@csbenc.com>
Subject: [External] Proposed Permanent Rules – 15A NCAC 07J .1401-.1405, .1501-.1503, Processing Coastal Area Management Act (CAMA) Permits

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Dear Members of the Rules Review Commission and Commission Staff,

On behalf of Cedar Point Developers, LLC, we submit the attached comments on the above-referenced proposed permanent rules. We are also writing to request the opportunity to speak on behalf of Cedar Point Developers during the December 19, 2024 RRC Meeting in opposition to the proposed permanent rules.

We respectfully request that you please acknowledge receipt of these comments and the request to speak during the December 19, 2024 RRC Meeting.

Please let us know if you have any questions.

Sincerely,
Laura Truesdale

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December 12, 2024

Ms. Ashley Snyder (*by email*)
Codifier of Rules
Ashley.snyder@oah.nc.gov

NC Rules Review Commission (*by email*)
Rrc.comments@oah.nc.gov

Re: Proposed Permanent Rules – 15A NCAC 07J .1401-.1405, .1501-.1503, Processing Coastal Area Management Act (CAMA) Permits

Dear Ms. Snyder:

On behalf of Cedar Point Developers, LLC (“**Cedar Point**”), we submit the following comments on the permanent rules being proposed by the Coastal Resources Commission (“**CRC**”) to implement the Coastal Area Management Act (“**CAMA**”) as set forth in the September 3, 2024 North Carolina Register Notice. On November 4, 2024, Cedar Point submitted comments in opposition to the permanent rulemaking as part of the regulatory review process (the “**November 4th Letter**”). The November 4, 2024 comments are attached to this letter for your reference.

At the outset, and as Mr. Liebman referenced in his December 5, 2024 memorandum to the Coastal Resources Commission, we note that Cedar Point does not believe the CRC followed the appropriate process for public notice of the permanent rulemaking. As discussed in the November 4th Letter, notice of the permanent rulemaking – including the beginning of the public comment period, the deadline for public comments, and the September 26, 2024 public hearing – was not included on the CRC virtual homepage, nor in any of the CRC’s meeting schedules, or meeting minutes.¹ Similarly, as of the date of this letter, there is no notice of the public comment period or its expiration on the Division of Coastal Management (“**DCM**”) list of “Public Notices.” Counsel for Cedar Point is registered for DCM and the CRC’s “Interested Party” mailing lists and, despite receiving notifications of other public comment periods throughout the last several months, Counsel did not receive any indication that the public comment period for this rulemaking had begun until it received the Interested Parties List Meetings, Information, Notices and News 11.1.24 email from Christy Simmons, on behalf of DCM, which included an agenda for the upcoming

¹ The meeting minutes from the August 27-28, 2024 CRC Meeting in Beaufort, NC include three and a half pages of discussion of the CAMA permitting process that is the subject of the Proposed Permanent Rules, yet there is no mention in the August 27-28, 2024 Meeting Minutes or in the Agenda for that meeting of the upcoming public comment period or the September 26, 2024 public hearing. See August 27-28, 2024 NC Coastal Resources Commission (CRC) August 27-28, 2024 at pages 8-11, available at <https://www.deq.nc.gov/coastal-management/crc-minutes-august-2024/download?attachment> (last visited Nov. 4, 2024).

CRC meeting. That email was sent to “Interested Parties” on November 1, just three days before the end of the public comment period for the rulemaking. We look forward to reviewing the CRC’s response to Mr. Liebman’s December 5, 2024 request regarding proof of public notice tasks.

We also note that certain language in the Proposed Permanent Rules (as hereinafter defined) appears to have been modified to address previous comments submitted by Cedar Point and by you, as the North Carolina Rules Review Commission (“**RRC**”), regarding the rules’ analogs in the Returned Rules, the Emergency Rules, and the Temporary Rules (each as hereinafter defined). However, a number of statutory concerns noted in previous submittals by Cedar Point and by the RRC remain. Many of the comments in this letter are similar if not identical to those Cedar Point has submitted in connection with the Returned Rules and the Temporary Rules insofar as such rules address the same substance as the Proposed Permanent Rules. Therefore, to the extent Cedar Point’s comments in previous letters – including the (i) December 18, 2023 Letter to the Codifier, (ii) February 20, 2024 comments on the temporary rulemaking, (iii) March 25, 2024 Letter to the Codifier, (iv) comments made on behalf of Cedar Point during the April 8, 2024 Rules Review Commission Special Meeting, and the November 4th Letter to the CRC – are applicable to the Proposed Permanent Rules, those comments are incorporated herein by reference. Further, given the notice issues referenced above, Cedar Point reserves the right to supplement these comments.

I. RELEVANT BACKGROUND

As you and the RRC are aware, the rules that are the subject of the permanent rulemaking by the CRC have a long and tenuous history. We have included a summary of some of this history to underscore that the permanent rules that are being proposed today have many similar or identical deficiencies as the permanent rules that were removed from the Administrative Code and the emergency and temporary rules that the CRC has already attempted – and failed – to replace them with. Despite these past unsuccessful proposals and the numerous responses to the rules that have been supplied by the RRC over more than a year, the CRC continues to propose rules for which it does not have statutory authority.

Earlier, permanent versions of the rules now being proposed (some of which include the Returned Rules) were first submitted by the CRC to the RRC for review on June 15, 2022 as part of the decennial periodic review process of N.C. Gen. Stat. § 150B-21.3A. The RRC objected to the rules at its September 15, 2022 meeting and set forth those objections in a letter dated September 17, 2022. The CRC submitted changes to several of the rules on November 23, 2022 and again on January 18, 2023. The RRC renewed many of its objections to the revised rules during its February 2023 meeting, stating that the changes made by the CRC did not satisfy the RRC’s objections. A February 22, 2023 letter from the RRC to the CRC explained the basis for its objections. The CRC took no further action to submit new proposed permanent rules in response to the RRC’s objections.

S.L. 2023-134 became effective on October 3, 2023. Section 21.2(m) of S.L. 2023-134 stated that, for all state agencies, proposed permanent rules would be “immediately returned to the agency” if (i) the RRC has notified the agency that it has objected to the proposed permanent rule; (ii) the agency has not submitted a change to the rule to satisfy the RRC’s objection; and (iii) more than 60 days have passed since the RRC first notified the agency of the RRC’s objection to the proposed

rule. Because much more than 60 days had passed since the RRC provided its objections (indeed, its original objections had occurred 383 days prior), the RRC requested that the rules be “immediately returned to the agency” in accordance with S.L. 2023-134. The rules were returned to the CRC on October 5, 2023. These rules are referred to herein as the “**Returned Rules**.” Less than a month later, the CRC filed a complaint for a declaratory judgment that the RRC’s objections to its proposed rules were invalid. *See North Carolina Dept. of Environmental Quality, et al. v. North Carolina Rules Review Commission, et al.*, 23CV031533-910 (Superior Court Division, Wake County, North Carolina) (the “**CRC-RRC Lawsuit**”). The CRC requested a temporary restraining order which was denied.

Rather than continue to address the RRC’s objections or make additional revisions to the rules, the CRC attempted to circumvent the permanent rulemaking process and the decennial rule review process by proposing that those same objectionable rules be adopted through the emergency and temporary rulemaking processes.

Emergency Rules:

Importantly, the emergency rulemaking process – unlike the permanent and temporary rulemaking processes – does not require RRC review. Pursuant to N.C. Gen. Stat. § 150B-21.1A(b), when reviewing emergency rules, the Codifier of Rules (“**Codifier**”) must evaluate the proponent agency’s statement of need to determine whether it meets the criteria for enacting emergency rules set forth in the North Carolina Administrative Procedure Act (“**APA**”).

The CRC held a specially called meeting to discuss the emergency rules on December 13, 2023. The CRC then submitted the emergency rules (the “**Emergency Rules**”) and its statement of need on December 14, 2023 (“**Statement of Need**”). It was clear during the meeting that many Commission members did not agree that the emergency rulemaking was an appropriate method for returning the rules to the Code. As you know, Cedar Point filed comments on December 18, 2023 stating its objections to the emergency rulemaking. *See* December 18, 2023 Letter to Ashley Snyder, Codifier of Rules. The Emergency Rules expired after the Temporary Rules were rejected by the RRC.

Temporary Rules:

As required by the APA, the emergency rules were considered in parallel as temporary rules (the “**Temporary Rules**”). A public comment period was held from January 3, 2024 through February 22, 2024 in connection with the temporary rules. Cedar Point filed comments on February 20, 2024 objecting to the proposed adoption of the rules on an emergency or temporary basis, explaining why the Statement of Need for each was insufficient, and arguing that, even if the temporary rules were justified, they failed to meet the requirements of N.C. Gen. Stat. § 150B-21.9. *See* February 20, 2024 Letter to Ms. Angela Willis (DCM) and Mr. Tancred Miller (DCM).

The CRC held another specially called meeting to discuss the temporary rules and the public comments received in connection with those rules on March 13, 2024. Notably however, in a March 4, 2024 memorandum from Daniel Govoni to the CRC, the Division of Coastal management suggested that it did not consider the comments received from Cedar Point during

the March 13, 2024 meeting because “[t]heir concerns are more specifically described in their complaint dated January 3, 2024.” Moreover, the comments received from Cedar Point were not discussed in detail during the March 13, 2024 CRC meeting, and many of the concerns raised regarding points made in Cedar Point’s comments or in the Cedar Point lawsuit against the CRC were dismissed during the meeting. Instead, the CRC voted to approve the temporary rulemaking during its March 13, 2024 meeting.

Following the March 13, 2024 specially-called CRC meeting, Cedar Point submitted additional comments in response to the December 13, 2023 Notice of Temporary Rulemaking. *See* March 25, 2024 Letter to Ashley Snyder, Codifier of Rules. As explained in more detail below, the Temporary Rules expired after they were rejected by the RRC at the April 8, 2024 Rules Review Commission Meeting.

April 8, 2024 Rules Review Commission Meeting:

As you know, your commission held a special meeting on April 8, 2024 to review the Temporary Rules. Counsel for Cedar Point addressed the RRC and reiterated the reasons it believed the Temporary Rules should be rejected. The RRC voted to adopt RRC Staff’s recommendation to object to 15A NCAC 07H .0507, .0508, .0509; 07I .0702; 07J .0203, .0204, .0206, .0207, .0208; 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101 after finding that the CRC’s Statement of Need did not meet the criteria of N.C. Gen. Stat. § 150B-21.1(a). The RRC also voted to adopt the staff’s recommendations to object to 15A NCAC 07H .0507, .0508, .0509; 07I .0702; 07J .0203, .0204, .0207, .0208; 07M .0401, .0402, .0403, .0701, .0704, and .1101 in accordance with N.C. Gen. Stat. § 150B-21.9(a).

Following the RRC meeting, the CRC approved eight rules that had been rejected at the April 8, 2024 RRC Meeting for permanent rulemaking,² which process entails “the approximately year-long process for permanent rulemaking seeking approval of a fiscal analysis, approval from the Office of Budget Management and the Department of Environmental Quality, a public comment period and public hearings, before sending them back to the RRC for consideration.” *See* NC Coastal Resource Commission Meeting Actions, April 24-25, 2024, *available at* <https://www.deq.nc.gov/april-2024-regular-business-meeting-crc-actions/open> (last visited Nov. 4, 2024). The rules that were ultimately proposed – and which are the subject of this letter – include:

- 15A NCAC 07J .1401 Standards for Work Plats for CAMA Major and Dredge and Fill Permits
- 15A NCAC 07J .1402 Project Narrative
- 15A NCAC 07J .1403 Complete CAMA Major Permit and Dredge and Fill Applications

² According to the NC Coastal Resource Commission Meeting Actions, April 24-25, 2024, the eight rules included: 15A NCAC 07J .0203 Standards for Work Plats; 15A NCAC 07J .0204 Processing the Application; 15A NCAC 07J .0206 Public Notice Requirements; 15A NCAC 07J .0207 Review of Major Development and Dredge & Fill Applications; 15A NCAC 07J .0208 Permit Conditions; 15A NCAC 07M .0703 Mitigation Projects; 15A NCAC 07H .0508 Jockey’s Ridge Area of Environmental Concern; 15A NCAC 07H .0313 Installation and Maintenance of Wheat Straw Bales for Sand Fencing.

- 15A NCAC 07J .1404 Complete Minor Permit Applications
- 15A NCAC 07J .1405 Permit Fee
- 15A NCAC 07J .1501 Application Processing
- 15A NCAC 07J .1502 Circulation of CAMA and Dredge and Fill Applications
- 15A NCAC 07J .1503 Permit Conditions

(together, the “**Proposed Permanent Rules**”). According to the CRC, the fiscal analysis for the Proposed Permanent Rules was approved by the CRC during the specially called August 6, 2024 meeting, and a public hearing was held on September 26 at the DCM Morehead City office. As noted above, neither Cedar Point nor its counsel received notification of the September 26, 2024 public hearing from the CRC or DCM and were therefore unable to attend. Had Cedar Point known of the September 26, 2024 public hearing on the Proposed Permanent Rules, it would have attended and presented comments regarding the Proposed Permanent Rules, as it has done during each step of the emergency and temporary rulemaking processes.

As Cedar Point has since discovered, the Proposed Permanent Rules were published in the North Carolina Register on September 3, 2024 in Volume 39, Issue 05, Pages 212-217. The comments included herein are being submitted on behalf of Cedar Point in connection with the North Carolina Register notice. As of the date of this letter, we understand that RRC Counsel has not yet made a recommendation to the RRC as to whether it should accept or reject the Proposed Permanent Rules. However, for the reasons stated herein, and for the reasons that have been reiterated by Cedar Point and by the RRC itself over the last two years, we respectfully urge the RRC to reject the Proposed Permanent Rules.

II. THE PROPOSED PERMANENT RULES FAIL TO SATISFY THE REQUIREMENTS OF N.C. GEN. STAT. § 150B-21.9(A).

As you are aware, the Rules Review Commission evaluates proposed permanent rules in accordance with the standards set forth in N.C. Gen. Stat. § 150B-21.9. *See* N.C. Gen. Stat. § 150B-21.8(b). According to the statute, the RRC 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 [of the APA].

See N.C. Gen. Stat. § 150B-21.9(a). The Proposed Permanent Rules fail to satisfy the substantive requirements of Section 150B-21.9(a).

- a. The Proposed Permanent Rules are not within the authority delegated to DCM by the General Assembly.

The Proposed Permanent Rules are not within the authority delegated to DCM by the General Assembly because they impermissibly give other state and federal agencies authority to influence the granting of and the conditions contained within CAMA Major Permits, which is not expressly authorized under CAMA.

The agency continues to posit that if it merely includes a statutory citation in the body of a proposed rule or in the “History Notes” referencing the authority for such rule, it can manifest the existence of such authority. However, simply claiming to have statutory authority does not make it so. As we have seen over the course of the last two years, the CRC has tried – and failed – to point to an alleged grant of statutory authority for its attempt to circulate CAMA Major Permit applications amongst outside agencies. In response to the RRC’s comments about lack of statutory authority throughout the various iterations of the Returned Rules, the Emergency Rules, and the Temporary Rules, the CRC has revised the regulations to include statutory references in the “History Notes” and in the text of the rules themselves, apparently to give itself the authority the RRC has stated it lacks. As we have previously argued, these attempts are fruitless without express statutory authority, which does not exist:³

1. **G.S. § 113A-107(b)**: This provision authorizes the Commission’s “preparation, adoption, and amendment of the State guidelines” for the coastal area, which guidelines “shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area.” *See* G.S. 113A-107 *et seq.* This provision authorizes the Commission to obtain “incidental” assistance from other state agencies in “exercising this function” of the establishment of guidelines but says nothing about the Commission or any other state agency’s authority with respect to the review of permit applications or the issuance of permits themselves. Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that the proposed rules are within the authority delegated to DCM by the General Assembly.
2. **G.S. § 113A-118**: This statutory provision details when a CAMA permit is required and explains the difference between a “major development” and a “minor development,” along with discussing the process for obtaining a special emergency permit. Nowhere in Section 113A-118 does the statute discuss agency review of permit applications or grant authority for DCM to circulate CAMA Major Permit applications for review and comment outside of DCM. Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1502(b) is within the authority delegated to DCM by the General Assembly.
3. **G.S. § 113A-118.1(c)**: This statutory provision grants the Commission the authority to impose “reasonable notice provisions and other appropriate conditions and safeguards” on general permits. The authority delegated by CAMA to the agency with respect to general permits does not include the ability to circulate general permit applications to outside

³ Note that prior versions of the Returned and Temporary Rules also referenced N.C. Gen. Stat. § 113A-127 as a source of authority for circulating CAMA Major Permit applications to other agencies. Though that reference is not included in Proposed Permanent Rule 15A NCAC 07J .1502(b), Cedar Point reiterates arguments from previously submitted public comments that N.C. Gen. Stat. § 113A-127 does not grant the agency the authority it claims to have. *See also* April 5, 2024 Rules Review Commission Staff Opinion.

agencies. Arguably, even the CRC understands that such authority does not exist, as general permits are not included in the list of permit applications that should be circulated to outside agencies pursuant to the language in proposed rule 15A NCAC 07J .1502(b), which is limited to “CAMA Major and Dredge and Fill Applications.” Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1503 is within the authority delegated to DCM by the General Assembly.

4. **G.S. § 113A-119(a)**: Section 113A-119(a) states that a person required to obtain a permit must file an application and submit the requisite application fee. Nothing in this provision addresses the agency’s authority with respect to review of the permit application, the circulation of any such permit to other agencies, or circumstances under which the agency may condition a permit. Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1502(b) is within the authority delegated to DCM by the General Assembly.
5. **G.S. § 113A-120(a) and (b)**: Sections 113A-120(a) and (b) provide that the responsible DCM official or body – and no one else – shall deny an application for a permit upon finding, “[i]n the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).” *See* N.C. Gen. Stat. § 113A-120(a)(4). While subsection (b) allows the agency to condition the permit “upon the applicant’s amending his proposal to take whatever measures or agreeing to carry out whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a)” of Section 113A-120, that authority remains exclusively with the Secretary and the agency, not with any outside agency. Nothing in Section 113A-120 requires – or even permits – DCM to circulate permit applications or solicit other agency input to conduct its review and determine whether to deny the permit application. And, to the extent that the agency can condition a permit, such conditions must be “reasonably necessary to protect the public interest.” The RRC has itself stated this same conclusion on multiple occasions with respect to references to G.S. § 113A-120 in the Returned Rules and the Temporary Rules.⁴ Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that the proposed rules are within the authority delegated to DCM by the General Assembly.
6. **G.S. § 113-229(e)**: Had the General Assembly desired that the Secretary have authority to circulate CAMA Major Permit applications to other agencies or that such agencies should be authorized to condition CAMA Major Permits, it would have drafted the CAMA statute to expressly grant that authority. Unlike the statutory provision governing CAMA Major

⁴ For example, the April 5, 2024 Rules Review Commission Staff Opinion states that “[t]he reference to G.S. 113A-120(a)(4) is also inapposite; far from authorizing CRC to circulate CAMA permits to any State agency it chooses, G.S. 113A-120(a)(4) states only that a permit shall be denied if the CRC or local permitting authority finds that the development will occur in a ‘fragile or historic area, or other area containing environmental or natural resources of more than local significance,’ and will result in ‘major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).’”

Permits, N.C. Gen. Stat. §113-229, which addresses CAMA Dredge and Fill Permit applications, expressly provides the agency with the authority to circulate permit applications and seek input from other agencies. *See generally* N.C. Gen. Stat. § 113-229. The statutory language addressing CAMA Major Permit applications contains ***no such language***. In fact, the RRC itself has argued and reiterated this point again and again. For example, the RRC stated in its September 17, 2022 Staff Opinion and again, as recently as April 5, 2024:

“However, none of the statutes cited by the agency for statutory authority directs CRC to provide applications to any other state agency for review. While G.S. 113A-229 states that CRC ‘shall’ circulate fill and dredge permit applications ‘among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they may have’ ***this statutory provision does not appear to reach CAMA [major development] permits issued under G.S. 113A-118.***” April 5, 2024 Rules Review Commission Staff Opinion (*emphasis added*); *see also* September 17, 2022 Rules Review Commission Staff Opinion.

We agree that the statutory language on this issue is clear. As described above, the statute specifically references dredge and fill permits in the discussion of agency input, while at the same time, specifically omitting references to other types of CAMA permits. Moreover, the very section of the statute that gives DCM authority to solicit input is titled “***Permits to dredge or fill*** in or about estuarine waters of State-owned lakes.” *See* N.C. Gen. Stat. § 113-229 (*emphasis added*). Plainly, while the General Assembly intended to give other agencies the ability to comment on dredge and fill permits, it intentionally omitted other CAMA permits from that grant. Nothing has changed in the CAMA statute since the RRC’s September 17, 2022 Staff Opinion, or since the RRC’s rejection of the Temporary Rules. The fact remains that CAMA does not grant the agency authority to circulate CAMA Major Permit applications to outside agencies. Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that is the proposed rules are within the authority delegated to DCM by the General Assembly.

In the language of Proposed Rule 15A NCAC 07J .1502(b), the agency attempts to rely on a new statutory authority in its attempt to give itself the right to circulate CAMA Major Permit applications, relying on N.C. Gen. Stat. § 113A-124(a)(1). Yet, the RRC has already stated that this provision is not authoritative either:

“G.S. 113A-124(a)(1) provides that the Secretary of Environmental Quality is empowered to ‘conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.’ Nowhere within this language is the Secretary empowered to circulate permit applications to any number of unspecified State agencies.” April 5, 2024 Rules Review Commission Staff Opinion.

We agree with the RRC. While the Secretary does have authority to conduct investigations in connection with its review of CAMA Major Permit applications, that authority is not a blanket, open-ended authority. The Secretary's authority is limited to what he or she is authorized to do by statute.

Similarly, proposed rule 15A NCAC 07J .1502(b) states that permit applications will be circulated to "agencies having expertise in the subject matter contained in G.S. 113A-113(b)." As we have stated in previously submitted comments to the Emergency and Temporary Rules, N.C. Gen. Stat. § 113A-113(b)(1) through (b)(9) set out the factors that the CRC may consider in designating an AEC, not the factors pursuant to which the CRC – or any other agency for that matter – may deny or condition a permit. Thus, the reference to N.C. Gen. Stat. § 113A-113(b) in this context is inappropriate because other state agencies do not have the authority to designate AECs, and because these factors are not the same as those in G.S. 113A-120, pursuant to which a CAMA Major Permit may be denied. Further, as previously noted, G.S. 113A-113(c) specifically sets forth the instances in which a specified agency is authorized to make AEC determinations. In this way, CAMA expressly enumerates the instances where agency input is permissible, and the CRC cannot expand those instances by rule without statutory authorization. The proposed language purports to grant permission to agencies other than DCM to evaluate permit applications under a broader range of factors, when that authority is found nowhere in CAMA.

Allowing DCM to seek outside input on all CAMA Major Permit applications flies in the face of CAMA's directive that DCM make decisions and issue permits based on specific factors set forth in the statute. It also sets a dangerous precedent. Permit applications submitted to DCM have been circulated to outside agencies, and DCM has allowed such agencies to recommend and impose conditions on the work covered by those CAMA Major Permits. This practice gives other agencies outside of DCM the ability to regulate development or other activities over which they do not otherwise have any authority. This type of jurisdiction must be expressly granted by the General Assembly, as it has been in the case of Dredge and Fill Permits pursuant to G.S. 113-229(e). Otherwise, this interpretation could be used to open the door to virtually unlimited regulation of development activities through the mechanism of CAMA Major Permits.

b. The Proposed Permanent Rules are not clear and unambiguous.

Even assuming, *arguendo*, that the CRC does possess statutory authority for the proposed rules, some of the Proposed Permanent Rules are not "clear and unambiguous" as required by N.C. Gen. Stat. §150A-21.9(a). Throughout the review of the proposed temporary rules, the RRC noted a laundry list of terms and concepts that are impermissibly vague, ambiguous, and subjective. Cedar Point acknowledges that the CRC has addressed and corrected several of those terms pursuant to the RRC's feedback; however, there remain a number of terms and concepts in the Proposed Permanent Rules that are impermissibly unclear and ambiguous.

Proposed rule 15A NCAC 07J .1502(b) states that DCM will circulate applications to the agencies "having expertise in the subject matter contained in G.S. 113A-113(b)." While the Proposed Permanent Rule now lists the specific agencies it believes have such "expertise," it does not clarify what those agencies are expected to do after reviewing the permit applications, or what they have

authority to do with respect to commenting on or conditioning such permits. By contrast, subsection (a) states that Dredge and Fill Permit applications may be circulated to particular state and federal agencies for “an opportunity to raise objections and coordinate.” This language almost mirrors the language in G.S. 113-229 which requires the agency to circulate such applications “so that the agencies will have an opportunity to raise any objections they may have.” *See* N.C. Gen. Stat. § 113-229. Proposed subsection (b) does not similarly track the language in any statutory authority related to agency review because no such authority exists. This disregard for delegated authority is made even more blatant by leaving the language open for the CAMA Major Permit applications to be “circulated” without any limitation on what those agencies may do with respect to the permit applications.

III. CONCLUSION

For the reasons stated herein, reserving all rights, and, to the extent they are applicable to the Proposed Permanent Rules, for the reasons stated in our (i) December 18, 2023 Letter to the Codifier, (ii) February 20, 2024 comments on the temporary rulemaking, (iii) March 25, 2024 Letter to the Codifier, (iv) comments made on behalf of Cedar Point during the April 8, 2024 Rules Review Commission Special Meeting, and (v) the November 4th Letter to the CRC, the Proposed Permanent Rules should not be adopted because they do not meet the requirements for permanent rules set forth in N.C. Gen. Stat. § 150B-21.9.

Sincerely,



Mary Katherine Stukes

Cc: Jennifer Everett, NCDEQ Rulemaking Coordinator (*by email only*)
Christine Goebel, Esq., NCDEQ Assistant General Counsel (*by email only*)
Phil Feagan, Esq., NCDNCR General Counsel (*by email only*)
Steven Kellum, Cedar Point Developers, LLC (*by email only*)
Brian Liebman, RRC Commission Counsel (*by email only*)
James Maides, Cedar Point Developers, LLC (*by email only*)
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November 4, 2024

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Re: Proposed Permanent Rules – 15A NCAC 07J .1401-.1405, .1501-.1503, Processing Coastal Area Management Act (CAMA) Permits

Dear Director Miller:

On behalf of Cedar Point Developers, LLC (“**Cedar Point**”), we submit the following comments on the permanent rules being proposed by the Coastal Resources Commission (“**CRC**”) to implement the Coastal Area Management Act (“**CAMA**”) as set forth in the September 3, 2024 North Carolina Register Notice. We note that notice of the permanent rulemaking process discussed herein – including the beginning of the public comment period, the deadline for public comments, and the September 26, 2024 public hearing – was not included on the CRC virtual homepage, nor in any of the CRC’s meeting schedules, or meeting minutes.¹ Similarly, as of the date of this letter, there is no notice of the public comment period or its expiration on the Division of Coastal Management (“**DCM**”) list of “Public Notices.” Counsel for Cedar Point is registered for DCM and the CRC’s “Interested Party” mailing lists and, despite receiving notifications of other public comment periods throughout the last several months, Counsel did not receive any indication that the public comment period for this rulemaking had begun until it received the Interested Parties List Meetings, Information, Notices and News 11.1.24 email from Christy Simmons, on behalf of DCM, which included an agenda for the upcoming CRC meeting. That email was sent to “Interested Parties” on November 1, just three days before the end of the public comment period for the rulemaking.

We also note that certain language in the Proposed Permanent Rules (as hereinafter defined) appears to have been modified to address previous comments submitted by Cedar Point and by the North Carolina Rules Review Commission (“**RRC**”) regarding the rules’ analogs in the Returned Rules, the Emergency Rules, and the Temporary Rules (each as hereinafter defined). However, a

¹ The meeting minutes from the August 27-28, 2024 CRC Meeting in Beaufort, NC include three and a half pages of discussion of the CAMA permitting process that is the subject of the Proposed Permanent Rules, yet there is no mention in the August 27-28, 2024 Meeting Minutes or in the Agenda for that meeting of the upcoming public comment period or the September 26, 2024 public hearing. See August 27-28, 2024 NC Coastal Resources Commission (CRC) August 27-28, 2024 at pages 8-11, available at <https://www.deq.nc.gov/coastal-management/crc-minutes-august-2024/download?attachment> (last visited Nov. 4, 2024).

number of statutory concerns noted in previous submittals by Cedar Point and by the RRC remain. Many of the comments in this letter are similar if not identical to those Cedar Point has submitted in connection with the Returned Rules and the Temporary Rules insofar as such rules address the same substance as the Proposed Permanent Rules. Therefore, to the extent Cedar Point's comments in previous letters – including the (i) December 18, 2023 Letter to the Codifier, (ii) February 20, 2024 comments on the temporary rulemaking, (iii) March 25, 2024 Letter to the Codifier, and (iv) comments made on behalf of Cedar Point during the April 8, 2024 Rules Review Commission Special Meeting – are applicable to the Proposed Permanent Rules, those comments are incorporated herein by reference. Further, given the notice issues referenced above, Cedar Point reserves the right to supplement these comments.

I. RELEVANT BACKGROUND

As DCM and the CRC are aware, the rules that are the subject of the permanent rulemaking by the CRC have a long and tenuous history. We have included a summary of some of this history to underscore that the permanent rules that are being proposed today have many similar or identical deficiencies as the permanent rules that were removed from the Administrative Code and the emergency and temporary rules that the CRC has already attempted – and failed – to replace them with. Despite these past unsuccessful proposals and the numerous responses to the rules that have been supplied by the RRC over more than a year, the CRC continues to propose rules for which it does not have statutory authority.

Earlier, permanent versions of the rules now being proposed (some of which include the Returned Rules) were first submitted by the CRC to the RRC for review on June 15, 2022 as part of the decennial periodic review process of N.C. Gen. Stat. § 150B-21.3A. The RRC objected to the rules at its September 15, 2022 meeting and set forth those objections in a letter dated September 17, 2022. The CRC submitted changes to several of the rules on November 23, 2022 and again on January 18, 2023. The RRC renewed many of its objections to the revised rules during its February 2023 meeting, stating that the changes made by the CRC did not satisfy the RRC's objections. A February 22, 2023 letter from the RRC to the CRC explained the basis for its objections. The CRC took no further action to submit new proposed permanent rules in response to the RRC's objections.

S.L. 2023-134 became effective on October 3, 2023. Section 21.2(m) of S.L. 2023-134 stated that, for all state agencies, proposed permanent rules would be “immediately returned to the agency” if (i) the RRC has notified the agency that it has objected to the proposed permanent rule; (ii) the agency has not submitted a change to the rule to satisfy the RRC's objection; and (iii) more than 60 days have passed since the RRC first notified the agency of the RRC's objection to the proposed rule. Because much more than 60 days had passed since the RRC provided its objections (indeed, its original objections had occurred 383 days prior), the RRC requested that the rules be “immediately returned to the agency” in accordance with S.L. 2023-134. The rules were returned to the CRC on October 5, 2023. These rules are referred to herein as the “**Returned Rules.**” Less than a month later, the CRC filed a complaint for a declaratory judgment that the RRC's objections to its proposed rules were invalid. *See North Carolina Dept. of Environmental Quality, et al. v. North Carolina Rules Review Commission, et al.*, 23CV031533-910 (Superior Court Division,

Wake County, North Carolina) (the “**CRC-RRC Lawsuit**”). The CRC requested a temporary restraining order which was denied.

Rather than continue to address the RRC’s objections or make additional revisions to the rules, the CRC attempted to circumvent the permanent rulemaking process and the decennial rule review process by proposing that those same objectionable rules be adopted through the emergency and temporary rulemaking processes.

Emergency Rules:

Importantly, the emergency rulemaking process – unlike the permanent and temporary rulemaking processes – does not require RRC review. Pursuant to N.C. Gen. Stat. § 150B-21.1A(b), when reviewing emergency rules, the Codifier of Rules (“**Codifier**”) must evaluate the proponent agency’s statement of need to determine whether it meets the criteria for enacting emergency rules set forth in the North Carolina Administrative Procedure Act (“**APA**”).

The CRC held a specially called meeting to discuss the emergency rules on December 13, 2023. The CRC then submitted the emergency rules (the “**Emergency Rules**”) and its statement of need on December 14, 2023 (“**Statement of Need**”). It was clear during the meeting that many Commission members did not agree that the emergency rulemaking was an appropriate method for returning the rules to the Code. As you know, Cedar Point filed comments on December 18, 2023 stating its objections to the emergency rulemaking. *See* December 18, 2023 Letter to Ashley Snyder, Codifier of Rules. The Emergency Rules expired after the Temporary Rules were rejected by the RRC.

Temporary Rules:

As required by the APA, the emergency rules were considered in parallel as temporary rules (the “**Temporary Rules**”). A public comment period was held from January 3, 2024 through February 22, 2024 in connection with the temporary rules. Cedar Point filed comments on February 20, 2024 objecting to the proposed adoption of the rules on an emergency or temporary basis, explaining why the Statement of Need for each was insufficient, and arguing that, even if the temporary rules were justified, they failed to meet the requirements of N.C. Gen. Stat. § 150B-21.9. *See* February 20, 2024 Letter to Ms. Angela Willis (DCM) and Mr. Tancred Miller (DCM).

The CRC held another specially called meeting to discuss the temporary rules and the public comments received in connection with those rules on March 13, 2024. Notably however, in a March 4, 2024 memorandum from Daniel Govoni to the CRC, the Division of Coastal management suggested that it did not consider the comments received from Cedar Point during the March 13, 2024 meeting because “[t]heir concerns are more specifically described in their complaint dated January 3, 2024.” Moreover, the comments received from Cedar Point were not discussed in detail during the March 13, 2024 CRC meeting, and many of the concerns raised regarding points made in Cedar Point’s comments or in the Cedar Point lawsuit against the CRC were dismissed during the meeting. Instead, the CRC voted to approve the temporary rulemaking during its March 13, 2024 meeting.

Following the March 13, 2024 specially-called CRC meeting, Cedar Point submitted additional comments in response to the December 13, 2023 Notice of Temporary Rulemaking. *See* March 25, 2024 Letter to Ashley Snyder, Codifier of Rules. As explained in more detail below, the Temporary Rules expired after they were rejected by the RRC at the April 8, 2024 Rules Review Commission Meeting.

April 8, 2024 Rules Review Commission Meeting:

As you know, the Rules Review Commission held a special meeting on April 8, 2024 to review the Temporary Rules. Counsel for Cedar Point addressed the RRC and reiterated the reasons it believed the Temporary Rules should be rejected. The RRC voted to adopt RRC Staff's recommendation to object to 15A NCAC 07H .0507, .0508, .0509; 07I .0702; 07J .0203, .0204, .0206, .0207, .0208; 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101 after finding that the CRC's Statement of Need did not meet the criteria of N.C. Gen. Stat. § 150B-21.1(a). The RRC also voted to adopt the staff's recommendations to object to 15A NCAC 07H .0507, .0508, .0509; 07I .0702; 07J .0203, .0204, .0207, .0208; 07M .0401, .0402, .0403, .0701, .0704, and .1101 in accordance with N.C. Gen. Stat. § 150B-21.9(a).

Following the RRC meeting, the CRC approved eight rules that had been rejected at the April 8, 2024 RRC Meeting for permanent rulemaking,² which process entails "the approximately year-long process for permanent rulemaking seeking approval of a fiscal analysis, approval from the Office of Budget Management and the Department of Environmental Quality, a public comment period and public hearings, before sending them back to the RRC for consideration." *See* NC Coastal Resource Commission Meeting Actions, April 24-25, 2024, *available at* <https://www.deq.nc.gov/april-2024-regular-business-meeting-crc-actions/open> (last visited Nov. 4, 2024). The rules that were ultimately proposed – and which are the subject of this letter – include:

- 15A NCAC 07J .1401 Standards for Work Plats for CAMA Major and Dredge and Fill Permits
- 15A NCAC 07J .1402 Project Narrative
- 15A NCAC 07J .1403 Complete CAMA Major Permit and Dredge and Fill Applications
- 15A NCAC 07J .1404 Complete Minor Permit Applications
- 15A NCAC 07J .1405 Permit Fee
- 15A NCAC 07J .1501 Application Processing
- 15A NCAC 07J .1502 Circulation of CAMA and Dredge and Fill Applications
- 15A NCAC 07J .1503 Permit Conditions

² According to the NC Coastal Resource Commission Meeting Actions, April 24-25, 2024, the eight rules included: 15A NCAC 07J .0203 Standards for Work Plats; 15A NCAC 07J .0204 Processing the Application; 15A NCAC 07J .0206 Public Notice Requirements; 15A NCAC 07J .0207 Review of Major Development and Dredge & Fill Applications; 15A NCAC 07J .0208 Permit Conditions; 15A NCAC 07M .0703 Mitigation Projects; 15A NCAC 07H .0508 Jockey's Ridge Area of Environmental Concern; 15A NCAC 07H .0313 Installation and Maintenance of Wheat Straw Bales for Sand Fencing.

(together, the “**Proposed Permanent Rules**”). According to the CRC, the fiscal analysis for the Proposed Permanent Rules was approved by the CRC during the specially called August 6, 2024 meeting, and a public hearing was held on September 26 at the DCM Morehead City office. As noted above, neither Cedar Point nor its counsel received notification of the September 26, 2024 public hearing from the CRC or DCM and were therefore unable to attend. Had Cedar Point known of the September 26, 2024 public hearing on the Proposed Permanent Rules, it would have attended and presented comments regarding the Proposed Permanent Rules, as it has done during each step of the emergency and temporary rulemaking processes.

As Cedar Point has since discovered, the Proposed Permanent Rules were published in the North Carolina Register on September 3, 2024 in Volume 39, Issue 05, Pages 212-217. The comments included herein are being submitted on behalf of Cedar Point in connection with the North Carolina Register notice.

II. THE PROPOSED PERMANENT RULES FAIL TO SATISFY THE REQUIREMENTS OF N.C. GEN. STAT. § 150B-21.9(A).

The Rules Review Commission evaluates proposed permanent rules in accordance with the standards set forth in N.C. Gen. Stat. § 150B-21.9. *See* N.C. Gen. Stat. § 150B-21.8(b). According to the statute, the RRC 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 [of the APA].

See N.C. Gen. Stat. § 150B-21.9(a). The Proposed Permanent Rules fail to satisfy the substantive requirements of Section 150B-21.9(a).

- a. The Proposed Permanent Rules are not within the authority delegated to DCM by the General Assembly.

The Proposed Permanent Rules are not within the authority delegated to DCM by the General Assembly because they impermissibly give other state and federal agencies authority to influence the granting of and the conditions contained within CAMA Major Permits, which is not expressly authorized under CAMA.

The agency continues to posit that if it merely includes a statutory citation in the body of a proposed rule or in the “History Notes” referencing the authority for such rule, it can manifest the existence of such authority. However, simply claiming to have statutory authority does not make it so. As we have seen over the course of the last two years, the CRC has tried – and failed – to point to an alleged grant of statutory authority for its attempt to circulate CAMA Major Permit applications amongst outside agencies. In response to the RRC’s comments about lack of statutory authority

throughout the various iterations of the Returned Rules, the Emergency Rules, and the Temporary Rules, the CRC has revised the regulations to include statutory references in the “History Notes” and in the text of the rules themselves, apparently to give itself the authority the RRC has stated it lacks. As we have previously argued, these attempts are fruitless without express statutory authority, which does not exist:³

1. **G.S. § 113A-107(b)**: This provision authorizes the Commission’s “preparation, adoption, and amendment of the State guidelines” for the coastal area, which guidelines “shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area.” *See* G.S. 113A-107 *et seq.* This provision authorizes the Commission to obtain “incidental” assistance from other state agencies in “exercising this function” of the establishment of guidelines but says nothing about the Commission or any other state agency’s authority with respect to the review of permit applications or the issuance of permits themselves. Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that the proposed rules are within the authority delegated to DCM by the General Assembly.
2. **G.S. § 113A-118**: This statutory provision details when a CAMA permit is required and explains the difference between a “major development” and a “minor development,” along with discussing the process for obtaining a special emergency permit. Nowhere in Section 113A-118 does the statute discuss agency review of permit applications or grant authority for DCM to circulate CAMA Major Permit applications for review and comment outside of DCM. Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1502(b) is within the authority delegated to DCM by the General Assembly.
3. **G.S. § 113A-118.1(c)**: This statutory provision grants the Commission the authority to impose “reasonable notice provisions and other appropriate conditions and safeguards” on general permits. The authority delegated by CAMA to the agency with respect to general permits does not include the ability to circulate general permit applications to outside agencies. Arguably, even the CRC understands that such authority does not exist, as general permits are not included in the list of permit applications that should be circulated to outside agencies pursuant to the language in proposed rule 15A NCAC 07J .1502(b), which is limited to “CAMA Major and Dredge and Fill Applications.” Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1503 is within the authority delegated to DCM by the General Assembly.
4. **G.S. § 113A-119(a)**: Section 113A-119(a) states that a person required to obtain a permit must file an application and submit the requisite application fee. Nothing in this provision addresses the agency’s authority with respect to review of the permit application, the circulation of any such permit to other agencies, or circumstances under which the agency

³ Note that prior versions of the Returned and Temporary Rules also referenced N.C. Gen. Stat. § 113A-127 as a source of authority for circulating CAMA Major Permit applications to other agencies. Though that reference is not included in Proposed Permanent Rule 15A NCAC 07J .1502(b), Cedar Point reiterates arguments from previously submitted public comments that N.C. Gen. Stat. § 113A-127 does not grant the agency the authority it claims to have. *See also* April 5, 2024 Rules Review Commission Staff Opinion.

may condition a permit. Therefore, this statutory reference in the “History Note” is inapposite and does not support an argument that Proposed Rule 15A NCAC 07J .1502(b) is within the authority delegated to DCM by the General Assembly.

5. **G.S. § 113A-120(a) and (b)**: Sections 113A-120(a) and (b) provide that the responsible DCM official or body – and no one else – shall deny an application for a permit upon finding, “[i]n the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).” *See* N.C. Gen. Stat. § 113A-120(a)(4). While subsection (b) allows the agency to condition the permit “upon the applicant’s amending his proposal to take whatever measures or agreeing to carry out whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a)” of Section 113A-120, that authority remains exclusively with the Secretary and the agency, not with any outside agency. Nothing in Section 113A-120 requires – or even permits – DCM to circulate permit applications or solicit other agency input to conduct its review and determine whether to deny the permit application. And, to the extent that the agency can condition a permit, such conditions must be “reasonably necessary to protect the public interest.” The RRC has itself stated this same conclusion on multiple occasions with respect to references to G.S. § 113A-120 in the Returned Rules and the Temporary Rules.⁴ Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that the proposed rules are within the authority delegated to DCM by the General Assembly.
6. **G.S. § 113-229(e)**: Had the General Assembly desired that the Secretary have authority to circulate CAMA Major Permit applications to other agencies or that such agencies should be authorized to condition CAMA Major Permits, it would have drafted the CAMA statute to expressly grant that authority. Unlike the statutory provision governing CAMA Major Permits, N.C. Gen. Stat. § 113-229, which addresses CAMA Dredge and Fill Permit applications, expressly provides the agency with the authority to circulate permit applications and seek input from other agencies. *See generally* N.C. Gen. Stat. § 113-229. The statutory language addressing CAMA Major Permit applications contains ***no such language***. In fact, the RRC itself has argued and reiterated this point again and again. For example, the RRC stated in its September 17, 2022 Staff Opinion and again, as recently as April 5, 2024:

“However, none of the statutes cited by the agency for statutory authority directs CRC to provide applications to any other state agency for review. While G.S. 113A-229 states that CRC ‘shall’ circulate fill and dredge permit applications

⁴ For example, the April 5, 2024 Rules Review Commission Staff Opinion states that “[t]he reference to G.S. 113A-120(a)(4) is also inapposite; far from authorizing CRC to circulate CAMA permits to any State agency it chooses, G.S. 113A-120(a)(4) states only that a permit shall be denied if the CRC or local permitting authority finds that the development will occur in a ‘fragile or historic area, or other area containing environmental or natural resources of more than local significance,’ and will result in ‘major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).”

‘among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they may have’ ***this statutory provision does not appear to reach CAMA [major development] permits issued under G.S. 113A-118.***” April 5, 2024 Rules Review Commission Staff Opinion (*emphasis added*); *see also* September 17, 2022 Rules Review Commission Staff Opinion.

We agree that the statutory language on this issue is clear. As described above, the statute specifically references dredge and fill permits in the discussion of agency input, while at the same time, specifically omitting references to other types of CAMA permits. Moreover, the very section of the statute that gives DCM authority to solicit input is titled “***Permits to dredge or fill*** in or about estuarine waters of State-owned lakes.” *See* N.G. Gen. Stat. § 113-229 (*emphasis added*). Plainly, while the General Assembly intended to give other agencies the ability to comment on dredge and fill permits, it intentionally omitted other CAMA permits from that grant. Nothing has changed in the CAMA statute since the RRC’s September 17, 2022 Staff Opinion, or since the RRC’s rejection of the Temporary Rules. The fact remains that CAMA does not grant the agency authority to circulate CAMA Major Permit applications to outside agencies. Therefore, this statutory reference in the “History Note” to both proposed 15A NCAC 07J .1502(b) and 15A NCAC 07J .1503 is inapposite and does not support an argument that is the proposed rules are within the authority delegated to DCM by the General Assembly.

In the language of Proposed Rule 15A NCAC 07J .1502(b), the agency attempts to rely on a new statutory authority in its attempt to give itself the right to circulate CAMA Major Permit applications, relying on N.C. Gen. Stat. § 113A-124(a)(1). Yet, the RRC has already stated that this provision is not authoritative either:

“G.S. 113A-124(a)(1) provides that the Secretary of Environmental Quality is empowered to ‘conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.’ Nowhere within this language is the Secretary empowered to circulate permit applications to any number of unspecified State agencies.” April 5, 2024 Rules Review Commission Staff Opinion.

We agree with the RRC. While the Secretary does have authority to conduct investigations in connection with its review of CAMA Major Permit applications, that authority is not a blanket, open-ended authority. The Secretary’s authority is limited to what he or she is authorized to do by statute.

Similarly, proposed rule 15A NCAC 07J .1502(b) states that permit applications will be circulated to “agencies having expertise in the subject matter contained in G.S. 113A-113(b).” As we have stated in previously submitted comments to the Emergency and Temporary Rules, N.C. Gen. Stat. § 113A-113(b)(1) through (b)(9) set out the factors that the CRC may consider in designated an AEC, not the factors pursuant to which the CRC – or any other agency for that matter – may deny

or condition a permit. Thus, the reference to N.C. Gen. Stat. § 113A-113(b) in this context is inappropriate because other state agencies do not have the authority to designate AECs, and because these factors are not the same as those in G.S. 113A-120, pursuant to which a CAMA Major Permit may be denied. Further, as previously noted, G.S. 113A-113(c) specifically sets forth the instances in which a specified agency is authorized to make AEC determinations. In this way, CAMA expressly enumerates the instances where agency input is permissible, and the CRC cannot expand those instances by rule without statutory authorization. The proposed language purports to grant permission to agencies other than DCM to evaluate permit applications under a broader range of factors, when that authority is found nowhere in CAMA.

Allowing DCM to seek outside input on all CAMA Major Permit applications flies in the face of CAMA's directive that DCM make decisions and issue permits based on specific factors set forth in the statute. It also sets a dangerous precedent. Permit applications submitted to DCM have been circulated to outside agencies, and DCM has allowed such agencies to recommend and impose conditions on the work covered by those CAMA Major Permits. This practice gives other agencies outside of DCM the ability to regulate development or other activities over which they do not otherwise have any authority. This type of jurisdiction must be expressly granted by the General Assembly, as it has been in the case of Dredge and Fill Permits pursuant to G.S. 113-229(e). Otherwise, this interpretation could be used to open the door to virtually unlimited regulation of development activities through the mechanism of CAMA Major Permits.

b. The Proposed Permanent Rules are not clear and unambiguous.

Even assuming, *arguendo*, that the CRC does possess statutory authority for the proposed rules, some of the Proposed Permanent Rules are not "clear and unambiguous" as required by N.C. Gen. Stat. §150A-21.9(a). Throughout the review of the proposed temporary rules, the RRC noted a laundry list of terms and concepts that are impermissibly vague, ambiguous, and subjective. Cedar Point acknowledges that the CRC has addressed and corrected several of those terms pursuant to the RRC's feedback; however, there remain a number of terms and concepts in the Proposed Permanent Rules that are impermissibly unclear and ambiguous.

Proposed rule 15A NCAC 07J .1502(b) states that DCM will circulate applications to the agencies "having expertise in the subject matter contained in G.S. 113A-113(b)." While the Proposed Permanent Rule now lists the specific agencies it believes have such "expertise," it does not clarify what those agencies are expected to do after reviewing the permit applications, or what they have authority to do with respect to commenting on or conditioning such permits. By contrast, subsection (a) states that Dredge and Fill Permit applications may be circulated to particular state and federal agencies for "an opportunity to raise objections and coordinate." This language almost mirrors the language in G.S. 113-229 which requires the agency to circulate such applications "so that the agencies will have an opportunity to raise any objections they may have." *See* N.C. Gen. Stat. § 113-229. Proposed subsection (b) does not similarly track the language in any statutory authority related to agency review because no such authority exists. This disregard for delegated authority is made even more blatant by leaving the language open for the CAMA Major Permit applications to be "circulated" without any limitation on what those agencies may do with respect to the permit applications.

III. CONCLUSION

For the reasons stated herein, reserving all rights, and, to the extent they are applicable to the Proposed Permanent Rules, for the reasons stated in our (i) December 18, 2023 Letter to the Codifier, (ii) February 20, 2024 comments on the temporary rulemaking, (iii) March 25, 2024 Letter to the Codifier, and (iv) comments made on behalf of Cedar Point during the April 8, 2024 Rules Review Commission Special Meeting, the Proposed Permanent Rules should not be adopted because they do not meet the requirements for permanent rules set forth in N.C. Gen. Stat. § 150B-21.9.

Sincerely,



Mary Katherine Stukes

Cc: Christine Goebel, Esq., NCDEQ Assistant General Counsel (*by email only*)
Phil Feagan, Esq., NCDNCR General Counsel (*by email only*)
Steven Kellum, Cedar Point Developers, LLC (*by email only*)
James Maides, Cedar Point Developers, LLC (*by email only*)
Laura Truesdale, Moore & Van Allen PLLC (*by email only*)

Burgos, Alexander N

From: Liebman, Brian R
Sent: Thursday, December 12, 2024 3:42 PM
To: Tyler Newman
Cc: Burgos, Alexander N
Subject: Re: [External] CRC proposed permanent rules notification

Thank you, Mr. Newman. I will pass this along to the Commission.

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
[\(984\)236-1948](tel:(984)236-1948)
brian.liebman@oah.nc.gov

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From: Tyler Newman <tyler@ncbase.org>
Sent: Thursday, December 12, 2024 3:35:10 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: [External] CRC proposed permanent rules notification

You don't often get email from tyler@ncbase.org. [Learn why this is important](#)

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Mr. Liebman, please note for the record that concerning the Proposed Permanent Rules before you from the Coastal Resources Commission - 15A NCAC 07J .1401-.1405, .1501-.1503, I am on the interested persons listserv for the CRC and DCM and I did not receive notice of rulemaking for this ruleset from the agency. As a result, I was not afforded the opportunity according to NCGS 150B-21.2(d) to be provided notice of this rulemaking action and to provide comment to the CRC prior to their vote on the rule package.

Thank you,
Tyler Newman

Tyler Newman
President and CEO
Business Alliance for a Sound Economy
Wilmington, NC
404-484-9045

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Snyder, Ashley B

From: Snyder, Ashley B
Sent: Monday, October 9, 2023 11:34 AM
To: Lucasse, Mary L
Cc: Everett, Jennifer
Subject: Notice of Meetings and Rulemaking Listserv

Mary,

Please add me to your email distribution list for notice of CRC meetings as well as your rulemaking listserv.

Thanks,

Ashley Snyder
Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

Snyder, Ashley B

From: Snyder, Ashley B
Sent: Wednesday, October 11, 2023 8:38 AM
To: Lucasse, Mary
Cc: Simmons, Christy
Subject: RE: [External] RE: Interested Parties List Information, Notices and News 10.10.23

Thank you, Mary. I signed up via the link.

Ashley Snyder
Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

From: Lucasse, Mary <MLucasse@ncdoj.gov>
Sent: Tuesday, October 10, 2023 4:40 PM
To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Cc: Simmons, Christy <christy.simmons@deq.nc.gov>
Subject: FW: [External] RE: Interested Parties List Information, Notices and News 10.10.23

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Hi Ashley,

Please submit a request to be placed on the interested parties list using the link below. Let me know if you have any questions. ~ Mary

From: Simmons, Christy <christy.simmons@deq.nc.gov>
Sent: Tuesday, October 10, 2023 4:35 PM
To: Lucasse, Mary <MLucasse@ncdoj.gov>
Cc: Simmons, Christy <christy.simmons@deq.nc.gov>; Willis, Angela <angela.willis@deq.nc.gov>
Subject: RE: [External] RE: Interested Parties List Information, Notices and News 10.10.23

Hi Mary,

I did not see a subscription to the DCM Interested Parties list from Ashley Synder. Ashley may subscribe to the list here: [DCM Interested Parties | NC DEQ](#).

Respectfully,

Christy Simmons (she/her)
Public Information Officer
Division of Coastal Management
North Carolina Department of Environmental Quality
Office: 252-515-5409
NEW: christy.simmons@deq.nc.gov

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JOIN DCM's Interested Parties List
SUBMIT a Public Records Request



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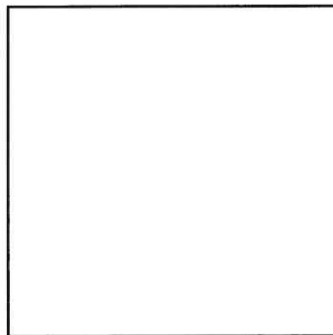
From: Lucasse, Mary <MLucasse@ncdoj.gov>
Sent: Tuesday, October 10, 2023 4:03 PM
To: Simmons, Christy <christy.simmons@deq.nc.gov>
Subject: [External] RE: Interested Parties List Information, Notices and News 10.10.23

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Hi Christy,
Can you tell me is Ashley Synder was added to the Interested Parties list? Thanks, Mary

From: NC Division of Coastal Management <christy.simmons+ncdenr.gov@ccsend.com>
Sent: Tuesday, October 10, 2023 4:01 PM
To: Lucasse, Mary <MLucasse@ncdoj.gov>
Subject: Interested Parties List Information, Notices and News 10.10.23

▪



Interested Parties List Information, Notices and News

10.10.23

**REMINDER: Threatened Oceanfront Structures Interagency Work Group to meet
Oct. 12 by web conference**

MOREHEAD CITY - The North Carolina Department of Environmental Quality's Division of Coastal Management and the Cape Hatteras National Seashore will host an interagency work group meeting on Oct. 12 by web conference to discuss government authorities for managing threatened oceanfront structures. The public may listen by computer or phone. The originally scheduled meeting was postponed due to a State of Emergency issued by Governor Roy Cooper in preparation for Hurricane Idalia.

The work group was established in August 2022 to engage with partner organizations and stakeholders to identify, research, and recommend policy and/or program improvements to establish more proactive, comprehensive, and predictable strategies for addressing structures at immediate risk of collapse.

Threatened Oceanfront Structures Interagency Work Group

Meeting topic: Government authorities for managing threatened oceanfront structures

Thursday, Oct. 12 at 1 p.m.

Join by [computer](#)

Meeting number: 2434 944 6635

Webinar password: IWGOCT1223 (49462812 from phones)

Join by phone

1-415-655-0003

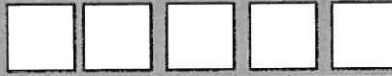
Access code: 2434 944 6635

Password: IWGOCT1223 (49462812 from phones)

Interested parties may submit comments by email to DCMcomments@deq.nc.gov. Please list "Threatened Oceanfront Structures" in the subject line.

[Visit our Website](#)

Comments

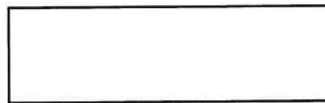


NC Division of Coastal Management | 400 Commerce Avenue, Morehead City, NC 28557

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