Burgos, Alexander N

Subject: FW: [External] RE: Temporary Rules - 15A NCAC 07H .0507, .0508, .0509, 07I .0702, 07J .0203, .0204, .0206, .0207, .0208, 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101
Attachments: Cedar Point Developers - Public Comments on CRC Temporary Rulemaking Submitted to RRC.pdf

Importance: High

From: Laura Boorman Truesdale <lauratruesdale@mvalaw.com>
Sent: Tuesday, March 26, 2024 10:47 PM
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Subject: [External] RE: Temporary Rules - 15A NCAC 07H .0507, .0508, .0509, 07I .0702, 07J .0203, .0204, .0206, .0207, .0208, 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101
Importance: High

Dear Ms. Snyder,

After the submittal of the comments referenced below earlier this morning, we realized the version of the comments submitted did not include the referenced attachments. As such, please replace the version of the comments submitted earlier this morning, submitted on behalf of Cedar Point Developers, LLC, with the version of the comments currently attached. We respectfully request that the attached version of Cedar Point's comments replaces the prior version in any relevant record (including those of the RRC) of the comments received in connection with the Temporary Rules referenced herein.

Apologies for the inadvertent omission of the attachments in the original submittal earlier this morning. Please do not hesitate to reach out with any questions.

Sincerely,
Laura Truesdale

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March 25, 2024

VIA EMAIL

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Re: Coastal Resources Commission Temporary Rules 15A NCAC 07H .0507, .0508, .0509, 07I .0702, 07J .0203, .0204, .0206, .0207, .0208, 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101

Dear Ms. Snyder,

In connection with the Rules Review Commission ("RRC") Meeting on March 27, 2024, on behalf of Cedar Point Developers, LLC ("Cedar Point"), we submit the following comments on the temporary rules being proposed by the Coastal Resources Commission ("CRC") to implement the Coastal Area Management Act ("CAMA") as set forth in its December 13, 2023 Notice of Temporary Rulemaking. As you know, earlier, permanent versions of the rules now being proposed in parallel as emergency and temporary 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. 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 is now attempting 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 Procedures 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 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.

Cedar Point filed comments on December 18, 2023 stating its objections to the emergency rulemaking. December 18, 2023 Letter to Ashley Snyder, Codifier of Rules ("December 18, 2023 Letter to the Codifier"). A copy of those comments is attached for reference, and they are incorporated herein by reference.

Temporary Rules:

As required by the APA, the emergency rules are now being considered in parallel as temporary rules. The temporary rules contain a similar statement of need as that submitted with the emergency rules, but it is no more successful in addressing the obligations of the Administrative Procedures Act.

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 is insufficient, and arguing that, even if the temporary rules were justified, they fail to meet the requirements of N.C. Gen. Stat. § 150B-21.9.

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 has 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.

As you know, pursuant to N.C. Gen. Stat. § 150B-21.1(b), you are charged with evaluating the CRC's statement of need for passing the temporary rulemaking and determining whether the statement meets the criteria for adoption of a temporary rule under that section. You are also charged with determining whether the proposed rules meet the standard for rulemaking using the criteria set forth in N.C. Gen. Stat. §150B-21.9(a). Nothing has changed since the CRC submitted its proposed emergency rules on December 14, 2023, so the RRC's objections set forth in the Codifier's letter of December 15, 2023 and December 19, 2023 remain. N.C. Gen. Stat. § 150B-21.1(b) also states that, in connection with her consideration of the temporary rulemaking, the Codifier may consider any Information submitted by the agency or another person. As such, we are writing to submit comments on the temporary rulemaking.

For the reasons stated in (i) our December 18, 2023 Letter to the Codifier, (ii) the February 20, 2024 comments on the temporary rulemaking, and (iii) for additional reasons explained herein, the proposed adoption of these rules on a temporary basis is not necessary or proper pursuant to N.C. Gen. Stat. § 150B-21.1(a) , and the rules do not met the requirements for rulemaking set forth in N.C. Gen. Stat. § 150B-21.9(a) because they are not within the authority delegated to DCM by the General Assembly, they are not clear and unambiguous, and they are not reasonably necessary to implement or interpret a statutory enactment. Moreover, approval of the temporary rulemaking during the March 13, 2024 meeting was not proper because many CRC Commissioners appeared unfamiliar or in disagreement with the issues and the apparent reasoning for the rulemaking on which they were voting. In fact, at least one Commissioner noted that his questions on the temporary rulemaking submitted to CRC's counsel had not yet been answered, indicating that at least one Commissioner felt there were open-ended questions and items that needed to be addressed before the temporary rules were approved.

Therefore, we urge the RRC to reject the temporary rules because they do not meet the standards set forth in N.C. Gen. Stat. §150B-21.1(a) or -21.9.

I. <u>The CRC has provided no evidence that immediate adoption of the proposed rules is necessary or proper.</u>

An agency may only adopt a temporary rule without adhering to the notice and hearing requirements applicable to permanent rules when it finds that (1) doing so would be "contrary to the public interest," and (2) the immediate adoption of the rule is required by one of the reasons enumerated in N.C. Gen. Stat. §150B-21.1(a). An agency must also prepare a written statement of its findings of need for a temporary rule – called a "statement of need" – stating "why adherence to the notice and hearing requirements [for permanent rules] would be contrary to the public interest and why the immediate adoption of the rule is required." *See* N.C. Gen. §150B-21.1(a4).

The CRC's Statement of Need justifying the temporary rulemaking inadequately explains how either of the requirements for a temporary rulemaking have been satisfied. In her December 15, 2023 response to the CRC in connection with the emergency rulemaking, the Codifier affirmed this inadequacy, stating that the CRC failed "to show that the notice and hearing requirements of

temporary and permanent rulemaking are contrary to the public interest," and that "[e]ntering the rules into the Code without public notice or comment would be in direct conflict with Session Law 2023-134 and is not in the public's interest." December 15, 2023 Letter from Ashley Snyder, Codifier of Rules to Renee Cahoon, Coastal Resources Commission Chair (the "Codifier's December 15, 2023 Letter"). The Codifier reiterated this position in her subsequent December 19, 2023 letter. *See* December 19, 2023 Letter from Ashley Snyder, Codifier of Rules to Renee Cahoon, Coastal Resources Commission Chair (the "Codifier's December 19, 2023 Letter"). As the Statement of Need discussed in the Codifier's December 15, 2023 and December 19, 2023 Letters remains unchanged as to the temporary rules, it fails to satisfy the requirements in the temporary rulemaking context as well.

a. <u>The CRC's Statement of Need does not explain how adherence to the rulemaking process would be contrary to the public interest.</u>

As we stated in our December 18, 2023 Letter to the Codifier, the CRC's Statement of Need has not adequately demonstrated that adherence to the notice and hearing requirements of N.C. Gen. Stat. §150B-21.2 would be contrary to the public interest for the following reasons:

1. The CRC has argued that public notice and hearing are unnecessary because the Rules "have been included in the Code for decades and more recently, the public was provided an opportunity to comment during the periodic readoption process." *See* Statement of Need. This argument is unpersuasive for three reasons. First, whether the notice and hearing process is unnecessary or duplicative is not the statutory standard. The statutory standard is that the process may not be ignored unless following that process is contrary to the public interest. Second, the argument is disingenuous. We agree that the public had an opportunity to comment on the rules when they were initially presented for review on June 15, 2022 as part of the decennial periodic review process. However, during the course of negotiations with the RRC over the last almost two years, the versions of the rules that were presented on June 15, 2022 have undergone multiple rounds of revisions. The public has not had the ability to comment on those revisions. Third, as a result of the many rounds of edits, the versions of the rules included in the temporary rulemaking are ***significantly*** different than those in existence prior to the decennial review. Those differences include several revisions that could have a significant – and potentially detrimental – impact on the regulated community and that could make substantial changes to the way in which the CRC may be able to implement its programs, including by providing the CRC with more breadth to regulate stakeholders. For example (in addition to other examples provided throughout this letter):

    a. Rule 07J .0208 no longer restricts the limitations that can be imposed on developments to those that are "reasonable."

    b. Rule 07H .0509 was amended to make the definition of "significant coastal archaeological resources" broader by (i) going from stating that such resources "are associated with historic events that have made a significant contribution to the broad patterns of history" to now stating that they must simply be "associated with historic events," and (ii) changing the language in subsection (4) to state that they

"may yield," rather than "may be likely to yield" to information important to history or prehistory.

c. Rule 07H .0509(d)(2) added language clarifying that archaeological investigation and resource management plans be "implemented by the applicant," where it was previously silent, which could impose significant, open-ended, and cost-prohibitive obligations on the regulated community.

By contrast, several of the other CRC rules that were reviewed by the RRC during the decennial process (and were since approved and retained in the Administrative Code) have only contained very minor changes. Unlike the wholesale modifications to several of the rules that are subject to this temporary rulemaking, those changes included addressing minor nits such as changing inadvertent references to "113-119.1" to "113-119A.1" or updating references to "the Department" to be "Department of Environmental Quality." *See e.g.*, Rules 15A NCAC 07H .1103, 07H .1203, 07H .1303, 07H .1403, 07H .1503, 07H .1903, 07H .2003, 07H .2103, 07H .2203, 07H .2403, 07H .2503, 07H .2703 (each amended effective January 1, 2024).

2. The CRC also argues in its Statement of Need that the temporary rulemaking process is necessary because without temporary rules in place, the state supposedly "cannot rely on these rules to issue permits for development in the coastal counties, make enforcement decisions, and can no longer review certain federal projects for consistency with State law pursuant to these rules." *See* Statement of Need. However, after the RRC objected to the rules in September 2022, "[t]he CRC did not satisfy the RRC's objections and did not request the return of the rules. As a result of the CRC's failure to act, the rules remained pending on RRC's agenda for over a year until the General Assembly stepped in." Codifier's December 15, 2023 Letter. The CRC cannot now invoke the emergency and temporary rulemaking process to address the gap in the rules caused by its own delays when there is no justifiable statutory basis for using that process.

   Moreover, the CRC's Statement of Need fails to demonstrate how DCM's authority has or will be limited in the absence of the temporary rulemaking. The rule giving DCM authority to issue permits, 15A NCAC 07J .0201, remains in effect and is unchanged. The CRC fails to provide examples of situations where DCM was unable to issue or enforce a permit, or of which "certain federal projects" it allegedly has been unable to review. Instead, a cursory review of publicly available information indicates that DCM has in fact issued at least twenty CAMA major permits since the rules were removed from the Code on October 5, 2023. Furthermore, the Court in the CRC-RRC Lawsuit denied the CRC's Motion for Temporary Restraining Order, which similarly claimed that "DCM is unable to rely on and use the rules to carry out its statutorily required duties." (*See* Pls.' Verified Compl., filed Nov. 3, 2023, ¶ 81.)

3. Finally, the CRC argues that the removal of the Rules from the Code "severely impacts the commission's rules and creates confusion related to permitting procedures for the State's coastal management program and the regulated public." *See* Statement of Need. However, the CRC's Statement of Need fails to provide any examples of instances since October 5, 2023 when there has been confusion related to the permitting procedures or incidences

when the commission's rules were "severely impact[ed]." *Id*. As we noted in our December 18, 2023 Letter to the Codifier, potential confusion – if it even exists – does not equate to justification for circumventing rulemaking procedures.

At the December 13, 2023 CRC meeting, members of the CRC expressed doubt that adherence to the notice and hearing requirements would be contrary to the public interest. For example, Commissioner Hennessy spoke against the need to bypass these requirements and voted against the motion along with Commissioner Yates.

b. The CRC's Statement of Need fails to demonstrate that a "serious and unforeseen threat to the public health, safety, or welfare" exists

Further, immediate adoption of the rules as temporary rules is not required by any of the reasons enumerated in N.C. Gen. Stat. §150B-21.1(a). Specifically, the CRC has failed to demonstrate that there is a "serious **and** unforeseen threat to the public health, safety, or welfare" if the rules are not adopted immediately. *See* N.C. Gen. Stat. §150B-21.1(a)(1)(emphasis added). The CRC does not point to any examples of "serious" or "unforeseen" threats to public health or safety that have resulted from the rules not being included in the Administrative Code over the last approximately four months. It states that removal of these rules would "pose a serious threat to public safety regarding the loss of protection of coastal lands and waters," but it fails to provide any support for this position, especially given that permits including requirements to protect such lands and waters have been issued during this period. Importantly, the CRC has also failed to even state, much less explain, how rejection of the temporary rules would cause an "unforeseen" threat to public health, safety, or welfare. Under N.C. Gen. Stat. §150B-21(a), both showings must be made to bypass the permanent rulemaking process. Even assuming that the CRC has properly alleged serious and unforeseen harm, the CRC has not demonstrated that the inability to issue permits, make enforcement decisions, or comment on federal projects is a threat to public (human) health or safety.

Moreover, many of the proposed temporary rules relate to inert cultural resources rather than the protection of public health or safety. While such resources are critical in many respects, they do not meet the statutory standard for bypassing the permanent rulemaking process. The Statement of Need fails to explain how enactment of those rules through the temporary rulemaking process is necessary to address a serious and unforeseen threat to the ***public health, safety, or welfare***.

During the December 13, 2023 CRC meeting discussed above, members of the CRC also expressed doubt that the temporary rulemaking process was required to avoid a serious and unforeseen harm. Again, Commissioners Hennessy and Yates voted against the motion, along with Commissioner Shuttleworth.

The CRC's Statement of Need is insufficient from a procedural basis, as well. As we noted in our December 18, 2023 Letter to the Codifier, the CRC has also failed to provide justification for the alleged serious and unforeseen threat that requires passage of each of the proposed rules. This is a critical detail, as the purported basis presumably would differ for each rule. In fact, the January 3, 2024 Statement of Need accompanying the Temporary Rulemaking request includes several reasons why the particular rule designating Jockey's Ridge Area of Environmental Concern is necessary to "take enforcement actions to protect" it. It also states that "[i]mmediate adoption of

this rule is required to designate Jockey's Ridge as an Area of Environmental Concern within the CRC's jurisdiction and protect this important resource." While these particular justifications may be relevant to that specific rule, they do not explain why the remaining fifteen rules should be adopted to address a "serious and unforeseen threat to the public health, safety, or welfare." Again, the failure to provide justification for each rule is a critical flaw.

II. Even if temporary rules were warranted in this case, these proposed rules still fail to satisfy the requirements of N.C. Gen. Stat. §150B-21.9(a).

The RRC evaluates temporary rules in accordance with the standards set forth in N.C. Gen. 150B-21.9. *See* N.C. Gen. Stat. §§150B-21.8. 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). Even if the temporary rules were warranted to address some pressing regulatory need (which, as described above, they do not), they still fail to satisfy the substantive requirements of Section 150B-21.9(a).

a. The temporary rules are not within the authority delegated to DCM by the General Assembly.

The temporary rules are not within the authority delegated to DCM by the General Assembly because they attempt to give DCM a means to regulate outside of their physical jurisdiction under CAMA, and 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.

DCM is only permitted to regulate development activities within Areas of Environmental Concern ("AEC"). *See* N.C. Gen. Stat. §113A-118(a). The language in the temporary rules attempts to expand the scope of DCM's authority to permit it to regulate activities outside of the AEC, as well. This is not within the authority that was delegated to DCM by the General Assembly. For example, 15A NCAC 07J .0203 previously included explicit language stating that DCM would not require subsequent permits, permit modifications, or other agency approval for work performed outside the AEC so long as the work performed was consistent with that described in the application. Removal of that language in the temporary rule version of Rule 07J .0203 could be read as an attempt to extend DCM's jurisdiction to areas outside AECs. This is not within the authority expressly delegated to DCM by the General Assembly under CAMA and is therefore improper.

The temporary rules also impermissibly give other state and federal agencies the functional equivalent of permit issuing authority. Specifically, as revised, Rule 07J .0208 states that

reviewing agencies may "submit 'specific recommendations … and limitations' on the work performed pursuant to these permits and on any operation or maintenance of the completed portion thereafter" that may in turn be enforced as "permit conditions." As noted in the February 2023 RRC Memorandum, this language "essentially circumvents G.S. 113A-118's commandment that permits shall be obtained 'from the Secretary' of DEQ or from the Commission and allows the permit conditions to be set by any other State, federal, or local 'reviewing agency.'" February 22, 2023 Letter from Brian Liebman, RRC Commission Counsel to Jennifer Everett, Coastal Resources Commission (containing February 2023 and December 2022 RRC Staff Opinions) ("February 2023 RRC Memorandum"). The rule does not specify which agencies could be considered "reviewing agencies," and it ostensibly gives DCM broad authority to unilaterally determine who should be considered "reviewing agencies." Not only is this authority not conferred by CAMA, but CAMA expressly limits the CRC's authority in this regard.

In addition to impermissibly giving other agencies the ability to dictate permit conditions, the proposed rules grant that authority to an even wider scope of parties. Originally, Rule 15A NCAC 07J .0208 stated that state reviewing agencies could submit recommendations for the proposed work. However, the temporary rule version of Rule 07J .0208 expands this provision, stating that "[e]ach of the state, ***federal, and local*** reviewing agencies" may submit such recommendations.

The proposed versions of temporary rules 07J .0207, 07J .0208 and 07H .0509 include references to incorrect statutory sections in its grant of reviewing authority, as well. Originally, Rule 07J .0207 stated that major development permits would be circulated "to the several state review agencies having expertise in the criteria enumerated in G.S. 113A-120." The criteria enumerated in G.S. 113A-120 are the reasons that the "responsible official or body" (i.e., DCM) shall deny an application for a permit. However, in the temporary rules, the language has been amended to state that the state reviewing agencies (or in the case of 07J .0208 and 07H .0509, the federal and local agencies, as well) to whom the permit application would be circulated are those "having expertise in the criteria enumerated in G.S. 113A-113(b)(1) through (b)(9)." 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 may deny a permit application. Thus, the reference to N.C. Gen. Stat. §113A-113(b)(1) through (b)(9) in this context is inappropriate because other state agencies do not have the authority to designate AECs, and because those factors are not the same as those in G.S. 113A-120, pursuant to which a CAMA major development permit may be denied. Further, Section 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 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.

In response to the RRC's comments about lack of statutory authority, the CRC has attempted to revise the regulations to include statutory references in the "History Notes", apparently to give itself the authority the RRC has stated it lacks. These attempts are fruitless without express statutory authority, which does not exist. The CRC's justifications are unpersuasive as explained below:

1. **N.C. Gen. Stat. §113A-120(a)(2)**. In Rules 07J .0207(b) and 07J .0208(a), for example, the CRC added language stating that its authority to solicit input from state and federal agencies on all CAMA major development permit applications derives from the need to "comply with G.S. 113A-120(a)(4)." References to N.C. Gen. Stat. §113A-120(a) were added to each of the respective History Notes, as well. However, Section 113A-120(a)(4) provides 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). Nothing in that statutory section 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.

2. **N.C. Gen. Stat. §113A-127**. The CRC also added a reference to N.C. Gen. Stat. 113A-127 in both 07J .0207 and 07J .0208 in their respective History Notes. Section 113A-127 requires DCM to keep federal and other state agencies informed and to take certain actions in the event that their policies conflict with federal or interstate agency plans. However, as the RRC stated in its February 2023 RRC Memorandum, that section does ***not*** give DCM authority to consult other agencies with respect to permits and permit conditions. As the RRC noted, "review of that statute reveals that it requires only that State agencies 'shall keep informed of federal and interstate agency plans, activities, and procedures' and take 'reasonable steps … to preserve the integrity' of their policies where they conflict with federal or interstate agency plans. It is staff's opinion that this does not resolve the existing objection for lack of statutory authority." February 2023 RRC Memorandum. Indeed, this provision references generally applicable policies, not individual permit decisions based on site-specific development activities.

3. **N.C. Gen. Stat. §113-229**. In Rule 07J .0208, the CRC added a reference to N.C. Gen. Stat. §113-229 in the History Notes. That reference was already included in the prior version of Rule 07J .0207. Section 113-229 refers to DCM's authority to issue dredge and fill permits but does not apply to the balance of CAMA major permits. While the statute grants DCM authority to seek input on CAMA dredge and fill permit applications, it does not provide authority for the CRC to invite outside agency input on all other CAMA major permit applications. The RRC commented as follows in its September 17, 2022 Staff Opinion:

> "However, neither G.S. 113A-120 nor 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***." September 17, 2022 Rules Review Commission Staff Opinion (emphasis added).
>
> We agree that the statutory language on this issue is clear. The statute specifically references dredge and fill permits in the discussion of agency input, while at the same time, omitting reference 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 or 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.

Allowing DCM to seek outside input on all CAMA major permit applications, and to impose conditions on them resulting from that input, 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; 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. <u>The Rules are not clear and unambiguous.</u>

In addition to lacking statutory authority, many of the proposed temporary rules are not "clear and unambiguous" as required by N.C. Gen. Stat. §150B-21.9(a). Throughout the review of the rules, the RRC has noted a laundry list of terms and concepts that are impermissibly vague, ambiguous, and subjective.

One of the terms to which the RRC has specifically objected time and time again is the term "significant adverse impact." In response to the RRC's comments that certain rules were not clear and unambiguous, CRC added the term "significant adverse impact" to several of them. For example, other terms in rules 15A NCAC 07H .0508, 07H .0509, 07M .0401, 07M .0402, 07M .0403, and 07M .0703 (such as "shall not adversely impact," or "significantly impact") were replaced with "significant adverse impact." Despite the RRC's continued objection to the use of that term, including for the reasons laid out in the February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners, the proposed temporary rules 07H .0508, 07H .0509, and 07M .0401, 07M .0402, 07M .0403, and 07M .0703 still contain the phrase "significant adverse impact."

Again, the RRC stated the following with respect to use of the term "significant adverse impact":

> "In the aforementioned proceedings before the Commission, the CRC consistently argued that 'significant adverse impact' was a term of art which had a meaning known to the General Assembly, the various environmental agencies, the regulated public, and North

> Carolina's courts. Nonetheless, the agency has repeatedly declined to articulate this known meaning in writing, incorporate it into its Rules, or provide specific references to this extensive usage other than citations to other equally opaque CRC rules, an inapposite statute, and a case which mentions but does not construe the term." RRC Staff Opinion dated August 14, 2023.

We agree with the RRC's comments. The CRC's argument that the term is a "term of art" that is understood by the regulated community also is unpersuasive. The CRC implies that the regulated community should and does understand the meaning of the term because they are familiar with it. Even if that were true, "terms of art" do not have meaning in law or regulation until they are defined (even if by reference to another source). This term is not defined anywhere in CAMA or its implementing regulations. Further, the term was not part of DCM's rules until it was added as part of the pending rulemaking. Thus, up to this point, the regulated community has no benchmark for what a "significant adverse impact" means in this particular context.

Without a definition of "significant adverse impact" or language clarifying how that concept is quantified and interpreted, the rules unfairly subject the regulated community to a standard that is vague and ambiguous. As the RRC noted, "[t]he result will be the arbitrary regulation of property owners against whom the process will be the punishment. Permits denied must then be either abandoned or litigated, both of which will have high costs for the regulated public." February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners.

In addition, proposed temporary rule 07J .0203 states that "[n]othing in this Rule would prohibit an applicant from proceeding with work outside an AEC that is determined by the Division of Coastal Management to not have a direct impact on the AEC while a permit application for work in the AEC is pending, provided that all other necessary local, state, and federal permits have been obtained." Again, the RRC notes that the language is not clear and unambiguous because, by referencing "direct impacts," it implies there are also "indirect impacts," neither of which is a defined term. We agree. In fact, DCM recently has attempted to regulate activities in areas outside an AEC on the basis that such activities have to the potential to "adversely affect" the AEC. August 17, 2023 Stop Work Order and Notice of Regulatory Requirements re: CAMA Permit No. 79-22. Yet, there is no explanation in the rules as to what "direct" impacts are or how they are quantified.

The RRC has also objected to a number of rules because they contained vague and subjective language that was "a blend of ambiguous or subjective terms and policy language." Some examples of these rules are discussed further below. However, the RRC's objections to the ambiguous language in 15A NCAC 07H .0501 is particularly telling. The RRC raised concerns about the purported definition of "[n]atural and cultural resource areas" in temporary rule 15A NCAC 07H .0501, stating that "the definition offered is not only self-referential but uses terms that are subjective and susceptible to any reading the agency wishes to give them." February 2023 RRC Memorandum. Further:

> "The agency does not define these values or qualities or give any explicatory examples. The agency does not explain what kind of development would be 'uncontrolled or

> incompatible' with these 'resources.' The agency does not state who makes the termination that any particular piece of land or water satisfies the provided definition. No term mentioned herein appears to have a settled meaning within Section 07H or within the portions of Ch. 113A cited by the agency in its History note … the revisions [to the rule] leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement." February 2023 RRC Memorandum.

The vague and ambiguous terms used throughout the proposed rules leave them lacking in the clarity that is necessary for them to meet the requirements of N.C. Gen. Stat. §150B-21.9(a). Therefore, they should not be adopted until they can be revised with sufficient clarity that the regulated public will understand just how they are being regulated.

c. <u>The Rules are not reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency and they were not adopted in accordance with the APA</u>

The third and fourth criteria enumerated in N.C. Gen. Stat. §150B-21.9(a) are whether a proposed rule is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency," and whether the rule "was adopted in accordance with Part 2 of [the APA]." *See* N.C. Gen. Stat. §150B-21.9(a). The language in a number of the proposed temporary rules does not meet the definition of a "rule" pursuant to Section 150B-2(8a). Therefore, their adoption as rules would be in contravention of N.C. Gen. Stat. §150B-21.9(a) because such adoption is not within the authority granted to DCM and they are not "reasonably necessary." Moreover, their adoption is not consistent with N.C. Gen. Stat. §150B-21.9(a)(4), which requires they be adopted pursuant to the APA.

N.C. Gen. Stat. §150B-19.1(a)(1) states that "[a]n agency may adopt only rules that are expressively authorized by federal and State law and that are necessary to serve the public interest." Section 150B-2(8a) defines a "rule" as "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 …". Section 150B-2(8a) goes on to list several things that are specifically excluded from the definition of a "rule," including, for example, nonbinding interpretive statements or statements of agency policy.

According to the RRC, many of the temporary rules do not meet the definition of a "rule," because they are "a blend of ambiguous or subject terms and policy language." For example, Rule 07H .0510 attempts to define the term "significant coastal historic architectural resources." The proposed definition, however, contains ambiguous phrases such as "more than local significance to history" and "uncontrolled or incompatible development." As the RRC stated in its objections, "[w]ithout further specificity, this paragraph appears to be a mere policy statement." February 2023 RRC Memorandum.

The February 2023 RRC Memorandum contains examples of other instances of policy-type language in the temporary rules, as well:

> "Paragraph (c) [of 15A NCAC 07H .0510] describes the 'management objectives' for these resources, and as in Rules .0506, .0507, and .0509, contains self-described 'policy statements.' As with numerous other rules in Section .0500, these 'policy statements' are expressed in terms of preserving or conserving the vaguely defined 'values' of a particular resource. For instance, paragraph (c)(1) [of 15A NCAC 07H .0510] states that the agency shall seek to 'conserve' these resources as 'a living part of community life and development … to give a sense of orientation to the people of the State[.]' This is facially subjective and ambiguous language … the revisions leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement."

Because several of the proposed temporary rules, including those described above, do not meet the definition of a "rule," they are not "reasonably necessary" and were not adopted in accordance with the APA. Should the CRC wish to develop and implement particular policies in relation to its goals of conservation and protection, and "for the protection of coastal waters," it can certainly develop and publish policies on its website, as the RRC suggested. However, such policies may not be adopted as "rules" and as such, may not have the force of law.

III. Conclusion

For the reasons stated in (i) our December 18, 2023 Letter to the Codifier, (ii) the February 20, 2024 comments on the temporary rulemaking, and (iii) the additional reasons explained herein, the RRC should reject the CRC's proposed temporary rules. The CRC has not shown the required justification for bypassing the permanent rulemaking process, and its proposed rules do not meet applicable legal requirements.

Moreover, the RRC has already notified the CRC that its proposed rules exceed its statutory authority, are vague and ambiguous, and are not reasonably necessary in violation of N.C. Gen. Stat. §150B-21.9(a) on several occasions. Despite multiple opportunities to revise the rules accordingly, the CRC has failed to sufficiently address the RRC's concerns. Therefore, we urge the RRC to find, once again, that the temporary rules do not meet the standards set forth in N.C. Gen. Stat. §150B-21.1(a) and NCGS 150B-21.9.

Sincerely,

Mary Katherine Stukes

Enclosures

cc: Alexander Burgos, Office of Administrative Hearings (*by email only*)
Brian Liebman, Office of Administrative Hearings Commission Counsel (*by email only*)

William Peaslee, Office of Administrative Hearings, Commission Counsel – Legislative Liaison (*by email only*)
Christine Goebel, Esq., NCDEQ Assistant General Counsel (*by email only*)
Phil Feagan, Esq., NCDNCR General Counsel (*by email only*)
Roy Brownlow, Tidewater Associates Inc. (*by email only*)
Steven Kellum, Cedar Point Developers, LLC (*by email only*)

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December 18, 2023

VIA EMAIL (ashley.snyder@oah.nc.gov)

Ms. Ashley Snyder
Codifier of Rules
NC Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Bridgeview Subdivision, 1180 Cedar Point Boulevard, Cedar Point, Carteret County, NC

Dear Ms. Snyder,

We represent Cedar Point Developers, LLC ("Cedar Point") related to a proposed residential development at 1180 Cedar Point Boulevard in Carteret County, North Carolina. As you know, the North Carolina Coastal Resources Commission ("CRC") called a December 13, 2023 Special Meeting (the "Meeting") to evaluate and pass an emergency rulemaking for sixteen rules which were then submitted to you on December 14, 2023 (the "Rules"). Cedar Point's proposed development is subject to a CAMA Major Permit and is therefore impacted by the status of the Rules and CRC's implementation of them.

Pursuant to NCGS 150B-21.1A(b), you are charged with evaluating the CRC's statement of need for passing the emergency rulemaking and determining whether the statement meets the criteria for adoption of an emergency rule under that section. NCGS 150B-21.1A(b) states that, in connection with her consideration of an emergency rulemaking, the Codifier of Rules may consider any information submitted by the agency or another person. As such, we are writing to submit comments on the emergency rulemaking, and to notify you of our position that the emergency rulemaking does not meet either of the criteria set forth in NCGS 150B-21.1A(a). Further, we do not believe that approval of the emergency rulemaking during the Meeting was proper because many CRC Commissioners (some of whom were attending their first meeting on the CRC) were unfamiliar with the issues and the apparent reasoning for the rulemaking on which they were voting.

The Rules do not meet the statutory criteria for an emergency rulemaking. As you know, an agency may adopt an emergency rule without prior notice or hearing when it finds that: (1) "adherence to the notice and hearing requirements … would be contrary to the public interest" and (2) "the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety." NCGS 150B-21.1A(a). The emergency rulemaking does not meet either of these criteria and is therefore inconsistent with the process set forth under state law.

North Carolina law requires an agency to demonstrate that an emergency rulemaking is necessary because a situation exists where rulemaking through the typical process would be "contrary to the public interest." NCGS 150B-21.1A(a). However, the CRC's statement of need fails to articulate how the public interest would be harmed or otherwise impacted by evaluation of the Rules through the normal rulemaking process. Moreover, the CRC has not provided such justification for each specific rule proposed.

First, the CRC argues that public notice and a public hearing are unnecessary because the Rules "have been included in the Code for decades and more recently, the public was provided an opportunity to comment during the periodic readoption process." This statement assumes that the rules being considered for emergency rulemaking are identical to those that existed in the Code prior to October 5, 2023. However,

this argument is disingenuous and inaccurate. The Rules contained in the proposed emergency rulemaking contain several revisions and edits that could have a significant impact on both the regulated community and on how the agency carries out its statutory mandate for rule promulgation. Thus, codification of emergency rules ***without*** time for the public to adequately evaluate and comment on these changes would be decidedly contrary to the public interest. CRC's statement of need does not provide any substantive basis as to why adherence to the process set forth under state law would be "contrary to the public interest." Even assuming that the rules do not change the status quo (which we dispute), such a status does not make the rulemaking process contrary to the public interest.

Second, the CRC argues that an emergency rulemaking is necessary to bypass adherence to the notice and hearing requirements because the state "cannot rely on these rules to issue permits for development in the coastal counties, make enforcement decisions, and can no longer review certain federal projects for consistency with State law pursuant to these rules." However, the CRC's statement of need fails to substantiate this assertion that its authority has or will be limited in the absence of the emergency rulemaking. The rule giving DCM authority to issue permits, 15A NCAC 07J .0201, is unchanged and in full force and effect. The CRC's statement does not include examples of situations where the agency was unable to issue or enforce a permit. Nor does it provide any detail on the "certain federal projects" that it is allegedly unable to review (for example, what federal agencies are involved, what types of projects are at issue, whether those projects involve issuance of permits or enforcement-related issues, etc.). As of the date of this letter, the Rules have not been part of the Code for approximately seventy days, and their status has been in question for over a year. A cursory review of publicly available information from the past seventy days indicates just the opposite, as the agency has in fact continued to issue major CAMA permits and conduct enforcement actions since the rules were removed from the Code on October 5, 2023.

The CRC goes on to argue that the removal of the Rules from the Code "severely impacts the commission's rules and creates confusion related to permitting procedures for the State's coastal management program and the regulated public." Again, the CRC has not provided any examples of instances during the last seventy days when there has been confusion related to the permitting procedures, or incidences when the commission's rules were "severely impact[ed]." Potential confusion does not equate to a justification for circumventing rulemaking procedures. These broad and general assertions do not provide sufficient justification for the emergency rulemaking pursuant to North Carolina law.

In addition to demonstrating that adherence to the typical notice and hearing requirements for rulemaking is contrary to the public interest, the statement of need must explain why the agency believes the emergency rulemaking is necessary to address "a serious and unforeseen threat to the public health or safety." NCGS 150B-21.1A(a). In their statement of need, the CRC merely argues that it believes the emergency rulemaking is necessary "[t]o ensure the stability and effectiveness of the coastal rules for the benefit of the regulated public, and to ensure the CRC's compliance with statutory mandates for rule promulgation under N.C. Gen. Stat. Chapter 113A, Article 7, the Coastal Area Management Act." However, the CRC does not point to any examples of "serious" or "unforeseen" threats to public health or safety that have resulted during the last seventy days, or that would result in the future, from the rejection of the emergency rules. Further, such justification should be enumerated for each specific rule proposed. This detail is critical, as the purported basis presumably would differ from rule to rule.

The CRC notes that removal of the rules would "pose a serious threat to public safety regarding the loss of protection of coastal lands and waters." While we acknowledge that protection of coastal lands and waters is essential to preserve our state's natural resources, the CRC has not provided in its statement of need any justification for its statement that the removal of such protections would pose a serious threat to public (human) health or public safety. Indeed, the statement does not even allege that the threat is unforeseen, as required by 150B-21.1A(a). Similarly, 15A NCAC 07H .0509 regarding archeological resources deals entirely with inert cultural resources, not protection of public health or safety. Again, the CRC has not

shown how emergency enactment of this rule is required because of a serious and unforeseen threat to the public health or safety.

Nor does the statement of need provide any explanation of how the stability and effectiveness of the coastal rules is or will be jeopardized. For instance, and as previously noted, the statement of need does not state that the CRC has lost its permitting authority entirely or provide details from instances when the CRC was unable to comply with statutory mandates for rule promulgation. Thus, it is our belief that the statement of need does not meet the statutory requirement to address a serious or unforeseen threat to public health or safety.

For the reasons stated herein, the emergency rulemaking passed on December 13, 2023 by the CRC does not meet either of the criteria set forth in NCGS 150B-21.1A(a) and therefore should not be codified as an emergency rule.

We appreciate your consideration of these comments. Please let us know if you have any questions about this submittal or if you would like to discuss.

Sincerely,

Mary Katherine H. Stukes
Moore & Van Allen PLLC

Cc: Christine Goebel, Esq., NCDEQ Assistant General Counsel
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Re: Temporary Rules 15A NCAC 07H .0507, .0508, .0509, 07I .0702, 07J .0203, .0204, .0206, .0207, .0208, 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101

Dear Ms. Willis and Director Miller,

On behalf of Cedar Point Developers, LLC ("Cedar Point"), we submit the following comments on the temporary rules being proposed by the Coastal Resources Commission ("CRC") to implement the Coastal Area Management Act ("CAMA") as set forth in its December 13, 2023 Notice of Temporary Rulemaking. Earlier, permanent versions of the rules now being proposed in parallel as emergency and temporary rules were first submitted by the CRC to the Rules Review Commission ("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. 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 is now attempting 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. Importantly, the emergency rulemaking process – unlike the permanent and temporary rulemaking processes – does not require RRC review. Pursuant to N.C. Gen. 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 Procedures 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 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 required by the APA, the emergency rules are now being considered in parallel as temporary rules. The temporary rules contain the same statement of need as that submitted with the emergency rules. Cedar Point filed comments on December 18, 2023 stating its objections to the emergency rulemaking. December 18, 2023 Letter to Ashley Snyder, Codifier of Rules ("December 18, 2023 Letter to the Codifier"). A copy of those comments is attached for reference. For the reasons stated in our December 18, 2023 Letter to the Codifier, and for additional reasons explained herein, the proposed adoption of these rules on either an emergency or temporary basis is inappropriate, and the Statement of Need for each is insufficient.

I. The CRC has provided no evidence that immediate adoption of the proposed rules is necessary or proper.

An agency may only adopt a temporary rule without adhering to the notice and hearing requirements applicable to permanent rules when it finds that (1) doing so would be "contrary to the public interest," and (2) the immediate adoption of the rule is required by one of the reasons enumerated in N.C. Gen. Stat. §150B-21.1(a). An agency must also prepare a written statement of its findings of need for a temporary rule – called a "statement of need" – stating "why adherence to the notice and hearing requirements [for permanent rules] would be contrary to the public interest and why the immediate adoption of the rule is required." *See* N.C. Gen. §150B-21.1(a4).

The CRC's Statement of Need justifying the temporary rulemaking inadequately explains how either of the requirements for a temporary rulemaking have been satisfied. In her December 15, 2023 response to the CRC in connection with the emergency rulemaking, the Codifier affirmed this inadequacy, stating that the CRC failed "to show that the notice and hearing requirements of temporary and permanent rulemaking are contrary to the public interest," and that "[e]ntering the rules into the Code without public notice or comment would be in direct conflict with Session Law 2023-134 and is not in the public's interest." December 15, 2023 Letter from Ashley Snyder, Codifier of Rules to Renee Cahoon, Coastal Resources Commission Chair (the "Codifier's

December 15, 2023 Letter"). The Codifier reiterated this position in her subsequent December 19, 2023 letter. *See* December 19, 2023 Letter from Ashley Snyder, Codifier of Rules to Renee Cahoon, Coastal Resources Commission Chair (the "Codifier's December 19, 2023 Letter"). As the Statement of Need discussed in the Codifier's December 15, 2023 and December 19, 2023 Letters remains unchanged as to the temporary rules, it fails to satisfy the requirements in the temporary rulemaking context as well.

a. <u>The CRC's Statement of Need does not explain how adherence to the rulemaking process would be contrary to the public interest.</u>

As we stated in our December 18, 2023 Letter to the Codifier, the CRC's Statement of Need has not adequately demonstrated that adherence to the notice and hearing requirements of N.C. Gen. Stat. §150B-21.2 would be contrary to the public interest for the following reasons:

1. The CRC has argued that public notice and hearing are unnecessary because the Rules "have been included in the Code for decades and more recently, the public was provided an opportunity to comment during the periodic readoption process." *See* Statement of Need. This argument is unpersuasive for three reasons. First, whether the notice and hearing process is unnecessary or duplicative is not the statutory standard. The statutory standard is that the process may not be ignored unless following that process is contrary to the public interest. Second, the argument is disingenuous. We agree that the public had an opportunity to comment on the rules when they were initially presented for review on June 15, 2022 as part of the decennial periodic review process. However, during the course of negotiations with the RRC over the last almost two years, the versions of the rules that were presented on June 15, 2022 have undergone multiple rounds of revisions. The public has not had the ability to comment on those revisions. Third, as a result of the many rounds of edits, the versions of the rules included in the temporary rulemaking are ***significantly*** different than those in existence prior to the decennial review. Those differences include several revisions that could have a significant – and potentially detrimental – impact on the regulated community and that could make substantial changes to the way in which the CRC may be able to implement its programs, including by providing the CRC with more breadth to regulate stakeholders. For example (in addition to other examples provided throughout this letter):

    a. Rule 07J .0208 no longer restricts the limitations that can be imposed on developments to those that are "reasonable."

    b. Rule 07H .0509 was amended to make the definition of "significant coastal archaeological resources" broader by (i) going from stating that such resources "are associated with historic events that have made a significant contribution to the broad patterns of history" to now stating that they must simply be "associated with historic events," and (ii) changing the language in subsection (4) to state that they "may yield," rather than "may be likely to yield" to information important to history or prehistory.

    c. Rule 07H .0509(d)(2) added language clarifying that archaeological investigation and resource management plans be "implemented by the applicant," where it was

previously silent, which could impose significant, open-ended, and cost-prohibitive obligations on the regulated community.

By contrast, several of the other CRC rules that were reviewed by the RRC during the decennial process (and were since approved and retained in the Administrative Code) have only contained very minor changes. Unlike the wholesale modifications to several of the rules that are subject to this temporary rulemaking, those changes included addressing minor nits such as changing inadvertent references to "113-119.1" to "113-119A.1" or updating references to "the Department" to be "Department of Environmental Quality." *See e.g.*, Rules 15A NCAC 07H .1103, 07H .1203, 07H .1303, 07H .1403, 07H .1503, 07H .1903, 07H .2003, 07H .2103, 07H .2203, 07H .2403, 07H .2503, 07H .2703 (each amended effective January 1, 2024).

2. The CRC also argues in its Statement of Need that the temporary rulemaking process is necessary because without temporary rules in place, the state supposedly "cannot rely on these rules to issue permits for development in the coastal counties, make enforcement decisions, and can no longer review certain federal projects for consistency with State law pursuant to these rules." *See* Statement of Need. However, after the RRC objected to the rules in September 2022, "[t]he CRC did not satisfy the RRC's objections and did not request the return of the rules. As a result of the CRC's failure to act, the rules remained pending on RRC's agenda for over a year until the General Assembly stepped in." Codifier's December 15, 2023 Letter. The CRC cannot now invoke the emergency and temporary rulemaking process to address the gap in the rules caused by its own delays when there is no justifiable statutory basis for using that process.

   Moreover, the CRC's Statement of Need fails to demonstrate how DCM's authority has or will be limited in the absence of the temporary rulemaking. The rule giving DCM authority to issue permits, 15A NCAC 07J .0201, remains in effect and is unchanged. The CRC fails to provide examples of situations where DCM was unable to issue or enforce a permit, or of which "certain federal projects" it allegedly has been unable to review. Instead, a cursory review of publicly available information indicates that DCM has in fact issued at least twenty CAMA major permits since the rules were removed from the Code on October 5, 2023. Furthermore, the Court in the CRC-RRC Lawsuit denied the CRC's Motion for Temporary Restraining Order, which similarly claimed that "DCM is unable to rely on and use the rules to carry out its statutorily required duties." (*See* Pls.' Verified Compl., filed Nov. 3, 2023, ¶ 81.)

3. Finally, the CRC argues that the removal of the Rules from the Code "severely impacts the commission's rules and creates confusion related to permitting procedures for the State's coastal management program and the regulated public." *See* Statement of Need. However, the CRC's Statement of Need fails to provide any examples of instances since October 5, 2023 when there has been confusion related to the permitting procedures or incidences when the commission's rules were "severely impact[ed]." *Id*. As we noted in our December 18, 2023 Letter to the Codifier, potential confusion – if it even exists – does not equate to justification for circumventing rulemaking procedures.

At the December 13, 2023 CRC meeting, members of the CRC expressed doubt that adherence to the notice and hearing requirements would be contrary to the public interest. For example, Commissioner Hennessy spoke against the need to bypass these requirements and voted against the motion along with Commissioner Yates.

b. The CRC's Statement of Need fails to demonstrate that a "serious and unforeseen threat to the public health, safety, or welfare" exists

Further, immediate adoption of the rules as temporary rules is not required by any of the reasons enumerated in N.C. Gen. Stat. §150B-21.1(a). Specifically, the CRC has failed to demonstrate that there is a "serious **and** unforeseen threat to the public health, safety, or welfare" if the rules are not adopted immediately. *See* N.C. Gen. Stat. §150B-21.1(a)(1)(emphasis added). The CRC does not point to any examples of "serious" or "unforeseen" threats to public health or safety that have resulted from the rules not being included in the Administrative Code over the last approximately four months. It states that removal of these rules would "pose a serious threat to public safety regarding the loss of protection of coastal lands and waters," but it fails to provide any support for this position, especially given that permits including requirements to protect such lands and waters have been issued during this period. Importantly, the CRC has also failed to even state, much less explain, how rejection of the temporary rules would cause an "unforeseen" threat to public health, safety, or welfare. Under N.C. Gen. Stat. §150B-21(a), both showings must be made to bypass the permanent rulemaking process. Even assuming that the CRC has properly alleged serious and unforeseen harm, the CRC has not demonstrated that the inability to issue permits, make enforcement decisions, or comment on federal projects is a threat to public (human) health or safety.

Moreover, many of the proposed temporary rules relate to inert cultural resources rather than the protection of public health or safety. While such resources are critical in many respects, they do not meet the statutory standard for bypassing the permanent rulemaking process. The Statement of Need fails to explain how enactment of those rules through the temporary rulemaking process is necessary to address a serious and unforeseen threat to the ***public health, safety, or welfare***.

During the December 13, 2023 CRC meeting discussed above, members of the CRC also expressed doubt that the temporary rulemaking process was required to avoid a serious and unforeseen harm. Again, Commissioners Hennessy and Yates voted against the motion, along with Commissioner Shuttleworth.

The CRC's Statement of Need is insufficient from a procedural basis, as well. As we noted in our December 18, 2023 Letter to the Codifier, the CRC has also failed to provide justification for the alleged serious and unforeseen threat that requires passage of each of the proposed rules. This is a critical detail, as the purported basis presumably would differ for each rule.

II. Even if temporary rules were warranted in this case, these proposed rules still fail to satisfy the requirements of N.C. Gen. Stat. §150B-21.9(a).

The RRC evaluates temporary rules in accordance with the standards set forth in N.C. Gen. 150B-21.9. *See* N.C. Gen. Stat. §§150B-21.8. 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). Even if the temporary rules were warranted to address some pressing regulatory need (which, as described above, they do not), they still fail to satisfy the substantive requirements of Section 150B-21.9(a).

a. <u>The temporary rules are not within the authority delegated to DCM by the General Assembly.</u>

The temporary rules are not within the authority delegated to DCM by the General Assembly because they attempt to give DCM a means to regulate outside of their physical jurisdiction under CAMA, and 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.

DCM is only permitted to regulate development activities within Areas of Environmental Concern ("AEC"). *See* N.C. Gen. Stat. §113A-118(a). The language in the temporary rules attempts to expand the scope of DCM's authority to permit it to regulate activities outside of the AEC, as well. This is not within the authority that was delegated to DCM by the General Assembly. For example, 15A NCAC 07J .0203 previously included explicit language stating that DCM would not require subsequent permits, permit modifications, or other agency approval for work performed outside the AEC so long as the work performed was consistent with that described in the application. Removal of that language in the temporary rule version of Rule 07J .0203 could be read as an attempt to extend DCM's jurisdiction to areas outside AECs. This is not within the authority expressly delegated to DCM by the General Assembly under CAMA and is therefore improper.

The temporary rules also impermissibly give other state and federal agencies the functional equivalent of permit issuing authority. Specifically, as revised, Rule 07J .0208 states that reviewing agencies may "submit 'specific recommendations … and limitations' on the work performed pursuant to these permits and on any operation or maintenance of the completed portion thereafter" that may in turn be enforced as "permit conditions." As noted in the February 2023 RRC Memorandum, this language "essentially circumvents G.S. 113A-118's commandment that permits shall be obtained 'from the Secretary' of DEQ or from the Commission and allows the permit conditions to be set by any other State, federal, or local 'reviewing agency.'" February 22, 2023 Letter from Brian Liebman, RRC Commission Counsel to Jennifer Everett, Coastal Resources Commission (containing February 2023 and December 2022 RRC Staff Opinions) ("February 2023 RRC Memorandum"). The rule does not specify which agencies could be considered "reviewing agencies," and it ostensibly gives DCM broad authority to unilaterally

determine who should be considered "reviewing agencies." Not only is this authority not conferred by CAMA, but CAMA expressly limits the CRC's authority in this regard.

In addition to impermissibly giving other agencies the ability to dictate permit conditions, the proposed rules grant that authority to an even wider scope of parties. Originally, Rule 15A NCAC 07J .0208 stated that state reviewing agencies could submit recommendations for the proposed work. However, the temporary rule version of Rule 07J .0208 expands this provision, stating that "[e]ach of the state, ***federal, and local*** reviewing agencies" may submit such recommendations.

The proposed versions of temporary rules 07J .0207, 07J .0208 and 07H .0509 include references to incorrect statutory sections in its grant of reviewing authority, as well. Originally, Rule 07J .0207 stated that major development permits would be circulated "to the several state review agencies having expertise in the criteria enumerated in G.S. 113A-120." The criteria enumerated in G.S. 113A-120 are the reasons that the "responsible official or body" (i.e., DCM) shall deny an application for a permit. However, in the temporary rules, the language has been amended to state that the state reviewing agencies (or in the case of 07J .0208 and 07H .0509, the federal and local agencies, as well) to whom the permit application would be circulated are those "having expertise in the criteria enumerated in G.S. 113A-113(b)(1) through (b)(9)." 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 may deny a permit application. Thus, the reference to N.C. Gen. Stat. §113A-113(b)(1) through (b)(9) in this context is inappropriate because other state agencies do not have the authority to designate AECs, and because those factors are not the same as those in G.S. 113A-120, pursuant to which a CAMA major development permit may be denied. Further, Section 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 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.

In response to the RRC's comments about lack of statutory authority, the CRC has attempted to revise the regulations to include statutory references in the "History Notes", apparently to give itself the authority the RRC has stated it lacks. These attempts are fruitless without express statutory authority, which does not exist. The CRC's justifications are unpersuasive as explained below:

1. **N.C. Gen. Stat. §113A-120(a)(2)**. In Rules 07J .0207(b) and 07J .0208(a), for example, the CRC added language stating that its authority to solicit input from state and federal agencies on all CAMA major development permit applications derives from the need to "comply with G.S. 113A-120(a)(4)." References to N.C. Gen. Stat. §113A-120(a) were added to each of the respective History Notes, as well. However, Section 113A-120(a)(4) provides 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). Nothing in that statutory section 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.

2. **N.C. Gen. Stat. §113A-127**. The CRC also added a reference to N.C. Gen. Stat. 113A-127 in both 07J .0207 and 07J .0208 in their respective History Notes. Section 113A-127 requires DCM to keep federal and other state agencies informed and to take certain actions in the event that their policies conflict with federal or interstate agency plans. However, as the RRC stated in its February 2023 RRC Memorandum, that section does ***not*** give DCM authority to consult other agencies with respect to permits and permit conditions. As the RRC noted, "review of that statute reveals that it requires only that State agencies 'shall keep informed of federal and interstate agency plans, activities, and procedures' and take 'reasonable steps … to preserve the integrity' of their policies where they conflict with federal or interstate agency plans. It is staff's opinion that this does not resolve the existing objection for lack of statutory authority." February 2023 RRC Memorandum. Indeed, this provision references generally applicable policies, not individual permit decisions based on site-specific development activities.

3. **N.C. Gen. Stat. §113-229**. In Rule 07J .0208, the CRC added a reference to N.C. Gen. Stat. §113-229 in the History Notes. That reference was already included in the prior version of Rule 07J .0207. Section 113-229 refers to DCM's authority to issue dredge and fill permits but does not apply to the balance of CAMA major permits. While the statute grants DCM authority to seek input on CAMA dredge and fill permit applications, it does not provide authority for the CRC to invite outside agency input on all other CAMA major permit applications. The RRC commented as follows in its September 17, 2022 Staff Opinion:

> "However, neither G.S. 113A-120 nor 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***." September 17, 2022 Rules Review Commission Staff Opinion (emphasis added).

We agree that the statutory language on this issue is clear. The statute specifically references dredge and fill permits in the discussion of agency input, while at the same time, omitting reference 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 or 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.

Allowing DCM to seek outside input on all CAMA major permit applications, and to impose conditions on them resulting from that input, 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; 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. <u>The Rules are not clear and unambiguous.</u>

In addition to lacking statutory authority, many of the proposed temporary rules are not "clear and unambiguous" as required by N.C. Gen. Stat. §150B-21.9(a). Throughout the review of the rules, the RRC has noted a laundry list of terms and concepts that are impermissibly vague, ambiguous, and subjective.

One of the terms to which the RRC has specifically objected time and time again is the term "significant adverse impact." In response to the RRC's comments that certain rules were not clear and unambiguous, CRC added the term "significant adverse impact" to several of them. For example, other terms in rules 15A NCAC 07H .0508, 07H .0509, 07M .0401, 07M .0402, 07M .0403, and 07M .0703 (such as "shall not adversely impact," or "significantly impact") were replaced with "significant adverse impact." Despite the RRC's continued objection to the use of that term, including for the reasons laid out in the February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners, the proposed temporary rules 07H .0508, 07H .0509, and 07M .0401, 07M .0402, 07M .0403, and 07M .0703 still contain the phrase "significant adverse impact."

Again, the RRC stated the following with respect to use of the term "significant adverse impact":

> "In the aforementioned proceedings before the Commission, the CRC consistently argued that 'significant adverse impact' was a term of art which had a meaning known to the General Assembly, the various environmental agencies, the regulated public, and North Carolina's courts. Nonetheless, the agency has repeatedly declined to articulate this known meaning in writing, incorporate it into its Rules, or provide specific references to this extensive usage other than citations to other equally opaque CRC rules, an inapposite statute, and a case which mentions but does not construe the term." RRC Staff Opinion dated August 14, 2023.

We agree with the RRC's comments. The CRC's argument that the term is a "term of art" that is understood by the regulated community also is unpersuasive. The CRC implies that the regulated community should and does understand the meaning of the term because they are familiar with it.

Even if that were true, "terms of art" do not have meaning in law or regulation until they are defined (even if by reference to another source). This term is not defined anywhere in CAMA or its implementing regulations. Further, the term was not part of DCM's rules until it was added as part of the pending rulemaking. Thus, up to this point, the regulated community has no benchmark for what a "significant adverse impact" means in this particular context.

Without a definition of "significant adverse impact" or language clarifying how that concept is quantified and interpreted, the rules unfairly subject the regulated community to a standard that is vague and ambiguous. As the RRC noted, "[t]he result will be the arbitrary regulation of property owners against whom the process will be the punishment. Permits denied must then be either abandoned or litigated, both of which will have high costs for the regulated public." February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners.

In addition, proposed temporary rule 07J .0203 states that "[n]othing in this Rule would prohibit an applicant from proceeding with work outside an AEC that is determined by the Division of Coastal Management to not have a direct impact on the AEC while a permit application for work in the AEC is pending, provided that all other necessary local, state, and federal permits have been obtained." Again, the RRC notes that the language is not clear and unambiguous because, by referencing "direct impacts," it implies there are also "indirect impacts," neither of which is a defined term. We agree. In fact, DCM recently has attempted to regulate activities in areas outside an AEC on the basis that such activities have to the potential to "adversely affect" the AEC. August 17, 2023 Stop Work Order and Notice of Regulatory Requirements re: CAMA Permit No. 79-22. Yet, there is no explanation in the rules as to what "direct" impacts are or how they are quantified.

The RRC has also objected to a number of rules because they contained vague and subjective language that was "a blend of ambiguous or subjective terms and policy language." Some examples of these rules are discussed further below. However, the RRC's objections to the ambiguous language in 15A NCAC 07H .0501 is particularly telling. The RRC raised concerns about the purported definition of "[n]atural and cultural resource areas" in temporary rule 15A NCAC 07H .0501, stating that "the definition offered is not only self-referential but uses terms that are subjective and susceptible to any reading the agency wishes to give them." February 2023 RRC Memorandum. Further:

> "The agency does not define these values or qualities or give any explicatory examples. The agency does not explain what kind of development would be 'uncontrolled or incompatible' with these 'resources.' The agency does not state who makes the termination that any particular piece of land or water satisfies the provided definition. No term mentioned herein appears to have a settled meaning within Section 07H or within the portions of Ch. 113A cited by the agency in its History note … the revisions [to the rule] leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement." February 2023 RRC Memorandum.

The vague and ambiguous terms used throughout the proposed rules leave them lacking in the clarity that is necessary for them to meet the requirements of N.C. Gen. Stat. §150B-21.9(a).

Therefore, they should not be adopted until they can be revised with sufficient clarity that the regulated public will understand just how they are being regulated.

c. The Rules are not reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency and they were not adopted in accordance with the APA

The third and fourth criteria enumerated in N.C. Gen. Stat. §150B-21.9(a) are whether a proposed rule is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency," and whether the rule "was adopted in accordance with Part 2 of [the APA]." *See* N.C. Gen. Stat. §150B-21.9(a). The language in a number of the proposed temporary rules does not meet the definition of a "rule" pursuant to Section 150B-2(8a). Therefore, their adoption as rules would be in contravention of N.C. Gen. Stat. §150B-21.9(a) because such adoption is not within the authority granted to DCM and they are not "reasonably necessary." Moreover, their adoption is not consistent with N.C. Gen. Stat. §150B-21.9(a)(4), which requires they be adopted pursuant to the APA.

N.C. Gen. Stat. §150B-19.1(a)(1) states that "[a]n agency may adopt only rules that are expressively authorized by federal and State law and that are necessary to serve the public interest." Section 150B-2(8a) defines a "rule" as "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 …". Section 150B-2(8a) goes on to list several things that are specifically excluded from the definition of a "rule," including, for example, nonbinding interpretive statements or statements of agency policy.

According to the RRC, many of the temporary rules do not meet the definition of a "rule," because they are "a blend of ambiguous or subject terms and policy language." For example, Rule 07H .0510 attempts to define the term "significant coastal historic architectural resources." The proposed definition, however, contains ambiguous phrases such as "more than local significance to history" and "uncontrolled or incompatible development." As the RRC stated in its objections, "[w]ithout further specificity, this paragraph appears to be a mere policy statement." February 2023 RRC Memorandum.

The February 2023 RRC Memorandum contains examples of other instances of policy-type language in the temporary rules, as well:

> "Paragraph (c) [of 15A NCAC 07H .0510] describes the 'management objectives' for these resources, and as in Rules .0506, .0507, and .0509, contains self-described 'policy statements.' As with numerous other rules in Section .0500, these 'policy statements' are expressed in terms of preserving or conserving the vaguely defined 'values' of a particular resource. For instance, paragraph (c)(1) [of 15A NCAC 07H .0510] states that the agency shall seek to 'conserve' these resources as 'a living part of community life and development … to give a sense of orientation to the people of the State[.]' This is facially subjective and ambiguous language … the revisions leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement."

Because several of the proposed temporary rules, including those described above, do not meet the definition of a "rule," they are not "reasonably necessary" and were not adopted in accordance with the APA. Should the CRC wish to develop and implement particular policies in relation to its goals of conservation and protection, and "for the protection of coastal waters," it can certainly develop and publish policies on its website, as the RRC suggested. However, such policies may not be adopted as "rules" and as such, may not have the force of law.

III. Conclusion

For the reasons set forth above, the CRC's actions in pursuing the temporary rulemaking process for these rules as currently proposed is improper. The CRC has not shown the required justification for bypassing the permanent rulemaking process, and its proposed rules do not meet applicable legal requirements. The RRC has already notified the CRC that its proposed rules exceed its statutory authority, are vague and ambiguous, and are not reasonably necessary in violation of N.C. Gen. Stat. 150B-21.9(a), and we urge the CRC to acknowledge these deficiencies and revise its rules accordingly.

Mary Katherine Stukes

Enclosure

cc:

Christine Goebel, Esq., NCDEQ Assistant General Counsel (*by email only*)
Phil Feagan, Esq., NCDNCR General Counsel (*by email only*)
Roy Brownlow, Tidewater Associates Inc. (*by email only*)
Steven Kellum, Cedar Point Developers, LLC (*by email only*)

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December 18, 2023

VIA EMAIL (ashley.snyder@oah.nc.gov)

Ms. Ashley Snyder
Codifier of Rules
NC Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: Bridgeview Subdivision, 1180 Cedar Point Boulevard, Cedar Point, Carteret County, NC

Dear Ms. Snyder,

We represent Cedar Point Developers, LLC ("Cedar Point") related to a proposed residential development at 1180 Cedar Point Boulevard in Carteret County, North Carolina. As you know, the North Carolina Coastal Resources Commission ("CRC") called a December 13, 2023 Special Meeting (the "Meeting") to evaluate and pass an emergency rulemaking for sixteen rules which were then submitted to you on December 14, 2023 (the "Rules"). Cedar Point's proposed development is subject to a CAMA Major Permit and is therefore impacted by the status of the Rules and CRC's implementation of them.

Pursuant to NCGS 150B-21.1A(b), you are charged with evaluating the CRC's statement of need for passing the emergency rulemaking and determining whether the statement meets the criteria for adoption of an emergency rule under that section. NCGS 150B-21.1A(b) states that, in connection with her consideration of an emergency rulemaking, the Codifier of Rules may consider any information submitted by the agency or another person. As such, we are writing to submit comments on the emergency rulemaking, and to notify you of our position that the emergency rulemaking does not meet either of the criteria set forth in NCGS 150B-21.1A(a). Further, we do not believe that approval of the emergency rulemaking during the Meeting was proper because many CRC Commissioners (some of whom were attending their first meeting on the CRC) were unfamiliar with the issues and the apparent reasoning for the rulemaking on which they were voting.

The Rules do not meet the statutory criteria for an emergency rulemaking. As you know, an agency may adopt an emergency rule without prior notice or hearing when it finds that: (1) "adherence to the notice and hearing requirements … would be contrary to the public interest" and (2) "the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety." NCGS 150B-21.1A(a). The emergency rulemaking does not meet either of these criteria and is therefore inconsistent with the process set forth under state law.

North Carolina law requires an agency to demonstrate that an emergency rulemaking is necessary because a situation exists where rulemaking through the typical process would be "contrary to the public interest." NCGS 150B-21.1A(a). However, the CRC's statement of need fails to articulate how the public interest would be harmed or otherwise impacted by evaluation of the Rules through the normal rulemaking process. Moreover, the CRC has not provided such justification for each specific rule proposed.

First, the CRC argues that public notice and a public hearing are unnecessary because the Rules "have been included in the Code for decades and more recently, the public was provided an opportunity to comment during the periodic readoption process." This statement assumes that the rules being considered for emergency rulemaking are identical to those that existed in the Code prior to October 5, 2023. However,

this argument is disingenuous and inaccurate. The Rules contained in the proposed emergency rulemaking contain several revisions and edits that could have a significant impact on both the regulated community and on how the agency carries out its statutory mandate for rule promulgation. Thus, codification of emergency rules ***without*** time for the public to adequately evaluate and comment on these changes would be decidedly contrary to the public interest. CRC's statement of need does not provide any substantive basis as to why adherence to the process set forth under state law would be "contrary to the public interest." Even assuming that the rules do not change the status quo (which we dispute), such a status does not make the rulemaking process contrary to the public interest.

Second, the CRC argues that an emergency rulemaking is necessary to bypass adherence to the notice and hearing requirements because the state "cannot rely on these rules to issue permits for development in the coastal counties, make enforcement decisions, and can no longer review certain federal projects for consistency with State law pursuant to these rules." However, the CRC's statement of need fails to substantiate this assertion that its authority has or will be limited in the absence of the emergency rulemaking. The rule giving DCM authority to issue permits, 15A NCAC 07J .0201, is unchanged and in full force and effect. The CRC's statement does not include examples of situations where the agency was unable to issue or enforce a permit. Nor does it provide any detail on the "certain federal projects" that it is allegedly unable to review (for example, what federal agencies are involved, what types of projects are at issue, whether those projects involve issuance of permits or enforcement-related issues, etc.). As of the date of this letter, the Rules have not been part of the Code for approximately seventy days, and their status has been in question for over a year. A cursory review of publicly available information from the past seventy days indicates just the opposite, as the agency has in fact continued to issue major CAMA permits and conduct enforcement actions since the rules were removed from the Code on October 5, 2023.

The CRC goes on to argue that the removal of the Rules from the Code "severely impacts the commission's rules and creates confusion related to permitting procedures for the State's coastal management program and the regulated public." Again, the CRC has not provided any examples of instances during the last seventy days when there has been confusion related to the permitting procedures, or incidences when the commission's rules were "severely impact[ed]." Potential confusion does not equate to a justification for circumventing rulemaking procedures. These broad and general assertions do not provide sufficient justification for the emergency rulemaking pursuant to North Carolina law.

In addition to demonstrating that adherence to the typical notice and hearing requirements for rulemaking is contrary to the public interest, the statement of need must explain why the agency believes the emergency rulemaking is necessary to address "a serious and unforeseen threat to the public health or safety." NCGS 150B-21.1A(a). In their statement of need, the CRC merely argues that it believes the emergency rulemaking is necessary "[t]o ensure the stability and effectiveness of the coastal rules for the benefit of the regulated public, and to ensure the CRC's compliance with statutory mandates for rule promulgation under N.C. Gen. Stat. Chapter 113A, Article 7, the Coastal Area Management Act." However, the CRC does not point to any examples of "serious" or "unforeseen" threats to public health or safety that have resulted during the last seventy days, or that would result in the future, from the rejection of the emergency rules. Further, such justification should be enumerated for each specific rule proposed. This detail is critical, as the purported basis presumably would differ from rule to rule.

The CRC notes that removal of the rules would "pose a serious threat to public safety regarding the loss of protection of coastal lands and waters." While we acknowledge that protection of coastal lands and waters is essential to preserve our state's natural resources, the CRC has not provided in its statement of need any justification for its statement that the removal of such protections would pose a serious threat to public (human) health or public safety. Indeed, the statement does not even allege that the threat is unforeseen, as required by 150B-21.1A(a). Similarly, 15A NCAC 07H .0509 regarding archeological resources deals entirely with inert cultural resources, not protection of public health or safety. Again, the CRC has not

shown how emergency enactment of this rule is required because of a serious and unforeseen threat to the public health or safety.

Nor does the statement of need provide any explanation of how the stability and effectiveness of the coastal rules is or will be jeopardized. For instance, and as previously noted, the statement of need does not state that the CRC has lost its permitting authority entirely or provide details from instances when the CRC was unable to comply with statutory mandates for rule promulgation. Thus, it is our belief that the statement of need does not meet the statutory requirement to address a serious or unforeseen threat to public health or safety.

For the reasons stated herein, the emergency rulemaking passed on December 13, 2023 by the CRC does not meet either of the criteria set forth in NCGS 150B-21.1A(a) and therefore should not be codified as an emergency rule.

We appreciate your consideration of these comments. Please let us know if you have any questions about this submittal or if you would like to discuss.

Sincerely,

Mary Katherine H. Stukes
Moore & Van Allen PLLC

Cc: Christine Goebel, Esq., NCDEQ Assistant General Counsel
Phil Feagan, Esq., NCDNCR General Counsel
Roy Brownlow, Tidewater Associates Inc.
Steven Kellum, Cedar Point Developers, LLC

when the commission's rules were "severely impact[ed]." *Id*. As we noted in our December 18, 2023 Letter to the Codifier, potential confusion – if it even exists – does not equate to justification for circumventing rulemaking procedures.

At the December 13, 2023 CRC meeting, members of the CRC expressed doubt that adherence to the notice and hearing requirements would be contrary to the public interest. For example, Commissioner Hennessy spoke against the need to bypass these requirements and voted against the motion along with Commissioner Yates.

b. The CRC's Statement of Need fails to demonstrate that a "serious and unforeseen threat to the public health, safety, or welfare" exists

Further, immediate adoption of the rules as temporary rules is not required by any of the reasons enumerated in N.C. Gen. Stat. §150B-21.1(a). Specifically, the CRC has failed to demonstrate that there is a "serious **and** unforeseen threat to the public health, safety, or welfare" if the rules are not adopted immediately. *See* N.C. Gen. Stat. §150B-21.1(a)(1)(emphasis added). The CRC does not point to any examples of "serious" or "unforeseen" threats to public health or safety that have resulted from the rules not being included in the Administrative Code over the last approximately four months. It states that removal of these rules would "pose a serious threat to public safety regarding the loss of protection of coastal lands and waters," but it fails to provide any support for this position, especially given that permits including requirements to protect such lands and waters have been issued during this period. Importantly, the CRC has also failed to even state, much less explain, how rejection of the temporary rules would cause an "unforeseen" threat to public health, safety, or welfare. Under N.C. Gen. Stat. §150B-21(a), both showings must be made to bypass the permanent rulemaking process. Even assuming that the CRC has properly alleged serious and unforeseen harm, the CRC has not demonstrated that the inability to issue permits, make enforcement decisions, or comment on federal projects is a threat to public (human) health or safety.

Moreover, many of the proposed temporary rules relate to inert cultural resources rather than the protection of public health or safety. While such resources are critical in many respects, they do not meet the statutory standard for bypassing the permanent rulemaking process. The Statement of Need fails to explain how enactment of those rules through the temporary rulemaking process is necessary to address a serious and unforeseen threat to the ***public health, safety, or welfare***.

During the December 13, 2023 CRC meeting discussed above, members of the CRC also expressed doubt that the temporary rulemaking process was required to avoid a serious and unforeseen harm. Again, Commissioners Hennessy and Yates voted against the motion, along with Commissioner Shuttleworth.

The CRC's Statement of Need is insufficient from a procedural basis, as well. As we noted in our December 18, 2023 Letter to the Codifier, the CRC has also failed to provide justification for the alleged serious and unforeseen threat that requires passage of each of the proposed rules. This is a critical detail, as the purported basis presumably would differ for each rule. In fact, the January 3, 2024 Statement of Need accompanying the Temporary Rulemaking request includes several reasons why the particular rule designating Jockey's Ridge Area of Environmental Concern is necessary to "take enforcement actions to protect" it. It also states that "[i]mmediate adoption of

this rule is required to designate Jockey's Ridge as an Area of Environmental Concern within the CRC's jurisdiction and protect this important resource." While these particular justifications may be relevant to that specific rule, they do not explain why the remaining fifteen rules should be adopted to address a "serious and unforeseen threat to the public health, safety, or welfare." Again, the failure to provide justification for each rule is a critical flaw.

II. Even if temporary rules were warranted in this case, these proposed rules still fail to satisfy the requirements of N.C. Gen. Stat. §150B-21.9(a).

The RRC evaluates temporary rules in accordance with the standards set forth in N.C. Gen. 150B-21.9. *See* N.C. Gen. Stat. §§150B-21.8. 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). Even if the temporary rules were warranted to address some pressing regulatory need (which, as described above, they do not), they still fail to satisfy the substantive requirements of Section 150B-21.9(a).

a. The temporary rules are not within the authority delegated to DCM by the General Assembly.

The temporary rules are not within the authority delegated to DCM by the General Assembly because they attempt to give DCM a means to regulate outside of their physical jurisdiction under CAMA, and 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.

DCM is only permitted to regulate development activities within Areas of Environmental Concern ("AEC"). *See* N.C. Gen. Stat. §113A-118(a). The language in the temporary rules attempts to expand the scope of DCM's authority to permit it to regulate activities outside of the AEC, as well. This is not within the authority that was delegated to DCM by the General Assembly. For example, 15A NCAC 07J .0203 previously included explicit language stating that DCM would not require subsequent permits, permit modifications, or other agency approval for work performed outside the AEC so long as the work performed was consistent with that described in the application. Removal of that language in the temporary rule version of Rule 07J .0203 could be read as an attempt to extend DCM's jurisdiction to areas outside AECs. This is not within the authority expressly delegated to DCM by the General Assembly under CAMA and is therefore improper.

The temporary rules also impermissibly give other state and federal agencies the functional equivalent of permit issuing authority. Specifically, as revised, Rule 07J .0208 states that

reviewing agencies may "submit 'specific recommendations … and limitations' on the work performed pursuant to these permits and on any operation or maintenance of the completed portion thereafter" that may in turn be enforced as "permit conditions." As noted in the February 2023 RRC Memorandum, this language "essentially circumvents G.S. 113A-118's commandment that permits shall be obtained 'from the Secretary' of DEQ or from the Commission and allows the permit conditions to be set by any other State, federal, or local 'reviewing agency.'" February 22, 2023 Letter from Brian Liebman, RRC Commission Counsel to Jennifer Everett, Coastal Resources Commission (containing February 2023 and December 2022 RRC Staff Opinions) ("February 2023 RRC Memorandum"). The rule does not specify which agencies could be considered "reviewing agencies," and it ostensibly gives DCM broad authority to unilaterally determine who should be considered "reviewing agencies." Not only is this authority not conferred by CAMA, but CAMA expressly limits the CRC's authority in this regard.

In addition to impermissibly giving other agencies the ability to dictate permit conditions, the proposed rules grant that authority to an even wider scope of parties. Originally, Rule 15A NCAC 07J .0208 stated that state reviewing agencies could submit recommendations for the proposed work. However, the temporary rule version of Rule 07J .0208 expands this provision, stating that "[e]ach of the state, ***federal, and local*** reviewing agencies" may submit such recommendations.

The proposed versions of temporary rules 07J .0207, 07J .0208 and 07H .0509 include references to incorrect statutory sections in its grant of reviewing authority, as well. Originally, Rule 07J .0207 stated that major development permits would be circulated "to the several state review agencies having expertise in the criteria enumerated in G.S. 113A-120." The criteria enumerated in G.S. 113A-120 are the reasons that the "responsible official or body" (i.e., DCM) shall deny an application for a permit. However, in the temporary rules, the language has been amended to state that the state reviewing agencies (or in the case of 07J .0208 and 07H .0509, the federal and local agencies, as well) to whom the permit application would be circulated are those "having expertise in the criteria enumerated in G.S. 113A-113(b)(1) through (b)(9)." 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 may deny a permit application. Thus, the reference to N.C. Gen. Stat. §113A-113(b)(1) through (b)(9) in this context is inappropriate because other state agencies do not have the authority to designate AECs, and because those factors are not the same as those in G.S. 113A-120, pursuant to which a CAMA major development permit may be denied. Further, Section 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 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.

In response to the RRC's comments about lack of statutory authority, the CRC has attempted to revise the regulations to include statutory references in the "History Notes", apparently to give itself the authority the RRC has stated it lacks. These attempts are fruitless without express statutory authority, which does not exist. The CRC's justifications are unpersuasive as explained below:

1. **N.C. Gen. Stat. §113A-120(a)(2)**. In Rules 07J .0207(b) and 07J .0208(a), for example, the CRC added language stating that its authority to solicit input from state and federal agencies on all CAMA major development permit applications derives from the need to "comply with G.S. 113A-120(a)(4)." References to N.C. Gen. Stat. §113A-120(a) were added to each of the respective History Notes, as well. However, Section 113A-120(a)(4) provides 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). Nothing in that statutory section 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.

2. **N.C. Gen. Stat. §113A-127**. The CRC also added a reference to N.C. Gen. Stat. 113A-127 in both 07J .0207 and 07J .0208 in their respective History Notes. Section 113A-127 requires DCM to keep federal and other state agencies informed and to take certain actions in the event that their policies conflict with federal or interstate agency plans. However, as the RRC stated in its February 2023 RRC Memorandum, that section does ***not*** give DCM authority to consult other agencies with respect to permits and permit conditions. As the RRC noted, "review of that statute reveals that it requires only that State agencies 'shall keep informed of federal and interstate agency plans, activities, and procedures' and take 'reasonable steps … to preserve the integrity' of their policies where they conflict with federal or interstate agency plans. It is staff's opinion that this does not resolve the existing objection for lack of statutory authority." February 2023 RRC Memorandum. Indeed, this provision references generally applicable policies, not individual permit decisions based on site-specific development activities.

3. **N.C. Gen. Stat. §113-229**. In Rule 07J .0208, the CRC added a reference to N.C. Gen. Stat. §113-229 in the History Notes. That reference was already included in the prior version of Rule 07J .0207. Section 113-229 refers to DCM's authority to issue dredge and fill permits but does not apply to the balance of CAMA major permits. While the statute grants DCM authority to seek input on CAMA dredge and fill permit applications, it does not provide authority for the CRC to invite outside agency input on all other CAMA major permit applications. The RRC commented as follows in its September 17, 2022 Staff Opinion:

> "However, neither G.S. 113A-120 nor 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***." September 17, 2022 Rules Review Commission Staff Opinion (emphasis added).
>
> We agree that the statutory language on this issue is clear. The statute specifically references dredge and fill permits in the discussion of agency input, while at the same time, omitting reference 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 or 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.

Allowing DCM to seek outside input on all CAMA major permit applications, and to impose conditions on them resulting from that input, 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; 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. <u>The Rules are not clear and unambiguous.</u>

In addition to lacking statutory authority, many of the proposed temporary rules are not "clear and unambiguous" as required by N.C. Gen. Stat. §150B-21.9(a). Throughout the review of the rules, the RRC has noted a laundry list of terms and concepts that are impermissibly vague, ambiguous, and subjective.

One of the terms to which the RRC has specifically objected time and time again is the term "significant adverse impact." In response to the RRC's comments that certain rules were not clear and unambiguous, CRC added the term "significant adverse impact" to several of them. For example, other terms in rules 15A NCAC 07H .0508, 07H .0509, 07M .0401, 07M .0402, 07M .0403, and 07M .0703 (such as "shall not adversely impact," or "significantly impact") were replaced with "significant adverse impact." Despite the RRC's continued objection to the use of that term, including for the reasons laid out in the February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners, the proposed temporary rules 07H .0508, 07H .0509, and 07M .0401, 07M .0402, 07M .0403, and 07M .0703 still contain the phrase "significant adverse impact."

Again, the RRC stated the following with respect to use of the term "significant adverse impact":

> "In the aforementioned proceedings before the Commission, the CRC consistently argued that 'significant adverse impact' was a term of art which had a meaning known to the General Assembly, the various environmental agencies, the regulated public, and North

> Carolina's courts. Nonetheless, the agency has repeatedly declined to articulate this known meaning in writing, incorporate it into its Rules, or provide specific references to this extensive usage other than citations to other equally opaque CRC rules, an inapposite statute, and a case which mentions but does not construe the term." RRC Staff Opinion dated August 14, 2023.

We agree with the RRC's comments. The CRC's argument that the term is a "term of art" that is understood by the regulated community also is unpersuasive. The CRC implies that the regulated community should and does understand the meaning of the term because they are familiar with it. Even if that were true, "terms of art" do not have meaning in law or regulation until they are defined (even if by reference to another source). This term is not defined anywhere in CAMA or its implementing regulations. Further, the term was not part of DCM's rules until it was added as part of the pending rulemaking. Thus, up to this point, the regulated community has no benchmark for what a "significant adverse impact" means in this particular context.

Without a definition of "significant adverse impact" or language clarifying how that concept is quantified and interpreted, the rules unfairly subject the regulated community to a standard that is vague and ambiguous. As the RRC noted, "[t]he result will be the arbitrary regulation of property owners against whom the process will be the punishment. Permits denied must then be either abandoned or litigated, both of which will have high costs for the regulated public." February 15, 2023 Memorandum from Lawrence R. Duke, Brian Liebman, and William W. Peaslee to All RRC Commissioners.

In addition, proposed temporary rule 07J .0203 states that "[n]othing in this Rule would prohibit an applicant from proceeding with work outside an AEC that is determined by the Division of Coastal Management to not have a direct impact on the AEC while a permit application for work in the AEC is pending, provided that all other necessary local, state, and federal permits have been obtained." Again, the RRC notes that the language is not clear and unambiguous because, by referencing "direct impacts," it implies there are also "indirect impacts," neither of which is a defined term. We agree. In fact, DCM recently has attempted to regulate activities in areas outside an AEC on the basis that such activities have to the potential to "adversely affect" the AEC. August 17, 2023 Stop Work Order and Notice of Regulatory Requirements re: CAMA Permit No. 79-22. Yet, there is no explanation in the rules as to what "direct" impacts are or how they are quantified.

The RRC has also objected to a number of rules because they contained vague and subjective language that was "a blend of ambiguous or subjective terms and policy language." Some examples of these rules are discussed further below. However, the RRC's objections to the ambiguous language in 15A NCAC 07H .0501 is particularly telling. The RRC raised concerns about the purported definition of "[n]atural and cultural resource areas" in temporary rule 15A NCAC 07H .0501, stating that "the definition offered is not only self-referential but uses terms that are subjective and susceptible to any reading the agency wishes to give them." February 2023 RRC Memorandum. Further:

> "The agency does not define these values or qualities or give any explicatory examples. The agency does not explain what kind of development would be 'uncontrolled or

> incompatible' with these 'resources.' The agency does not state who makes the termination that any particular piece of land or water satisfies the provided definition. No term mentioned herein appears to have a settled meaning within Section 07H or within the portions of Ch. 113A cited by the agency in its History note … the revisions [to the rule] leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement." February 2023 RRC Memorandum.

The vague and ambiguous terms used throughout the proposed rules leave them lacking in the clarity that is necessary for them to meet the requirements of N.C. Gen. Stat. §150B-21.9(a). Therefore, they should not be adopted until they can be revised with sufficient clarity that the regulated public will understand just how they are being regulated.

c. <u>The Rules are not reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency and they were not adopted in accordance with the APA</u>

The third and fourth criteria enumerated in N.C. Gen. Stat. §150B-21.9(a) are whether a proposed rule is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency," and whether the rule "was adopted in accordance with Part 2 of [the APA]." *See* N.C. Gen. Stat. §150B-21.9(a). The language in a number of the proposed temporary rules does not meet the definition of a "rule" pursuant to Section 150B-2(8a). Therefore, their adoption as rules would be in contravention of N.C. Gen. Stat. §150B-21.9(a) because such adoption is not within the authority granted to DCM and they are not "reasonably necessary." Moreover, their adoption is not consistent with N.C. Gen. Stat. §150B-21.9(a)(4), which requires they be adopted pursuant to the APA.

N.C. Gen. Stat. §150B-19.1(a)(1) states that "[a]n agency may adopt only rules that are expressively authorized by federal and State law and that are necessary to serve the public interest." Section 150B-2(8a) defines a "rule" as "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 …". Section 150B-2(8a) goes on to list several things that are specifically excluded from the definition of a "rule," including, for example, nonbinding interpretive statements or statements of agency policy.

According to the RRC, many of the temporary rules do not meet the definition of a "rule," because they are "a blend of ambiguous or subject terms and policy language." For example, Rule 07H .0510 attempts to define the term "significant coastal historic architectural resources." The proposed definition, however, contains ambiguous phrases such as "more than local significance to history" and "uncontrolled or incompatible development." As the RRC stated in its objections, "[w]ithout further specificity, this paragraph appears to be a mere policy statement." February 2023 RRC Memorandum.

The February 2023 RRC Memorandum contains examples of other instances of policy-type language in the temporary rules, as well:

> "Paragraph (c) [of 15A NCAC 07H .0510] describes the 'management objectives' for these resources, and as in Rules .0506, .0507, and .0509, contains self-described 'policy statements.' As with numerous other rules in Section .0500, these 'policy statements' are expressed in terms of preserving or conserving the vaguely defined 'values' of a particular resource. For instance, paragraph (c)(1) [of 15A NCAC 07H .0510] states that the agency shall seek to 'conserve' these resources as 'a living part of community life and development … to give a sense of orientation to the people of the State[.]' This is facially subjective and ambiguous language … the revisions leave such significant ambiguity that it is unclear whether CRC is adopting a 'rule' as defined in G.S. 150B-2(8a) or a policy statement."

Because several of the proposed temporary rules, including those described above, do not meet the definition of a "rule," they are not "reasonably necessary" and were not adopted in accordance with the APA. Should the CRC wish to develop and implement particular policies in relation to its goals of conservation and protection, and "for the protection of coastal waters," it can certainly develop and publish policies on its website, as the RRC suggested. However, such policies may not be adopted as "rules" and as such, may not have the force of law.

III. Conclusion

For the reasons stated in (i) our December 18, 2023 Letter to the Codifier, (ii) the February 20, 2024 comments on the temporary rulemaking, and (iii) the additional reasons explained herein, the RRC should reject the CRC's proposed temporary rules. The CRC has not shown the required justification for bypassing the permanent rulemaking process, and its proposed rules do not meet applicable legal requirements.

Moreover, the RRC has already notified the CRC that its proposed rules exceed its statutory authority, are vague and ambiguous, and are not reasonably necessary in violation of N.C. Gen. Stat. §150B-21.9(a) on several occasions. Despite multiple opportunities to revise the rules accordingly, the CRC has failed to sufficiently address the RRC's concerns. Therefore, we urge the RRC to find, once again, that the temporary rules do not meet the standards set forth in N.C. Gen. Stat. §150B-21.1(a) and NCGS 150B-21.9.

Sincerely,

Mary Katherine Stukes

Enclosures

cc: Alexander Burgos, Office of Administrative Hearings (*by email only*)
Brian Liebman, Office of Administrative Hearings Commission Counsel (*by email only*)

William Peaslee, Office of Administrative Hearings, Commission Counsel – Legislative Liaison (*by email only*)
Christine Goebel, Esq., NCDEQ Assistant General Counsel (*by email only*)
Phil Feagan, Esq., NCDNCR General Counsel (*by email only*)
Roy Brownlow, Tidewater Associates Inc. (*by email only*)
Steven Kellum, Cedar Point Developers, LLC (*by email only*)

Burgos, Alexander N

From: Millis, Chris <CMillis@nchba.org>
Sent: Tuesday, March 26, 2024 2:30 PM
To: rrc.comments; Jeanette.k.doran@gmail.com; jakeparkerrrc@gmail.com; bwl@ocrlaw.com; wboyles@aol.com; jh@hemphillgelderlaw.com; justicebarbarajackson@gmail.com; jeff.hyde@aestheticimages.net; overton.ro@gmail.com; wnelson@smithlaw.com; ppowell@apbev.com
Cc: Everett, Jennifer; Burgos, Alexander N
Subject: [External] RRC Comments - Agenda Item V.1. - CRC Temporary Rules
Attachments: NCHBA Comments to RRC Meeting 032724 Item V1.pdf

Commission Members and Staff, please find attached to this email comments regarding Agenda Item V.1. under your consideration involving temporary rules proposed by the Coastal Resources Commission.

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

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

Chris Millis, PE
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March 26, 2024

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

RE: Written Comment on Proposed Temporary Rules
Coastal Resources Commission - 15A NCAC 07H .0507, .0508, .0509; 07I .0702; 07J .0203, .0204, .0206, .0207, .0208; 07M .0401, .0402, .0403, .0701, .0703, .0704, .1101

Members of the Rules Review Commission & Commission Staff:

On behalf of over 15,000 member firms that comprise the North Carolina Home Builders Association (NCHBA), and consistent with our shared commitment to protect the environment, please find these comments concerning the temporary rules proposed by the Coastal Resources Commission under Agenda Item V.1. at your upcoming March 27th, 2024 Rules Review Commission meeting.

We ask that the Commission reject the temporary rules proposed by the Coastal Resources Commission according to your authority under G.S. 150B-21.9 for the following reasons:

1. A recent act of the General Assembly or the United States Congress did not require the Agency to immediately adopt rules according to G.S. 150B-21.1(a)(2).
2. The rules fail to meet the standard as a serious and unforeseen threat to the public health, safety, or welfare according to G.S. 150B-21.1(a)(1) as supported by:
    a. Agency communication to the CRC that illustrates that not a single permit was withheld from being issued during the entire time that previous rules were vacated.
    b. The Courts refusing to grant the CRC judicial intervention aimed to keep the previous rules the Commission rejected in place due to an alleged "*immediate harm to the regulated public*".
    c. The Codifier's conclusion that the CRC did not meet the criteria to qualify for emergency rulemaking which is a standard substantially identical to the standard for temporary rulemaking.
3. The proposed temporary rules, like the previous rules the Commission previously rejected, remain unclear and ambiguous and potentially stray outside of the Agency's statutory authority.

Failure to meet G.S. 150B-21.1(a)(2):

The Coastal Resources Commission (CRC) asserts in the *Temporary Rule-Making Findings of Need* submittal to the Office of Administrative Hearings (OAH) that their authority to utilize temporary rulemaking powers is according to G.S. 150B-21.1(a)(1) – "*A serious and unforeseen threat to the public health, safety, or welfare*" & G.S. 150B-21.1(a)(2) – "*The effective date of a recent act of the General Assembly or the United States Congress*".

We respectfully disagree with the reasons the CRC gives within the *Temporary Rule-Making Findings of Need* document to justify their ability to utilize temporary rules according to G.S. 150B-21.1 rather than using the permanent rule process to accomplish their intent to replace the rule set, which the Commission previously rejected, after the passage of Section 21.2(m) of Session Law 2023-134.

Locking in CRC regulations via a temporary rule process that severely condenses public comment and stakeholder input is a serious concern of our Association. We find the CRC's utilization of the temporary rule process, which minimizes the input of the regulated community, particularly concerning since this very rule set contains similar rule language that this Commission previously and rightfully determined to be not "*clear and unambiguous*" and not within the authority delegated to the Division of Coastal Management (DCM) by the General Assembly.

When contemplating whether this CRC proposed rule set qualifies for the temporary rule process as established within G.S. 150B 21.1, please consider the entire context of G.S. 150B-21.1(a)(2) as reiterated below:

> *"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:*
>
> *…*
>
> *(2) The effective date of a recent act of the General Assembly or the United States Congress."*

While the Session Law provision did reform the return of rule process concerning rules that were previously disapproved by the Commission but failed to receive corresponding action by the related agency within 60 days, we argue that this fact is unrelated to the plain meaning of G.S. 150B-21.1(a)(2). We assert that G.S. 150B-21.1(a)(2) allows an agency to use the condensed temporary rule process, rather than a lengthier permanent rule process when a reduced time frame is necessary to meet an effective date mandate required by state or federal law.

Please consider that neither state nor federal lawmakers have taken recent action that requires the CRC to meet a specific effective date that would allow the CRC to qualify for the temporary rule process according to G.S. 105B-21.1(a)(2).

Failure to meet G.S. 150B-21.1(a)(1):
Regarding G.S. 150B-21.1(a)(1), we argue that there is not "*a serious and unforeseen threat to the public health, safety or welfare*" that allows the CRC to forgo the permanent rule-making process and qualify for the expedited temporary rule procedure.

When the CRC was considering adopting emergency rules, which later underpinned their effort to proceed with the temporary rule process, a member of the CRC requested justification from the Agency whether there was "*a serious and unforeseen threat to the public health, safety or welfare*". The Agency's response, in our view, does not justify the claim that these rules meet the threshold of 21.1(a)(1). Please see below:

CRC Member Inquiry: *"Director Miller - lastly, I would like a copy of the memo / white-paper detailing the serious threat to public health and public safety that occurred / was triggered due to the rules being decodified during the early part of October, 2023. Essentially, trying to understand the complete picture to what was described by one presenter at last week's CRC meeting as "chaos".*

DCM Response: *"DCM staff provided memorandum CRC-23-25 (dated December 7, 2023) to the Commission stating that the 16 rules proposed for Emergency and now Temporary rulemaking are considered critical to DCM's day-to-day operations. The Division's position was, and is, that immediate adoption of the rules was necessary to address "a serious or unforeseen threat to the public health or safety," as required by the NC APA. While we avoided what might be described as chaos, we believe that the potential was there if the rules were not restored as quickly as possible. These rules are considered critical to DCM's day-to-day operations because they allow us to ensure that development proposals properly take into account environmental, public trust, and neighbor impacts before they are permitted, and that the proposed activities themselves are appropriated sited, scaled, timed, and noticed. Implementing a coastal management and regulatory program without clear standards and processes will almost certainly lead to inconsistency, public confusion, legal challenges, development activity that is contrary to the goals of CAMA, the Dredge & Fill Law, and other state statutes resource management programs that are considered in CAMA permitting, and dangerous for the permittee or others. For example, someone could apply for a CAMA permit to build a docking facility without describing the proposed dimensions, alignment, materials, distance into the waterbody, or proof of riparian ownership, and without properly notifying their riparian neighbors. Without these rules we would have no way to require that information be provided, and a structure could be built in a prohibited area, with dimensions and alignment that cut off their neighbor's riparian access and present a hazard to navigation. Multiply this by the hundreds of permits we issue every year and "chaos" does not seem to be an overstatement*."

CRC Member Inquiry: "*Director Miller - during the CRC meeting on February 22, 2024, I noted that there were several months that such rules were not applicable. Roughly, three to four months. As such, I would like a list of the permits issued during that period of time which were not impacted by not having such rules in place. Also, I would like a list of such permits that could not be issued during that period of time due to the lack of not having a rule in effect.*"

DCM Response: "*DCM issued 42 Major Permits in the period Oct 5, 2023 to Jan 5, 2024 while the Commission's rules were vacated, and all of these permits were impacted by not having the rules in place. We can provide you with a list of these permits if you would like. There were no permits that we could not issue because the rules were vacated because CAMA requires us to accept, process and issue or deny permit applications, under the "form and content" designated by DCM and approved by the commission. What we lacked by not having the rules in place was that form and content, which provide clarity and consistency for what needs to be included in a permit application so that we and other review agencies, adjacent property owners, and other interested parties can evaluate the potential impacts on the environment, on public trust resources and uses, and on adjacent private property. Applicants lost a degree of clarity and direction in understanding what information they need to provide and how their applications would be reviewed. The public's ability to be notified of permit applications was also impacted. Because we lost the rules, form, and process we were left more open to potential challenges from applicants and third parties seeking administrative or judicial review of permit actions, and a compromised ability to perform our legislative duties.*"

From the communication above, it is clear in our view that the Agency was not prevented from processing a single permit during the period that the CRC rules were vacated after being previously rejected by the Commission.

In addition to not preventing the Agency's ability to act on permits during the time the rules were vacated, it is also understood that the Courts refused to intervene when the CRC requested judicial intervention through Wake County Superior Court in an attempt to keep the previously rejected CRC rules in place due to a similar claim that the absence of rules would "*cause immediate harm to the regulated public*". *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).

It is alarming that after a judge refused to grant the CRC's series of motions to keep the very rules the Commission previously rejected in place due to an alleged "*immediate harm to the regulated public*" the CRC would later use a similar argument under G.S. 150B to commence emergency and temporary rulemaking.

Please note that our viewpoint of these CRC rules not meeting the standard of qualifying for the temporary rule process is further supported by the Codifier of Rules. On December 15th, 2023, the Codifier concluded that the CRC did not meet the criteria required in the APA when the CRC

submitted emergency rules under the same pretense as these temporary rules currently under your consideration.

We believe that evidence from the Agency being able to process all permits during the time the disapproved CRC rules were vacated, a failure to compel a judge to intervene under similar grounds, and the Codifier's opinion that these substantially identical CRC rules do not meet the standard to qualify for emergency rules all strongly establish that these temporary rules do not meet the threshold of G.S. 150B-21.1(a)(1).

Failure to meet G.S. 150B-21.9(a)(1) & (a)(2):
Beyond these rules not meeting the APA requirement to qualify for temporary rulemaking according to G.S. 150B-21.1, we also assert that the rules fail to meet G.S. 150B-21.9(a)(2) as it is our view that the rules remain unclear and ambiguous similar to your previous rejections in the fall of 2022.

Our Association previously communicated concern to the CRC regarding proposed changes to 15A NCAC 07H .0208 regarding the definitions of "*Adverse impact*" and "*Significant*" as we believe the definitions remain unclear and ambiguous, and may stray outside of the authority of the Agency to regulate outside of the Area of Environmental Concern. Beyond 07H .0208, we are also concerned by the proposed language of 07J .0208 and 07H .0509 for the same aforementioned reasons.

A special thank you to each Commission Member and Commission Staff for the opportunity to share comments concerning the temporary rules proposed by the CRC under Agenda Item V.1. under your consideration. Again, we ask that the Commission reject the temporary rules proposed by the Coastal Resources Commission according to your authority under G.S. 150B-21.9.

Sincerely,

Chris Millis
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