



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

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February 17, 2016

Via E-mail: Jason.Thomas@oah.nc.gov

Jason Thomas, Staff Counsel
Rules Review Commission
6714 Mail Service Center
Raleigh, NC 27699-6714

**Re: Coastal Resources Commission
15A NCAC 07H .0308, .1704, and .1705**

Dear Mr. Thomas:

I am writing on behalf of the Coastal Resources Commission (CRC) to address the concerns expressed in the Rules Review Commission (RRC) Staff Opinion regarding rules submitted by the CRC, which rules are proposed to be codified at 15A NCAC 07H .0308, .1704, and .1705. Specifically, this letter is to address RRC staff's concern as to whether specific statutory authority supports the rules¹.

As a preliminary matter, the CRC has statutory authority to promulgate rules to govern the use of sandbags which authority is set forth in N.C. Gen. Stat. §§113A-107(a),(b); -113(b)(6)a, b, d; -114.1(b1); -115.1; and -124. Indeed, the RRC Staff Opinion recognizes that the CRC may adopt permanent rules relating to sandbags consistent with the requirements of N.C. Gen. Stat. §150B.

The specific statutory authority to adopt the proposed temporary rules is set forth in the 2015 Appropriations Act, North Carolina Session Law 2015-241, Section 14.6.(p) which requires the CRC to amend its rules relating to the use of temporary erosion control structures (e.g. sandbags) in order to address each of the following issues:

- (1) Allow the placement of temporary erosion control structures on a property that is experiencing coastal erosion even if there are no imminently threatened structures on the property if the property is adjacent to a property where temporary erosion control structures have been placed.
- (2) Allow the placement of contiguous temporary erosion control structures from one shoreline boundary of a property to the other shoreline boundary, regardless of proximity to an imminently threatened structure.

¹ This is an advisory letter and has not been reviewed and approved in accordance with the procedure for issuing an Attorney General's Opinion.

- (3) The termination date of all permits for contiguous temporary erosion control structures on the same property shall be the same and shall be the latest termination date for any of the permits.
- (4) The replacement, repair, or modification of damaged temporary erosion control structures that are either legally placed with a current permit or legally placed with an expired permit, but the status of the permit is being litigated by the property owner.

The Session Law became law on September 18, 2015 with an effective date of July 1, 2015 (since no other effective date is specified for this section).

The CRC met on September 23, 2015 and immediately began work to amend its rules in a manner consistent with the legislative directive. DCM Staff prepared draft rule language based on the CRC's discussion and draft temporary rules were presented to the CRC at its next meeting on November 17 and 18, 2015. At this meeting, the CRC approved the draft rules for submission to the Office of Administrative Hearing and to send out for public comment consistent with the requirements of the Administrative Procedures Act (APA), N.C. Gen. Stat. §150B-21.1. Following the CRC's approval, the proposed temporary rules were filed with OAH on November 20, 2015, a public hearing was held December 10, 2015 in Morehead City, North Carolina, and public comment was received up to December 22, 2015. Five written comments were received and all were opposed to the proposed changes to the sandbag rules. Pursuant to the provisions of N.C. Gen. Stat. §150B-21.1(a3)(3), the CRC was required to wait 15 business days before adopting the temporary rule. Given the state holidays, the 16th business day fell on Wednesday, January 20, 2016.

At its next regularly scheduled meeting, held February 9-10, 2016, the CRC considered the substantive comments received and staff's response to the comments. Following discussion, the CRC adopted the temporary rules in compliance with Session Law 2015-241, Section 14.6(p).

The RCC Staff Opinion focuses on another section of the session law which states that the CRC "shall adopt temporary rules . . . no later than December 31, 2015." Session Law 2015-241, Section 14.6(q). The RCC Staff Opinion asserts that insofar as the CRC failed to meet the December deadline, "the CRC's authority to enact these temporary rule amendments has expired." However, the failure to meet this deadline is not fatal to the CRC's attempt to adopt temporary rules in accordance with the General Assembly's directive for two reasons. First, the temporary rules are consistent with the intent of the General Assembly to have the CRC make changes to the sandbag rules on an expedited basis. Second, the temporary rules were adopted in substantial compliance with the time frame established by the session law and the APA for temporary rulemaking.

We have not found any case law in support of the position that the date included in the session law, which is inconsistent with the APA timeline for temporary rulemaking, would mandate the outcome recommended in the RCC Staff Opinion and would welcome the opportunity to review any case law supporting that opinion.

Jason Thomas, Esq.

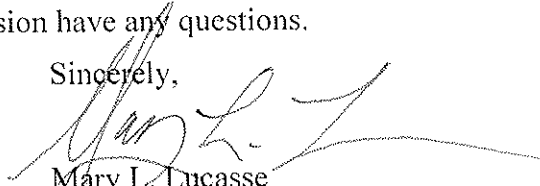
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We respectfully request that the Commission approve the temporary sandbag rules based on the authority provided by Session Law 2015-241, Section 14.6(p) and the Administrative Procedures Act. N.C. Gen. Stat. §150B-21.1

Please feel free to contact me if you have any questions about the information contained in this letter. I will plan to attend the Rules Review Commission's February 18, 2016 meeting in case the members of the Commission have any questions.

Sincerely,



Mary L. Lucasse
Special Deputy Attorney General

cc: Frank D. Gorham, III, Chair, Coastal Resources Commission (electronically)
Braxton C. Davis, Executive Director, Division of Coastal Management (electronically)
Mike Lopazanski, Division of Coastal Management (electronically)
Jennifer Everett, DEQ Rulemaking Coordinator (electronically)