

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
(919) 716-6962
MLUCASSE@NCDOJ.GOV

April 4, 2024

Via email submission: oah.rules@oah.nc.gov

Rules Review Commission
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: CRC request for approval of 16 Temporary Rules
15A NCAC 07H.0507, .0508, .0509
15A NCAC 07I.0702
15A NCAC 07J.0203, .0204, .0206, .0207, .0208
15A NCAC 07M.0401, .0402, .0403, .0701, .0703, .0704, .1101

Dear Commissioners:

I am writing in response to comments submitted on behalf of Cedar Point Developers, LLC and the NC Home Builders Association (hereinafter “comments”) and to provide additional information regarding the public comments received and the NC Coastal Resources Commission’s (“CRC”) unanimous adoption of the sixteen temporary rules at its recent March 13, 2024 special meeting.

I. The Temporary Rules Include Changes to Address Objections Raised by The RRC and counsel to the RRC.

Many of the issues raised in the comments relate to changes in the temporary rules made by the CRC to address objections raised by the RRC and RRC’s counsel. For example, to address the objection that certain rules were simply stating policies, the CRC has included clear direction in the 07M rules on how the policy statements will be used for permit and enforcement decisions. In other rules, the CRC clarified how DCM would determine what is “reasonable” and/or clearly outlined DCM’s current practice such as circulating permit applications to other agencies with expertise or concurrent jurisdiction and allowing those agencies to suggest permit conditions for DCM’s consideration.

In response to the RRC’s objection that the phrase “significant adverse impact” and related phrases were ambiguous, the CRC added definitions in the temporary rules that match the definition for “significant adverse impact” included in two permanent rules recently approved by the RRC during its meeting on December 14, 2023—15A NCAC 07H .0208 and 07H .0308. These recently approved permanent rules are not part of this set of sixteen temporary rules. Given the RRC’s approval of the definition in the permanent rules, the CRC included the same definition for “significant adverse impact” and similar phrases in the temporary rules to address the RRC’s objection that these phrases are ambiguous.

II. Counsel for the RRC suggested that the CRC use the temporary rule process.

Both comments about the temporary rules received by the RRC assert that the CRC's Statements of Need for the temporary rules are insufficient. However, during the hearing on the request for temporary restraining order ("TRO") in CRC v. RRC, File No. 23 CVS 031533-910, counsel for both RRC and the Codifier suggested to the trial court that a TRO was unnecessary as the CRC had the option of proceeding with emergency and temporary rulemaking. RRC counsel reiterated this suggestion in a letter to CRC counsel the day after the TRO hearing. In response, the CRC began emergency and temporary rulemaking on sixteen of the thirty rules that were returned to the CRC by the RRC. The CRC has attempted to work within the process suggested by RRC's counsel and has provided Statements of Need for each temporary rule that meet the requirements in the APA.

III. A significant number of public comments were received in favor of adopting temporary rules.

Although the APA provides an abbreviated comment period in the temporary rule process, the CRC received a robust response to its request for comments on the temporary rules. 239 comments were submitted to the CRC. Of the comments received, the vast majority (228) were in support of the temporary rules, 3 were neither for nor against, 1 comment was from Cedar Point Developers raising concerns about the alleged impact of the temporary rules on its development project (which it has already received a CAMA Major Permit), 5 comments supported Cedar Point Developers' comments, and 2 comments were received from Corolla Civic Association and Corolla Light Board of Directors Comments which did not address the RRC objections or temporary rules but commented on other elements of the CRC's rules and general permitting procedures.

The comments in support came from a variety of sources including the Town of North Topsail Beach, the Town of Kill Devil Hills, the Town of Duck, and the Topsail Island Shoreline Protection Commission. For example, the Town of Kill Devil Hills adopted a resolution in strong support of the rules stating, among other concerns, that without these rules there would be "confusion and inconsistency within permitting" and "North Carolina's ability to avail itself of federal consistency review privileges and federal funding" would be jeopardized. In addition, the NC Coastal Resources Advisory Council unanimously requested the CRC adopt the temporary rules expressing concern that "without these rules, there will be chaos in development due to lack of rules resulting in unwanted development."

The CRC received multiple comments in favor of the temporary rules from environmental groups including the Coastal Carolina Riverwatch, the North Carolina Sierra Club, Carteret County Wildlife Club, the Southern Environmental Law Center, and one email from the North Carolina Conservation Network forwarding 651 signatures (counted as 1 comment). The Commission also received numerous comments in favor of the rules from private citizens.

The CRC received focused comments in support of re-adoption of the AEC for Jockey's Ridge from Dare County Tourism Board, the Division of Parks and Recreation, Outer Banks Chamber of Commerce, Friends of Jockey's Ridge, the Outer Banks Realty Group, the Town

of Nags Head, George Barnes from Jockey's Ridge State Park, Outer Banks Visitor's Bureau, Atlantic Crest Townhomes Owners Association, the Manteo High School Student Environmental Awareness Coalition, and private citizens. All the comments received by the CRC can be found at this link: [Public Comments on Temporary Rules Received by CRC](#)

IV. During the March 13, 2024 Special Meeting, the CRC unanimously adopted the sixteen temporary rules.

The comments submitted to the RRC mention concerns raised by individual commissioners during the process of adopting the temporary rules. During the process of adopting the temporary rules, the CRC listened to the comments received and decided that some of the issues raised in the comments could appropriately be addressed during the subsequent permanent rulemaking process. After considering all the comments received and working through the APA process for adopting temporary rules, the CRC commissioners voted unanimously in favor of adopting the temporary rules.

* * * *

The CRC is availing itself of the emergency and temporary rulemaking process at the suggestion of RRC Counsel. Because the CRC's temporary rules comply with the requirements of the APA and for the reasons provided in this letter, the CRC respectfully requests the RRC approve the sixteen temporary rules submitted. I will be available remotely to answer any questions at the RRC's April 8, 2024 meeting.

Sincerely,



Mary L. Lucasse
Special Deputy Attorney General/ CRC Counsel

cc: NC Coastal Resources Commission
Tancred Miller, DCM Director
John Branch via E-mail to: john.branch@neslonmullins.com
Martin Warf via E-mail to: martin.warf@nelsonmullins.com
Lewis Lamar via E-mail to: llamar@ncdoj.gov
Mark Teague via E-mail to: gteague@ncdoj.gov

John E. Branch III
T: 919.329.3828
john.branch@nelsonmullins.com

301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
T: 919.329.3800 F: 919.329.3799
nelsonmullins.com

November 8, 2023

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

Dear Ms. Lucasse,

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

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

- Temporary Rulemaking Flowchart may be found here: <https://www.oah.nc.gov/documents/rules/rulemaking-chart-temporary-rule/download>
- Temporary Rule Form (0700) may be found here: <https://www.oah.nc.gov/rules-form-0700-proposed-temporary-rule-publication-oah-website>

- Proposed Temporary Rulemaking Findings of Need (0500) may be found here: <https://www.oah.nc.gov/rules-form-0500-temporary-rulemaking-findings-need>
- Emergency Rulemaking Flowchart may be found here: <https://www.oah.nc.gov/documents/rules/rules-rulemakingchart-emergencyrule-0/download>
- Emergency Rulemaking Findings of Need may be found here: <https://www.oah.nc.gov/rules-form-0600-emergency-rulemaking-findings-need>
- Other resources (including electronic filing instructions) for potentially preparing the rules can be found in the “Information for Rulemaking Coordinators” section of the RRC’s website, here: <https://www.oah.nc.gov/rules-division/information-rulemaking-coordinators>

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

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

Best regards,

John E. Branch III

JB