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DEPARTMENT OF JUSTICE

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December 17, 2024

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Colin Justice
Special Deputy Attorney General
NC Department of Justice - Transportation Div.
1505 Mail Service Center,
Raleigh, NC 27699-1505

**Re: Variance Request for Coastal Area Management Act Permit,
CRC-VR-24-13 - NCDOT**

Dear Colin:

At its December 16, 2024 Special meeting, the Coastal Resources Commission granted Petitioner NC Department of Transportation's request for a variance. Attached is a copy of the final agency decision signed by the Chair of the Coastal Resources Commission. Thank you for agreeing to accept service on behalf of Petitioner. Prior to undertaking the development for which a variance was sought, Petitioner must first obtain a CAMA permit from the Division of Coastal Management.

If for some reason Petitioner does not agree to the variance as issued, you have the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in the superior court as provided in N.C.G.S. § 150B-45 within thirty days after receiving the final agency decision. A copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

William F. Lane, General Counsel
Dept. of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

If Petitioner files a petition for judicial review, please send me a copy at the email address listed in the letterhead. If you have any questions, please feel free to contact me.

Sincerely,

Mary L. Lucasse
Special Deputy Attorney General and

Colin Justice, Esq.
December 17, 2024
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Counsel for the Coastal Resources Commission

cc: M. Renee Cahoon, Chair electronically
Christine A. Goebel, Esq. electronically
Tancred Miller, Director, electronically
Mike Lopazanski, Deputy Director, electronically
Jonathan Howell, Regulatory Program electronically
Gregg Bodnar, Major Permits Coordinator, electronically
Stephan Lane, Transportation Projects, electronically
Angela Willis, Administrative Assistant, electronically

STATE OF NORTH CAROLINA)	BEFORE THE NORTH CAROLINA
)	COASTAL RESOURCES
COUNTY OF DARE)	COMMISSION
)	CRC-VR-24-13
)	
)	
IN THE MATTER OF:)	
PETITION FOR VARIANCE)	FINAL AGENCY DECISION
BY NC DEPARTMENT OF)	
TRANSPORTATION)	
)	

On December 6, 2024, Petitioner NC Department of Transportation submitted a request for an expedited variance from the North Carolina Coastal Resources Commission’s (“Commission”) rules at 15A NCAC 07H .0308(b)(2)(L) and 15A N.C. Admin. Code 07H .0308(c)(1), 07H .0305(1) and (4); 07H .0308(c)(1), (2) and (3) (referred to herein as the “Sandbag Rules and “Dune Rules”) to construct a 1300 linear foot trapezoidal sandbag structure in the public right-of-way easement to protect NC Highway 12 (“NC 12”) at a location on Hatteras Island in Dare County, North Carolina. This matter was heard pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. Code 07J .0700, *et seq.*, at a special meeting of the Commission on December 16, 2024 held remotely. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”). Colin Justice, Special Deputy Attorney General appeared for Petitioner Department of Transportation.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Coman*, 228 N.C. App. 630, 652, 747 S.E.2d 301, 314 (2013) (Commission has “judicial authority to rule on variance requests . . . ‘reasonably necessary’ to accomplish the Commission’s statutory purpose.”); *see also Application of Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (discussing the Board of Adjustment’s quasi-judicial role in allowing variances for permits not otherwise

allowed by ordinance). In its role as judge, the Commission “balance[es] competing policy concerns under CAMA’s statutory framework.” *Riggings*, 228 N.C. App. at 649 n.6, 747 S.E.2d at 312.

Petitioner and Respondent DCM are the parties appearing before the Commission. The parties stipulated to facts and presented stipulated exhibits to the Commission for its consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach agreement on the facts considered necessary to address the variance request, the matter would have been forwarded to the North Carolina Office of Administrative Hearings (“OAH”) for a full evidentiary hearing to determine the relevant facts before coming to the Commission. *Id.* 07J .0702(d). As in any court, the parties before the decision-maker are responsible for developing and presenting evidence on which a decision is made. If DCM and Petitioner had entered into other stipulated facts, it is possible that the Commission would have reached a different decision. In this case, the record on which the Commission’s final agency decision was made includes the parties’ stipulations of facts, the stipulated exhibits provided to the Commission, and the arguments of the parties.

FACTS STIPULATED TO BY PETITIONER AND DCM

1. Petitioner, the North Carolina Department of Transportation (“NCDOT”), is an agency of the State of North Carolina.

2. “The general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law.” N.C. Gen. Stat. § 143B-346.

3. NCDOT owns, controls, and maintains a public right-of-way easement

through the Pea Island National Wildlife Refuge (“Refuge”) on Hatteras Island in Dare County, North Carolina. The Refuge is managed by the U.S. Fish and Wildlife Service. The right-of-way easement is shown on the site plans provided to the Commission as a stipulated exhibit. The site of the variance request is near the Visitor’s Center located within the Refuge on Hatteras Island (“Visitor Center Hot Spot”) and is shown on the stipulated exhibits.

4. The public highway through the public right-of-way easement in the Refuge is known as NC 12 and provides the only roadway connection between the mainland and Hatteras Island, one of several barrier islands that comprise the Outer Banks.

5. NC 12 is North Carolina’s eastern-most primary route which runs throughout the entire Outer Banks from Corolla, Dare County in the northeastern part of the state, to the community of Sea Level in southeastern Carteret County.

6. In 2010, a coastal monitoring program was established to assist NCDOT and Federal Highway Administration, in cooperation with other state and federal agencies, in planning future transportation needs from Oregon Inlet to Rodanthe. The coastal monitoring program considers factors such as Atlantic Ocean shoreline erosion, accelerated sea level rise, potential for island breaches, and vulnerability to coastal processes.

7. Beach erosion, dune loss, and risk to NC 12 have been particularly severe near the Refuge Visitor Center. This area has been identified as a “hot spot”

at least as early as 2002 in a vulnerability study. It was more recently discussed by the NC 12 Task Force in a February 2023 report available here: <https://www.darenc.gov/home/showpublisheddocument/11865/638114401900770000>

The Visitor Center Hot Spot is adjacent to, and runs parallel to, the Atlantic Ocean and the Pamlico Sound.

8. The Visitor Center Hot Spot is characterized by low topography/elevations transitioning from the Refuge ponds to a flat beach and ocean within a few hundred feet. This topography subjects this area to erosive wave energy and coastal flooding. Historic aerial images of the Visitor Center Hot Spot from the DCM Map Viewer were provided to the Commission as a stipulated exhibit, as are images from the DCM Map Viewer of historic shorelines and erosion rates.

9. The Visitor Center Hot Spot is located within the Ocean Erodible Area of Environmental Concern and per N.C. Gene. Stat. § 113A-118, any development within that AEC requires authorization through a CAMA permit.

10. The average annual erosion rate in 2020 based on the Commission's data at the Refuge Visitor Center Hot Spot is 7.5 feet per year.

11. The total width of the island at this location ranges between 3,500 and 5,800 feet; however, much of that area is occupied by the Refuge ponds. The area of land through which NC 12 travels between the ocean and Refuge ponds is as narrow as 245 feet. A topographical map and aerial photos were provided as a stipulated exhibit.

12. Due to storm and tidal events and the geomorphology of this area, the Visitor Center Hot Spot is susceptible to shoreline erosion, overwash, coastal flooding, the loss of beach and dunes, and sand cover. These circumstances can undermine the integrity of the road, making travel by the general public unsafe and forcing NCDOT to close the road.

13. The Visitor Center Hot Spot and project area fall within an area previously approved through CAMA Major Permit No. 86-99 for dune maintenance.

14. CAMA Major Permit No. 86-99, initially issued on September 4, 1999 and modified many times since, authorizes NCDOT to perform dune maintenance along NC 12 on Hatteras Island. The most recent renewal of this permit was in December 2021 for a period of five years. Dune maintenance is authorized in specific areas where DCM has previously reviewed and authorized development, as shown on three vicinity maps that depict the covered areas, provided to the Commission as stipulated exhibits.

15. The portions of the 1,300 linear feet of proposed maintenance and repair of sand dunes that are above high water as depicted on the drawings are approved under the maintenance clause of CAMA Major Permit No. 86-99.

16. During November 15 through 17, 2024, a coastal storm severely impacted the primary dune along NC 12 at the Visitor Center Hot Spot. Ocean overwash removed approximately 1,000 linear feet of the dune, exposing the highway's pavement edge to the high surf. The roadway flooding and pavement drop-

off produced hazardous traffic conditions. NCDOT temporarily closed NC 12 to all traffic between the Marc Basnight Bridge and the village of Rodanthe on November 15, 2024. After NCDOT temporarily rebuilt the primary dune as maintenance work authorized under CAMA Permit No. 86-99, the road reopened.

17. NCDOT proposes repairing 1,300 linear feet of primary dune and installing 1,100 linear feet of Permashield trapezoidal sandbags along NC 12 as shown in the permit drawings, and in a product specification document, provided as stipulated exhibits.

18. Approximately 1300 linear feet of the dune would be removed to allow placement of sandbag, then the dune would be rebuilt covering the sandbags.

19. NCDOT has committed to developing a vegetation plan for the reconstructed dune in the areas that have vegetation at the time the project starts. NCDOT will coordinate with DCM, North Carolina Wildlife Resources Commission (“WRC”) and the Refuge to develop that plan.

20. The proposed temporary sandbag structure being requested by NCDOT would meet the following plan specifications:

- a. The temporary sandbags (multi-cellular trapezoidal shaped, woven polypropylene, white in color as represented in stipulated exhibit 4) would be placed in two adjoining rows parallel to the shoreline. The oceanward row would be 6-feet high and have an 8-foot wide base. The landward row would be 4-feet high and have a 6-foot wide base.
- b. Both rows would be placed 2 feet below the grade of the roadway and directly adjacent to each other with a combined base of 14-feet0 wide.
- c. The sandbags would be placed 10 feet from the edge of pavement and would be entirely covered by a reconstructed dune.
- d. The sandbags and reconstructed dune would be placed within

NCDOT right-of-way.

- e. The bags would be dry-filled with clean sand from a stockpile on the State of North Carolina property at the end of Lifeboat Station Road and the Lifeboat Station Road right of way. The sand used would be compatible and have the same general characteristics as the sand in the existing dune and beach of the project area.
- f. That sand would also be used to construct a dune on the bags approximately 6-feet high and 25-feet wide.
- g. Sand would not be dredged from the swash zone on the beach. There would be no wetland impacts.
- h. There would be approximately 950 square feet of open water impacts where a portion of the dune would extend below the normal high water line.

21. NCDOT asserts that the alternative sandbags are only available in the color white.

22. The proposed work area along NC 12 near the Refuge Visitor Center has the following conditions present:

- a. The proposed work area is situated within the Visitor Center Hot Spot area,
- b. NC 12 is the only road providing any means of travel to and from the island for residents or visitors to access emergency services, doctors, utilities, and other essential needs, and
- c. The proposed work area is located within the Ocean Hazard Area of Environmental Concern.

23. The portions of the 1,300 linear feet of proposed maintenance and repair of sand dunes that are above high water as depicted on the drawings approved under the maintenance clause of CAMA Major Permit No. 86-99 and provided as a stipulated exhibit.

24. NCDOT's permit modification request to install 1,100 linear feet of Perma shield trapezoidal sandbags along NC 12 in the Visitor Center Hot Spot was

granted by DCM on December 4, 2024, a copy of which was provided as a stipulated exhibit. The CAMA Permit modification imposed conditions, including the following conditions from which NCDOT now petitions the Commission for a variance:

Condition 9: In keeping with 15A NCAC 07H .0308(b)(2)(L), the sandbags shall be tan in color and 3 to 5 feet wide and 7 to 15 feet long when measured flat. Base width of the temporary erosion control structure shall not exceed 20 feet, and the total height shall not exceed 6 feet, as measured from the bottom of the lowest bag.

Condition 12: No development shall be permitted that involves the removal or relocation of primary or frontal dune sand or vegetation that would adversely affect the integrity of the dune's function as a protective barrier against flooding and erosion. These areas shall be identified by NCDOT and submitted to DCM for approval at the preconstruction meeting [07H .0308(c)(1)].

Condition 13: No portion of the proposed dunes shall be placed below Normal High Water. [07H .0305(1); 07H .305(4); 07H .0308(c)(2); 07H .0308(c)(3)].

A copy of the modification request and the stamped drawings were provided as stipulated exhibits.

26. NCDOT seeks variances from permit conditions number 9, 12, and 13, to construct the sandbag structure as proposed in its modification request dated November 24, 2024.

27. The United States Fish and Wildlife Service ("USFWS") manages the Refuge and is the only adjacent riparian landowner. Following receipt of notice, USFWS indicated that it has no objection to NCDOT's proposed sandbag structure at that location. A copy of USFWS's completed adjacent riparian landowner form was provided as a stipulated exhibit.

28. The Refuge issued a Special Use Permit to NCDOT for the proposed project on December 13, 2024 (Permit No. 2024-013G), a copy of which was provided as a stipulated exhibit.

29. The Minor Modification of CAMA Permit 86-99 was issued on December 4, 2024 and includes a note stating: “The permittee is advised that approval from the U.S. Fish and Wildlife Service (USFWS) and/or the National Park Service (NPS), may be required, for work within the Pea Island National Wildlife Refuge and/or the Cape Hatteras National Seashore. If required, these approvals shall be obtained prior to the initiation of any activities approved under this modification.”

30. DCM received comments from the USFWS Refuge on December 2, 2024 stating that it will be consulting with the USFWS Ecological Services office through an Intra-Service Section 7 consultation for piping plovers and sea turtles.

31. DCM received comments from the USFWS Ecological Services Office on December 2, 2024 stating that they have no objections, but that an Intra-Service Section 7 consultation will be required.

32. Notice of the proposed project was posted on DCM’s website and a screenshot of the website notice was provided as a stipulated exhibit. Notice of the proposed project was also posted on the site and photographs of the posted placard were provided as stipulated exhibits. DCM has not received any comments from the public regarding this project. If any are received before the variance hearing, DCM

will share those comments with the Commission.

33. The National Park Service, which manages Cape Hatteras National Seashore, indicated that it supports temporary installation of sandbags along NC 12 at the Refuge Visitor Center. Those comments were provided to the Commission as a stipulated exhibit.

34. The United States Army Corps of Engineers (“USACE”) indicated that it has no objection to the project as proposed. A copy of its comment was provided as a stipulated exhibit. USACE authorized the proposed project under Regional General Permit 198000048 (COE Action ID No. SAQ-2024-02198) which was issued on December 13, 2024, a copy of the permit was provided as a stipulated exhibit.

35. The NC Wildlife Resources Commission indicated that it had “no additional comments” in response to NCDOT’s proposed permit modification.

36. On December 9, 2024, the North Carolina Department of Environmental Quality, Division of Water Resources (“DWR”) issued a 401 Water Quality Certification for the proposed project, a copy of which was provided as a stipulated exhibit. DWR assigned the Project Number 20241626.

37. The NCDOT Historic Architecture Group Leader provided comments on November 25, 2024 stating that NCDOT can proceed with the project under its exclusion checklist.

38. NCDOT has stipulated that the proposed development is inconsistent with Commission’s rules as required by 15A NCAC 7J.0701. See stipulated exhibit.

39. The type of alternative sandbags NCDOT is requesting for the Visitor Center Hot Spot temporary sandbag structure were previously granted a variance in February 2022 by the Coastal Resource Commission for use by NCDOT on the old NC 12 cul-de-sac at the north end of Rodanthe. (Variance No. CRC-VR-21-07). Photographs of the alternative sandbags used at the Rodanthe cul-de-sac were provided to the Commission as stipulated exhibits.

40. The type of alternative sandbags NCDOT is requesting for the Visitor Center Hot Spot temporary sandbag structure were approved through a 2020 variance for use by NCDOT along NC 12 on Ocracoke Island (Variance No. CRC-VR-20-06). The alternative sandbags authorized by the variance were not used on Ocracoke Island due to funding and contract limitations.

EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM

1. Modification Request materials including Permit application drawings, topographic and aerial maps, Permashield sandbag product information
2. DCM Map Viewer of Site with historic photos, historic shorelines, and erosion rates and factors
3. Maps from previous 86-99 approval areas
4. CAMA Permit No. 86-99 issued December 4, 2024
5. USFWS Refuge adjacent riparian owner comments and SUP
6. Notice placard photos and DCM website notice screengrab
7. NPS comments.
8. USACE comments and permit
9. WRC comments.
10. DWR 401 issued December 9, 2024
11. Stipulation of inconsistency.
12. Photos of Permashield bags used at Rodanthe cul-de-sac
13. PowerPoint with ground and aerial photographs of the Site

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. As set forth in detail below, Petitioner has met the requirements in N.C. Gen. Stat. § 113A-120.1(a) and 15 N.C. Admin. Code 07J .0703(f) which must be found before a variance can be granted.

a. Strict application of the rule will cause unnecessary hardships.

The Commission affirmatively finds that strict application of the Commission's rules for dune protection, establishment, restoration, and stabilization at 15A N.C. Admin. Code 07H .0308(c)(1), (c)(2), and (c)(3) and for temporary erosion control structures (orientation, size and color) found at 15A N.C. Admin. Code 07H .0308(b)(2)(L) will cause unnecessary hardships.

As NCDOT explained, NC 12 is the only road connecting Hatteras Island with the mainland. A coastal storm during November 2024 severely impacted the primary dune along NC 12 at the Refuge removing approximately 1,000 linear feet of the dune and exposing the highway's edge of pavement to the high surf. On November 15, 2024, NCDOT temporarily closed NC 12 to all traffic between the Marc Basnight Bridge and the village of Rodanthe. NCDOT rebuilt the primary dune as maintenance work authorized under CAMA Permit No. 86-99 and the road has been reopened.

NCDOT is seeking a variance from sandbag orientation, size, and color rules found at 15A NCAC 7H .0308(b)(2)(L), so it can construct the sandbag structure using the Permashield trapezoidal sandbag structure which uses non-standard size white sandbags. The Commission set limitations on the size of individual sandbags to ensure that they are well-defined and limited in application. Here, NCDOT seeks to use these differently designed

and installed sandbags because the information provided indicates that the trapezoidal design is stronger than traditional sandbags and the material will hold up better than the fabric used in traditional sandbags. NCDOT also asserts that precluding the use of these sandbags would be an unnecessary hardship because the nontraditional sandbags can be installed at a faster rate, require less maintenance, and are easier to remove when they are no longer needed. The parties agree that it would cause an unnecessary hardship to deny the variance request based on the color, size of the sandbags and the shape of the sandbag structure given the positive attributes of the alternative sandbag system.

The parties pointed out that the Commission has granted a variance to use this trapezoidal sandbag system in two prior instances. This trapezoidal sandbag system was previously installed on the old NC 12 cul-de-sac at the north end of Rodanthe, as authorized by CAMA Permit No. 106-12 Minor Modification by a variance issued February 23, 2022. In June 2020, the Commission granted NCDOT's variance petition (CRC-VR 20-06) to use this same style of alternative sandbags on Ocracoke Island.

Based on the information provided, the Commission agrees that strict application of the rules pertaining to sandbag size, color, and shape of the sandbag structure would cause unnecessary hardship by preventing NCDOT from using an alternative sandbag design which would have a narrower footprint than if conforming sandbags were used, amounting to less square footage occupied by sandbags.

The parties also agree that strict application of the rules prohibiting removal or relocation of the primary or frontal dune would cause NCDOT unnecessary hardship by preventing NCDOT from effectively repairing the dune as proposed to protect NC 12. The reconstructed dune that was rebuilt as a temporary measure after the November 15-17 storm

will be disturbed in order to install the proposed sandbags and then repaired. NCDOT has designed the sandbag structure and constructed dune to be as landward as possible while still maintaining the highway within the right-of-way of NC 12.

Both NCDOT and DCM emphasized that this sandbag project is a temporary solution for maintaining NC 12 while NCDOT works with numerous stakeholders, including DCM, to develop and implement a long-term solution. NCDOT has recently been awarded a PROTECT Planning Grant from Federal Highway Administration to conduct a Planning and Environmental Linkages study that includes comprehensive resiliency planning, alternatives development and evaluation, and robust public engagement for NC 12 on Pea Island. Also known as Solving Access for NC 12 in Dare County (“SAND”), this project will establish a solid foundation for future project development and construction, with the goal of streamlining subsequent environmental review, accelerating project delivery, and securing the long-term resiliency of NC 12. NCDOT anticipations the SAND project will determine short-term and long-term solutions for maintaining NC 12 on Pea Island National Wildlife Refuge. When those solutions are implemented and the temporary sandbags are no longer needed, NCDOT would remove the temporary sandbags.

The Commission agrees with the parties that strict application of the Commission’s dune rules would cause NCDOT an unnecessary hardship. For the reasons provided, the Commission affirmatively holds that Petitioner has met the first factor without which a variance cannot be granted.

b. The hardship results from conditions peculiar to the Site.

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, the Project Area of NC

12 at the Refuge Visitor Center Hot Spot has a high erosion rate and is located on a narrow strip of land between the ocean and the Refuge ponds just west of NC 12. These conditions make the area vulnerable to damage from erosion. In addition, the duration and frequency of storms including Hurricane Matthew (2016), Hurricane Florence (2018) and Hurricane Dorian (2019) has accelerated erosion. This hot spot is characterized by low topography/elevations transitioning from the Refuge ponds to a flat beach and ocean within a few hundred feet. This topography subjects this area to erosive wave energy created by storm surge from the Atlantic Ocean. Ocean wave energy on the outer banks is higher than anywhere else on the North Carolina coast, and east coast of the U.S., due to its close proximity to the continental shelf edge and deeper nearshore waters which create less bottom drag on wind-generated wave energy. The parties provided the Commission with numerous photographs as stipulated exhibits illustrating the conditions peculiar to the property.

The Commission agrees with the parties that the erosion is quickly altering the low topography of the site and that these conditions peculiar to the property are causing NCDOT's hardships. Accordingly, the Commission affirmatively finds that Petitioner has demonstrated that this hardship results from conditions peculiar to the property and has met the second factor required for the grant of its request for a variance.

c. The hardships do not result from Petitioner's actions.

The Commission affirmatively holds that Petitioner has demonstrated that the hardship does not result from its actions. Specifically, the hardships facing NCDOT in maintaining safe travel in the Refuge Visitor Center area are the result of erosion, topography- and weather-related factors. For decades, NCDOT has collaborated with other state and federal agencies to study and evaluate options for maintaining safe transportation

in the area. NCDOT and the other participants in multiple studies of NC 12 have long recognized the vulnerability of this area and have made efforts to develop and implement a long-term solution to maintain NC 12.

The Commission agrees that the hardships do not result from Petitioner's actions. For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that it has met the third factor required for a variance.

d. Petitioner has demonstrated that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, will secure public safety and welfare, and will preserve substantial justice.

Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose and intent of the Commission's rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice. The principal purpose of the Commission's sandbag and dune rules from which a variance is sought is to protect oceanfront dune systems and to set standards for temporary erosion control systems.

In this environment, any style sandbag will only provide temporary protection and is not expected to provide protection beyond the eight-year timeframe allowed per 7H.0308(b)(2)(F). The proposed alternative sandbag structure would be limited to 4 feet above existing grade when installed and would be buried within a protective dune. The sandbags would be within NCDOT's existing right of way. The currently permitted smaller sandbags are susceptible to scatter when they fail during a storm event. The proposed alternative temporary erosion control structure would fail less often, when damage does occur the proposed bags would fragment less, and the proposed structure would be easier to remove once its usefulness ends. Therefore, the proposed structure is consistent with the intent of the specific use standard in the Commission's rules at 07H.0308(b)(2)(K).

Although the size and color of the alternative sandbags do not comply with 7H.0308(b)(2)(L), the proposed temporary erosion control structure will be covered by a protective dune. In addition, the proposed structure is consistent with the remaining standards in (b)(2). The proposed temporary erosion control structure would have a base width (14 feet) which is significantly less than the currently permitted 20 feet and the proposed height is less than the maximum allowed 6 feet.

The proposed temporary erosion structure was designed by NCDOT to comply with 7H.0308(b)(H)(iii) by “limiting the extent and scope necessary” to provide some measure of protection to the highway during storm overwash events. Also, the proposed sandbag system would reduce impacts to the beach during construction because the proposed bags could be filled using dry sand, which eliminates the impacts caused by extending a hydraulic pump and pipe from the surf zone across the beach.

The specific use standard found under 7H.0308(b)(1)(K) provides the ability for the Commission and DCM regulatory staff to consider “erosion control measures using innovative technology or design” as experimental on a case by case basis[.]” The use of this trapezoidal sandbag structure will provide data for review by DCM regulatory staff and NCDOT regarding the designs effectiveness in protecting NC 12 and any associated environmental impacts.

For all these reasons, the Commission holds that the requested variance is consistent with the spirit, purpose and intent of the Commission’s sandbag and dune rules.

The second factor that the Commission assesses is whether the variance request is consistent with the goal of maintaining public safety. The Commission agrees with the parties that the proposed project will improve public safety and welfare by limiting the need

to close NC 12 to the detriment of residents and visitors travelling to and from Hatteras Island. NC 12 is the only road access to Hatteras Island and loss of vehicular access from erosion or storm and tidal events can severely impact access to Hatteras Island, especially during the summer months which are the peak public travel period. Granting the requested variance would allow NCDOT to protect access to Hatteras Island while State and Federal agencies cooperate to identify and implement long term solutions.

For these reasons, the Commission holds that the Petitioner has shown that the request is consistent with the goal of maintaining public safety.

The last factor the Commission considers is whether the variance request will preserve substantial justice. The Commission agrees that granting the requested variance will preserve substantial justice by enabling NCDOT to employ the nonconforming alternative sandbag system to protect the primary transportation route to Hatteras Island for the benefit of residents and visitors to the Refuge.

* * * * *

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C.G.S. § 113A-120.1(a).

ORDER

THEREFORE, the requested variance is GRANTED.

The granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that any of the above Stipulated Facts are not accurate or correct.

This the 17th day of December 2024.



M. Renee Cahoon, Chair
Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing FINAL AGENCY
DECISION upon the parties and other interested persons by the methods indicated below:

Method of Service

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Special Deputy Attorney General
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This the 17th day of December, 2024.



Mary L. Lucasse
Special Deputy Attorney General and Commission Counsel
N.C. Department of Justice
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