

NC COASTAL RESOURCES COMMISSION (CRC)

March 13, 2024

Specially Called Meeting

Video Conference

Present CRC Members

Renee Cahoon, Chair

Neal Andrew, Vice-chair

Larry Baldwin

D.R. Bryan

Bob Emory

Jordan Hennessy

Robert High

Sheila Holman, 2nd Vice-chair

Steve King

Lauren Salter

Earl Smith

James "Robbie" Yates

Present from the Office of the Attorney General

Mary Lucasse

Present from the Department of Environmental Quality, Office of the General Counsel

Christine Goebel

CALL TO ORDER/ROLL CALL

CRC Chair Renee Cahoon called the meeting to order at 11:00 a.m. on March 13, 2024, reminding the Commissioners of the need to state any conflicts due to Executive Order Number 34 and the State Government Ethics Act. The State Government Ethics Act mandates that at the beginning of each meeting the Chair remind all members of their duty to avoid conflicts of interest and inquire as to whether any member knows of a conflict of interest or potential conflict with respect to matters to come before the Commission. The Chair requested that if any member knows of a conflict of interest or a potential conflict of interest, they state when the roll is called. No conflicts were reported, and based upon this roll call Chair Cahoon declared a quorum.

ACTION ITEMS

Temporary Rulemaking Process

Mary Lucasse, Esq.

Mary Lucasse stated under the Administrative Procedures Act an agency, such as this Commission, may adopt temporary rules with abbreviated notice to the public, and that can happen if there is a serious and unforeseen threat to the public health, safety, or welfare, or with a recent act of the General Assembly. In this case, that was the change in Session Law 2023-134 with the effective date of October 3, 2023, which changed the way that the Rules Review Commission (RRC) and the rule making agency, in this case the CRC, handles conflicts over rules. This recent Act allowed the RRC for the first time to return rules to an agency instead of

waiting for the agency to request the return of the rules. In the case of our rules, the RRC returned the CRC's rules on October 5, 2023, and that same day the Codifier removed the rules from the Code. If a rule is not in the Code, it cannot be used to issue a permit or to take enforcement action. Additionally, rules that have been removed cannot be used to review federal projects under the CZMA. As a result of the removal of the rules, there is a serious threat to the public safety and welfare because of the lack of protection provided by the Coastal Management program of the coastal lands and waters. The CRC has moved forward with emergency rulemaking and at the same time has taken these temporary rules out for public comment. The Commission has proposed the text, sent the rules to OAH and DCM's interested parties list, published the rules on OAH's website, held public hearings on two dates, and extended the comment period until February 22, 2024, to allow for additional time for public comment. The CRC is now at the point of deciding whether to adopt these temporary rules. The emergency rules the CRC adopted will expire on April 1, 2024, if temporary rules are not adopted. Commissioner Hennessy asked if the CRC is following all the rules and laws of the State when it comes to the temporary rules and the rulemaking process and referred to the December 15, 2023, correspondence from the Codifier stating that the CRC fails to show that the notice and hearing requirements of the temporary and permanent rulemaking are contrary to the public interest. Ms. Lucasse responded that the Codifier did not agree with what was submitted by the agency at the time regarding temporary rules, and that in her opinion, the CRC is following the laws. There is a dispute between two equally positioned agencies about how to interpret laws. A court will determine how this dispute is decided. The CRC has been provided with the memo and a copy of the Finding of Need form, which must be submitted for each of the 16 temporary rules. On this form, the agency is to explain why there is a need for the temporary action. The memo points to the reasons that will be listed for each rule that will be submitted.

Ms. Lucasse then reviewed each of the sixteen rules. She stated that 15A NCAC 7H .0507 is the CRC's rule regarding unique coastal geologic formations. The CRC indicated that there is a need to adopt this temporary rule, because without this rule, neither the CRC nor DCM have jurisdiction to issue permits under the minimum use standards or to take enforcement actions to protect Jockey's Ridge or to comment under CZMA. The CRC has designated Jockey's Ridge as an Area of Environmental Concern and without this rule, the Commission does not have jurisdiction. Commissioner Yates asked if Jockey's Ridge has been identified as a natural landmark by the US Department of Interior, why would we need a rule to protect it? Ms. Lucasse explained by analogy to Town ordinances and CAMA rules. In that instance, both entities can have jurisdiction over a marina to enforce their own rules or ordinances. So, while the Department of Interior and the Coastal Resources Commission have overlapping jurisdiction on Jockey's Ridge, the agencies are in charge of different programs designed to protect different things. Commissioner King stated that it strikes me that what I heard is that there are now multiple jurisdictions that have authority with regard to regulations and permitting of a natural resource area. Jockey's Ridge is regulated by Nags Head, the County, Park Service, and the CRC. That is the de facto definition of bureaucracy and I'm not sure that weighs in the public interest to have this kind of process. I will look beyond these temporary rules to the time we look at these rules as permanent rules and we can take a complete investigative audit of rulemaking and permitting processes. Commissioner Salter stated when looking at the actual text of the rule, the rule specifically says the management objectives of the rule are to preserve the hydrologic functions of this cultural resource and prohibits the removal of an amount of sand greater than

ten cubic yards from the area. This rule outlines the parameters of the need for this protection, where a federal designation might protect it from being defaced or trespassed upon, the CRC is looking at the actual sand resource and the physical protection of the environment, which is why there should be multiple layers of jurisdiction.

The next rule is 15A NCAC 7H .0508 which are the use standards that go along with, and address permits for development in designated fragile coastal natural or cultural resources. Without this rule, the CRC and DCM would not be in a position to issue permits for development in these areas because this provides the requirements for those permits. Commissioner Hennessy asked about the 42 permits that were issued while these rules were vacated. Ms. Lucasse responded that the standards that were outlined in the vacated rules could not be used during that time as a basis for permitting or enforcement. DCM Director Tancred Miller added that for the 42 permits issued, when the applications were submitted the rules were all in effect. Commissioner Hennessy asked about permit applications received between October 5 and January 3. Jonathan Howell stated those permits that were issued during that time will have citations from the General Statute associated with them. The Statute states the Division can require an application however rules say what is required to be in that application.

15A NCAC 7H .0509 refers to significant coastal archaeological resources. This rule provides a description of those types of areas, the significance of these areas, the management objective for these areas, and general and specific use standards. At the end of this rule, the CRC designated Permuda Island as a significant coastal archeological resource AEC. It is necessary to adopt this as a temporary rule for without it, there would be a significant serious and unforeseen threat to the public safety and welfare because without this rule, neither the CRC nor DCM will have jurisdiction to regulate activities or take enforcement actions to protect any significant archeological evidence indicating occupation of Permuda Island from 300 B.C. and the archeological artifacts dating before the Revolutionary War. Additionally, no additional areas could be designated under this rule if it is not re-entered into the Code. Commissioner Yates stated archeologically, there is not a coastal piece of property anywhere in North Carolina up and down the coast that is not going to be impacted by this rule. Ms. Lucasse responded that the CRC would need to designate an AEC under this rule before the rule could apply. Ms. Lucasse stated DNCR is responsible for issues relating to archeological finds and this is another example of overlapping jurisdictions. The CRC has a narrow focus according to the Legislature's designation. Commissioner Hennessy asked about the revisions that have been made to this rule. Ms. Lucasse responded that the Commission was briefed on these amendments at the December 2023 and February 2024 CRC meetings by staff. These changes were made to respond to questions raised by the Rules Review Commission (RRC). Mike Lopazanski stated the changes that have been made address the standing objections from RRC. The changes include addressing clarity and ambiguities, updating citations, and defining the term "significant adverse impact". The RRC approved definitions of "significant adverse impact" used in other rules (not these 16 temporary rules). Commissioner Hennessy asked about the lawsuit that was filed in Wake County Superior Court by Cedar Point Development, LLC against the CRC which stated the emergency rulemaking process further hinders Cedar Point's ability to obtain DNCR's approval as conditioned in the CAMA permit by specifically stating that the permit application must implement all archeological investigations and resource management plans. Commissioner Hennessy quoted other claims in the lawsuit and asked about whether the rule applies to the

things mentioned in the Complaint in addition to Permuda Island. Ms. Lucasse stated that in her opinion, Plaintiff Cedar Point Development's statements are incorrect. At the time the permit was issued, the emergency and temporary rules had not yet been adopted. The permit was issued in July 2022 and the condition requires the developer to have approval from the Department of Cultural and Natural Resources because that agency has been delegated authority by our General Assembly and DNCR enforces several federal rules on how to deal with cultural and archeological remains. The permit was based on the rules at the time and the enforcement of the permit is based on the terms of the permit and not the emergency rules adopted after the Permit was issued. There have been no requests for a modification of that permit and, in fact, most of the work under that permit has been done and there have been no requests by any third parties for development on that site. This is the basis on which the CRC moved for dismissal of the complaint.

15A NCAC 07I .0702 is a rule that talks about what to do when a local permitting agency exceeds its authority. CAMA is a cooperative program between the state and local governments. Many local governments participate in the local permit program to issue CAMA Minor Permits. This rule addresses how disagreements will be addressed between the CRC and the local permit letting agency. Without this rule, there's an unforeseen threat to the public safety and welfare because there is not a clear understanding of who gets the final call. Without this rule, the CRC has lost its ability to be the entity that resolves any disagreements and that's the reason for taking this temporary action.

15A NCAC 7J .0203 is a rule, along with 15A NCAC 7J .0204, that sets forth very specific details about what needs to be included in a permit application, whether the work plat, application processing, or notice requirements. Temporary action is needed because without these rules even though there is a general statutory authority, the local programs as well as DCM staff feel it's important for transparency and clarity to provide very clear standards and statements within the CRC's rules about what is expected. Commissioner Hennessy asked about 7J .0203, which previously included a provision that explicitly stated that neither a new permit nor a permit modification would be required for work performed outside the Area of Environmental Concern (AEC), so long as the work had begun. The revision provided no longer contains that provision essentially giving DCM new broader authority to regulate developments in areas outside of a CAMA permit area. Ms. Lucasse responded that the temporary rule language is language that was revised by DCM staff to address concerns raised by RRC staff and include technical changes to help clarify the rule.

15A NCAC 07J .0206 includes public notice of proposed development and addresses major development permits. Without this rule, there is a serious and unforeseen threat to the public safety and welfare since there is not a clear or consistent requirement on how to provide public notice for a major development permit. The CRC has worked tirelessly to make sure that notice is provided so if people want to comment they have an opportunity to do so.

15A NCAC 7J .0207 describes how a major development or dredge and fill applications are reviewed and how they are circulated out to other agencies that have expertise or overlapping jurisdictions. Without this rule there is a serious and unforeseen threat to public safety and welfare because the CRC won't have the ability to get the information needed from other

agencies and use that in the permit. Commissioner Hennessy asked about the lawsuit that states this is another example of significant revisions between what was previously codified and today's version of the rule that allow federal, state, and local agencies to review CAMA permit applications and suggest conditions and limitations for those permits where prior versions of the rules limited those revisions to only other state agencies. Ms. Lucasse stated it has always been DCM's process to look at the application received and determine which agencies should review the application. These agencies can include Sedimentation, Water Resources, Water Quality, and the Corps of Engineers depending on the scope of the project. This practice is not going to change, we are just making sure the rules are clear so the regulated community knows who will review permit applications.

15A NCAC 07J .0208 identifies how permit conditions can be added following review of a permit application. Without this rule there would not be a clear and consistent requirement for other agencies reviewing major development or dredge and fill permit applications to submit specific recommendations regarding the manner in which the requested work should be carried out and any limitations that they may want to request to protect the public interest.

The 7M rules are policy rules that include 7M .0401, .0402, .0403, .0701, .0703, .0704, and .1101. These policies are about coastal energy, mitigation, and beneficial use of dredged materials. Without these rules there is a serious and unforeseen threat to public safety and welfare because DCM, and the State in general, would not be in a position to comment on federal permits and activities as we're allowed to do under the federal Coastal Zone Management Act (CZMA). We would also not have enforceable policy statements that can be used by local governments and DCM when issuing permits and enforcing permits.

Daniel Govoni stated the Division has worked with Rules Review Commission Staff to address their technical change requests and standing objections. Following our work with RRC, that Commission continued to object to 30 of the 132 rules that were submitted for review. Session Law 2023-134 was enacted which allowed these rules to be returned to the agency and as a result, the Codifier removed these rules from the Code. Since then, DCM has identified 16 rules that we deem necessary for the safety and welfare of the public. The CRC adopted these rules as emergency rules and requested staff move forward with the temporary rulemaking process. Any amendments were solely to address RRC objections and impose no additional requirements on the regulated community than DCM already has required. Following an extension of the comment period on these proposed temporary rules, the Division received a total of 239 comments. Of the comments received, 228 were in support, 3 were neither for nor against, one comment from Cedar Point Developers with concerns, 5 comments supporting Cedar Point Developers, and two comments from Corolla Civic Association and Corolla Light Board of Directors. All of these comments are in the Commission's packet for review. Comments of support were received from the Town of North Topsail Beach, 3 comments from the Coastal Carolina Riverwatch, 52 comments from the North Carolina Sierra Club, Corolla Light Community Association, Topsail Island Shoreline Protection Commission, Town of Kill Devil Hills, 2 from Carteret County Wildlife Club, Town of Duck, Southern Environmental Law Center, one email from the North Carolina Conservation Network with 651 signatures on a petition in support of the temporary rules, and 33 private citizen comments. Comments were received in support of readoption 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, 2 from 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, 7 from the Manteo High School Student Environmental Awareness Coalition, and 108 private citizen comments in support. Comments were received by Corolla Civic Association and Corolla Light Board of Directors, but these comments did not address the RRC objections or temporary rules but commented on other elements of the CRC's rules and general permitting procedures. DCM does not believe this is the time to address their comments, but these could be addressed during the permanent rulemaking process. The emergency rules will expire on April 1, 2024, and staff are requesting your adoption of these temporary rules.

Commissioner Hennessy stated that his preference would be to vote on these individually as there are changes needed to some of these rules. He noted that maybe the proper time to address changes is during the permanent rulemaking process. Commissioner Hennessy stated I will support these temporary rules. Chair Cahoon stated these rules will all come back before the Commission for discussion with public comment and public hearings during the permanent rulemaking process.

Neal Andrew made a motion that the CRC adopt the 16 temporary rules based on the finding of needs as discussed today. Larry Baldwin seconded the motion. The motion passed unanimously (Cahoon, Andrew, Baldwin, Bryan, Emory, Hennessy, High, Holman, King, Salter, Smith, Yates).

Technical Changes to 15A NCAC 07H .0308 and 07H .0312

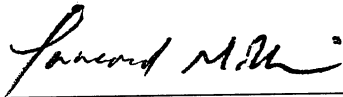
Mike Lopazanski

Mike Lopazanski stated we are bringing these two rules to the Commission to request approval of typos within the rules. This action will allow a record of the change as the history note will be updated to reflect the amendments. In 7H .0308 there are two little (b)'s. We need to change the second (b) to (c) and re-letter the rest of the rule from there. In 7H .0312 there is a misdirected citation to another rule, so we are correcting that as well.

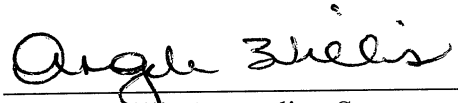
Neal Andrew made a motion to correct the typo in 7H .0308 and the citation in 7H .0312. Sheila Holman seconded the motion. The motion passed unanimously (Cahoon, Andrew, Baldwin, Bryan, Emory, Hennessy, High, Holman, King, Salter, Smith, Yates).

With no further business, the CRC adjourned.

Respectfully submitted,



Tancred Miller, Executive Secretary



Angela Willis, Recording Secretary