

JEFF JACKSON
ATTORNEY GENERAL



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

Memorandum

To: North Carolina Coastal Resource Commission
Fr: Mary L Lucasse, Esq.
Re: Legal Update for Feb 2025 Meeting (**CRC 25-25**)
Date: April 15, 2025

I. WAKE COUNTY SUPERIOR COURT

CRC v. RRC, File No. 23CV031533. The CRC requested judgment against the RRC on issues relating to the RRC's decision not to approve thirty rules readopted and revised by the CRC during the periodic review of rules. The North Carolina Coastal Federation filed a motion for leave to submit a memorandum in support of the CRC as a friend of the court. Following a hearing on dispositive motions, on February 13, 2025, the trial court entered an Order granting the CRCs Motions for summary and declaratory judgment and injunctive relief. At the CRC's request, the trial court entered an Amended Order on March 3, 2025 clarifying that the Codifier must immediately return the 30 existing rules to the Code during the appeal. On March 4, 2025, the Codifier returned the rules that were removed in October 2023 to the Code. Defendant RRC filed a notice of appeal. The parties agreed to a consent order to stay paragraph 8 of the Amended Order relating to Defendant RRC. After the record is filed, the appeal will be briefed to the Court of Appeals.

II. PETITIONS FOR JUDICIAL REVIEW (PJR)

Petitioners Clifton et. al. (22 CVS 1074) – Carteret Co. Superior Court. The Commission denied the request of several lot owners in the Beaufort Waterfront RV Park to appeal the permit issued to Collette Properties LLC & Beaufort Waterway RV Park to construct a dock on the water in front of their lots. The Chair held that the property and contract claims raised were not within DCM, CRC, or OAH's jurisdiction. Petitioners filed a PJR in superior court. An order to stay was filed December 21, 2022. The petitioners had filed other cases in superior court to address their claims. Following mediation in those cases, several of the petitioners have dismissed their claims against the CRC. Petitioners' counsel withdrew in March, 2025. The remaining Petitioners are Dale, Karen, and Dean Gokel and David and Esther Jones who are proceeding without an attorney.

Petitioner Martin Purvis (24CV001929-060) – Beaufort County Superior Court. On October 4, 2024, Petitioner filed a petition for judicial review appealing the Commission's denial of a request for a hearing to challenge DCM's reissuance of CAMA Minor Permit No. 17-16 in Beaufort County authorizing drainage work in an easement. I filed the record, a response, and a motion to strike non-record documents which was set for a hearing on March 10, 2025. On March 7, 2025, the Petitioner voluntarily dismissed the PJR. Consequently, the hearing was cancelled and I will close my file.

Petitioners Sherri and Kenneth Elliott (24 CVS 1915) Brunswick County Superior Court. On October 25, 2024, Petitioner filed a petition for judicial review appealing the Commission's denial of their request for a hearing to challenge CAMA Minor Permit No. OIB 33-24 issued to Permittee David Hill authorizing the development of a single-family residence in Ocean Isle Beach, North Carolina. The Chair denied the request as untimely. I filed a response, the certified record, and a motion to strike non-record documents. At petitioner's request the **hearing on the motion to strike has been moved to July 14, 2025**. There is no hearing scheduled for the PJR.

Petitioner Jud Ready (24 CVS 1000) Carteret County Superior Court. On November 12, Petitioner filed a Petition for Judicial Review appealing the Chair's denial of a TPHR to challenge DMC's issuance of CAMA Permit 92857 and CAMA Permit 78413 to construct a bulkhead and extension to a bulkhead. I filed the certified record, a response, and a motion to strike affidavits and other documents. A hearing on the Motion to Strike is set for May 19, 2025. The hearing on the PJR is set for **July 28, 2025**.

III. OFFICE OF ADMINISTRATIVE HEARINGS (OAH):

Pirates Cove LLC v. DCM (25 EHR 01051): Petitioner filed a petition for a contested case in OAH challenging DCM's alleged decision to deny its application for a general permit claiming the denial did not conform with the procedures and requirements for an agency decision outlined in the APA. Phillip Reynolds and Elly Young are representing DCM.

IV. VARIANCES: The Commission heard two variance requests at its February meeting. The final agency decision for one is attached. The other was continued and it will be heard with the other variance request scheduled for hearing at your April meeting.

V. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH:

Following is a review of the outstanding requests:

Kathleen Stafford (CMT25-01) requests a hearing to challenge DCM's issuance of CAMA Major Permit No. 108-24 in Currituck County based on lack of notice. The Chair denied the Petition on the grounds that it was untimely and failed to demonstrate a hearing in OAH was not frivolous. Petitioner did not file a petition for judicial review of the decision by the March 23, 2025 deadline. I will close my file.

Lincoln Griswold (CMT25-02) requests a hearing to challenge the LPO's issuance of CAMA Minor Permit No. 25-0219 DL authorizing construction of a retaining wall and fill at 5208 Bucco Reef Dr. in New Bern, Craven County, North Carolina. The Chair's decision is due May 4, 2025.

VI. PETITION FOR RULEMAKING

Nelson Paul submitted a petition on December 6, 2024 requesting the CRC begin rulemaking to clarify the scope of 07H .0206(a). During your February meeting, Mr. Paul withdrew his request. I have closed my file.

VII. PETITION FOR DECLARATORY RULING

Nelson Paul submitted a petition for declaratory ruling on February 28, 2025 on the same issue as his petition for rulemaking. The Chair denied the request as incomplete as Petitioner failed to submit a stipulated set of facts on which the Commission could issue a ruling by the March 21, 2025 deadline and failed to identify a genuine controversy that he had standing to raise. Petitioner has until April 28, 2025 to appeal the Chair's decision by filing a petition for judicial review.

Attachments:

1. Letters of support for BIMP Funding
2. CRC-VR-25-02 The Shoals Club on Bald Head Island Final Agency Decision and cover letter
3. Filings in CRC v. RRC including the March 3, 2025 Order, Notion of Appeal – amended Order and Motion for Stay of paragraph 8 of the amended Order.
4. Cover letter and Order denying request to issue Declaratory Ruling.



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TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Ted Davis, Jr
300 N. Salisbury Street, Rm. 301D
Raleigh, NC 27603-5925
Ted.Davis@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Davis, Jr.:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

Through legislation passed by the General Assembly in 2000 (Section 13.9c of HB 1840) and recommendations presented in the Coastal Habitat Projection Plan of 2005, the North Carolina Department of Environmental Quality commissioned the development of a comprehensive Beach and Inlet Management Plan that was completed in 2009. An update to the plan was authorized in 2015 (HB 97) and submitted to the General Assembly in December 2016. [nc-bimp-update-2016-final-report](#). The primary focus of the 2016 update was to incorporate beach nourishment and dredging activities completed since 2009 and refine the historical data evaluated in the initial report in order to develop an updated accurate estimate of the funding needed to maintain the State's beaches and inlets. That information is no longer accurate.

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Representative Ted Davis, Jr.

March 20, 2025

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Sincerely,

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Celeste C. Cairns
300 N. Salisbury Street, Rm. 530
Raleigh, NC 27603-5925
Celeste.Cairns@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Cairns:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Celeste C. Cairns

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Sincerely,

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Wyatt Gable
300 N. Salisbury Street, Rm. 609
Raleigh, NC 27603-5925
Wyatt.Gable@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Gable:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Wyatt Gable

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M. Renee Cahoon, Chair
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cc: North Carolina Coastal Resources Commission
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Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Edward C. Goodwin
16 West Jones Street, Rm. 2217
Raleigh, NC 27601-1096
Edward.Goodwin@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Goodwin:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Edward C. Goodwin

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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Frank Iler
300 N. Salisbury Street, Rm. 639
Raleigh, NC 27603-5925
Frank.Iler@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Iler:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Frank Iler

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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Keith Kidwell
16 West Jones Street, Rm. 1206
Raleigh, NC 27601-1096
keith.kidwell@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Kidwell:

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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Charles W. Miller
300 N. Salisbury Street, Rm. 417B
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Representative Charles W. Miller

March 20, 2025

Page 2

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Sincerely,

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



JOSH STEIN
GOVERNOR

M. RENEE CAHOON
CHAIR

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1ST VICE CHAIR

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W. EARL SMITH

JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Phil Shepard
300 N. Salisbury Street, Rm. 534
Raleigh, NC 27603-5925
Phil.Shepard@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Shepard:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

Through legislation passed by the General Assembly in 2000 (Section 13.9c of HB 1840) and recommendations presented in the Coastal Habitat Projection Plan of 2005, the North Carolina Department of Environmental Quality commissioned the development of a comprehensive Beach and Inlet Management Plan that was completed in 2009. An update to the plan was authorized in 2015 (HB 97) and submitted to the General Assembly in December 2016. [nc-bimp-update-2016-final-report](#). The primary focus of the 2016 update was to incorporate beach nourishment and dredging activities completed since 2009 and refine the historical data evaluated in the initial report in order to develop an updated accurate estimate of the funding needed to maintain the State's beaches and inlets. That information is no longer accurate.

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Representative Phil Shepard

March 20, 2025

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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W. EARL SMITH

JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Carson Smith
300 N. Salisbury Street, Rm. 410
Raleigh, NC 27603-5925
Carson.Smith@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Smith:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

Through legislation passed by the General Assembly in 2000 (Section 13.9c of HB 1840) and recommendations presented in the Coastal Habitat Projection Plan of 2005, the North Carolina Department of Environmental Quality commissioned the development of a comprehensive Beach and Inlet Management Plan that was completed in 2009. An update to the plan was authorized in 2015 (HB 97) and submitted to the General Assembly in December 2016. [nc-bimp-update-2016-final-report](#). The primary focus of the 2016 update was to incorporate beach nourishment and dredging activities completed since 2009 and refine the historical data evaluated in the initial report in order to develop an updated accurate estimate of the funding needed to maintain the State's beaches and inlets. That information is no longer accurate.

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Representative Carson Smith

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

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Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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W. EARL SMITH

JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Steve Tyson
300 N. Salisbury Street, Rm. 634
Raleigh, NC 27603-5925
Steve.Tyson@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Tyson:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Steve Tyson

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
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W. EARL SMITH

JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Bill Ward
300 N. Salisbury Street, Rm. 306A2
Raleigh, NC 27603-5925
Bill.Ward@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Ward:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Bill Ward

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



JOSH STEIN
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W. EARL SMITH

JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Shelly Willingham
300 N. Salisbury Street, Rm. 513
Raleigh, NC 27603-5925
Shelly.Willingham@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Willingham:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Shelly Willingham

March 20, 2025

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

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Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Bob Brinson
16 West Jones Street, Rm. 2115
Raleigh, NC 27601
Bob.Brinson@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Brinson:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Senator Bob Brinson

March 20, 2025

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North Carolina Coastal Resources Commission

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TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Bobby Hanig
300 N. Salisbury Street, Rm. 629
Raleigh, NC 27603
Bobby.Hanig@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Hanig:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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JOSH STEIN
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JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Brent Jackson
16 West Jones Street, Rm. 2022
Raleigh, NC 27601
Brent.Jackson@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Jackson:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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JOSH STEIN
GOVERNOR

M. RENEE CAHOON
CHAIR

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JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Michael A. Lazzara
300 N. Salisbury Street, Rm. 300-C
Raleigh, NC 27603
Michael.Lazzara@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Lazzara:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

Through legislation passed by the General Assembly in 2000 (Section 13.9c of HB 1840) and recommendations presented in the Coastal Habitat Projection Plan of 2005, the North Carolina Department of Environmental Quality commissioned the development of a comprehensive Beach and Inlet Management Plan that was completed in 2009. An update to the plan was authorized in 2015 (HB 97) and submitted to the General Assembly in December 2016. [nc-bimp-update-2016-final-report](#). The primary focus of the 2016 update was to incorporate beach nourishment and dredging activities completed since 2009 and refine the historical data evaluated in the initial report in order to develop an updated accurate estimate of the funding needed to maintain the State's beaches and inlets. That information is no longer accurate.

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Senator Michael A. Lazzara

March 20, 2025

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The Coastal Resources Commission strongly endorses the need for an update to the Beach and Inlet Management Plan, and the need for future periodic updates to support a proactive and regional approach to managing the State's ocean shoreline. For these reasons, the Commission respectfully requests the N.C. General Assembly consider providing funding for an update to the Beach and Inlet Management Plan in the 2025-27 state budget. Thank you for your consideration of this request.

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Michael V. Lee
16 West Jones Street, Rm. 2108
Raleigh, NC 27601
Michael.Lee@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Lee:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Senator Michael V. Lee

March 20, 2025

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Bill Rabon
16 West Jones Street, Rm. 2010
Raleigh, NC 27601
Bill.Rabon@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Rabon:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Senator Bill Rabon

March 20, 2025

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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JAMES (ROBBIE) YATES

TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Senator Norman W. Sanderson
300 N. Salisbury Street, Rm. 309
Raleigh, NC 27603
Norman.Sanderson@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Senator Sanderson:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Senator Norman W. Sanderson

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Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



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TANCRED MILLER
EXECUTIVE SECRETARY



North Carolina Coastal Resources Commission

March 20, 2025

Via US Mail and E-mail:

Representative Deb Butler
16 West Jones Street, Rm. 1010
Raleigh, NC 27601-1096
Deb.Butler@ncleg.gov

Re: Request Funding for Beach and Inlet Management Plan

Dear Representative Butler:

The North Carolina Coastal Resources Commission is renewing its request that the N.C. General Assembly to provide funding in the 2025-2027 state budget for an update to the Beach and Inlet Management Plan (last updated in 2016).

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Representative Deb Butler

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M. Renee Cahoon, Chair
North Carolina Coastal Resources Commission

cc: North Carolina Coastal Resources Commission
Tancred Miller, Director Division of Coastal Management
Kathleen Reily, Executive Director North Carolina Beach, Inlet and Waterways Association



JEFF JACKSON
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

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

March 13, 2025

Electronically: troessler@ktslaw.com

Todd S. Roessler
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609

**Re: Variance Request for Coastal Area Management Act Permit,
CRC-VR-25-02
The Shoals Club on Bald Head Island and Shoals Overlook, Inc.**

Dear Todd:

At its February 26-27 2025 meeting, the Coastal Resources Commission granted Petitioners The Shoals Club on Bald Head Island and Shoals Overlook, Inc. request for a variance from the Commission's sandbag rules. 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 the Petitioners. Before undertaking the development for which the variance was sought, the Petitioners must first obtain a CAMA permit from the Division of Coastal Management.

If for some reason the Petitioners does not agree to the variance as issued, they may 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:

Dan Hirschman, General Counsel
Dept. of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

If Petitioners file 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
Counsel for the Coastal Resources Commission

Todd Roessler, Esq.

March 13, 2025

Page 2

cc: M. Renee Cahoon, Chair electronically
Christine A. Goebel, Esq. electronically
Tancred Miller, Director, electronically
Jonathan Howell, Deputy Director, electronically
Angela Willis, Administrative Assistant, electronically
Charles S. Baldwin, IV, Village Attorney, electronically
Chris McCall, Village Manager, electronically

STATE OF NORTH CAROLINA)	BEFORE THE NORTH CAROLINA
)	COASTAL RESOURCES
COUNTY OF BRUNSWICK)	COMMISSION
)	CRC-VR-25-02
)	
)	
IN THE MATTER OF:)	
PETITION FOR VARIANCE)	FINAL AGENCY DECISION
BY THE SHOALS CLUB ON BALD)	
HEAD ISLAND LLC and SHOALS)	
OVERLOOK, INC.)	

On January 14, 2025, Petitioners The Shoals Club on Bald Head Island, LLC and Shoals Overlook, Inc. submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) sandbag rules set forth at 15A NCAC 07H .0313(c) and (d) to construct a twelve-foot by forty-foot sandbag structure. This matter was heard pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A NCAC 07J .0700, *et seq.*, at the regularly scheduled meeting of the Commission held on February 26 and 27, 2025 in New Bern, North Carolina. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”). Todd Roessler, Esq. appeared on behalf of Petitioners.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Com’n*, 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.

The Petitioners and Respondent DCM are the parties appearing before the Commission. The parties stipulated to facts and presented stipulated documents to the Commission for its consideration. *See*, NCAC 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 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 the Petitioners 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 documents provided to the Commission, and the arguments of the parties.

FACTS STIPULATED TO BY THE PETITIONERS AND DCM

1. Petitioners are The Shoals Club on Bald Head Island LLC ("Shoals Club"), a North Carolina limited liability company, and Shoals Overlook, Inc., a North Carolina corporation.

2. The Shoals Club lot is owned by the Shoals Club on Bald Head Island LLC. The adjacent lot located at 3210 Shoals Watch Way is owned by Shoals Overlook, Inc. A copy of each of the deeds was provided as stipulated exhibits, as were the 2024 annual reports and creation filings for both entities.

3. The Project Site ("Site") consists of two parcels. The first is 100 Station House Way, which is a 7.79 acre (as platted) parcel which houses the Shoals Club. The second is vacant lot No. 3210 located at 3210 Shoals Watch Way which is adjacent to the Site. Copies

of the tax cards for these two parcels were provided as stipulated exhibits along with Plats which show the Site recorded in the Brunswick County Registry of Deeds at Book 27, Page 473 and Book 26, Page 361.

4. The Site is bordered by the south by the Atlantic Ocean, to the southeast by an eleven acre parcel at the tip of the Point owned by the State of North Carolina, to the north by 184 Station House Way (owned by David Uslar) and by Shoals Watch Way, and to the east by undeveloped Lot No. 3212 (owned by Ronald Peele, Jr, Trustee).

5. The proposed project site is located within the Ocean Erodible and State Ports Inlet Management Areas of Environmental Concern (“AECs”).

6. The Village of Bald Head Island (the “Village”), as the permittee of State Permit No. 91-14 and grantee of the associated beach nourishment easement on the beach portions of the Site, proposed to install a large stack sandbag revetment waterward of the Shoals Club located at 100 Station House Way. The sandbag revetment is located partially on the undeveloped adjacent lot at 3210 Shoals Watch Way. This structure is designed with a forty-foot base and twelve-foot height and will incorporate the existing twenty-foot by six-foot standard stack. The permittee also proposed constructing a new twenty-foot by six-foot sandbag structure west of the Shoals Club, waterward of 3210 Shoals Watch Way.

7. The Village supports Petitioners’ variance petition and consents to modification of Permit No. 91-14 if the request for a variance is granted. *See* January 16, 2025 letter to Mary L. Lucasse, counsel for the Commission from Charles S. Baldwin, IV, Village Attorney provided to the Commission as a stipulated exhibit.

8. The Shoals Club has two pools, lounge chair decks, sand volleyball, golf cart parking, two shipping containers, two storage sheds, a pool towel/sunscreen hut, a beach

chair/beach umbrella station, and a six-foot wide wood beach access walkway (the “Shoals Club Pools and Amenities”) and two restaurants, a fitness room, and an event pavilion (the “Shoals Club Structures”) (collectively, the “Shoals Club Facilities”).

9. The property at 3210 Shoals Watch Way is undeveloped and currently used as a beach maintenance laydown area and heavy machinery beach access.

10. The upland portion of the Project Site located at 100 Station House Way contains an existing sandbag revetment authorized under State Permit No. 91-14 on May 18, 2022.

11. The Project Site is located on Bald Head Island and situated at a geologically unique location at the intersection of two, broad arcuate embayment features along the Atlantic Ocean coastline: Onslow Bay to the north and Long Bay to the south. These two bays converge at the Cape Fear foreland, resulting in two, near-perpendicular shorelines adjacent to the Shoals Club: East Beach to its east, and South Beach to its south. East Beach and South Beach connect at the sandspit historically referred to as the Cape Fear “point.”

12. As shown on “Sheet 11” of the application drawings, a copy of which was provided as a stipulated exhibit, the elevation of the Project Site ranges from approximately 2-feet North American Vertical Datum (“NAVD” or “NAVD 88”) to approximately 8-feet NAVD.

13. As noted in the September 2023 Report from Coastal Protection Engineering of North Carolina, Inc.’s (“CPE”), to mitigate chronic erosion issues experienced along West Beach and South Beach beach compatible material dredged from the navigation channel and the river’s ebb shoals has been systematically placed along varying extents of South Beach.

Since 1991, approximately 13.2 million cubic yards have been placed along portions of South Beach and West Beach. *See* Report provided as a stipulated exhibit, p 6.

14. State Permit No. 91-14 was originally issued to the Village on October 21, 2014 for the construction of a terminal groin structure and associated sand fillet and construction trestle. State Permit No. 91-14 was last renewed on January 25, 2023 and expires on December 9, 2029.

15. State Permit No. 91-14 has been modified a number of times, including:

- a. On January 9, 2015 a minor modification was issued for construction of a temporary materials offload trestle associated with the permitted terminal groin.
- b. On March 26, 2018, a major modification was issued for a one-time beach nourishment event.
- c. On November 16, 2018, a minor modification was issued for excavating and placement of 100,000 cubic yards of material associated with beach nourishment.
- d. On January 25, 2019, a minor modification was issued for the placement of an additional 1,200 linear feet of material extending to Station 146+00 associated with beach nourishment.
- e. On March 11, 2021, a minor modification was issued to remove Permit Conditions 22 & 23 related to monitoring and mitigation requirements for the Oak Island/Caswell Beach Shorelines.
- f. On May 18, 2022, a minor modification was issued authorizing an existing six-foot by twenty-foot sandbag revetment at the Shoals Club located at 100 Station House Way. The sandbag revetment was permitted to protect the primary and frontal dunes, the Shoals Club Structures, and Village infrastructure, including an eight-inch main waterline and to address accelerated erosion that increased the risk of imminent damage to these features, structures, and infrastructure. The sandbag removal forms, which are required of the applicant as part of the permitting process, state that the existing temporary sandbag revetment may remain in place up to “8 years plus thirty days” if not covered by sand. A copy of minor modification was provided as a stipulated exhibit.

- g. On February 9, 2024, a major modification was issued for a one time beach nourishment event, which is scheduled to begin this winter. Based on the approved template, beach-quality sand will be dredged from Jay Bird Shoals and placed on the west end of the terminal groin down through the groin tubes. The sand fill will restart east of Muscadine Wynd and fill to the east end of the Shoals Club. While this is the permitted plan, the final placement will depend on how much material is dredged and if it will be placed near Shoals Club.

16. The Shoals Club plat was recorded on July 25, 2002. When the Shoals Club construction was completed in 2004, there were approximately 550 feet of beach from the Shoals Club to the waterline to the south.

17. Historically, the shoreline in the vicinity of the Project Site has changed, sometimes accreting, sometimes eroding. Between 1993 and 2002, the first-line of stable vegetation accreted about 110 feet. Since the Shoals Club construction was completed in 2004, about 550 feet of beach perpendicular to shore has been lost to erosion at the Project Site. This erosion and accretion can be seen on images from the DCM Map Viewer which were provided as stipulated exhibits.

18. According to DCM's 2020 Annual Erosion Rate maps, the average annual erosion rate at the Project Site used for determining setbacks is 13 feet per year.

19. On or about November 4, 2021, the Village CAMA LPO issued an exemption to the Shoals Club for maintenance and repair of an existing fence at the Shoals Club.

20. As a result of a winter storm in January 2022, approximately 90-feet of dunes in the vicinity of the Project Site were lost, which unearthed a large wooden ship remnant. This storm also eroded the shoreline where the wood fence is located.

21. According to CPE's report, erosion along the eastern South Beach at the Project Site has consistently eroded since early 2007 most likely as a result of the orientation of the Cape Fear point. As documented in the CPE report, from summer 2007 to May 2022, the

Cape Fear point and the mean high water (“MHW”) shoreline (+1.41 NAVD88 contour) in front of the Shoals Club steadily retreated hundreds of feet. From May 2008 to May 2022, the MHW shoreline at station B-55 oceanward of the Shoals Club steadily retreated an average of approximately -43 feet per year.

22. From May 2008 to May 2022 and between stations B-54 and B-55 in the vicinity of the Project Site, approximately -151,300 cubic yards of sand were steadily lost above the depth of closure, or at a rate of approximately -11,000 cubic yards per year. The addition of sand from the beach renourishment projects along South Beach during this time period did not result in appreciable accretion oceanward of the Shoals Club.

23. According to the Petitioners, the Project Site experienced 20-feet or more of erosion on several occasions due to hurricanes, winter storms (large wave events), and king tides, and the shoreline is progressively receding. The beach has eroded to the fence located waterward of the Shoals Club wading pool, and it is now located just landward of the existing sandbags at the normal high water (“NHW”) line.

24. According to CPE, the terminal groin is not suspected of contributing to the erosion experienced along the beach in the vicinity of the Project Site due to the net westerly-directed sand transport in the vicinity of the groin as well as its overall distance from the Project Site.

25. In response to the erosion and imminent threat, the Shoals Club has been working with Bruce Marek, P.E., CPE, and representatives of DCM to gather information to address this erosion. Before seeking a variance, the Shoals Club and the Village pursued other alternatives, including the existing sandbag revetment, construction of a wooden fence surrounding the Shoals Club Pools and Amenities, planting sea oats/beach grasses, and

beach bulldozing—the process of moving natural beach material from any point seaward of the first line of stable vegetation to provide protection. Beach bulldozing was most recently conducted in February and March 2022 pursuant to Beach Bulldozing General Permits Nos. 85548 and 85549 issued on February 2, 2022. The re-located sand eroded within a few weeks. Each of these measures has been ineffective in addressing the high erosion rates at the Project Site and protecting the Shoals Club Structures, the primary and frontal dunes, and infrastructure.

26. As observed by Bruce Marek, P.E. in his affidavit, the existing sandbag revetment, after settling and eroding into the sand, is approximately 6.5 to 7.0 feet above mean sea level elevation, which is approximately the height of the grade of the Shoals Club wading pool.

27. As observed by Bruce Marek, P.E. in his affidavit, since the existing sandbag revetment was installed in May 2022, it has been inundated from the oceanside multiple times, causing erosion escarpments landward of the sandbag revetment, undermining the wading pool and sandbag revetment, and imminently threatening the Shoals Club Structures, the primary and frontal dunes, and infrastructure.

28. Petitioners contend that the proposed enlarged sandbag revetment is needed to: (a) slow or stop the erosion progression landward of the sandbag revetment; (b) act as a frontal dune as several have been lost at the Project Site; and (c) provide temporary protection while the Shoals Club implements a long-term solution.

29. Petitioners contend that as a result of the shoreline erosion and despite the existing sandbag revetment, the Shoals Club Structures, the primary and frontal dunes, and infrastructure continue to be imminently threatened.

30. On or about August 2, 2024, the Village applied for a CAMA Major Permit seeking to: (i) enlarge the existing sandbag revetment by increasing the width by twenty feet (for a new width of forty feet) and the height by six feet (for a new height of twelve feet). A copy of the permit application materials is a stipulated exhibit.

31. Rule 15A NCAC 07H .0313(c) provides that sandbags may only be used to protect imminently threatened frontal or primary dunes, public and private structures and infrastructure within a State Ports Inlet Management Area.

32. As used in 15A NCAC 07H .0313, a frontal or primary dune, structure or infrastructure is “imminently threatened” if:

- a. its foundation, septic system, right-of-way in the case of roads, or waterward toe of the dune is less than 20 feet away from the erosion scarp;
- b. site conditions, such as flat beach profile or accelerated erosion, increase the risk of imminent damage to the structure as determined by the Director of the Division of Coastal Management;
- c. the frontal or primary dune or infrastructure will be imminently threatened within six months as certified by persons meeting all applicable State occupational licensing requirements; or
- d. the rate of erosion from the erosion scarp or shoreline within 100 feet of the infrastructure, structure, frontal or primary dune was greater than 20 feet over the preceding 30 days.

33. Petitioners’ proposed enlargement of the existing sandbag revetment exceeds the dimension requirements set forth in 15A NCAC 07H .0313(d), which provides:

Temporary erosion control structures constructed by a local or state government shall have a base width not exceeding 20 feet, and a height not to exceed six feet.

34. As part of the CAMA Major Permit process, DCM Field Representative Tara MacPherson completed a Field Investigation Report for the proposed project, a copy of which is a stipulated exhibit.

35. As part of the CAMA Major Permit Application process, adjacent riparian landowners were provided notice by certified mail about the proposed project. Copies of those notice letters and tracking information were provided as stipulated exhibits. The NC State Property Office has formally objected to this project, and adjacent property owner Mr. Peele expressed concerns about adverse impacts to his adjacent shoreline. The public was provided notice of the Village's CAMA Major Permit application through a newspaper notice, which ran on October 8, 2024 as well as on-site posting. DCM staff received objections from the State Property Office and Mr. Peele. Copies of the comment letters are stipulated exhibits.

36. As part of the CAMA Major Permit application process, the Village's application, Field Investigation Report, and other materials were sent to resource agencies for comment. The U.S. Fish & Wildlife Service ("USFWS") provided comments, a copy of which is a stipulated exhibit. USFWS raised concerns that a larger sandbag structure will further exacerbate scour and erosion in front of and to the downdrift side and may cause adverse effects impacting sea turtle nesting, and piping plover and red knot foraging and roosting. USFWS did not object to the smaller section extending the sandbag revetment to the west.

37. In a letter dated December 11, 2024, DCM granted the Village authorization to proceed with the proposed project. Condition three of the permit provides:

The base width of the authorized temporary erosion control structure shall not exceed twenty feet, and the height shall not exceed six feet. This permit does not authorize the placement of additional sandbags in

areas where existing temporary erosion control structures already exist.

Thus, DCM authorized a new twenty-foot by six-foot sandbag structure west of the Shoals Club, waterward of 3210 Shoals Watch Way and denied the large stack sandbag revetment waterward of the Shoals Club located at 100 Station House Way (forty-foot base by twelve-foot height, incorporating the existing twenty-foot by six-foot standard stack as a base). A copy of the DCM letter and permit are stipulated exhibits.

38. The Shoals Club's variance petition seeking to install a large stack sandbag revetment is supported by the Island's developer, Bald Head Island Limited, LLC. A copy of the letter of support is a stipulated exhibit.

39. Petitioners assert that the proposed large sandbag revetment is intended to protect the Shoals Club Structures, the primary and frontal dunes, and infrastructure, including an 8-inch main waterline, and address accelerated erosion that increased the risk of imminent damage to these features, structures, and infrastructure until a longer term solution can be implemented.

40. As documented in the CPE report, the Shoals Club retained CPE to evaluate the feasibility of potential alternatives to provide a longer term solution. Managed retreat—relocating the Shoals Club Facilities and infrastructure to a landward property recently purchased by the Shoals Club—is the Shoals Club's preferred alternative.

41. The Shoals Club has retained CPE to further evaluate the managed retreat alternative. The proposed large sandbag revetment would be a short-term, temporary measure pending the anticipated managed retreat.

42. As part of the CAMA variance process, notice to the adjacent riparian neighbors and anyone who commented on the application is required per 15A NCAC 7J .0701

(c)(7). The Commission was provided with notices of the variance request sent to the adjacent riparian owners and relevant agencies as stipulated exhibits.

43. As part of the CAMA variance process, the Commission's rules require that "[b]efore filing a petition for a variance from a rule of the Commission, the person must seek relief from local requirements restricting use of the Property." 15A NCAC 7J .0701(a). In an email dated January 10, 2025, the Shoals Club's counsel reached out to the CAMA Local Permitting Officers to confirm that there are no applicable local requirements restricting use of the Project Site that would require a variance. Petitioners' counsel is not aware of any local requirements that would require a variance, and the Village's response confirms this position. Copies of these emails are stipulated exhibits.

44. Petitioners are seeking a variance from the strict application of the Commission's temporary sandbag rules in 15A NCAC 07H .0313(d). This rule limits the height of sandbags to six-feet and the width to twenty-feet.

45. Petitioners contend that if the Commission does not grant a variance from its temporary sandbag rule, the Shoals Club Structures, related infrastructure, and the primary and frontal dunes will likely suffer significant damage and ultimately fail. Petitioners seek this variance to allow time to implement a long-term alternative.

46. When Petitioners submitted this request for a variance from the sandbag structure dimension requirements set forth at 15A NCAC 07H .0313(d), they did not request a variance from 15A NCAC 07H .0313(c) because the structures were imminently threatened when State Permit No. 91-14 was modified and are imminently threatened today.

47. However, the Village of Bald Head is currently conducting a beach renourishment project that is planned to extend seaward of the Shoals Club. The beach

renourishment is working its way along South Beach and may reach the Shoals Club in the near future. If the beach is renourished seaward of the Shoals Club, the structures and dunes protected by the existing sandbag revetment would no longer be imminently threatened—although they may become imminently threatened again in the future.

48. Before the Commission meeting, the Petitioners revised their petition for a variance to include a petition for a variance from the imminently threatened requirement in 15A NCAC 07H .0313(c). Petitioners agree that if the beach is renourished seaward of the Shoals Club, the structures and dunes protected by the existing sandbag revetment would no longer be imminently threatened. However, this nearshore area is dynamic, this beach area has never been renourished, and no other renourishments are planned for this area. As a result, DCM and the Petitioners agree that even with the planned beach renourishment, the structures and dunes protected by the sandbag revetment will likely become imminently threatened again in the near future.

49. The Project Site is shown on aerial and ground-level photos contained in a PowerPoint presentation, provided as stipulated exhibits.

EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM

1. Deeds for Shoals Club and Shoals Overlook parcels
2. 2024 SOS annual reports and filings for Shoals Club and Shoals Overlook
3. Tax cards for the two parcels
4. Plat 27/473 and 26/361
5. CAMA Major Permit 91-14 as amended on October 21, 2014 (terminal groin); May 18, 2022 (sandbag structure), February 9, 2024 (current nourishment)
6. Letter of Support from the Village of Bald Head Island
7. DCM Map Viewer images showing historic shorelines, erosion rates (actual and factor), and the State Port AEC boundary
8. November 4, 2021 LPO Exemption for fence repair
9. CPE report and CPE letter addendum
10. Affidavit of Bruce Marek, P.E.
11. August 2, 2024 Modification Application materials including narrative description and Sheet 11 drawing

12. DCM Field Investigation Report
13. Adjacent Riparian Landowner proof of notice
14. NC State Property Objection letter and Peele Objection letter
15. USFWS comment/objection letter
16. December 11, 2024 Modification to 91-14 with conditions on structure size
17. Letter of Support from BHI Limited, LLC
18. Notice of Variance request to adjacent riparian owners
19. Local Variance email and response
20. PowerPoint presentation with images of the Site and surrounding area

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, the Petitioners have met the requirements in N.C.

Gen. Stat. § 113A-120.1(a) and 15 NCAC 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 sandbag rules at 15A NCAC 07H .0313(c) and (d) would cause unnecessary hardships. The purpose of this rule is to establish requirements for when sandbags can be used and to provide specifications for sandbag structures.

In their request, the Petitioners claim that they will suffer unnecessary hardship from strict application of the Commission's temporary sandbag rule for the State Ports Inlet Management AEC at 15A NCAC 07H .0313(d). The Petitioners explain that if the Commission's temporary sandbag rule is strictly applied to the Petitioners' property, the primary and frontal dunes and the Shoals Club Facilities structures, including two restaurants, a fitness room, and an event pavilion and other amenities, including, two pools, lounge chair decks, sand volleyball, golf cart parking, two storage sheds, two shipping

containers, a pool towel/sunscreen hut, a beach chair/beach umbrella station, and a six-foot wide wood beach access walkway, and infrastructure, including an 8-inch main waterline will suffer significant damage and will likely ultimately fail.

Since the founding of the Shoals Club in 2003 and completion of construction of the Shoals Club in 2004, erosion along the Shoals Club shoreline has increased. Between 1993 and 2002, the first-line of stable vegetation accreted about 110 feet. In 2004, there were approximately 550 feet of beach from the Shoals Club to the waterline to the south. Since 2004, about 550 feet of beach perpendicular to the shore has been lost to erosion south of the Shoals Club. As a result of a winter storm in January 2022, approximately 90-feet of dunes in the vicinity of the Shoals Club were lost.

In response to the increased erosion and imminent threat, the Village and the Petitioners have pursued other alternatives, including the existing sandbag revetment, construction of a sand fence, planting sea oats/beach grasses, and beach bulldozing—the process of moving natural beach material from any point seaward of the first line of stable vegetation to provide protection. Beach bulldozing was most recently conducted in February and March 2022. The re-located sand was eroded within a few weeks. These measures have not provided adequate protection. As a result of the shoreline erosion and despite the existing sandbag revetment, the Shoals Club Facilities, the primary and frontal dunes, and infrastructure are imminently threatened.

The Petitioners argue that the sandbag structure allowed by the existing rules does not provide adequate protection. There is an existing sandbag revetment which measures approximately six-feet in height by twenty-feet in width and spans approximately four hundred and ten feet. Yet, the adjacent shoreline continues to experience ongoing damage

and erosion from high tides and storm tides over washing the existing sandbags. This has resulted in erosion on the landward side of the sandbags undermining the wading pool and existing sandbag revetment and at times washing into the wading pool.

Petitioners retained the engineering firm of CPE to evaluate the feasibility of potential alternatives to provide a longer term solution. Managed retreat—relocating the Shoals Club Facilities and infrastructure to a landward property recently purchased by the Petitioners—is the Petitioners’ preferred alternative. The proposed large sandbag revetment which is the subject of this request is intended to protect the Shoals Club Structures, the primary and frontal dunes, and infrastructure until Petitioners can implement its managed retreat strategy.

In DCM’s recommendation on the variance request, Staff acknowledges that strict application of Commission rules 15A NCAC 07H .0308 (a)(2)(L), limiting sandbag structures to six-feet by twenty-feet will cause the Petitioners unnecessary hardship. DCM bases this determination on information from Petitioners’ engineer Mr. Marek indicating that the existing six-foot by twenty-foot sandbag structure have been inundated from the ocean multiple times. Staff acknowledged the specific steps the Petitioners and the Village have taken toward long-term solutions to mitigate erosion in this area through beach bulldozing, sandbags, and the under-way nourishment project. Staff indicates that limiting the sandbag structure to the usual six-foot by twenty-foot dimensions will cause Petitioners hardship.

The Commission agrees. Based on the stipulated facts, strict application of the rule would cause the Petitioners hardship because the sandbag structure allowed by the Commission’s rules has not been adequately protective of the Shoals Club Facilities, the Village and the Shoals Club infrastructure, and the existing dunes. The Petitioners have

pursued other methods of protecting The Shoals Club Facilities, dunes, and infrastructure without success including beach bulldozing. Now the Petitioners have taken steps to relocate the Shoals Club Facilities and needs additional time that will be provided by allowing a larger sandbag structure to execute the plan. For these reasons, the Commission affirmatively finds that Petitioners have 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 the Petitioners have demonstrated that the hardship results from conditions peculiar to the property. As the Petitioners point out, the project Site is located on Bald Head Island and situated at a geologically unique location at the intersection of two, broad arcuate embayment features along the Atlantic Ocean coastline: Onslow Bay to the north and Long Bay to the south. These two bays converge at the Cape Fear foreland, resulting in two, near-perpendicular shorelines adjacent to the Shoals Club: East Beach to its east, and South Beach to its south. East Beach and South Beach connect at the sandspit historically referred to as the Cape Fear “point.” Likely as a result of the orientation of the Cape Fear point, the shoreline in the vicinity of the project site has changed shape over the years, sometimes accreting, sometimes eroding. Prior to construction of the Shoals Club, between 1993 and 2002 when the point was oriented to the south, the first-line of stable vegetation accreted about 110 feet. Since the Shoals Club construction was completed in 2004, the point re-oriented to the east and about 550 feet of beach perpendicular to shore has eroded at the project Site. From May 2008 to May 2022, the mean high water shoreline at station B-55 oceanward of the Shoals Club steadily retreated an average of approximately -43 feet per year.

Not only is the location of Petitioners’ property unique, but it is also the only developed

cape along North Carolina's coast. Cape Lookout point is within the Cape Lookout National Seashore, and Cape Hatteras point is located with Cape Hatteras National Seashore. Neither of these points are developed. In addition, Bald Head Island—and Petitioners' property—is unique in that it lies directly to the southeast of the Cape Fear River Inlet, which is a large, regularly maintained shipping channel. The location of the Project Site on the Cape Fear point and adjacent to the maintained Cape Fear River Inlet are conditions peculiar to the Petitioners' property which cause unnecessary hardships.

In the Staff Recommendation, DCM agrees that the Petitioners' hardship is caused in part by conditions peculiar to the subject property. Specifically, the Site's location at the cape point is unique. In addition, the wide swing in the accretion and erosion cycle at the Site is an unusual condition. And, while the average annual erosion rate at the Site is thirteen feet per year, that average erosion rate does not account for the accelerated erosion that resulted in a loss of approximately 550 feet of dune and beach system since the Shoals Club was constructed twenty-two years ago in 2003 (thirteen feet multiplied by twenty two years should have resulted in a loss of 286 feet (not 550 feet)).

The Commission agrees that the conditions peculiar to the Site contribute to the Petitioners' hardships. Accordingly, the Commission affirmatively finds that the Petitioners have 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 Petitioners have demonstrated that the hardship does not result from their actions.

The Commission affirmatively holds that the Petitioners have demonstrated that the hardship does not result from its actions. First, when building the structures, the Petitioners complied with the erosion setbacks established by the Commission. In addition, the Village

and the Petitioners have implemented measures to mitigate the hardships to the extent permitted by the current regulations through, among other things, installing an existing sandbag structure, a sand fence, plating sea oats/beach grasses, and beach bulldozing. All these measures have failed to protect the property and infrastructure from imminent danger. Further, the Petitioners have retained consultants and coastal engineers to evaluate potential long-term solutions to the erosion issue, including the preferred alternative of managed retreat.

In its Recommendation, DCM agreed that the Petitioners have supported the Village in taking steps to address the ongoing erosion problem.

For these reasons, the Commission affirmatively finds that the Petitioners have demonstrated that they have met the third factor required for a variance.

- d. The Petitioners have 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.**

The Petitioners have 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 rules are to provide an exception to the General Assembly and the Commission's prohibition on permanent erosion control structures which apply to all "imminently threatened structures." The Commission's rules set limitations for the use of sandbags that in most cases balance protection of natural habitat and property and infrastructure. However, in this case, the authorized sandbag revetment does not provide adequate protection for the Shoals Club Facilities, related infrastructure, and primary and frontal dunes which are imminently threatened. If the accelerated erosion described above

continues to move landward, it may preclude or hinder later expansion of the existing sandbag structure. The expanded sandbag revetment is needed as temporary protection while the Petitioners further evaluate and implement its preferred alternative of managed retreat.

The variance would secure the public safety and welfare because, without a variance, the Shoals Club Facilities, primary and frontal dunes, and infrastructure will suffer damage and likely fail. Further, due to the proximity of the existing sandbag revetment to the ocean and the erosion experienced in this area, the public's access in front of these properties is already limited. Thus, increasing the footprint and height of the sandbags would not have significant additional impacts on the public's access to the beach or habitat.

The variance will preserve substantial justice because it will protect the dunes, structures and infrastructure long enough for the Petitioners to further evaluate the feasibility and implement the Petitioners' preferred alternative of managed retreat. Despite the best efforts of the Petitioners to address the erosion issue, the existing sandbags and other measures will not provide sufficient protection to allow the Petitioners time to implement a managed retreat.

In its Recommendation, DCM agrees that a variance from the Commission's rule limiting the size of sandbag structures will allow the Petitioners to install a structure no more than twelve-feet by forty-feet while they develop a long term plan to relocate the structures. The Commission's rules set forth limitations for use of sandbags such as size limits and time limits which are sufficient in most cases. However, in this case these limitations have not offered sufficient temporary protection to allow the Petitioners to complete the planning, funding, permitting processes for the planned relocation which is

consistent with the spirit and intent of the sandbag rules.

In its Recommendation, DCM agreed with the Petitioners that the variance would not have an impact on public safety and welfare where there is little room waterward of the existing structures to use the public trust area. DCM Staff also agreed with the Petitioners that the variance would preserve substantial justice as it appears that the Petitioners' and the Village's efforts to address the accelerated erosion issues at the Site though various responses was not successful and larger bags may afford the Petitioners the necessary time to protect the structures on Site while they pursue a longer-term response to the accelerated erosion.

For the above stated reasons, the Commission agrees that Petitioner's proposed development is consistent with the spirit, purpose, and intent of the Commission's sandbag rules, will secure public safety and welfare, and will preserve substantial justice.

* * * * *

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

ORDER

THEREFORE, the Petitioners requested variance from 15A NCAC 07H .0313(d) is GRANTED as allowed by N.C. Gen. Stat. § 113A-120.1(b). Moreover, in accordance with this variance order, the Commission further grants the requested variance from 15A NCAC 07H.0313(c) which requires that a structure is imminently threatened in order to have temporary erosion control structures authorized. If the current nourishment project places sand at the Site before the larger sandbag structure is installed resulting in the structures no longer qualifying as "imminently threatened," the Petitioners' request for variance from

this provision is still allowed and they may install the larger size sandbag structure.

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 13th day of March 2025.



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 by the methods indicated below:

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This the 13th day of March, 2025.



Mary L. Lucasse
Special Deputy Attorney General and
Commission Counsel
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

STATE OF NORTH CAROLINA ^{BY: S. Smallwood} IN THE GENERAL COURT OF JUSTICE
 COUNTY OF WAKE SUPERIOR COURT DIVISION
 23 CVS 031533-910

North Carolina Department of)
 Environmental Quality, Division of)
 Coastal Management and North Carolina)
 Coastal Resources Commission,)
 Plaintiffs,)
 v.)
 North Carolina Rules Review)
 Commission and Ashley Snyder in her)
 Official Capacity as Codifier of Rules,)
 Office of Administrative Hearings,)
 Defendants.)

**AMENDED
 ORDER ON MOTIONS**

THIS MATTER WAS HEARD by the undersigned at the December 11, 2024 session of Wake County Superior Court upon Plaintiffs’ Motions for Summary Judgment, for Declaratory Judgment, and Injunctive Relief; Defendant North Carolina Rules Review Commission's Motion for Summary Judgment; and the North Carolina Coastal Federation's Motion for Leave to File an Amicus Brief.

The Court entered an Order on Motions on February 12, 2025. On or about February 20, 2025, Plaintiffs filed a Motion for Clarification of that Order. Upon consideration of the Motion for Clarification, The Court determined that it made certain clerical mistakes and omissions which need to be corrected. Pursuant to N.C.G.S. §1A-1, Rule 60, the Court hereby amends the original Order on Motions as follows.

The Court has carefully considered the file, the written and oral arguments of counsel, the written argument of *amicus curiae*, and the proffered and other relevant authority. The Court concludes, in the light most favorable to Defendants, that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law.

The Court further concludes that Plaintiffs have statutory authority to establish enforceable standards, guidelines and policies through rulemaking, have statutory authority to adopt rules that provide brief statements of law to give context to or aid in understanding that rule or other rules, and the term “adverse environmental impact” is not ambiguous as used in this rulemaking context, and that Plaintiffs are entitled to Declaratory Judgment.

NOW, THEREFORE, the Court orders as follows.

1. This Amended Order on Motions supersedes and replaces the Order on Motions filed by the Court on February 12, 2025.
2. The motion of the North Carolina Coastal Federation for Leave to File an Amicus Brief is GRANTED.
3. Plaintiffs' Motion for Summary Judgment is GRANTED.
4. Defendants' Motion for Summary Judgment is DENIED.
5. Plaintiffs' Motion for Declaratory Judgment is GRANTED.
6. Judgment is hereby entered for Plaintiffs.
7. The objections of Defendant Rules Review Commission to the rules at issue in this proceeding are overruled.
.
8. Defendant Rules Review Commission is ordered to approve Plaintiffs' 30 rules as written in Exhibit 1 to Plaintiff's Verified Complaint.
9. Defendant Codifier is ordered immediately to return the 30 rules to the Code in the form they were in prior to removal from the Code in October, 2023 (as shown in Exhibit 12 to Plaintiffs' Response to Codifier's Memorandum of Law in Response to Plaintiffs' Motion for Summary Judgment and Motion for Injunctive Relief). This order is not contingent on whether Defendant Rules Review Commission approves Plaintiffs' 30 rules in the form set forth in Exhibit 1 to Plaintiffs' verified complaint. If Defendant Rules Review Commission appeals the Court's order(s) herein, Defendant Codifier may prominently notate and identify the returned rules as "Under Appeal" or words to that effect.

2/28/2025 4:09:18 PM

IT IS SO ORDERED this the 28th day of February, 2025.



William R. Pittman
Superior Court Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23-CV-031533-910

NORTH CAROLINA DEPARTMENT)
OF ENVIRONMENTAL QUALITY,)
DIVISION OF COASTAL)
MANAGEMENT, and NORTH)
CAROLINA COASTAL RESOURCES)
COMMISSION,)
)
Plaintiffs,)
)
v.)
)
NORTH CAROLINA RULES REVIEW)
COMMISSION, and ASHLEY)
SNYDER, in her official capacity as)
CODIFIER OF RULES, OFFICE OF)
ADMINISTRATIVE HEARINGS,)
)
Defendants. _____)

**DEFENDANT NORTH CAROLINA RULES REVIEW COMMISSION'S
NOTICE OF APPEAL OF AMENDED ORDER**

NOW COMES Defendant North Carolina Rules Review Commission and, pursuant to N.C. R. App. P. 3, files this Notice of Appeal to the North Carolina Court of Appeals of the decision by the Honorable Judge William R. Pittman, entered on February 12, 2025, as amended on March 3, 2025, granting Plaintiffs' Motion for Summary Judgment and for Declaratory Judgment, denying Defendant Rules Review Commission's Motion for Summary Judgment, and granting third-party North Carolina Coastal Federation's Motion for Leave to File Amicus Brief.

This the 19th day of March, 2025.

**Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC**

s/ John E. Branch, III

John E. Branch, III

N.C. State Bar No. 32598

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Phone: (984) 844-7907

*Counsel for Defendant North Carolina
Rules Review Commission*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the persons indicated below via electronic mail and through filing via the Court's electronic filing system, addressed as follows:

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*Attorney for Defendant Ashley Snyder
in her official capacity as Codifier of
Rules, Office of Administrative
Hearings*

This the 19th day of March, 2025.

**Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC**

s/ John E. Branch, III
John E. Branch, III
N.C. State Bar No. 32598
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Raleigh, NC 27607
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*Counsel for Defendant North Carolina
Rules Review Commission*

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23-CV-031533-910

NORTH CAROLINA DEPARTMENT)
OF ENVIRONMENTAL QUALITY,)
DIVISION OF COASTAL)
MANAGEMENT, and NORTH)
CAROLINA COASTAL RESOURCES)
COMMISSION,)
)
Plaintiffs,)
)
v.)
)
NORTH CAROLINA RULES REVIEW)
COMMISSION, and BRIAN)
LIEBMAN¹, in his official capacity as)
CODIFIER OF RULES, OFFICE OF)
ADMINISTRATIVE HEARINGS,)
)
Defendants. _____)

**DEFENDANT NORTH CAROLINA RULES REVIEW COMMISSION'S
MOTION TO STAY ENFORCEMENT OF PARAGRAPH 8 OF THE
AMENDED ORDER**

CONSENTED TO BY PLAINTIFFS AND DEFENDANT CODIFIER

Defendant North Carolina Rules Review Commission (the “RRC” or “Commission”), pursuant to N.C. R. Civ. P. 62, submits this motion to stay enforcement of the Court’s February 12, 2025 Order against the RRC, as amended by the Court’s March 3, 2025 Order (“Order”) pending the appeal sought by the RRC of

¹ Pursuant to N.C. Gen. Stat. § 1A, Rule 25(f)(1) Brian Liebman has been substituted for Ashley Synder as Codifier of Rules.

the Order granting Plaintiffs North Carolina Department of Environmental Quality Division of Coastal Management (“NCDEQ”) and North Carolina Coastal Resources Commission’s (“CRC”) Motions for Summary Judgment, for Declaratory Judgment, and Injunctive Relief, and denying RRC’s Motion for Summary Judgment

Under N.C. R. Civ. P. 62(d), “When an appeal is taken, the appellant may obtain a stay of execution,” subject to certain exceptions, “by proceeding in accordance with and subject to the conditions” of certain statutory provisions, including N.C. Gen. Stat. § 1-294. Contemporaneously with the filing of this motion, the RRC is filing its Notice of Appeal of the February 12, 2025 Order, as amended by the Court’s March 3, 2025 Order.

Here, the Order (as amended) requires Defendant Rules Review Commission to “approve Plaintiffs’ 30 rules (the “30 Rules”) as written in Exhibit 1 to Plaintiff’s Verified Complaint.” (Order p.2, ¶8). The Court should stay execution of paragraph 8 of the Order, and all proceedings taken for its enforcement, until the RRC’s appeal has concluded. N.C. R. Civ. P. 62(a).

The Order, as amended on March 3, 2025, required the Codifier “to immediately return the 30 rules to the Code in the form they were in prior to removal from the Code in October, 2023.” (Order p 2, ¶ 9) On March 4, 2025, the Codifier returned Plaintiffs’ 30 rules to the Code. See e.g., 15A NCAC 07H .0507 attached as Exhibit A. The parties agree that the Codifier has complied with paragraph 9 of the Order (as amended). This motion does not request a stay of paragraph 9 of the Order (as amended).

The Order, as amended on March 3, 2025, granted Plaintiffs' request to "enjoin the RRC to approve the CRC's proposed permanent rules as written in Exhibit 1 to Plaintiff's Verified Complaint." (Index ECF No. 37 (emphasis added). Rule 62(c) provides, in the context of the appeal of injunctions, "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Rule 62(e) further provides that, when an appeal is taken by an agency of the State of North Carolina, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant."

Here, the Court should stay the enforcement of its Order requiring the RRC to approve the 30 Rules. First, all parties agree that such a stay should be entered. Second, the RRC's position is that Plaintiffs will not be harmed absent such a stay, while Defendants and the consuming public of North Carolina will be harmed if the stay is not issued. This is because the RRC is likely to win its appeal of this case and the public will be subject to a set of rules that are removed from the Code, placed into the Code, approved by the RRC pursuant to Court Order, and then removed from the Code again. The RRC submits that the better path is for the Court to stay the RRC's obligation to approve the 30 Rules pending the appeal. The Plaintiffs do not agree with the RRC's position on the likelihood of harm if the stay is not granted or the relative merits of RRC's appeal. However, the Plaintiffs have consented to a stay of

paragraph 8 (enjoining the RRC to approve the readopted rules) because any harm during the pendency of the appeal has been alleviated by the Codifier's return of the existing rules to the Code.

For these reasons, the Court should stay the enforcement of the Court's Order requiring that the RRC approve the 30 Rules as set forth in paragraph 8 of the Order, as amended.

Undersigned counsel has been authorized by counsel for Plaintiffs North Carolina Department of Environmental Quality, Division of Coastal Management and North Carolina Coastal Resources Commission and Defendant Codifier to represent to the Court that the parties consent to the entry of a stay of paragraph 8 of the March 3, 2025 Amended Order on Motions as requested by this Motion.

This the 19th day of March, 2025.

**Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC**

s/ John E. Branch, III
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*Counsel for Defendant North Carolina
Rules Review Commission*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the persons indicated below via electronic mail and through filing via the Court's electronic filing system, addressed as follows:

Mary L. Lucasse
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mlucasse@ncdoj.gov

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*Attorney for Defendant Brian Liebman
in his official capacity as Codifier of
Rules, Office of Administrative
Hearings*

This the 19th day of March, 2025.

**Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC**

s/ John E. Branch, III
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*Counsel for Defendant North Carolina
Rules Review Commission*

STATE OF NORTH CAROLINA	BY: S. Smallwood	IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE		SUPERIOR COURT DIVISION
		23-CV-031533-910

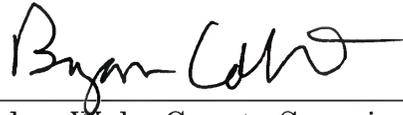
NORTH CAROLINA DEPARTMENT)
 OF ENVIRONMENTAL QUALITY,)
 DIVISION OF COASTAL)
 MANAGEMENT, and NORTH)
 CAROLINA COASTAL RESOURCES)
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 NORTH CAROLINA RULES REVIEW)
 COMMISSION, and BRIAN)
 LIEBMAN, in his official capacity as)
 CODIFIER OF RULES, OFFICE OF)
 ADMINISTRATIVE HEARINGS,)
)
Defendants.)

Consent Order on Defendant North Carolina Rules Review Commission's Motion to Stay

THIS MATTER is before the Court on Defendant Rules Review Commission's Motion to Stay, submitted with the consent of Plaintiff and Defendant Codifier, requesting a stay of paragraph 8 of the March 3, 2025 Amended Order on Motions pending appeal.

Having considered the request and given the consent of the parties, **IT IS HEREBY ORDERED** that the motion is granted, and paragraph 8 of the Court's March 3, 2025 Amended Order on Motions is stayed pending appeal.

This ____ day of April, 2025.
4/9/2025



Judge, Wake County Superior Court

Consented to by:

/s/ John E. Branch III
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JEFF JACKSON
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

REPLY TO:
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ENVIRONMENTAL DIVISION
(919)716-6962
MLUCASSE@NCDOJ.GOV

March 28, 2025

Nelson Paul
307 Misty Grove Circle
Morrisville, North Carolina 27560

Electronically: nelson@nelsonpaul.com

**Re: Final Decision DENYING Petitioner Nelson Paul's
Request for a Declaratory Ruling – CMD-25-01**

Dear Mr. Paul:

The Chair of the Coastal Resources Commission has denied your request for Request for a Declaratory Ruling without prejudice on the basis that Petitioners and DCM failed to agree to a set of stipulated facts on which the issue could be decided by the date required in order to be placed on the April Commission meeting and failure to clearly articulate the issue on which Petitioner was requesting a ruling. Attached is a copy of the Order signed by the Chair. Because the Order denied your request without prejudice, you may resubmit the request with the necessary information.

On the other hand, you have the right to appeal this 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 you were served with the Final Agency Decision. By my calculation, the deadline to file a petition for judicial review is April 28, 2025. If you decide to file a petition for judicial review, please provide me with a courtesy copy. A copy of the filed judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

Dan Hirschman, General Counsel
Dept. Of Environmental Quality
1601 Mail Service Center
Raleigh, N. C. 27699-1601

Let me know if you have any questions.

Very truly yours,

Mary L. Lucasse
Special Deputy Attorney General/CRC Counsel

Nelson Paul
March 28, 2025
Page 2

cc electronically:

M. Renee Cahoon, CRC Chair
Christine A. Goebel, Esq.
Tancred Miller, Director
Jonathan Howell, Deputy Director
Daniel Govoni, Policy Section Chief
Christy Simmons, PIO
Angela Willis, Assistant to Director

STATE OF NORTH CAROLINA

BEFORE THE CHAIR
COASTAL RESOURCES COMMISSION
CMD-25-01

CARTERET COUNTY

IN THE MATTER OF **NELSON PAUL’S**)
REQUEST FOR A DECLARATORY)
RULING ON WHETHER CAMA,)
DREDGE & FILL, AND THE)
COMMISSION’S RULES APPLY TO)
MAN-MADE DITCHES DUG ON)
PRIVATE PROPERTY ENTIRELY ON)
HIGH GROUND.)

ORDER DENYING REQUEST FOR
DECLARATORY RULING
WITHOUT PREJUDICE

Petitioner Nelson Paul has requested that the North Carolina Coastal Resources Commission (“Commission”) issue a declaratory ruling regarding the applicability of the Dredge and Fill Act at N.C. Gen. Stat. § 113-229(n); the Coastal Area Management Act of 1974 (“CAMA”) at N.C. Gen. Stat. §§ 113A-113, -115, and -118; and the Commission’s rules at 15A N.C. Admin. Code 07H .0205, 07H .0206, 07H .0207, 07H .0208(b)(3), (4) and (11), 07H .1500, 07H .2500, and 07K .0206 to “man-made ditches dug on private property, entirely within the high ground.” However, for the reasons explained below, the request for a declaratory ruling is incomplete. Therefore, the Chair denies the request without prejudice.

A. STANDARD OF REVIEW

Under the North Carolina Administrative Procedure Act, a person aggrieved may request that an agency issue a declaratory ruling

1. as to the validity of a rule,
2. as to the applicability of a statute administered by the agency to a given statement of facts, or
3. to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.

N.C. Gen. Stat. § 150B-4. Under the Commission’s rules, if a petitioner is requesting “a ruling on the applicability of a rule, order, or statute,” the petitioner “shall include a description of the

factual situation on which the ruling is to be based.” 15A N.C. Admin. Code 07J .0602(b). If a petitioner is requesting “a ruling on the validity of a Commission rule” the petitioner “shall state the aggrieved person’s reasons for questioning the validity of the rule.” *Id.* The Commission’s rules do not specify a procedure for requesting a declaratory ruling to “resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.” However, this type of request is allowed under the North Carolina Administrative Procedure Act (“NCAPA”). N.C. Gen. Stat. § 150B-4.

The Commission has delegated the authority to its Chair to grant or deny requests for declaratory rulings. 15A N.C. Admin. Code 07J .0603(a). Under the Commission’s rules, the Chair “shall deny a request for declaratory ruling on finding that:

1. the requesting party and the Division of Coastal Management cannot agree on a set of stipulated facts to support a ruling;
2. the matter is the subject of a pending contested case hearing; and
3. no genuine controversy exists as to the application of a statute or rule to a proposed project or activity.

Id. The Commission has also delegated authority to its Chair to determine whether notice of the declaratory ruling request should be provided to anyone other than the adjacent property owners. 15A N.C. Admin. Code 07J .0603(a) and (c).

Through CAMA and the APA, the General Assembly has imposed standing requirements on petitioners who seek a declaratory ruling. Specifically, petitioners must demonstrate that a “genuine controversy exists as to the application of a statute or rule to a proposed project or activity.” The APA defines a “person aggrieved” as a person who is “directly or indirectly affected substantially in his . . . person, property, or employment by an administrative decision.” N.C. Gen. Stat. § 150B-2(6). In its foundational case of Empire Power Co. v. N.C. of Environment, Health and Natural Resources, this Court held that, to demonstrate person-

aggrieved status under the APA, a petitioner must have “alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute.” 337 N.C. 569, 589, 447 S.E.2d 768, 780 (1994). This Court also emphasized in that case that the injury the petitioner suffered had been “caused” by the agency’s permitting decision, and that a ruling for petitioner “would substantially eliminate or redress the injury” at issue. *Id.* at 591; 447 S.E.2d at 780. Thus, in order to demonstrate standing to request a declaratory ruling, petitioners must demonstrate there is a genuine (not speculative) controversy establishing that their legal rights have been adversely affected or infringed by the agency’s interpretation of CAMA or the Commission’s Rules. *See* Aggrieved, Black’s Law Dictionary (11th Ed. 2019 Of a person or entity).

B. FINDINGS OF FACT

1. Petitioner Nelson Paul filed his Request for a Declaratory Ruling on February 27, 2025. Petitioner requested a ruling as to the validity of the CAMA statute and the rules adopted by the Commission, as applied by the Division of Coastal Management (“DCM”), to man-made ditches dug on private property entirely within the high ground (“man-made ditches”). In support, Petitioner asserts that man-made ditches do not qualify as a component of the “natural environment” entitled to the protection of CAMA. *See* Request at 1-2 citing N.C. Gen. Stat. §113A-102.

2. On March 7, 2025, counsel for the Chair wrote Petitioner and DCM Director Tancred Miller acknowledging receipt of the request and providing deadlines. Specifically, the parties were asked to timely consult to determine if they can agree on relevant undisputed facts. The parties were also required to submit a set of stipulated facts to the Chair no later than close

of business on March 21, 2025. The Chair’s counsel also advised that the decision on whether to grant or deny the request for a hearing before the Commission was due March 29, 2025 (30 days after the request for declaratory ruling was filed). Because this date falls on a Saturday, counsel for the Chair informed the parties that the decision would be sent out no later than Friday, March 28, 2025.

3. On March 20, 2025 pursuant to 15A N.C. Admin. Code 07J .0603(a), DCM submitted a memo and supporting documents to the Chair recommending that the matter be placed on the agenda for the Commission’s April 2025 regularly scheduled meeting. In support of its Recommendation, DCM indicated that in its opinion: 1) it is likely that the Division and the requesting party will be able to agree on a set of undisputed facts sufficient to support a meaningful ruling; 2) the matter is not the subject of a pending contested case hearing; and 3) a genuine controversy exists as to the application of certain rules to a specific project or area of the coast. DCM further stated that the Commission’s rules provide a procedure for seeking two types of declaratory rulings—a general ruling questioning the validity of a rule or law and a site-specific ruling regarding “the applicability of a rule, order or statute” to a stipulated set of facts. DCM posited that Petitioner has standing as an aggrieved party under the NCAPA to request a site-specific ruling based on Petitioner’s ownership interest in two properties in Carteret County. DCM argued that Petitioner does not have standing to request declaratory rulings over the application of the CAMA and the Commission’s rules to property owned by others. Finally, DCM asserted that Petitioner had not demonstrated standing as an aggrieved party to generally question the validity of the rules and statutes included in his petition. The Division’s recommendation did not include stipulated facts.

4. On March 21, 2025, Petitioner Nelson Paul responded to the DCM's March 20, 2025 Recommendation regarding his request for a declaratory ruling. His response did not include a set of stipulated facts on which the request could be heard. However, Petitioner stated that he thought the parties would be able to agree to a set of stipulated facts to present to the Commission. In his response, Mr. Paul claimed he had a constitutional right to bring the request and took issue with DCM's statement that he was not a person aggrieved. In support of his position, Mr. Paul stated he is employed as a North Carolina licensed real estate agent and some of his work takes place in North Carolina's 20 coastal counties. Petitioner claims that DCM's application of CAMA and the Commission's rules operates to "adversely impact property values and substantially modify the highest and best use of coastal properties." In his response, Mr. Paul also agreed that he has standing to bring a request for a declaratory ruling based on his ownership of property in Carteret County. However, Petitioner stated that he is not requesting a declaratory ruling relating to or limited to his properties.

Instead, Petitioner explained that in his opinion, the manner in which DCM "has been applying the CAMA statute and the Commission's rules to man-made ditches dug in the high ground on private property" has resulted in a "a major policy change, [that has] never been addressed by the oversight of a governing body." Petitioner's March 21, 2025 Response at 2. Mr. Paul requested a general review by the Commission of the manner in which DCM is applying the Commission's rules and CAMA to man-made ditches dug on high ground on private property.

5. DCM submitted a reply to Mr. Paul's response on March 24, 2025. In the response, DCM stated that constitutional theories are not relevant here as the declaratory ruling is controlled by the NCAPA. DCM also appreciated Petitioner's clarification that he is

“requesting this Declaratory Ruling be heard as a general matter.” DCM explained that if the Petitioner opts to proceed as a general matter, specific properties cannot be offered for “discussion [at] the meeting” and “any facts must be general in nature and not specific to any site.” DCM’s March 2025 Response at 1-2.

6. Petitioner provided a further response regarding the request for a declaratory ruling on March 25, 2025. In summary, Petitioner indicates that he finds DCM’s comment “in the 4th paragraph confusing” and possibly “problematic.” Petitioner’s March 25, 2025 Response at 1. Petitioner also claims that DCM appears to have adopted “a new “Tidal Ditches” Area of Environmental Concern.” *Id.* Petitioner also restates his claim that man-made ditches are not part of the natural environment protected by CAMA.

7. As of the date of this order, the parties have failed to submit a set of stipulated facts for which to use to Commission consider the request.

C. CONCLUSIONS OF LAW

Under the procedures set out by the Commission, there are three requirements for granting a request for a declaratory ruling. 15A N.C. Admin. Code 07J .0603(a). The first is that the requesting party and DCM must be able to agree on a set of stipulated facts to support a ruling. In the March 7, 2025 letter sent on behalf of the Chair, Special Deputy Attorney General Mary L. Lucasse, counsel to the Commission, explicitly stated that the parties must agree to a stipulated set of facts and submit them to the Chair by March 21, 2025 in order for the Commission to hear the request at its April 2025 meeting. If additional time was required, counsel invited the parties to indicate how much additional time was needed to come up with a set of stipulated facts. This was not done.

Although both parties have stated the belief that they may be able to agree to a set of stipulated facts, they have continued to disagree on the scope of the request, the facts that would be sufficient to support a meaningful ruling, and how to present the request to the Commission for a decision. Petitioner has failed to submit a complete request enabling his petition to be heard at the Commission's next meeting because Petitioner and DCM have not timely agreed on the facts necessary to support a ruling on the issue by the Commission. Given the disagreements exhibited over what constitutes relevant facts and the requesting party and DCM failure to agree on a set of stipulated facts to support a ruling by March 21, 2025, the Chair finds that this request for a declaratory ruling is incomplete. On that ground alone, the request is denied.

The second requirement is that the matter not be the subject of a contested case hearing. Based on the information provide by Petitioner and DCM, that requirement has been met.

Finally, the Chair is required to deny the request if the request for a declaratory ruling fails to raise a genuine controversy exists as to the application of a statute or rule to a proposed project or activity. In order for there to be a "genuine controversy" a petitioner must have standing to request a declaratory ruling regarding the impact to a proposed project or activity. This may involve a claim regarding the "validity of a rule" applied to a petitioner's particular project or activity or an "inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency" as applied to a petitioner's property. 15A NCAC 07J .0602(b); N.C. Gen. Stat. § 150B-4. And, while any ruling may have implications for other persons' properties in the CAMA counties, a petitioner only has standing to bring such a claim on his own behalf. This means, that a petitioner does not have standing to request a declaratory ruling for property owned by others.

In order to meet this third requirement, a petitioner must demonstrate he has standing to bring the request based on a specific factual situation on which the ruling is to be based. However, in this case, the Chair understands that Petitioner is not requesting a declaratory ruling applying CAMA or the Commission's rules to any specific property.

Instead, Petitioner has requested a general ruling on a broad issue regarding DCM's policy for applying CAMA and the Commission's rules to "man-made ditches" in all twenty coastal counties. This is not the purpose of a declaratory ruling.

Based on information provided by DCM, a call on whether a ditch is within CAMA jurisdiction is based on specific information. The determination often begins with an onsite visit by a DCM field representative to flag high water, coastal wetlands, and other features that may be used to determine whether a CAMA jurisdictional Area of Environmental Concern ("AEC") is present. Without specifying a particular property, or project, or ditch, Petitioner has failed to meet the requirements for requesting a declaratory ruling as he has failed to demonstrate there is a genuine controversy or that he has standing to raise the issue.

The Chair does not foreclose the possibility that petitioner may be able to demonstrate there is a genuine controversy by providing stipulated facts that would necessarily include specific examples of man-made ditches for which he can demonstrate he has standing to request a declaratory ruling. However, to date, Petitioner has not explained the manner in which DCM's application of the listed CAMA sections and Commission's rules to man-made ditches creates a genuine controversy. For example, pursuant to 15A N.C. Admin. Code 07K.0206, ditches used for agricultural or forestry purposes with maximum dimensions equal to or less than six feet (top width) by four feet deep are exempted from the CAMA permit requirement. Petitioner has not

identified any genuine controversy demonstrating that DCM does not exempt such ditches as required by the Commission's rules. Without making such a showing, the request fails to meet the third requirement and is incomplete.

Finally, in his request for a Declaratory Ruling, Petitioner did not identify any persons directly affected by the Request, and did not provide notice to any person or the public. In its recommendation, DCM suggests that notice be provided either to the adjacent property owners if Petitioner seeks a declaratory ruling specific to his properties. In the alternative, if Petitioner seeks a general declaratory ruling, DCM suggested that notice should be given to the general public through a posting on the CRC's Website Rulemaking Page, through a notice to the DCM Interested Parties Email List, and to the CRC's Rulemaking Email List. DCM suggests that the notice alert the public that comments may be directed by email to DCMComments@deq.nc.gov.

ORDER

The undersigned hereby finds that:

1. Notice is required. If Petitioner proceeds with a site-specific request, notice to adjacent property owners is required. For other types of requests, public notice as described by DCM in its recommendation would be required.
2. Petitioner has not reached agreement with DCM on a set of undisputed facts that would be sufficient to support a meaningful ruling. However, in Petitioner's March 25, 2025 submission, he appears to agree that any stipulated facts could be articulated in general terms without mentioning any specific property. Petitioner also provided a photograph of a non-specific location in order to provide context for the issue and to describe the various landform features which are the subject of this Declaratory Ruling. Petitioner's March 25, 2025 Response

at 4-5. These do not appear to be sufficient facts to support a meaningful ruling. Moreover, there is no indication that DCM Staff have agreed to these facts.

3. The matter is not the subject of a contested case proceeding.

4. In order to meet the third requirement, Petitioner must clarify his request to identify a “genuine controversy” which he has standing to raise. Specifically, Petitioner must clarify whether he is asserting a request relating to “the validity of a rule” or whether he is seeking a declaratory ruling “to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency,” or whether he is seeking another type of declaratory ruling. For guidance, the Chair provides the following examples:

- a. Petitioner may be claiming that there is a genuine controversy regarding whether “man-made ditches” can qualify as a component of the “natural environment” entitled to the protection of CAMA. See Request at 1-2 citing N.C. Gen. Stat. §113A-102 and March 25, 2025 Response at 2-3. Since the request is general, the parties must agree to a set of stipulated facts that articulates this issue across the twenty coastal counties in all their variations and demonstrates that petitioner has standing to raise the issue.
- b. Petitioner may be claiming that there is a genuine controversy regarding whether the Dredge and Fill Law is limited to “marshland” growing in the “natural environment,” and cannot include “opportunistic or volunteer marsh species growing in man-made ditches dug in the high ground on private property.” Petitioner’s March 25, 2025 Response at 3 and March 25, 2025 Response at 3. If this is Petitioner’s claim, there may well be a genuine controversy over whether a “man-made ditch dug entirely on private property and entirely within high ground” could be within CAMA jurisdiction. Relevant facts could include whether the man-made ditch was “navigable” or “tidal,” included coastal wetlands, was within an Area of Environmental Concern (“AEC”), or whether based on its manner of construction and location, CAMA would never apply to such a ditch. This would require a different set of stipulated facts and would also require petitioner to demonstrate he has standing to raise the issue.
- c. Petitioner may be claiming that there is a genuine controversy regarding whether it is DCM’s policy to assert CAMA jurisdiction over “man-made ditches dug on private property entirely within high ground” that are not navigable and are not in an AEC and that such an application is inconsistent with CAMA and the

Commission's rules. If so, that would require a different set of stipulated facts and would also require petitioner to demonstrate he has standing to raise the issue.

- d. Petitioner may be asserting that there is a genuine controversy regarding whether it is DCM's policy to assert jurisdiction over a new composite "Tidal Ditches" AEC comprised of the Estuarine Waters and Public Trust AECs without any distinction between the two in a manner and such a policy would be inconsistent with CAMA and the Commission's rules. Petitioner's March 25, 2025 Response at 1-2. If this is Petitioner's claim, then he and DCM would need to agree to a set of facts that focuses on whether DCM has required CAMA permits for petitioner's projects or property based solely on whether the "man-made ditch" is tidal as opposed to being based on a determination that the "man-made ditch" is part of a defined AEC or other relevant facts. Petitioner would also be required to show he has standing to raise the issue.
- e. Petitioner may be asserting there is a genuine controversy regarding whether DCM's policy relating to man-made ditches is inconsistency with two exemptions to the CAMA definition of development set forth in N.C. Gen. Stat. § 113A-103 (5)(b). Petitioner's March 25, 2025 Response at 3-4. If there is a genuine controversy on this issue, the parties must stipulate to a set of undisputed facts relevant to this issue and sufficient to support a meaningful ruling. Petitioner would also be required to show that he has standing to raise the issue.
- f. Petitioner may be asserting that one or more of the Commission's rules cited in the request are not valid, and/or that one or more of the CAMA sections or Commission's rule cannot validly be applied to man-made ditches. If there is a genuine controversy on this issue, the parties must stipulate to a set of undisputed facts relevant to this issue and sufficient to support a meaningful ruling. Petitioner would also be required to show that he has standing to raise the issue.

This is not an exhaustive list. The examples here were gleaned from the legal arguments presented by Petitioner in his various submissions.

5. The Petitioner has submitted an incomplete request for a declaratory ruling because he has failed to demonstrate that there is a genuine controversy as to the application of a statute or rule to a proposed project or activity. On this basis alone, the request shall be denied.

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For the reasons above, the Chair HEREBY DENIES the Request for a Declaratory Ruling without prejudice to Petitioner's right to resubmit a Request for a Declaratory Ruling articulating a genuine controversy which he has standing to raise and on which he and DCM timely provide a stipulated set of facts. .

This is the 28th day of March, 2025.



M. Renee Cahoon, Chair
N.C. Coastal Resources Commission

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the attached Order on Petitioner and other interested parties by electronic means addressed as follows:

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This the 28th day of March, 2025.



Mary L. Lucasse
Special Deputy Attorney General