



**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

February 22, 2023

Jennifer Everett  
Coastal Resources Commission  
**Sent via email only to: Jennifer.Everett@ncdenr.gov**

Re: Objection to 15A NCAC 07M .0201, .0202, .0401, .0402, .0403, .0701, .0703, .0704, .1001, .1002, and .1101.

Dear Ms. Everett:

At its meeting on February 16, 2023, the Rules Review Commission (“RRC”) adopted the attached staff recommendations. The RRC determined that the Coastal Resources Commission (“CRC”) had not satisfied the September 2022 RRC objections and continues to object pursuant to G.S. 150B-21.12(c) for the reasons set forth in the staff recommendations.

The attached staff recommendations further delineate the ambiguity in each rule to which the RRC has and continues to object pursuant to G.S. 150B-21.10 and G.S. 150B-21.9(a)(2).

Further, the RRC determined that, as written, 07M .0201, and .0202 have substantially changed pursuant to G.S. 150B-21.12(c).

If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,  
/s/ William W. Peaslee  
William W. Peaslee  
Commission Counsel

Attachments: 12/2022 Staff Opinion Rule 07M NCAC .0703  
02/2023 Staff Opinions Rules 15A NCAC 07M .0201, .0202, .0401, .0402, .0403,  
.0701, .0704, .1001, .1002, and .1101.

**Donald R. van der Vaart**, Director  
Chief Administrative Law Judge

**Fred G. Morrison, Jr.**  
Senior Administrative Law Judge

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## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0201

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X  Object, based on:
  - Lack of statutory authority
  - X  Unclear or ambiguous
    - Unnecessary
    - Failure to comply with the APA
  - X  Determine a substantial change
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this 15A NCAC 07M .0201 on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a).<sup>1</sup> Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*As revised, the CRC changed "should" to "shall". With this change, it appears to staff that the CRC has changed language of the "Declaration of General Policy" to meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, it appears to staff that the CRC has satisfied the RRC's*

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<sup>1</sup> THE SEPTEMBER 2022 RRC OBJECTION IS CONSISTENT WITH RRC'S OCTOBER 1991 OBJECTION TO THE SAME LANGUAGE. THE 1991 OBJECTION STATED THAT 15A NCAC 07M .0201 DOES "NOT MEET THE DEFINITION OF A 'RULE'", AND THE RRC OBJECTED "DUE TO LACK OF NECESSITY". THE 1991 OBJECTION APPEARS TO HAVE BEEN DISREGARDED BY THE CRC.

William W. Peaslee  
Commission Counsel

objections pursuant to G.S. 150B-21.9 (a)(1), (3) and (4) as now the CRC is clearly regulating or establishing a practice requirement of general applicability which meets the definition of a “rule” pursuant to G.S. 150B-2(8a).

However, contextually this raises the question of whether the change differs substantially from the proposed rule pursuant to G.S. 150B-21.2(g). While it has been the practice of the RRC to request technical changes from “should” to “shall” and “may” to “shall” without finding that those changes were a substantial difference from the proposed rule, those technical changes have been in the context of rules which were clearly intended to meet the definition of a “rule” pursuant to G.S. 150B-2(8a). Here, the CRC did not use language in the initial published version of the rule which met the definition of a “rule”. The proposed rule used the non-binding “should” and the CRC titled the proposed rule as a “Declaration of General Policy”. As the rule changed from what appeared to be a mere policy statement into a regulation, staff recommends that the RRC determine that the revised rule is a substantial change pursuant to G.S. 150B-21.12(c) as the revised rule now regulates. The revised rule substantially differs the proposed rule pursuant to all three criteria of G.S. 150B-21.2(g).

G.S. 150B-21.2

...

(g) ...

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

*It appears to counsel that one question the RRC should consider is whether the public was given notice by the language published that the CRC was going to regulate them and in this manner.*

*In addition, while in the revised rule the CRC removed some ambiguous language, the rule remains unclear and ambiguous. It appears that the first two sentences are prefatory. The last sentence is regulatory. It is unclear who the CRC is regulating and thus whether they have authority to regulate those they are attempting to regulate is likewise unclear. The rule requires those planning, adopting rules, or making public expenditures to do so “in a coordinated manner”; however, the rule is unclear about the parties to be involved in the coordination. The “coordinated manner” must be “so as to minimize the likelihood of damage to private and public resources”. As written, either the “damage” or the “resources” must be “resulting from coastal hazards.” “Coastal hazards” is an undefined term in Subchapter 7M and in Chapter 113A of the North Carolina General Statutes.*

*It is staff’s opinion that that the agency’s revisions do not satisfy the RRC’s objections concerning ambiguity pursuant to G.S. 150B-21.9(a)(2).*

*It is staff’s opinion that, pursuant to G.S. 150B-21.12(c), the RRC should determine that the revised rule is a substantial change pursuant to G.S. 150B-21.2(g).*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.



(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0202

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Determine substantial change
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9(a). Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a).<sup>1</sup> Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with revisions to satisfy the RRC's objection.*

*As revised, the CRC changed "should" to "shall" on lines 5 and 10 on page one, and lines 6, 14, 17 and 19 on page 2. With this change, it appears to staff that the CRC has changed the language of*

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<sup>1</sup> THE SEPTEMBER 2022 RRC OBJECTION IS CONSISTENT WITH RRC'S OCTOBER 1991 AND 1995 OBJECTIONS TO THE SAME LANGUAGE, EXCEPT FOR PARAGRAPH (F). THE 1991 OBJECTION STATED THAT 15A NCAC 07M .0202 DOES "NOT MEET THE DEFINITION OF A 'RULE', AND THE RRC OBJECTED "DUE TO LACK OF NECESSITY". THE 1991 OBJECTION APPEARS TO HAVE BEEN DISREGARDED BY THE CRC.

William W. Peaslee  
Commission Counsel

*the “Declaration of General Policy” to meet the definition of a “rule” pursuant to G.S. 150B-2(8a) regarding Paragraphs (a), (g), (h) and (i). Accordingly, it appears to staff that the CRC has satisfied the RRC’s objections pursuant to G.S. 150B-21.9 (a)(1), (3) and (4) regarding these lines only as now the CRC is clearly regulating or establishing a practice requirement of general applicability which meets the definition of a “rule” pursuant to G.S. 150B-2(8a).*

*However, contextually this raises the question of whether the change differs substantially from the proposed rule pursuant to G.S. 150B-21.2(g). While it has been the practice of the RRC to request technical changes from “should” to “shall” and “may” to “shall” without finding that those changes were a substantial difference from the proposed rule, those technical changes have been in the context of rules which were clearly always intended to meet the definition of a “rule” pursuant to G.S. 150B-2(8a). Here, the CRC did not use language in the initial published version of the rule which met the definition of a “rule”. The proposed rule used the non-binding “should” and the CRC titled the proposed rule as a “Policy Statements”. As the rule changed from what appeared to be a mere policy statement into a regulation, staff recommends that the RRC determine that the revised rule is a substantial change pursuant to G.S. 150B-21.12(c) as the revised rule now regulates. The revised rule substantially differs from the proposed rule pursuant to all three criteria of G.S. 150B-21.2(g).*

G.S. 150B-21.2

...

(g) ...

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

*It appears to counsel that one question the RRC should consider is whether the public was given notice that the CRC was going to regulate them with the initial published rule.*

*Notwithstanding the CRC’s revisions, the CRC has not satisfied the RRC’s objections in Paragraphs (b) and (c) as this language continues to fail to meet the definition of a “rule” pursuant to G.S. 150B-21-2(8a).*

*In addition, while in the revised rule the CRC removed some ambiguous language, the rule remains unclear and ambiguous and contained unnecessary language as stated more specifically hereafter.*

*It appears that the first sentence of Paragraph (a) is prefatory and unnecessary pursuant to G.S. 150B-21.9(a)(3). The next two sentences of (a), as revised, are regulatory; however, it is under clear which entities are being regulated. Thus, it is also unclear whether the CRC has authority to regulate those entities the CRC is attempting to regulate. Who must “identify and develop” and who must “protect” is not stated. Likewise, the last sentence of Paragraph (a) fails to identify who must protect private property rights. Accordingly, Paragraph (a) is ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*It appears that the first two sentences of Paragraph (c) are prefatory and unnecessary pursuant to G.S. 150B-21.9(a)(3). Lines 19-25 state when restoration, renourishment and disposal projects “may be allowed”. It is unclear whether the standards contained therein are related to a permitting process under the authority of the CRC. Lines 26-30 appear to relate Paragraph (c) to the issuance of grants under the authority of the Secretary of the North Carolina Department of Environmental Quality pursuant to Part 8 of Article 21 of Chapter 143 of the North Carolina General Statutes. The CRC does not appear to be part of this process. Paragraph (c) states that if the conditions listed are met, the CRC “supports” this issuance of such grants. If this language is a rule as define by G.S. 150B-2(8a) and can be adopted as such, this language is mere commentary on a grant program which is outside of the authority of the CRC, unnecessary, and ambiguous pursuant to G.S. 150B-21.9(a)(1)-(3).*

*In Paragraph (d) the CRC is regulating state “funding or sponsorship” in beach restoration and sand renourishment projects. The CRC does not appear to have the authority to regulate, by the plain language of the rule, the State of North Carolina. Accordingly, the CRC has exceeded the authority delegated to it pursuant to G.S. 150B-21.9(a)(1).*

*In Paragraph (e), it is not clear if the first sentence is meant to be a requirement or merely a suggestion. If a suggestion, it is unnecessary pursuant to G.S. 150B-21.9(a)(3). If it is necessary, it is not clear what is meant by “a short period of time”.<sup>2</sup>*

*Paragraph (e) appears to be in relationship to a permitting process for temporary measures to counteract erosion; however, there is no reference to any permitting process. The language is silent on who will issue the permits and, by what process. Paragraph (e) is also permissive in its language and there is no reference to any rule or statute prohibiting temporary measures for erosion control.*

*In Paragraph (g) the CRC requires “the State of North Carolina” to “consider” “innovative institutional programs and scientific research” without any context. This language is ambiguous pursuant to G.S. 150B-21.9(a)(2). Who will decide whether a program or research is “innovative”, which is a prerequisite to consideration, is unclear. It is unclear who or what agency is being required to consider these programs or the criteria by which they will determine them to be “effective”. If the CRC intends to regulate State government in its entirety, the CRC has exceeded the authority delegated to it pursuant to G.S. 150B-21.9(a)(1). Furthermore, the consideration being mandated has no consequence. Without regard to the determining authority’s decision, the rule provides no instruction or relationship to any process or permit. The last sentence of Paragraph (g) is unnecessary. Paragraph (g) is both ambiguous and unnecessary pursuant to G.S. 150B-21.9(a)(2) and (3).*

*Paragraph (h) requires coordination “with appropriate” planning agencies, affected governments and “the interested public”. As the CRC employs the word “with” (as opposed to perhaps “between”), it is unclear who is mandated to coordinate. The term “interested public” is also ambiguous and undefined.*

*Paragraph (h) opines but does not require that “local, state, and federal government activity” “reflect awareness” of “natural dynamics” of the ocean front. As the language appears to be merely a suggestion, it is unnecessary pursuant to G.S. 150B-21.9(a)(3). To the extent that the language is a requirement, the CRC does not appear to have the authority to regulate federal activity and thus*

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<sup>2</sup> THE RRC MADE THE SAME OBJECTION IN 1995 WHICH THE CRC HAS DISREGARDED.

*exceeds the authority delegated to it pursuant to G.S. 150B-21.9(a)(1). Further the standard of requiring “activity” to “reflect an awareness of natural dynamics” is an ambiguous standard pursuant to G.S. 150B-21.9(a)(2). The “activity” is undefined. It is also unclear how or in what manner the activity is to “reflect”. It is unclear what the CRC means by “natural dynamics”.*

*In Paragraph (i) the CRC is requiring “the State” to promote “education of the public”. It is unclear who the CRC is regulating. It does not appear that the CRC has the authority to mandate “the promotion” of any kind of education. Paragraph (i) exceeds the authority granted to the CRC pursuant to G.S. 150B-21.9(a)(1). To the extent that the CRC has authority to require anyone to “[promote] education”, the educational topics the CRC is requiring to be promoted are ambiguous. The terms “dynamic nature” and “effective measures” are ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*It is staff’s recommendation that the RRC find that the agency’s revisions do not satisfy the RRC’s objections G.S. 150B-21.9(a).*

*It is staff’s opinion that, pursuant to G.S. 150B-21.12(c), the RRC should determine that the revised rule is a substantial change pursuant to G.S. 150B-21.2(g).*

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)



**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 143-215.70. Secretary of Environmental Quality authorized to accept applications.**

The Secretary is authorized to accept applications for grants for nonfederal costs relating to water resources development projects from units of local government sponsoring such projects, except that this shall not include small watershed projects reviewed by the State Soil and Water Conservation Commission pursuant to G.S. 139-55. (1979, c. 1046, s. 1; 1987, c. 827, s. 154; 1989, c. 727, s. 218(109); 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v).)

**§ 143-215.71. Purposes for which grants may be requested.**

(a) Applications for grants may be made for the nonfederal share of water resources development projects for the following purposes in amounts not to exceed the percentage of the nonfederal costs indicated:

- (1) General navigation projects that are sponsored by local governments - eighty percent (80%);
- (2) Recreational navigation projects - twenty-five percent (25%);
- (3) Construction costs for water management (flood control and drainage) purposes, including utility and road relocations not funded by the State Department of Transportation - sixty-six and two-thirds percent (66 2/3%), but only of that portion of the project specifically allocated for such flood control or drainage purposes;
- (4) Stream restoration - sixty-six and two-thirds percent (66 2/3%);
- (5) Protection of privately owned beaches where public access is allowed and provided for - seventy-five percent (75%);
- (6) Land acquisition and facility development for water-based recreation sites operated by local governments - fifty percent (50%);
- (7) Aquatic weed control projects sponsored by local governments - fifty percent (50%);
- (8) Projects that are part of the Environmental Quality Incentives Program - one hundred percent (100%).

(b) Notwithstanding subdivision (8) of subsection (a) of this section, projects that are part of the Environmental Quality Incentives Program are ineligible for funding under this Part if they receive funding from the Clean Water Management Trust Fund established in G.S. 143B-135.234. (1979, c. 1046, s. 1; 1983, c. 450; 1987, c. 781, s. 1; 2016-94, s. 37.2(h); 2020-18, s. 12(a).)

**§ 143-215.72. Review of applications.**

(a) The Secretary shall receive and review applications for the grants specified in this Part and approve, approve in part, or disapprove such applications.

(b) In reviewing each application, the Secretary shall consider:

- (1) The economic, social, and environmental benefits to be provided by the projects;
- (2) Regional benefits of projects to an area greater than the area under the jurisdiction of the local sponsoring entity;
- (3) The financial resources of the local sponsoring entity;
- (4) The environmental impact of the project;
- (5) Any direct benefit to State-owned lands and properties.

(c) When the Secretary issues new or revised policies for review of grant applications and fund disbursement under this Part, those policies shall not apply to a project already approved for funding unless the project applicant agrees to the new or revised policy. For purposes of this section, a project is approved for funding when the Department enters into a contract or other binding agreement to provide any share of State funding for the project. Nothing in this subsection is intended to preclude the Secretary from issuing or enforcing policies applicable to projects approved for funding in order to comply with a requirement of State law or federal law or regulations.

(d) The following procedures apply only to grants for the purpose set forth in G.S. 143-215.71(8):

- (1) A nongovernmental entity managing, administering, or executing the grant on behalf of a unit of local government may apply as a co-applicant for the grant and may be included as a responsible party on any required resolution issued by the unit of local government.
- (2) Upon request signed by the grant applicant and co-applicant, the Department shall make periodic payments to the co-applicant for its share of nonfederal costs of a project prior to receipt of a final practice approval from the Natural Resources Conservation Service if the grantee has submitted a certified reimbursement request or invoice.
- (3) The Department shall annually report no later than November 1 to the Joint Legislative Oversight Committee on Agriculture and Natural and Economic Resources and the Fiscal Research Division regarding grants for projects funded through the Western Stream Initiative. The report shall include measures of grant administration and grant implementation efficiency and effectiveness. For purposes of this subdivision, the "Western Stream Initiative" refers to the portion of federal Environmental Quality Incentives Program funding provided to the Western North Carolina Stream Initiative for the counties of Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Cherokee, Clay, Cleveland, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Stokes, Surry, Swain, Transylvania, Watauga, Wilkes, Yadkin, and Yancey.



- (4) A single project shall consist of all the landowners and other participants under a project design contract approved by the Natural Resources Conservation Service for a contiguous section of stream. (1979, c. 1046, s. 1; 2017-57, s. 36.3(h); 2017-212, s. 4.10(b); 2020-18, s. 13(c); 2021-180, s. 40.3(e).)

**§ 143-215.73. Recommendation and disbursement of grants.**

After review of grant applications, project funds shall be disbursed and monitored by the Department. (1979, c. 1046, s. 1; 1983, c. 717, s. 70; 1985 (Reg. Sess., 1986), c. 955, s. 93; 1987, c. 827, s. 154; 2006-203, s. 90.)

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0401

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*At some point language proposed as a rule is so unclear and ambiguous that it does not regulate, set a standard, implement interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-21.2(8a), and the language is nothing more than a mere statement of policy as the title to the 15 NCAC 07M .0401 suggests. Staff counsel believes 15A NCAC 07M .0401 has reached that point notwithstanding the CRC's revisions.*

*While the CRC made some revisions to remedy ambiguity, significant ambiguity remains such that, considering the entirety of language adopted, it is unclear whether the CRC is adopting a "rule" as defined in G.S. 150B-2(8a) or a policy statement.*

William W. Peaslee  
Commission Counsel

*The CRC employs the term “coastal resources” without any definition in either the Chapter 7 or Chapter 113A. It is unclear what the CRC means by this term.*

*The first three sentences of Paragraph (a) appear to be prefatory and are not reasonably necessary pursuant to G.S. 150B-21.9(a)(3).*

*The fourth sentence of Paragraph (a) appears to require that “the exercise of regulatory authority, and determinations of consistency” “assure that the development of energy facilities and energy resources shall avoid significant adverse impact.” The language does not specify whose exercise of authority and determinations are to make the assurances, nor to whom the assurances shall be made.*

*The first two sentences of Paragraph (b) appear to be prefatory and are not reasonably necessary pursuant to G.S. 150B-21.9(a)(3).*

*The third sentence of Paragraph (b) however appears to define or mandate that which shall be included in the “enforceable policies”. It is unclear to which “enforceable policies” the CRC is referring or whether the CRC is using the rule as authority to make the policies enforceable. It is also unclear why the contents of a policy would be included in a rule as opposed to in the policy itself. Accordingly, to the extent that the language is a rule and can be adopted, the language is ambiguous.*

*The fourth sentence of Paragraph (b) requires all permit applications, plans and assessments to contain “information to allow analysis”. This language is a facially ambiguous standard. The regulated public would not know what type or amount of information is required without consulting the agency. Accordingly, to the extent that the language is a rule and can be adopted, the language is ambiguous.*

*It is staff’s opinion that that the agency’s revisions do not satisfy the RRC’s objections pursuant to G.S. 150B-21.9(a)(1)-(4).*

*Assuming arguendo that the RRC finds this language to meet the definition of a “rule”, staff recommends that the RRC object to the language pursuant to G.S. 150B-21.9(a)(2) for ambiguity.*

*Staff further recommends that the RRC determine that the revised language does not constitute a substantial change pursuant to G.S. 150B-21.12(c).*

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.



...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0402

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
  - Lack of statutory authority
  - X Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September 2022 meeting, the Rules Review Commission ("RRC") objected to this rule for ambiguity. (Attached hereto)*

*In January 2023 the Coastal Resources Commission ("CRC") filed a revised rule.*

*In its revision of Paragraph (b), the agency newly employs the term "significant adverse impact". This term is also under consideration by the RRC in other CRC rules. Staff finds this phrase to be ambiguous. RRC Counsel Lawrence Duke has issued a staff opinion on the ambiguity of this phrase attached hereto and recommended for reading.*

*The CRC employs the term "coastal resources" without any definition in either the Chapter 7 or Chapter 113A. It is unclear what the CRC means by this term.*

*The staff recommends that the RRC find that the CRC has not satisfied the RRC's objection regarding ambiguity pursuant to G.S. 150B-21.12(c).*

*Staff further recommends that the RRC find that the revisions do not substantially differ from the proposed and published rule.*

William W. Peaslee  
Commission Counsel

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0402

RECOMMENDED ACTION: **September 12, 2022**

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

### COMMENT:

*Paragraph (a) of the Rule entitled "Definitions", provides a definition of "Impact Assessment". In its original submission, paragraph (a) stated that "the Impact Assessment shall include" and then stated the necessary items. The Coastal Resources Commission deleted "shall include" and replaced it with "includes". In the context of a definition, this changes the listed items from that which must be included in an Impact Assessment to that which may also be considered an Impact Assessment. Accordingly, the adopted rule differs substantially from the proposed rule as it produces an effect that could not reasonably have been expected based upon the proposed rule pursuant to G.S. 150B-21.2(g)(3).*

*Paragraph (a)(9) requires the Impact Analysis to provide "other specific data required by various state and federal agencies and commissions with jurisdiction to evaluate the consistency of the proposed project with relevant standards and guidelines". This is ambiguous.*

*The Rule defines the term "Major Energy Facilities" as energy facilities that "have the potential to negatively impact any land or water use or coastal resource of the coastal area." While Rule proceeds to provide a list of facilities that are specifically included, it does not site the listed facilities as examples which would have clarified, limited, and defined the types of facilities the CRC considers having the potential to have negative impact. Further, there is no definition of "negative impact". Accordingly, the agency would have broad discretion in determining which energy facilities are Major Energy Facilities. Any energy facility could become a Major Energy Facility by the arbitrary standard of having the "potential" to have a negative impact.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(2).*

William W. Peaslee  
Commission Counsel

To: All RRC Commissioners  
From: Lawrence R. Duke, Commission Counsel  
In re: 15A NCAC 07H .2305  
Date: **January 17, 2023**

**THE RRC OBJECTED TO RULE .2305 FINDING THE TERM “SIGNIFICANT ADVERSE IMPACT” UNCLEAR AND AMBIGUOUS.**

*SIMILAR TO OTHER COASTAL RESOURCES COMMISSION RULES BEFORE THE RRC AT THIS JANUARY MEETING, THE RRC ISSUED AN OBJECTION AT THE SEPTEMBER 2022 MEETING TO RULE 07H.2305. ON NOVEMBER 23, 2022, CRC SUBMITTED A LETTER STATING IT WOULD NOT BE REVISING RULE .2305, WOULD NOT BE WITHDRAWING THIS RULE, AND REQUESTED THAT THE RRC RESCIND ITS EARLIER OBJECTION TO THIS RULE. IT SENT A SECOND LETTER ON JANUARY 18, 2023, RESTATING THE SAME ARGUMENT.*

*AT THE DECEMBER 2022 MEETING, THE RRC INDICATED IT WAS WILLING TO TAKE THE NOVEL STEP OF CONSIDERING THIS MATTER ANEW, PRESUMABLY BASED ON THE ARGUMENTS CRC MADE IN ITS NOVEMBER 23<sup>RD</sup> AND JANUARY 18<sup>TH</sup> LETTERS, EACH OF WHICH ARE ADDRESSED BELOW.*

I. Statutory Argument

*CRC ARGUES THAT BECAUSE THE STATUTE GRANTING IT AUTHORITY TO REGULATE DREDGE AND FILL PERMITS USES “SIGNIFICANT ADVERSE EFFECT”, THIS AND SIMILAR PHRASES ARE UNAMBIGUOUS. IN .2305 IT USES “SIGNIFICANT ADVERSE IMPACT”. CRC USES “SIGNIFICANT ADVERSE IMPACT” AND “SIGNIFICANT ADVERSE EFFECT” INTERCHANGEABLY IN BOTH LETTERS. IT WOULD SEEM THAT THIS WOULD CUT AGAINST CRC’S ARGUMENT AND ONLY MAKES THIS AMBIGUITY MORE PROFOUND.*

*THE GENERAL ASSEMBLY USES THE SPECIFIC PHRASE FROM RULE .2305 IN ONLY **ONE** STATUTE, G.S. 143-215.120, WHICH REGULATES WIND ENERGY FACILITIES. **IT IS NOT USED IN THE STATUTE CITED IN CRC’S MOST RECENT LETTER, EVEN THOUGH THAT LETTER INCORRECTLY STATES THAT G.S. 113-229(E) “USES THE VERY SAME PHRASE”.** FURTHERMORE, OUR LEGISLATURE IS UNDER NO OBLIGATION TO MEET THE SPECIFICITY REQUIREMENTS OF G.S. 150B-21.9. IT MAY CHOOSE LANGUAGE THAT EMPOWERS A RULEMAKING BODY TO FLESH OUT WITH CLARITY AND UNAMBIGUITY HOW THE STATUTE WILL BE APPLIED VIA ADMINISTRATIVE RULES. THE RRC HAS BEEN TASKED WITH ENSURING THE ADMINISTRATIVE CODE IS “CLEAR AND UNAMBIGUOUS”. G.S. 150B-21.9(A)(2). STATUTES AND ADMINISTRATIVE RULES ARE NOT HELD TO THE SAME STANDARD.*

*FURTHERMORE, IN USING “SIGNIFICANT ADVERSE IMPACT”, G.S. 143-215.120 DOES NOT USE THE PHRASE AS A GENERAL TERM, BUT IN EACH INSTANCE STATES SPECIFICALLY TO WHAT THE IMPACT WOULD APPLY. FOR INSTANCE: “A SIGNIFICANT ADVERSE IMPACT ON THE MISSION, TRAINING, OR OPERATIONS OF ANY MAJOR MILITARY INSTALLATION OR BRANCH OF MILITARY IN NORTH CAROLINA AND RESULT IN A*

William W. Peaslee  
Commission Counsel

DETRIMENT TO CONTINUED MILITARY PRESENCE IN THE STATE.” G.S. 143-215.120(A)(2). FEDERAL REGULATIONS USE THE TERM IN A SIMILAR WAY. HOWEVER, RULE .2305 DOES NOT LIMIT THE TERM IN ANY WAY AND LEAVES IT OPEN TO INTERPRETATION BY THE REGULATOR.

THE RESULT WILL BE THE ARBITRARY REGULATION OF PROPERTY OWNERS, AGAINST WHOM THE PROCESS WILL BE THE PUNISHMENT. PERMITS DENIED MUST THEN BE EITHER ABANDONED OR LITIGATED, BOTH OF WHICH WILL HAVE HIGH COSTS FOR THE REGULATED PUBLIC. SURPRISINGLY, ONE SUCH EXAMPLE OF THIS LITIGATION IS USED IN CRC’S NEXT ARGUMENT.

## II. Term of Art Argument

CRC NEXT ARGUES IN ITS LETTER THAT “SIGNIFICANT ADVERSE IMPACT” “IS “A TERM OF ART USED IN OTHER RULES AND UNDERSTOOD BY THE COURTS.[”] SEE, E.G., SHELL ISLAND HOMEOWNERS ASSOC. V. TOMLINSON, 134 NC APP. 217 (1999).” HOWEVER, THE CITED CASE ONLY USES THIS PHRASE ONCE, AND ONLY WHEN QUOTING THE CRC RULE AT ISSUE IN THAT CASE. THE PHRASE IS NOT DISCUSSED FURTHER AND DOES NOT IMPACT THE OUTCOME OF THE CASE.

IN SHELL ISLAND HOMEOWNERS ASSOC., THE REGULATED ENTITY (A HOMEOWNERS’ ASSOCIATION) WAS DENIED A PERMIT TO ERECT PERMANENT EROSION CONTROL STRUCTURES AND HAD TO LITIGATE THIS DENIAL. THE ASSOCIATION’S CLAIMS WERE DISMISSED ON JURISDICTIONAL AND CONSTITUTIONAL GROUNDS, WITH NO RELATION TO THE RULE UNDER WHICH THE PERMIT WAS DENIED. THERE IS NO WAY TO READ THIS CASE AND COME TO THE CONCLUSION THAT “SIGNIFICANT ADVERSE IMPACT” IS A TERM OF ART UNDERSTOOD BY THE COURTS BECAUSE THE TERM IS NEITHER DEFINED NOR EVEN DISCUSSED IN THE CASE.

## III. Rules Argument

FINALLY, CRC’S LETTER ESSENTIALLY ARGUES THAT IT SHOULD BE ALLOWED TO USE “SIGNIFICANT ADVERSE IMPACT” BECAUSE IT USES THAT PHRASE AND SIMILAR PHRASES IN ITS RULES. IT STATED IN ITS RESPONSE TO THE REQUESTS FOR CHANGES THAT IT SHOULD BE ALLOWED BECAUSE “[T]HE TERM OF ART IS USED THROUGH OUT [SIC] THE CRC RULES AND HAS BEEN FOR 40 YEARS.” THE LETTER CONTINUES, “[I]T IS ARBITRARY AND CAPRICIOUS FOR THE RRC TO CLAIM THE USE OF THIS PHRASE IN ONE RULE IS AMBIGUOUS WHEN THAT OBJECTION HAS NOT BEEN CONSISTENTLY ASSERTED BY THE RRC.”

TO THE EXTENT THAT THE CRC AVERS THAT ITS REGULATED PUBLIC UNDERSTANDS THIS TERM DESPITE ITS AMBIGUITY, IT SHOULD BE NOTED THAT THE CRC HAS HAD OVER THIRTY YEARS TO EDUCATE THE REGULATED OF THE MEANING OF THE TERM AS SUBJECTIVELY DETERMINED BY THE CRC. LONG-STANDING AMBIGUOUS LANGUAGE IN THE CODE, AND THE ENFORCEMENT THEREOF BY THE CAPRICES OF THE AGENCY TRAINING THE REGULATED, DO NOT PERMIT THE LANGUAGE TO ESCAPE FROM SUBSEQUENT REVIEW. INDEED, THIS GOES TO THE VERY HEART OF THE DECENNIAL PERIODIC REVIEW.

*THIS ARGUMENT IS NOT COMPELLING UNLESS THE RRC WISHES TO EXCLUDE LANGUAGE IN THE CODE, WHICH HAVE BEEN USED HISTORICALLY BY A REGULATORY BODY, FROM ITS REVIEW. THIS ARGUMENT WOULD EFFECTIVELY NULLIFY THE STANDARDS UNDER WHICH THE RRC MAKES ITS DETERMINATIONS ON RULES THAT COME BEFORE IT. SEE G.S. 150B-21.9. THIS WILL LIKELY HAVE FAR-REACHING RAMIFICATIONS, WITH THE EFFECT OF GRANDFATHERING IN MATTERS ALREADY IN THE CODE. THIS SEEMS TO RUN AFOUL OF THE PERIODIC REVIEW MANDATED BY THE LEGISLATURE.*

**CONCLUSION**

*AS STATED ABOVE, EACH OF CRC'S ARGUMENTS FAIL: ITS USE OF INTERCHANGEABLE PHRASES, ITS CONFLATION OF STANDARDS APPLIED TO STATUTE VERSES THE ADMINISTRATIVE CODE, ITS USE OF CASELAW THAT IS INAPPLICABLE, ITS "WE'VE ALWAYS DONE IT AND YOU'VE LET US" ARGUMENT. UNDER CLOSER REVIEW, NOT ONE OF THESE ARGUMENTS IS COMPELLING. THEREFORE, MY OPINION HAS NOT CHANGED: RULE .2305, AS WELL AS THE OTHER RULES CONTAINING "SIGNIFICANT ADVERSE IMPACT", SHOULD BE OBJECTED TO AND CONTINUE UNDER THE OBJECTION UNTIL CRC ALTERS THE LANGUAGE SO THAT THE REGULATED PUBLIC CAN UNDERSTAND CLEARLY AND UNAMBIGUOUSLY WHAT IS REQUIRED OF THEM.*

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)



**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.



## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0403

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*While the CRC has revised the language to remove some ambiguity, significant ambiguity remains in the revised "rule" as stated hereafter.*

*Throughout this rule the CRC employs the term "significant adverse impact" without definition, or example. Staff counsel recommends that the RRC find this term to be ambiguous in the absence of any definition. Staff counsel Lawrence Duke has written a memo on the ambiguity of this term for RRC members' consideration as the term is used frequently in multiple rules adopted by the CRC and under consideration by RRC.*

*The CRC employs the term "coastal resources" without any definition in either the Chapter 7 or Chapter 113A. It is unclear what the CRC means by this term.*

William W. Peaslee  
Commission Counsel



*In Paragraph (c), the CRC authorizes local governments to “develop siting measures”. It is unclear whether the CRC means adopt, enforce, permit, or restrict by the use of the word “develop”. Or perhaps the CRC intends the term as defined in G.S. 113A-103(5). Further, “siting measures” is an undefined term used only in this instance in all of Chapter 7.*

*In Paragraph (c), “wind energy facilities”<sup>1</sup> are required to “demonstrate compliance” with local ordinances. It is unclear how the facility is to demonstrate compliance or whether the CRC simply intends for the facilities to be in compliance.*

*In Paragraph (d), requires “energy facilities” that do not require shorefront access to be sited “inland of shorelines areas”. While the CRC has defined “major energy facilities” in 15A NCAC 07M .0402, the CRC has not defined “energy facilities”. “Shoreline areas” is an undefined term used only in this instance in all of Chapter 7. Further, what the CRC means by “inland” is ambiguous.*

*In Paragraph (d), shoreline siting of energy facilities is “acceptable only if it can be demonstrated that there are no adverse impacts” to coastal resources, etc. By employing the word “acceptable”, the CRC appears to be referring to some permitting or approval process that is not referenced. It is unclear who must demonstrate and how this is accomplished.*

*In Paragraph (d), the CRC uses the term “coastal zone areas”. This is an undefined term used only in this instance in all of Chapter 7. However, “coastal area” is defined in G.S. 113A-103(2). It would appear the CRC intended something other than the coastal area by using the term coastal zone area.*

*In Paragraph (e), the CRC requires that scenic and visual qualities “shall be considered and protected”. The rule does not state who is responsible for this mandate.*

*In Paragraph (f), requires all “energy facilities” in or impacting the use of public trust waters and adjacent lands or coastal resources to comply with the listed criteria in Subparagraphs (f)(1-12). While the CRC has defined “major energy facilities” in 15A NCAC 07M .0402, the CRC has not defined “energy facilities”.*

*In Subparagraph (f)(2), the CRC uses the term “petroleum facilities” and “Oil Spill Response Plan”. Neither term is defined.*

*In subparagraph (f)(4), the CRC phrase “high biological or recreational value”.<sup>2</sup> This is an undefined term used only in this instance in all of Chapter 7.*

*In subparagraph (f)(8), the CRC determines that major energy facilities “are not appropriate uses” in areas defined by G.S. 113A-113(b)(4). It is unclear who, if anyone, is being regulated. Further, the CRC uses the phrase “of more than local significance” which is an ambiguous standard.*

*In Subpart (f)(10)(F), the CRC uses the term “Ocean Dredged Material Disposal Sites.” This is an undefined term used only in this instance in all of Chapter 7.*

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<sup>1</sup> “WIND ENERGY FACILITY” IS DEFINED IN 15A NCAC 07H .0106.

<sup>2</sup> UNLIKE “HIGH BIOLOGICAL SIGNIFICANCE” USED IN SUBPART (F)(1)(A) WHICH PROVIDES EXAMPLES OF WHAT THE CRC MEANS, THE CRC FAILS TO DEFINE THE TERM “HIGH BIOLOGICAL SIGNIFICANCE” IN ANY WAY.

*In Subpart (f)(10)(F), the CRC phrase of “of more than local significance” which is an ambiguous standard.*

*In Subpart (f)(10)(K), the CRC refers to the “Wild and Scenic River System”. This is an undefined term and used only in this instance in all of Chapter 7.*

*In Subparagraph (f)(11), the CRC uses the term “lowest biological vulnerability”. This is an undefined term used only in this instance in all of Chapter 7. It appears that the CRC could establish those periods by rule rather than describing them.*

*In Subparagraph (f)(12), the CRC uses the term “facilities” twice. It is unclear what facilities the CRC intends. Presumably the CRC intends for this to be applicable to energy facilities (once defined), major energy facilities, petroleum facilities, and wind energy facilities.*

*It is staff’s recommendation that the RRC find that the agency’s revisions do not satisfy the RRC’s objections pursuant to G.S. 150B-21.9(a)(2).*

*Staff further recommends that the RRC delay determination of whether the revised language constitutes a substantial change pursuant to G.S. 150B-21.12(c) pending conclusion of the ambiguity of the language.*

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and

the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.



- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 143-215.70. Secretary of Environmental Quality authorized to accept applications.**

The Secretary is authorized to accept applications for grants for nonfederal costs relating to water resources development projects from units of local government sponsoring such projects, except that this shall not include small watershed projects reviewed by the State Soil and Water Conservation Commission pursuant to G.S. 139-55. (1979, c. 1046, s. 1; 1987, c. 827, s. 154; 1989, c. 727, s. 218(109); 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v).)

**§ 143-215.71. Purposes for which grants may be requested.**

(a) Applications for grants may be made for the nonfederal share of water resources development projects for the following purposes in amounts not to exceed the percentage of the nonfederal costs indicated:

- (1) General navigation projects that are sponsored by local governments - eighty percent (80%);
- (2) Recreational navigation projects - twenty-five percent (25%);
- (3) Construction costs for water management (flood control and drainage) purposes, including utility and road relocations not funded by the State Department of Transportation - sixty-six and two-thirds percent (66 2/3%), but only of that portion of the project specifically allocated for such flood control or drainage purposes;
- (4) Stream restoration - sixty-six and two-thirds percent (66 2/3%);
- (5) Protection of privately owned beaches where public access is allowed and provided for - seventy-five percent (75%);
- (6) Land acquisition and facility development for water-based recreation sites operated by local governments - fifty percent (50%);
- (7) Aquatic weed control projects sponsored by local governments - fifty percent (50%);
- (8) Projects that are part of the Environmental Quality Incentives Program - one hundred percent (100%).

(b) Notwithstanding subdivision (8) of subsection (a) of this section, projects that are part of the Environmental Quality Incentives Program are ineligible for funding under this Part if they receive funding from the Clean Water Management Trust Fund established in G.S. 143B-135.234. (1979, c. 1046, s. 1; 1983, c. 450; 1987, c. 781, s. 1; 2016-94, s. 37.2(h); 2020-18, s. 12(a).)

**§ 143-215.72. Review of applications.**

(a) The Secretary shall receive and review applications for the grants specified in this Part and approve, approve in part, or disapprove such applications.

(b) In reviewing each application, the Secretary shall consider:

- (1) The economic, social, and environmental benefits to be provided by the projects;
- (2) Regional benefits of projects to an area greater than the area under the jurisdiction of the local sponsoring entity;
- (3) The financial resources of the local sponsoring entity;
- (4) The environmental impact of the project;
- (5) Any direct benefit to State-owned lands and properties.

(c) When the Secretary issues new or revised policies for review of grant applications and fund disbursement under this Part, those policies shall not apply to a project already approved for funding unless the project applicant agrees to the new or revised policy. For purposes of this section, a project is approved for funding when the Department enters into a contract or other binding agreement to provide any share of State funding for the project. Nothing in this subsection is intended to preclude the Secretary from issuing or enforcing policies applicable to projects approved for funding in order to comply with a requirement of State law or federal law or regulations.

(d) The following procedures apply only to grants for the purpose set forth in G.S. 143-215.71(8):

- (1) A nongovernmental entity managing, administering, or executing the grant on behalf of a unit of local government may apply as a co-applicant for the grant and may be included as a responsible party on any required resolution issued by the unit of local government.
- (2) Upon request signed by the grant applicant and co-applicant, the Department shall make periodic payments to the co-applicant for its share of nonfederal costs of a project prior to receipt of a final practice approval from the Natural Resources Conservation Service if the grantee has submitted a certified reimbursement request or invoice.
- (3) The Department shall annually report no later than November 1 to the Joint Legislative Oversight Committee on Agriculture and Natural and Economic Resources and the Fiscal Research Division regarding grants for projects funded through the Western Stream Initiative. The report shall include measures of grant administration and grant implementation efficiency and effectiveness. For purposes of this subdivision, the "Western Stream Initiative" refers to the portion of federal Environmental Quality Incentives Program funding provided to the Western North Carolina Stream Initiative for the counties of Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Cherokee, Clay, Cleveland, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Stokes, Surry, Swain, Transylvania, Watauga, Wilkes, Yadkin, and Yancey.

- (4) A single project shall consist of all the landowners and other participants under a project design contract approved by the Natural Resources Conservation Service for a contiguous section of stream. (1979, c. 1046, s. 1; 2017-57, s. 36.3(h); 2017-212, s. 4.10(b); 2020-18, s. 13(c); 2021-180, s. 40.3(e).)

**§ 143-215.73. Recommendation and disbursement of grants.**

After review of grant applications, project funds shall be disbursed and monitored by the Department. (1979, c. 1046, s. 1; 1983, c. 717, s. 70; 1985 (Reg. Sess., 1986), c. 955, s. 93; 1987, c. 827, s. 154; 2006-203, s. 90.)

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0701

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*At some point language proposed as a rule is so unclear and ambiguous that it does not regulate, set a standard, implement interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-21.2(8a), and the language is nothing more than a mere statement of policy as the title to the 15 NCAC 07M .0701 suggests. Staff counsel believes 15A NCAC 07M .0701 has reached that point notwithstanding the CRC's revisions.*

*Subparagraph (a) continues to read like a policy, rather than a rule as defined by G.S. 150B-2(8a). To the extent that it meets the definition of a rule, the language is unclear about who it is regulating. It is unclear who the CRC is requiring to mitigate or minimize adverse impacts and under what circumstances. It is also unclear in the second sentence who is responsible for protecting and maintaining coastal ecosystems.*

William W. Peaslee  
Commission Counsel

*The CRC employs the term “coastal resources” without any definition in either the Chapter 7 or Chapter 113A. It is unclear what the CRC means by this term.*

*Staff counsel recommends that the RRC find that the revised language does not satisfy any of the RRC’s objections pursuant to G.S. 150B-21.9(a)(1)-(4) from September 2022.*

*Assuming arguendo that the RRC finds this language to meet the definition of a “rule”, staff recommends that the RRC object to the language pursuant to G.S. 150B-21.9(a)(2) for ambiguity.*

*Staff further recommends that the RRC determine that the revised language does not constitute a substantial change pursuant to G.S. 150B-21.12(c).*

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)



G.S. 150B-2

...

(8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
- e. Statements of agency policy made in the context of another proceeding, including:
  1. Declaratory rulings under G.S. 150B-4.
  2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0704

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule for lack of statutory authority and lack of clarity and ambiguity pursuant to G.S. 150B-21.9(a)(1) and (2). Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection. RRC staff counsel issued a staff opinion recommending that the RRC find that the CRC had not satisfied the RRC's September 2022 objections and had also adopted a rule substantially different from the proposed rule as a result of the CRC's revisions. At its December 2022 meeting, the RRC tables consideration of the rule. Immediately prior to the January 2023 RRC meeting, the CRC submitted a new revision to the rule in the absence of any action by the RRC. At its January 2023 meeting, the RRC tabled consideration of the rule until the February 2023 RRC meeting.*

*This opinion is limited to the rule adopted and filed by the CRC in January 2023.*

*The CRC employs the term "coastal resources" without any definition in either Chapter 7 or Chapter 113A of the North Carolina General Statutes. It is unclear what the CRC means by this term.*

*In paragraph (a)(1), the CRC attempts to clarify "the resources characteristic of unaltered North Carolina ecosystems" by citing to G.S. 113A-102(a). However, G.S. 113A-102(a) does not describe "resources" or "ecosystems".*

*Paragraph (b) states that mitigation proposals "may be the basis for approval of a development..." Again, the Rule does not address the criteria which will be used in making the determination.*

William W. Peaslee  
Commission Counsel

*In paragraph (c), the CRC requires federal agencies to include mitigation proposals “into the project”. Staff counsel does not believe that the CRC has the authority to regulate a federal agency.*

*In paragraph (d), G.S. 113A-120(b) “permit conditions” shall be “memorialized in a mitigation agreement”. The rule states that the mitigation agreement “will constitute a contract” between the mitigation proposal applicant and the Division of Coastal Management. Whether a document is a “contract” is a justiciable issue for the courts. The CRC does not have authority to decide or pre-determine justiciable issues.*

*Accordingly, staff recommends that the RRC find that the CRC has not satisfied the RRC’s objection regarding ambiguity pursuant to G.S. 150B-21.9(a)(2), and by the revisions addressed herein, exceeded its delegated authority pursuant to G.S. 150B-21.9(a)(1).*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

**§ 113A-120. Grant or denial of permits.**

- (a) The responsible official or body shall deny an application for a permit upon finding:
- (1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.
  - (2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).
  - (3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements of more than local concern identified in subdivisions a through c of G.S. 113A-113(b)(3).
  - (4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).
  - (5) In the case of areas covered by G.S. 113A-113(b)(5), that the development will jeopardize the public rights or interests specified in said subdivision.
  - (6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in subdivisions a through e of G.S. 113A-113(b)(6) in such a manner as to unreasonably endanger life or property.
  - (7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions (1) to (6) of this subsection.
  - (8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.
  - (9) In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.
  - (10) In any case, that the proposed development would contribute to cumulative effects that would be inconsistent with the guidelines set forth in subdivisions (1) through (9) of this subsection. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity.

(b) In the absence of such findings, a permit shall be granted. The permit may be conditioned upon the applicant's amending his proposal to take whatever measures or agreeing to carry out whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

(b1) In addition to those factors set out in subsection (a) of this section, and notwithstanding the provisions of subsection (b) of this section, the responsible official or body may deny an application for a permit upon finding that an applicant, or any parent or subsidiary corporation if the applicant is a corporation:

- (1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of

violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;

- (2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;
- (3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

(c) Repealed by Session Laws 1989, c. 676, s. 7. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1; 1983, c. 518, ss. 4, 5; 1987, c. 827, s. 138; 1989, c. 51; c. 676, s. 7; 1997-337, s. 2; 1997-456, s. 55.2B; 1997-496, s. 2; 2000-172, s. 2.1.)



**§ 113A-102. Legislative findings and goals.**

(a) Findings. - It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the Constitution of this State and of the United States.

(b) Goals. - The goals of the coastal area management system to be created pursuant to this Article are as follows:

- (1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;
- (2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;
- (3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;
- (4) To establish policies, guidelines and standards for:
  - a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;
  - b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;
  - c. Recreation and tourist facilities and parklands;
  - d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

- e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;
- f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;
- g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .1001

RECOMMENDATION DATE: February 10, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*At some point language proposed as a rule is so unclear and ambiguous that it does not regulate, set a standard, implement interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-21.2(8a), and the language is nothing more than a mere statement of policy as the title to the 15 NCAC 07M .0101 suggests. Staff counsel believes 15A NCAC 07M .0101 has reached that point notwithstanding the CRC's revisions.*

*The entire language of the rule appears to be prefatory.*

*If the CRC were to remove the words "the public interest requires that" the rule would then be setting a standard, although it would be an ambiguous standard. It is also unclear what the CRC*

William W. Peaslee  
Commission Counsel

*means by “military training” or who it is regulating. It could be military style training conducted by private enterprises or the use a firing range open to the public. Or the CRC could be referring to the United States Armed Forces or perhaps the National Guard. It is unclear what, if any, authority the CRC has over the United States Armed Forces to set a standard by which the military must abide.*

*Notwithstanding the ambiguity regarding who is being regulated, the standard “to the maximum extent practicable” offers no clear guidance to the regulated.*

*The language arguably prohibits the violation of “water quality standards” but does not specify which standards are applicable. How would the regulated public know?*

*The CRC employs the term “coastal resources” without any definition in either the Chapter 7 or Chapter 113A. It is unclear what the CRC means by this term.*

*Lastly, the language requires that the use of “such targets”<sup>1</sup> not “result in public safety hazards”. This is an ambiguous standard which offers no guidance to the regulated public.*

*It is staff’s opinion that that the agency’s revisions do not satisfy the RRC’s objections pursuant to G.S. 150B-21.9(a)(1),(3) and(4) as the language does not meet the definition of a rule.*

*It is staff’s opinion that that the agency’s revisions do not satisfy the RRC’s objections pursuant to G.S. 150B-21.9(a)(2) for ambiguity.*

*If the RRC finds that the United States Armed Forces is being regulated by the language employed, then Staff recommends that the RRC object to the rule pursuant to G.S. 150B-21.9(a)(1) as the CRC exceeded its delegated authority by setting a standard for the United States United States Military.*

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<sup>1</sup> PRESUMABLY THE LANGUAGE IS REFERRING TO TARGETS IN THE “WATER AND WET-LAND-BASED TARGET AREAS” FROM THE FIRST SENTENCE.

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

G.S. 150B-2

...

(8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
- e. Statements of agency policy made in the context of another proceeding, including:
  1. Declaratory rulings under G.S. 150B-4.
  2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.



**§ 113A-102. Legislative findings and goals.**

(a) Findings. - It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the Constitution of this State and of the United States.

(b) Goals. - The goals of the coastal area management system to be created pursuant to this Article are as follows:

- (1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;
- (2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;
- (3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;
- (4) To establish policies, guidelines and standards for:
  - a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;
  - b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;
  - c. Recreation and tourist facilities and parklands;
  - d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

- e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;
- f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;
- g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

**§ 113A-107. State guidelines for the coastal area.**

(a) State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission under Part 3. Land and water areas addressed in the State guidelines may include underground areas and resources, and airspace above the land and water, as well as the surface of the land and surface waters. Such guidelines shall be used in the review of applications for permits issued pursuant to this Article and for review of and comment on proposed public, private and federal agency activities that are subject to review for consistency with State guidelines for the coastal area. Such comments shall be consistent with federal laws and regulations.

(b) The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines. In exercising this function it shall be furnished such staff assistance as it requires by the Secretary of Environmental Quality and the Secretary of the Department of Administration, together with such incidental assistance as may be requested of any other State department or agency.

(c) The Commission shall mail proposed as well as adopted rules establishing guidelines for the coastal area to all cities, counties, and lead regional organizations within the area and to all State, private, federal, regional, and local agencies the Commission considers to have special expertise on the coastal area. A person who receives a proposed rule may send written comments on the proposed rule to the Commission within 30 days after receiving the proposed rule. The Commission shall consider any comments received in determining whether to adopt the proposed rule.

(d), (e) Repealed by Session Laws 1987, c. 827, s. 134.

(f) The Commission shall review its rules establishing guidelines for the coastal area at least every five years to determine whether changes in the rules are needed. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1975, 2nd Sess., c. 983, ss. 75, 76; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, s. 134; 1989, c. 313; c. 727, s. 218(65); 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v).)

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .1002

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule for lack of statutory authority pursuant to G.S. 150B-21.9(a)(1) and for ambiguity pursuant to G.S. 150B-21.9(a)(2).*

*The Coastal Resources Commission ("CRC") filed the same language to which the RRC objected in September 2022 without any changes presumably to satisfy the RRC's objection pursuant to G.S. 150B-21.12.*

*It is staff's opinion that that the agency's filings do not satisfy the Commission's objections to these rules, and that the Commission should determine that the RRC's objections from September 2022 have not been satisfied.*

William W. Peaslee  
Commission Counsel

## RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .1002

RECOMMENDED ACTION: **September 12, 2022**

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

### COMMENT:

*Paragraph (a) requires "public trust waters subject to water restrictions pursuant to 33 USC 3 shall be opened to commercial fishing". It is unclear what, if any, authority the CRC has over 33 USC 3 waters as they appear to be under the authority of the United States Secretary of the Army. Further, the requirement that the water be open "at established times" is ambiguous.*

*Paragraph (b) appears to require "the area of restricted surface waters" to be as large as the "recommended laser safety zone under 33 USCS 3" where laser weaponry is used. In response to staff's inquiry, the CRC identified the Secretary of the United States Army as the authority which establishes the "area of restricted waters". It is unclear what, if any, authority the CRC has over the Secretary of the Army.*

*Paragraph (c) requires water quality to be tested periodically but fails to identify who is required to conduct the test.*

*Accordingly, staff recommends objection to the Rule as the Rule is unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2), and the agency lacks authority to adopt the Rule pursuant to G.S. 150B-21.9(a)(1).*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

## § 3. Regulations to prevent injuries from target practice

**Authority to adopt regulations.** In the interest of the national defense, and for the better protection of life and property on the navigable waters of the United States, the Secretary of the Army is authorized and empowered to prescribe such regulations as he may deem best for the use and navigation of any portion or area of the navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Artillery fire in target practice or otherwise, or by the proving operations of the Government ordnance proving grounds at Sandy Hook, New Jersey, or at any Government ordnance proving ground that may be established elsewhere on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications, or by any plant or facility engaged in the execution of any public project of river and harbor improvement; and the said Secretary shall have like power to regulate the transportation of explosives upon any of said waters: *Provided*, That the authority conferred shall be so exercised as not unreasonably to interfere with or restrict the food fishing industry, and the regulations prescribed in pursuance hereof shall provide for the use of such waters by food fishermen operating under permits granted by the Department of the Army.

**Detail of vessels to enforce regulations.** To enforce the regulations prescribed pursuant to this section, the Secretary of the Army, may detail any public vessel in the service of the Department of the Army, or, upon the request of the Secretary of the Army, the head of any other department may enforce, and the head of any such department is authorized to enforce, such regulations by means of any public vessel of such department.

**Posting and violation of regulations.** The regulations made by the Secretary of the Army pursuant to this section shall be posted in conspicuous and appropriate places, designated by him, for the information of the public; and every person who and every corporation which shall willfully violate any regulations made by the said Secretary pursuant to this section shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not exceeding \$500, or by imprisonment (in the case of a natural person) not exceeding six months, in the discretion of the court.

**Venue and jurisdiction of offenses; procedure.** Offenses against the provisions of this section, or any regulation made pursuant thereto, committed in any Territory or other place subject to the jurisdiction of the United States where there is no court having general jurisdiction of crimes against the United States, shall be cognizable in any court of such place or Territory having original jurisdiction of criminal cases in the place or Territory in which the offense has been committed, with the same right of appeal in all cases as is given in other criminal cases where imprisonment not exceeding six months forms a part of the penalty, and jurisdiction is conferred upon such courts and such courts shall exercise the same for such purposes; and in case any such offense be committed beyond the territorial jurisdiction of any court having jurisdiction thereof, the offense shall be deemed and held to have been committed within the jurisdiction in which the offender may be found or into which he is first brought, and shall be tried by the court having jurisdiction thereof.

**CREDIT(S)**

(July 9, 1918, c. 143, Subch. XIX, §§ 1 to 4, 40 Stat. 892, 893; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501.)



## RRC STAFF OPINION

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .1101

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
  - Extend the period of review

COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*The first four sentences are prefatory. They are statements that neither regulate, set a standard, nor implement an enactment or describe a procedure or practice requirement. In staff's opinion they do not meet the definition of a "rule" pursuant to G.S. 150B-2.(8a).*

*The last sentence is the only language that comes close to the G.S. 150B-2(8a) definition of a rule. If the CRC had written, "Material resulting from the exaction or maintenance of navigation channels shall be used in a beneficial way" the CRC would have adopted a rule as defined by G.S. 150B-2(8a). However, this language too fails to pass the standards established in G.S. 150B-21.9(a). The terms "beneficial way" and "whenever practicable" are unclear and ambiguous.*

William W. Peaslee  
Commission Counsel

*Staff recommends that the RRC determine that the revisions have not satisfied the RRC's objections from September 2022.*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 150B-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8.)

G.S. 150B-2

...

(8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
- e. Statements of agency policy made in the context of another proceeding, including:
  1. Declaratory rulings under G.S. 150B-4.
  2. Orders establishing or fixing rates or tariffs.
- f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
- h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 113A-102. Legislative findings and goals.**

(a) Findings. - It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the Constitution of this State and of the United States.

(b) Goals. - The goals of the coastal area management system to be created pursuant to this Article are as follows:

- (1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;
- (2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;
- (3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;
- (4) To establish policies, guidelines and standards for:
  - a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;
  - b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;
  - c. Recreation and tourist facilities and parklands;
  - d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

- e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;
- f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;
- g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)



**§ 113A-107. State guidelines for the coastal area.**

(a) State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission under Part 3. Land and water areas addressed in the State guidelines may include underground areas and resources, and airspace above the land and water, as well as the surface of the land and surface waters. Such guidelines shall be used in the review of applications for permits issued pursuant to this Article and for review of and comment on proposed public, private and federal agency activities that are subject to review for consistency with State guidelines for the coastal area. Such comments shall be consistent with federal laws and regulations.

(b) The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines. In exercising this function it shall be furnished such staff assistance as it requires by the Secretary of Environmental Quality and the Secretary of the Department of Administration, together with such incidental assistance as may be requested of any other State department or agency.

(c) The Commission shall mail proposed as well as adopted rules establishing guidelines for the coastal area to all cities, counties, and lead regional organizations within the area and to all State, private, federal, regional, and local agencies the Commission considers to have special expertise on the coastal area. A person who receives a proposed rule may send written comments on the proposed rule to the Commission within 30 days after receiving the proposed rule. The Commission shall consider any comments received in determining whether to adopt the proposed rule.

(d), (e) Repealed by Session Laws 1987, c. 827, s. 134.

(f) The Commission shall review its rules establishing guidelines for the coastal area at least every five years to determine whether changes in the rules are needed. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1975, 2nd Sess., c. 983, ss. 75, 76; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, s. 134; 1989, c. 313; c. 727, s. 218(65); 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v).)

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0703

RECOMMENDED ACTION: December 13, 2022

- Approve, but note staff's comment
- X Object, based on:
  - Lack of statutory authority
  - X Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA
- Extend the period of review

### COMMENT:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule for lack of clarity and ambiguousness pursuant to G.S. 150B-21.9. Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.*

*In its revision to the Rule, the agency added Subparagraph (d), which includes the term "significant adverse impacts".*

*"[S]ignificant adverse impact" is undefined. It is counsel's position that the phrase is unclear and ambiguous, and this language could be used to deny an applicant's permit. The regulated public must understand exactly what is required of them and by what criteria a permit may be denied.*

*Accordingly, staff recommends that the RRC find that the revised rule do not satisfy the Commission's objection to this Rule, and that the Commission should continue to object to the revised rule.*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

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- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.