

## **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 07J .0403, .0404, and .0405

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:

*These rules were published in the Register as readoptions "without substantive changes." The agency adopted and filed these rules for RRC review without any strikethroughs or underlines, meaning the agency formally met and adopted these rules with no changes to the text currently in the Code.*

*When the agency submitted revised rules following staff's technical change requests, the agency made changes that were not responsive to technical change requests. In response to staff's questions about these changes, the agency stated: "The CRC has been reviewing this rule and is proposing amendments." To be clear, these revised rules now contain changes that were not published in the Register, were not subject to public comment, and were not included in the changes approved by the Coastal Resources Commission at adoption.*

*The APA has no procedure to add "amendments" to a rule after publication of notice in the Register and after the agency's final action to adopt a rule.<sup>1</sup> G.S. 150B-21.2 specifically states: "When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part."*

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<sup>1</sup> G.S. 150B-21.10 allows technical changes in response to RRC technical change requests. G.S. 150B-21.5 exempts changes requested by the RRC from publication requirements unless RRC determines the changes are substantial.

*Further, staff thinks these changes rise to the level of a “substantial change” as defined in G.S. 150B-21.2(g) because they address a subject matter not addressed in the proposed rule or produce an effect that could not reasonably have been expected. The issue here is that the substantial changes were also not adopted by the Coastal Resources Commission following the close of the comment period. Specifically, staff believes the following proposed changes are substantial.*

**15A NCAC 07J .0403:**

- Paragraph (a) sets new permit expiration timelines.
- The deletion of Paragraph (e) removes an exception allowing development after permit expiration in certain circumstances.

**15A NCAC 07J .0404:**

- Paragraph (b) adds a new exception allowing permits for multi-phased beach nourishment to be granted ten-year extensions.
- Paragraph (b) changes permit renewals for maintenance and repairs at from 10 years to five years.
- Paragraph (b) adds a description of “substantial development” applicable to elevated structures in Ocean Hazard Areas.
- Paragraph (d) changes comment period from three weeks to 30 days.
- Paragraph (f), governing modifications to extended permits, has been deleted.

**15 NCAC 07J .0405:**

- Paragraph (a) makes changes related to minor permit modification requests.
- The deletion of Paragraph (c) which governed minor permit modifications for projects that benefit private waterfront property owners.
- In (c), a “consolidated” fee of \$400 with the Division of Water Resources.
- (c)(1), setting size requirements for modifications, has been deleted.

*Staff recommends objection to the above-referenced rules for failure to comply with the APA because they contain changes, some of which are substantial, that did not meet the notice and comment requirements of the permanent rulemaking process and that were not adopted by the agency.*

## **§ 150B-2. Definitions.**

As used in this Chapter,

- (1b) "Adopt" means to take final action to create, amend, or repeal a rule.

## **§ 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 Web site 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 period of time during which and the 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 who have requested notice of rule making. 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 or text to each person on the mailing list who 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 shall 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 shall 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 who, 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 rule-making 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.

**§ 150B-21.10. Commission action on permanent rule.**

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

**§ 150B-21.5. Circumstances when notice and rule-making hearing not required; circumstances when submission to the Commission not required.**

(a) Amendment. - An agency is not required to publish a notice of text in the North Carolina Register, hold a public hearing, or submit the amended rule to the Commission for review when it proposes to amend a rule to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address, email address, a telephone number, or a Web site.
- (5) Correct a typographical error.
- (6) Repealed by Session Laws 2019-140, s. 1(a), effective July 19, 2019.

(a1) Response to Commission. - An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to change the rule in response to a request or an objection by the Commission, unless the Commission determines that the change is substantial.

1 15A NCAC 07J .0403 is readopted as published in 34:22 NCR 2104 as follows:

2  
3 **15A NCAC 07J .0403 DEVELOPMENT PERIOD/COMMENCEMENT/CONTINUATION**

4 (a) New dredge and fill permits and CAMA ~~permits, excepting~~ Major permits shall expire five years from the date of  
5 permit issuance, with the exception of multi-phased beach nourishment projects, which shall expire ten years from the  
6 date of permit issuance. Minor permits, except those authorizing beach bulldozing ~~when authorized through issuance~~  
7 ~~of a CAMA minor permit,~~ shall expire on December 31 of the third year following the year of permit issuance.

8 (b) ~~Pursuant to Subparagraph (a) of this Rule, a CAMA minor permit~~ permits authorizing beach bulldozing shall  
9 expire 30 days from the date of permit issuance. ~~issuance when issued to a property owner(s).~~ Following permit  
10 expiration, the ~~applicant~~ permit holder ~~is entitled to~~ may request an extension in accordance with Rule .0404(a) of this  
11 Section.

12 (c) Development After Permit Expiration. ~~Expiration Illegal.~~ Any development ~~done~~ undertaken after permit  
13 expiration shall be considered unpermitted and shall constitute a violation of G.S. 113A-118 or G.S. 113-229. Any  
14 development ~~to be done~~ undertaken after permit expiration shall require ~~either a new permit, permit, or renewal of the~~  
15 original permit according to 15A NCAC 7J .0404 with the exception of Paragraph (e) of this Rule.

16 (d) Commencement of Development in Ocean Hazard AEC. No development shall begin until the oceanfront setback  
17 requirement can be ~~established.~~ met in accordance with 15A NCAC 07H .0306. When the ~~possessor of a permit holder~~  
18 ~~or a ruling of an individual receiving an exception to the permit requirement~~ is ready to begin ~~construction, he~~  
19 development, they shall arrange ~~a~~ an on-site meeting with the ~~appropriate permitting authority at the site~~ Division of  
20 Coastal Management or Local Permitting Officer to determine the oceanfront setback. This setback determination  
21 shall replace the one ~~done~~ completed at the time the permit was processed and approved and ~~construction must~~  
22 development shall begin within a ~~period of~~ 60 days from the date of that meeting. In the case of a ~~major~~ shoreline  
23 change that alters the location of the permitted development, ~~within that period~~ a new setback determination will may  
24 be required ~~required, before construction begins.~~ To determine if a new setback is required, additional coordination  
25 with the Division of Coastal Management or Local Permitting Officer shall be required. ~~Upon completion of the~~  
26 ~~measurement, the permitting authority will issue a written statement to the permittee certifying the same.~~

27 (e) Continuation of Development in the Ocean Hazard AEC. Once development has begun under proper authorization  
28 development in the Ocean Hazard AEC may continue beyond the authorized development period if, in the opinion of  
29 the ~~permitting authority,~~ substantial progress has been made and is continuing according to customary and usual  
30 building standards and schedules. ~~In most cases, substantial progress begins with the placement of foundation pilings,~~  
31 ~~and proof of the local building inspector's certification that the installed pilings have passed a floor and foundation~~  
32 ~~inspection.~~

33 (f)(c) Any permit that has been ~~suspended pursuant to G.S. 113A-121.1 as a result of a contested case petition or by~~  
34 ~~order of superior court for a period longer than six months~~ stayed as a result of litigation shall be extended at the  
35 ~~applicant's~~ permit holder's written request for a period equivalent to the period of permit suspension, but not to exceed  
36 the development period authorized under Paragraph (a) of this Rule.

1 ~~(g) An applicant may voluntarily suspend development under an active permit that is the subject of judicial review~~  
2 ~~by filing a written notice with the Department once the review has started. An applicant shall obtain an extension of~~  
3 ~~said permit if the permitting authority finds:~~

4 ~~(1) That the applicant notified the permitting authority in writing of the voluntary suspension;~~

5 ~~(2) The period during which the permit had been subject to judicial review is greater than six months;~~

6 ~~(3) The applicant filed a written request for an extension of the development period once the judicial~~  
7 ~~review had been completed; and~~

8 ~~(4) The applicant undertook no development after filing the notice of suspension. The period of permit~~  
9 ~~extension shall be equivalent to the length of the judicial review proceeding, but not to exceed the~~  
10 ~~development period authorized under Paragraph (a) of this Rule.~~

11  
12 *History Note: Authority G.S. 113A-118; 113A-124(c)(8)*

13 *Eff. March 15, 1978;*

14 *Amended Eff. August 1, 2002; April 1, 1995; July 1, 1989; March 1, 1985; November 1, 1984;*

15 *Readopted Eff. April 1, 2021.*

1 15A NCAC 07J .0404 is readopted with changes as published in 34:22 NCR 2104 as follows:

2  
3 **15A NCAC 07J .0404 DEVELOPMENT PERIOD EXTENSION**

4 (a) For CAMA minor permits authorizing beach bulldozing, the applicant **permit holder** ~~is entitled to~~ may request a  
5 one-time ~~30-day~~ 30-day permit extension. No additional extensions shall be granted after the ~~30-day~~ 30-day extension  
6 has expired. Notwithstanding this Paragraph, the ~~applicant~~ permit holder is eligible to apply for another minor permit  
7 authorizing beach bulldozing following expiration of the ~~30-days~~ 30-day permit extension.

8 ~~(b) Where no development has been initiated during the development period, the permitting authority shall extend~~  
9 ~~the authorized development period for no more than two years upon receipt of a signed and dated request from the~~  
10 ~~applicant containing the following:~~

11 (1) ~~\_\_\_\_\_ a statement of the intention of the applicant to complete the work within a reasonable time;~~

12 (2) ~~\_\_\_\_\_ a statement of the reasons why the project will not be completed before the expiration of the current~~  
13 ~~permit;~~

14 (3) ~~\_\_\_\_\_ a statement that there has been no change of plans since the issuance of the original permit other~~  
15 ~~than changes that would have the effect of reducing the scope of the project, or, project or previously~~  
16 ~~approved permit modifications;~~

17 (4) ~~\_\_\_\_\_ notice of any change in ownership of the property to be developed and a request for transfer of the~~  
18 ~~permit permit, if appropriate; and~~

19 (5) ~~\_\_\_\_\_ a statement that the project is in compliance with all conditions of the current permit.~~

20 ~~Where substantial development, either within or outside the AEC, has begun and is continuing on a permitted project,~~  
21 ~~the permitting authority shall grant as many two year extensions as necessary to complete the initial development. For~~  
22 ~~the purpose of this Rule, substantial development “substantial development” shall be deemed to have occurred on a~~  
23 ~~project if the permittee can show that development has progressed beyond basic site preparation, such as land clearing~~  
24 ~~and grading, and construction has begun and is continuing on the primary structure or structures authorized under the~~  
25 ~~permit. For purposes of residential subdivision, installation of subdivision roads consistent with an approved~~  
26 ~~subdivision plat shall constitute substantial development. Renewals for maintenance and repairs of previously~~  
27 ~~approved projects may be granted for periods not to exceed 10 years.~~

28 ~~(b) All other CAMA permits may be extended where substantial development, either within or outside the AEC, has~~  
29 ~~begun and is continuing. The permitting authority shall grant as many two-year extensions as necessary to complete~~  
30 ~~the initial development, with the exception that multi-phased beach nourishment projects may be granted ten-year~~  
31 ~~extensions to allow for continuing project implementation. Renewals for maintenance of previously approved~~  
32 ~~dredging projects may be granted for periods not to exceed five years. For the purpose of this Rule, substantial~~  
33 ~~development shall be deemed to have occurred on a project if the permit holder can show that development has~~  
34 ~~progressed beyond basic site preparation, such as land clearing and grading, and construction has begun and is~~  
35 ~~continuing on the primary structure or structures authorized under the permit. For elevated structures in Ocean Hazard~~  
36 ~~Areas, substantial development begins with the placement of foundation pilings, and proof of the local building~~  
37 ~~inspector’s certification that the installed pilings have passed a floor and foundation inspection. For residential~~



1 subdivisions, installation of subdivision roads consistent with an approved subdivision plat shall constitute substantial  
2 development.

3 (c) To request an extension pursuant to Paragraphs (a) and (b) of this Rule, the permit holder shall submit a signed  
4 and dated request containing the following:

5 (1) a statement of the completed and remaining work;

6 (2) a statement that there has been no change of plans since the issuance of the original permit other than  
7 changes that would have the effect of reducing the scope of the project or previously approved permit modifications;

8 (3) notice of any change in ownership of the property to be developed and a request for transfer of the  
9 permit, if appropriate; and

10 (4) a statement that the project is in compliance with all conditions of the current permit.

11 ~~(e)(d)~~ When an For extension request requests where substantial development has not met occurred in accordance  
12 with the criteria of Paragraph (b) of this Rule, the Department may circulate the request to the commenting state State  
13 agencies pursuant to 15A NCAC 07J .0207 along with a copy of the original permit application. Commenting agencies  
14 will be given three weeks 30 days in which to comment on the extension request. Upon the expiration of the  
15 commenting period period, the Department will notify the applicant permit holder promptly of its actions on the  
16 extension request.

17 ~~(d)(c)~~ Notwithstanding Paragraphs (b) and (e)(d) of this Rule, an extension request may be denied on making findings  
18 as required in either G.S. 113A-120 or G.S. 113-229(e). Changes in circumstances or in development standards shall  
19 be considered and applied to the maximum extent practical by the permitting authority in making a decision on an  
20 extension request.

21 ~~(e)(f)~~ The applicant for a major development extension request must shall submit, with the request, a check or money  
22 order payable to the Department in the sum of one hundred dollars (\$100.00).

23 ~~(f) Modifications to extended permits may be considered pursuant to 15A NCAC 07J .0405.~~

24  
25 *History Note: Authority G.S. 113A-119; 113A-119.1; 113A-124(c)(8);*

26 *Eff. March 15, 1978;*

27 *Amended Eff. August 1, 2002; August 1, 2000; April 1, 1995; March 1, 1991; March 1, 1985;*

28 *November 1, 1984;*

29 *Readopted Eff. April 1, 2021.*

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0405

RECOMMENDED ACTION:

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

COMMENT:

*Staff recommends objection to the \$400 fee added post-publication to Paragraph (d) for lack of statutory authority. The agency provided a 2001 MOA between the Division of Coastal Management and the Department of Environment and Natural Resources in support of the fee. The MOA references the following statute:*

### **§ 143-215.3D. Fee schedule for water quality permits.**

- (e) Other fees under this Article. –
  - (7) Limit Water Quality Certification Fee Required for CAMA Permit. - An applicant for a permit under Article 7 of Chapter 113A of the General Statutes for which a water quality certification is required **shall pay a fee established by the Secretary.** The Secretary shall not establish a fee that exceeds the greater of the fee for a permit under Article 7 of Chapter 113A of the General Statutes or the fee for a water quality certification under subdivision (3) or (4) of this subsection.

*G.S. 143-215.3D is not listed in the History Note as statutory authority for the Rule. Additionally, the statute grants the authority to establish a fee to the Secretary, not the Coastal Resources Commission. There is no indication in the filing before RRC that the Secretary adopted this Rule.*

Ashley Snyder  
Commission Counsel

1 15A NCAC 07J .0405 is readopted as published in 34:09 NCR 762 as follows:

2  
3 **15A NCAC 07J .0405 PERMIT MODIFICATION**

4 (a) ~~An applicant~~ A permit holder may apply for a major or minor modification ~~modify his permitted~~ of an active  
5 major development permit and/or dredge and fill permit. ~~project only after approval by the Department.~~ In order to  
6 modify an active a permitted project major development or dredge and fill permit the permit holder applicant must  
7 shall make a written request to the ~~Department~~ Division of Coastal Management showing ~~in detail~~ the proposed  
8 modifications. ~~Minor modifications may be shown on the existing approved application and plat.~~ Modification  
9 requests ~~which, in the opinion of the Department,~~ that, based on the Division's assessment of the potential impacts to  
10 coastal resources or use conflicts are considered major will shall require a new ~~application.~~ application and shall  
11 follow the major permit procedures defined in NCAC 07J .0200. ~~Modification requests are subject to the same~~  
12 ~~processing procedure applicable to original permit applications.~~ Modification requests that, based on the Division's  
13 assessment of potential impacts on coastal resources or use conflicts, are considered minor shall require a permit  
14 drawing and project narrative and shall ~~A permit need not~~ be circulated to ~~all~~ those agencies commenting on the  
15 original application and adjacent riparian property owners where, based on the Division's assessment of the impacts  
16 of the proposed changes, the potential exists for additional impacts on coastal resources or use conflicts. ~~if the~~  
17 ~~Commission determines that the modification is so minor that circulation would serve no purpose.~~

18 (b) Modifications to a permitted project ~~which~~ that are imposed or ~~made at the request of~~ or requested by the U.S.  
19 Army Corps of Engineers or other federal agencies ~~must~~ shall be approved by the ~~Department~~ Division of Coastal  
20 Management under provisions of Paragraph (a) of this Rule. ~~Rule dealing with permit modification procedures.~~

21 (c) ~~Modifications of projects for the benefit of private waterfront property owners which~~ that meet the following  
22 criteria ~~shall be considered minor modifications and shall not require a new permit application, but must~~ shall be  
23 approved under the provisions of Paragraph (a) of this Rule:

24 (1) ~~for bulkheads:~~

25 (A) ~~Bulkhead bulkhead must shall~~ be positioned so as not to extend more than an average  
26 distance of two feet waterward of the mean high water contour; ~~contour and in no place~~  
27 ~~shall the bulkhead be more than five feet waterward of the mean high water contour; and~~

28 (B) ~~All all~~ backfill must shall come from an upland source; and

29 (C) ~~No no~~ marsh area may be excavated or filled; and

30 (D) ~~Work work must shall~~ be undertaken because of the necessity to prevent significant loss of  
31 private residential property due to erosion; and

32 (E) ~~The the~~ bulkhead must shall be constructed prior to any backfilling activities; and

33 (F) ~~The the~~ bulkhead must shall be constructed so as to prevent seepages of backfill materials  
34 through the bulkhead; and

35 (G) ~~The the~~ bulkhead may not be constructed in the Ocean Hazard AEC;

36 (2) ~~for piers, docks and boathouses:~~

(A) ~~The the modification or addition may shall~~ not be within 150 feet of the edge of a federally maintained channel; and

(B) ~~The the structure, as modified, must shall~~ be 200 feet or less in total length offshore; and

(C) ~~The the structure, as modified, must shall~~ not extend past the four feet mean low water contour line (four feet depth at mean low water) of the waterbody; and

(D) ~~The the project as modified, must shall~~ not exceed six feet in width; and

(E) ~~The the modification or addition must shall~~ not include an enclosed structure; and

(F) ~~The the project shall continue to be used for private, residential purposes;~~

(3) ~~for boatramps:~~

(A) ~~The the project, as modified, would shall~~ not exceed 10 feet in width and 20 feet offshore; and

(B) ~~The the project shall continue to be used for private, residential purposes.~~

(d)(c) ~~An applicant~~ A permit holder may modify his ~~an active permitted~~ minor development project permit only after approval by the local permit-letting ~~authority.~~ authority, or the Division of Coastal Management if the local government does not have a delegated minor permit program pursuant to G.S. 113A-117 and 15A NCAC 07I. In order to modify a permitted project project, the applicant ~~must~~ permit holder shall make a written request to the local minor permit-letting authority or the Division of Coastal Management showing in detail the proposed modifications. The request shall be reviewed ~~approved in consultation with the appropriate Division of Coastal Management field consultant and granted~~ if all of the following provisions are met:

(1) ~~The size of the project is expanded less than 20 percent of the size of the originally permitted project; and~~

(2)(1) A signed, written statement is obtained from all adjacent riparian property owners indicating they have no objections to the proposed modifications; ~~and~~

(3)(2) ~~The the~~ proposed modifications are consistent with all local, ~~state,~~ State, and federal standards and local Land Use Plans in effect at the time of the modification requests; and

(4)(3) ~~The the~~ type or nature of development is not changed.

Failure to meet ~~these the~~ provisions of this Paragraph shall necessitate the submission of a new permit application.

(e)(d) The applicant for a minor modification or a major permit shall submit with the request a check or money order payable to the Department of Environmental Quality (\$100). The applicant for a major permit modification of a major permit ~~must shall~~ submit with the request a check or money order payable to the Department in the sum of ~~one hundred dollars (\$100.00) for a minor modification and two hundred fifty dollars (\$250.00) or (\$400) in cases where fees are consolidated with the N.C. Division of Water Resources. for a major modification.~~

History Note: Authority G.S. 113A-119; 113A-119.1; ~~113A-124(e)(5);~~ 113-229; 113A-124(c)(8);  
 Eff. March 15, 1978;  
 Amended Eff. August 1, 2000; March 1, 1991; August 1, 1986; November 1, 1984;  
 Readopted Eff. April 1, 2021.

## **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 07J .0407

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:

*Staff recommends objection for lack of clarity. Subparagraph (e)(2) says the Division may suspend or revoke the right to a project if "there has been a change of conditions in the area, or facts that would justify denial of a permit due to additional impacts to coastal resources..." Staff is not sure under what circumstances "facts" would justify permit denial or under what circumstances "impacts to coastal resources" would justify a permit denial.*

1 15A NCAC 07J .0407 is readopted with changes as published in 34:09 NCR 762 as follows:

2  
3 **15A NCAC 07J .0407 PROJECT MAINTENANCE: MAJOR DEVELOPMENT/DREDGE AND FILL**

4 (a) No project previously requiring a major development or dredge and fill permit shall be maintained after the expiration  
5 of the authorized development period without approval from the ~~Department~~ Division of Coastal Management. Permits  
6 may contain provisions ~~which that~~ allow the applicant to maintain the project after its completion. Persons wishing to  
7 maintain a project beyond the development period and whose permit contains no maintenance provision shall apply for a  
8 maintenance permit. This Rule does not apply to maintenance required by rule or by permit condition.

9 (b) Maintenance Request. Persons desiring to initiate maintenance work on a project pursuant to the maintenance provisions  
10 of an existing permit shall file a request ~~at least~~ two weeks prior to the initiation of maintenance work with:

11 Department of ~~Environment and Natural Resources~~ Environmental Quality  
12 Division of Coastal Management  
13 400 Commerce Avenue  
14 Morehead City, NC 28557

15 (c) Such requests shall include:

- 16 (1) the name and address of the permittee;  
17 (2) the number of the original permit;  
18 (3) a description of proposed changes;  
19 (4) in the case of a dredge and fill maintenance request, a statement that no dimensional changes are  
20 proposed;  
21 (5) a copy of the original permit plat with cross-hatching indicating the area to be maintained, any area to be  
22 used as spoil, and the estimated amount of material to be removed; and  
23 (6) the date of map revision and the applicant's signature shown anew on the original plat.

24 (d) Conditions for Maintenance. All work undertaken pursuant to the maintenance provisions of a permit shall comply with  
25 the following conditions:

- 26 (1) Maintenance work under a major development permit shall be limited to activities which are within the  
27 exemptions set forth by the Commission.  
28 (2) Maintenance under a dredge and fill permit shall be limited to excavation and filling which is necessary  
29 to maintain the project dimensions as found in the original permit.  
30 (3) Maintenance work is subject to all the conditions included in the original permit.  
31 (4) Spoil disposal shall be in the same locations as authorized in the original permit, provided that the person  
32 requesting the authority to maintain a project may request a different spoil disposal site if he or she first  
33 serves a copy of the maintenance request on all adjoining landowners.  
34 (5) The maintenance work is subject to any conditions determined by the Department to be necessary to  
35 protect the public interest with respect to the factors enumerated in G.S. 113A-120 or G.S. 113-229.

36 (e) The ~~Department~~ Division of Coastal Management may suspend or revoke the right to maintain a project in whole or in  
37 part upon a finding:

- 38 (1) that the project area has been put to a different use from that indicated in the original permit application;

39 ~~or~~

1 (2) that there has been a change of conditions in the area, ~~newly found facts or facts, or newly reached~~  
2 ~~opinions which that~~ would justify denial of a ~~permit;~~ permit due to additional impacts to coastal resources;  
3 or

4 (3) that there has been a violation of any of the terms or conditions of the original permit.

5 (f) Grant or Denial of Maintenance Request

6 (1) Upon receipt of a complete maintenance request the ~~Department~~ Division of Coastal Management shall  
7 determine if there are grounds for revocation or suspension of the applicant's right to ~~maintain.~~ maintain  
8 based on the criteria in (e) of this Paragraph. If there are grounds for revocation or suspension the  
9 applicant shall be notified of the suspension or revocation by ~~registered letter~~ certified mail, return receipt  
10 requested setting forth the findings on which the revocation or suspension is based.

11 (2) If the ~~Department~~ Division of Coastal Management determines that the right to maintain should not be  
12 revoked or ~~suspended,~~ based on the criteria in (e) of this Paragraph, a letter shall be issued which shall  
13 authorize the applicant to perform maintenance work. The letter shall set forth the terms and conditions  
14 under which the maintenance work is authorized.

15 (3) If the maintenance request discloses changes in the dimensions of the original project, the ~~Department~~  
16 Division of Coastal Management shall notify the applicant that a permit modification or renewal shall be  
17 required pursuant to the procedure set out in 15A NCAC 07J .0404 and .0405.

18 (4) Appeal of ~~department~~ ~~Department~~ the Division of Coastal Management action under this Section shall  
19 be in accordance with 15A NCAC 07J .0302.

20  
21 *History Note: Authority G.S. 113A-103(5)c; 113A-120(b); 113A-124(c)(8);*

22 *Eff. March 15, 1978;*

23 *Amended Eff. June 1, 2005; December 1, 1991; May 1, 1990; March 1, 1985; November 1, 1984;*

24 *Readopted Eff. April 1, 2021.*

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0410

RECOMMENDED ACTION:

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

COMMENT:

*Staff recommends objection for lack of statutory authority. Staff has not been able to locate authority for the agency, instead of a court, to order restoration of sites to pre-development conditions.*

### **§ 113A-126. Injunctive relief and penalties.**

(a) Upon violation of any of the provisions of this Article or of any rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(b) Upon violation of any of the provisions of this Article relating to permits for minor developments issued by a local government, or of any rule or order adopted under the authority of this Article relating to such permits, the designated local official may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the affected local government

Ashley Snyder  
Commission Counsel



upon the relation of the designated local official for injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(c) Any person who shall be adjudged to have knowingly or willfully violated any provision of this Article, or any rule or order adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates, any such provision, rule or order after written notice from the Secretary or (in the case of a permit for a minor development issued by a local government) written notice from the designated local official, the court may determine that each day during which the violation continues or is repeated constitutes a separate violation subject to the foregoing penalties.

(d) (1) A civil penalty of not more than one thousand dollars (\$1,000) for a minor development violation and ten thousand dollars (\$10,000) for a major development violation may be assessed by the Commission against any person who:

- a. Is required but fails to apply for or to secure a permit required by G.S. 113A-118, or who violates or fails to act in accordance with the terms, conditions, or requirements of such permit.
- b. Fails to file, submit, or make available, as the case may be, any documents, data or reports required by the Commission pursuant to this Article.
- c. Refuses access to the Commission or its duly designated representative, who has sufficiently identified himself by displaying official credentials, to any premises, not including any occupied dwelling house or curtilage, for the purpose of conducting any investigations provided for in this Article.
- d. Violates a rule of the Commission implementing this Article.

(2) For each willful action or failure to act for which a penalty may be assessed under this subsection, the Commission may consider each day the action or inaction continues after notice is given of the violation as a separate violation; a separate penalty may be assessed for each such separate violation.

(3) The Commission shall notify a person who is assessed a penalty or investigative costs by registered or certified mail. The notice shall state the reasons for the penalty. A person may contest the assessment of a penalty or investigative costs by filing a petition for a contested case under G.S. 150B-23 within 20 days after receiving the notice of assessment. If a person fails to pay any civil penalty or investigative cost assessed under this subsection, the Commission shall refer the matter to the Attorney General for collection. An action to collect a penalty must be filed within three years after the date the final decision was served on the violator.

(4) In determining the amount of the civil penalty, the Commission shall consider the following factors:

- a. The degree and extent of harm, including, but not limited to, harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
  - b. The duration and gravity of the violation;
  - c. The effect on water quality, coastal resources, or public trust uses;
  - d. The cost of rectifying the damage;
  - e. The amount of money saved by noncompliance;
  - f. Whether the violation was committed willfully or intentionally;
  - g. The prior record of the violator in complying or failing to comply with programs over which the Commission has regulatory authority; and
  - h. The cost to the State of the enforcement procedures.
- (4a) The Commission may also assess a person who is assessed a civil penalty under this subsection the reasonable costs of any investigation, inspection, or monitoring that results in the assessment of the civil penalty. For a minor development violation, the amount of an assessment of investigative costs shall not exceed one-half of the amount of the civil penalty assessed or one thousand dollars (\$1,000), whichever is less. For a major development violation, the amount of an assessment of investigative costs shall not exceed one-half of the amount of the civil penalty assessed or two thousand five hundred dollars (\$2,500), whichever is less.
- (5) The clear proceeds of penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

1 15A NCAC 07J .0410 is readopted as published in 34:09 NCR 762 as follows:

2  
3 **15A NCAC 07J .0410 RESTORATION/MITIGATION**

4 Any violation involving development ~~which~~ that is inconsistent with ~~guidelines~~ rules for development within  
5 AECs (~~i.e., i.e.~~ wetland fill, improper location of a structure, ~~etc.~~) ~~must~~ shall be corrected by restoring the  
6 project site to pre-development conditions upon notice by the Commission or its delegate that restoration is  
7 necessary to recover lost resources, or to prevent further resource damage. Said notice ~~will~~ shall describe the  
8 extent of restoration necessary and a time for its completion. Failure to act to complete the required restoration  
9 may be determined to constitute a separate violation, according to G.S. 113-126(d)(2), subject to the penalties  
10 in Rule .0409 of this section. ~~foregoing penalties.~~ Any resources ~~which~~ that cannot be recovered by restoration  
11 of the affected site shall be replaced in compliance with the goals of the Commission's mitigation policy  
12 described in 15A NCAC 07M .0701. ~~policy.~~

13  
14 *History Note: Authority G.S. 113A-126(d); 113A-124(c); ~~113A-124(e)(5); 113A-124(c)(8);~~*  
15 *Eff. July 1, 1985;*  
16 *Readopted Eff. April 1, 2021.*

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07K .0207

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:

*Staff recommends objection for ambiguity. It is unclear how the agency determines when alterations are "necessary" and "possible." It is also unclear when a dune's capacity as a protective barrier against flooding and erosion is "significantly" diminished.*

Ashley Snyder  
Commission Counsel

1 15A NCAC 07K .0207 is readopted as published in 34:09NCR 763 as follows:

2  
3 **15A NCAC 07K .0207 STRUCTURAL ACCESSWAYS OVER FRONTAL DUNES EXEMPTED**

4 (a) The ~~N.C. North Carolina~~ Coastal Resources Commission ~~hereby~~ exempts from the CAMA permit requirement all  
5 structural pedestrian accessways over frontal dunes which can be shown to meet the following criteria:

6 (1) The accessway ~~must~~ shall not exceed six feet in width and ~~must~~ shall be for private residential or  
7 for public access to an ocean beach. This exemption does not apply to accessways for commercial  
8 use or for motor-powered vehicular use.

9 (2) The accessway ~~must~~ shall be constructed so as to make no alterations to the frontal dunes that are  
10 not necessary to construct the accessway. This means that wherever possible the accessway ~~must~~  
11 shall be constructed over the frontal dune without any alteration of the dunes. In no case shall the  
12 dune be altered so as to significantly diminish its capacity as a protective barrier against flooding  
13 and erosion. Driving of pilings into the dune shall not be considered alteration of a frontal dune for  
14 the purposes of this Rule.

15 (3) The accessway shall conform with any applicable local or ~~state~~ State building code standards.

16 (b) Before beginning any work under this exemption the CAMA local permit officer or Department of ~~Environment,~~  
17 ~~Health, and Natural Resources~~ Environmental Quality representative ~~must~~ shall be notified of the proposed activity to  
18 allow on-site review of the proposed accessway. Notification can be by telephone, in person, or in writing and must  
19 include:

20 (1) name, address, and telephone number of landowner and location of work including county and  
21 nearest community; and

22 (2) the dimensions of the proposed structural accessway.

23  
24 *History Note: Authority G.S. 113A-103(5) c;*  
25 *Eff. November 1, 1984;*  
26 *Amended Eff. December 1, 1991; May 1, 1990;*  
27 *Readopted Eff. April 1, 2021.*