



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

May 13, 2024

Renee Cahoon, Chair
Coastal Resources Commission
Sent via email only: Renee.Cahoon@deq.nc.gov

Re: Return of Rules 15A NCAC 07H .0507, .0508, and .0509; 15A NCAC 07I .0702; 15A NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15 NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

Dear Chair Cohoon:

At its meeting on May 13, 2024, the Rules Review Commission voted to return the above captioned rules in accordance with the requirements of G.S. 150B-21.1(b1). With respect to 15A NCAC 07H .0509; 15A NCAC 07I .0702; 15A NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15 NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101, the RRC adopted the opinion of counsel attached hereto and incorporated by reference.

15A NCAC 07H .0507 and .0508 were returned on the basis that the rules continue to fail to meet the standards of G.S. 150B-21.9, as articulated in staff opinions adopted by the Commission on April 8, 2024 and again at today's meeting. These staff opinions are attached hereto and incorporated by reference.

In accordance with G.S. 150B-21.1(b1), the above-captioned rules are hereby returned.

If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,

/s/ Brian Liebman
Brian Liebman
Commission Counsel

cc: Ashley Snyder, Codifier of Rules, via email
Jennifer Everett, Rulemaking Coordinator, via email
Mary Lucasse, NCDOJ, counsel to CRC, via email

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
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: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0509; 15A NCAC 07I .0702; 15 NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15A NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

DATE ISSUED: May 9, 2024

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

X Return to agency

COMMENT:

Pursuant to G.S. 150B-21.1(b1), an agency has 30 days from receipt of notification of an objection from RRC to either supplement its statement of findings of need or submit a new statement. "If the agency fails to supplement its statement of need with additional findings or submit a new statement to the Commission within 30 days . . . the Commission . . . **shall immediately** return the rule to the agency." Sess. Law. 2023-134, s. 21.2.(a) (emphasis added).

The Commission objected to the above-captioned temporary rules at its April 2024 special meeting and notified the Coastal Resources Commission of the objection via letter dated and emailed to the head of the agency on April 8, 2024. The CRC's thirty-day period to respond

Brian Liebman
Commission Counsel

closed on May 8, 2024. As of the date of this opinion, the Commission has received no supplement to its statement of need or new statement of need with respect to the above captioned temporary rules.¹

Based on the foregoing, it is staff's opinion that the above-captioned temporary rules must be immediately returned to the agency.

¹The agency submitted a response to the objection to Rules 15A NCAC 07H .0507 and .0508 on May 7, 2024. The response was titled "Supplemental to Statements of Need for 15A N.C. Admin. Code 07H .0507 and .0508" and the content was restricted to the substance of these two rules. Moreover, staff contacted the rulemaking coordinator for the CRC and asked whether further responses for the other rules not addressed in the May 7, 2024 response would be forthcoming. Staff received no response. As such, it is staff's opinion that the response cannot be read to extend to any rule other than Rules 07H .0507 and .0508.

Brian Liebman
Commission Counsel

STATE PROPERTY AND LAND USE REGULATION

SECTION 20.5.(a) G.S. 160D-913 reads as rewritten:

"§ 160D-913. Public buildings.

(a) All Except as provided in G.S. 143-345.5 and this section, local government zoning and development regulations are applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions.

(b) Except as provided in G.S. 143-345.5, this Chapter shall not apply to the construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, demolition, or use of any building or property by the State of North Carolina, including The University of North Carolina or any of its constituent institutions, located in whole or in part in Wake County and the project is managed by the State Construction Office.

(c) Except as provided in G.S. 143-345.5, this Chapter shall not apply to the construction, erection, alteration, enlargement, renovation, substantial repair, movement to another site, demolition, or use of any building or property when the project is managed by the Legislative Services Commission.

(d) Notwithstanding the provisions of any general or local law or ordinance, except as provided in Part 4 of Article 9 of this Chapter, no land owned by the State of North Carolina may be included within an overlay district or a conditional zoning district without approval of the Council of State or its delegate.

(e) For properties exempt from this Chapter under subsection (b) or (c) of this section, the State Construction Office or the Legislative Services Commission shall consult with the appropriate county or city with jurisdiction with regard to all of the following:

(1) Water and sewer services to be provided to the project.

(2) Stormwater implications of the project.

(3) Impacts on traffic patterns and parking.

(4) Perimeter buffering, landscaping, tree protection, and riparian buffer requirements.

(5) Local environmental regulations adopted under Part 2 of Article 9 of this Chapter."

SECTION 20.5.(b) This section is effective when it becomes law and applies to any erection, construction, repair, or renovation in existence on or after that date.

PART XXI. ADMINISTRATIVE HEARINGS**INCREASE COMPENSATION FOR RULES REVIEW COMMISSION MEMBERS**

SECTION 21.1. G.S. 143B-30.1(d) reads as rewritten:

"(d) Members of the Commission who are not officers or employees of the State shall receive compensation of two hundred fifty dollars ~~(\$200.00)-(\$250.00)~~ for each day or part of a day of service plus reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence at the rate set out in G.S. 138-6."

AMEND RULEMAKING PROCEDURES IN THE ADMINISTRATIVE PROCEDURE ACT

SECTION 21.2.(a) G.S. 150B-21.1 reads as rewritten:

"§ 150B-21.1. Procedure for adopting a temporary rule.

...

(b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new

~~statement.~~ statement within 30 days of the notification. If the agency fails to supplement its statement of need with additional findings or submit a new statement to the Commission within 30 days, or submits written notice within 30 days to the Commission that the agency does not intend to supplement its statement of need with additional findings or submit a new statement, the Commission or its designee shall immediately return the rule to the agency. If the agency provides additional findings or submits a new ~~statement,~~ statement within 30 days of the notification, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in G.S. 150B-21.9, the Commission or its designee must immediately notify the head of the agency and return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment within 30 days after notification of the return of the rule by the Commission in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. ~~Statutes within 30 days of the date the rule is returned to the agency.~~

(b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of G.S. 12-3.1, the Codifier of Rules shall not enter the rule into the Code.

(b4) When the Commission returns to an agency a proposed permanent rule intended to replace a temporary rule, the holder of a permit from the agency may submit revised plans for a revised permit removing the impacts of the returned rule if all of the following conditions apply:

(1) The permit was conditioned upon adherence to the requirements of a temporary rule that the returned proposed permanent rule was intended to replace.

(2) The revised plans comply with all other applicable regulations.

The agency shall review the revised plans and approve or deny the revised permit within 45 days of the receipt of the revised plans. The agency may not impose an additional permit fee for review of a revised plan resulting from the expiration of a temporary rule.

(c) Standing. – A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in G.S. 150B-21.9. The court shall not grant an ex parte temporary restraining order.

(c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) Effective Date and Expiration. – A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

(1) The date specified in the rule.

(2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.

- (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.
- (6) Notwithstanding subdivision (5) of this subsection, 12 months after the effective date of the temporary rule.

(e) Publication. – When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register."

SECTION 21.2.(b) G.S. 150B-21.2 reads as rewritten:

"§ 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:

...

(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 but not later than 60 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.

...."

SECTION 21.2.(c) G.S. 150B-21.3 reads as rewritten:

"§ 150B-21.3. Effective date of rules.

...

(b2) Objection. – Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons, no later than 5:00 P.M. of the day following the day the Commission approves the rule, clearly requesting review by the legislature in accordance with instructions posted on the agency's Web site pursuant to G.S. 150B-19.1(c)(4), and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. The Commission shall notify the agency that the rule is subject to legislative disapproval on the day following the day it receives 10 or more written objections. ~~When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in G.S. 150B-21.1(a) at the time the notice of text for the permanent rule was published in the North Carolina Register.~~ If the Commission receives objections from 10 or more persons clearly requesting review by the legislature, and the rule objected to is one of a group of related rules adopted by the agency at the same time, the agency that adopted the rule may cause any of the other rules in the group to become effective as provided in subsection (b1) of this section by

RRC STAFF OPINION

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AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0508

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule lays out use standards for development permits in fragile coastal resource areas. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule on all four grounds of G.S. 150B-21.9.

Item (1) and subitems (a)-(c) contain "policy" terms, as they give vague and unspecific terms for approval of permits. For instance, (a) states that "Development shall preserve the values of the individual resource as it functions as a critical component of a natural system." Similarly, in (b) and (c), the Rule seeks to preserve "values of the resource as a unique scientific, associative, or educational resource" and "the aesthetic values of a resource as identified by the local government and citizenry." The reference to "values" which are undefined and ultimately subjective turns this from a rule to a mere statement of policy.

Brian Liebman
Commission Counsel

Moreover, in item (1)(c), there is no process specified for how the local government or citizenry is to express the “values” that are sought to be preserved.

In item (4), the CRC states that development shall be approved only if it finds that the project is “of equal or greater public benefit than those benefits lost or damaged through development.” Because the terms used throughout this rule are so vague, it appears as if this language allows the CRC to essentially pick and choose winners at whim. The rule conditions granting of a permit on the CRC’s finding that an applicant’s project will be equally or more beneficial to the public than whatever portion of the area of environmental concern is damaged by its construction, without defining the contours of “public benefit” and without providing any guidance as to how the CRC will quantify and weigh these subjective “benefits” against each other.

* * * * *

G.S. 150B-19.1(a)(1) states, “An agency may adopt only *rules* that are expressly authorized by federal and State law and that are necessary to serve the public interest” (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:

Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .

....

- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.

To the extent this Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S.150B-2(8a).

Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”

§ 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-2. Definitions.

As used in this Chapter, the following definitions apply:

....

- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

- (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 G.S. 150B-2 Page 3 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.

§ 150B-19.1. Requirements for agencies in the rule-making process.

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

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: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0507

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule purports to describe “unique coastal geological formations”, explain their “significance”, lay out the CRC’s “objectives” for management of these formations, designate Jockey’s Ridge, a large sand dune in Nags Head, North Carolina, as a unique coastal geological formation, and finally to lay out specific use standards for development within the Jockey’s Ridge area of environmental concern (“AEC”). In addition to staff’s objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule on all four grounds of G.S. 150B-21.9.

In paragraph (a), the agency attempts to define “unique coastal geologic formations”, which are a type of AEC enumerated by the legislature in the Coastal Area Management Act. However, the definition offered is almost entirely self-referential: unique coastal geologic formations are “sites that contain *geologic formations* that are *unique* or significant

components of *coastal* systems, or that are notable examples of *geologic formations* or processes in the coastal area.” The rule does not explain what is and is not considered a “geologic formation”, does not define what degree of exclusivity transforms an ordinary geologic formation into a “unique” geologic formation, and does not define the coastal area in which these formations must be found. Further, to the extent that the definition contains words other than those in the term being defined, those words are equally vague and may impermissibly expand the statutory term. The agency does not explain what makes a geologic formation “notable” or “significant”, or how those qualifiers are different from “unique”. Nor does the agency explain how a geologic “process” differs from a “formation”. Without defining these terms, it is impossible for the regulated public, the agency, or a reviewing judge to determine whether the description offered in this rule remains within the meaning of “unique geologic formation” as used in G.S. 113A-113(b)(4)g.

Paragraph (b) purports to describe the significance of “unique coastal geological areas,” again using vague and ambiguous terms such as “unique,” “important,” “uncontrolled,” and “incompatible.” Without further specificity, this paragraph appears to be a mere policy statement, as opposed to a “regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency.” G.S. 150B-2(8a) (2023).

Similarly, paragraph (c) lays out the CRC’s objectives in preserving unique coastal geologic areas in impermissibly vague and unclear terms that are more akin to policy than rule. The agency states that its objective is to “preserve unique resources of more than local significance that function as key physical components of natural systems, as important scientific and educational sites, or as valuable scenic resources.” Terms such as “unique”, “more than local significance,” “key”, “important”, “valuable”, and even “scenic” are all undefined and as such are entirely subjective. Additionally, with the exception of the verb “preserve”, none of this sentence actually expresses an objective; to the contrary, it appears to continue to define—in equally vague terms as in paragraph (a)—what the CRC considers a “unique coastal geologic formation.”

Items (c)(1)-(3) contain the agency’s specific objectives for the functions of a unique coastal geologic formation. The CRC wishes that the formulation be able to “interact with other components of the identified systems”, “be preserved for study purposes”, and be preserved to “protect the values” of the feature “as expressed by the local government and

citizenry”. Again, the language used is vague, subjective, and appears to describe the agency’s policy preferences, rather than specific enactments of the Coastal Area Management Act or the CRC’s procedure or practice requirements. Moreover, there is no process specified for how the local government or citizenry is to express the “values” that are sought to be preserved.

Paragraph (d) is a designation of Jockey’s Ridge as a unique coastal geologic formation AEC. While portions of this paragraph meet the definition of a rule, namely the identification and location of the feature, lines 32-37, which include interesting facts about Jockey’s Ridge are “not statements of general applicability interpreting or implementing an act of the General Assembly or U.S. Congress” and as such are inappropriate for inclusion in a Rule.

In Paragraph (e)(1), the CRC requires developers seeking the removal of more than ten cubic yards of sand per year to seek “a permit” without specifying whether that is a CAMA major, minor, or general permit, or a fill and dredge permit under G.S. 113-229.

* * * * *

G.S. 150B-19.1(a)(1) states, “An agency may adopt only *rules* that are expressly authorized by federal and State law and that are necessary to serve the public interest” (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:

Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .

. . . .

- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.

To the extent this Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S.150B-2(8a).

Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”

§ 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-2. Definitions.

As used in this Chapter, the following definitions apply:

....

- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

- (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 G.S. 150B-2 Page 3 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.

§ 150B-19.1. Requirements for agencies in the rule-making process.

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.