STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

August 21, 2023

Jennifer Everett, Rulemaking Coordinator.
North Carolina Coastal Resources Commission
Sent via email only to: jennifer.everett@deq.nc.gov

Re: Objection to 15A NCAC 07H .0208, .0308, and 15 NCAC 07M .0603.

Dear Ms. Everett:

At its meeting on August 17, 2023, the Rules Review Commission (RRC) objected to the above-captioned Rules pursuant to G.S. 150B-21.9(a). Specifically, with respect to Rules 07H .0208 and .0308, the RRC adopted the opinion of counsel attached hereto and incorporated by reference.

With respect to Rule 07M .0603, the Commission objected pursuant to G.S. 150B-21.9(a)(1) on the grounds that the CRC lacks statutory authority to regulate floating upweller systems.

Please respond to this objection in accordance with the provisions of G.S. 150B-21.12.

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

Sincerely,

Brian Liebman
Commission Counsel

Enc: Staff opinions issued August 14, 2023.

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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 07H .0208

DATE ISSUED: August 14, 2023

RECOMMENDED ACTION:

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

X Failure to comply with the APA

Extend the period of review

COMMENT:

This rule, which governs use standards within estuarine and ocean system areas of environmental concern, contains several different ambiguous or unclear terms. Additionally, several of the agency's post-publication changes to the Rule rise to the level of a substantial change under G.S. 150B-21.2(g).

Significant Adverse Impact

Throughout the Rule, the agency uses the terms "significant adverse impact", "adverse impact", "adverse effect", and "adversely affect" (and other similar formulations) without definition or example, despite their importance to the regulatory scheme enshrined herein.

For instance, in Part (a)(2)(A), as a general use standard the agency requires that any permit granted under this Rule requires a finding that the development is "sited and designed to avoid significant adverse impacts upon the productivity and biologic integrity of coastal wetlands, shellfish beds, submerged aquatic vegetation . . . and spawning and nursery areas." Part (a)(2)(F) further requires that development be timed to "avoid significant adverse impacts on life cycles of estuarine and ocean resources[.]"

These terms are similarly included in almost every specific use standard described in this Rule. Developers seeking to construct navigation channels, canals, and boat basins (subparagraph (b)(1)), drainage ditches (subparagraph (b)(3)), marinas (subparagraph (b)(5)), bulkheads (subparagraph (b)(7)), freestanding moorings (subparagraph (b)(10)), wind energy facilities

(subparagraph (b)(13)), conduct beach nourishment projects (subparagraph (b)(8)), fill existing canals, basins, and ditches (subparagraph (b)(11), or engage in mining of submerged lands (subparagraph (b)(12)) will have their projects evaluated for whether they will cause "significant adverse impacts", "adverse impacts", "adverse effects", etc.

While development projects must avoid "significant adverse impacts" in order to meet with agency approval, the agency provides no definition of this term, provides no examples to elucidate the meaning of the term, or any other guidance that would allow the regulated public to determine whether a particular project is in compliance with this Rule and the laws undergirding it.

In response to staff's request that the agency provide a definition of the term, the CRC responded in an August 3, 2023 memo that "adverse impact," "adverse effect," or "adversely effected" should be given their ordinary meaning, citing to Webster's Dictionary. Incorporating that meaning, the agency states that "adverse impact (or effect)" means "an effect or impact that is opposed or antagonistic to the goals of the Coastal Area Management Act" as found in G.S. 113A-102(b). Turning to the addition of the term "significant", the agency again argues that the word be given its ordinary meaning, which the agency claims is: "to require an impact be large enough to make a difference. This use of this adjective disqualifies a 'de minimus' impact from requiring action under the CRC's rules." The agency then goes on to argue that "significant adverse impact" "is a term of art that has been consistently used by the General Assembly, in North Carolina regulations, and by appellate courts to analyze negative impacts that warrant action." ***It is important to note that these responses were not incorporated into the Rule****.*

The Commission has previously objected to the use of these terms in CRC's rules. At the September 2022 meeting, the Commission objected to 07H .2305 on the basis that "significant adverse impact" was unclear and ambiguous under G.S. 150B-21.9(a)(2). The Commission continued that objection at the February 2023 meeting, and added objections to rules 07H .0508, 07H .0509, 07J .0203, 07M .0202, .0401, .0402, and .0403 where the agency added the term in revisions made following objections on other grounds. Staff hereby incorporates the staff opinions, memos, and objection letters issued with respect to those Rules by reference.

In the aforementioned proceedings before the Commission, the CRC consistently argued that "significant adverse impact" was a term of art which had a meaning known to the General Assembly, the various environmental regulatory agencies, the regulated public, and North Carolina's courts. Nonetheless, the agency has repeatedly declined to articulate this known meaning in writing, incorporate it into its Rules, or provide specific references to this extensive usage other than citations to other equally opaque CRC rules, an inapposite statute, and a case which mentions but does not construe the term.

With respect to the instant Rule, the CRC now appears to argue that "significant adverse impact" and its variants are both terms of art and *have ordinary meaning. This argument is contradicted by the very definition of "term of art": "[a] word or phrase having a specific, precise meaning in a given specialty,* ***apart from its general meaning in ordinary contexts****."* Term of Art*,* BLACK'S LAW DICTIONARY *(11th ed. 2019) (emphasis added). See also* Southern Furniture Co. of Conover, Inc. v. DOT*, 133 N.C.App. 400, 403-04 (1999) ("When terms with special meanings or terms of art appear in an instrument, they are to be given their technical meaning; whereas, ordinary terms are to be given their meaning in ordinary speech.");* In re Pharm. Indus. Average Wholesale Price Litig., 460 F. Supp. 2d 277 (D. Mass. 2006) *("By definition, a term must have an established and settled meaning to constitute a term of art.").*

Thus, to the extent that the agency claims that "significant adverse impact" is a term of art, their claim necessitates the conclusion that "significant adverse impact" does not *have the ordinary meaning of its component words, and instead has a specific industry meaning apart from the ordinary meaning. Such a meaning has not been proffered here, and more importantly, has not been included in this Rule or any other within CRC's authority.*

Assuming for the sake of argument that the agency has imprecisely used the phrase "term of art" and that "significant adverse impact" and its variants are to be given their ordinary meaning, that meaning still has not yet been incorporated into this Rule or any other rule under the CRC's authority. While staff believes that the ordinary meaning articulated in the agency's August 3, 2023 memo could form the basis for a workable definition, unless and until these terms are formally defined within the CRC's rules, staff is of the opinion that the terms "significant adverse impact", "adverse impact", "adverse effect", and "adversely affect" (and other similar formulations) are impermissibly unclear or ambiguous.

Consequently, staff recommends objection to this Rule under G.S. 150B-21.9(a)(2).

Navigation Channels, Canals, and Boat Basins

In (b)(1)(A), as amended, the Rule states that "navigation channels and canals may not be allowed through of regularly and irregularly flooded coastal wetlands if the loss of wetlands will have significant adverse impacts on fishery resources, water quality, or adjacent wetlands, and if there is no alternative that would avoid the wetland losses."

Although it may be that this subparagraph has merely been unartfully edited by the agency, the Rule submitted for review by the agency contains several ambiguities. First, the phrase "through of", while likely a typographical error, indicates some kind of modifier which is no longer in the Rule. Second, the final clause "if there is no alternative that would avoid wetland losses" is unclear in context, as the Rule states when channels and canals would not be allowed. A lack of alternatives is almost always a factor in favor of allowing construction where it would otherwise be prohibited. Here, the Rule provides just the opposite.

Moreover, to the extent that the agency intended to say that a lack of alternatives is indeed a factor that would work against an applicant seeking permission to dig a navigation channel or canal through a wetland, it is staff's opinion that this is a substantial change under G.S. 150B-21.2(g)(3). Previously, the Rule stated that channels and canals may be dug through wetlands if there were no alternative. The new language, which was added post-publication, turns the existing language on its head, creating an "effect that could not reasonably have been expected based on the proposed text of the Rule."

For the foregoing reasons, staff recommends objection to this Rule as impermissibly unclear or ambiguous under G.S. 150B-21.9(a)(2) and for failure to comply with the APA under G.S. 150B-21.9(a)(4)

Marinas

In (b)(5), the CRC defines the specific use standards applicable to marinas within estuarine and ocean system areas of environmental concern. In relevant part, the agency lists four alternatives for siting marinas in order of preference for the least damaging alternative. As amended, the Rule now says that marina projects "shall be designed to accommodate the highest of the four listed priorities."

While the agency has not deleted the text of the other three priorities, it appears that they have been constructively written out of the Rule. Thus, it is unclear whether an applicant may continue to satisfy the requirements of the Rule by accommodating one of the other three priorities. Moreover, if the other three priorities remain as options for the applicant, it is no longer clear who determines which priority the applicant shall accommodate.[1]

Additionally, to the extent that the agency intended to constructively write three of the four priorities for siting marinas out of the Rule, it is staff's opinion that this is a substantial change under G.S. 150B-21.2(g)(3). Previously, the Rule gave an applicant four different priorities, listed in order of preference to the agency, that the applicant might satisfy based upon the permit letting agency's discretion. The amended language, added post-publication, effectively limits applicants to satisfying only the "highest" of these priorities, creating an "effect that could not reasonably have been expected based on the proposed text of the Rule."

For the foregoing reasons, staff recommends objection to this Rule as impermissibly unclear or ambiguous under G.S. 150B-21.9(a)(2) and for failure to comply with the APA under G.S. 150B-21.9(a)(4)

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[1] *Previously, the rule stated that a marina project would accommodate the highest priority "deemed feasible by the permit letting agency." When asked by staff to clarify how that determination was communicated to the applicant, the agency chose to delete "deemed feasibly by the permit letting agency."*

§ 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.)

JOSH STEIN
ATTORNEY GENERAL

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

Memorandum

To: Brian Liebman, Commission Counsel
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

From: Mary L. Lucasse,
Special Deputy Attorney General & Counsel for Coastal Resources Commission

Date: August 3, 2023

Re: 15A NCAC 07H .0208, .0308, 07K .0207, and 15A NCAC 07M .0603

On May 26, 2023, the NC Coastal Resources Commission ("CRC") received a request for G.S. § 150B-21.10 changes to 15A NCAC 07H .0208, .0308, 07K .0207, and 15A NCAC 07M .0603. At its June 2023 meeting, the RRC extended the period of review for the rules in accordance with G.S. § 150B-21.10. Attached is an annotated copy of the requests for changes which includes the CRC's responses (in red) to each request and a clean copy of the rewritten rules for your review.

In addition, the CRC responds to RRC counsel's comments regarding the use of the terms "significant adverse impact," adverse impact, "adverse effect" and "adversely effected" in 15A NCAC 07H 0208 and .0308 as follows:

Our Supreme Court has applied the rules of statutory construction to administrative regulations as well as statutes. State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980). References in the CRC's rules to "adverse impact," "adverse effect" or "adversely effected" should be given their ordinary meaning. See Food Town Stores Inc. v. City of Salisbury, 300 N.C. 21, 2654 S.E.2d 123 (1980) (words are to be given their ordinary meaning unless they have been defined or have "acquired a technical meaning.). Dictionaries may be used to determine the ordinary meaning of words used. State v. Fly, 127 N.C. App. 286, 488 S.E.2d 614 (1997). The words "impact" and "effect" can be used interchangeably. See Webster's II New College Dictionary, (3rd ed., 2005) (definition of impact includes " "the effect or impression of one thing upon another."). The ordinary meaning of "adverse" is opposed or antagonistic. Id. Thus, in context, the ordinary meaning of this phrase is an effect or impact that is opposed or antagonistic to the goals of the Coastal Area Management Act. N.C.G.S. § 113A-102(b). Placing this phrase in the context of the organic statute does not create ambiguity since the CRC's rules could not be reasonably understood as referring to anything else. The ordinary meaning of this phrase – a negative effect or impact – has been used in other statutory contexts. Following are just two of many examples. Padilla

v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010) (defendant's counsel was ineffective by reason of failing to inform the client of the adverse effects of a criminal conviction on immigration status.) and American Motors Sales Corp. v. Peters, 311 N.C. 311, 317, 317 (1984) (considering whether there was an "adverse effect" in order to determine whether a restraint of trade is monopolistic.). Given the plain and ordinary meaning of "adverse impact, "adverse effect" and "adversely effected" in 15A NCAC 07H 0208, the CRC requests counsel reconsider its objection.

RRC Staff may believe that a more difficult question is raised when the adjective "significant" is added to the phrase since this addition indicates that the effect or impact must be large enough to be important. However, as the CRC has previously explained, this phrase is not ambiguous. The ordinary meaning of "significant" when added to "adverse impact" (or some variation of that phrase) is to require an impact be large enough to make a difference. This use of this adjective disqualifies a "de minimus" impact from requiring action under the CRC's rules. This phrase is a "term of art" that has been consistently used by the General Assembly, in North Carolina regulations, and by appellate courts to analyze negative impacts that warrant action. *See* November 23, 2022 Letter to NC Rules Review Commission from Mary L. Lucasse, counsel for the CRC, p 3; January 18, 2023 Letter to NC Rules Review Commission from Mary L. Lucasse, counsel for the CRC, p 1; and February 9, 2023 letter to NC Rules Review Commission from Julie Youngman, SELC, pp 1-2.

The term "significant adverse impact" is also used by state and federal agencies in the environmental review of coastal development projects, where use of the term in this context indicates that there the effects are raised to a level which requires some mitigative measure or a change in the scope of the project is necessary for the project to proceed. Under the National Environmental Policy Act (NEPA), the NEPA review process begins when a federal agency develops a proposal to take a major federal action. These actions are defined at 40 CFR 1508.1, and include a **Finding of No Significant Impact** where a federal agency presents the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. 40 C.F.R. § 1508.13.

15A NCAC 07H .0208 and .0308 relate to construction of development including erosion control activities, navigation channels, canals, and boat basins to marinas, piers, and docks to bulkheads, beach nourishment, submerged land mining, and freestanding moorings. Each permit application may, depending on the design and scope of the proposed development, have different impacts on a range of different environmental and cultural resources. Individual resource values can vary as well, for example, where a small patch of sparsely vegetated, mono-specific salt marsh in an already impacted area may not have the same value as a pristine, densely vegetated, multi-species salt marsh that is providing a variety of habitat for multiple species. Not knowing what the regulated public will propose in any application and how severe the impacts will be on various coastal and marine resources, the CRC is not in a position to list all possible adverse impacts or numerical thresholds regarding the significance of

those impacts. Through its legislative findings and goals, the General Assembly has provided the CRC and DCM with a roadmap to use to weigh negative impacts. This analysis occurs on a case-by-case basis. To provide further examples trying to capture the ordinary meaning of the phrase "significant adverse impact" and explain the roadmap provided by the General Assembly would either be limiting because not every situation could be provided as an example or incomplete. As written, the CRC's rule allows the courts, the CRC, and DCM to weigh and balance the protection provided for the valuable natural resources of the coastal area while ensuring development proceeds appropriately. See 113A-102(b).

For these reasons, the CRC strongly believes that the version of 15A NCAC 07H .0208 submitted simultaneously with this memo, which has been revised to address many of the comments received from RRC, is not impermissibly ambiguous. Accordingly, please recommend approval of the rule as submitted.

Enclosures:

- CRC's Responses to Requests for Changes dated May 26, 2023;
- 15A NCAC 07H .0208 (revised and retyped);
- 15A NCAC 07H .0308 (revised and retyped);
- 15A NCAC 07K .0207 (revised and retyped);
- 15A NCAC 07M .0603 (revised and retyped);
- Nov. 23, 2022 Letter to NC Rules Review Commission from Mary L. Lucasse;
- Jan. 18, 2023 Letter to NC Rules Review Commission from Mary L. Lucasse;
- Feb. 9, 2023 letter to NC Rules Review Commission from Julie Youngman, SELC.

JOSH STEIN
ATTORNEY GENERAL

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

November 23, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305; 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702; 07J .0203, .0206, .0207, .0208, .0210, .0312; 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102.

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC) and pursuant to N.C. Gen. Stat. § 150B-21.12(a)(1) and (2), please accept this letter as the CRC's partial written response to the North Carolina Rules Review Commission ("RRC") September 17, 2022 letter objecting to the above referenced rules (the "Objection Letter"). The CRC will be submitting a second letter (dated November 23, 2022) addressing the remaining rules included in the Objection Letter.

While the CRC disagrees with the RRC's objections, this written response is not intended to be–and should not be interpreted as–a written request to return the above-referenced rules pursuant to N.C. Gen. Stat. § 150B-21.12(d). The CRC is not seeking the return of these rules at this time and, instead, appreciates the opportunity to continue working with the RRC and its staff to resolve the RRC's objections.

At its recent November 17, 2022 regularly scheduled meeting, the CRC decided to submit additional technical changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(1) to the following rules: 07H .0501, .0506, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0204, .0206, .0207, .0208, .0210, .0312, 07M .0601, .0603, .0703, and .0704. While the CRC disagrees with the RRC's objections to these rules, we have attempted to resolve the RRC's concerns through additional technical changes and are submitting the revised rules to the RRC along with this Response. Please do not hesitate to let us know if there are any additional technical changes requested.

In addition, the CRC decided not to submit changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(2), for the following rules: 15A NCAC 07H .0502, .0503, .0505, .0507, .2305, 07I .0406, .0506, 07M .0201, .0202, .0401, .0402, .0403, .0701, .1001, .1002, .1101, .1102. The CRC disagrees with the RRC's objections to these rules.

The CRC is submitting the following additional information in an effort to resolve the concerns raised in RRC Objection Letter to all the above-referenced rules.

1.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101 based on the allegation that "each of [these] . . . rules do not meet the definition of a "Rule" pursuant to G.S. 150B-2(8a)" and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). *See* Objection Letter and attached RRC Staff Opinions. This argument is incorrect.

The CRC's authority and duty to adopt "guidelines for the coastal area" consisting of "statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102" is well established and uniquely provided for under its enabling statute. N.C. Gen. Stat. § 113A-107. In 1978, the North Carolina Supreme Court concluded that "the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area." *Adams v. NC Dep't of Natural & Economic Resources*, 295 N.C. 683, 698, 249 S.E. 2d 402, 411 (1978). The Commission provided an initial response on this issue in its September 1, 2022 Memorandum to Brian Liebman and William W. Peaslee, RRC Commission Counsel attached is a copy for your convenience.

During the RRC's September 15, 2022 meeting, RRC counsel was asked by one of the Commissioners for a response to the CRC's claim that that it has authority to adopt rules to set policies and guidelines. RRC counsel responded that the CRC could set policies and guidelines as contemplated by statute–just not by rulemaking. This response completely misunderstands the authority provided by the legislature to the CRC. As explained by the North Carolina Supreme Court, "amendments to the State guidelines by the CRC <u>are</u> considered administrative rule-making."[1] *Adams,* 295 N.C. at 702, 249 S.E.2d at 413. (Emphasis added). This is consistent with the requirement that the CRC "shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement" unless it has "been adopted as a rule in accordance with this Article." N.C. Gen. Stat. § 150B-18. Thus, as authorized by the North Carolina General Assembly in the CRC's enabling statute and confirmed by the North Carolina Supreme Court, the CRC is authorized to set guidelines (including objectives, policies, and standards) regulating the public and private use of land and waters within the coastal area through rule-making.

These rules are not newly adopted but have been in existence for decades as part of the North Carolina Administrative Code pursuant to the very same statutory authority. This creates "a rebuttable presumption that" each "rule was adopted in accordance with Part 2 of the Article." *See* N.C. Gen. Stat. § 150B-21.9(a1). For the RRC to change course in 2022 and now assert that the CRC's long-standing rules are not within the authority

[1] This case was decided under an earlier iteration of the Administrative Procedure Act at N.C. Gen. Stat. 150A.

delegated to the agency by the General Assembly, is arbitrary and capricious and contrary to the North Carolina Supreme Court precedent.

In addition to addressing the RRC's generic objection regarding whether the rules are "Rules," the CRC has provided additional authority for specific rules that the RRC identified as lacking authority. For example, the RRC objected to 15A NCAC 07J .0208 claiming that CAMA does not authorize the circulation of CAMA permit application to other state agencies for review. However, the CRC was instructed by the General Assembly "to coordinate the issuance of permits" and consideration of variances under the Dredge & Fill Act and the Coastal Area Management Act "to avoid duplication and to create a single, expedited permitting process." N.C. Gen. Stat. § 113-229(e). Both statutes also provide for the CRC to adopt rules to implement these articles. *See* N.C. Gen. Stat. § 113-229(e) ("The CRC may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section.") and N.C. Gen. Stat. § 113A-124(c)(8) (The CRC has additional authority "[t]o adopt rules to implement this Article."). As noted by RRC counsel, a dredge and fill permit application is required to be circulated among State agencies and may be submitted to federal agencies. *See* RRC Staff opinion for 15A NCAC 07J .0208 attached to Objection Letter. Given the authority from the legislature requiring that the CRC create a single, expedited permitting process, this provision in the Dredge and Fill Act is sufficient to provide authorization for the CAMA permit applications to be circulated to state and federal agencies for review.

Based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the RRC rescind its earlier objection to these rules based on Section 150B-21.9(1).

2.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(2).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07J .0203, .0204, .0206, .0210, 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, and .1102 based on the claim that these rules were ambiguous. The majority of the RRC's objection to these rules is not specific to individual rules. To the extent that specific words or phrases were identified as ambiguous by the Objection Letter, the CRC has attempted to provide further clarifying language. *See e.g.,* technical changes provided for 15A NCAC 07J .0203, .0204, .0206, .0210, .0601, .0603, .0703, .0704. If there are other technical changes that the RRC believes would resolve any remaining ambiguity, the CRC is willing to consider further changes.

The perceived ambiguity that the RRC has identified in 15A NCAC 07H .2305 regarding the use of the phrase "significant adverse impact" continues to puzzle the CRC. The General Assembly has authorized denial of "an application for a dredge or fill permit upon finding . . . that there will be <u>significant adverse effect</u>" as a result of the proposed dredging and filling. N.C. Gen. Stat. §113-229(e) (emphasis added). The General Assembly clearly understands that determining whether there is a significant adverse impact is not ambiguous. As the CRC has previously explained, this phrase is "a term of art used in other rules and understood by the courts. *See, e.g., Shell Island Homeowners Assoc. v. Tomlinson*, 134 NC App. 217 (1999). The CRC has used this phrase, or similar phrase,

throughout its rules to require an assessment of the impact of the development on the natural resources. *See e.g.,* 15A NCAC 07H .0209 (throughout), 07H .0308, 07J .1101, .1102, 1201, 07K .0202, 07M .0402. Many, if not most, of these rules were recently readopted or amended without the RRC objecting to the rule language requiring an assessment of the impact. It is arbitrary and capricious for the RRC to claim the use of this phrase in one rule is ambiguous when that objection has not been consistently asserted by the RRC.

Based on the changes provided, as well as the clarifying information provided above, the CRC respectfully requests that the RRC rescind its earlier objection based on Section 150B-21.9(2).

3.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(3).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0406, .0506, 07J .0203, .0206, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101 on the grounds these rules were not "reasonably necessary" pursuant to N.C. Gen. Stat. §150B-21.9(3). The majority of these rules are those the RRC contends are not "Rules" and therefore, it also objects under section 3 claiming "only 'Rules' can be reasonably necessary." *See* Objection Letter and attachments. In response, the CRC incorporates and relies on the arguments set forth above in Section 1 relating to N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objects to 15A NCAC 07I .0406 claiming that this rule simply restates information from "G.S. 113A-119.1 and in 15A NCAC 07J .0204." *See* RRC Staff Opinion for 15A NCAC 07I .0406 attached to the Opinion Letter. Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly provides that "a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review." N.C. Gen. Stat.§ 150B-19(4). In this rule, the CRC has provided a brief statement synthesizing information regarding the fee requirement found in two separate places. This is allowable under the Administrative Procedure Act. Moreover, the information included the middle sentence relating to "deficits" is not included elsewhere. Therefore, this rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

In its Objection Letter, the RRC also objects to 15A NCAC 07I .0506 on the basis that the rule is not reasonably necessary as it "re-states material regarding allocation of permit-letting authority that is contained in G.S. 113A-116, -118, and -121." *See* RRC Staff Opinion for 15A NCAC 07I .0506 attached to Objection Letter (cleaned up). Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly has provided that "a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review." N.C. Gen. Stat.§ 150B-19(4). Moreover, this rule provides additional clarifying information regarding boundaries and the extra-territorial zoning area subject to permit letting authority, and timeframes. This rule does not simply re-state material in the statute. Therefore, the rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

4.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(4).

In the Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07J .0203, .0204, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, .1102 for "failure to comply with the Part 2 of Article 2A of the Administrative Procedure Act pursuant to G.S. 150B-21.9(4)." This section of the NC Administrative Procedure Act provides procedures for the adoption of temporary rules, emergency rules, permanent rules, and the periodic review of existing rules. In the Objection Letter and the attachments to the Objection Letter, the RRC has not identified the manner in which it alleges the CRC failed to follow the rulemaking procedures set forth in Part 2 of this Article during its periodic review and re-adoption of these rules.

Moreover, if this objection is merely intended to indicate that the RRC does not believe these rules meet the definition of a "Rule," that objection is based on N.C. Gen. Stat. § 150B-19 which lists restrictions on what can be adopted as a rule in Part 1 of Article 2A of the Administrative Procedure Act–not in Part 2 of Article 2A. Therefore, a reference to Part 1 of Article 2A is not a proper basis for alleging that the rules were not adopted in accordance with Part 2 of Article 2A as required by N.C. Gen. Stat. § 150B-21.9(a)(4).

To the extent that the RRC is objecting to the procedure by which these rules were adopted by the CRC, we are providing the following information to address any such concern. As required by N.C. Gen. Stat. § 150B-21.3A(c), the CRC conducted an analysis of each existing rule and made an "initial determination as to whether the rule is necessary or unnecessary." The classifications were posted for public comment and submitted to the Office of Administrative Hearings for posting on its Web site. The CRC accepted public comment for sixty days after the determination was posted from February 20–April 20, 2017. The agency amended classifications, responded to all objections, and sent a final report to the RRC, including the public comments. Thereafter, the CRC re-adopted these rules as required by July 31, 2020 and sent them out for public comment. Twenty public hearings were held between November 17 and December 10, 2019 throughout the twenty coastal counties included within the Coastal Area Management Act. The public comment period ended December 31, 2019. No public comments were received, no changes were proposed, and no fiscal analysis was required. The CRC re-adopted the rules at its regularly scheduled meeting on February 12, 2020. Thereafter, the CRC began submitting its re-adopted rules to the RRC in manageable groupings. At the RRC's request, the last 132 re-adopted rules were submitted in one large group in June 2022. The RRC objected to 47 of the 132 rules in its September 2022 Objection Letter.

There are fifteen remaining rules for which the RRC's objection is based, in part, on an alleged failure to comply with Part 2 of Article 2A. However, the RRC has not identified any procedural flaws in the process used by the CRC to re-adopt these rules pursuant to the requirements for the periodic review of rules in Part 2 of Article 2A of the Administrative Procedure Act. In addition, an attachment to the specific objection for 15A NCAC 07M .1102 includes a highlighted reference to the procedures for adopting a permanent rule. Since the relevant procedure here relates to the periodic review of rules, the relevance of this attachment is unclear.

If our understanding of the substance of this objection is incorrect, please provide specific information identifying the procedure established in N.C. Gen. Stat. § 150B-21.3A for the periodic review of existing rules or some other section included in Part 2 of Article 2A on which the RRC bases its objection. If there is no alleged flaw in the procedure by which these rules were re-adopted, the CRC respectfully requests that this objection be withdrawn.

In conclusion and based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the objections to each of the 38 rules addressed in this letter be withdrawn.

Sincerely,

Mary L. Lucasse

Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

JOSH STEIN
ATTORNEY GENERAL

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

January 18, 2023

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections for the following rules:
07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305;
07I .0406, .0504, .0506, .0508, .0511, .0602, .0702;
07J .0203, .0204; .0206, .0207, .0208, .0312;
07M .0201, .0202, .0401, .0402; .0403; .0701, .0703, .0704, .1001, .1002, .1101, and .1102

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC"), please accept this letter as a follow-up to comments provided at the December 15, 2022 RRC meeting. Note, some of the rules are addressed in more than one category.

First, as set forth in more detail in our November 23, 2022 letter, RRC counsel continued to recommend the RRC object to the CRC's rules at **15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101** based on the allegation that "each of [these] . . . rules do not meet the definition of a "Rule" pursuant to G.S. 150B-2(8a)" and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). This argument is simply incorrect. The CRC has authority to adopt "guidelines for the coastal area" through rulemaking consisting of "objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area" as recognized by the NC Supreme Court in *Adams v. Dept. of N.E.R*, 295 N.C. 683, 249 S.E.2d 402 (1978). The CRC respectfully requests the Commission approve these rules based on authority in Chapter 113A, Article 7 and the North Carolina Supreme Court's decision.

Second, following receipt of our November 23, 2022 letter, RRC counsel continued to recommend that the RRC object to the use of the term "significant adverse impact" as ambiguous. This recommendation should be rejected. The phrase "significant adverse impact" has been recently approved by the RRC in other CRC rules. Furthermore, the North Carolina appellate courts understand this term of art (*see, e.g., Shell Island Homeowners Assoc. v. Tomlinson,* 134 N.C. App. 217 (1999) and the General Assembly has authorized the application of this standard (using the very same phrase). *See* N.C.G.S. § 113-229(e). For these reasons, the CRC respectfully requests the RRC approve the following rules which include that phrase: **07H .0508; .2305, 07J .0203; 07M .0402; .0703.**

Third, following receipt of our November 23, 2022 letter, RRC counsel again recommended the RRC object to the following rules as unnecessary: **07I .0406; .0506; .0702**. These rules synthesize different sections of statutes as allowed under G.S. § 150B-19(4) and/or include additional information. I urge this Commission not to accept the Staff's recommendation for these rules. Specifically: The middle sentence in 07I .0406 regarding "deficits resulting from administrative costs" is not contained in statute. This sentence in the Rule addresses a situation that can arise when a local government handling the CAMA minor permits incurs costs greater than the permit fee collected from the applicant. This sentence allows the local program to cover that amount from other CAMA permit reimbursements. Similarly, 07I .0506 combines and consolidates the various requirements imposed by law for the benefit of the regulated public. The rule also includes additional information regarding extra-territorial areas which is not in the statute and is necessary to implement the article as allowed by G.S. § 113A-124(c)(5). Finally, 7I .0702 provides something more than is contained in case law or black letter law by specifying that the CRC, not a court or the OAH, determines whether a local permit-letting agency exceeds its authority. For these reasons, the CRC respectfully requests that the RRC determine these three rules are necessary and approve the rules.

Finally, the CRC has provided additional authority and/or technical changes to address the previous objections raised by RRC Staff Counsel in September and December, 2022 for the following rules: 07I .0508; .0511; 07J .0203; .0204; .0206; .0207; .0208 and 07M .0402, .0704, and .1102.

For the above stated reasons, we respectfully request the RRC approve the remaining re-adopted rules addressed in this letter pursuant to G.S. § 150B-21.3A. Thank you for your consideration of this request.

Sincerely,

Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

15A NCAC 07H .0208 is amended as published with changes in 37:15 NCR 1036-1046 as follows:

15A NCAC 07H .0208 USE STANDARDS

(a) General Use Standards

(1) Uses that are not water dependent shall not be permitted in coastal wetlands, estuarine waters, and public trust areas. Restaurants, residences, apartments, motels, hotels, trailer parks, private roads, factories, and parking lots are examples of uses that are not water dependent. Uses that are water dependent include: utility crossings, wind energy facilities, docks, wharves, boat ramps, dredging, bridges and bridge approaches, revetments, bulkheads, culverts, groins, navigational aids, mooring pilings, navigational channels, access channels and drainage ditches;

(2) Before being granted a permit, the CRC or local permitting authority shall find that the applicant has complied with the following standards:

(A) The location, design, and need for development, as well as the construction activities involved shall be consistent with the management objective of the Estuarine and Ocean ~~System AEC (Rule .0203 of this subchapter)~~ System AEC in Rule .0203 of this Section and shall be sited and designed to avoid significant adverse impacts upon the productivity and biologic integrity of coastal wetlands, shellfish beds, submerged aquatic vegetation as defined by the Marine Fisheries Commission, and spawning and nursery areas;

(B) Development shall comply with State and federal water and air quality rules, ~~statutes~~ statutes, and regulations;

(C) Development shall not cause irreversible damage to documented archaeological or historic resources as identified by the N.C. Department of Cultural ~~resources;~~ and Natural Resources;

(D) Development shall not increase siltation;

(E) Development shall not create stagnant water bodies;

(F) Development shall be timed to avoid significant adverse impacts on life cycles of estuarine and ocean resources; and

(G) Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust areas including estuarine waters.

(3) When the proposed development is in conflict with the general or specific use standards set forth in this Rule, the CRC may approve the development if the applicant can demonstrate that the activity associated with the proposed project will have public benefits ~~as identified~~ consistent with the findings and goals of the Coastal Area Management Act identified in G.S. 113A-102~~, as identified in G.S 113A-102~~, that the public benefits outweigh the ~~long range~~ adverse effects of the project, that there is no ~~reasonable~~ alternate site available for the project, and that all ~~reasonable~~ means and measures to mitigate adverse impacts of the project have been incorporated into the project design

and shall be implemented at the applicant's expense. Measures taken to mitigate or minimize adverse impacts shall include actions that:

(A) minimize or avoid adverse impacts by limiting the magnitude or degree of the action;

(B) restore the affected environment; or

(C) compensate for the adverse impacts by replacing or providing substitute resources.

(4) "Primary nursery areas" are defined as those areas in the estuarine and ocean system where initial post larval development of finfish and crustaceans takes ~~place.~~ place, are ~~They are usually~~ located in the uppermost sections of a system where populations are uniformly early juvenile stages. Primary nursery areas are designated and described by the N.C. Marine Fisheries Commission (MFC) and by the N.C. Wildlife Resources Commission (WRC) at 15A NCAC 03R .0103;

(5) "Outstanding Resource Waters" (ORW) are defined as those estuarine waters and public trust areas classified by the N.C. Environmental Management Commission ~~(EMC).~~ EMC as defined in15A NCAC 02B .0225. ~~In those estuarine waters and public trust areas classified as ORW by the EMC EMC, no permit required by the Coastal Area Management Act shall be approved for any project which would be inconsistent with applicable use standards adopted by the CRC, EMC, or MFC for estuarine waters, public trust areas, or coastal wetlands. For development activities not covered by specific use standards, no permit shall be issued if the activity would, based on site specific information, degrade the water quality or outstanding resource values;~~ and

(6) Beds of "submerged aquatic vegetation" ~~(SAV)~~ are defined as those habitats in public trust and estuarine ~~waters~~ waters, that occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas, vegetated with one or more species of submergent vegetation. ~~These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed~~ ~~is~~ submerged aquatic vegetation beds are defined by the Marine Fisheries Commission. Any rules relating to ~~SAVs~~ submerged aquatic vegetation beds shall not apply to non-development control activities authorized by the Aquatic Weed Control Act of 1991 (G.S. 113A-220 et seq.).

(b) Specific Use Standards

(1) Navigation channels, canals, and boat basins shall be aligned or located so as to avoid primary nursery areas, shellfish beds, beds of submerged aquatic vegetation as defined by the MFC, or areas of coastal wetlands except as otherwise allowed within this Subchapter. Navigation channels, canals and boat basins shall also comply with the following standards:

(A) Navigation channels and canals may not be allowed through ~~fringes~~ of regularly and irregularly flooded coastal wetlands if the loss of wetlands will have ~~no~~ significant adverse impacts on fishery resources, water ~~quality~~ quality, or adjacent wetlands, and if there is no ~~reasonable~~ alternative that would avoid the wetland losses;

(B) All dredged material shall be confined landward of regularly and irregularly flooded coastal wetlands and stabilized to prevent entry of sediments into the adjacent water bodies or coastal wetlands;

(C) Dredged material from maintenance of channels and canals through ~~irregularly flooded~~ coastal wetlands shall be placed on non-wetland areas, remnant spoil piles, or disposed of by a method having no ~~significant, long-term~~ wetland impacts. Under no circumstances shall dredged material be placed on regularly flooded wetlands. New dredged material disposal areas shall not be located in the buffer area as outlined in 15A NCAC 07H .0209(d)(10);

(D) Widths of excavated canals and channels shall be the minimum required to meet the applicant's needs but not impair water circulation;

(E) Boat basin design shall maximize water exchange by having the widest possible opening and the shortest practical entrance canal. Depths of boat basins shall decrease from the waterward end inland;

(F) Any canal or boat basin shall be excavated no deeper than the depth of the connecting waters;

(G) Construction of finger canal systems are not allowed. Canals shall be either straight or meandering with no right angle corners;

(H) Canals shall be designed so as not to create an erosion hazard to adjoining property. Design may include shoreline stabilization, vegetative stabilization, or setbacks based on soil characteristics; and

(I) Maintenance excavation in canals, ~~channels~~ channels, and boat basins within primary nursery areas and areas of submerged aquatic vegetation as defined by the MFC shall be avoided. However, when essential to maintain a traditional and established use, maintenance excavation ~~may~~ shall be approved if the applicant meets all of the following criteria:

(i) ~~The applicant demonstrates and documents that~~ There has been navigational use of the area; ~~water-dependent need exists for the excavation;~~

(ii) There exists a previously permitted channel that was constructed or maintained under permits issued by the State or ~~Federal~~ federal government. If a natural channel was in use, or if a human-made channel was constructed before permitting was necessary, there shall be evidence that the channel was continuously used for a specific purpose;

(iii) Excavated material can be removed and placed in a disposal area in accordance with Part (b)(1)(B) and Part (b)(1)(C) of this Rule without impacting adjacent nursery areas and submerged aquatic vegetation as defined by the MFC; ~~and~~

(iv) The original depth and width of a human-made or natural channel shall not be increased to allow a new or expanded use of the ~~channel.~~ channel; and

(v) Consistent with the provisions of G.S. 113-229.

(2) Hydraulic Dredging

(A) The terminal end of the dredge pipeline shall be positioned at a distance sufficient to preclude erosion of the containment dike and a maximum distance from spillways to allow settlement of suspended solids;

(B) Dredged material shall be either confined on high ground by retaining structures or deposited on beaches for purposes of renourishment if the material is suitable in accordance with 15A NCAC 7H .0208(b)(8) and 15A NCAC 7H .0312 ~~and the rules in this Subchapter,~~ except as provided in Part (G) of this Subparagraph;

(C) Confinement of excavated materials shall be landward of all coastal wetlands and shall employ soil stabilization measures to prevent entry of sediments into the adjacent water bodies or coastal wetlands;

(D) Effluent from diked areas receiving disposal from hydraulic dredging operations shall be contained by pipe, trough, or similar device to a point waterward of emergent vegetation or, where local conditions require, below normal low water or normal water level;

(E) When possible, effluent from diked disposal areas shall be returned to the area being dredged;

(F) A water control structure shall be installed at the intake end of the effluent pipe;

(G) Publicly funded projects shall be considered by review agencies on a case-by-case basis with respect to dredging methods and dredged material disposal in accordance with Subparagraph (a)(3) of this Rule; and

(H) Dredged material from closed shellfish waters and effluent from diked disposal areas used when dredging in closed shellfish waters shall be returned to the closed shellfish waters.

(3) Drainage Ditches

(A) Drainage ditches located through any coastal wetland shall not exceed six feet wide by four feet deep (from ground surface) unless the applicant shows that larger ditches are necessary;

(B) Dredged material derived from the construction or maintenance of drainage ditches through regularly flooded marsh shall be placed landward of these marsh areas in a manner that will insure that entry of sediment into the water or marsh will not occur. Dredged material derived from the construction or maintenance of drainage ditches through irregularly flooded marshes shall be placed on non-wetlands wherever feasible. Non-wetland areas include ~~relic~~ existing disposal sites;

(C) Excavation of new ditches through high ground shall take place landward of an earthen plug or other methods to minimize siltation to adjacent water bodies; and

(D) Drainage ditches shall not have a significant adverse impact on primary nursery areas, productive shellfish beds, submerged aquatic vegetation as defined by the MFC, or other estuarine habitat. Drainage ditches shall be designed so as to minimize the effects of freshwater inflows, sediment, and the introduction of nutrients to receiving waters. Settling basins, water ~~gates~~ gates, and retention structures are examples of design alternatives that may be used to minimize sediment introduction.

(4) Nonagricultural Drainage

(A) Drainage ditches shall be designed so that restrictions in the volume or diversions of flow are minimized to both surface and ground water;

(B) Drainage ditches shall provide for the passage of migratory organisms by allowing free passage of water of sufficient ~~depth;~~ depth required to allow passage of those migratory organism; and

(C) Drainage ditches shall not create stagnant water pools or changes in the velocity of flow.

(5) Marinas. "Marinas" are defined as any publicly or privately owned dock, ~~basin~~ basin, or wet boat storage facility constructed to accommodate more than 10 boats and providing any of the following services: permanent or transient docking spaces, dry storage, fueling facilities, haulout facilities, and repair service. Excluded from this definition are boat ramp facilities allowing access only, temporary docking, and none of the preceding services. Expansion of existing facilities shall comply with the standards of this Subparagraph for all development other than maintenance and repair necessary to maintain previous service levels. Marinas shall comply with the following standards:

(A) Marinas shall be sited in non-wetland areas or in deep ~~waters~~ water ~~(areas~~ areas not requiring ~~dredging)~~ dredging, and shall not disturb shellfish resources, submerged aquatic vegetation as defined by the MFC, or wetland habitats, except for dredging necessary for access to high-ground sites. The following four alternatives for siting marinas are listed in order of preference for the least damaging alterative; marina projects shall be designed to accommodate ~~have~~ the highest of these four priorities: ~~priorities that is deemed feasible by the permit letting agency:~~

(i) an upland basin site requiring no alteration of wetland or estuarine habitat and providing flushing by tidal or wind generated water circulation or basin design characteristics;

(ii) an upland basin site requiring dredging for access when the necessary dredging and operation of the marina will not result in significant adverse impacts to existing fishery, shellfish, or wetland resources and the basin design shall provide flushing by tidal or wind generated water circulation;

(iii) an open water site located outside a primary nursery area which utilizes piers or docks rather than channels or canals to reach deeper water; and

(iv) an open water marina requiring excavation of no intertidal habitat, and no dredging greater than the depth of the connecting channel.

(B) Marinas that require dredging shall not be located in primary nursery areas nor in areas which require dredging through primary nursery areas for access. Maintenance dredging in primary nursery areas for existing marinas shall comply with the standards set out in Part (b)(1)(I) of this Rule;

~~(C) To minimize coverage of public trust areas by docks and moored vessels, dry storage marinas shall be used where feasible;~~

~~(D)~~(C) Marinas to be developed in waters subject to public trust rights, ~~rights~~ ~~(other~~ other than those created by dredging upland basins or ~~canals)~~ canals, for the purpose of providing docking for residential developments shall be allowed no more than 27 square feet of public trust areas for every one linear foot of shoreline adjacent to these public trust areas for construction of docks and mooring facilities. The 27 square feet allocation does not apply to fairway areas between parallel piers or any portion of the pier used only for access from land to the docking spaces;

~~(E)~~(D) To protect water quality in shellfishing areas, marinas shall not be located within areas where shellfish harvesting for human consumption is a significant existing use or adjacent to such areas if shellfish harvest closure ~~is anticipated to~~ will result from the location of the marina. In compliance with 33 U.S.C.§ ~~U.S. Code~~ ~~Section~~ 101(a)(2) of the Clean Water Act and North Carolina Water Quality Standards ~~(15A NCAC 02B .0200)~~ 15A NCAC 02B .0200 adopted pursuant to that section, shellfish harvesting is a significant existing use if it can be established that shellfish have been regularly harvested for human consumption since November 28, 1975 or that shellfish are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting for the purpose of human ~~consumption.~~ consumption as determined by the NC Division of Marine Fisheries in accordance with 15A NCAC 18A .0900. The Division of Coastal Management shall consult with the Division of Marine Fisheries regarding the significance of shellfish harvest as an existing use and the magnitude of the quantities of shellfish that have been harvested or are available for harvest in the area where harvest will be affected by the development;

~~(F)~~(E) Marinas shall not be located without written consent from the leaseholders or owners of submerged lands that have been leased from the ~~state~~ State or deeded by the State;

~~(G)~~(F) Marina basins shall be designed to promote flushing through the following design criteria:

(i) the basin and channel depths shall gradually increase toward open water and shall never be deeper than the waters to which they connect; and

(ii) when possible, an opening shall be provided at opposite ends of the basin to establish flow-through circulation;

~~(H)~~(G) Marinas shall be designed so that the capability of the waters to be used for navigation or for other public trust rights in estuarine or public trust waters are not jeopardized while allowing the applicant access to deep waters;

~~(I)~~(H) Marinas shall be located and constructed so as to avoid ~~adverse~~ impacts on navigation throughout all federally maintained channels and their boundaries as designated by the US Army Corps of Engineers. This includes permanent or temporary mooring sites; speed or traffic reductions; or any other device, either physical or regulatory, that may cause a federally maintained channel to be restricted;

~~(J)~~(I) Open water marinas shall not be enclosed within breakwaters that preclude circulation sufficient to maintain water ~~quality;~~ as determined by the Division of Water Resources.

~~(K)~~(J) Marinas that require dredging shall provide areas in accordance with Part (b)(1)(B) of this Rule to accommodate disposal needs for future maintenance dredging, including the ability to remove the dredged material from the marina site;

~~(L)~~(K) Marina design shall comply with all applicable EMC requirements ~~(15A NCAC 02B .0200)~~ 15A NCAC 02B .0200 for management of stormwater runoff. Stormwater management systems shall not be located within the 30-foot buffer area outlined in 15A NCAC 07H .0209(d);

~~(M)~~(L) Marinas shall post a notice prohibiting the discharge of any waste from boat toilets and listing the availability of local pump-out services;

~~(N)~~(M) Boat maintenance areas shall be designed so that all scraping, sandblasting, and painting will be done over dry land with collection and containment devices that prevent entry of waste materials into adjacent waters;

~~(O)~~(N) All marinas shall comply with all applicable standards for docks and piers, shoreline stabilization, dredging and dredged material disposal ~~of this Rule;~~ pursuant to 15A NCAC 7H .0208;

~~(P)~~(O) All applications for marinas shall be reviewed by the Division of Coastal Management to determine their potential impact to coastal resources and compliance with applicable standards of this Rule. Such review shall also consider the cumulative impacts of marina development in accordance with G.S. 113A-120(a)(10); and

~~(Q)~~(P) Replacement of existing marinas to maintain previous service levels shall be allowed provided that the development complies with the standards for marina development within this Section.

(6) Piers and Docking Facilities.

(A) Piers shall not exceed six feet in width. Piers greater than six feet in width shall be permitted only if the greater width is necessary for safe use, to improve public access, or to support a water dependent use that cannot otherwise occur;

(B) The total square footage of ~~shaded~~ ~~impact~~ ~~for~~ ~~docks~~ docks, ~~platforms~~ platforms, and mooring facilities (excluding the pier) allowed shall be eight square feet per linear foot of shoreline with a maximum of 2,000 square ~~feet.~~ feet to limit shading impacts to the substrate. In calculating the ~~shaded~~ ~~impact,~~ the total square footage, uncovered open water slips shall not be counted in the total. Projects requiring dimensions greater than those stated in this Rule shall be permitted only if the greater dimensions are necessary for safe use, to improve public access, or to support a water dependent use that cannot otherwise occur. Size restrictions shall not apply to marinas;

(C) Piers and docking facilities over coastal wetlands shall be no wider than six feet and shall be elevated at least three feet above any coastal wetland substrate as measured from the bottom of the decking;

(D) A boathouse shall not exceed 400 square feet except to accommodate a documented ~~need~~ need, provided to the Division of Coastal Management by the ~~application~~ applicant for a larger boathouse and shall have sides extending no farther than one-half the height of the walls as measured from the Normal Water Level or Normal High Water to the bottom edge of the roofline, and covering only the top half of the walls. Measurements of square footage shall be taken of the greatest exterior dimensions. Boathouses shall not be allowed on lots with less than 75 linear feet of shoreline, except that structural boat covers utilizing a frame-supported fabric covering may be permitted on properties with less than 75 linear feet of shoreline when using screened fabric for side walls. Size restrictions do not apply to marinas;

(E) The total area enclosed by an individual boat lift shall not exceed 400 square feet except to accommodate a documented need for a larger boat lift;

(F) Piers and docking facilities shall be single story. They may be roofed but shall not be designed to allow second story use;

(G) Pier and docking facility length shall be limited by:

~~(i) not extending beyond the established pier or docking facility length along the same shoreline for similar use. This restriction does not apply to piers 100 feet or less in length unless necessary to avoid unreasonable interference with navigation or other uses of the waters by the public;~~

~~(ii)~~(i) not extending into the channel portion of the water body; and

~~(iii)~~(ii) not extending more than one-fourth the width of a natural water body, or human-made canal or basin. Measurements to determine widths of the water body, canals, or basins shall be made from the waterward edge of any coastal wetland vegetation that borders the water body. The one-fourth length limitation does not apply in areas where the U.S. Army Corps of Engineers, or a local government in consultation with the Corps of Engineers, has established an official pier-head

line. The one-fourth length limitation shall not apply when the proposed pier is located between longer piers or docking facilities within 200 feet of the applicant's property. ~~However, the proposed pier or docking facility shall not be longer than the pier head line established by the adjacent piers or docking facilities, nor longer than one-third the width of the water body.~~

(iii) Notwithstanding (i) and (ii), the proposed pier or docking facility shall not be longer than the pier head line established by the piers or docking facilities along the same contiguous shoreline having the same land use, nor longer than one-third the width of the water body. This restriction does not apply to piers 100 feet or less in length unless necessary to avoid unreasonable interference with navigation or other uses of the waters by the public.

(H) Piers or docking facilities longer than 400 feet shall be permitted only if the proposed length gives access to deeper water at a rate of at least 1 foot for each 100 foot increment of length longer than 400 feet, or, if the additional length is necessary to span some obstruction to navigation. Measurements to determine lengths shall be made from the waterward edge of any coastal wetland vegetation that borders the water body;

(I) Piers and docking facilities shall not interfere with the access to any riparian property and shall have a minimum setback of 15 feet between any part of the pier or docking facility and the adjacent property owner's areas of riparian access. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. If the adjacent property is sold before construction of the pier or docking facility commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development of the pier. Application of this Rule may be aided by reference to the approved diagram in 15A NCAC 07H .1205(t) illustrating the rule as applied to various shoreline configurations. When shoreline configuration is such that a perpendicular alignment cannot be achieved, the pier shall be aligned to meet the intent of this Rule to the maximum extent practicable as determined by the Director of the Division of Coastal Management; and

(J) Applicants for authorization to construct a pier or docking facility shall provide notice of the permit application to the owner of any part of a shellfish franchise or lease over which the proposed dock or pier would extend. The applicant shall allow the lease holder the opportunity to mark a navigation route from the pier to the edge of the lease.

(7) Bulkheads

(A) Bulkhead alignment, for the purpose of shoreline stabilization, shall approximate the location of normal high water or normal water level;

(B) Bulkheads shall be constructed landward of coastal wetlands in order to avoid significant adverse impacts to ~~the~~ coastal resources;

(C) Bulkhead backfill material shall be obtained from an upland source approved by the Division of Coastal Management pursuant to this Section, or if the bulkhead is a part of a permitted project involving excavation from a non-upland source, the material so obtained may be contained behind the bulkhead;

(D) Bulkheads shall be permitted below normal high water or normal water level only when the following standards are met:

(i) the property to be bulkheaded has an identifiable erosion problem, whether it results from natural causes or adjacent bulkheads, or it has unusual geographic or geologic features, e.g. steep grade bank; ~~bank, which will cause the applicant unreasonable hardship under the other provisions of this Rule~~;

(ii) the bulkhead alignment extends no further below normal high water or normal water level than necessary to allow recovery of the area eroded in the year prior to the date of application, to align with adjacent bulkheads, or to mitigate the ~~unreasonable hardship resulting from the~~ unusual geographic or geologic features;

(iii) the bulkhead alignment will not adversely impact public trust rights or the property of adjacent riparian owners; and;

~~(iv) the need for a bulkhead below normal high water or normal water level is documented by the Division of Coastal Management; and~~

~~(v)~~(iv) the property to be bulkheaded is in a non-oceanfront area.

(E) Where possible, sloping rip-rap, gabions, or vegetation shall be used rather than bulkheads.

(8) Beach Nourishment

(A) Beach creation or maintenance ~~may~~ shall be allowed to enhance water related recreational facilities for public, commercial, and private use consistent with the following:

(i) Beaches ~~may be created or maintained~~ are located in areas where they have historically been found due to natural processes;

(ii) Material placed in the water and along the shoreline shall be clean sand. ~~sand and free from pollutants~~. Grain size shall be equal to that found naturally at the site;

(iii) Beach creation shall not be allowed in primary nursery areas, nor in any areas where siltation from the site would pose a threat to shellfish beds;

(iv) Material shall not be placed on any coastal wetlands or submerged aquatic vegetation as defined by MFC;

(v) Material shall not be placed on any submerged bottom with ~~significant~~ shellfish resources as identified by the Division of Marine Fisheries during the permit review; and

(vi) Beach construction shall not ~~create the potential for~~ cause filling of adjacent navigation channels, ~~canals~~ canals, or boat basins.

(B) Placing unconfined sand material in the water and along the shoreline shall not be allowed as a method of shoreline erosion control;

(C) Material from dredging projects may be used for beach nourishment if:

(i) it is first handled in a manner consistent with dredged material disposal as set forth in ~~this Rule;~~ 15A NCAC 7H .0208;

(ii) it is allowed to dry prior to being placed on the beach; and

(iii) only that material of acceptable grain size as set forth in Subpart (b)(8)(A)(ii) of this Rule is removed from the disposal site for placement on the beach. Material shall not be placed directly on the beach by dredge or dragline during maintenance excavation.

~~(D) Beach construction shall comply with State and federal water quality standards;~~

~~(E)~~(D) The renewal of permits for beach nourishment projects shall require an evaluation by the Division of Coastal Management of any significant adverse impacts of the original work; and

~~(F))~~(E) Permits issued for beach nourishment shall be limited to authorizing beach nourishment only one time.

(9) Groins

(A) Groins shall not extend more than 25 feet waterward of the normal high water or normal water level unless a longer structure is justified by site specific conditions and by an individual who meets any North Carolina occupational licensing requirements for the type of structure being proposed and approved during the application process;

(B) Groins shall be set back a minimum of 15 feet from the adjoining riparian lines. The setback for rock groins shall be measured from the toe of the structure. This setback may be waived by written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the groin commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development of the groin;

(C) Groins shall pose no threat to navigation;

(D) The height of groins shall not exceed one foot above normal high water or normal water level;

(E) No more than two structures shall be allowed per 100 feet of shoreline unless the applicant provides ~~evidence~~ the Division of Coastal Management a design showing that more structures are needed for shoreline stabilization. The groin structures shall be designed by an individual who meets any North Carolina occupational licensing requirements for the structures being proposed.

(F) "L" and "T" sections shall not be allowed at the end of groins; and

(G) Riprap material used for groin construction shall be free from loose dirt ~~or any other pollutant~~ and of a size sufficient to prevent its movement from the site by wave and current action.

(10) "Freestanding Moorings".

(A) A "freestanding mooring" is any means to attach a ship, boat, vessel, floating ~~structure~~ structure, or other water craft to a stationary underwater device, mooring buoy, buoyed anchor, or piling as long as the piling is not associated with an existing or proposed pier, dock, or boathouse;

(B) Freestanding moorings shall be permitted only:

(i) to riparian property owners within their riparian corridors; ~~or~~

(ii) to any applicant proposing to locate a mooring buoy consistent with a water use plan that is included in either the local zoning or land use ~~plan.~~plan; or

(iii) is associated with commercial shipping, public service, or temporary construction or salvage operations.

(C) All mooring fields shall provide an area for access to any ~~mooring(s)~~ moorings and other land based operations that shall include wastewater pumpout, trash ~~disposal~~ disposal, and vehicle parking;

(D) To protect water quality of shellfishing areas, mooring fields shall not be located within areas where shellfish harvesting for human consumption is a significant existing use or adjacent to such areas if shellfish harvest closure ~~is anticipated to~~ will result from the location of the mooring field. In compliance with Section 101(a)(2) of the Federal Water Pollution Control Act, 33 U.S.C. 1251 (a)(2), and North Carolina Water Quality Standards adopted pursuant to that section, shellfish harvesting is a significant existing use if it can be established that shellfish have been regularly harvested for human consumption since November 28, 1975 or that shellfish are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting for the purpose of human ~~consumption.~~ consumption as determined by the Division of Marine Fisheries in accordance with 15A NCAC 18A .0900. The Division of Marine Fisheries shall be consulted regarding the significance of shellfish harvest as an existing use and the magnitude of the quantities of shellfish that have been harvested or are available for harvest in the area where harvest will be affected by the development;

(E) Moorings shall not be located without written consent from the leaseholders or owners of submerged lands that have been leased from the state or deeded by the State;

(F) Moorings shall be located and constructed so as to avoid ~~adverse~~ impacts on navigation throughout all federally maintained channels. This includes permanent or temporary mooring sites, speed or traffic reductions, or any other device, either physical or regulatory, which may cause a federally maintained channel to be restricted;

(G) Open water moorings shall not be enclosed within breakwaters that preclude circulation and degrade water quality in violation of EMC ~~standards;~~ in accordance with 15A NCAC 2B .0225.

~~(H) Moorings and the associated land based operation design shall comply with all applicable EMC requirements for management of stormwater runoff;~~

~~(I)~~(H) Mooring fields shall have posted in view of patrons a notice prohibiting the discharge of any waste from boat toilets or any other discharge and listing the availability of local pump-out services and waste disposal;

~~(J) Freestanding moorings associated with commercial shipping, public service, or temporary construction or salvage operations may be permitted without a public sponsor;~~

~~(K)~~(I) Freestanding mooring buoys and piles shall be evaluated based upon the arc of the swing including the length of the vessel to be moored. Moorings and the attached vessel shall not interfere with the access of any riparian owner nor shall it block riparian access to channels or deep water, which allows riparian access. Freestanding moorings shall not interfere with the ability of any riparian owner to place a pier for access;

~~(L)~~(J) Freestanding moorings shall not be established in submerged cable or pipe crossing areas or in a manner that interferes with the operations of an access through any bridge;

~~(M)~~(K) Freestanding moorings shall be marked or colored in compliance with U.S. Coast Guard and the WRC requirements and the required marking maintained for the life of the mooring(s); and

~~(N)~~(L) The type of material used to create a mooring must be ~~free of pollutants and~~ of a design and type of material so as to not present a hazard to navigation or public safety.

(11) Filling of Canals, Basins and Ditches - Notwithstanding the general use standards for estuarine systems as set out in Paragraph (a) of this Rule, filling canals, basins and ditches shall be allowed if all of the following conditions are met:

(A) the area to be filled was not created by excavating lands which were below the normal high water or normal water level;

(B) if the area was created from wetlands, the elevation of the proposed filling does not exceed the elevation of said wetlands so that wetland function will be restored;

(C) the filling will not adversely impact any designated primary nursery area, shellfish bed, submerged aquatic vegetation as defined by the MFC, coastal wetlands, public trust ~~right~~ right, or public trust usage; and

(D) the filling will not adversely affect the value and enjoyment of property of any riparian owner.

(12) "Submerged Lands Mining"

(A) Development Standards. Mining of submerged lands shall meet all the following standards:

(i) The Division of Coastal Management shall evaluate the biological productivity and biological significance of mine sites, or borrow sites used for sediment ~~extraction, shall be evaluated~~ extraction for significant adverse impacts and a protection strategy for these ~~natural functions and values~~ sites provided with the State approval request or permit application;

(ii) Natural reefs, coral outcrops, artificial reefs, seaweed communities, and significant benthic communities identified by the Division of Marine Fisheries or the WRC shall be avoided;

(iii) Mining shall avoid ~~significant~~ archaeological resources ~~as defined in Rule .0509 of this Subchapter;~~ and shipwrecks identified by the Department of Cultural Resources; and unique geological features that require protection from uncontrolled or incompatible development as identified by the Division of Energy, Mineral, and Land Resources pursuant to G.S. 113A-113(b)(4)(g);

(iv) Mining activities shall not be conducted on or within 500 meters of ~~significant~~ biological communities identified by the Division of Marine Fisheries or the WRC, such as high relief hard bottom areas. "High relief" is defined for this Part as relief greater than or equal to one-half meter per five meters of horizontal distance;

(v) Mining activities shall be timed to minimize impacts on the life cycles of estuarine or ocean resources; and

(vi) Mining activities shall not negatively affect potable groundwater supplies, wildlife, freshwater, estuarine, or marine fisheries.

(B) Permit Conditions. Permits for submerged lands mining ~~may~~ shall be conditioned on the applicant amending the mining proposal to include measures necessary to ensure compliance with the provisions of the Mining Act and the rules for development set out in this Subchapter. Permit conditions shall also include:

(i) Monitoring by the applicant to ensure compliance with all applicable development standards; and

(ii) A determination of the necessity and feasibility of restoration shall be made by the Division of Coastal Management as part of the permit or consistency review

process. Restoration shall be necessary where it will facilitate recovery of the pre-development ecosystem. Restoration shall be considered feasible unless, after consideration of all practicable restoration alternatives, the Division of Coastal Management determines that the adverse effects of restoration outweigh the benefits of the restoration on estuarine or ocean resources. If restoration is determined to be necessary and feasible, then the applicant shall submit a restoration plan to the Division of Coastal Management prior to the issuance of the permit.

(C) Dredging activities for the purposes of mining natural resources shall be consistent with the development standards set out in ~~this Rule;~~ 15A NCAC 7H .0208.

(D) Mitigation. Where mining cannot be conducted consistent with the development standards set out in this Rule, the applicant may request mitigation approval under 15A NCAC 07M .0700; and

~~(E) Public Benefits Exception. Projects that conflict with the standards in this Subparagraph, but provide a public benefit, may be approved pursuant to the standards set out in Subparagraph (a)(3) of this Rule.~~

(13) "Wind Energy Facilities"

(A) An applicant for the development and operation of a wind energy facility shall provide:

(i) an evaluation of the proposed noise impacts of the turbines to be associated with the proposed facility;

(ii) an evaluation of shadow flicker impacts for the turbines to be associated with the proposed facility;

(iii) an evaluation of avian and bat impacts of the proposed facility;

(iv) an evaluation of viewshed impacts of the proposed facility;

(v) an evaluation of potential user conflicts associated with development in the proposed project area; and

(vi) a plan regarding the action to be taken upon decommissioning and removal of the wind energy facility. The plan shall include estimates of monetary costs, time frame of ~~removal~~ removal, and the proposed site condition after decommissioning.

(B) Development Standards. Development of wind energy facilities shall meet the following standards in addition to adhering to the requirements outlined in Part (a)(13)(A) of this Rule:

(i) Natural reefs, coral outcrops, artificial reefs, seaweed communities, and significant benthic communities identified by the Division of Marine Fisheries or the WRC shall be avoided;

(ii) Development shall not be sited on or within 500 meters of ~~significant~~ biological communities identified by the Division of Marine Fisheries or the WRC, such as high relief hard bottom areas. High relief is defined for this standard as relief greater than or equal to one-half meter per five meters of horizontal distance;

(iii) Development shall not cause irreversible damage to documented archeological resources including shipwrecks identified by the Department of Cultural Resources and unique geological features as identified by the State Geologist pursuant to G.S. 113A-113(b)(4)(g) that require protection from uncontrolled or incompatible development; ~~development as identified by the Division of Energy, Mineral, and Land Resources pursuant to G.S. 113A-113(b)(4)(g);~~

(iv) Development activities shall be timed to avoid significant adverse impacts on the life cycles of estuarine or ocean resources, or wildlife;

(v) Development or operation of a wind energy facility shall not jeopardize the use of the surrounding waters for navigation or for other public trust rights in public trust areas or estuarine waters; and

(vi) Development or operation of a wind energy facility shall not interfere with air navigation routes, air traffic control areas, military training ~~routes~~ routes, ~~or~~ or, special use airspace and shall comply with standards adopted by the Federal Aviation Administration and codified under 14 CFR Part 77.13.

(C) Permit Conditions. Permits for wind energy facilities may be conditioned on the applicant amending the proposal to include measures necessary to ensure compliance with the standards for development set out in this Rule. Permit conditions may include monitoring to ensure compliance with all applicable development standards; and

~~(D) Public Benefits Exception. Projects that conflict with these standards, but provide a public benefit, may be approved pursuant to the standards set out in Subparagraph (a)(3) of this Rule.~~

History Note: *Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-115; 113A-115.1; 113A-124; 113-229;*
Eff. September 9, 1977;
Amended Eff. February 1, 1996; April 1, 1993; February 1, 1993; November 30, 1992;
RRC Objection due to ambiguity Eff. March 21, 1996;
Amended Eff. August 1, 2012(see S.L. 2012-143, s.1.(f)); February 1, 2011; August 1, 2010;
June 1, 2010; August 1, 1998; May 1, 1996;
Readopted Eff. July 1, 2020;
Amended Eff. September 1,2023; August 1, 2022.

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 07H .0308

DATE ISSUED: August 14, 2023

RECOMMENDED ACTION:

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

This rule, which governs use standards within ocean hazard areas of environmental concern, contains several different ambiguous or unclear terms.

Significant Adverse Impact

Throughout this Rule, which governs specific use standards within ocean hazard areas, the agency uses the terms "significant adverse impact", "adverse impact", "adverse effect", and "adversely affect" (and other similar formulations) without definition or example, despite their importance to the regulatory scheme enshrined herein.

These terms are included in almost every specific use standard described in this Rule. Any property owner or entity seeking to engage in erosion control activities (subparagraph (a)(1)), beach bulldozing (subparagraph (a)(4)), dune protection, establishment, restoration, and stabilization (subparagraph (b)), or construct structural beach accessways (subparagraph (c)) will have their projects evaluated for whether they will cause "significant adverse impacts", "adverse impacts", "adverse effects", etc.

While development projects must avoid "significant adverse impacts" in order to meet with agency approval, the agency provides no definition of this term, provides no examples to elucidate the meaning of the term, or any other guidance that would allow the regulated public to determine whether a particular project is in compliance with this Rule and the laws undergirding it.

Brian Liebman
Commission Counsel

In response to staff's request that the agency provide a definition of the term, the CRC responded in an August 3, 2023 memo that "adverse impact," "adverse effect," or "adversely effected" should be given their ordinary meaning, citing to Webster's Dictionary. Incorporating that meaning, the agency states that "adverse impact (or effect)" means "an effect or impact that is opposed or antagonistic to the goals of the Coastal Area Management Act" as found in G.S. 113A-102(b). Turning to the addition of the term "significant", the agency again argues that the word be given its ordinary meaning, which the agency claims is: "to require an impact be large enough to make a difference. This use of this adjective disqualifies a 'de minimus' impact from requiring action under the CRC's rules." The agency then goes on to argue that "significant adverse impact" "is a term of art that has been consistently used by the General Assembly, in North Carolina regulations, and by appellate courts to analyze negative impacts that warrant action." ***It is important to note that these responses were not incorporated in the Rule****.*

The Commission has previously objected to the use of these terms in CRC's rules. At the September 2022 meeting, the Commission objected to 07H .2305 on the basis that "significant adverse impact" was unclear and ambiguous under G.S. 150B-21.9(a)(2). The Commission continued that objection at the February 2023 meeting, and added objections to rules 07H .0508, 07H .0509, 07J .0203, 07M .0202, .0401, .0402, and .0403 where the agency added the term in revisions made following objections on other grounds. Staff hereby incorporates the staff opinions, memos, and objection letters issued with respect to those Rules by reference.

In the aforementioned proceedings before the Commission, the CRC consistently argued that "significant adverse impact" was a term of art which had a meaning known to the General Assembly, the various environmental regulatory agencies, the regulated public, and North Carolina's courts. Nonetheless, the agency has repeatedly declined to articulate this known meaning in writing, incorporate it into its Rules, or provide specific references to this extensive usage other than citations to other equally opaque CRC rules, an inapposite statute, and a case which mentions but does not construe the term.

With respect to the instant Rule, the CRC now appears to argue that "significant adverse impact" and its variants are both terms of art and *have ordinary meaning. This argument is contradicted by the very definition of "term of art": "[a] word or phrase having a specific, precise meaning in a given specialty,* ***apart from its general meaning in ordinary contexts****."* Term of Art, BLACK'S LAW DICTIONARY *(11th ed. 2019) (emphasis added). See also* Southern Furniture Co. of Conover, Inc. v. DOT*, 133 N.C.App. 400, 403-04 (1999) ("When terms with special meanings or terms of art appear in an instrument, they are to be given their technical meaning; whereas, ordinary terms are to be given their meaning in ordinary speech.");* In re Pharm. Indus. Average Wholesale Price Litig., 460 F. Supp. 2d 277 (D. Mass. 2006) *("By definition, a term must have an established and settled meaning to constitute a term of art.").*

Thus, to the extent that the agency claims that "significant adverse impact" is a term of art, their claim necessitates the conclusion that "significant adverse impact" does not *have the ordinary meaning of its component words, and instead has a specific industry meaning apart from the ordinary meaning. Such a meaning has not been proffered here, and more importantly, has not been included in this Rule or any other within CRC's authority.*

Assuming for the sake of argument that the agency has imprecisely used the phrase "term of art" and that "significant adverse impact" and its variants are to be given their ordinary meaning, that meaning still has not yet been incorporated into this Rule or any other rule under the CRC's authority. While staff believes that the ordinary meaning articulated in the agency's August 3, 2023

memo could form the basis for a workable definition, unless and until these terms are formally defined within the CRC's rules, staff is of the opinion that the terms "significant adverse impact", "adverse impact", "adverse effect", and "adversely affect" (and other similar formulations) are impermissibly unclear or ambiguous.

Consequently, staff recommends objection to this Rule under G.S. 150B-21.9(a)(2).

Regional Significance

In (a)(1)(l), the CRC lays out several potential exemptions for structures that would otherwise be prohibited by the use standards contained in this Rule. In subparagraph (i), the agency states that a structure may be permitted upon a finding that "the structure is necessary to maintain an existing commercial navigation channel of regional significance within federally authorized limits." The Rule does not define "regional" or "regional significance."

In response to staff's request for a definition of "regional significance," the agency states only that the Coastal Area Management Act (CAMA) "includes references to issues with either a 'statewide' or 'regional' focus at different times." Additionally, the agency states that the limits on erosion control structures "was added to the [CAMA] in 2003. 113A-115.1. The section of the statute is based on the CRC's rules as of 2003 which included 'regional significance.' To delete this language from the CRC's rule would be contrary to the Coastal Area Management Act."

As an initial matter, staff would point out that the agency was asked to define, rather than delete the term, and has chosen to do neither, despite the ambiguity in the Rule. It is unclear whether "region" means a geographical portion of the State (i.e. the Town of Emerald Isle, the Inner Banks, Onslow County, etc.), or whether it refers to an area of interstate territory (i.e. the Southeast United States). It is similarly unclear what standards the agency uses to determine whether a commercial navigation channel is "significant".

The Rule contains use standards that an applicant must meet as part of a permitting process. Thus, it appears that the applicant bears the burden of providing the CRC with the evidence to support the CRC's "finding" that the structure is necessary to maintain a "regionally significant" channel. Without objective standards as to what is "regionally significant", or at least a list of those channels that the agency has determined meet its standards for regional significance, the applicant must rely on the agency's after-the-fact determination as to the sufficiency of the evidence provided.

Consequently, staff recommends objection to this Rule as impermissibly unclear and ambiguous under G.S. 150B-21.9(a)(2).

Practical Alternative

In (a)(1)(J), the CRC states that it may authorize the replacement of a permanent erosion control structure that was permitted pursuant to a variance granted by the Commission prior to 1 July 1995 if the Commission finds, among other things, "(ii) there is no practical alternative to replacing the structure that will provide the same or similar benefits".

In response to staff's request to define the term "practical alternative", the agency merely stated that the statute "references exceptions to the limitations on erosion control structures as of 2003. 'Practical alternative' is included in the 2003 rule language."

Thus, neither the agency's response nor the text of the Rule itself provide clarity as to what standards the CRC will use to determine what alternatives are "practical" and which are not.

As such, staff recommends objection to this Rule as impermissibly unclear and ambiguous under G.S. 150B-21.9(a)(2).

§ 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.)

JOSH STEIN
ATTORNEY GENERAL

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

Memorandum

To: Brian Liebman, Commission Counsel
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

From: Mary L. Lucasse,
Special Deputy Attorney General & Counsel for Coastal Resources Commission

Date: August 3, 2023

Re: 15A NCAC 07H .0208, .0308, 07K .0207, and 15A NCAC 07M .0603

On May 26, 2023, the NC Coastal Resources Commission ("CRC") received a request for G.S. § 150B-21.10 changes to 15A NCAC 07H .0208, .0308, 07K .0207, and 15A NCAC 07M .0603. At its June 2023 meeting, the RRC extended the period of review for the rules in accordance with G.S. § 150B-21.10. Attached is an annotated copy of the requests for changes which includes the CRC's responses (in red) to each request and a clean copy of the rewritten rules for your review.

In addition, the CRC responds to RRC counsel's comments regarding the use of the terms "significant adverse impact," adverse impact, "adverse effect" and "adversely effected" in 15A NCAC 07H 0208 and .0308 as follows:

Our Supreme Court has applied the rules of statutory construction to administrative regulations as well as statutes. State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980). References in the CRC's rules to "adverse impact," "adverse effect" or "adversely effected" should be given their ordinary meaning. See Food Town Stores Inc. v. City of Salisbury, 300 N.C. 21, 2654 S.E.2d 123 (1980) (words are to be given their ordinary meaning unless they have been defined or have "acquired a technical meaning.). Dictionaries may be used to determine the ordinary meaning of words used. State v. Fly, 127 N.C. App. 286, 488 S.E.2d 614 (1997). The words "impact" and "effect" can be used interchangeably. See Webster's II New College Dictionary, (3rd ed., 2005) (definition of impact includes " "the effect or impression of one thing upon another."). The ordinary meaning of "adverse" is opposed or antagonistic. Id. Thus, in context, the ordinary meaning of this phrase is an effect or impact that is opposed or antagonistic to the goals of the Coastal Area Management Act. N.C.G.S. § 113A-102(b). Placing this phrase in the context of the organic statute does not create ambiguity since the CRC's rules could not be reasonably understood as referring to anything else. The ordinary meaning of this phrase – a negative effect or impact – has been used in other statutory contexts. Following are just two of many examples. Padilla

v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010) (defendant's counsel was ineffective by reason of failing to inform the client of the adverse effects of a criminal conviction on immigration status.) and American Motors Sales Corp. v. Peters, 311 N.C. 311, 317, 317 (1984) (considering whether there was an "adverse effect" in order to determine whether a restraint of trade is monopolistic.). Given the plain and ordinary meaning of "adverse impact, "adverse effect" and "adversely effected" in 15A NCAC 07H 0208, the CRC requests counsel reconsider its objection.

RRC Staff may believe that a more difficult question is raised when the adjective "significant" is added to the phrase since this addition indicates that the effect or impact must be large enough to be important. However, as the CRC has previously explained, this phrase is not ambiguous. The ordinary meaning of "significant" when added to "adverse impact" (or some variation of that phrase) is to require an impact be large enough to make a difference. This use of this adjective disqualifies a "de minimus" impact from requiring action under the CRC's rules. This phrase is a "term of art" that has been consistently used by the General Assembly, in North Carolina regulations, and by appellate courts to analyze negative impacts that warrant action. *See* November 23, 2022 Letter to NC Rules Review Commission from Mary L. Lucasse, counsel for the CRC, p 3; January 18, 2023 Letter to NC Rules Review Commission from Mary L. Lucasse, counsel for the CRC, p 1; and February 9, 2023 letter to NC Rules Review Commission from Julie Youngman, SELC, pp 1-2.

The term "significant adverse impact" is also used by state and federal agencies in the environmental review of coastal development projects, where use of the term in this context indicates that there the effects are raised to a level which requires some mitigative measure or a change in the scope of the project is necessary for the project to proceed. Under the National Environmental Policy Act (NEPA), the NEPA review process begins when a federal agency develops a proposal to take a major federal action. These actions are defined at 40 CFR 1508.1, and include a **Finding of No Significant Impact** where a federal agency presents the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. 40 C.F.R. § 1508.13.

15A NCAC 07H .0208 and .0308 relate to construction of development including erosion control activities, navigation channels, canals, and boat basins to marinas, piers, and docks to bulkheads, beach nourishment, submerged land mining, and freestanding moorings. Each permit application may, depending on the design and scope of the proposed development, have different impacts on a range of different environmental and cultural resources. Individual resource values can vary as well, for example, where a small patch of sparsely vegetated, mono-specific salt marsh in an already impacted area may not have the same value as a pristine, densely vegetated, multi-species salt marsh that is providing a variety of habitat for multiple species. Not knowing what the regulated public will propose in any application and how severe the impacts will be on various coastal and marine resources, the CRC is not in a position to list all possible adverse impacts or numerical thresholds regarding the significance of

those impacts. Through its legislative findings and goals, the General Assembly has provided the CRC and DCM with a roadmap to use to weigh negative impacts. This analysis occurs on a case-by-case basis. To provide further examples trying to capture the ordinary meaning of the phrase "significant adverse impact" and explain the roadmap provided by the General Assembly would either be limiting because not every situation could be provided as an example or incomplete. As written, the CRC's rule allows the courts, the CRC, and DCM to weigh and balance the protection provided for the valuable natural resources of the coastal area while ensuring development proceeds appropriately. See 113A-102(b).

For these reasons, the CRC strongly believes that the version of 15A NCAC 07H .0208 submitted simultaneously with this memo, which has been revised to address many of the comments received from RRC, is not impermissibly ambiguous. Accordingly, please recommend approval of the rule as submitted.

Enclosures:

- CRC's Responses to Requests for Changes dated May 26, 2023;
- 15A NCAC 07H .0208 (revised and retyped);
- 15A NCAC 07H .0308 (revised and retyped);
- 15A NCAC 07K .0207 (revised and retyped);
- 15A NCAC 07M .0603 (revised and retyped);
- Nov. 23, 2022 Letter to NC Rules Review Commission from Mary L. Lucasse;
- Jan. 18, 2023 Letter to NC Rules Review Commission from Mary L. Lucasse;
- Feb. 9, 2023 letter to NC Rules Review Commission from Julie Youngman, SELC.

JOSH STEIN
ATTORNEY GENERAL

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

November 23, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305; 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702; 07J .0203, .0206, .0207, .0208, .0210, .0312; 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102.

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC) and pursuant to N.C. Gen. Stat. § 150B-21.12(a)(1) and (2), please accept this letter as the CRC's partial written response to the North Carolina Rules Review Commission ("RRC") September 17, 2022 letter objecting to the above referenced rules (the "Objection Letter"). The CRC will be submitting a second letter (dated November 23, 2022) addressing the remaining rules included in the Objection Letter.

While the CRC disagrees with the RRC's objections, this written response is not intended to be–and should not be interpreted as–a written request to return the above-referenced rules pursuant to N.C. Gen. Stat. § 150B-21.12(d). The CRC is not seeking the return of these rules at this time and, instead, appreciates the opportunity to continue working with the RRC and its staff to resolve the RRC's objections.

At its recent November 17, 2022 regularly scheduled meeting, the CRC decided to submit additional technical changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(1) to the following rules: 07H .0501, .0506, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0204, .0206, .0207, .0208, .0210, .0312, 07M .0601, .0603, .0703, and .0704. While the CRC disagrees with the RRC's objections to these rules, we have attempted to resolve the RRC's concerns through additional technical changes and are submitting the revised rules to the RRC along with this Response. Please do not hesitate to let us know if there are any additional technical changes requested.

In addition, the CRC decided not to submit changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(2), for the following rules: 15A NCAC 07H .0502, .0503, .0505, .0507, .2305, 07I .0406, .0506, 07M .0201, .0202, .0401, .0402, .0403, .0701, .1001, .1002, .1101, .1102. The CRC disagrees with the RRC's objections to these rules.

The CRC is submitting the following additional information in an effort to resolve the concerns raised in RRC Objection Letter to all the above-referenced rules.

1.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101 based on the allegation that "each of [these] . . . rules do not meet the definition of a "Rule" pursuant to G.S. 150B-2(8a)" and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). *See* Objection Letter and attached RRC Staff Opinions. This argument is incorrect.

The CRC's authority and duty to adopt "guidelines for the coastal area" consisting of "statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102" is well established and uniquely provided for under its enabling statute. N.C. Gen. Stat. § 113A-107. In 1978, the North Carolina Supreme Court concluded that "the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area." *Adams v. NC Dep't of Natural & Economic Resources*, 295 N.C. 683, 698, 249 S.E. 2d 402, 411 (1978). The Commission provided an initial response on this issue in its September 1, 2022 Memorandum to Brian Liebman and William W. Peaslee, RRC Commission Counsel attached is a copy for your convenience.

During the RRC's September 15, 2022 meeting, RRC counsel was asked by one of the Commissioners for a response to the CRC's claim that that it has authority to adopt rules to set policies and guidelines. RRC counsel responded that the CRC could set policies and guidelines as contemplated by statute–just not by rulemaking. This response completely misunderstands the authority provided by the legislature to the CRC. As explained by the North Carolina Supreme Court, "amendments to the State guidelines by the CRC <u>are</u> considered administrative rule-making."[1] *Adams,* 295 N.C. at 702, 249 S.E.2d at 413. (Emphasis added). This is consistent with the requirement that the CRC "shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement" unless it has "been adopted as a rule in accordance with this Article." N.C. Gen. Stat. § 150B-18. Thus, as authorized by the North Carolina General Assembly in the CRC's enabling statute and confirmed by the North Carolina Supreme Court, the CRC is authorized to set guidelines (including objectives, policies, and standards) regulating the public and private use of land and waters within the coastal area through rule-making.

These rules are not newly adopted but have been in existence for decades as part of the North Carolina Administrative Code pursuant to the very same statutory authority. This creates "a rebuttable presumption that" each "rule was adopted in accordance with Part 2 of the Article." *See* N.C. Gen. Stat. § 150B-21.9(a1). For the RRC to change course in 2022 and now assert that the CRC's long-standing rules are not within the authority

[1] This case was decided under an earlier iteration of the Administrative Procedure Act at N.C. Gen. Stat. 150A.

delegated to the agency by the General Assembly, is arbitrary and capricious and contrary to the North Carolina Supreme Court precedent.

In addition to addressing the RRC's generic objection regarding whether the rules are "Rules," the CRC has provided additional authority for specific rules that the RRC identified as lacking authority. For example, the RRC objected to 15A NCAC 07J .0208 claiming that CAMA does not authorize the circulation of CAMA permit application to other state agencies for review. However, the CRC was instructed by the General Assembly "to coordinate the issuance of permits" and consideration of variances under the Dredge & Fill Act and the Coastal Area Management Act "to avoid duplication and to create a single, expedited permitting process." N.C. Gen. Stat. § 113-229(e). Both statutes also provide for the CRC to adopt rules to implement these articles. *See* N.C. Gen. Stat. § 113-229(e) ("The CRC may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section.") and N.C. Gen. Stat. § 113A-124(c)(8) (The CRC has additional authority "[t]o adopt rules to implement this Article."). As noted by RRC counsel, a dredge and fill permit application is required to be circulated among State agencies and may be submitted to federal agencies. *See* RRC Staff opinion for 15A NCAC 07J .0208 attached to Objection Letter. Given the authority from the legislature requiring that the CRC create a single, expedited permitting process, this provision in the Dredge and Fill Act is sufficient to provide authorization for the CAMA permit applications to be circulated to state and federal agencies for review.

Based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the RRC rescind its earlier objection to these rules based on Section 150B-21.9(1).

2.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(2).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07J .0203, .0204, .0206, .0210, 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, and .1102 based on the claim that these rules were ambiguous. The majority of the RRC's objection to these rules is not specific to individual rules. To the extent that specific words or phrases were identified as ambiguous by the Objection Letter, the CRC has attempted to provide further clarifying language. *See e.g.,* technical changes provided for 15A NCAC 07J .0203, .0204, .0206, .0210, .0601, .0603, .0703, .0704. If there are other technical changes that the RRC believes would resolve any remaining ambiguity, the CRC is willing to consider further changes.

The perceived ambiguity that the RRC has identified in 15A NCAC 07H .2305 regarding the use of the phrase "significant adverse impact" continues to puzzle the CRC. The General Assembly has authorized denial of "an application for a dredge or fill permit upon finding . . . that there will be <u>significant adverse effect</u>" as a result of the proposed dredging and filling. N.C. Gen. Stat. §113-229(e) (emphasis added). The General Assembly clearly understands that determining whether there is a significant adverse impact is not ambiguous. As the CRC has previously explained, this phrase is "a term of art used in other rules and understood by the courts. *See, e.g., Shell Island Homeowners Assoc. v. Tomlinson*, 134 NC App. 217 (1999). The CRC has used this phrase, or similar phrase,

throughout its rules to require an assessment of the impact of the development on the natural resources. *See e.g.,* 15A NCAC 07H .0209 (throughout), 07H .0308, 07J .1101, .1102, 1201, 07K .0202, 07M .0402. Many, if not most, of these rules were recently readopted or amended without the RRC objecting to the rule language requiring an assessment of the impact. It is arbitrary and capricious for the RRC to claim the use of this phrase in one rule is ambiguous when that objection has not been consistently asserted by the RRC.

Based on the changes provided, as well as the clarifying information provided above, the CRC respectfully requests that the RRC rescind its earlier objection based on Section 150B-21.9(2).

3.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(3).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0406, .0506, 07J .0203, .0206, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101 on the grounds these rules were not "reasonably necessary" pursuant to N.C. Gen. Stat. §150B-21.9(3). The majority of these rules are those the RRC contends are not "Rules" and therefore, it also objects under section 3 claiming "only 'Rules' can be reasonably necessary." *See* Objection Letter and attachments. In response, the CRC incorporates and relies on the arguments set forth above in Section 1 relating to N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objects to 15A NCAC 07I .0406 claiming that this rule simply restates information from "G.S. 113A-119.1 and in 15A NCAC 07J .0204." *See* RRC Staff Opinion for 15A NCAC 07I .0406 attached to the Opinion Letter. Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly provides that "a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review." N.C. Gen. Stat.§ 150B-19(4). In this rule, the CRC has provided a brief statement synthesizing information regarding the fee requirement found in two separate places. This is allowable under the Administrative Procedure Act. Moreover, the information included the middle sentence relating to "deficits" is not included elsewhere. Therefore, this rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

In its Objection Letter, the RRC also objects to 15A NCAC 07I .0506 on the basis that the rule is not reasonably necessary as it "re-states material regarding allocation of permit-letting authority that is contained in G.S. 113A-116, -118, and -121." *See* RRC Staff Opinion for 15A NCAC 07I .0506 attached to Objection Letter (cleaned up). Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly has provided that "a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review." N.C. Gen. Stat.§ 150B-19(4). Moreover, this rule provides additional clarifying information regarding boundaries and the extra-territorial zoning area subject to permit letting authority, and timeframes. This rule does not simply re-state material in the statute. Therefore, the rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

4.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(4).

In the Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07J .0203, .0204, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, .1102 for "failure to comply with the Part 2 of Article 2A of the Administrative Procedure Act pursuant to G.S. 150B-21.9(4)." This section of the NC Administrative Procedure Act provides procedures for the adoption of temporary rules, emergency rules, permanent rules, and the periodic review of existing rules. In the Objection Letter and the attachments to the Objection Letter, the RRC has not identified the manner in which it alleges the CRC failed to follow the rulemaking procedures set forth in Part 2 of this Article during its periodic review and re-adoption of these rules.

Moreover, if this objection is merely intended to indicate that the RRC does not believe these rules meet the definition of a "Rule," that objection is based on N.C. Gen. Stat. § 150B-19 which lists restrictions on what can be adopted as a rule in Part 1 of Article 2A of the Administrative Procedure Act–not in Part 2 of Article 2A. Therefore, a reference to Part 1 of Article 2A is not a proper basis for alleging that the rules were not adopted in accordance with Part 2 of Article 2A as required by N.C. Gen. Stat. § 150B-21.9(a)(4).

To the extent that the RRC is objecting to the procedure by which these rules were adopted by the CRC, we are providing the following information to address any such concern. As required by N.C. Gen. Stat. § 150B-21.3A(c), the CRC conducted an analysis of each existing rule and made an "initial determination as to whether the rule is necessary or unnecessary." The classifications were posted for public comment and submitted to the Office of Administrative Hearings for posting on its Web site. The CRC accepted public comment for sixty days after the determination was posted from February 20–April 20, 2017. The agency amended classifications, responded to all objections, and sent a final report to the RRC, including the public comments. Thereafter, the CRC re-adopted these rules as required by July 31, 2020 and sent them out for public comment. Twenty public hearings were held between November 17 and December 10, 2019 throughout the twenty coastal counties included within the Coastal Area Management Act. The public comment period ended December 31, 2019. No public comments were received, no changes were proposed, and no fiscal analysis was required. The CRC re-adopted the rules at its regularly scheduled meeting on February 12, 2020. Thereafter, the CRC began submitting its re-adopted rules to the RRC in manageable groupings. At the RRC's request, the last 132 re-adopted rules were submitted in one large group in June 2022. The RRC objected to 47 of the 132 rules in its September 2022 Objection Letter.

There are fifteen remaining rules for which the RRC's objection is based, in part, on an alleged failure to comply with Part 2 of Article 2A. However, the RRC has not identified any procedural flaws in the process used by the CRC to re-adopt these rules pursuant to the requirements for the periodic review of rules in Part 2 of Article 2A of the Administrative Procedure Act. In addition, an attachment to the specific objection for 15A NCAC 07M .1102 includes a highlighted reference to the procedures for adopting a permanent rule. Since the relevant procedure here relates to the periodic review of rules, the relevance of this attachment is unclear.

If our understanding of the substance of this objection is incorrect, please provide specific information identifying the procedure established in N.C. Gen. Stat. § 150B-21.3A for the periodic review of existing rules or some other section included in Part 2 of Article 2A on which the RRC bases its objection. If there is no alleged flaw in the procedure by which these rules were re-adopted, the CRC respectfully requests that this objection be withdrawn.

In conclusion and based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the objections to each of the 38 rules addressed in this letter be withdrawn.

Sincerely,

Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

JOSH STEIN
ATTORNEY GENERAL

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

January 18, 2023

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections for the following rules:
07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305;
07I .0406, .0504, .0506, .0508, .0511, .0602, .0702;
07J .0203, .0204; .0206, .0207, .0208, .0312;
07M .0201, .0202, .0401, .0402; .0403; .0701, .0703, .0704, .1001, .1002, .1101, and .1102

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC"), please accept this letter as a follow-up to comments provided at the December 15, 2022 RRC meeting. Note, some of the rules are addressed in more than one category.

First, as set forth in more detail in our November 23, 2022 letter, RRC counsel continued to recommend the RRC object to the CRC's rules at **15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101** based on the allegation that "each of [these] . . . rules do not meet the definition of a "Rule" pursuant to G.S. 150B-2(8a)" and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). This argument is simply incorrect. The CRC has authority to adopt "guidelines for the coastal area" through rulemaking consisting of "objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area" as recognized by the NC Supreme Court in *Adams v. Dept. of N.E.R*, 295 N.C. 683, 249 S.E.2d 402 (1978). The CRC respectfully requests the Commission approve these rules based on authority in Chapter 113A, Article 7 and the North Carolina Supreme Court's decision.

Second, following receipt of our November 23, 2022 letter, RRC counsel continued to recommend that the RRC object to the use of the term "significant adverse impact" as ambiguous. This recommendation should be rejected. The phrase "significant adverse impact" has been recently approved by the RRC in other CRC rules. Furthermore, the North Carolina appellate courts understand this term of art (*see, e.g., Shell Island Homeowners Assoc. v. Tomlinson,* 134 N.C. App. 217 (1999) and the General Assembly has authorized the application of this standard (using the very same phrase). *See* N.C.G.S. § 113-229(e). For these reasons, the CRC respectfully requests the RRC approve the following rules which include that phrase: **07H .0508; .2305, 07J .0203; 07M .0402; .0703.**

Third, following receipt of our November 23, 2022 letter, RRC counsel again recommended the RRC object to the following rules as unnecessary: **07I .0406; .0506; .0702**. These rules synthesize different sections of statutes as allowed under G.S. § 150B-19(4) and/or include additional information. I urge this Commission not to accept the Staff's recommendation for these rules. Specifically: The middle sentence in 07I .0406 regarding "deficits resulting from administrative costs" is not contained in statute. This sentence in the Rule addresses a situation that can arise when a local government handling the CAMA minor permits incurs costs greater than the permit fee collected from the applicant. This sentence allows the local program to cover that amount from other CAMA permit reimbursements. Similarly, 07I .0506 combines and consolidates the various requirements imposed by law for the benefit of the regulated public. The rule also includes additional information regarding extra-territorial areas which is not in the statute and is necessary to implement the article as allowed by G.S. § 113A-124(c)(5). Finally, 7I .0702 provides something more than is contained in case law or black letter law by specifying that the CRC, not a court or the OAH, determines whether a local permit-letting agency exceeds its authority. For these reasons, the CRC respectfully requests that the RRC determine these three rules are necessary and approve the rules.

Finally, the CRC has provided additional authority and/or technical changes to address the previous objections raised by RRC Staff Counsel in September and December, 2022 for the following rules: 07I .0508; .0511; 07J .0203; .0204; .0206; .0207; .0208 and 07M .0402, .0704, and .1102.

For the above stated reasons, we respectfully request the RRC approve the remaining re-adopted rules addressed in this letter pursuant to G.S. § 150B-21.3A. Thank you for your consideration of this request.

Sincerely,

Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

15A NCAC 07H .0308 is amended as published with changes in 37:14 NCR 1003-1008 as follows:

15A NCAC 07H .0308 SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS

(a) Ocean Shoreline Erosion Control Activities:

(1) Use Standards Applicable to all Erosion Control Activities:

(A) All oceanfront erosion response activities shall be consistent with ~~the general policy statements in~~ 15A NCAC 07M .0200.

(B) Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, unless specifically authorized under the Coastal Area Management Act, are prohibited. Such structures include bulkheads, seawalls, revetments, jetties, ~~groins~~ groins, and breakwaters.

(C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront properties without regard to the size of the structure on the property or the date of its construction.

(D) Shoreline erosion response projects shall not be constructed in beach or estuarine areas that sustain ~~substantial~~ habitat for fish and wildlife species, as identified by State or federal natural resource agencies during project review, unless mitigation measures are incorporated into project design, as set forth in Rule .0306(h) of this Section.

(E) Project construction shall be timed to minimize adverse effects on biological activity.

(F) Prior to completing any erosion response project, all exposed remnants of or debris from failed erosion control structures must be removed by the permittee.

(G) Permanent erosion control structures that would otherwise be prohibited by these standards may be permitted on finding by the Division that:

(i) the erosion control structure is necessary to protect a bridge that provides the only existing road access on a barrier island, that is vital to public safety, and is imminently threatened by erosion as defined in Part (a)(2)(B) of this Rule;

(ii) the erosion response measures of relocation, beach nourishment or temporary stabilization are not adequate to protect public health and safety; and

(iii) the proposed erosion control structure will have no adverse impacts on adjacent properties in private ownership or on public use of the beach.

(H) Structures that would otherwise be prohibited by these standards may also be permitted on finding by the Division that:

(i) the structure is necessary to protect a ~~state~~ State or federally registered historic site that is imminently threatened by shoreline erosion as defined in Part (a)(2)(B) of this Rule;

(ii) the erosion response measures of relocation, beach nourishment or temporary stabilization are not adequate and practicable to protect the site;

(iii) the structure is limited in extent and scope to that necessary to protect the site; and

(iv) a permit for a structure under this Part may be issued only to a sponsoring public agency for projects where the public benefits outweigh the significant adverse impacts. Additionally, the permit shall include conditions providing for mitigation or minimization by that agency of significant adverse impacts on adjoining properties and on public access to and use of the beach.

(I) Structures that would otherwise be prohibited by these standards may also be permitted on finding by the Division that:

(i) the structure is necessary to maintain an existing commercial navigation channel of regional significance within federally authorized limits;

(ii) dredging alone is not practicable to maintain safe access to the affected channel;

(iii) the structure is limited in extent and scope to that necessary to maintain the channel;

(iv) the structure shall not have significant adverse impacts on fisheries or other public trust resources; and

(v) a permit for a structure under this Part may be issued only to a sponsoring public agency for projects where the public benefits outweigh the significant adverse impacts. Additionally, the permit shall include conditions providing for mitigation or minimization by that agency of any significant adverse impacts on adjoining properties and on public access to and use of the beach.

(J) The Commission may renew a permit for an erosion control structure issued pursuant to a variance granted by the Commission prior to 1 July 1995. The Commission may authorize the replacement of a permanent erosion control structure that was permitted by the Commission pursuant to a variance granted by the Commission prior to 1 July 1995 if the Commission finds that:

(i) the structure will not be enlarged beyond the dimensions set out in the permit;

(ii) there is no practical alternative to replacing the structure that will provide the same or similar benefits; and

(iii) the replacement structure will comply with all applicable laws and with all rules, other than the rule or rules with respect to which the Commission granted the variance, that are in effect at the time the structure is replaced.

(K) Proposed erosion response measures using innovative technology or design shall be considered as experimental and shall be evaluated on a case-by-case basis to determine consistency with 15A NCAC 07M .0200 and general and specific use standards within this Section.

(2) Temporary Erosion Control Structures:

(A) Permittable temporary erosion control structures shall be limited to sandbags placed landward of mean high water and parallel to the shore.

(B) Temporary erosion control structures as defined in Part (A) of this Subparagraph may be used to protect only imminently threatened roads and associated right of ways and buildings and their associated septic systems. A structure is considered imminently threatened if its foundation, septic system, or right-of-way in the case of roads is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no obvious erosion scarp may also be found to be imminently threatened when site conditions, such as a flat beach profile or accelerated erosion, increase the risk of imminent damage to the structure.

(C) Temporary erosion control structures shall be used to protect only the principal structure and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed under Rule .0309 of this Section as an exception to the erosion setback requirement.

(D) Temporary erosion control structures may be placed waterward of a septic system when there is no alternative to relocate it on the same or adjoining lot so that it is landward of or in line with the structure being protected.

(E) Temporary erosion control structures shall not extend more than 20 feet past the sides of the structure to be protected except to align with temporary erosion control structures on adjacent properties, where the Division has determined that gaps between adjacent erosion control structures may result in an increased risk of damage to the structure to be protected. The landward side of such temporary erosion control structures shall not be located more than 20 feet waterward of the structure to be protected or the right-of-way in the case of roads. If a building or road is found to be imminently threatened and at an increased risk of imminent damage due to site conditions such as a flat beach profile or accelerated erosion, temporary erosion control structures may be located more than 20 feet waterward of the structure being protected. In cases of increased risk of imminent damage, the location of the temporary erosion control structures shall be determined by the Director of the Division of Coastal Management or the Director's designee in accordance with Part (A) of this Subparagraph.

(F) Temporary erosion control structures may remain in place for up to eight years for a building and its associated septic system, a bridge or a road. The property owner shall be responsible for removal of any portion of the temporary erosion control structure exposed above grade within 30 days of the end of the allowable time period.

(G) An imminently threatened structure or property may be protected only once, regardless of ownership, unless the threatened structure or property is located in a community that is

actively pursuing a beach nourishment project or an inlet relocation or stabilization project in accordance with Part (H) of this Subparagraph. Existing temporary erosion control structures may be permitted for additional eight-year periods provided that the structure or property being protected is still imminently threatened, the temporary erosion control structure is in compliance with requirements of this Subchapter, and the community in which it is located is actively pursuing a beach nourishment or an inlet relocation or stabilization project in accordance with Part (H) of this Subparagraph. In the case of a building, a temporary erosion control structure may be extended, or new segments constructed, if additional areas of the building become imminently threatened. Where temporary structures are installed or extended incrementally, the time period for removal under Part (F) or (H) of this Subparagraph shall begin at the time the initial erosion control structure was installed. For the purpose of this Rule:

(i) a building and its septic system shall be considered separate structures,

(ii) a road or highway may be incrementally protected as sections become imminently threatened. The time period for removal of each contiguous section of temporary erosion control structure shall begin at the time that the initial section was installed, in accordance with Part (F) of this Subparagraph.

(H) For purposes of this Rule, a community is considered to be actively pursuing a beach nourishment or an inlet relocation or stabilization project in accordance with G.S. 113A-115.1 if it:

(i) has been issued an active CAMA permit, where necessary, approving such project; or

(ii) has been identified by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance Study, General Reevaluation Report, Coastal Storm Damage Reduction Study, or an ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local or federal money, when necessary; or

(iii) has received a favorable economic evaluation report on a federal project; or

(iv) is in the planning stages of a project designed by the U.S. Army Corps of Engineers or persons meeting applicable State occupational licensing requirements and initiated by a local government or community with a commitment of local or state funds to construct the project or the identification of the financial resources or funding bases necessary to fund the beach nourishment, inlet relocation or stabilization project.

If beach nourishment, inlet relocation, or stabilization is rejected by the sponsoring agency or community, or ceases to be actively planned for a section of shoreline, the time extension is void for that section of beach or community and existing sandbags are subject to all applicable time limits set forth in Part (F) of this Subparagraph.

(I) Once a temporary erosion control structure is determined by the Division of Coastal Management to be unnecessary due to relocation or removal of the threatened structure, it shall be removed to the maximum extent practicable by the property owner within 30 days of official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure. If the temporary erosion control structure is determined by the Division of Coastal Management to be unnecessary due to the completion of a storm protection project constructed by the U.S. Army Corps of Engineers, a large-scale beach nourishment project, or an inlet relocation or stabilization project, any portion of the temporary erosion control structure exposed above grade shall be removed by the property owner within 30 days of official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure.

(J) Removal of temporary erosion control structures is not required if they are covered by sand. Any portion of the temporary erosion control structure that becomes exposed above grade after the expiration of the permitted time period shall be removed by the property owner within 30 days of official notification from the Division of Coastal Management.

(K) The property owner shall be responsible for the removal of remnants of all portions of any damaged temporary erosion control structure.

(L) Sandbags used to construct temporary erosion control structures shall be tan in color and ~~three~~ 3 to ~~five~~ 5 feet wide and ~~seven~~ 7 to 15 feet long when measured flat. Base width of the temporary erosion control structure shall not exceed 20 feet, and the total height shall not exceed ~~six~~ 6 feet, as measured from the bottom of the lowest bag.

(M) Soldier pilings and other types of devices to anchor sandbags shall not be allowed.

(N) Existing sandbag structures may be repaired or replaced within their originally permitted dimensions during the time period allowed under Part (F) or (G) of this Subparagraph.

(3) Beach Nourishment. Sand used for beach nourishment shall be compatible with existing grain size and in accordance with Rule .0312 of this Section.

(4) Beach Bulldozing. Beach bulldozing ~~(defined~~ is defined as the process of moving natural beach material from any point seaward of the vegetation line to create a protective sand dike or to obtain material for any other ~~purpose)~~ purpose is considered development and may be permitted as an erosion response if the following conditions are met:

(A) The area on which this activity is being performed shall maintain a slope of adequate grade so as to not endanger the public or the public's use of the beach and shall follow the pre-emergency slope as closely as possible. The movement of material utilizing a bulldozer, front end loader, backhoe, scraper, or any type of earth moving or construction equipment shall not exceed one foot in depth measured from the pre-activity surface elevation;

(B) The activity shall not exceed the lateral bounds of the applicant's property unless permission is obtained from the adjoining land owner(s);

(C) Movement of material from seaward of the mean low water line will require a CAMA Major Development and State Dredge and Fill Permit;

(D) The activity shall not increase erosion on neighboring properties and shall not have an adverse effect on natural or cultural ~~resources;~~ resources as identified by the NC Department of Natural and Cultural Resources.

(E) The activity may be undertaken to protect threatened on-site waste disposal systems as well as the threatened structure's foundations.

(b) Dune Protection, Establishment, Restoration and Stabilization.

(1) No development shall be permitted that involves the removal or relocation of primary or frontal dune sand or vegetation that would adversely affect the integrity of the ~~dune~~ dune's function as a protective barrier against flooding and erosion. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable. Any disturbance of these other dunes shall be allowed only to the extent permitted by this Rule.

(2) Any new dunes established shall be aligned to the greatest extent possible with existing adjacent dune ridges and shall be of the same configuration as adjacent natural dunes.

(3) Existing primary and frontal dunes shall not, except for beach nourishment and emergency situations, be broadened or extended in an oceanward direction.

(4) Adding to dunes shall be accomplished in such a manner that the damage to existing vegetation is minimized. The filled areas shall be replanted or temporarily stabilized until planting can be completed.

(5) Sand used to establish or strengthen dunes shall be of the same general characteristics as the sand in the area in which it is to be placed.

(6) No new dunes shall be created in inlet hazard areas. Reconstruction or repair of existing dune systems as defined in Rule .0305 of this Section and within the Inlet Hazard Area may be permitted.

(7) Sand held in storage in any dune, other than the frontal or primary dune, shall remain on the lot or tract of land to the maximum extent practicable and may be redistributed within the Ocean Hazard AEC provided that it is not placed any farther oceanward than the crest of a primary dune, if present, or the crest of a frontal dune.

(8) No disturbance of a dune area shall be allowed when other techniques of construction can be utilized and alternative site locations exist to avoid dune impacts.

(c) Structural Accessways:

(1) Structural accessways shall be permitted across primary or frontal dunes so long as they are designed and constructed in a manner that ~~entails negligible alteration of~~ does not alter the primary or frontal dune. Structural accessways shall not be considered threatened structures for the purpose of Paragraph (a) of this Rule.

(2) An accessway shall be considered to entail negligible alteration of primary or frontal dunes provided that:

(A) The accessway is exclusively for pedestrian use;

(B) The accessway is a maximum of six feet in width;

(C) Except in the case of beach ~~matting for a local, State, or federal government's public access,~~ matting, the accessway is raised on posts or pilings of five feet or less depth, so that wherever possible only the posts or pilings touch the dune, in accordance with any more restrictive local, State, or federal building requirements. Beach matting ~~for a local, State, or federal government's public access~~ shall be installed at grade and not involve any excavation or fill of the dune; and

(D) Any areas of vegetation that are disturbed are revegetated as soon as feasible.

(3) An accessway that does not meet Part (2)(A) and (B) of this Paragraph shall be permitted only if it meets a public purpose or need which cannot otherwise be met and it meets Part (2)(C) of this Paragraph. Public fishing piers are allowed provided all other applicable standards of this Rule are met.

(4) In order to preserve the protective nature of primary and frontal dunes, a structural accessway ~~(such~~ such as a "Hatteras ~~ramp")~~ ramp" may be provided for off-road vehicle (ORV) or emergency vehicle access. Such accessways shall be no greater than 15 feet in width and may be constructed of wooden sections fastened together, or other materials approved by the Division, over the length of the affected dune area. Installation of a Hatteras ramp shall be done in a manner that will preserve the dune's function as a protective barrier against flooding and erosion by not reducing the volume of the dune.

(5) Structural accessways and beach matting may be constructed no more than six feet seaward of the waterward toe of the frontal or primary dune, provided they do not interfere with public trust rights and emergency access along the beach. Structural accessways and beach matting are not restricted by the requirement to be landward of the First Line of Stable and Natural Vegetation as described in Rule .0309(a) of this Section. A local, State, or federal entity may install beach matting farther seaward to enhance handicap accessibility at a public beach access, subject to review by the Wildlife Resources Commission and the U.S. Fish and Wildlife Service to determine whether the proposed design or installation will have an adverse impact on sea turtles or other threatened or endangered species.

(d) Building Construction Standards. New building construction and any construction identified in Rule .0306(a)(5) of this Section and 15A NCAC 07J .0210 shall comply with the following standards:

(1) In order to avoid danger to life and property, all development shall be designed and placed so as to minimize damage due to fluctuations in ground elevation and wave action in a 100-year storm. Any building constructed within the ocean hazard area shall comply with relevant sections of the North Carolina Building Code including the Coastal and Flood Plain Construction Standards and the local

flood damage prevention ordinance as required by the National Flood Insurance Program. If any provision of the building code or a flood damage prevention ordinance is inconsistent with any of the following AEC standards, the more restrictive provision shall control.

(2) All building in the ocean hazard area shall be on pilings not less than eight inches in diameter if round or eight inches to a side if square.

(3) All pilings shall have a tip penetration greater than eight feet below the lowest ground elevation under the structure. For those structures so located on or seaward of the primary dune, the pilings shall extend to five feet below mean sea level.

(4) All foundations shall be designed to be stable during applicable fluctuations in ground elevation and wave forces during a 100-year storm. Cantilevered decks and walkways shall meet the requirements of this Part or shall be designed to break-away without structural damage to the main structure.

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