

RRC STAFF OPINION

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

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0403

RECOMMENDATION DATE: December 14, 2022

RECOMMENDED ACTION:

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

COMMENT:

At its September meeting, the Rules Review Commission ("RRC") objected to this Rule. Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") submitted the Rule with changes to satisfy the RRC's objection.

It is staff's opinion that that the agency's revisions do not satisfy the Commission's objections to this rule, and that the Commission should continue to object to the revised rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 15A NCAC 07M .0403 is readopted as published **with changes** in 34:09 NCR 764 as follows:

2
3 **15A NCAC 07M .0403 POLICY STATEMENTS**

4 (a) The **placement siting** and operations of major energy facilities **in or affecting impacting** the use of public trust
5 waters and adjacent lands or coastal resources of North Carolina shall be done in a manner that allows for protection
6 of the environment and local and regional socio-economic goals as set forth in the local land-use plan(s) and **state**
7 **guidelines** in 15A NCAC 07H and 07M. The placement and operation of such facilities shall be consistent with state
8 rules and statutory standards and shall comply with local land use plans and with use standards for development within
9 AECs, as set forth in 15A NCAC 07H.

10 (b) Proposals, plans and permit applications for major energy facilities to be **located sited** in or **affecting impacting**
11 any land or water use or coastal resource of the North Carolina coastal area shall include a disclosure of all costs and
12 benefits associated with the project. This disclosure shall be prepared **at the earliest feasible stage in planning for the**
13 **project and shall be** in the form of an impact assessment as defined in 15A NCAC 07M .0402 prepared by the applicant.
14 If **appropriate** environmental documents are prepared and reviewed under the provisions of the National
15 Environmental Policy Act (NEPA) or the North Carolina Environmental Policy Act (NCEPA), this review **will shall**
16 satisfy the definition of "impact assessment" if all issues listed in this Rule are addressed and these documents are
17 submitted **in sufficient time to be used** to review state permit applications for the project or **subsequent** consistency
18 determinations.

19 (c) Local governments shall not **unreasonably** restrict the development of **necessary** energy facilities; however, they
20 may develop siting measures that will minimize impacts to local resources and to identify potential sites suitable for
21 energy facilities. This section shall not limit the ability of a city or county to plan for and regulate the siting of a wind
22 energy facility in accordance with land-use regulations authorized under Chapter 160A and Chapter 153A of the
23 General Statutes. Wind energy facilities constructed within the planning jurisdiction of a city or county shall
24 demonstrate compliance with any local ordinance concerning land use and any applicable permitting process.

25 (d) Energy facilities that do not require shorefront access shall be sited inland of the shoreline areas. **In instances**
26 **when** **When the siting of energy facilities along shorelines** **shoreline portions** of the coastal zone area are **necessary**
27 **necessary locations**, shoreline siting shall be acceptable only if it can be demonstrated that there are no significant
28 adverse impacts to coastal resources, public trust waters, and the public's right to access **and passage** will not be
29 **unreasonably** restricted, and all **reasonable** mitigating measures have been taken to minimize impacts to AECs.
30 **Whether restrictions or mitigating Mitigating** measures **are reasonable** shall be determined after consideration **of of,**
31 **as appropriate,** economics, technical feasibility, **aerial areal** extent of impacts, **uniqueness of and** impacted **area. area,**
32 **and other relevant factors.**

33 (e) The scenic and visual qualities of coastal areas shall be considered and protected as **important** public **resources**
34 **consistent with G.S. 113A-1-2(b)(4)(a). resources.** Energy development shall be sited and designed to provide
35 maximum protection of views to and along the ocean, sounds and scenic coastal areas, and to minimize the alteration
36 of natural landforms.

1 (f) All energy facilities in or ~~affecting impacting~~ the use of public trust waters and adjacent lands or coastal ~~resource~~
2 ~~resources~~ shall be sited and operated so as to comply with the following criteria:

- 3 (1) Activities that ~~could may~~ result in significant adverse impacts on ~~coastal resources, resources of the~~
4 ~~coastal area,~~ including marine and estuarine resources and wildlife resources, as defined in G.S.
5 113-129, and significant adverse impacts on the use of public trust waters and adjacent lands in the
6 coastal area shall be ~~avoided avoided. unless site specific information demonstrates that each such~~
7 ~~activity will result in no significant adverse impacts on the use of public trust waters and adjacent~~
8 ~~lands or coastal resources;~~
- 9 (2) For petroleum facilities, ~~necessary~~ data and information required ~~by the state~~ for ~~state State~~ permits
10 and federal consistency reviews, pursuant to 15 CFR part 930, shall assess the risks of petroleum
11 release or spills, evaluate possible trajectories, and enumerate response and mitigation measures
12 employing the best available technology to be followed in the event of a release or spill. The
13 information ~~must shall~~ demonstrate that the potential for petroleum release or spills and ensuing
14 damage to coastal resources has been minimized and shall factor environmental conditions, currents,
15 winds, and inclement events such as northeasters and hurricanes, in trajectory scenarios. ~~For This~~
16 ~~same data and information shall be required for~~ facilities requiring an Oil Spill Response ~~Plan; Plan;~~
17 ~~this information shall be included in such a plan;~~
- 18 (3) Dredging, spoil disposal and construction of ~~related~~ structures that are likely to have significant
19 adverse impacts on the use of public trust waters and adjacent lands or coastal resources shall be
20 ~~avoided; minimized, and any unavoidable actions of this sort shall minimize damage to the marine~~
21 ~~environment;~~
- 22 (4) ~~Damage to or interference with Significant adverse impacts to~~ existing or traditional uses, such as
23 fishing, navigation and access to public trust areas, and areas with high biological or recreational
24 value such as those listed in Subparagraphs (f)(10)(A) and (H) of this Rule, shall be ~~avoided; avoided~~
25 ~~to the extent that such damage or interference is likely to have significant adverse impacts on the~~
26 ~~use of public trust waters and adjacent lands or coastal resources;~~
- 27 (5) Placement of structures in geologically unstable areas, such as unstable sediments and active faults,
28 shall be avoided ~~to the extent that damage to such structures resulting from geological phenomena~~
29 ~~is likely to if the siting of structures will~~ have significant adverse impacts on the use of public trust
30 waters, adjacent lands or coastal resources;
- 31 (6) Procedures necessary to secure an energy facility in the event of severe weather conditions, such as
32 extreme wind, currents and waves due to northeasters and hurricanes, shall be initiated ~~sufficiently~~
33 ~~in advance of the commencement of severe weather~~ to ensure that significant adverse impacts on
34 the use of public trust waters, adjacent lands and coastal ~~resources; resources shall be avoided;~~
- 35 (7) Significant adverse impacts on federally listed threatened or endangered species shall be avoided;

- 1 (8) Major energy facilities are not appropriate uses in fragile or historic areas, and other areas containing
2 environmental or natural resources of more than local significance, as defined in G.S. 113A-
3 113(b)(4), such as parks, recreation areas, wildlife refuges, and historic sites;
- 4 (9) ~~No energy~~ Energy facilities shall ~~not~~ be sited in areas where they pose a threat to the integrity of the
5 facility and surrounding areas, such as ocean front areas with high erosion rates, areas having a
6 history of overwash or inlet formation, and ~~areas in the vicinity of existing inlets; Inlet Hazard Areas~~
7 ~~identified in 15A NCAC 07H .0304;~~
- 8 (10) In the siting of energy facilities and related structures, significant adverse impacts to the following
9 areas shall be avoided:
- 10 (A) areas of high biological significance, including offshore reefs, rock outcrops, hard bottom
11 areas, sea turtle nesting beaches, coastal wetlands, primary or secondary nursery areas or
12 spawning areas and essential fish habitat areas of particular concern as designated by the
13 appropriate fisheries management agency, oyster sanctuaries, submerged aquatic
14 vegetation as defined by the Marine Fisheries Commission, colonial bird nesting areas, and
15 migratory bird routes;
- 16 (B) tracts of maritime forest in excess of 12 contiguous acres and areas identified as eligible
17 for registration or dedication by the North Carolina Natural Heritage Program;
- 18 (C) crossings of streams, rivers, and lakes except for existing ~~readily accessible~~ corridors;
- 19 (D) anchorage areas and port areas;
- 20 (E) artificial reefs, shipwrecks, and submerged archaeological resources;
- 21 (F) ~~dump sites; Ocean Dredged Material Disposal Sites;~~
- 22 (G) primary dunes and frontal dunes;
- 23 (H) established recreation or wilderness areas, such as federal, ~~state~~ State and local parks,
24 forests, wildlife ~~refuges; refuges and other areas used in a like manner;~~
- 25 (I) military air space, training or target area and transit lanes;
- 26 (J) cultural or historic sites of more than local significance; and
- 27 (K) segments of Wild and Scenic River System.
- 28 (11) Construction of energy facilities shall occur only during periods of lowest biological vulnerability.
29 Nesting and spawning periods shall be avoided; and
- 30 (12) If facilities located in the coastal area are abandoned, habitat of value equal to or greater than that
31 existing prior to construction shall be restored ~~as soon as practicable~~ following abandonment. For
32 abandoned facilities outside the coastal area, habitat in the areas shall be restored to its
33 preconstruction state and functions ~~as soon as practicable~~ if the abandonment of the structure is
34 likely to have significant adverse impacts on the use of public trust waters, adjacent lands or coastal
35 resources.
36

37 *History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;*

1 *Eff. March 1, 1979;*
2 *Amended Eff. April 1, 1992;*
3 *Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;*
4 *Temporary Amendment Eff. July 8, 1999; December 22, 1998;*
5 *Amended Eff. February 1, 2011; August 1, 2000;*
6 *Readopted Eff. January 1, 2023.*

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AGENCY: Coastal Resources Commission
RULE CITATION: 15A NCAC 07M .1002 and 07M .1102
RECOMMENDATION DATE: December 14, 2022
RECOMMENDED ACTION:

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

COMMENT:

At its September meeting, the Rules Review Commission ("RRC") objected to these Rules. Pursuant to G.S. 150B-21.12, the Coastal Resources Commission ("CRC") filed rules presumably to satisfy the RRC's objection.

It appears that the agency submitted the same rules as those to which the RRC objected without any changes.

It is staff's opinion that that the agency's filings do not satisfy the Commission's objections to these rules, and that the Commission should continue to object to the revised rules.

William W. Peaslee
Commission Counsel

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- (4) It was adopted in accordance with Part 2 of this Article.

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

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

1 15A NCAC 07M .1002 is readopted as published **with changes** in 34:09 NCR 764 as follows:

2

3 **15A NCAC 07M .1002 POLICY STATEMENTS**

4 (a) It is the policy of the State of North Carolina that all public trust waters subject to surface water restrictions
5 pursuant to 33 USCS 3 for use in military training shall be opened to commercial fishing at established times
6 **appropriate** for harvest of the fisheries resources **consistent with state and federal regulations** within those areas.

7 (b) Where laser weaponry is used, the area of restricted surface waters shall be at least as large as the recommended
8 laser safety **zone-zone under 33 USCS 3.**

9 (c) Water quality shall be tested periodically in the surface water restricted areas surrounding such targets and results
10 of such testing shall be reported to the ~~Department.~~ **Department of Environmental Quality.**

11

12 *History Note:* Authority G.S. 113A-102(b); 113A-107; **113A-124;**

13 *Eff. March 1, 1990;*

14 *Readopted Eff. January 1, 2023.*

1 15A NCAC 07M .1102 is readopted as published **with changes** in 34:09 NCR 765 as follows:

2

3 **15A NCAC 07M .1102 POLICY STATEMENTS**

4 (a) Clean, beach quality material dredged from navigation channels within the active nearshore, beach, or inlet shoal
5 systems **must shall** not be removed permanently from the active nearshore, beach or inlet shoal system unless no
6 practicable alternative exists. Preferably, this dredged material will be disposed of on the ocean beach or shallow
7 active nearshore area where environmentally acceptable and compatible with other uses of the beach.

8 (b) Research on the beneficial use of dredged material, particularly poorly sorted or fine grained materials, and on
9 innovative ways to dispose of this material so that it is more readily accessible for beneficial use is encouraged.

10 (c) Material in disposal sites not privately owned shall be available to anyone proposing a beneficial use not
11 inconsistent with Paragraph (a) of this Rule.

12 (d) Restoration of estuarine waters and public trust areas adversely impacted by existing disposal sites or practices is
13 in the public interest and shall be **encouraged at every opportunity, consistent with G.S. 113A-18(f)**

14

15 *History Note: Authority G.S. 113A-107; **113A-118(f); 113-229***

16

Eff. October 1, 1992;

17

Readopted Eff. January 1, 2023.