RRC STAFF OPINION

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

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0704

RECOMMENDED ACTION: December 13, 2022

Approve, but note staff's comment

X Object, based on:

X Lack of statutory authority

X Unclear or ambiguous

Unnecessary

X Failure to comply with the APA

Extend the period of review

COMMENT:

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

The Rule as currently written does not clarify the ambiguous descriptions of the criteria which the Division of Coastal Management ("DCM") will consider. i.e., "systems determined to be more productive" and the creation of areas of "similar ecological utility and potential biological value".

Subparagraph (a)(4) lists forms of mitigation which "shall be considered" by the DCM and "may be used in combination with" subparagraphs (a)(1)-(3) to achieve the stated goal set forth in 15A NCAC 07M .0703(d)." 15A NCAC 07M .0703(d) does not state a goal.

> *(D) IN DETERMINING WHETHER TO APPROVE AN APPLICATION FOR DEVELOPMENT FOR WHICH MITIGATION IS PROPOSED, THE DIVISION OF COASTAL MANAGEMENT SHALL CONSIDER THE SCOPE OF THE PROJECT, THE SITE OF THE PROPOSED MITIGATION, THE AMOUNT OF MITIGATION PROPOSED, THE HISTORIC USES OF THE DEVELOPMENT SITE AND MITIGATION SITE, THE PUBLIC TRUST, AND SIGNIFICANT ADVERSE IMPACTS.*

William W. Peaslee
Commission Counsel

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

Paragraph (d) attempts to make the enforcement options provided in G.S. 113A-126 applicable to "permit conditions according to G.S. 113A-120(b)".

G.S. 113A-126(a) provides for injunctive relief for a "violation of any of the provisions of [Article 7 of Chapter 113A] or of any rule or order adopted under the authority of this article …"

G.S. 113A-126(b) provides for injunctive relief and penalties for a "violation of any of the provisions of [Article 7 of Chapter 113A] relating to permits for minor developments issued by a local government, or of any rule or order adopted under the authority of this article relating to such permits…"

It does not appear that permit conditions of G.S. 113A-120(b) are enforceable under G.S. 113A-126. Accordingly, staff recommends objection to the Rule as the agency lacks authority pursuant G.S. 150B-21.9(a)(1).

In the current version of the Rule, the Commission has removed Paragraph (e) to which the RRC made no objection. This Paragraph exempted certain projects from mitigation requirements. The Rule now differs substantially from the proposed Rule pursuant to G.S. 150B-21.2(g). The adoption was not in compliance with the Administrative Procedures Act.

Accordingly, staff recommends that the RRC find that the CRC has not satisfied the RRC's objection and object to this Rule for the continued lack of authority to adopt the Rule, the ambiguity of the Rule, and recent failure to comply with the APA in the Rule's adoption.

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

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

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

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

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

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

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

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

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

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

(1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.

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

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

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

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

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

(a) The responsible official or body shall deny an application for a permit upon finding:

(1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.

(2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).

(3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements of more than local concern identified in subdivisions a through c of G.S. 113A-113(b)(3).

(4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).

(5) In the case of areas covered by G.S. 113A-113(b)(5), that the development will jeopardize the public rights or interests specified in said subdivision.

(6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in subdivisions a through e of G.S. 113A-113(b)(6) in such a manner as to unreasonably endanger life or property.

(7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions (1) to (6) of this subsection.

(8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.

(9) In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.

(10) In any case, that the proposed development would contribute to cumulative effects that would be inconsistent with the guidelines set forth in subdivisions (1) through (9) of this subsection. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity.

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

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

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

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

(2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

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

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

§ 113A-126. Injunctive relief and penalties.

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

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

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

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

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

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

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

(4) In determining the amount of the civil penalty, the Commission shall consider the following factors:
a. The degree and extent of harm, including, but not limited to, harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
b. The duration and gravity of the violation;
c. The effect on water quality, coastal resources, or public trust uses;
d. The cost of rectifying the damage;
e. The amount of money saved by noncompliance;
f. Whether the violation was committed willfully or intentionally;
g. The prior record of the violator in complying or failing to comply with programs over which the Commission has regulatory authority; and

h. The cost to the State of the enforcement procedures.

(4a) The Commission may also assess a person who is assessed a civil penalty under this subsection the reasonable costs of any investigation, inspection, or monitoring that results in the assessment of the civil penalty. For a minor development violation, the amount of an assessment of investigative costs shall not exceed one-half of the amount of the civil penalty assessed or one thousand dollars ($1,000), whichever is less. For a major development violation, the amount of an assessment of investigative costs shall not exceed one-half of the amount of the civil penalty assessed or two thousand five hundred dollars ($2,500), whichever is less.

(5) The clear proceeds of penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 485, ss. 1-3; c. 518, s. 6; 1987, c. 827, ss. 11, 143; 1991, c. 725, s. 6; 1991 (Reg. Sess., 1992), c. 839, s. 3; c. 890, s. 8; 1993, c. 539, s. 874; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 53(a); 2006-229, s. 1; 2011-398, s. 38.)

15A NCAC 07M .0704 is readopted as published in 34:09 NCR 764 as follows:

15A NCAC 07M .0704 POLICY STATEMENTS

(a) The following forms of mitigation are ranked in order of preference:

(1) Enhancement of coastal resources with created or restored systems determined to be potentially more productive of the resources characteristic of unaltered North Carolina ecosystems than those destroyed.

(2) Creation or restoration of an area of similar ecological utility and potential biological value than that destroyed or altered.

(3) Creation or restoration of an area with a desirable but different ecological function or potential than that destroyed or altered.

(4) The following forms of mitigation will be considered even though they do not meet the definition in 15A NCAC 7M .0702. They are actions which by themselves shall not be deemed adequate to offset habitat losses, but may be used in combination with Subparagraphs (a) (1) through (3) to achieve the stated goal of these Rules.

(A) Acquisition for public ownership of unique and ecologically important systems not protected by state and/or federal regulatory programs. The type of impacts to be mitigated and the quality of the area to be acquired will be considered on a case-by-case basis.

(B) Transfer of privately owned lands subject to state and federal regulatory control into public ownership.

(C) Provisions of funds for research or for management programs.

(D) Increased public access for recreational use.

(b) Mitigation proposals may be the basis for approval of a development which is otherwise in conflict with general or specific use standards set forth in 15A NCAC 7H .0208. If a development represents no significant loss to coastal resources, the mitigation proposal must be on-site, or proximate thereto, and must be designed to enhance the coastal environment.

(c) Mitigation proposals to offset losses associated with publicly funded projects shall be reviewed by the staff with the sponsoring agency and incorporated into project plans.

(d) Approved mitigation proposals for all categories of development shall become a part of permit conditions according to G.S. 113A-120(b) and thereby subject to enforcement authority pursuant to G.S. 113A-126 and shall be memorialized in a mitigation agreement which will constitute a contract between the applicant and the CRC.

(e) Those projects consistent with the review criteria for permit approval shall be exempt from mitigation requirements.

History Note: *Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124;*
Eff. January 1, 1984;
Readopted Eff. August 1, 2022.