

## 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 .0703

RECOMMENDED ACTION: December 13, 2022

- 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:

*At its September meeting, the Rules Review Commission ("RRC") objected to this Rule for 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.*

*In its revision to the Rule, the agency added Subparagraph (d), which includes the term "significant adverse impacts".*

*"[S]ignificant adverse impact" is undefined. It is counsel's position that the phrase is unclear and ambiguous, and this language could be used to deny an applicant's permit. The regulated public must understand exactly what is required of them and by what criteria a permit may be denied.*

*Accordingly, staff recommends that the RRC find that the revised rule do not satisfy the Commission's objection to this Rule, and that the Commission should continue to object to the revised rule.*

William W. Peaslee  
Commission Counsel

**§ 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.

1 15A NCAC 07M .0703 is readopted as published with changes in 34:09 NCR 764 as follows:

2  
3 **15A NCAC 07M .0703 MITIGATION CANDIDACY PROJECTS**

4 (a) Before the The CRC may approve a development project for mitigation candidacy if the applicant shall can  
5 demonstrate that all of the following criteria can be are met:

6 (1) there is no reasonable or prudent alternate design or location for the project that would avoid the  
7 losses to be mitigated;

8 (2) the entire project for which the permit is requested is dependent upon being located within or in  
9 close proximity to public trust waters and coastal wetlands;

10 (3) benefits to the public interest will clearly outweigh the long range adverse impacts effects to the  
11 environment. A benefit to the public interest may be established by a project which has been clearly  
12 shown to be the least damaging alternative and which:

13 (A) if publicly funded funded, creates benefits of national or state importance. This category  
14 may include but is not limited to public roadways, navigation projects, state ports, and  
15 projects designed to provide public access to the water; public trust waters;

16 (B) if privately funded funded, provides increased access opportunities to public trust resources  
17 available to the general public for free or for a nominal fee, or provides significant  
18 economic benefits to the state or community in accord and is consistent with the local land  
19 use plan; plan.

20 (4) all reasonable means and measures to lessen the impacts of the project have been incorporated into  
21 the project design.

22 (b) Mitigation may also be the basis for CRC approval for projects which cannot meet all the criteria of 15A NCAC  
23 7M-07M .0703(a) if the CRC determines that public benefits of the project and enhancement and protection of the  
24 environment overwhelmingly outweigh environmental losses based on the criteria set out in 15A NCAC 07M  
25 .0703(d).

26 (c) Mitigation candidacy projects may be considered by the CRC during the permit processing time prescribed in 15A  
27 NCAC 7J .0204, in accordance with the procedures set out in 15A NCAC 7J .0600 concerning declaratory rulings.  
28 The applicant may request a declaratory ruling on the applicability of the mitigation policy as set forth in 15A NCAC  
29 7M .0703(a) provided that the applicant agrees that the permit processing time period set out in 15A NCAC 07J .0600  
30 will not run during the pendency of the declaratory ruling consideration. If a declaratory ruling is to be issued pursuant  
31 to the applicant's request, a public meeting will be held to discuss the proposed project and to assist the Commission  
32 in obtaining the information necessary to make the declaratory ruling, and to receive comments from the public prior  
33 to presenting the ruling request to the Commission. Information concerning the proposed mitigation may also be  
34 introduced at the meeting. CRC approval of the mitigation candidacy project is binding on the Commission and the  
35 person applicant requesting it, in accordance with 15A NCAC 7J-07J .0603(e).

36 (d) In determining whether to approve an application for development for which mitigation is proposed, the Division  
37 of Coastal Management shall consider the scope of the project, the site of the proposed mitigation, the amount of

1 mitigation proposed, the historic uses of the development site and mitigation site, the public trust, and significant  
2 adverse impacts.

3  
4 *History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124; 113-229;*  
5 *Eff. January 1, 1984;*  
6 *Amended Eff. September 1, 1985;*  
7 *Readopted Eff. January 1, 2023.*