

**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 .0501

RECOMMENDATION DATE: February 13, 2023

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 on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a “rule” pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency’s authority pursuant to G.S. 150B-21.9(a(1)), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission (“CRC”) resubmitted the Rule with changes in an effort to satisfy RRC’s objections.*

*Specifically addressing the language of the Rule, it is best described as both vague and circular. While the Rule purports to define “[n]atural and cultural resource areas,” the definition offered is not only self-referential but uses terms that are subjective and susceptible to any reading the agency wishes to give them. In essence, the definition reads that a “natural and cultural resource area” is an “area containing natural or cultural resources” that are “of more than local significance” in which “uncontrolled or incompatible development” could cause damage to those resources or undefined “scientific, educational, or associative values” and “aesthetic qualities” possessed by those resources. The agency does not define these values or qualities or give any explicatory examples. The agency does not explain what kind of development would be “uncontrolled or incompatible” with these “resources”. The agency does not state who makes the determination that any particular piece of land or water satisfies the provided definition. No term mentioned herein appears to have a*

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Commission Counsel

*settled meaning within Section 07H or within the portions of Ch. 113A cited by the agency in its History Note. Moreover, comparing the language of the Rule to its supporting statutes, it appears that beyond largely repeating G.S. 113A-113(b)(4), other subparagraphs of G.S. 113A-113(b)(4) provide more detail as to what is being regulated than the Rule which must “implement[]or interpret[]” the statute.*

*While CRC submitted a revised version of this Rule prior to the December 2022 meeting, the revisions leave such significant ambiguity that it is unclear whether CRC is adopting a “rule” as defined in G.S. 150B-2(8a) or a policy statement.*

*As such, staff recommends that RRC find that CRC has not satisfied the September 2022 objections and continue its existing objections on the basis that the Rule does not meet the statutory definition of a “rule” and alternatively is impermissibly 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.)

**§ 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.)

G.S. 150B-2

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- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
  - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

**§ 113A-113. Areas of environmental concern; in general.**

(a) The Coastal Resources Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part.

(b) The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination:

- (1) Coastal wetlands as defined in G.S. 113-229(n)(3) and contiguous areas necessary to protect those wetlands;
- (2) Estuarine waters, that is, all the water of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters, as set forth in the most recent official published agreement adopted by the Wildlife Resources Commission and the Department of Environmental Quality;
- (3) Renewable resource areas where uncontrolled or incompatible development which results in the loss or reduction of continued long-range productivity could jeopardize future water, food or fiber requirements of more than local concern, which may include:
  - a. Watersheds or aquifers that are present sources of public water supply, as identified by the Department or the Environmental Management Commission, or that are classified for water-supply use pursuant to G.S. 143-214.1;
  - b. Capacity use areas that have been declared by the Environmental Management Commission pursuant to G.S. 143-215.13(c) and areas wherein said Environmental Management Commission (pursuant to G.S. 143-215.3(d) or 143-215.3(a)(8)) has determined that a generalized condition of water depletion or water or air pollution exists;
  - c. Prime forestry land (sites capable of producing 85 cubic feet per acre-year, or more, of marketable timber), as identified by the Department.
- (4) Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems, which may include:
  - a. Existing national or State parks or forests, wilderness areas, the State Nature and Historic Preserve, or public recreation areas; existing sites that have been acquired for any of the same, as identified by the Secretary; and proposed sites for any of the same, as identified by the Secretary, provided that the proposed

- site has been formally designated for acquisition by the governmental agency having jurisdiction;
  - b. Present sections of the natural and scenic rivers system;
  - c. Stream segments that have been classified for scientific or research uses by the Environmental Management Commission, or that are proposed to be so classified in a proceeding that is pending before said Environmental Management Commission pursuant to G.S. 143-214.1 at the time of the designation of the area of environmental concern;
  - d. Existing wildlife refuges, preserves or management areas, and proposed sites for the same, as identified by the Wildlife Resources Commission, provided that the proposed site has been formally designated for acquisition (as hereinafter defined) or for inclusion in a cooperative agreement by the governmental agency having jurisdiction;
  - e. Complex natural areas surrounded by modified landscapes that do not drastically alter the landscape, such as virgin forest stands within a commercially managed forest, or bogs in an urban complex;
  - f. Areas that sustain remnant species or aberrations in the landscape produced by natural forces, such as rare and endangered botanical or animal species;
  - g. Areas containing unique geological formations, as identified by the State Geologist; and
  - h. Historic places that are listed, or have been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966; historical, archaeological, and other places and properties owned, managed or assisted by the State of North Carolina pursuant to Chapter 121; and properties or areas that are or may be designated by the Secretary of the Interior as registered natural landmarks or as national historic landmarks;
- (5) Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution;
- (6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include:



- a. Sand dunes along the Outer Banks;
  - b. Ocean and estuarine beaches and the shoreline of estuarine and public trust waters;
  - c. Floodways and floodplains;
  - d. Areas where geologic and soil conditions are such that there is a substantial possibility of excessive erosion or seismic activity, as identified by the State Geologist;
  - e. Areas with a significant potential for air inversions, as identified by the Environmental Management Commission.
- (7) Areas which are or may be impacted by key facilities.
- (8) Outstanding Resource Waters as designated by the Environmental Management Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary for the purpose of maintaining the exceptional water quality and outstanding resource values identified in the designation.
- (9) Primary Nursery Areas as designated by the Marine Fisheries Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

(c) In those instances where subsection (b) of this section refers to locations identified by a specified agency, said agency is hereby authorized to make the indicated identification from time to time and is directed to transmit the identification to the Commission; provided, however, that no designation of an area of environmental concern based solely on an agency identification of a proposed location may remain effective for longer than three years unless, in the case of paragraphs (4)a and d of subsection (b) of this section, the proposed site has been at least seventy-five percent (75%) acquired. Within the meaning of this section, "formal designation for acquisition" means designation in a formal resolution adopted by the governing body of the agency having jurisdiction (or by its chief executive, if it has no governing body), together with a direction in said resolution that the initial step in the land acquisition process be taken (as by filing an application with the Department of Administration to acquire property pursuant to G.S. 146-23).

(d) Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly. (1973, c. 476, s. 128; c. 1262, ss. 23, 86; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 518, s. 1; 1989, c. 217, s. 1; c. 727, s. 128; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(u).)

1 15A NCAC 07H .0501 is readopted as published with changes in 34:09 NCR 757 as follows:

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**SECTION .0500 - NATURAL AND CULTURAL RESOURCE AREAS**

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**15A NCAC 07H .0501 GENERAL**

6 ~~The fourth and final group of AECs is gathered under the heading of fragile coastal natural~~ **Natural** and cultural  
7 resource areas ~~and is~~ **are** defined as areas containing environmental, natural or cultural resources of more than local  
8 significance in which uncontrolled or incompatible development could result in major or irreversible damage to natural  
9 systems or cultural resources, scientific, educational, or associative values, or aesthetic qualities.

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11 *History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(4e) to (b)(4g);*

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*113A-124;*

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*Eff. September 9, 1977;*

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*Amended Eff. June 1, 1979;*

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*Readopted Eff. January 1, 2023.*

**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 .0510  
RECOMMENDATION DATE: February 13, 2023  
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 on all four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a)(1), it was not reasonably necessary pursuant to G.S. 150B-21.9(a)(3), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a)(4). Additionally, the RRC objected to the language as it was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections.*

*This Rule purports to define "significant coastal historic architectural resources." Again, as in previous rules in Section .0500, the "description" of the term is self-referential and circular; "districts, structures, buildings, sites, or objects that have more than local significance to history or architecture."*

*Paragraph (b) attempts to explain the significance of these resources. Again, it is a blend of ambiguous or subjective terms and policy language. The rule states that these are "important educational, scientific, associative, or aesthetic resources," which would be "jeopardized" by "uncontrolled or incompatible development." No detail is given as to what kind of development would be "incompatible." Without further specificity, this paragraph appears to be a mere policy statement.*

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*Paragraph (c) describes the “management objectives” for these resources, and as in Rules .0506., 0507, and .0509, contains self-described “policy statements.” As with numerous other rules in Section .0500, these “policy statements” are expressed in terms of preserving or conserving the vaguely defined “values” of a particular resource. For instance, paragraph (c)(1) states that the agency shall seek to “conserve” these resources as “a living part of community life and development... to give a sense of orientation to the people of the State[.]” This is facially subjective and ambiguous language.*

*While CRC submitted a revised version of this Rule prior to the December 2022 meeting, the revisions leave such significant ambiguity that it is unclear whether CRC is adopting a “rule” as defined in G.S. 150B-2(8a) or a policy statement.*

*As such, staff recommends that RRC find that CRC has not satisfied the September 2022 objections and continue its existing objections on the basis that the Rule does not meet the statutory definition of a “rule” and alternatively is impermissibly 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.)

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(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.)

G.S. 150B-2

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- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
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  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
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    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
  - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.



**§ 113A-113. Areas of environmental concern; in general.**

(a) The Coastal Resources Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part.

(b) The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination:

- (1) Coastal wetlands as defined in G.S. 113-229(n)(3) and contiguous areas necessary to protect those wetlands;
- (2) Estuarine waters, that is, all the water of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters, as set forth in the most recent official published agreement adopted by the Wildlife Resources Commission and the Department of Environmental Quality;
- (3) Renewable resource areas where uncontrolled or incompatible development which results in the loss or reduction of continued long-range productivity could jeopardize future water, food or fiber requirements of more than local concern, which may include:
  - a. Watersheds or aquifers that are present sources of public water supply, as identified by the Department or the Environmental Management Commission, or that are classified for water-supply use pursuant to G.S. 143-214.1;
  - b. Capacity use areas that have been declared by the Environmental Management Commission pursuant to G.S. 143-215.13(c) and areas wherein said Environmental Management Commission (pursuant to G.S. 143-215.3(d) or 143-215.3(a)(8)) has determined that a generalized condition of water depletion or water or air pollution exists;
  - c. Prime forestry land (sites capable of producing 85 cubic feet per acre-year, or more, of marketable timber), as identified by the Department.
- (4) Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems, which may include:
  - a. Existing national or State parks or forests, wilderness areas, the State Nature and Historic Preserve, or public recreation areas; existing sites that have been acquired for any of the same, as identified by the Secretary; and proposed sites for any of the same, as identified by the Secretary, provided that the proposed

- site has been formally designated for acquisition by the governmental agency having jurisdiction;
  - b. Present sections of the natural and scenic rivers system;
  - c. Stream segments that have been classified for scientific or research uses by the Environmental Management Commission, or that are proposed to be so classified in a proceeding that is pending before said Environmental Management Commission pursuant to G.S. 143-214.1 at the time of the designation of the area of environmental concern;
  - d. Existing wildlife refuges, preserves or management areas, and proposed sites for the same, as identified by the Wildlife Resources Commission, provided that the proposed site has been formally designated for acquisition (as hereinafter defined) or for inclusion in a cooperative agreement by the governmental agency having jurisdiction;
  - e. Complex natural areas surrounded by modified landscapes that do not drastically alter the landscape, such as virgin forest stands within a commercially managed forest, or bogs in an urban complex;
  - f. Areas that sustain remnant species or aberrations in the landscape produced by natural forces, such as rare and endangered botanical or animal species;
  - g. Areas containing unique geological formations, as identified by the State Geologist; and
  - h. Historic places that are listed, or have been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966; historical, archaeological, and other places and properties owned, managed or assisted by the State of North Carolina pursuant to Chapter 121; and properties or areas that are or may be designated by the Secretary of the Interior as registered natural landmarks or as national historic landmarks;
- (5) Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution;
- (6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include:

- a. Sand dunes along the Outer Banks;
  - b. Ocean and estuarine beaches and the shoreline of estuarine and public trust waters;
  - c. Floodways and floodplains;
  - d. Areas where geologic and soil conditions are such that there is a substantial possibility of excessive erosion or seismic activity, as identified by the State Geologist;
  - e. Areas with a significant potential for air inversions, as identified by the Environmental Management Commission.
- (7) Areas which are or may be impacted by key facilities.
- (8) Outstanding Resource Waters as designated by the Environmental Management Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary for the purpose of maintaining the exceptional water quality and outstanding resource values identified in the designation.
- (9) Primary Nursery Areas as designated by the Marine Fisheries Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

(c) In those instances where subsection (b) of this section refers to locations identified by a specified agency, said agency is hereby authorized to make the indicated identification from time to time and is directed to transmit the identification to the Commission; provided, however, that no designation of an area of environmental concern based solely on an agency identification of a proposed location may remain effective for longer than three years unless, in the case of paragraphs (4)a and d of subsection (b) of this section, the proposed site has been at least seventy-five percent (75%) acquired. Within the meaning of this section, "formal designation for acquisition" means designation in a formal resolution adopted by the governing body of the agency having jurisdiction (or by its chief executive, if it has no governing body), together with a direction in said resolution that the initial step in the land acquisition process be taken (as by filing an application with the Department of Administration to acquire property pursuant to G.S. 146-23).

(d) Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly. (1973, c. 476, s. 128; c. 1262, ss. 23, 86; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 518, s. 1; 1989, c. 217, s. 1; c. 727, s. 128; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(u).)

1 15A NCAC 07H .0510 is readopted as published with changes in 34:09 NCR 757 as follows:

2

3 **15A NCAC 07H .0510 SIGNIFICANT COASTAL HISTORIC ARCHITECTURAL RESOURCES**

4 (a) Description. Significant coastal historic architectural resources are defined as districts, structures, buildings, sites  
5 or objects that have more than local significance to history or architecture. Such areas ~~will~~ shall be evaluated by the  
6 ~~North Carolina Historical Commission~~ Department of Natural and Cultural Resources in consultation with the Coastal  
7 Resources Commission as part of the procedure set forth in Rule .0503 of this Section.

8 (b) Significance. Significant coastal historic architectural resources are important educational, scientific, associative,  
9 or aesthetic resources. Such resources would be jeopardized by uncontrolled or incompatible development. In general,  
10 significant Significant historic architectural resources possess integrity of design, setting, workmanship, materials,  
11 and association and:

- 12 (1) are associated with historic events; ~~events that have made a significant contribution to the broad~~  
13 ~~patterns of history;~~ or  
14 (2) are associated with the lives of persons significant in history; or  
15 (3) embody the distinctive characteristics of a type, period, or method of construction, or represent a  
16 significant and distinguishable entity whose components may lack individual distinction; or  
17 (4) have yielded, or may be likely to yield, information important in history.

18 (c) Management Objectives. The CRC's objective is to conserve coastal historic architectural resources of more than  
19 local significance which are valuable educational, scientific, associative or aesthetic resources. Specific objectives  
20 for each of these functions shall be related to the following policy statements either singly or in combination:

- 21 (1) to conserve historic architectural resources as a living part of community life and development,  
22 including their structural and environmental characteristics, ~~in order and~~ to give a sense of  
23 orientation to the people of the ~~state;~~ State;  
24 (2) to ~~insure~~ ensure that the designated historic architectural resource be preserved, as a tangible element  
25 of our cultural heritage, for its educational, scientific, associative or aesthetic purposes;  
26 (3) to protect the values of the designated historic architectural resource as expressed by the local  
27 government and citizenry; these values should be related to the educational, scientific, associative  
28 or aesthetic qualities of the resource.

29

30 *History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(4h); 113A-124;*  
31 *Eff. June 1, 1979;*  
32 *Readopted Eff. January 1, 2023.*

**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 07I .0406

RECOMMENDED ACTION:

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

COMMENT:

*It is staff's opinion that the agency has not satisfied the Commission's objection. Staff recommends continuing the existing objection.*

**§ 150B-19. Restrictions on what can be adopted as a rule.**

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. 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 set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following: a. A service to a State, federal, or local governmental unit. b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both. c. A transcript of a public hearing. NC General Statutes - Chapter 150B 11 d. A conference, workshop, or course. e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

**§ 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.)

1 15A NCAC 07I .0406 is readopted as published in 34:09 NCR 761 as follows:

2

3 **15A NCAC 07I .0406 APPLICATION FEES**

4 The application fees collected by the locality shall be used only to defray the administrative costs associated with the  
5 processing of a CAMA minor permit development application. Deficits resulting from administrative costs exceeding  
6 amounts received from application fees shall be recovered from permit reimbursements. The application fee shall be  
7 consistent with 15A NCAC 07J .0204(b)(6)(B).

8

9 *History Note: Authority G.S. 113A-112; 113A-119; 113A-124;*

10 *Eff. December 10, 1977;*

11 *Amended Eff. July 1, 2013; October 1, 1982; May 20, 1980; August 1, 1978;*

12 *Readopted Eff. January 1, 2023.*



**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 07I .0506

RECOMMENDED ACTION:

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

COMMENT:

*It is staff's opinion that the agency has not satisfied the Commission's objection. Staff recommends continuing the existing objection.*

**§ 150B-19. Restrictions on what can be adopted as a rule.**

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. 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 set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following: a. A service to a State, federal, or

Brian Liebman  
Commission Counsel  
Issued 12/14/22

local governmental unit. b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both. c. A transcript of a public hearing. NC General Statutes - Chapter 150B 11 d. A conference, workshop, or course. e. Data processing services.

- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

### **§ 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.)

1 15A NCAC 07I .0506 is readopted as published with changes in 34:09 NCR 761 as follows:

2

3 **15A NCAC 07I .0506 ALLOCATION OF AUTHORITY**

4 (a) A county may establish permit-letting authority for any city or part thereof that lies within said county if such city  
5 does not submit a letter of intent to the Coastal Resources Commission or states to the Coastal Resources Commission  
6 its intent not to become a local permit-letting agency.

7 (b) A city municipal implementation and enforcement management plan shall be limited to its corporate boundaries  
8 and to any extra-territorial zoning area over which it may have established control at the time it requested authority to  
9 act as a permit-letting agency or over which it later gains control.

10 (c) A county implementation and enforcement plan shall be limited to areas not covered by any city municipal  
11 implementation and enforcement plans unless the county acts as the permit-letting agency for a city or cities. A county  
12 shall begin such duties only after the county's implementation and enforcement plan has been amended to include  
13 such areas.

14 (d) In any city municipality in which neither the city municipality nor the county elects to become the permit-letting  
15 agency, the secretary Secretary shall have that duty.

16 (e) Only the Department of Environment and Natural Resources Environmental Quality shall issue a permit for major  
17 development.

18

19 *History Note: Authority G.S. 113A-117(b); 113A-124(c)(5);*  
20 *Eff. November 1, 1984;*  
21 *Amended Eff. June 1, 2006; May 1, 1990;*  
22 *Readopted Eff. January 1, 2023.*

**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 071 .0508

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

X 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 on three out of the four bases of G.S. 150B-21.9. Specifically, the RRC found that the language did not meet the definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, its adoption as a rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a(1)), it was not reasonably necessary pursuant to G.S. 150B-21.9(a(3)), and its adoption was not in accordance with the Administrative Procedures Act pursuant to G.S. 150B-21.9(a(4)).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. As this version of the Rule continued to contain policy language in paragraph (e), staff issued an opinion on December 14 recommending continued objection. RRC has not acted on that opinion. The agency subsequently revised and resubmitted the rule on January 18, 2023. The January revision eliminates the objectionable policy language.*

*As such, staff recommends that RRC find the agency has satisfied the September 2022 objection, that the changes do not rise to the level of a substantial change, and that the January 18, 2023 version of the rule be approved.*

Brian Liebman  
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.

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.)

## G.S. 150B-2

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
  - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.



1 15A NCAC 07I .0508 is readopted as published with changes in 34:09 NCR 761 as follows:

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**15A NCAC 07I .0508 CONSIDERATION OF APPLICATION BY LOCAL PERMIT OFFICER**

(a) The method of consideration of minor development permit requests by the local permit officer ~~must shall~~ be uniform in application and ~~must shall~~ be set out in writing and available for public inspection. The ~~permit officer~~ Local Permit Officer (LPO) shall use only forms approved by the Coastal Resources Commission in ~~its~~ handling of any minor development permit application.

(b) The local ~~management~~ implementation and enforcement plan shall specify the procedures which will be followed in the handling and consideration of all applications for a minor development permit, including ~~appropriate~~ response to receipt of an application for a major development permit.

(c) The ~~permit officer~~ LPO shall maintain a record of all applications, correspondence, public notices, responses from public notices, and a copy of ~~his~~ the final disposition for all permit applications whether issued or denied.

(d) The ~~permit officer,~~ LPO, in ~~his~~ handling of all minor development permit applications, ~~must shall~~ use a numbering system ~~which will be~~ developed by the Coastal Resources Commission in consultation with local government.

(e) ~~It is the policy of the Coastal Resources Commission to allow local government the greatest flexibility in coordinating minor development permits with all other local permits and approvals. The local government Commission requires, however, that the implementation and enforcement plan eventually submitted to the Commission shall state how the local government will coordinate its review of minor development permits with all other local permits and approvals. this coordination will be accomplished.~~

*History Note:* Authority G.S. 113A-117(c); 113A-124(e)(5);  
Eff. November 1, 1984;  
Readopted Eff. February 1, 2023.

## 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 07I .0511

RECOMMENDATION DATE: February 13, 2023

RECOMMENDED ACTION:

X 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 on three out of the four bases of G.S. 150B-21.9. Specifically, the RRC found that the rule would exceed the agency's authority pursuant to G.S. 150B-21.9(a(1)) as of the two statutes cited in the History Note, one had been repealed in 1987 and the other was inapposite.*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. As this version of the Rule did little else besides omitting the repealed statute from the History Note, staff recommended continued objection. The agency subsequently revised and resubmitted the rule on January 18, 2023. The January revision adds G.S. 113A-111 to the History Note. It is staff's opinion that this statute provides the agency with the authority to require, as a condition of approval of local implementation and enforcement programs, a local government to adopt said plan as part of their ordinances.*

*As such, staff recommends that RRC find the agency has satisfied the September 2022 objection, that the changes do not rise to the level of a substantial change, and that the January 18, 2023 version of the rule be approved.*

Brian Liebman  
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.

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.)

G.S. 150B-2

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    - 1. Declaratory rulings under G.S. 150B-4.
    - 2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
  - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
  - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

1 15A NCAC 07I .0511 is readopted with changes as published in 34:09 NCR 761 as follows:

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3 **15A NCAC 07I .0511 COMMITMENT TO ADOPT LOCAL MANAGEMENT PLAN AS ORDINANCE**

4 **In order for the Commission to approve a local implementation and enforcement program the** The local governing  
5 body shall enter into a commitment to accept the local management plan as part of the city or county code of ordinances  
6 within a three-month period.

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8 *History Note:* Authority G.S. 113A-111; 113A-117(c); ~~113A-124(e)(5)~~;

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*Eff. November 1, 1984;*

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*Readopted Eff. February 1, 2023.*

**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 07I .0702

RECOMMENDED ACTION:

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

COMMENT:

*In response to the Commission's objections, the agency added a reference in the History Note to G.S. 113A-117(c), which, in staff's opinion, satisfies the Commission's objection for lack of statutory authority. However, the agency continues to cite to G.S. 113A-120(c), which as noted previously, was repealed, and to G.S. 113A-118(e), which is inapposite.*

*Moreover, the agency has made no revision in response to the objection for lack of necessity and it is staff's opinion that the Commission should continue its objection on that basis.*



**§ 113A-118. Permit required.**

(e) If, within the meaning of G.S. 113A-103(5)b3, the siting of any utility facility for the development, generation or transmission of energy is subject to regulation under this Article rather than by the State Utilities Commission or by other law, permits for such facilities shall be obtained from the Coastal Resources Commission rather than from the appropriate city or county.

**§ 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-124. Additional powers and duties.**

(c) The Commission shall have the following additional powers and duties under this Article:

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

(5) Repealed by Session Laws 1987, c. 827, s. 141.

- (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
- (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
- (8) To adopt rules to implement this Article.
- (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.

(d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

**§ 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.)

1 15A NCAC 07I .0702 is readopted as published **with changes** in 34:09 NCR 761 as follows:

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3 **15A NCAC 07I .0702 WHEN AN ACTION EXCEEDS THE LOCAL AUTHORITY**

4 When the local permit-letting agency exceeds **the scope and extent of** its authority, which is limited to consideration  
5 of applications proposing minor development as defined in the Coastal Area Management Act, that action shall be  
6 null, void and of no effect. The determinations of the **commission Coastal Resources Commission** shall be binding  
7 on the local permit-letting agency as to questions of such jurisdiction.

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9 *History Note:* Authority G.S. **113A-117(c); 113A-118(e); 113A-120(c); 113A-124(c)(5);**

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*Eff. November 1, 1984;*

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*Readopted Eff. January 1, 2023.*

## 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 07J .0203

DATE ISSUED: February 13, 2023

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 on all four bases of G.S. 150B-21.9. Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. While the agency made revisions that staff believed were sufficient to satisfy the objections for lack of statutory authority, necessity, and failure to comply with the APA, staff opined on December 14, 2022 that the rule continued to contain ambiguous language. The agency subsequently revised and resubmitted the rule on January 18, 2023.*

*The January revisions continue to contain ambiguous language. Specifically, the agency continued to make changes to language in (a) requiring plats to be drawn to scale. However, the revised language: "A scale of 1" = 200' or less is normally required" remains ambiguous, as this does not actually provide the regulated public with an enforceable standard.*

*Moreover, throughout new paragraph (d), the agency has replaced ambiguous language with terms RRC has specifically objected to as ambiguous. Specifically, the agency has added the term "significant adverse impact," which is currently the basis for objection to 07H .2305. Mr. Duke has prepared a staff opinion and a memo regarding this term, which are herein incorporated by reference.*

*Even assuming arguendo that the term "significant adverse impact" is not objectionable on its own, its use in context here remains impermissibly ambiguous. The relevant language states that new*

Brian Liebman  
Commission Counsel

*permits or permit modifications shall not be required unless staff of the Division of Coastal Management “find[] that the changes have the potential for significant adverse impact to an Area of Environmental Concern or rendering the project inconsistent with Local Land Use Plans.” The Rule provides no guidelines as to what kind of changes could have the “potential” to impact an AEC or land use plan.*

*The Rule goes on to state that “[n]othing in this Rule would prohibit an applicant from proceeding with work outside an AEC that cannot be determined to have a direct significant adverse impact on the AEC while a permit application for work in the AEC” is pending and all other permits have been obtained. This sentence adds the concept of a “direct” significant adverse impact, seemingly in opposition to an “indirect” significant adverse impact. This concept is undefined and undescribed here.*

*As such, staff recommends that RRC find that CRC has not satisfied the September 2022 objections and continue its existing objection on the basis that the Rule is impermissibly ambiguous under G.S. 150B-21.9(a)(2). Additionally, staff recommends that RRC add a new objection pursuant to G.S. 150B-21.9(a)(2) for ambiguity with respect to use of the term “significant adverse impact.”*

**§ 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.)



1 15A NCAC 07J .0203 is readopted as published with changes in 34:09 NCR 762 as follows:

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**15A NCAC 07J .0203 PREPARATION OF WORK PLATS**

(a) General. Project plans or work plats must shall include a top or planview, plan view, a cross-sectional view, and a location map. All plats must shall have the standard north arrow. North should shall be at the top of the plat. The prints must be neat and sufficiently clear to permit photographic reproduction. Originals are preferred as copies are often found to be unacceptable. The applicant should use as few sheets as necessary to show clearly what is proposed. Work plats must shall be accurately drawn to scale. A scale of 1" = 200' or less is normally required, required, in order that project detail can be easily understood.

(b) Details of Work Plats

- (1) Topview Top View or Planview Plan View Plats. Such drawings must shall show existing and proposed features such as dune systems, shorelines, creeks, marshlands, docks, piers, bulkheads, excavated areas, fill areas, type and location of sewage treatment facilities and effluent outlets. Existing water depths must shall be indicated using mean low water as base or zero. These can zero and shall be shown either as contours or spot elevation. Care should be used in indicating Work plats shall indicate which features are existing and which are proposed. Property boundaries, as they appear on the deed, and the names of adjacent property owners must shall be shown on the detailed plat. The work plat must shall clearly show any all areas to be excavated and the exact locality site for disposal of the excavated material. When fill material is to be placed behind a bulkhead or dike, the plan shall must be sufficiently detailed to show the exact location of such bulkheads or dikes, and the adequacy ability of the bulkhead or dike to confine the material. Drawings must shall indicate approximate mean low and mean high water lines and the presence of marsh wetlands in the area of proposed work. In areas where the difference in daily low and high tides is less than six inches, only an average water level must shall be indicated.
- (2) Cross-Section Drawing. A cross-sectional diagram showing depth and elevation of proposed work relative to existing ground level -- mean low and mean high water line must shall be included in the plan. The mean low water must shall be the reference for water depths and land elevations (i.e., mean low water should be depicted as "Elevation 0.0 MLW"). First floor elevations relative to mean sea level must shall be shown for any proposed buildings, structures.
- (3) Location Map. A map of small scale showing the geographic location of the proposed work is also required. The location map must provide information to locate the project site.
- (4) Title of Drawing. Each drawing must shall have a simple title block to identify the project or work, and shall include name of applicant, date the plat was prepared, and scale of the plat. The date of any revisions must shall be clearly noted. The applicant must also include the name of the person who drew the plat.

(c) Applications are often made for permits to authorize projects that have a portion of the development outside Areas of Environmental Concern. Some Basic information concerning plans for development outside AECs is necessary to

1 determine compatibility with the local Land Use Plan and to demonstrate be reasonably sure that such development  
2 will not adversely impact AECs. Therefore, any Any application for a CAMA or Dredge and Fill permit shall include,  
3 at a minimum, include the following information:

- 4 (1) detailed information on any development located in or directly impacting an AEC;
- 5 (2) a plat showing the entire tract of land to be developed and possible access or roadway locations;
- 6 (3) maps or statements or government agency concerning identifying the location of wetlands within  
7 the project area or indicating that there are no wetlands within the project area. to the extent that a  
8 wetlands examination has been made by a private consultant or government agency. Each developer  
9 of a project is urged, for his own protection and planning, to procure such information prior to  
10 submission for a CAMA permit;
- 11 (4) a narrative description of the proposed development that shall include include, at a minimum, the  
12 following information:
  - 13 (A) the character of the development (i.e. residential, commercial, recreational, etc.);
  - 14 (B) the maximum number of residential living units that will be permitted;
  - 15 (C) the maximum acreage that will be utilized for non-residential purposes; and,
  - 16 (D) a statement as to whether wastewater treatment is to be by municipal system, septic tank,  
17 or other on-site treatment system. A general description of any on-site treatment system  
18 shall be included, included;
  - 19 (E) — a statement that access, as required by all land use regulations, is available through the site  
20 to the Area of Environmental Concern without crossing any Section +404= wetland or, if  
21 such a crossing is required, a statement that said crossing is properly authorized. If the site  
22 contains significant wetlands, such statement may be required from a qualified private  
23 consultant or government agency, based on an examination of the property by such private  
24 consultant or government agency. The CAMA permit when issued may be conditioned  
25 upon the procurement of any required wetlands permit, if the need for such is disclosed by  
26 such statement;
- 27 (5) any maps or plans that have been prepared to meet other regulatory requirements such as stormwater  
28 management and sedimentation and erosion control.

29 (d) Following review of the permit application, including the aforementioned supporting data (Subparagraphs 1-59),  
30 a permit may be issued conditioned upon compliance with the development parameters provided in the narrative  
31 statement accompanying the application. Any subsequent violation of these narrative standards as incorporated  
32 within the permit shall be a permit violation. No subsequent permit, permit modification, or other agency approval  
33 shall be required for any subsequent work performed outside the Area of Environmental Concern as long as such  
34 work is within the parameters described in the narrative statement presented with the permit, and included in the  
35 permit conditions. Any subsequent change in the development which changes the parameters of the narrative,  
36 statement shall be submitted to the staff, Division of Coastal Management, but no new permit or permit modification  
37 shall be required unless staff the Division of Coastal Management finds that the changes would have the potential

1 ~~for significant adverse impact to reasonable expectation of adversely affecting~~ an Area of Environmental Concern or  
2 rendering the project inconsistent with Local Land Use Plans. Nothing in this Rule would prohibit an applicant from  
3 proceeding with work outside an AEC that cannot reasonably be determined to have a direct significant adverse  
4 impact on the AEC while a permit application for work in the AEC is pending provided that all other necessary  
5 local, state, and federal permits have been obtained.

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7 *History Note: Authority G.S. 113-229(n)(3); 113-230(a); 113A-119; 113A-124;*  
8 *Eff. March 15, 1978;*  
9 *Amended Eff. July 1, 1989;*  
10 *Readopted Eff. February 1, 2023.*

## **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 07J .0204

DATE ISSUED: February 13, 2023

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, finding that the rule was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2), and that the agency had failed to comply with the APA pursuant to G.S. 150B-21.9(a)(4).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. On December 14, 2022, staff issued an opinion recommending continued objection on the basis that the revised rule had not addressed any of RRC's objections. Although the Commission did not act upon this opinion, the agency submitted further revisions on January 18, 2023.*

*In its most recent revision, the agency has satisfied RRC's objections with respect to failure to comply with the APA, in that it has added the requirements of the application form referenced in subparagraph (b)(1). As there is no indication that these requirements are new—i.e. that the contents of the form have been changed by their inclusion in the Rule—staff believes this change is not substantial pursuant to G.S. 150B-21.2(g).*

*Nevertheless, the rule continues to contain significant ambiguity, upon which staff continues to recommend objection. In paragraph (b)(7), the agency requires submission of "any other information the Department or local permit officer deems necessary for a review of the application..." While the agency has deleted the portion of the Rule stating that incomplete applications will be returned and added a reference to the "balanced judgment" required by G.S.*

Brian Liebman  
Commission Counsel

*113A-124(a)(1), it continues to appear that any application could be deemed incomplete for any reason. Without further description of what kinds of materials or information the Department may require before rejecting a permit application, it is staff's opinion that this provision is impermissibly unclear and ambiguous.*

*As such, staff recommends that RRC find that CRC has satisfied the September 2022 objection with respect to failure to comply with the APA pursuant to G.S. 150B-21.9(a)(4), but that CRC has not satisfied the September 2022 objection for ambiguity under G.S. 150B-21.9(a)(2). Staff recommends that the September 2022 objection for ambiguity be continued.*

**§ 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.)

1 15A NCAC 07J .0204 is readopted as published with changes in 34:09 NCR 762 as follows:

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**15A NCAC 07J .0204 PROCESSING THE APPLICATION**

(a) On receipt of a CAMA major development and/or dredge and fill permit application ~~by the Department, the Department shall send~~ a letter ~~shall be sent~~ to the applicant acknowledging receipt.

(b) Application processing shall begin when an application is accepted as complete. Before an application will be accepted as complete, the applicant ~~following requirements must be met;~~ [must] shall submit the following:

(1) a current application form available from the Division of Coastal Management located at 400 Commerce Avenue, Morehead City, North Carolina, 28557. The substantive requirements of the form shall include the name and contact information of the applicant, the name and contact information for the agent and contractor, the project location and site description, a description of the purpose, the daily use of the proposed development, and a description of the proposed construction methodology; must be submitted;

(2) all questions on the application form must be completed or the letters "N/A" must be placed in each section that does not apply;

(3) an accurate work ~~plan plat~~ as described in 15A NCAC 07J .0203 15A NCAC 7J .0203 herein must shall be attached to all CAMA major development ~~and/or or~~ dredge and fill permit applications;

(4) a copy of a deed or other instrument under which the applicant claims title must accompany a CAMA major development ~~and/or or~~ dredge and fill permit application;

(5) notice to adjacent riparian landowners must be given as follows:

(A) For CAMA major development permits, the applicant must provide the certified Certified return mail receipts (or copies thereof) indicating that the adjacent riparian landowners who share a property line with the site of the proposed development (as identified in the permit application) have been sent have received a copy of the application for the proposed development must be included in a CAMA major development and/or dredge and fill permit application. Said landowners have 30 days from the date of notification in which to comment. Such comments will be considered by the Department in reaching a final decision on the application.

(B) For CAMA minor development permits, the applicant must shall give actual notice to all adjacent riparian landowners who share a property line with the site of the proposed development of his or her intention to develop his or her property and apply for a CAMA minor development permit, permit to all adjacent riparian landowners. Actual notice can be given by sending a certified letter, informing the adjoining property owner in person or by telephone, or by using any other method which satisfies the Local Permit Officers that a good faith effort has been made to provide the required notice;

(6) the application fee must be paid as set out in this Subparagraph:

1 (A) Major development permit - Application fees shall be in the form of a check or money  
2 order payable to the Department. The application fee for private, non-commercial for profit  
3 development shall be two hundred fifty dollars (\$250.00). The application fee for a public  
4 or commercial for profit project shall be four hundred dollars (\$400.00).

5 (B) Minor development permit - Application fees shall be in the form of a check or money  
6 order payable to the permit-letting agency in the amount of one hundred dollars (\$100.00).  
7 Monies so collected may be used only in the administration of the permit program;

8 (7) any other information the Department or local permit officer deems necessary to review the  
9 application and make a balanced judgment per G.S.113A-124(a)(1), on whether to issue the  
10 requested permit. ~~for a review of the application must be provided. Any application not in~~  
11 ~~compliance with these requirements will be returned to the applicant along with a cover letter~~  
12 ~~explaining the deficiencies of the application and will not be considered accepted until it is~~  
13 ~~resubmitted and determined to be complete and sufficient.~~ If a local permit officer receives an

14 application for a permit that the local permit officer lacks authority to grant, the permit officer shall  
15 return the application with information as to how the application may be properly considered; and  
16 (8) for development proposals subject to review under the North Carolina Environmental Policy Act  
17 (NCEPA), G.S. ~~113A-100~~ 113A-1 ~~et. et~~ seq., the permit application will be complete only on  
18 submission of the appropriate environmental assessment document.

19 (9) Any application not in compliance with the requirements in this Rule will be returned to the  
20 applicant along with a cover letter explaining why it is not considered complete.

21 (c) Upon acceptance of a major development and/or dredge and fill permit as complete, the Department shall send a  
22 letter to the applicant setting forth the date date on which acceptance was made.

23 (d) If the application is found to be incomplete or inaccurate after processing has begun or if based on review by the  
24 Division or other State and federal review agencies additional information regarding the scale or scope of the project  
25 from the applicant is necessary to adequately assess the project, the processing shall be terminated held in abeyance  
26 pending receipt of the additional necessary changes or necessary information from the applicant. During the pendency  
27 of any termination of processing, While permit processing is suspended, the time to process the permit processing  
28 period shall not run. If the changes or additional information significantly alters the scale or scope of the project  
29 proposal, the application shall be considered new and the permit processing period will begin to run from that date.

30 (e) Any CAMA or Dredge and Fill violation occurring at a proposed project site for which an application is being  
31 reviewed shall be processed according to the procedures in 15A NCAC 07J .0408 through 0410. ~~15A NCAC 7J~~  
32 ~~.0408—0410.~~ If the violation substantially altered the proposed project site, and restoration is deemed necessary,  
33 required in accordance with G.S. 113A-126. the applicant shall be notified that processing of the application will be  
34 suspended pending compliance with the notice of required restoration. Satisfactory restoration Restoration of any  
35 unpermitted unauthorized development that has substantially altered a at the project site is required deemed necessary  
36 to allow a complete review of the application and an accurate assessment of the project's potential impacts. The  
37 applicant shall be notified that permit processing has resumed, and that a new processing deadline has been established



1 once the required restoration has been deemed satisfactory by the Division of Coastal Management or Local Permit  
2 Officer.

3 (f) If during the public comment period a question is raised as to public rights of access across the subject property,  
4 the Division of Coastal Management shall examine the access issue prior to making a permit decision. Any individual  
5 or governmental entity initiating action to judicially recognize a public right of access must obtain a court order to  
6 suspend processing of the permit application. Should the parties to legal action resolve the issue, permit processing  
7 shall continue.

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9 *History Note: Authority G.S. 113-229; 113A-119; 113A-119.1; 113A-122(c); 113A-124;*

10 *Eff. March 15, 1978;*

11 *Amended Eff. November 1, 1991; March 1, 1991; July 1, 1990; July 1, 1989;*

12 *Temporary Amendment Eff. September 2, 1998;*

13 *Temporary Amendment Expired June 28, 1999;*

14 *Amended Eff. August 1, 2000;*

15 *Readopted Eff. February 1, 2023.*

## 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 07J .0206

DATE ISSUED: February 13, 2023

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X  Object, based on:
  - Lack of statutory authority
  - Unclear or ambiguous
- X  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 on the basis that the agency lacked statutory authority to adopt the Rule pursuant to G.S. 150B-21.9(a)(1), that the rule was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2), and that the rule was unnecessary pursuant to G.S. 150B-21.9(a)(3).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. On December 14, 2022, staff issued an opinion recommending continued objection on the basis that the revised rule had not satisfied RRC's objections regarding ambiguity or necessity, but that the agency had cited sufficient statutory authority for the Rule. Although the Commission did not act upon this opinion, the agency submitted further revisions on January 18, 2023.*

*In its latest revision, the agency has replaced the ambiguous term "[w]ithin a reasonable time" with "No later than 45 days". While it is staff's opinion that the change satisfies the ambiguity objection, and does not constitute a substantial change, staff observes that the agency has not revised the rule to cure the necessity objection. As stated in the original September 2022 objection, the first sentence of this two-sentence rule merely re-states the statutory language of G.S. 113A-119(b).*

*Moreover, while staff believes the agency's reference to G.S. 132-6.2 does provide statutory authority to charge fees for the cost of an application, it is misplaced in the body of the Rule rather*

Brian Liebman  
Commission Counsel

*than in the History Note. While this is not objectionable, moving the reference to the History Note is a technical change that should be completed prior to approval of this Rule.*

*As such, staff recommends that RRC find that CRC has satisfied the September 2022 objection with respect to lack of statutory authority pursuant to G.S. 150B-21.9(a)(1) and ambiguity pursuant to G.S. 150B-21.9(a)(2), but that CRC has not satisfied the September 2022 objection for necessity under G.S. 150B-21.9(a)(3). Staff recommends that the September 2022 objection for lack of necessity be continued.*

**§ 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.)

1 15A NCAC 07J .0206 is readopted with changes as published in 34:09 NCR 762 as follows:

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3 **15A NCAC 07J .0206 PUBLIC NOTICE OF THE PROPOSED DEVELOPMENT**

4 Within a reasonable time No later than 45 days after receiving an a complete application for a major development  
5 permit, a significant modification to an application for a major permit, or an application to modify substantially a  
6 previously issued major permit, the Division of Coastal Management shall issue public notice of the proposed  
7 development as provided in G.S. 113A-119(b). Any citizen or group will, upon request, be promptly sent a copy of  
8 the application upon payment of a reasonable fee to cover costs of copying, handling, and ~~posting~~ posting as  
9 authorized by G.S.132-6.2.

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11 *History Note: Authority G.S. 113A-119(b);*

12 *Eff. March 15, 1978;*

13 *Amended Eff. January 1, 1990; October 1, 1988; November 1, 1983;*

14 *Readopted Eff. February 1, 2023.*

## 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 07J .0207

DATE ISSUED: February 13, 2023

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 on the basis that the agency lacked statutory authority to adopt the Rule pursuant to G.S. 150B-21.9(a)(1) and that the rule was unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. On December 14, 2022, staff issued an opinion recommending continued objection on the basis that the revised rule had not satisfied either ground for RRC's objections. Although the Commission did not act upon this opinion, the agency submitted further revisions on January 18, 2023.*

*In the latest revision of the Rule, the agency makes two principal changes. First, the agency adds G.S. 113A-127 to the History Note. However, review of that statute reveals that it requires only that State agencies "shall keep informed of federal and interstate agency plans, activities, and procedures" and take "reasonable steps . . . to preserve the integrity" of their policies where they conflict with federal or interstate agency plans. It is staff's opinion that this does not resolve the existing objection for lack of statutory authority.*

*Second, the agency has added language to paragraph (e) replacing a "thorough and complete review of the application" with "a complete review of the application based on the criteria for granting or denying permits set for [sic] in G.S. 113A-120." Staff opines that this new language does not rise to the level of a substantial change, and satisfies the objection for ambiguity.*

Brian Liebman  
Commission Counsel

*As such, staff recommends that RRC find that CRC has satisfied the September 2022 objection with respect to ambiguity pursuant to G.S. 150B-21.9(a)(2), but that CRC has not satisfied the September 2022 objection for lack of statutory authority under G.S. 150B-21.9(a)(1). Staff recommends that the September 2022 objection for lack of statutory authority be continued.*

**§ 113A-127. Coordination with the federal government.**

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

**§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.**

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

- (1) The size of the development.
- (2) The impact of the development on areas of environmental concern.
- (3) How often the class of development is carried out.
- (4) The need for on-site oversight of the development.
- (5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and



enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii) providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to

create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift

ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the

Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

- (3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*). (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55.)

**§ 113A-118. Permit required.**

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

- (1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environmental Quality, the Department of Administration, the North Carolina Oil and Gas Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies

on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

- (2) A "minor development" is any development other than a "major development."

(e) If, within the meaning of G.S. 113A-103(5)b3, the siting of any utility facility for the development, generation or transmission of energy is subject to regulation under this Article rather than by the State Utilities Commission or by other law, permits for such facilities shall be obtained from the Coastal Resources Commission rather than from the appropriate city or county.

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). The fees associated with any permit issued pursuant to this subsection or rules adopted pursuant to this subsection shall be waived. (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a); 2007-485, s. 5; 2012-143, s. 1(d); 2014-4, s. 4(c); 2015-241, s. 14.30(u).)

**§ 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-124. Additional powers and duties.**

(c) The Commission shall have the following additional powers and duties under this Article:

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.
- (5) Repealed by Session Laws 1987, c. 827, s. 141.
- (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
- (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
- (8) To adopt rules to implement this Article.
- (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.

(d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

**§ 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.)



1 15A NCAC 07J .0207 is readopted as published in 34:09 NCR 762 as follows:

2

3 **15A NCAC 07J .0207 AGENCY REVIEW/COMMENTS: MAJOR DEVELOPMENT/DREDGE AND**  
4 **FILL**

5 (a) In order to determine the impact of the proposed project, the Department shall prepare a field report on each major  
6 development and/or dredge and fill permit application accepted for processing. Such report shall be prepared after an  
7 on-site investigation is made, preferably in the presence of the applicant or his agent. The report **will shall** include  
8 such topics as project location, environmental setting, project description and probable environmental impact but will  
9 not include recommendations of the office.

10 (b) The Department **will shall** circulate major development permit applications to the **several state State** review  
11 agencies having expertise in the criteria enumerated in G.S. 113A-120.

12 (c) The Department **will shall** circulate dredge and fill permit applications to the several state review agencies having  
13 expertise in those matters enumerated in G.S. 113- 229(e) (1) - (5).

14 (d) Each reviewing agency may make an independent analysis of the application and submit recommendations and  
15 comments to the Department. Such recommendations and comments **will shall** be considered by the Department in  
16 taking action on a permit application.

17 (e) Each reviewing agency may request additional information (including Stormwater Management Plans) from the  
18 applicant through the Division of Coastal Management if such information is deemed necessary for a **thorough and**  
19 complete review of the application **based on the criteria for granting or denying permits set for in G.S. 113A-120**. The  
20 applicant **will shall** be notified of the requirement for additional information and permit processing will be suspended  
21 according to 15A NCAC 7J .0204(d).

22 (f) The Division of Coastal Management is one of the **state State** agencies that comments on dredge and fill project  
23 applications. In its role as a commenting agency the Division **will shall** use criteria in 15A NCAC 7H and local land  
24 use plans to assess whether to recommend permit issuance, permit issuance with conditions, or permit denial. Other  
25 commenting **state State** agencies **will shall** make assessments, in accordance with Paragraph (c) of this Rule.

26

27 *History Note: Authority G.S. 113-229; 113A-124(a)(1); **113A-127**;*

28 *Eff. March 15, 1978;*

29 *Amended Eff. July 1, 1989; October 1, 1988; September 1, 1985; November 1, 1984;*

30 *Readopted Eff. February 1, 2023.*

## 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 07J .0208

DATE ISSUED: February 13, 2023

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 on the basis that the agency lacked statutory authority to adopt the Rule pursuant to G.S. 150B-21.9(a)(1).*

*Pursuant to G.S. 150B-21.12, on November 23, 2022, the Coastal Resources Commission ("CRC") resubmitted the Rule with changes in an effort to satisfy RRC's objections. On December 14, 2022, staff issued an opinion recommending continued objection on the basis that the revised rule had not satisfied RRC's objection. Although the Commission did not act upon this opinion, the agency submitted further revisions on January 18, 2023.*

*In the latest revision of the Rule, the agency makes several changes which, in staff's opinion, do not satisfy RRC's objection. The agency added references to G.S. 113-229 and G.S. 113A-127 to the History Note. However, as noted in the original staff opinion issued in July, it is staff's opinion that G.S. 113-229 reaches fill and dredge permits, but does not reach CAMA permits in this manner. Further, review of G.S. 113A-127 reveals that it requires only that State agencies "shall keep informed of federal and interstate agency plans, activities, and procedures" and take "reasonable steps . . . to preserve the integrity" of their policies where they conflict with federal or interstate agency plans. This is in contrast to the Rule, which allows any State, federal, or local agency to submit "specific recommendations . . . and . . . limitations" on the work performed pursuant to these permits and on any operation or maintenance of the completed project thereafter. These "recommendations" and "limitations" may be enforced as "permit conditions" by the Department of Environmental Quality. Thus, this Rule essentially circumvents G.S. 113A-118's commandment that*

Brian Liebman  
Commission Counsel

*permits shall be obtained “from the Secretary” of DEQ or from the Commission, and allows the permit conditions to be set by any other State, federal, or local “reviewing agency.” It should be noted that the Rule does not specify what State, federal, or local agencies are considered “reviewing agencies.”*

*The agency also added a reference to G.S. 150B-19.1(d), which requires that when two or more agencies’ policies or programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules. Staff is of the opinion that without explicitly stating which agencies CRC is attempting to coordinate with, this provision does not apply. Moreover, there is no evidence in the record before RRC that these rules are the product of any such coordination. Rather, this is an open-ended invitation to any State, federal, or local agency CRC determines is a “reviewing agency” to place conditions on the issuance of a permit.*

*As such, staff recommends that RRC find that CRC has not satisfied the September 2022 objection for lack of statutory authority under G.S. 150B-21.9(a)(1). Staff recommends that the September 2022 objection for lack of statutory authority be continued.*

**§ 113A-127. Coordination with the federal government.**

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

**§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.**

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

- (1) The size of the development.
- (2) The impact of the development on areas of environmental concern.
- (3) How often the class of development is carried out.
- (4) The need for on-site oversight of the development.
- (5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and

enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii) providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to

create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift

ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the

Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

- (3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*). (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55.)

**§ 113A-118. Permit required.**

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

- (1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environmental Quality, the Department of Administration, the North Carolina Oil and Gas Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies



on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

- (2) A "minor development" is any development other than a "major development."

(e) If, within the meaning of G.S. 113A-103(5)b3, the siting of any utility facility for the development, generation or transmission of energy is subject to regulation under this Article rather than by the State Utilities Commission or by other law, permits for such facilities shall be obtained from the Coastal Resources Commission rather than from the appropriate city or county.

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). The fees associated with any permit issued pursuant to this subsection or rules adopted pursuant to this subsection shall be waived. (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a); 2007-485, s. 5; 2012-143, s. 1(d); 2014-4, s. 4(c); 2015-241, s. 14.30(u).)

**§ 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-124. Additional powers and duties.**

(c) The Commission shall have the following additional powers and duties under this Article:

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.
- (5) Repealed by Session Laws 1987, c. 827, s. 141.
- (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
- (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
- (8) To adopt rules to implement this Article.
- (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.

(d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

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

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

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

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

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

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

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

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

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

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

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

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

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

### **§ 150B-21.9. 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.)

1 15A NCAC 07J .0208 is readopted with changes as published in 34:09 NCR 762 as follows:

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**15A NCAC 07J .0208 PERMIT CONDITIONS**

(a) Each of the ~~several state review~~ State, federal and local reviewing agencies may submit specific recommendations regarding the manner in which the requested work should be carried out and suggest reasonable limitations on the work in order to protect the public interest with respect to the factors enumerated in G.S. 113A-120 and/or G.S. 113-229(c). The ~~several state review~~ State, federal and local reviewing agencies also may submit specific recommendations regarding limitations to be placed on the operation and/or maintenance of the completed project, as necessary to ensure continued protection of the public interest with respect to those factors. Such limitations may be ~~recommended by the Department or commission to be~~ imposed by the Department on the project in the form of "permit conditions". Upon the failure of the applicant to appeal a permit condition, the applicant will shall be deemed to have amended his permit to conform to the conditions imposed by the Department. Compliance with operational and/or maintenance conditions must shall continue for the life of the project.

(b) The local permit officer may condition a minor development permit upon amendment of the proposed project to take whatever measures may be reasonably necessary to protect the public interest with respect to the factors enumerated in G.S. 113A-120. The applicant must shall sign the conditioned grant permit as an indication of amendment of the proposed project in a manner consistent with the conditions set out by the local permit officer before the permit shall become effective.

(c) Failure to comply with permit conditions constitutes a violation of an order of the Commission under G.S. 113A-126.

*History Note: Authority G.S. 113-229; 113A-120(b); 113A-124(a)(1); ~~113A-124(e)(5)~~; 113A-127;150B-19.1(d)  
Eff. March 15, 1978;  
Amended Eff. March 1, 1985; November 1, 1984.  
Readopted Eff. February 1, 2023.*

**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 07J .0312

RECOMMENDED ACTION:

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

COMMENT:

*It is staff's opinion that the agency's revision has failed to satisfy the Commission's objection for lack of statutory authority. The lone revision to the Rule merely adds a reference to G.S. 150B-22, which refers in part to informal settlement of disputes before the initiation of a contested case under Article 3 or 3A of the APA.*

*This does not address outstanding issues with this Rule, specifically the delegation of authority from CRC to the Director (presumably the Director of the Division of Coastal Management) to enter into settlement negotiations, and ultimately into settlements thereafter.*



**§ 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.

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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.

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