

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 .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:

2
3 **15A NCAC 07I .0508 CONSIDERATION OF APPLICATION BY LOCAL PERMIT OFFICER**

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

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

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

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

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

20
21 *History Note:* Authority G.S. 113A-117(c); 113A-124(e)(5);

22 Eff. November 1, 1984;

23 Readopted Eff. February 1, 2023.

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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

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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.
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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.

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.

7
8 *History Note: Authority G.S. 113A-111; 113A-117(c); 113A-124(c)(5);*

9 *Eff. November 1, 1984;*

10 *Readopted Eff. February 1, 2023.*