

Burgos, Alexander N

From: Thomas, Jason S
Sent: Monday, April 25, 2016 2:57 PM
To: Burgos, Alexander N
Subject: FW: CRC Amendments of Temporary Rules - 15A NCAC 07H .0308, .1704, .1705

Jason Thomas
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
919-431-3081

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

From: Everett, Jennifer
Sent: Monday, April 25, 2016 12:37 PM
To: Thomas, Jason S <jason.thomas@oah.nc.gov>
Subject: RE: CRC Amendments of Temporary Rules - 15A NCAC 07H .0308, .1704, .1705

Hi Jason,

The Coastal Resources Commission will not be submitting a new statement or additional findings regarding these temporary rules.
Thanks.

Jennifer Everett
DEQ Rulemaking Coordinator
NC Department of Environmental Quality

919-707-8614 office
jennifer.everett@ncdenr.gov

1601 Mail Service Center
Raleigh, NC 27699



Email correspondence to and from this address is subject to the North Carolina Public Records Law and may be disclosed to third parties.

From: Thomas, Jason S
Sent: Friday, April 22, 2016 11:13 AM

To: Everett, Jennifer <jennifer.everett@ncdenr.gov>

Subject: CRC Amendments of Temporary Rules - 15A NCAC 07H .0308, .1704, .1705

I am unsure of the status of the Coastal Resources Commission decisions regarding the temporary amendments to the rules referenced above. Will the CRC be providing notice pursuant to G.S. 150B-21.1(b2)?

(b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, **the agency must notify the Commission or its designee of its decision.** The Commission or its designee shall then return the rule to the agency.

Please let me know of the status of this matter.

Thanks.

Jason Thomas
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
919-431-3081

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**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

April 25, 2016

Jennifer Everett
DEQ Rulemaking Coordinator
NC Department of Environmental Quality
Sent via electronic mail to Jennifer.everett@ncdenr.gov

Re: Objection to CRC Amendments of Temporary Rules - 15A NCAC 07H .0308,
.1704, .1705


Dear Ms. Everett:

At its February 18, 2016 meeting, the Rules Review Commission objected to the amendments to the above-identified Rules in accordance with G.S. 150B-21.1(b1).

The Coastal Resources Commission (CRC) responded in accordance with the provisions of G.S. 150B-21.1(b2) on April 25, 2016, and indicated that the CRC will not be submitting a new statement or additional findings regarding these amendments. Pursuant to G.S. 150B-21.1(b2), the amendments referenced above are being returned by attachment to this letter. No further action will be taken by the Rules Review Commission on these amendments.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Jason Thomas
Commission Counsel

Attached: Filing dated February 11, 2016

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

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OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

February 18, 2016

Via Email Only: frankgorhamCRC@gmail.com

Frank Gorham, Chairman
142 Beach Road South
Wilmington, NC 28411

Re: 15A NCAC 07H .0308, .1704, .1705

Dear Chairman Gorham:

At the February 18, 2016, meeting of the Rules Review Commission, the Commission reviewed amendments to the rules referenced above filed by the Coastal Resources Commission (CRC) on February 11, 2016. The Findings of Need forms filed with these rules indicate that the rules were adopted by the Board on February 10, 2016, after completing the process for adopting a temporary rule. The Commission declined to approve these amendments to the rules because the CRC failed to comply with G.S. 150B-21.9(a)(1) and with Session Law 2015-241, Section 14.6.(q).

The findings of need forms for the rules state that the temporary rules were mandated by Session Law 2015-241, Section 14.6.(q), which states the following:

SECTION 14.6.(q) The Coastal Resources Commission shall adopt temporary rules to implement subsection (p) of this section no later than December 31, 2015. The Commission shall also adopt permanent rules to implement this section.

The Commission disapproved the above-captioned rule amendments because the adoption date of each rule was after December 31, 2015, and, therefore, the CRC lacked the statutory authority for this temporary rule making. *See* G.S. 150B-21.9(a)(1).

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919/431-3000
fax: 919/431-3100

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fax: 919/431-3104

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fax: 919/431-3100

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Division
919/431-3036
fax: 919/431-3103

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'Jason Thomas', with a long horizontal flourish extending to the right.

Jason Thomas
Commission Counsel

cc: Renee Cahoon, Vice Chair – cahooncrc@gmail.com
Jennifer Everett, Rule-making Coordinator – jennifer.everett@ncdenr.gov
Mike Lopazanski, Agency Contact – mike.lopezanski@ncdenr.gov
Mary L. Lucasse, Esq. – MLucasse@ncdoj.gov



STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

ROY COOPER
ATTORNEY GENERAL

P.O. BOX 629
RALEIGH, NC 27602

REPLY TO: MARY L. LUCASSE
ENVIRONMENTAL DIVISION
TEL: (919) 716-6962
FAX: (919) 716-6767
mlucasse @ncdoj.gov

February 17, 2016

Via E-mail: Jason.Thomas@oah.nc.gov

Jason Thomas, Staff Counsel
Rules Review Commission
6714 Mail Service Center
Raleigh, NC 27699-6714

**Re: Coastal Resources Commission
15A NCAC 07H .0308, .1704, and .1705**

Dear Mr. Thomas:

I am writing on behalf of the Coastal Resources Commission (CRC) to address the concerns expressed in the Rules Review Commission (RRC) Staff Opinion regarding rules submitted by the CRC, which rules are proposed to be codified at 15A NCAC 07H .0308, .1704, and .1705. Specifically, this letter is to address RRC staff's concern as to whether specific statutory authority supports the rules¹.

As a preliminary matter, the CRC has statutory authority to promulgate rules to govern the use of sandbags which authority is set forth in N.C. Gen. Stat. §§113A-107(a),(b); -113(b)(6)a, b, d; -114.1(b1); -115.1; and -124. Indeed, the RRC Staff Opinion recognizes that the CRC may adopt permanent rules relating to sandbags consistent with the requirements of N.C. Gen. Stat. §150B.

The specific statutory authority to adopt the proposed temporary rules is set forth in the 2015 Appropriations Act, North Carolina Session Law 2015-241, Section 14.6.(p) which requires the CRC to amend its rules relating to the use of temporary erosion control structures (e.g. sandbags) in order to address each of the following issues:

- (1) Allow the placement of temporary erosion control structures on a property that is experiencing coastal erosion even if there are no imminently threatened structures on the property if the property is adjacent to a property where temporary erosion control structures have been placed.
- (2) Allow the placement of contiguous temporary erosion control structures from one shoreline boundary of a property to the other shoreline boundary, regardless of proximity to an imminently threatened structure.

¹ This is an advisory letter and has not been reviewed and approved in accordance with the procedure for issuing an Attorney General's Opinion.

- (3) The termination date of all permits for contiguous temporary erosion control structures on the same property shall be the same and shall be the latest termination date for any of the permits.
- (4) The replacement, repair, or modification of damaged temporary erosion control structures that are either legally placed with a current permit or legally placed with an expired permit, but the status of the permit is being litigated by the property owner.

The Session Law became law on September 18, 2015 with an effective date of July 1, 2015 (since no other effective date is specified for this section).

The CRC met on September 23, 2015 and immediately began work to amend its rules in a manner consistent with the legislative directive. DCM Staff prepared draft rule language based on the CRC's discussion and draft temporary rules were presented to the CRC at its next meeting on November 17 and 18, 2015. At this meeting, the CRC approved the draft rules for submission to the Office of Administrative Hearing and to send out for public comment consistent with the requirements of the Administrative Procedures Act (APA), N.C. Gen. Stat. §150B-21.1. Following the CRC's approval, the proposed temporary rules were filed with OAH on November 20, 2015, a public hearing was held December 10, 2015 in Morehead City, North Carolina, and public comment was received up to December 22, 2015. Five written comments were received and all were opposed to the proposed changes to the sandbag rules. Pursuant to the provisions of N.C. Gen. Stat. §150B-21.1(a3)(3), the CRC was required to wait 15 business days before adopting the temporary rule. Given the state holidays, the 16th business day fell on Wednesday, January 20, 2016.

At its next regularly scheduled meeting, held February 9-10, 2016, the CRC considered the substantive comments received and staff's response to the comments. Following discussion, the CRC adopted the temporary rules in compliance with Session Law 2015-241, Section 14.6(p).

The RCC Staff Opinion focuses on another section of the session law which states that the CRC "shall adopt temporary rules . . . no later than December 31, 2015." Session Law 2015-241, Section 14.6(q). The RCC Staff Opinion asserts that insofar as the CRC failed to meet the December deadline, "the CRC's authority to enact these temporary rule amendments has expired." However, the failure to meet this deadline is not fatal to the CRC's attempt to adopt temporary rules in accordance with the General Assembly's directive for two reasons. First, the temporary rules are consistent with the intent of the General Assembly to have the CRC make changes to the sandbag rules on an expedited basis. Second, the temporary rules were adopted in substantial compliance with the time frame established by the session law and the APA for temporary rulemaking.

We have not found any case law in support of the position that the date included in the session law, which is inconsistent with the APA timeline for temporary rulemaking, would mandate the outcome recommended in the RCC Staff Opinion and would welcome the opportunity to review any case law supporting that opinion.

Jason Thomas, Esq.

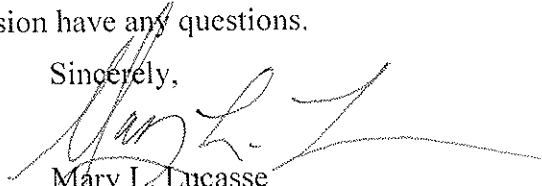
February 17, 2016

Page 3

We respectfully request that the Commission approve the temporary sandbag rules based on the authority provided by Session Law 2015-241, Section 14.6(p) and the Administrative Procedures Act. N.C. Gen. Stat. §150B-21.1

Please feel free to contact me if you have any questions about the information contained in this letter. I will plan to attend the Rules Review Commission's February 18, 2016 meeting in case the members of the Commission have any questions.

Sincerely,



Mary L. Lucasse
Special Deputy Attorney General

cc: Frank D. Gorham, III, Chair, Coastal Resources Commission (electronically)
Braxton C. Davis, Executive Director, Division of Coastal Management (electronically)
Mike Lopazanski, Division of Coastal Management (electronically)
Jennifer Everett, DEQ Rulemaking Coordinator (electronically)

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 .0308, .1704, .1705

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 recommendation that the Rules Review Commission object to the temporary rule amendments filed by the Coastal Resources Commission (CRC), because the CRC failed to comply with Session Law 2015-241, Section 14.6.(q).

Failure to comply with Session Law 2015-241, Section 14.6.(q):

The statute requires the following:

SECTION 14.6.(q) The Coastal Resources Commission shall adopt temporary rules to implement subsection (p) of this section no later than December 31, 2015. The Commission shall also adopt permanent rules to implement this section.

The legislation specifically states that the CRC "shall adopt temporary rules ... no later than December 31, 2015." The Findings of Need forms for these Rules indicate that each of these Rules were adopted on February 10, 2016, after the statutory deadline of December 31, 2015. Based upon the legislative directive, the CRC's authority to enact these temporary rule amendments has expired. The CRC retains
Jason Thomas
Commission Counsel

the authority to implement Section 14.6(p) of Session Law 2015-241 by adopting permanent rules consistent with the requirements of G.S. 150B.

Summary:

The CRC violated the plain language of Session Law 2015-241, Section 14.6(q). It is staff's opinion that the Rules Review Commission should object to the temporary rule amendments filed by the CRC for 15A NCAC 07H .0308, .1704, and .1705 because the CRC lacks statutory authority to amend these rules through temporary rule-making.

EROSION CONTROL STRUCTURES SECTION 14.6.(p) The Coastal Resources Commission shall amend its rules for the use of temporary erosion control structures to provide for all of the following: (1) Allow the placement of temporary erosion control structures on a property that is experiencing coastal erosion even if there are no imminently threatened structures on the property if the property is adjacent to a property where temporary erosion control structures have been placed. (2) Allow the placement of contiguous temporary erosion control structures from one shoreline boundary of a property to the other shoreline boundary, regardless of proximity to an imminently threatened structure. (3) The termination date of all permits for contiguous temporary erosion control structures on the same property shall be the same and shall be the latest termination date for any of the permits. (4) The replacement, repair, or modification of damaged temporary erosion control structures that are either legally placed with a current permit or legally placed with an expired permit, but the status of the permit is being litigated by the property owner.

SECTION 14.6.(q) The Coastal Resources Commission shall adopt temporary rules to implement subsection (p) of this section no later than December 31, 2015. The Commission shall also adopt permanent rules to implement this section.

SECTION 14.6.(r) G.S. 113A-115.1(g) reads as rewritten: "(g) The Commission may issue no more than ~~four~~ six permits for the construction of a terminal groin pursuant to this ~~section~~ section, provided that two of the six permits may be issued only for the construction of terminal groins on the sides of New River Inlet in Onslow County and Bogue Inlet between Carteret and Onslow Counties."

REQUEST FOR TECHNICAL CHANGE

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0308

DEADLINE FOR RECEIPT: Wednesday, February 17, 2016

NOTE WELL: This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Generally throughout this Rule, the terms "imminent" and "imminently" appear to be defined in the second sentence of .0308(a)(2)(B). .1704 and .1705 also appear to rely on this definition. Consider stating this definition separately in an appropriate rule and citing that definition wherever it is used.

Page 2, lines 10-11 – is "unavoidable adverse impacts" defined or well-understood by your regulated public?

Page 2, line 20 – is "adversely impact" defined or well-understood by your regulated public?

Page 2, line 34 – is "practical alternative" defined or well-understood by your regulated public?

Page 3, line 26 – delete the dash ("-") between "structure" and "and"

Page 3, line 14 – delete the comma after "system, or" (but the retain the comma before "or") (Note: something odd is happening with my copy of this file – in any event, the phrase should read "if its foundation, septic system, or right of way in the case of roads is less....")

Page 4, lines 20, 33 – replace the comma with "or an"

Page 4, line 22 – insert "been issued" before "an active"

Page 4, line 25 – insert a comma after "Reduction Study"

Page 4, line 33 – replace the comma with "or the"

Page 4, line 34 – replace the comma with "or"

Jason S. Thomas
Commission Counsel

Date submitted to agency: February 15, 2016

Page 5, line 7 – insert “or” after “beach nourishment project,”

Page 5, line 21 – insert “Part” before (G)

Page 5, line 23 – replace “eight year” with “eight-year”

Page 5, line 25 – insert a comma after “Subchapter”

Page 5, line 26 – replace the comma with “or an”

Page 6, line 5 – replace “but have expired permits” with “pursuant to permits that have since expired”

Page 6, line 6 – insert a comma after “repaired” and delete the comma after “dimensions”

Page 6, line 16 – what does “pre-emergency” mean – what emergency is referred to? Does it mean the same as “pre-activity”? If so, use only one term.

Page 6, line 19 – is “lateral” needed?

Page 6, line 25 – replace “as-well as” with “or”

Page 6, line 27 – replace “so long as” with “if”

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Coastal Resources Commission

2. Rule citation & name: 15A NCAC 07H .0308 Specific Use Standards for Ocean Hazard Areas

3. Action: ☐ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: November 20, 2015
- b. Proposed Temporary Rule published on the OAH website: December 1, 2015
- c. Public Hearing date: December 10, 2015
- d. Comment Period: December 1 – December 22, 2015
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): November 20, 2015
- f. Adoption by agency on: February 10, 2016
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: February 26, 2016
- h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: S.L. 2015-241
Effective date: September 18, 2015
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain:

The 2015 Appropriations Act (S.L. 2015-241) Section 14.6(p) directs the NC Coastal Resources Commission to amend its rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) and to adopt temporary rules no later than December 31, 2015. The Commission is therefore proceeding with temporary rulemaking in accordance with §150B-21.1(a)(2).

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

As required by Session Law 2015-241, Section 14.6(p), the NC Coastal Resources Commission adopted temporary rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) in accordance with §150B-21.1(a)(2). A condensed public comment period was appropriate to meet this mandate. The Commission is proceeding with the permanent rulemaking process.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: (919)707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Mike Lopazanski

Phone: (252) 808-2808

E-Mail: Mike.Lopazanski@ncdenr.gov

10. Signature of Agency Head*:

Frank O Gorham

* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Frank Gorham

Title: Chair, Coastal Resources Commission

E-Mail: frankgorhamCRC@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

1 **15A NCAC 07H .0308 IS AMENDED UNDER TEMPORARY PROCUEDURES AS FOLLOWS:**

2
3 **15A NCAC 07H .0308 SPECIFIC USE STANDARDS FOR OCEAN HAZARD AREAS**

4 (a) Ocean Shoreline Erosion Control Activities:

5 (1) Use Standards Applicable to all Erosion Control Activities:

- 6 (A) All oceanfront erosion response activities shall be consistent with the general policy
7 statements in 15A NCAC 07M .0200.
- 8 (B) Permanent erosion control structures may cause significant adverse impacts on the value
9 and enjoyment of adjacent properties or public access to and use of the ocean beach, and,
10 therefore, unless specifically authorized under the Coastal Area Management Act, are
11 prohibited. Such structures include bulkheads, seawalls, revetments, jetties, groins and
12 breakwaters.
- 13 (C) Rules concerning the use of oceanfront erosion response measures apply to all oceanfront
14 properties without regard to the size of the structure on the property or the date of its
15 construction.
- 16 (D) All permitted oceanfront erosion response projects, other than beach bulldozing and
17 temporary placement of sandbag structures, shall demonstrate sound engineering for their
18 planned purpose.
- 19 (E) Shoreline erosion response projects shall not be constructed in beach or estuarine areas that
20 sustain substantial habitat for fish and wildlife species, as identified by natural resource
21 agencies during project review, unless mitigation measures are incorporated into project
22 design, as set forth in Rule .0306(i) of this Section.
- 23 (F) Project construction shall be timed to minimize adverse effects on biological activity.
- 24 (G) Prior to completing any erosion response project, all exposed remnants of or debris from
25 failed erosion control structures must be removed by the permittee.
- 26 (H) Erosion control structures that would otherwise be prohibited by these standards may be
27 permitted on finding by the Division that:
- 28 (i) the erosion control structure is necessary to protect a bridge which provides the
29 only existing road access on a barrier island, that is vital to public safety, and is
30 imminently threatened by erosion as defined in provision (a)(2)(B) of this Rule;
- 31 (ii) the erosion response measures of relocation, beach nourishment or temporary
32 stabilization are not adequate to protect public health and safety; and
- 33 (iii) the proposed erosion control structure will have no adverse impacts on adjacent
34 properties in private ownership or on public use of the beach.
- 35 (I) Structures that would otherwise be prohibited by these standards may also be permitted on
36 finding by the Division that:

- 1 (i) the structure is necessary to protect a state or federally registered historic site that
2 is imminently threatened by shoreline erosion as defined in provision (a)(2)(B) of
3 this Rule;
4 (ii) the erosion response measures of relocation, beach nourishment or temporary
5 stabilization are not adequate and practicable to protect the site;
6 (iii) the structure is limited in extent and scope to that necessary to protect the site; and
7 (iv) any permit for a structure under this Part (I) may be issued only to a sponsoring
8 public agency for projects where the public benefits outweigh the short or long
9 range adverse impacts. Additionally, the permit shall include conditions
10 providing for mitigation or minimization by that agency of any unavoidable
11 adverse impacts on adjoining properties and on public access to and use of the
12 beach.

13 (J) Structures that would otherwise be prohibited by these standards may also be permitted on
14 finding by the Division that:

- 15 (i) the structure is necessary to maintain an existing commercial navigation channel
16 of regional significance within federally authorized limits;
17 (ii) dredging alone is not practicable to maintain safe access to the affected channel;
18 (iii) the structure is limited in extent and scope to that necessary to maintain the
19 channel;
20 (iv) the structure shall not adversely impact fisheries or other public trust resources;
21 and
22 (v) any permit for a structure under this Part (J) may be issued only to a sponsoring
23 public agency for projects where the public benefits outweigh the short or long
24 range adverse impacts. Additionally, the permit shall include conditions
25 providing for mitigation or minimization by that agency of any unavoidable
26 adverse impacts on adjoining properties and on public access to and use of the
27 beach.

28 (K) The Commission may renew a permit for an erosion control structure issued pursuant to a
29 variance granted by the Commission prior to 1 July 1995. The Commission may authorize
30 the replacement of a permanent erosion control structure that was permitted by the
31 Commission pursuant to a variance granted by the Commission prior to 1 July 1995 if the
32 Commission finds that:

- 33 (i) the structure will not be enlarged beyond the dimensions set out in the permit;
34 (ii) there is no practical alternative to replacing the structure that will provide the
35 same or similar benefits; and

(iii) the replacement structure will comply with all applicable laws and with all rules, other than the rule or rules with respect to which the Commission granted the variance, that are in effect at the time the structure is replaced.

(L) Proposed erosion response measures using innovative technology or design shall be considered as experimental and shall be evaluated on a case-by-case basis to determine consistency with 15A NCAC 7M .0200 and general and specific use standards within this Section.

(2) Temporary Erosion Control Structures:

(A) Permittable temporary erosion control structures shall be limited to sandbags placed landward of mean high water and parallel to the shore.

(B) Temporary erosion control structures as defined in Part (2)(A) of this Subparagraph ~~shall~~ may be used to protect ~~only~~ imminently threatened roads and associated right of ways, and buildings and their associated septic systems. A structure is considered imminently threatened if its foundation, septic system, or right-of-way in the case of roads, is less than 20 feet away from the erosion scarp. Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no obvious erosion scarp may also be found to be imminently threatened when site conditions, such as a flat beach profile or accelerated erosion, increase the risk of imminent damage to the structure. Temporary erosion control structures may be used to protect properties that are experiencing erosion when there are no imminently threatened structures on the property if an adjacent property has an existing temporary erosion control structure that is in compliance with the Commission's rules. Temporary erosion control structures used to protect property without imminently threatened structures shall be sited to align with and be no further oceanward than the most landward adjacent temporary erosion control structure.

(C) ~~Temporary~~ Notwithstanding Part (B) of this Subparagraph, temporary erosion control structures shall be used to protect only the principal structure—and its associated septic system, but not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to the erosion setback requirement.

(D) Temporary erosion control structures may be placed seaward of a septic system when there is no alternative to relocate it on the same or adjoining lot so that it is landward of or in line with the structure being protected.

(E) ~~Temporary erosion control structures shall not extend more than 20 feet past the sides of the structure to be protected.~~ The landward side of such temporary erosion control structures shall not be located more than 20 feet seaward of the structure to be protected or the right-of-way in the case of roads. If a building or road is found to be imminently threatened and at an increased risk of imminent damage due to site conditions such as a flat

1 beach profile or accelerated erosion, temporary erosion control structures may be located
2 more than 20 feet seaward of the structure being protected. In cases of increased risk of
3 imminent damage, the location of the temporary erosion control structures shall be
4 determined by the Director of the Division of Coastal Management or their designee in
5 accordance with Part (2)(A) of this Subparagraph.

6 (F) Temporary erosion control structures may remain in place for up to two years after the date
7 of approval if they are protecting a building with a total floor area of 5000 sq. ft. or less
8 and its associated septic system, or, for up to five years for a building with a total floor area
9 of more than 5000 sq. ft. and its associated septic system. Temporary erosion control
10 structures may remain in place for up to five years if they are protecting a bridge or a road.
11 The termination date of all permits for contiguous temporary erosion control structures on
12 the same property shall be the same and shall be the latest termination date of any of the
13 permits. The property owner shall be responsible for removal of the temporary structure
14 within 30 days of the end of the allowable time period.

15 (G) Temporary sandbag erosion control structures may remain in place for up to eight years
16 from the date of approval if they are located in a community that is actively pursuing a
17 beach nourishment project, or if they are located in an Inlet Hazard Area adjacent to an
18 inlet for which a community is actively pursuing an inlet relocation or stabilization project
19 in accordance with G.S. 113A-115.1 For purposes of this Rule, a community is considered
20 to be actively pursuing a beach nourishment, inlet relocation or stabilization project if it
21 has:

- 22 (i) an active CAMA permit, where necessary, approving such project; or
- 23 (ii) been identified by a U.S. Army Corps of Engineers' Beach Nourishment
24 Reconnaissance Study, General Reevaluation Report, Coastal Storm Damage
25 Reduction Study or an ongoing feasibility study by the U.S. Army Corps of
26 Engineers and a commitment of local or federal money, when necessary; or
- 27 (iii) received a favorable economic evaluation report on a federal project; or
- 28 (iv) is in the planning stages of a project designed by the U.S. Army Corps of
29 Engineers or persons meeting applicable State occupational licensing
30 requirements and initiated by a local government or community with a
31 commitment of local or state funds to construct the project and the identification
32 of the financial resources or funding bases necessary to fund the beach
33 nourishment, inlet relocation or stabilization project.

34 If beach nourishment, inlet relocation or stabilization is rejected by the sponsoring agency
35 or community, or ceases to be actively planned for a section of shoreline, the time extension
36 is void for that section of beach or community and existing sandbags are subject to all

applicable time limits set forth in Part (F) of this Subparagraph. The termination date of all permits for contiguous temporary erosion control structures on the same property shall be the same and shall be the latest termination date of any of the permits.

- (H) Once the temporary erosion control structure is determined by the Division of Coastal Management to be unnecessary due to relocation or removal of the threatened structure, a storm protection project constructed by the U.S. Army Corps of Engineers, a large-scale beach nourishment project, an inlet relocation or stabilization project, it shall be removed by the property owner within 30 days of official notification from the Division of Coastal Management regardless of the time limit placed on the temporary erosion control structure.
- (I) Removal of temporary erosion control structures is not required if they are covered by dunes with stable and natural vegetation.
- (J) The property owner shall be responsible for the removal of remnants of all portions of any damaged temporary erosion control structure.
- (K) Sandbags used to construct temporary erosion control structures shall be tan in color and three to five feet wide and seven to 15 feet long when measured flat. Base width of the structure shall not exceed 20 feet, and the height shall not exceed six feet.
- (L) Soldier pilings and other types of devices to anchor sandbags shall not be allowed.
- (M) An imminently threatened structure may be protected only once, regardless of ownership, unless the threatened structure is located in a community that is actively pursuing a beach nourishment project, or in an Inlet Hazard Area and in a community that is actively pursuing an inlet relocation or stabilization project in accordance with (G) of this Subparagraph. Existing temporary erosion control structures located in Inlet Hazard Areas may be eligible for an additional eight year permit extension provided that the structure being protected is still imminently threatened, the temporary erosion control structure is in compliance with requirements of this Subchapter and the community in which it is located is actively pursuing a beach nourishment, inlet relocation or stabilization project in accordance with Part (G) of this Subparagraph. In the case of a building, a temporary erosion control structure may be extended, or new segments constructed, if additional areas of the building become imminently threatened. Where temporary structures are installed or extended incrementally, the time period for removal under Part (F) or (G) of this Subparagraph shall begin at the time the ~~initial~~ most recent erosion control structure is installed. For the purpose of this Rule:
 - (i) a building and septic system shall be considered as separate structures.
 - (ii) a road or highway shall be allowed to be incrementally protected as sections become imminently threatened. The time period for removal of each contiguous

1 section of sandbags shall begin at the time that the most recent section is installed
2 in accordance with Part (F) or (G) of this Subparagraph.

3 (N) Existing sandbag structures may be repaired or replaced within their originally permitted
4 dimensions during the time period allowed under Part (F) or (G) of this Subparagraph.
5 Existing sandbag structures that were legally placed but have expired permits may be
6 replaced, repaired or modified within their permit dimensions, if the status of the permit is
7 being litigated by the property owner in state or federal court.

8 (3) Beach Nourishment. Sand used for beach nourishment shall be compatible with existing grain
9 size and in accordance with 15A NCAC 07H .0312.

10 (4) Beach Bulldozing. Beach bulldozing (defined as the process of moving natural beach material from
11 any point seaward of the first line of stable vegetation to create a protective sand dike or to obtain
12 material for any other purpose) is development and may be permitted as an erosion response if the
13 following conditions are met:

14 (A) The area on which this activity is being performed shall maintain a slope of adequate grade
15 so as to not endanger the public or the public's use of the beach and shall follow the pre-
16 emergency slope as closely as possible. The movement of material utilizing a bulldozer,
17 front end loader, backhoe, scraper, or any type of earth moving or construction equipment
18 shall not exceed one foot in depth measured from the pre-activity surface elevation;

19 (B) The activity shall not exceed the lateral bounds of the applicant's property unless he has
20 permission of the adjoining land owner(s);

21 (C) Movement of material from seaward of the mean low water line will require a CAMA
22 Major Development and State Dredge and Fill Permit;

23 (D) The activity shall not increase erosion on neighboring properties and shall not have an
24 adverse effect on natural or cultural resources;

25 (E) The activity may be undertaken to protect threatened on-site waste disposal systems as-well
26 as the threatened structure's foundations.

27 (b) Dune Establishment and Stabilization. Activities to establish dunes shall be allowed so long as the following
28 conditions are met:

29 (1) Any new dunes established shall be aligned to the greatest extent possible with existing adjacent
30 dune ridges and shall be of the same general configuration as adjacent natural dunes.

31 (2) Existing primary and frontal dunes shall not, except for beach nourishment and emergency
32 situations, be broadened or extended in an oceanward direction.

33 (3) Adding to dunes shall be accomplished in such a manner that the damage to existing vegetation is
34 minimized. The filled areas shall be immediately replanted or temporarily stabilized until planting
35 can be successfully completed.

- 1 (4) Sand used to establish or strengthen dunes shall be of the same general characteristics as the sand
2 in the area in which it is to be placed.
- 3 (5) No new dunes shall be created in inlet hazard areas.
- 4 (6) Sand held in storage in any dune, other than the frontal or primary dune, may be redistributed within
5 the AEC provided that it is not placed any farther oceanward than the crest of a primary dune or
6 landward toe of a frontal dune.
- 7 (7) No disturbance of a dune area shall be allowed when other techniques of construction can be utilized
8 and alternative site locations exist to avoid unnecessary dune impacts.
- 9 (c) Structural Accessways:
- 10 (1) Structural accessways shall be permitted across primary dunes so long as they are designed and
11 constructed in a manner that entails negligible alteration on the primary dune. Structural accessways
12 shall not be considered threatened structures for the purpose of Paragraph (a) of this Rule.
- 13 (2) An accessway shall be conclusively presumed to entail negligible alteration of a primary dune
14 provided that:
- 15 (A) The accessway is exclusively for pedestrian use;
- 16 (B) The accessway is less than six feet in width;
- 17 (C) The accessway is raised on posts or pilings of five feet or less depth, so that wherever
18 possible only the posts or pilings touch the frontal dune. Where this is deemed impossible,
19 the structure shall touch the dune only to the extent absolutely necessary. In no case shall
20 an accessway be permitted if it will diminish the dune's capacity as a protective barrier
21 against flooding and erosion; and
- 22 (D) Any areas of vegetation that are disturbed are revegetated as soon as feasible.
- 23 (3) An accessway which does not meet Part (2)(A) and (B) of this Paragraph shall be permitted only if
24 it meets a public purpose or need which cannot otherwise be met and it meets Part (2)(C) of this
25 Paragraph. Public fishing piers shall not be deemed to be prohibited by this Rule, provided all other
26 applicable standards are met.
- 27 (4) In order to avoid weakening the protective nature of primary and frontal dunes a structural
28 accessway (such as a "Hatteras ramp") shall be provided for any off-road vehicle (ORV) or
29 emergency vehicle access. Such accessways shall be no greater than 10 feet in width and shall be
30 constructed of wooden sections fastened together over the length of the affected dune area.
- 31 (d) Building Construction Standards. New building construction and any construction identified in .0306(a)(5) and
32 07J .0210 shall comply with the following standards:
- 33 (1) In order to avoid danger to life and property, all development shall be designed and placed so as to
34 minimize damage due to fluctuations in ground elevation and wave action in a 100-year storm. Any
35 building constructed within the ocean hazard area shall comply with relevant sections of the North
36 Carolina Building Code including the Coastal and Flood Plain Construction Standards and the local

flood damage prevention ordinance as required by the National Flood Insurance Program. If any provision of the building code or a flood damage prevention ordinance is inconsistent with any of the following AEC standards, the more restrictive provision shall control.

- (2) All building in the ocean hazard area shall be on pilings not less than eight inches in diameter if round or eight inches to a side if square.
- (3) All pilings shall have a tip penetration greater than eight feet below the lowest ground elevation under the structure. For those structures so located on or seaward of the primary dune, the pilings shall extend to five feet below mean sea level.
- (4) All foundations shall be adequately designed to be stable during applicable fluctuations in ground elevation and wave forces during a 100-year storm. Cantilevered decks and walkways shall meet this standard or shall be designed to break-away without structural damage to the main structure.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(6)a.,b.,d.; 113A-115.1; 113A-124; Eff. June 1, 1979;
Filed as a Temporary Amendment Eff. June 20, 1989, for a period of 180 days to expire on December 17, 1989;
Amended Eff. August 3, 1992; December 1, 1991; March 1, 1990; December 1, 1989;
RRC Objection Eff. November 19, 1992 due to ambiguity;
RRC Objection Eff. January 21, 1993 due to ambiguity;
Amended Eff. March 1, 1993; December 28, 1992;
RRC Objection Eff. March 16, 1995 due to ambiguity;
Amended Eff. April 1, 1999; February 1, 1996; May 4, 1995;
Temporary Amendment Eff. July 3, 2000; May 22, 2000;
Amended Eff. May 1, 2013; July 1, 2009; April 1, 2008; February 1, 2006; August 1, 2002;
Temporary Amendment Eff. February 26, 2016.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .1704

DEADLINE FOR RECEIPT: Wednesday, February 17, 2016

NOTE WELL: This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Generally throughout this Rule, the terms "imminent" and "imminently" appear to be defined in the second sentence of .0308(a)(2)(B). Consider stating this definition separately in an appropriate rule and citing that definition wherever it is used.

Page 1, lines 12 and 16 – do "waterward" and "seaward" have the same meaning? If so, use only one term.

Page 1, line 19 – insert "the Director's" before "designee"

Page 1, line 22 – replace "protection" with "work"

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason S. Thomas
Commission Counsel
Date submitted to agency: February 15, 2016



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Coastal Resources Commission

2. Rule citation & name: 15A NCAC 07H .1704 General Conditions

3. Action: ☐ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: November 20, 2015
- b. Proposed Temporary Rule published on the OAH website: December 1, 2015
- c. Public Hearing date: December 10, 2015
- d. Comment Period: December 1 – December 22, 2015
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): November 20, 2015
- f. Adoption by agency on: February 10, 2016
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: February 26, 2016
- h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: S.L. 2015-241
Effective date: September 18, 2015
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain:

The 2015 Appropriations Act (S.L. 2015-241) Section 14.6(p) directs the NC Coastal Resources Commission to amend its rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) and to adopt temporary rules no later than December 31, 2015. The Commission is therefore proceeding with temporary rulemaking in accordance with §150B-21.1(a)(2).

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

As required by Session Law 2015-241, Section 14.6(p), the NC Coastal Resources Commission adopted temporary rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) in accordance with §150B-21.1(a)(2). A condensed public comment period was appropriate to meet this mandate. The Commission is proceeding with the permanent rulemaking process.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: (919)707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Mike Lopazanski

Phone: (252) 808-2808

E-Mail: Mike.Lopazanski@ncdenr.gov

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Frank Gorham

Title: Chair, Coastal Resources Commission

E-Mail: frankgorhamCRC@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

1 **15A NCAC 07H .1704 IS AMENDED UNDER TEMPORARY PROCEDURES AS FOLLOWS:**

3 **15A NCAC 07H .1704 GENERAL CONDITIONS**

4 (a) Work permitted by means of an emergency general permit shall be subject to the following limitations:

- 5 (1) No work shall begin until an onsite meeting is held with the applicant and a Division of Coastal
6 Management representative so that the proposed emergency work can be delineated. Written
7 authorization to proceed with the proposed development may be issued during this visit.
- 8 (2) No work shall be permitted other than that which is necessary to reasonably protect against or reduce
9 the imminent danger caused by the emergency, to restore the damaged property to its condition
10 immediately before the emergency, or to re-establish necessary public facilities or transportation
11 corridors.
- 12 (3) Any permitted erosion control projects shall be located no more than 20 feet waterward of the
13 imminently threatened structure or the right-of way in the case of ~~roads~~ roads, except as provided
14 under 15A NCAC 07H .0308. If a building or road is found to be imminently threatened and at
15 increased risk of imminent damage due to site conditions such as a flat beach profile or accelerated
16 erosion, temporary erosion control structures may be located more than 20 feet seaward of the
17 structure being protected. In cases of increased risk of imminent damage, the location of the
18 temporary erosion control structures shall be determined by the Director of the Division of Coastal
19 Management or designee.
- 20 (4) Fill materials used in conjunction with emergency work for storm or erosion control shall be
21 obtained from an upland source. Excavation below MHW in the Ocean Hazard AEC may be
22 allowed to obtain material to fill sandbags used for emergency protection.
- 23 (5) Structural work shall meet sound engineering practices.
- 24 (6) This permit allows the use of oceanfront erosion control measures for all oceanfront properties
25 without regard to the size of the existing structure on the property or the date of construction.

26 (b) Individuals shall allow authorized representatives of the Department of ~~Environment and Natural Resources~~
27 Environmental Quality to make inspections at any time deemed necessary to be sure that the activity being performed
28 under authority of this general permit is in accordance with the terms and conditions in these Rules.

29 (c) Development shall not jeopardize the use of the waters for navigation or for other public trust rights in public trust
30 areas including estuarine waters.

31 (d) This permit shall not be applicable to proposed construction where the Department has determined, based on an
32 initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are
33 unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality, air quality,
34 coastal wetlands, cultural or historic sites, wildlife, fisheries resources, or public trust rights.

35 (e) This permit does not eliminate the need to obtain any other state, local, or federal authorization.

36 (f) Development carried out under this permit must be consistent with all local requirements, CAMA rules, and local
37 land use plans, storm hazard mitigation, and post-disaster recovery plans current at the time of authorization.

1

2 *History Note:* Authority G.S. 113-229(cl); 113A-107(a),(b); 113A-113(b); 113A-118.1;

3 *Eff. November 1, 1985;*

4 *Amended Eff. December 1, 1991; May 1, 1990;*

5 *RRC Objection due to ambiguity Eff. May 19, 1994;*

6 *Amended Eff. May 1, 2010; August 1, 1998; July 1, 1994;*

7 *Temporary Amendment Eff. February 26, 2016.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .1705

DEADLINE FOR RECEIPT: Wednesday, February 17, 2016

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Generally throughout this Rule, the terms "imminent" and "imminently" appear to be defined in the second sentence of .0308(a)(2)(B). Consider stating this definition separately in an appropriate rule and citing that definition wherever it is used.

Page 1, line 10 – delete the commas after "or" and "roads" (but the retain the comma before "or")

Page 1, lines 18 and 24 – does "oceanward" and "seaward" have the same meaning? If so, use only one term (and see .1704).

Page 1, line 34 – insert "the Director's" before "designee"

Page 2, line 13 – replace the comma with "or an"

Page 2, line 24 – replace the comma with "or the"

Page 2, line 25 – replace the comma with "or"

Page 2, line 33 – insert "or" after "beach nourishment project,"

Page 3, line 10 – replace "protection" with "work"

Page 3, line 17 – insert a comma after ""Subparagraph"

Page 3, line 18 – replace the comma with "or"

Page 3, line 31– replace "but have expired permits" with "pursuant to permits that have since expired"

Jason S. Thomas
Commission Counsel
Date submitted to agency: February 15, 2016

Page 3, line 31 – insert a comma after “repaired”

Page 3, line 32 – delete the comma after “dimensions”

Page 3, line 2-3, page 4, lines 21-22, and page 5, line 7 – what does “emergency” mean – what emergency is referred to?

Page 3, lines 4, 7, and 14 and page 4, lines 23, 27, and 36 – do “waterward,” “seaward”, and “oceanward” have the same meaning? If so, use only one term.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Jason S. Thomas
Commission Counsel
Date submitted to agency: February 15, 2016



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Coastal Resources Commission

2. Rule citation & name: 15A NCAC 07H .1705 Specific Conditions

3. Action: ☐ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: November 20, 2015
- b. Proposed Temporary Rule published on the OAH website: December 1, 2015
- c. Public Hearing date: December 10, 2015
- d. Comment Period: December 1 – December 22, 2015
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): November 20, 2015
- f. Adoption by agency on: February 10, 2016
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: February 26, 2016
- h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: S.L. 2015-241
Effective date: September 18, 2015
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain:

The 2015 Appropriations Act (S.L. 2015-241) Section 14.6(p) directs the NC Coastal Resources Commission to amend its rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) and to adopt temporary rules no later than December 31, 2015. The Commission is therefore proceeding with temporary rulemaking in accordance with §150B-21.1(a)(2).

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

As required by Session Law 2015-241, Section 14.6(p), the NC Coastal Resources Commission adopted temporary rules for the use of temporary erosion control structures (15A NCAC 7H .0308; 15A NCAC .1704; and 15A NCAC 7H .1705) in accordance with §150B-21.1(a)(2). A condensed public comment period was appropriate to meet this mandate. The Commission is proceeding with the permanent rulemaking process.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Jennifer Everett

Phone: (919)707-8614

E-Mail: Jennifer.Everett@ncdenr.gov

Agency contact, if any: Mike Lopazanski

Phone: (252) 808-2808

E-Mail: Mike.Lopazanski@ncdenr.gov

10. Signature of Agency Head*:

Frank O Gorham

* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Frank Gorham

Title: Chair, Coastal Resources Commission

E-Mail: frankgorhamCRC@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

1 **15A NCAC 07H .1705 IS AMENDED UNDER TEMPORARY PROCEDURES AS FOLLOWS:**

2
3 **15A NCAC 07H .1705 SPECIFIC CONDITIONS**

4 (a) Temporary Erosion Control Structures in the Ocean Hazard AEC.

- 5 (1) Permittable temporary erosion control structures shall be limited to sandbags placed landward of
6 mean high water and parallel to the shore.
- 7 (2) Temporary erosion control structures as defined in Subparagraph (1) of this Paragraph ~~shall~~ may be
8 used to protect ~~only~~ imminently threatened roads and associated right of ways, and buildings and
9 their associated septic systems. A structure is considered imminently threatened if its foundation,
10 septic system, or, right-of-way in the case of roads, is less than 20 feet away from the erosion scarp.
11 Buildings and roads located more than 20 feet from the erosion scarp or in areas where there is no
12 obvious erosion scarp may also be found to be imminently threatened when the Division determines
13 that site conditions, such as a flat beach profile or accelerated erosion, increase the risk of imminent
14 damage to the structure. Temporary erosion control structures may be used to protect properties that
15 are experiencing erosion when there are no imminently threatened structures on the property if an
16 adjacent property has an existing temporary erosion control structure that is in compliance with the
17 Commission's rules. Temporary erosion control structures used to protect property without
18 imminently threatened structures shall be sited to align with and be no farther oceanward than the
19 most landward adjacent temporary erosion control structure.
- 20 (3) ~~Temporary~~ Notwithstanding Subparagraph (2) of this Paragraph, temporary erosion control
21 structures shall be used to protect only the principal structure and its associated septic system, but
22 not appurtenances such as pools, gazebos, decks or any amenity that is allowed as an exception to
23 the erosion setback requirement.
- 24 (4) Temporary erosion control structures may be placed seaward of a septic system when there is no
25 alternative to relocate it on the same or adjoining lot so that it is landward of or in line with the
26 structure being protected.
- 27 (5) ~~Temporary erosion control structures shall not extend more than 20 feet past the sides of the structure~~
28 ~~to be protected.~~ The landward side of such temporary erosion control structures shall not be located
29 more than 20 feet seaward of the structure to be protected or the right-of-way in the case of roads.
30 If a building or road is found to be imminently threatened and at increased risk of imminent damage
31 due to site conditions such as a flat beach profile or accelerated erosion, temporary erosion control
32 structures may be located more than 20 feet seaward of the structure being protected. In cases of
33 increased risk of imminent damage, the location of the temporary erosion control structures shall be
34 determined by the Director of the Division of Coastal Management or designee in accordance with
35 Subparagraph (1) of this Paragraph.
- 36 (6) Temporary erosion control structures may remain in place for up to two years after the date of
37 approval if they are protecting a building with a total floor area of 5,000 square feet or less and its

1 associated septic system, or for up to five years for a building with a total floor area of more than
2 5,000 square feet and its associated septic system. Temporary erosion control structures may remain
3 in place for up to five years if they are protecting a bridge or a road. The termination date of all
4 permits for contiguous temporary erosion control structures on the same property shall be the same
5 and shall be the latest termination date of any of the permits. The property owner shall be
6 responsible for removal of the temporary structure within 30 days of the end of the allowable time
7 period.

- 8 (7) Temporary sandbag erosion control structures may remain in place for up to eight years from the
9 date of approval if they are located in a community that is actively pursuing a beach nourishment
10 project, or if they are located in an Inlet Hazard Area adjacent to an inlet for which a community is
11 actively pursuing an inlet relocation or stabilization project in accordance with ~~G.S. 113A-115.1~~
12 G.S. 113A-115.1. For purposes of this Rule, a community is considered to be actively pursuing a
13 beach nourishment, inlet relocation or stabilization project if it has:

- 14 (A) an active CAMA permit, where necessary, approving such project; or
15 (B) been identified by a U.S. Army Corps of Engineers' Beach Nourishment Reconnaissance
16 Study, General Reevaluation Report, Coastal Storm Damage Reduction Study, or an
17 ongoing feasibility study by the U.S. Army Corps of Engineers and a commitment of local
18 or federal money, when necessary; or
19 (C) received a favorable economic evaluation report on a federal project; or
20 (D) is in the planning stages of a project designed by the U.S. Army Corps of Engineers or
21 persons meeting applicable State occupational licensing requirements and initiated by a
22 local government or community with a commitment of local or state funds to construct the
23 project and the identification of the financial resources or funding bases necessary to fund
24 the beach nourishment, inlet relocation or stabilization project.

25 If beach nourishment, inlet relocation or stabilization is rejected by the sponsoring agency or
26 community, or ceases to be actively planned for a section of shoreline, the time extension is void
27 for that section of beach or community and existing sandbags are subject to all applicable time limits
28 set forth in Subparagraph (6) of this Paragraph. The termination date of all permits for contiguous
29 temporary erosion control structures on the same property shall be the same and shall be the latest
30 termination date of any of the permits.

- 31 (8) Once the temporary erosion control structure is determined by the Division of Coastal Management
32 to be unnecessary due to relocation or removal of the threatened structure, a storm protection project
33 constructed by the U.S. Army Corps of Engineers, a large scale beach nourishment project, an inlet
34 relocation or stabilization project, it shall be removed by the permittee within 30 days of official
35 notification by the Division of Coastal Management regardless of the time limit placed on the
36 temporary erosion control structure.

- 1 (9) Removal of temporary erosion control structures is not required if they are covered by dunes with
2 stable and natural vegetation.
- 3 (10) The property owner shall be responsible for the removal of remnants of all portions of any damaged
4 temporary erosion control structure.
- 5 (11) Sandbags used to construct temporary erosion control structures shall be tan in color and 3 to 5 feet
6 wide and 7 to 15 feet long when measured flat. Base width of the structure shall not exceed 20 feet,
7 and the height shall not exceed 6 feet.
- 8 (12) Soldier pilings and other types of devices to anchor sandbags shall not be allowed.
- 9 (13) Excavation below mean high water in the Ocean Hazard AEC may be allowed to obtain material to
10 fill sandbags used for emergency protection.
- 11 (14) An imminently threatened structure may be protected only once regardless of ownership, unless the
12 threatened structure is located in a community that is actively pursuing a beach nourishment project,
13 or in an Inlet Hazard Area and in a community that is actively pursuing an inlet relocation or
14 stabilization project in accordance with Subparagraph (7). Existing temporary erosion control
15 structures may be eligible for an additional eight year permit extension provided that the structure
16 being protected is still imminently threatened, the temporary erosion control structure is in
17 compliance with requirements of this Subparagraph and the community in which it is located is
18 actively pursuing a beach nourishment, an inlet relocation or stabilization project in accordance with
19 Subparagraph (7) of this Paragraph. In the case of a building, a temporary erosion control structure
20 may be extended, or new segments constructed, if additional areas of the building become
21 imminently threatened. Where temporary structures are installed or extended incrementally, the time
22 period for removal under Subparagraph (6) or (7) shall begin at the time the ~~initial~~ most recent
23 erosion control structure is installed. For the purpose of this Rule:
- 24 (A) a building and septic system shall be considered as separate structures.
- 25 (B) a road or highway shall be allowed to be incrementally protected as sections become
26 imminently threatened. The time period for removal of each contiguous section of
27 sandbags shall begin at the time that the most recent section is installed in accordance with
28 Subparagraph (6) or (7) of this Rule.
- 29 (15) Existing sandbag structures may be repaired or replaced within their originally permitted dimensions
30 during the time period allowed under Subparagraph (6) or (7) of this Rule. Existing sandbag
31 structures that were legally placed but have expired permits may be replaced, repaired or modified
32 within their permit dimensions, if the status of the permit is being litigated by the property owner in
33 state or federal court.
- 34 (b) Erosion Control Structures in the Estuarine Shoreline, Estuarine Waters, and Public Trust AECs. Work permitted
35 by this general permit shall be subject to the following limitations:

- 1 (1) No work shall be permitted other than that which is necessary to reasonably protect against or reduce
2 the imminent danger caused by the emergency or to restore the damaged property to its condition
3 immediately before the emergency;
- 4 (2) The erosion control structure shall be located no more than 20 feet waterward of the imminently
5 threatened structure. If a building or road is found to be imminently threatened and at increased risk
6 of imminent damage due to site conditions such as a flat shore profile or accelerated erosion,
7 temporary erosion control structures may be located more than 20 feet seaward of the structure being
8 protected. In cases of increased risk of imminent damage, the location of the temporary erosion
9 control structures shall be determined by the Director of the Division of Coastal Management or
10 designee. Temporary erosion control structures may be used to protect properties that are
11 experiencing erosion when there are no imminently threatened structures on the property if an
12 adjacent property has an existing temporary erosion control structure that is in compliance with the
13 Commission's rules. Temporary erosion control structures used to protect property without
14 imminently threatened structures shall be sited to align with and be no further oceanward than the
15 most landward adjacent temporary erosion control structure.
- 16 (3) Fill material used in conjunction with emergency work for storm or erosion control in the Estuarine
17 Shoreline, Estuarine Waters and Public Trust AECs shall be obtained from an upland source.
- 18 (c) Protection, Rehabilitation, or Temporary Relocation of Public Facilities or Transportation Corridors.
- 19 (1) Work permitted by this general permit shall be subject to the following limitations:
- 20 (A) no work shall be permitted other than that which is necessary to protect against or reduce
21 the imminent danger caused by the emergency or to restore the damaged property to its
22 condition immediately before the emergency;
- 23 (B) the erosion control structure shall be located no more than 20 feet waterward of the
24 imminently threatened structure or the right-of-way in the case of roads. If a public facility
25 or transportation corridor is found to be imminently threatened and at increased risk of
26 imminent damage due to site conditions such as a flat shore profile or accelerated erosion,
27 temporary erosion control structures may be located more than 20 feet seaward of the
28 facility or corridor being protected. In cases of increased risk of imminent damage, the
29 location of the temporary erosion control structures shall be determined by the Director of
30 the Division of Coastal Management or designee in accordance with Subparagraph (a)(1)
31 of this Rule. Temporary erosion control structures may be used to protect properties that
32 are experiencing erosion when there are no imminently threatened structures on the
33 property if an adjacent property has an existing temporary erosion control structure that is
34 in compliance with the Commission's rules. Temporary erosion control structures used to
35 protect property without imminently threatened structures shall be sited to align with and
36 be no further oceanward than the most landward adjacent temporary erosion control
37 structure;

1 (C) any fill materials used in conjunction with emergency work for storm or erosion control
2 shall be obtained from an upland source except that dredging for fill material to protect
3 public facilities or transportation corridors shall be considered in accordance with standards
4 in 15A NCAC ~~7H .0208~~; 07H .0208; and

5 (D) all fill materials or structures associated with temporary relocations which are located
6 within Coastal Wetlands, Estuarine Water, or Public Trust AECs shall be removed after
7 the emergency event has ended and the area restored to pre-disturbed conditions.

8 (2) This permit authorizes only the immediate protection or temporary rehabilitation or relocation of
9 existing public facilities. Long-term stabilization or relocation of public facilities shall be consistent
10 with local governments' post-disaster recovery plans and policies which are part of their Land Use
11 Plans.

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13 *History Note: Authority G.S. 113-229(c1); 113A-107(a),(b); 113A-113(b); 113A-115.1; 113A-118.1;*
14 *Eff. November 1, 1985;*
15 *Amended Eff. April 1, 1999; February 1, 1996; June 1, 1995;*
16 *Temporary Amendment Eff. July 3, 2000; May 22, 2000;*
17 *Amended Eff. May 1, 2013; May 1, 2010; August 1, 2002. Temporary Amendment Eff. July 3, 2000;*
18 *May 22, 2000;*
19 *Temporary Amendment Eff. February 26, 2016.*