

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

RECOMMENDED ACTION:

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

COMMENT:

This Rule governs the processing of an application for permits under the Coastal Area Management Act (CAMA) and for fill and dredge permits. In paragraph (b)(1), the agency specifies the requirements for a "complete" application. Among these, the agency requires submission of a "current application form[,] yet does not specify the contents or substantive requirements of the form.

Pursuant to G.S. 150B-2(8a)d., unless the "contents or substantive requirements of [a form] are prescribed by rule or statute" the form itself is subject to rulemaking. In response to requests for changes, the agency confirmed that the contents of the form are not described in another Rule or statute, but declined to revise the Rule to include these contents. Thus, it is staff's opinion that this Rule is subject to objection on the grounds that the agency has failed to comply with the APA.

Additionally, 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..." and goes on to note that any application not in compliance will be not be returned and not considered accepted. As written, it appears any application could be deemed incomplete and returned for any reason. Without further description of what kinds of materials or information the Department may require before rejecting and returning a permit application, it is staff's opinion that this provision is impermissibly unclear and ambiguous.

Accordingly, staff recommends that RRC object to 15A NCAC 07J .0204 on the basis that the Rule is unclear and ambiguous, and that the agency has failed to adopt it in compliance with the APA.

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Commission Counsel
September 12, 2022

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (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 07J .0204 is readopted as published with changes in 34:09 NCR 762 as follows:

2
3 **15A NCAC 07J .0204 PROCESSING THE APPLICATION**

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

6 (b) Application processing shall begin when an application is accepted as complete. Before an application will be
7 accepted as complete, the following requirements must be met;

- 8 (1) a current application form must be submitted;
- 9 (2) all questions on the application form must be completed or the letters "N/A" must be placed in each
10 section that does not apply;
- 11 (3) an accurate work plan as described in 15A NCAC 7J .0203 herein must be attached to all CAMA
12 major development and/or or dredge and fill permit applications;
- 13 (4) a copy of a deed or other instrument under which the applicant claims title must accompany a
14 CAMA major development and/or or dredge and fill permit application;
- 15 (5) notice to adjacent riparian landowners must be given as follows:
 - 16 (A) Certified return mail receipts (or copies thereof) indicating that adjacent riparian
17 landowners (as identified in the permit application) have been sent a copy of the application
18 for the proposed development must be included in a CAMA major development and/or
19 dredge and fill permit application. Said landowners have 30 days from the date of
20 notification in which to comment. Such comments will be considered by the Department
21 in reaching a final decision on the application.
 - 22 (B) For CAMA minor development permits, the applicant must give actual notice of his or her
23 intention to develop his property and apply for a CAMA minor development permit to all
24 adjacent riparian landowners. Actual notice can be given by sending a certified letter,
25 informing the adjoining property owner in person or by telephone, or by using any other
26 method which satisfies the Local Permit Officers that a good faith effort has been made to
27 provide the required notice;
- 28 (6) the application fee must be paid as set out in this Subparagraph:
 - 29 (A) Major development permit - Application fees shall be in the form of a check or money
30 order payable to the Department. The application fee for private, non-commercial for profit
31 development shall be two hundred fifty dollars (\$250.00). The application fee for a public
32 or commercial for profit project shall be four hundred dollars (\$400.00).
 - 33 (B) Minor development permit - Application fees shall be in the form of a check or money
34 order payable to the permit-letting agency in the amount of one hundred dollars (\$100.00).
35 Monies so collected may be used only in the administration of the permit program;
- 36 (7) any other information the Department or local permit officer deems necessary for a review of the
37 application must be provided. Any application not in compliance with these requirements will be

1 returned to the applicant along with a cover letter explaining the deficiencies of the application and
2 will not be considered accepted until it is resubmitted and determined to be complete and sufficient.
3 If a local permit officer receives an application for a permit that the local permit officer lacks
4 authority to grant, the permit officer shall return the application with information as to how the
5 application may be properly considered; and

6 (8) for development proposals subject to review under the North Carolina Environmental Policy Act
7 (NCEPA), G.S. ~~113A-100~~ ~~113A-1~~ ~~et. et~~ seq., the permit application will be complete only on
8 submission of the ~~appropriate~~ environmental assessment document.

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

11 (d) If the application is found to be incomplete or inaccurate after processing has begun or if ~~based on review by the~~
12 ~~Division or other State and federal review agencies~~ additional information ~~regarding the scale or scope of the project~~
13 from the applicant is necessary to ~~adequately~~ assess the project, the processing shall be ~~terminated in abeyance~~ pending
14 receipt of the ~~additional necessary changes or necessary~~ information from the applicant. During the pendency of any
15 termination of processing, the permit processing period shall not run. If the changes or additional information
16 ~~significantly~~ alters the ~~scale or scope of the~~ project proposal, the application shall be considered new and the permit
17 processing period will begin to run from that date.

18 (e) Any ~~CAMA or Dredge and Fill~~ violation occurring at a proposed project site for which an application is being
19 reviewed shall be processed according to the procedures in 15A NCAC 7J .0408 - 0410. If the violation ~~substantially~~
20 altered the proposed project site, and restoration is ~~deemed necessary, required in accordance with G.S. 113A-126.~~
21 the applicant shall be notified that processing of the application will be suspended pending compliance with the notice
22 of required restoration. ~~Satisfactory restoration~~ ~~Restoration~~ of any ~~unpermitted unauthorized~~ development ~~that has~~
23 ~~substantially altered a~~ ~~at the~~ project site is ~~required~~ ~~deemed necessary~~ to allow a complete review of the application
24 and an accurate assessment of the project's potential impacts. The applicant shall be notified that permit processing
25 has resumed, and that a new processing deadline has been established once the required restoration has been deemed
26 satisfactory by the Division of Coastal Management or Local Permit Officer.

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

32
33 *History Note:* Authority G.S. 113-229; 113A-119; 113A-119.1; 113A-122(c); 113A-124;

34 *Eff. March 15, 1978;*

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

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

37 *Temporary Amendment Expired June 28, 1999;*

- 1 *Amended Eff. August 1, 2000;*
- 2 *Readopted Eff. October 1, 2022.*

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AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0210

RECOMMENDED ACTION:

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

COMMENT:

This Rule pertains to the circumstances when CAMA permits are necessary for the replacement of existing structures. Several provisions within the Rule are impermissibly ambiguous. In item (1), the Rule specifies that for non-water dependent structures, proposed work is considered replacement (and thus subject to permitting requirements) "if the cost to do the work exceeds 50 percent of the market value of an existing structure immediately prior to the time of damage or the time of request." It is staff's opinion that as described in the Rule, both the "cost to do the work" and the "market value" are impermissibly unclear or ambiguous.

First, it is unclear who determines whether the market value is determined prior to the time of damage or at the time of the request. In responses to staff's request for changes, the agency stated that "[t]he Division or the Local Permitting Officer" makes the determination. However, the agency declined to make this clarification in the text of the Rule. Further, the Rule gives no guidance as to how this determination is to be made. Market value before and after damage could be markedly different, and thus have a direct impact on whether a permit is necessary.

Additionally, it is unclear what the agency means by "immediately prior to the time of damage." In response to staff's request for changes, the agency stated that it was using the common definition of both words, meaning "without lapse of time and before." Given the unlikely event that a structure may have had its value assessed moments before it was damaged, this answer does little to clarify the issue. The relevant inquiry is how much time may lapse before an appraisal or assessment of the market value is no longer considered "immediately prior to the time of damage." It is similarly unclear if the agency, upon receiving from the applicant an appraisal or assessment that is not

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September 12, 2022

deemed “immediate”, will choose to value the property at the time of request, thus potentially affecting the market value and thus the necessity of a permit.

*Second, the Rule defines the “cost to do the work” as “the cost to return the structure to its pre-damaged condition....” However, the Rule goes on to state that the cost “shall include . . . any improvements that the owner chooses to construct.” The definition of cost cannot simultaneously mean both the cost to return the structure to its pre-damaged condition **and** the cost to make improvements beyond what had previously existed. Although staff asked about this apparent conflict in requests for changes, the agency’s response did not address the conflict.*

Thus, staff recommends that the Commission object to this Rule on the basis that it is impermissibly unclear and ambiguous pursuant to G.S. 150B-21.9(a)(2).

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September 12, 2022

1 15A NCAC 07J .0210 is readopted as published **with changes** in 34:09 NCR 762 as follows:

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3 **15A NCAC 07J .0210 REPLACEMENT OF EXISTING STRUCTURES**

4 Replacement of structures damaged or destroyed by natural elements, fire or normal deterioration is considered
5 development and requires CAMA permits. Replacement of structures shall be permitted if the replacements is
6 consistent with current CRC rules. Repair of structures damaged by natural elements, fire or normal deterioration is
7 not considered development and shall not require CAMA permits. The CRC shall use the following criteria to
8 determine whether proposed work is considered repair or replacement.

9 (1) NON-WATER DEPENDENT STRUCTURES. Proposed work is considered replacement if the
10 cost to do the work exceeds 50 percent of the market value of an existing structure immediately
11 prior to the time of damage or the time of request. Market value and costs are determined as follows:

12 (a) Market value of the structure does not include the value of the land, value resulting from
13 the location of the property, value of accessory structures, or value of other improvements
14 located on the property. Market value of the structure shall be determined by the Division
15 based upon information provided by the applicant using any of the following methods:

- 16 (i) appraisal;
- 17 (ii) replacement cost with depreciation for age of the structure and quality of
18 construction; or
- 19 (iii) tax assessed value.

20 (b) The cost to do the work is the cost to return the structure to its pre-damaged condition,
21 using labor and materials obtained at market prices, regardless of the actual cost incurred
22 by the owner to restore the structure. It shall include the costs of construction necessary to
23 comply with local and state building codes and any improvements that the owner chooses
24 to construct. The cost shall be determined by the Division utilizing any or all of the
25 following:

- 26 (i) an estimate provided by a North Carolina licensed contractor qualified by license
27 to provide an estimate or bid with respect to the proposed work;
- 28 (ii) an insurance company's report itemizing the cost, excluding contents and
29 accessory structures; or
- 30 (iii) an estimate provided by the local building inspections office.

31 (2) WATER DEPENDENT STRUCTURES. The proposed work is considered replacement if it
32 enlarges the existing ~~structure.~~ **structure in any dimension.** The proposed work is also considered
33 replacement if:

34 (a) in the case of fixed docks, piers, platforms, boathouses, boatlifts, and free standing
35 moorings, more than 50 percent of the framing and structural components (beams, girders,
36 joists, stringers, or pilings) must be rebuilt in order to restore the structure to its pre-damage
37 condition. Water dependent structures that are structurally independent from the principal

1 pier or dock, such as boatlifts or boathouses, are considered as separate structures for the
2 purpose of this Rule;

3 (b) in the case of boat ramps and floating structures such as docks, piers, platforms, and
4 modular floating systems, more than 50 percent of the square feet area of the structure must
5 be rebuilt in order to restore the structure to its pre-damage condition;

6 (c) in the case of bulkheads, seawalls, groins, breakwaters, and revetments, more than 50
7 percent of the linear footage of the structure must be rebuilt in order to restore the structure
8 to its pre-damage condition.

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10 *History Note: Authority G.S. 113A-103(5)b.5.; 113A-107(a),(b);*

11 *Eff. July 1, 1990;*

12 *Amended Eff. August 1, 2007;*

13 *Readopted October 1, 2022.*