To: All RRC Commissioners
From: Brian Liebman, Commission Counsel
In re: Objections to 15A NCAC 07I .0406, .0506, .0702, 07J .0206
Date: February 14, 2023

I. History

The Coastal Resources Commission ("CRC") readopted rules and submitted the same for the consideration of the Rules Review Commission ("RRC") as part of the decennial periodic review process of G.S. 150B-21.3A. G.S. 150B-21.3A was adopted in 2013. Many of the rules have not been reviewed in thirty or more years. These rules were first submitted for RRC review prior to the July 2022 meeting.

It should be noted that the RRC made very few changes to its rules. Indeed some of CRC's rules failed to correct the name change of its host department from the Department of Environment and Natural Resources to the Department of Environmental Quality. Some rules contained citations to general statutes which had been repealed in the late 1980s.

RRC granted an extension to the agency at the July meeting, extending the period of review 70 days, or roughly until the September 2022 meeting. The agency did not revise any of the above captioned rules to address staff opinions recommending objection on the basis of necessity, and CRC's September 1, 2022 memo did not specifically address rules subject to objection solely on the basis of necessity. At the September 15, 2022 RRC meeting, the Commission voted to adopt staff's opinions and thus object to the above-captioned rules for the reasons set forth in staff's opinions.

Subsequently, on November 23, 2022, the agency submitted revised versions of the above-captioned rules as well as another memo specifically addressing necessity for the first time. At the subsequent December 15, 2022 RRC meeting, the Commission heard from Mary Lucasse, but ultimately voted to table these rules for further consideration at the January 2023 meeting. RRC further asked counsel to categorize those rules subject to objection on three bases: policy objections, necessity objections, and objections based on the inclusion of the ambiguous phrase "significant adverse impact."

Prior to the January 2023 meeting, the agency again submitted a memo revisiting the November 23, 2022 necessity arguments, and submitted a revised version of 07J .0206. As these filings were submitted the day before the meeting, RRC again voted to table these rules, and asked staff to prepare updated opinions addressing CRC's arguments.

II. Necessity

In each of the above-captioned rules, staff has previously opined that the content of the rule is entirely, or in substantial part, a repetition of statutory language found in Chapter 113A of the General Statutes.

In Rule 07I .0406, the agency restates material regarding permit fees that is repeated in G.S. 113A-119.1[1] and also in 15 NCAC 07J .0204. In G.S. 113A-119.1, the law states that

[1] Staff notes that this statute, although on point, is not cited in the Rule's History Note.

"[f]ees collected under this section shall be applied to the costs of administering this article." In Rule 07J .0204(b)(6)(B), it is stated that "[m]onies so collected may be used only in the administration of the permit program." The first sentence of 07I .0406 echoes this statement directly, which is in contradiction to G.S. 150B-19(4), which states that a rule shall not "[r]epeat[] the content of a law, a rule, or a federal regulation…." While the agency argues that the middle sentence of this Rule is not a statutory repetition and should be preserved, it has made no effort to revise the rule to remove the unnecessary language. In fact, when asked whether CRC could do just that at the December 2022 meeting, CRC's counsel responded that it could, but chose not to do so. As such, staff opines that the objection has not been satisfied, and that the September 2022 objection should be continued until and unless the agency revises the rule to address the objection or requests return of the rule.

Similarly, in Rule 07I .0506, the Rule brings together authority that is contained in several different statutes within Chapter 113A. G.S. 113A-116, 113A-118, and 113A-121 all state that CRC will administer permits for any city or county that failed to provide CRC with a letter of intent to act as the permit letting agency, or failed to develop an approved implementation and enforcement program.[2] This principle is restated in paragraphs (d) and (e) of Rule .0506. Paragraph (a) explicitly restates a portion of G.S. 113A-118 which specifically states that "a county may submit a letter of intent to issue permits in any city within said county that disclaims it intent to issue permits or fails to submit a letter of intent." Paragraphs (b) and (c) of Rule .0506 merely state obvious conclusions that can be drawn from the statutory language, namely that cities and counties may only act as permit letting agencies within the bounds of their territorial jurisdiction. Again, the agency may revise the Rule to preserve the language of Paragraphs (b) and (c), but has elected not to do so. As such, staff opines that the objection has not been satisfied, and that the September 2022 objection should be continued until and unless the agency revises the rule to address the objection or requests return of the rule.

Rule 07I .0702 states, in pertinent part, that when a local permit letting agency exceeds the authority granted to it under the Coastal Area Management Act, "that action" shall be null, void, and of no effect." This essentially repeats a common maxim of black letter law that an action taken without jurisdiction is void *ab initio*. *See e.g.* State v. Harwood, 243 N.C. App. 425, 428, 777 S.E.2d 116, 118 (2015). As this is repetitious of state law, staff continues to believe that this language is unnecessary. Again, the agency may revise the Rule to preserve the remaining language, but has elected not to do so.[3] As such, staff opines that the objection has not been satisfied, and that the September 2022 objection should be continued until and unless the agency revises the rule to address the objection or requests return of the rule.

Finally, the Commission originally objected to 07J .0206 on the basis of statutory authority, ambiguity, and necessity. In staff's latest February 13, 2023 opinion, staff opines that CRC's subsequent revisions have satisfied the Commission's objections on the basis of

[2] Again, staff notes that none of these statutes, despite being on point, are cited in the Rule's History Note. Rather, the agency persists in citing to G.S. 113A-124(c)(5), a statute that was repealed in 1987.

[3] Further, the agency persists in citing to G.S. 113-120(c), a statute that was repealed in 1989.

statutory authority and ambiguity. However, the original objection to necessity remains unaddressed, as the first sentence of this two-sentence rule does little more than repeat the provisions of G.S. 113A-119(b). As such, staff opines that the necessity objection has not been satisfied, and that the September 2022 objection on the basis of necessity should be continued until and unless the agency revises the rule to address the objection or requests return of the rule.

III. Conclusion

Staff's opinion regarding the above-captioned rules has not changed. It continues to be staff's opinion that these rules principally "[r]epeat[] the content of a law, a rule, or a federal regulation." N.C. Gen. Stat. 150B-19(4) (2022). While the APA states "[a] brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3)," it continues to be staff's opinion that the objectionable language in these rules is more than a "brief statement" and is instead wholesale repetition which could be removed and replaced with more concise references that would comply with the provisions of the APA. Staff recommends that RRC continue its objections at this time.