



# 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 071 .0702 When the Local Permitting Agency Exceeds Local Authority

3. **Action:**  Adoption  Amendment  Repeal

4. **Was this an Emergency Rule:**  Yes  No **Effective date:** January 3, 2024

5. **Provide dates for the following actions as applicable:**

- a. **Proposed Temporary Rule submitted to OAH:** December 14, 2023
- b. **Proposed Temporary Rule published on the OAH website:** December 20, 2023
- c. **Public Hearing date:** January 9 and 10, 2024
- d. **Comment Period:** January 3, 2024 through February 22, 2024
- e. **Notice pursuant to G.S. 150B-21.1(a3)(2):** December 19, 2023
- f. **Adoption by agency on:** March 13, 2024
- 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:**

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. 2023-134 s 21.2(m)  
Effective date: October 3, 2023
- 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:
- Other:**

**Explain:** Pursuant to NC Session Law 2023-134, the Rules Review Commission returned rules to the CRC on October 5, 2023 and the Codifier removed those rules from the Code the same day. Until the effective date of this session law, only an agency could request the return of its rules. As a result, the State of North Carolina cannot rely on the rules removed from the Code for permitting and enforcement decisions. In addition, the State of North Carolina can no longer review certain federal projects for consistency with State law based on these rules. The removal of the rules from the Code severely impacts the CRC's rules and creates confusion related to permitting procedures for the State's coastal management program and the regulated public. In addition, there is a serious threat to public safety and welfare because the removal of these rules results in the loss of protection of coastal lands and waters, which the General Assembly has deemed "among North Carolina's most valuable resources." N.C. Gen. Stat. 113A-102(a). In particular, this rule establishes that if the CRC's determinations, as opposed to some other entity or the courts, are binding on the local permitting agency in resolving issues relation to the coastal management program.

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

The CRC incorporates the explanation provided in response in Block 6 of this form. In addition, the CRC contends that immediate adoption of the rule is required instead of a more extended notice and hearing requirements. The CRC has received numerous public comments with the significant majority in favor of adopting the temporary rules. Specifically, the CRC has held three public hearings and extended the public comment period to February 22, 2024 in order to widely solicit comments not only from the general public and the regulated public but also through a direct appeal to the Coastal Resources Advisory Council. The CRC has received comments from a diverse group of commenters including, among others coastal towns and counties, civic groups, environmental groups, businesses, visitors' bureaus, a group of high school students, and numerous private citizens. During the public comment period, the CRC received 239 comments including 1 petition with 651 signatures in support of adopting the rules. Of the comments received 3 were neutral, 6 included concerns, 2 provided recommendations for changes which the CRC has decided to consider during permanent rulemaking, and the remaining 228 comments were in support of adopting the rules. Immediate adoption of the rule is required to establish the CRC's role as the binding decision maker if conflicts arise and, by doing so protect the CRC's jurisdiction over the coastal resource.

**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

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**Agency contact, if any:** Mike Lopazanski

**Phone:** 252-515-5400

**E-Mail:** [Mike.Lopazanski@deq.nc.gov](mailto:Mike.Lopazanski@deq.nc.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:** Renee Cahoon

**Title:** CRC Chair

**E-Mail:** [Renee.Cahoon@deq.nc.gov](mailto:Renee.Cahoon@deq.nc.gov)

**RULES REVIEW COMMISSION USE ONLY**

Action taken:

Submitted for RRC Review:

Date returned to agency:

## **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: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07I .0702

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule governs situations where the local permitting agency exceeds the scope and extent of its authority under G.S. 113A-117. Pursuant to the Rule, such actions are “null, void, and of no effect.” The Rule goes on to state that “the determinations of the Commission shall be binding on the local permit-letting agency as to questions of such jurisdiction. In addition to staff’s objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule for lack of statutory authority and lack of necessity.

This Rule relies on G.S. 113A-118(e), 113A-120(c), and 113A-124(c)(5) as its sources of statutory authority. The General Assembly repealed G.S. 113A-120(c) and 113A-124(c)(5) in 1989 and 1987, respectively. The remaining statute, G.S. 113A-118(e) is still in effect but is inapposite, as it refers only to the siting of utility facilities for the development, generation, or

Brian Liebman  
Commission Counsel

transmission of energy. As the agency has provided no other source of authority for this Rule—such as G.S. 113A-117, which is referenced in the text, but not the History Note—it is staff's opinion that RRC should object to this Rule for lack of statutory authority.

Moreover, to the extent it merely repeats the well-established provision of black-letter law and case law, that government action outside the scope of statutory authority is null and void, it is staff's opinion that the Rule is not reasonably necessary to implement or interpret federal or State law, and that RRC should object on that basis.

**§ 113A-117. Implementation and enforcement programs.**

(a) The Secretary shall develop and present to the Commission for consideration and to all cities and counties and lead regional organizations within the coastal area for comment a set of criteria for local implementation and enforcement programs. In the preparation of such criteria, the Secretary shall emphasize the necessity for the expeditious processing of permit applications. Said criteria may contain recommendations and guidelines as to the procedures to be followed in developing local implementation and enforcement programs, the scope and coverage of said programs, minimum standards to be prescribed in said programs, staffing of permit-letting agencies, permit-letting procedures, and priorities of regional or statewide concern. Within 20 months after July 1, 1974, the Commission shall adopt and transmit said criteria (with any revisions) to each coastal-area county and city that has filed an applicable letter of intent, for its guidance.

(b) The governing body of each city in the coastal area that filed an affirmative letter of intent shall adopt an implementation and enforcement plan with respect to its zoning area within 36 months after July 1, 1974. The board of commissioners of each coastal-area county that filed an affirmative letter of intent shall adopt an implementation plan with respect to portions of the county outside city zoning areas within 36 months after July 1, 1974, provided, however, that a county implementation and enforcement plan may also cover city jurisdictions for those cities within the counties that have not filed affirmative letters of intent pursuant to G.S. 113A-116. Prior to adopting the implementation and enforcement program the local governing body shall hold a public hearing at which public and private parties shall have the opportunity to present comments and views. Notice of the hearing shall be given not less than 15 days before the date of the hearing, and shall state the date, time and place of the hearing, the subject of the hearing, and the action which is to be taken. The notice shall state that copies of the proposed implementation and enforcement program are available for public inspection at the county courthouse. Any such notice shall be published at least once in one newspaper of general circulation in the county at least 15 days before the date on which the public hearing is scheduled to begin.

(c) Each coastal-area county and city shall transmit its implementation and enforcement program when adopted to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the program, and shall review and consider each local implementation and enforcement program submitted in light of such objections and comments, the Commission's criteria and any general standards of review applicable throughout the coastal area as may be adopted by the Commission. Within 45 days after receipt of a local implementation and enforcement program the Commission shall either approve the program or notify the county or city of the specific changes that must be made in order for it to be approved. Following such changes, the program may be resubmitted in the same manner as the original program.

(d) If the Commission determines that any local government is failing to administer or enforce an approved implementation and enforcement program, it shall notify the local government in writing and shall specify the deficiencies of administration and enforcement. If the local government has not taken corrective action within 90 days of receipt of notification from the Commission, the Commission shall assume enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement of the program. (1973, c. 1284, s. 1; 1975, c. 452, s. 3; 1977, c. 771, s. 4; 1989, c. 727, s. 130.)

**§ 113A-118. Permit required.**

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

**§ 113A-120. Grant or denial of permits.**

- (a) The responsible official or body shall deny an application for a permit upon finding:
- (1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.
  - (2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).
  - (3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements of more than local concern identified in subdivisions a through c of G.S. 113A-113(b)(3).
  - (4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).
  - (5) In the case of areas covered by G.S. 113A-113(b)(5), that the development will jeopardize the public rights or interests specified in said subdivision.
  - (6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in subdivisions a through e of G.S. 113A-113(b)(6) in such a manner as to unreasonably endanger life or property.
  - (7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions (1) to (6) of this subsection.
  - (8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.
  - (9) In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.
  - (10) In any case, that the proposed development would contribute to cumulative effects that would be inconsistent with the guidelines set forth in subdivisions (1) through (9) of this subsection. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity.

(b) In the absence of such findings, a permit shall be granted. The permit may be conditioned upon the applicant's amending his proposal to take whatever measures or agreeing to carry out whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

(b1) In addition to those factors set out in subsection (a) of this section, and notwithstanding the provisions of subsection (b) of this section, the responsible official or body may deny an application for a permit upon finding that an applicant, or any parent or subsidiary corporation if the applicant is a corporation:

- (1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of

violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;

- (2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;
  - (3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or
  - (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.
- (b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

(c) Repealed by Session Laws 1989, c. 676, s. 7. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1; 1983, c. 518, ss. 4, 5; 1987, c. 827, s. 138; 1989, c. 51; c. 676, s. 7; 1997-337, s. 2; 1997-456, s. 55.2B; 1997-496, s. 2; 2000-172, s. 2.1.)



**§ 113A-124. Additional powers and duties.**

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

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

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

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 15A NCAC 07I .0702 is adopted under temporary procedures as follows:  
2

3 **15A NCAC 07I .0702 WHEN THE LOCAL PERMITTING AGENCY EXCEEDS LOCAL AUTHORITY**

4 When the local permit-letting agency exceeds the scope and extent of its authority pursuant to G.S. 113A-117, which  
5 is limited to consideration of applications proposing minor development as defined in the Coastal Area Management  
6 Act, that action shall be null, void and of no effect. The determinations of the Commission shall be binding on the  
7 local permit-letting agency as to questions of such jurisdiction.

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

10 *Temporary Adoption Eff. April 5, 2024.*