



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .0401 Declaration of General Policy
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> <b>Cite:</b> S.L. 2023-134 s 21.2(m) <b>Effective date:</b> October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> <b>Effective date of change:</b> <input type="checkbox"/> <b>A recent federal regulation.</b> <b>Cite:</b> <b>Effective date:</b> <input type="checkbox"/> <b>A recent court order.</b> <b>Cite order:</b> <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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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**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

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**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: Coastal Resources Commission

RULE CITATION: 15A 07M .0401 Temporary

RECOMMENDATION DATE: 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:

*While the Rules Review Commission does not consider "questions relating to the quality or efficacy" of a rule propounded by an agency pursuant to G.S. 150B-21.9, there are occasions where the language employed and the intentions of the agency are unclear and ambiguous. Such is the case with this rule.*

*Much of the language employed does not regulate, set a standard, implement or interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-2(8a). This language is nothing more than a mere statement of policy, belief, or opinion as the title 15 NCAC 07M .0401 suggests.*

*This temporary rule is substantially the same as the revision submitted to and objected by the Rules Review Commission in February 2023. While the Coastal Resources Commission (CRC) made some additions, significant ambiguity remains such that, considering the entirety of language adopted, it is unclear whether the CRC is adopting a "rule" as defined in G.S. 150B-2(8a) or a policy statement.*

*A notable addition is Paragraph (a) of the rule.*

William W. Peaslee  
Commission Counsel

*Paragraph (a) self-proclaims that “the policy statements in this Section are enforceable.”<sup>1</sup> G.S. 150B-19.1(a)(1) states, “An agency may adopt only rules that are expressly authorized by federal and State law and that are necessary to serve the public interest” (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:*

Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

*G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:*

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .

.....

- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

*Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.*

*While a policy can become a rule in the North Carolina Administrative Code, the language must meet the definition of a “rule” pursuant to G.S. 150B-2(8a). It must also meet the standards of G.S. 150B-21.9.*

*Paragraph (a) also requires local governments and the Division of Coastal Management (DCM) to “consider” the policy statements when issuing permits and implementing “the coastal management program” or when commenting on federal permit and activities pursuant to Section 307 of the federal Coastal Zone Management Act.*

*The CRC also uses the term “North Carolina Coastal Management Program.” in Paragraphs (b) and (c)*

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1 SECTION .0400 ENTITLED IS “COASTAL MANAGEMENT DEVELOPMENT – GENERAL POLICIES” CONTAINS THREE RULES. WHILE RULES .0401 AND .0403 ARE TITLED AS A “POLICY,” NONE OF THE RULES SPECIFICALLY IDENTIFY A POLICY OF THE COASTAL RESOURCES COMMISSION.

*“Coastal management program” is undefined in either Subchapter 07M or Chapter 113A of the North Carolina General Statutes. Presumably the CRC intends coastal management programs approved pursuant to 16 USC Ch. 33 §1455(d) ( the Federal Coastal Zone Act of 1972) however that is unclear.*

*Likewise, the term “coastal resources” is without any definition in either Chapter 7 of Title 15A of the North Carolina Code or Chapter 113A of the General Statutes. It is unclear what the CRC means by this term.*

*The first three sentences of Paragraph (b) appear to be prefatory and are not reasonably necessary pursuant to G.S. 150B-21.9(a)(3). Nor do they meet the definition of a rule pursuant to G.S. 150B-2(8a).*

*The fourth sentence of Paragraph (b) appears to require that “the exercise of regulatory authority, and determinations of consistency” “assure that the development of energy facilities and energy resources shall avoid significant adverse impact.”<sup>2</sup> The language does not specify whose exercise of authority and determinations are to make the assurances, nor to whom the assurances shall be made.*

*The first two sentences of Paragraph (c) appear to be prefatory and are not reasonably necessary pursuant to G.S.150B-21.9(a)(3). Nor do they meet the definition of a rule pursuant to G.S. 150B-2(8a).*

*The third sentence of Paragraph (c) however appears to define or mandate that which shall be included in the “enforceable policies”. It is unclear to which “enforceable policies” the CRC is referring or whether the CRC is using the rule as authority to make the policies enforceable. It is also unclear why the contents of a policy would be included in a rule as opposed to in the policy itself. Accordingly, to the extent that the language is a rule and can be adopted, the language is ambiguous.*

*The last sentence of Paragraph (c) requires all permit applications, plans and assessments related to exploration of [Outer Continental Shelf] resources or other energy facilities to “contain information to allow analysis of the consistency of all proposed activities with these rules.”*

*“Outer Continental Shelf” is undefined in either the rules or in Chapter 113A of the North Carolina General Statutes. Accordingly, how would applicants, local governments, or DCM know to which areas the rule applies? The regulated public is left to wonder.*

*The requirement of “information to allow analysis” is facially ambiguous. The regulated public would not know what type or amount of information is required without consulting the agency.*

*To the extent this language in the Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S.150B-2(8a).*

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*<sup>2</sup> PLEASE NOTE THAT THE CRC HAS DEFINED “ADVERSE IMPACT” AND “SIGNIFICANT” IN THE TEMPORARY RULE 15A NACA 07M .0402 CURRENTLY BEFORE THE RRC.*

*Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a "Rule"; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary "rule."*

*In short, the language of this policy/rule is a mix of policy, statements of opinion, and some language which may meet the definition of a rule as defined in G.S. 150B-2(8a); however, to the extent the language constitutes a "rule" it is unclear and ambiguous. Accordingly, staff recommends objection of all four bases of G.S. 150B-21.9(a).*

**§ 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.)

G.S. 150B-2

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.



- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

## 16 USC Ch 33 §1455. Administrative grants

### (a) Authorization; matching funds

The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

- (1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.
- (2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

### (b) Grants to coastal states; requirements

The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d).

### (c) Allocation of grants to coastal states

Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

### (d) Mandatory adoption of State management program for coastal zone

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

- (1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.
- (2) The management program includes each of the following required program elements:
  - (A) An identification of the boundaries of the coastal zone subject to the management program.
  - (B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.
  - (C) An inventory and designation of areas of particular concern within the coastal zone.
  - (D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.
  - (E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.
  - (F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the

management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development <sup>1</sup> to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

**(e) Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program

unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

(Pub. L. 89-454, title III, §306, as added Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1283; amended Pub. L. 93-612, §1(2), Jan. 2, 1975, 88 Stat. 1974; Pub. L. 94-370, §5, July 26, 1976, 90 Stat. 1017; Pub. L. 96-464, §5(a), Oct. 17, 1980, 94 Stat. 2062; Pub. L. 99-272, title VI, §6043(b)(1), (c), Apr. 7, 1986, 100 Stat. 124, 125; Pub. L. 101-508, title VI, §6206(a), Nov. 5, 1990, 104 Stat. 1388-303; Pub. L. 102-587, title II, §2205(b)(1)(A), (B), (8), Nov. 4, 1992, 106 Stat. 5050, 5051.)

1 15A NCAC 07M .0401 is adopted under temporary procedures as follows:  
2

3 **SECTION .0400 - COASTAL ENERGY DEVELOPMENT – GENERAL POLICIES**  
4

5 **15A NCAC 07M .0401 DECLARATION OF GENERAL POLICY**

6 (a) The policy statements in this Section are enforceable and shall be considered by local governments and DCM  
7 when issuing permits and implementing the coastal management program under this Subchapter and commenting on  
8 federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

9 (b) It is hereby declared that the general welfare and public interest require that reliable sources of energy be made  
10 available to the citizens of North Carolina. It is further declared that the development of energy facilities and energy  
11 resources within the State and in offshore waters can serve important regional and national interests. However, unwise  
12 development of energy facilities or energy resources can conflict with the recognized and equally important public  
13 interest that rests in conserving and protecting the land and water resources of the State and nation, particularly coastal  
14 lands and waters. Therefore, in order to balance the public benefits of energy development with the need to:

15 (1) protect coastal resources; and

16 (2) preserve access to and utilization of public trust resources, the planning of future uses affecting both  
17 land and public trust resources,

18 the exercise of regulatory authority, and determinations of consistency with the North Carolina Coastal Management  
19 Program shall assure that the development of energy facilities and energy resources shall avoid significant adverse  
20 impact upon coastal resources or uses, public trust areas and public access rights.

21 (c) Exploration for the development of offshore and Outer Continental Shelf (OCS) energy resources has the potential  
22 to affect coastal resources. The Federal Coastal Zone Management Act of 1972, as amended, requires that leasing  
23 actions of the federal government be consistent to the maximum extent practicable with the enforceable policies of  
24 the federally approved North Carolina Coastal Management Program, and that exploration, development and  
25 production activities associated with such leases comply with those enforceable policies. Enforceable policies  
26 applicable to OCS activities include all the provisions of this Subchapter as well as any other federally approved  
27 components of the North Carolina Coastal Management Program. All permit applications, plans and assessments  
28 related to exploration or development of OCS resources and other energy facilities shall contain information to allow  
29 analysis of the consistency of all proposed activities with these rules.

30  
31 History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;

32 Temporary Adoption Eff. April 5, 2024.



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

**OAH USE ONLY**

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .0402 Definitions
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> Cite: S.L. 2023-134 s 21.2(m) Effective date: October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> Effective date of change: <input type="checkbox"/> <b>A recent federal regulation.</b> Cite: Effective date: <input type="checkbox"/> <b>A recent court order.</b> Cite order: <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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:** 919-707-8595

**E-Mail:** [Jennifer.Everett@deq.nc.gov](mailto:Jennifer.Everett@deq.nc.gov)

**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: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0402 Temporary

RECOMMENDED ACTION: April 5, 2024

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:

*In Paragraph (b) and throughout the rule, the Coastal Resources Commission (CRC) employs the term "coastal resources." This is a term which is undefined in either Chapter 113A of the North Carolina General Statutes or the CRC's rules.*

*In Paragraph (b)(5), the CRC employs the term "archaeological and historic resources." This is a term which is undefined in either Chapter 113A of the North Carolina General Statutes or the CRC's rules.*

*In Paragraph (b)(8), the CRC employs the term "energy facility." Energy facility is a term which is undefined in either Chapter 113A of the North Carolina General Statutes or the CRC's rules.*

*Paragraph (b)(9) requires the Impact Analysis to provide "other specific data required by various state and federal agencies and commissions with jurisdiction to evaluate the consistency of the proposed project with relevant standards and guidelines". This is ambiguous.*

*In Paragraph (c), the rule defines the term "Major Energy Facilities" as "energy facilities" that "have the potential to negatively impact any land or water use or coastal resource of the coastal area." While Rule proceeds to provide a list of facilities that are specifically included, it does not site the listed facilities as examples which would have clarified, limited, and defined the types of facilities the CRC considers having the potential to have negative impact. Further, there is no definition of "negative impact". Accordingly, the agency would have broad discretion in determining which energy facilities are Major Energy Facilities. Any energy facility could become a Major Energy Facility by the arbitrary standard of having the "potential" to have a negative impact. Further, it is*

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Commission Counsel

*unclear why the CRC chose the term “negatively impact” when it has defined “adverse impact” in Paragraph (a) of the rule.*

*Accordingly, staff recommends objection to the Rule pursuant to G.S. 150B-21.9(a)(2).*

**§ 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 07M .0402 is adopted under temporary procedures as follows:

2  
3 **15A NCAC 07M .0402 DEFINITIONS**

4 (a) "Adverse impact", "adverse impacts", "adverse effects", or similar formulations, are defined as an effect or impact  
5 that is opposed to the goals of the Coastal Area Management Act as found in G.S. 113A-102(b) and with the provisions  
6 of G.S. 113-229(e).

7 (b) "Impact Assessment" is an analysis of the potential environmental, economic, and social consequences, including  
8 cumulative and secondary impacts of a proposed major energy facility. An Impact Assessment includes the following  
9 and for each of the following assess the effects the project will have on the use of public trust waters, adjacent lands,  
10 and on the coastal resources, including the effects caused by activities related to exploration or development of OCS  
11 resources and other energy facilities outside the coastal area:

12 (1) An analysis of the preferred sites for those elements of the project affecting the use of public trust  
13 waters, adjacent lands and the coastal resources:

14 (A) In all cases where the preferred site is located within an area of environmental concern  
15 (AEC) or on a barrier island, the applicant shall identify alternative sites considered and  
16 present a full analysis in terms of Subparagraphs (b)(2) through (b)(9) of this Rule of the  
17 reasons why the chosen location was deemed more suitable than another feasible alternate  
18 site;

19 (B) If the preferred site is not located within an AEC or on a barrier island, the applicant shall  
20 present an analysis to support the proposed location over an alternate site.

21 (2) An analysis of the economic impacts, both positive and negative, of the proposed project. The  
22 analysis shall focus on economic impacts to the public, not on matters that are purely internal to the  
23 corporate operation of the applicant. No proprietary or confidential economic data shall be required.  
24 This analysis shall include potential adverse impacts upon the ability of any governmental unit to  
25 furnish necessary services or facilities as well as other secondary impacts.

26 (3) An analysis of potential adverse impacts on coastal resources, including marine and estuarine  
27 resources and wildlife resources, as defined in G.S. 113-129;

28 (4) An analysis of potential adverse impacts on existing industry and potential limitations on the  
29 availability of, and accessibility to, coastal resources, including beach compatible sand and water,  
30 for future use or development;

31 (5) An analysis of potential significant adverse impacts on recreational uses and scenic, archaeological  
32 and historic resources;

33 (6) An analysis of potential risks to human life or property;

34 (7) An analysis of the impacts on the human environment including noise, vibration and visual impacts;

35 (8) An analysis of the procedures and time needed to secure an energy facility in the event of severe  
36 weather conditions, such as extreme wind, currents and waves due to northeasters and hurricanes;

1 (9) Other specific data required for the various state and federal agencies and commissions with  
2 jurisdiction to evaluate the consistency of the proposed project with relevant standards and  
3 guidelines;

4 (10) A plan regarding the action to be taken upon the decommissioning and removal of the facility and  
5 related structures. The plan shall include an estimate of the cost to decommission and remove the  
6 energy facility including a discussion of the financial instrument(s) used to provide for the  
7 decommissioning and the removal of the structures that comprise the energy facility. The plan shall  
8 also include a proposed description of the condition of the site once the energy facility has been  
9 decommissioned and removed; and

10 (11) An analysis that the proposed project is consistent with local land use plans.

11 An impact analysis for a proposed major energy facility shall include the items described in Subparagraphs (b)(1)  
12 through (b)(11) of this Rule for the associated energy exploration or development activities related to exploration or  
13 development of OCS resources and other energy facilities, including all foreseeable assessments of resource potential,  
14 the gathering of scientific data, exploration wells, and any delineation activities that are likely to follow development,  
15 production, maintenance, and decommissioning.

16 (c) "Major energy facilities" are those energy facilities, including those described in G.S. 113A-119.2(3), which have  
17 the potential to negatively impact any land or water use or coastal resource of the coastal area. For purposes of this  
18 definition, major energy facilities shall include the following:

19 (1) Any facility refining petroleum consistent with G.S. 143-215.77;

20 (2) Any terminals (and associated facilities) capable of handling, processing, or storing petroleum  
21 products or synthetic gas as defined in G.S 143-215.96;

22 (3) Any petroleum storage facility that is capable of storing 15 million gallons or more on a single site;

23 (4) Gas, coal, oil or nuclear electric generating facilities 300 MGW or larger;

24 (5) Wind energy facilities, including turbines, accessory buildings, transmission facilities, and other  
25 equipment necessary for the operation of a wind generating facility that cumulatively, with any other  
26 wind energy facility whose turbines are located within one-half mile of one another, are capable of  
27 generating three megawatts or larger;

28 (6) Thermal energy generation;

29 (7) Pipelines 12 inches or more in diameter that carry petroleum products or synthetic gas;

30 (8) Structures, including drillships and floating platforms located in offshore waters for the purposes of  
31 energy exploration, development, or production; and

32 (9) Onshore support or staging facilities related to offshore energy exploration, development, or  
33 production.

34 (d) "Offshore waters" are those waters seaward of the state's three-mile offshore jurisdictional boundary in which  
35 development activities may impact any land or water use or natural resource of the state's coastal area.

36 (e) "Significant" as used in this section includes consideration of both context and intensity. Context means that the  
37 impact or effect shall be analyzed from several perspectives that include society as a whole

1 (human, national), the affected subregion of the North Carolina coast, the local area and all directly and indirectly  
2 affected parties. Both short-and long-term effects are relevant. Intensity refers to the severity of impact or effect.

3 The following shall be considered in evaluating intensity:

4 (1) Both adverse impacts as defined in Paragraph (a) of this Rule and impacts that promote or enhance  
5 the goals of the Coastal Area Management Act as found in G.S. 113A-102(b);

6 (2) The degree to which the proposed action affects public health or safety;

7 (3) Unique characteristics of the geographic area;

8 (4) The degree to which the possible effects on the environment are uncertain or involve unique or  
9 unknown risks;

10 (5) The degree to which the CRC's permit decisions may establish a precedent for future CRC permit  
11 decisions;

12 (6) The degree to which the CRC's permit decisions are related to other CRC permit decisions with  
13 individually insignificant but cumulatively significant impacts. Significance cannot be avoided by  
14 termining an action temporary or by breaking it down into small component parts; and

15 (8) The degree to which the CRC's permit decision may cause the loss or destruction of scientific,  
16 cultural, historical, and environmental resources as those terms are commonly defined and  
17 understood.

18  
19 *History Note: Authority G.S. 113A-102(b); 113A-107; 113A-119.2; 113A-124;*  
20 *Temporary Adoption Eff. April 5, 2024.*



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .0403 Coastal Energy Development – Specific Policy Statements
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> Cite: S.L. 2023-134 s 21.2(m) Effective date: October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> Effective date of change: <input type="checkbox"/> <b>A recent federal regulation.</b> Cite: Effective date: <input type="checkbox"/> <b>A recent court order.</b> Cite order: <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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:** 919-707-8595

**E-Mail:** [Jennifer.Everett@deq.nc.gov](mailto:Jennifer.Everett@deq.nc.gov)

**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: Coastal Resources Commission

RULE CITATION: 15A 07M .0403 Temporary

RECOMMENDATION DATE: 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:

*While the Rules Review Commission does not consider "questions relating to the quality or efficacy" of a rule propounded by an agency pursuant to G.S. 150B-21.9, there are occasions where the language employed and the intentions of the agency are unclear and ambiguous. Such is the case with this rule.*

*This temporary rule is substantially the same as the revision submitted to and objected by the Rules Review Commission in February 2023. A notable addition is Paragraph (a) of the rule.*

*Paragraph (a) self-proclaims that "the policy statements in this Section are enforceable."<sup>1</sup>*

*G.S. 150B-19.1(a)(1) states, "An agency may adopt only rules that are expressly authorized by federal and State law and that are necessary to serve the public interest" (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:*

*Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document*

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*<sup>1</sup> SECTION .0400 ENTITLED IS "COASTAL MANAGEMENT DEVELOPMENT – GENERAL POLICIES" CONTAINS THREE RULES. WHILE RULES .0401 AND .0403 ARE TITLED AS A "POLICY," NONE OF THE RULES SPECIFICALLY IDENTIFY A POLICY OF THE COASTAL RESOURCES COMMISSION.*

William W. Peaslee  
Commission Counsel

issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

*G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:*

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .  
 . . . .
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

*Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.*

*While a policy can become a rule in the North Carolina Administrative Code, the language must meet the definition of a “rule” pursuant to G.S. 150B-2(8a). It must also meet the standards of G.S. 150B-21.9.*

*Paragraph (a) also requires local governments and the Division of Coastal Management (DCM) to “consider” the policy statements when issuing permits and implementing “the coastal management program” or when commenting on federal permit and activities pursuant to Section 307 of the federal Coastal Zone Management Act.*

*“Coastal management program” is undefined in either Subchapter 07M or Chapter 113A of the North Carolina General Statutes. Presumably, the CRC intends coastal management programs approved pursuant to 16 USC Ch. 33 §1455(d) ( the Federal Coastal Zone Act of 1972) however that is unclear.*

*Likewise, the term “coastal resources” is without any definition in either Chapter 7 of Title 15A of the North Carolina Code or Chapter 113A of the General Statutes in Paragraph (b) and throughout the rule. It is unclear what the CRC means by this term.*

*In Paragraph (d), the CRC authorizes local governments to “develop siting measures”. It is unclear whether the CRC means adopt, enforce, permit, or restrict by the use of the word “develop”. Or perhaps the CRC intends the term as defined in G.S. 113A-103(5). Further, “siting measures” is an undefined term used only in this instance in all of Chapter 7.*

*In Paragraph (d), “wind energy facilities”<sup>2</sup> are required to “demonstrate compliance” with local ordinances. It is unclear how the facility is to demonstrate compliance or whether the CRC simply intends for the facilities to be in compliance.*

*In Paragraph (e), requires “energy facilities” that do not require shorefront access to be sited “inland of shorelines areas”. While the CRC has defined “major energy facilities” in 15A NCAC 07M .0402, the CRC has not defined “energy facilities”. “Shoreline areas” is an undefined term used only in this instance in all of Chapter 7. Further, what the CRC means by “inland” is ambiguous.*

*In Paragraph (e), shoreline siting of energy facilities is “acceptable only if it can be demonstrated that there are no adverse impacts” to coastal resources, etc. By employing the word “acceptable”, the CRC appears to be referring to some permitting or approval process that is not referenced. It is unclear who must demonstrate and how this is accomplished.*

*In Paragraph (e), the CRC uses the term “coastal zone areas”. This is an undefined term used only in this instance in all of Chapter 7. However, “coastal area” is defined in G.S. 113A-103(2). It would appear the CRC intended something other than the coastal area by using the term coastal zone area.*

*In Paragraph (f), the CRC requires that scenic and visual qualities “shall be considered and protected”. The rule does not state who is responsible for this mandate.*

*In Paragraph (g), requires all “energy facilities” in or impacting the use of public trust waters and adjacent lands or coastal resources to comply with the listed criteria in Subparagraphs (f)(1-12). While the CRC has defined “major energy facilities” in 15A NCAC 07M .0402, the CRC has not defined “energy facilities”.*

*In Subparagraph (g)(2), the CRC uses the term “petroleum facilities” and “Oil Spill Response Plan”. Neither term is defined.*

*In subparagraph (g)(8), the CRC determines that major energy facilities “are not appropriate uses” in areas defined by G.S. 113A-113(b)(4). It is unclear who, if anyone, is being regulated. Further, the CRC uses the phrase “of more than local significance” which is an ambiguous standard.*

*In Subpart (g)(10)(F), the CRC uses the term “Ocean Dredged Material Disposal Sites.” This is an undefined term used only in this instance in all of Chapter 7.*

*In Subpart (g)(10)(J), the CRC phrase of “of more than local significance” which is an ambiguous standard.*

*In Subpart (g)(10)(K), the CRC refers to the “Wild and Scenic River System”. This is an undefined term and used only in this instance in all of Chapter 7.*

*In Subparagraph (g)(11), the CRC uses the term “lowest biological vulnerability”. This is an undefined term used only in this instance in all of Chapter 7. It appears that the CRC could establish those periods by rule rather than describing them.*

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<sup>2</sup> “WIND ENERGY FACILITY” IS DEFINED IN 15A NCAC 07H .0106.

*In Subparagraph (g)(12), the CRC uses the term “facilities” twice. It is unclear what facilities the CRC intends. Presumably the CRC intends for this to be applicable to energy facilities (once defined), major energy facilities, petroleum facilities, and wind energy facilities.*

*To the extent this language in the Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a).*

*Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”*

*In short, the language of this policy/rule is a mix of policy, statements of opinion, and some language which may meet the definition of a rule as defined in G.S. 150B-2(8a); however, to the extent the language constitutes a “rule” it is unclear and ambiguous. Accordingly, staff recommends objection of all four bases of G.S. 150B-21.9(a).*

**§ 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.)

G.S. 150B-2

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

## 16 USC Ch 33 §1455. Administrative grants

### (a) Authorization; matching funds

The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

- (1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.
- (2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

### (b) Grants to coastal states; requirements

The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d).

### (c) Allocation of grants to coastal states

Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

### (d) Mandatory adoption of State management program for coastal zone

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

- (1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.
- (2) The management program includes each of the following required program elements:
  - (A) An identification of the boundaries of the coastal zone subject to the management program.
  - (B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.
  - (C) An inventory and designation of areas of particular concern within the coastal zone.
  - (D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.
  - (E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.
  - (F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.



(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the

management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development <sup>1</sup> to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

**(e) Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program

unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

(Pub. L. 89-454, title III, §306, as added Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1283; amended Pub. L. 93-612, §1(2), Jan. 2, 1975, 88 Stat. 1974; Pub. L. 94-370, §5, July 26, 1976, 90 Stat. 1017; Pub. L. 96-464, §5(a), Oct. 17, 1980, 94 Stat. 2062; Pub. L. 99-272, title VI, §6043(b)(1), (c), Apr. 7, 1986, 100 Stat. 124, 125; Pub. L. 101-508, title VI, §6206(a), Nov. 5, 1990, 104 Stat. 1388-303; Pub. L. 102-587, title II, §2205(b)(1)(A), (B), (8), Nov. 4, 1992, 106 Stat. 5050, 5051.)

1 15A NCAC 07M .0403 is adopted under temporary procedures as follows:

2  
3 **15A NCAC 07M .0403 COASTAL ENERGY DEVELOPMENT - SPECIFIC POLICY STATEMENTS**

4 (a) The policy statements in this Section are enforceable and shall be considered by local governments and DCM  
5 when issuing permits and implementing the coastal management program under this Subchapter and commenting on  
6 federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

7 (b) The siting and operations of major energy facilities impacting the use of public trust waters and adjacent lands or  
8 coastal resources of North Carolina shall be done in a manner that allows for protection of the environment and local  
9 and regional socio-economic goals as set forth in the local land use plans and in 15A NCAC 07H and 07M. The  
10 placement and operation of such facilities shall be consistent with state rules and statutory standards and shall comply  
11 with local land use plans and with use standards for development within AECs, as set forth in 15A NCAC 07H.

12 (c) Proposals, plans, and permit applications for major energy facilities to be sited in or impacting any land or water  
13 use or coastal resource of the North Carolina coastal area shall include a disclosure of all costs and benefits associated  
14 with the project. This disclosure shall be prepared in the form of an impact assessment as defined in 15A NCAC 07M  
15 .0402 prepared by the applicant. If environmental documents are prepared and reviewed under the provisions of the  
16 National Environmental Policy Act (NEPA) or the North Carolina Environmental Policy Act (NCEPA), this review  
17 shall satisfy the definition of "impact assessment" if all issues listed in this Rule are addressed and these documents  
18 are submitted to review state permit applications for the project or consistency determinations.

19 (d) Local governments shall not restrict the development of energy facilities; however, they may develop siting  
20 measures that will minimize impacts to local resources and to identify potential sites suitable for energy facilities.  
21 This Section shall not limit the ability of a city or county to plan for and regulate the siting of a wind energy facility  
22 in accordance with land use regulations authorized under Chapter 160A, Chapter 153A, and 160D of the General  
23 Statutes. Wind energy facilities constructed within the planning jurisdiction of a city or county shall demonstrate  
24 compliance with any local ordinance concerning land use and any applicable permitting process.

25 (e) Energy facilities that do not require shorefront access shall be sited inland of the shoreline areas. When the siting  
26 of energy facilities along shorelines of the coastal zone area are necessary, shoreline siting shall be acceptable only if  
27 it can be demonstrated that there are no significant adverse impacts to coastal resources, public trust waters, and the  
28 public's right to access will not be restricted, and all mitigating measures have been taken to minimize impacts to  
29 AECs. Mitigating measures shall be determined after consideration of economics, technical feasibility, areal extent  
30 of impacts, and impacted area.

31 (f) The scenic and visual qualities of coastal areas shall be considered and protected as public resources consistent  
32 with G.S. 113A-1-2(b)(4)(a). Energy development shall be sited and designed to provide maximum protection of  
33 views to and along the ocean, sounds, and scenic coastal areas, and to minimize the alteration of natural landforms.

34 (g) All energy facilities in or impacting the use of public trust waters and adjacent lands or coastal resources shall be  
35 sited and operated so as to comply with the following criteria:

- 1 (1) Activities that may result in significant adverse impacts on coastal resources, including marine and  
2 estuarine resources and wildlife resources, as defined in G.S. 113-129, and significant adverse  
3 impacts on the use of public trust waters and adjacent lands in the coastal area shall be avoided;
- 4 (2) For petroleum facilities, data and information required for State permits and federal consistency  
5 reviews, pursuant to 15 CFR part 930, shall assess the risks of petroleum release or spills, evaluate  
6 possible trajectories, and enumerate response and mitigation measures employing the best available  
7 technology to be followed in the event of a release or spill. The information shall demonstrate that  
8 the potential for petroleum release or spills and ensuing damage to coastal resources has been  
9 minimized and shall factor environmental conditions, currents, winds, and inclement events such as  
10 northeasters and hurricanes, in trajectory scenarios. This same data and information shall be  
11 required for facilities requiring an Oil Spill Response Plan;
- 12 (3) Dredging, spoil disposal, and construction of structures that are likely to have significant adverse  
13 impacts on the use of public trust waters and adjacent lands or coastal resources shall be avoided;
- 14 (4) Significant adverse impacts to existing or traditional uses, such as fishing, navigation and access to  
15 public trust areas, and areas with high biological or recreational value such as those listed in Parts  
16 (10)(A) through (10)(K) of this Paragraph, shall be avoided;
- 17 (5) Placement of structures in geologically unstable areas, such as unstable sediments and active faults,  
18 shall be avoided if the siting of structures will have significant adverse impacts on the use of public  
19 trust waters, adjacent lands or coastal resources;
- 20 (6) Procedures necessary to secure an energy facility in the event of severe weather conditions, such as  
21 extreme wind, currents and waves due to northeasters and hurricanes, shall be initiated to ensure  
22 that significant adverse impacts on the use of public trust waters, adjacent lands and coastal  
23 resources;
- 24 (7) Significant adverse impacts on federally listed threatened or endangered species shall be avoided;
- 25 (8) Major energy facilities are not appropriate uses in fragile or historic areas, and other areas containing  
26 environmental or natural resources of more than local significance, as defined in G.S. 113A-  
27 113(b)(4), such as parks, recreation areas, wildlife refuges, and historic sites;
- 28 (9) Energy facilities shall not be sited in areas where they pose a threat to the integrity of the facility  
29 and surrounding areas, such as ocean front areas with high erosion rates, areas having a history of  
30 overwash or inlet formation, and Inlet Hazard Areas identified in 15A NCAC 07H .0304;
- 31 (10) In the siting of energy facilities and related structures, significant adverse impacts to the following  
32 areas shall be avoided:
- 33 (A) areas of high biological significance, including offshore reefs, rock outcrops, hard bottom  
34 areas, sea turtle nesting beaches, coastal wetlands, primary or secondary nursery areas or  
35 spawning areas and essential fish habitat areas of particular concern as designated by the  
36 appropriate fisheries management agency, oyster sanctuaries, submerged aquatic

1 vegetation as defined by the Marine Fisheries Commission, colonial bird nesting areas, and  
2 migratory bird routes;

3 (B) tracts of maritime forest in excess of 12 contiguous acres and areas identified as eligible  
4 for registration or dedication by the North Carolina Natural Heritage Program;

5 (C) crossings of streams, rivers, and lakes except for existing corridors;

6 (D) anchorage areas and port areas;

7 (E) artificial reefs, shipwrecks, and submerged archaeological resources;

8 (F) Ocean Dredged Material Disposal Sites;

9 (G) primary dunes and frontal dunes;

10 (H) established recreation or wilderness areas, such as federal, state and local parks, forests,  
11 wildlife refuges;

12 (I) military air space, training or target area and transit lanes;

13 (J) cultural or historic sites of more than local significance; and

14 (K) segments of Wild and Scenic River System.

15 (11) Construction of energy facilities shall occur only during periods of lowest biological vulnerability.  
16 Nesting and spawning periods shall be avoided; and

17 (12) If facilities located in the coastal area are abandoned, habitat of value equal to or greater than that  
18 existing prior to construction shall be restored following abandonment. For abandoned facilities  
19 outside the coastal area, habitat in the areas shall be restored to its preconstruction state and functions  
20 if the abandonment of the structure is likely to have significant adverse impacts on the use of public  
21 trust waters, adjacent lands or coastal resources.

22  
23 History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;

24 Temporary Adoption Eff. April 5, 2024.



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .0701 Declaration of General Policy
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> Cite: S.L. 2023-134 s 21.2(m) Effective date: October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> Effective date of change: <input type="checkbox"/> <b>A recent federal regulation.</b> Cite: Effective date: <input type="checkbox"/> <b>A recent court order.</b> Cite order: <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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:** 919-707-8595

**E-Mail:** [Jennifer.Everett@deq.nc.gov](mailto:Jennifer.Everett@deq.nc.gov)

**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: Coastal Resources Commission

RULE CITATION: 15A 07M .0701 Temporary

RECOMMENDATION DATE: 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:

*While the Rules Review Commission does not consider "questions relating to the quality or efficacy" of a rule propounded by an agency pursuant to G.S. 150B-21.9, there are occasions where the language employed and the intentions of the agency are unclear and ambiguous. Such is the case with this rule.*

*Much of the language employed does not regulate, set a standard, implement or interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-2(8a). This language is nothing more than a mere statement of policy, belief, or opinion as the title 15 NCAC 07M .0701 suggests.*

*This temporary rule is substantially the same as the revision submitted to and objected by the Rules Review Commission in February 2023. While the Coastal Resources Commission (CRC) made some additions, significant ambiguity remains such that, considering the entirety of language adopted, it is unclear whether the CRC is adopting a "rule" as defined in G.S. 150B-2(8a) or a policy statement.*

*A notable addition is Paragraph (a) of the rule.*

William W. Peaslee  
Commission Counsel

*Paragraph (a) self-proclaims that “the policy statements in this Section are enforceable.”<sup>1</sup>*

*While a policy can become a rule in the North Carolina Administrative Code, the language must meet the definition of a “rule” pursuant to G.S. 150B-2(8a). It must also meet the standards of G.S. 150B-21.9.*

*G.S. 150B-19.1(a)(1) states, “An agency may adopt only rules that are expressly authorized by federal and State law and that are necessary to serve the public interest” (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:*

*Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.*

*G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:*

*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 does not include the following:*

- a. Statements concerning only the internal management of an agency . . . 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 . . .*
- . . . .*
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.*

*Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.*

*Paragraph (a) also requires local governments and the Division of Coastal Management (DCM) to “consider” the policy statements when issuing permits and implementing “the coastal management program” or when commenting on federal permit and activities pursuant to Section 307 of the federal Coastal Zone Management Act.*

*“Coastal management program” is undefined in either Subchapter 07M or Chapter 113A of the North Carolina General Statutes. Presumably the CRC intends coastal management programs*

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*1 SECTION .0700 ENTITLED IS “MITIGATION - GENERAL POLICY” CONTAINS FIVE RULES, THREE OF WHICH ARE CURRENTLY BEFORE THE RRC AS TEMPORARY RULES. WHILE RULES .0701 AND .0704 ARE TITLED AS A “POLICY”, ONLY RULE .0701(B) SPECIFICALLY IDENTIFIES A POLICY OF THE COASTAL RESOURCES COMMISSION.*

*approved pursuant to 16 USC Ch. 33 §1455(d) ( the Federal Coastal Zone Act of 1972) however that is unclear.*

*Likewise, the term “coastal resources” in Paragraph (b) and used throughout the rule is without definition in either Chapter 7 of Title 15A of the North Carolina Code or Chapter 113A of the General Statutes). It is unclear what the CRC means by this term.*

*Paragraph (b) reads like a policy rather than a rule as defined by G.S. 150B-2(8a). To the extent that it meets the definition of a rule, the language is unclear about who it is regulating. It is unclear who the CRC is requiring to mitigate or minimize adverse impacts and under what circumstances. It is also unclear in the second sentence who is responsible for protecting and maintaining coastal ecosystems.*

*Paragraph (b) also requires adverse impacts and waters to be mitigated be in “compliance with Commission’s standards for development, and creation or restoration of coast resources.” There is no reference to which standards the CRC is referring. Have these standards been adopted pursuant to the Administrative Procedures Act(APA)?*

*In Paragraph (c), the CRC requires itself to “apply mitigation requirements as defined in this Section consistent with the goal, policies and objectives of set forth in G.S. 113A-102...” G.S. 113A-102 sets forth broad policies and goals including the establishment of “policies, guidelines and standards.” . As is the case with other legislation, agencies are empowered to adopt, pursuant to the APA, rules which provide unambiguous requirements upon the regulated public. It is unclear whether the CRC is restricting itself, and if so how, or whether the CRC is empowering itself to apply any ambiguous terms in G.S. 113A-102 and without the protections and notice requirements of the APA.*

*To the extent this Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S.150B-2(8a).*

*Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”*

*In short, the language of this policy/rule is a mix of policy, statements of opinion, and some language which may meet the definition of a rule as defined in G.S. 150B-2(8a); however, to the extent the language constitutes a “rule” it is unclear and ambiguous. Accordingly, staff recommends objection of all four bases of G.S. 150B-21.9(a).*

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

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

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

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

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

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

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

## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. – A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. – To take final action to create, amend, or repeal a rule.
- (1b) Agency. – An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. – The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. – The Rules Review Commission.
- (2) Contested case. – An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. – A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. – Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. – Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.
- (5) Party. – Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. – Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.

- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (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.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

**§ 150B-19.1. Requirements for agencies in the rule-making process.**

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.



(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

## **16 USC Ch. 33 §1455. Administrative grants**

### **(a) Authorization; matching funds**

The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

(1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.

(2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

### **(b) Grants to coastal states; requirements**

The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d).

### **(c) Allocation of grants to coastal states**

Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

### **(d) Mandatory adoption of State management program for coastal zone**

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.

(2) The management program includes each of the following required program elements:

(A) An identification of the boundaries of the coastal zone subject to the management program.

(B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(C) An inventory and designation of areas of particular concern within the coastal zone.

(D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.

(E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development<sup>1</sup> to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

**(e) Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

(Pub. L. 89-454, title III, §306, as added Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1283; amended Pub. L. 93-612, §1(2), Jan. 2, 1975, 88 Stat. 1974; Pub. L. 94-370, §5, July 26, 1976, 90 Stat. 1017; Pub. L. 96-464, §5(a), Oct. 17, 1980, 94 Stat. 2062; Pub. L. 99-272, title VI, §6043(b)(1), (c), Apr. 7, 1986, 100 Stat. 124, 125; Pub. L. 101-508, title VI, §6206(a), Nov. 5, 1990, 104 Stat. 1388-303; Pub. L. 102-587, title II, §2205(b)(1)(A), (B), (8), Nov. 4, 1992, 106 Stat. 5050, 5051.)

1 15A NCAC 07M .0701 is adopted under temporary procedures as follows:  
2

3 **SECTION .0700 – MITIGATION - GENERAL POLICY**

4  
5 **15A NCAC 07M .0701 DECLARATION OF GENERAL POLICY**

6 (a) The policy statements in this Section are enforceable and shall be considered by local governments and DCM  
7 when issuing permits and implementing the coastal management program under this Subchapter and commenting on  
8 federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

9 (b) It is the policy of the Coastal Resources Commission to require that adverse impacts to coastal lands and waters  
10 be mitigated or minimized through planning, site selection, compliance with Commission’s standards for  
11 development, and creation or restoration of coastal resources. Coastal ecosystems shall be protected and maintained  
12 as complete and functional systems by mitigating the adverse impacts of development by enhancing, creating, or  
13 restoring areas with the goal of improving or maintaining ecosystem function and areal proportion.

14 (c) The CRC shall apply mitigation requirements as defined in this Section consistent with the goals, policies and  
15 objectives set forth in G.S. 113A-102 for coastal resource management and development. Mitigation shall be used to  
16 enhance coastal resources and offset any potential losses occurring from permitted and unpermitted development.  
17 Proposals to mitigate losses of coastal resources shall be considered only for development shown to be in the public  
18 interest, as defined by the standards in 15A NCAC 07M .0703.

19  
20 *History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124; 113-229;*  
21 *Temporary Adoption Eff. April 5, 2024.*



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

**OAH USE ONLY**

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .0704 Mitigation – Specific Policies
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> Cite: S.L. 2023-134 s 21.2(m) Effective date: October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> Effective date of change: <input type="checkbox"/> <b>A recent federal regulation.</b> Cite: Effective date: <input type="checkbox"/> <b>A recent court order.</b> Cite order: <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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:** 919-707-8595

**E-Mail:** [Jennifer.Everett@deq.nc.gov](mailto:Jennifer.Everett@deq.nc.gov)

**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: Coastal Resources Commission

RULE CITATION: 15A 07M .0704 Temporary

RECOMMENDATION DATE: 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:

*While the Rules Review Commission does not consider "questions relating to the quality or efficacy" of a rule propounded by an agency pursuant to G.S. 150B-21.9, there are occasions where the language employed and the intentions of the agency are unclear and ambiguous. Such is the case with this rule.*

*Paragraph (a) self-proclaims that "the policy statements in this Section are enforceable."<sup>1</sup>*

*G.S. 150B-19.1(a)(1) states, "An agency may adopt only rules that are expressly authorized by federal and State law and that are necessary to serve the public interest" (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:*

*Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.*

*G.S. 150B-2(7a) (2023). On the other hand, the APA defines a "rule" as:*

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*1 SECTION .0700 ENTITLED IS "MITIGATION – GENERAL POLICY" CONTAINS FIVE RULES, THREE OF WHICH ARE CURRENTLY BEFORE THE RRC AS TEMPORARY RULES. WHILE RULES .0701 AND .0704 ARE TITLED AS A "POLICY", ONLY RULE .0701(B) SPECIFICALLY IDENTIFIES A POLICY OF THE COASTAL RESOURCES COMMISSION.*

William W. Peaslee  
Commission Counsel

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .
- . . . .
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

*Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.*

*While a policy can become a rule in the North Carolina Administrative Code, the language must meet the definition of a “rule” pursuant to G.S. 150B-2(8a). It must also meet the standards of G.S. 150B-21.9.*

*Paragraph (a) also requires local governments and the Division of Coastal Management (DCM) to “consider” the policy statements when issuing permits and implementing “the coastal management program” or when commenting on federal permit and activities pursuant to Section 307 of the federal Coastal Zone Management Act.*

*The CRC also uses the term “North Carolina Coastal Management Program” in Paragraphs (b) and (c).*

*“Coastal management program” is undefined in either Subchapter 07M or Chapter 113A of the North Carolina General Statutes. Presumably the CRC intends coastal management programs approved pursuant to 16 USC Ch. 33 §1455(d) ( the Federal Coastal Zone Act of 1972) however that is unclear.*

*Likewise, the term “coastal resources” is used in Paragraphs (b) and (d). “Coastal resources” is without definition in either Chapter 7 of Title 15A of the North Carolina Code or Chapter 113A of the General Statutes. It is unclear what the CRC means by this term.*

*Paragraph (b) includes a list of forms of mitigation “in order of preference”. Thereafter, the list includes ambiguous descriptions of the types of mitigation. i.e. “systems determined to be more productive of the resources characteristics of unaltered North Carolina ecosystems...” and the creation of areas of “similar ecological utility and potential biological value” and “ecologically important systems.” The Rule is silent on how the determinations and values will be made or the criteria which will be used.*

*Paragraph (c) states that mitigation proposals “may be the basis for approval of a development...” Again, the Rule does not address the criteria which will be used in making the determination.*

*In paragraph (d), the CRC requires federal agencies to include mitigation proposals “into the project.” Staff counsel does not believe that the CRC has the authority to regulate a federal agency.*

*Paragraph (e) attempts to make the enforcement options provided in G.S. 113A-126 applicable to “permit conditions according to G.S. 113A-120(b)”. G.S. 113A-126(a) provides for injunctive relief and penalties for a “violation of any of the provisions of [Article 7 of Chapter 113A] or of any rule or order adopted under the authority of this article ...” G.S. 113A-126(b) provides for injunctive relief for a “violation of any of the provisions of [Article 7 of Chapter 113A] relating to permits for minor developments issued by a local government, or of any rule or order adopted under the authority of this article relating to such permits...” It does not appear that permit conditions are enforceable under G.S. 113A-126. Accordingly, staff recommends objection to the Rule as the agency lacks authority pursuant G.S. 150B-21.9(a)(1).*

*To the extent the language in the Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a).*

*Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”*

*In short, the language of this policy/rule is a mix of policy, statements of opinion, and some language which may meet the definition of a rule as defined in G.S. 150B-2(8a); however, to the extent the language constitutes a “rule” it is unclear and ambiguous. Accordingly, staff recommends objection of all four bases of G.S. 150B-21.9(a).*

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

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

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

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

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

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

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

## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. – A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. – To take final action to create, amend, or repeal a rule.
- (1b) Agency. – An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. – The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. – The Rules Review Commission.
- (2) Contested case. – An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. – A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. – Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. – Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.
- (5) Party. – Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. – Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.

- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy.** – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (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.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

**§ 150B-19.1. Requirements for agencies in the rule-making process.**

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.



(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

## 16 USC Ch. 33 §1455. Administrative grants

### (a) Authorization; matching funds

The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

(1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.

(2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

### (b) Grants to coastal states; requirements

The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d).

### (c) Allocation of grants to coastal states

Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

### (d) Mandatory adoption of State management program for coastal zone

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.

(2) The management program includes each of the following required program elements:

(A) An identification of the boundaries of the coastal zone subject to the management program.

(B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(C) An inventory and designation of areas of particular concern within the coastal zone.

(D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.

(E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development<sup>1</sup> to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

**(e) Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

(Pub. L. 89-454, title III, §306, as added [Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1283](#); amended [Pub. L. 93-612, §1\(2\), Jan. 2, 1975, 88 Stat. 1974](#); [Pub. L. 94-370, §5, July 26, 1976, 90 Stat. 1017](#); [Pub. L. 96-464, §5\(a\), Oct. 17, 1980, 94 Stat. 2062](#); [Pub. L. 99-272, title VI, §6043\(b\)\(1\), \(c\), Apr. 7, 1986, 100 Stat. 124, 125](#); [Pub. L. 101-508, title VI, §6206\(a\), Nov. 5, 1990, 104 Stat. 1388-303](#); [Pub. L. 102-587, title II, §2205\(b\)\(1\)\(A\), \(B\), \(8\), Nov. 4, 1992, 106 Stat. 5050, 5051.](#))

(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.

(a) 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.)

G.S. 150B-2

...

- (8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
  - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
  - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
  - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
  - e. Statements of agency policy made in the context of another proceeding, including:
    1. Declaratory rulings under G.S. 150B-4.
    2. Orders establishing or fixing rates or tariffs.
  - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
  - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
  - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.



1 15A NCAC 07M .0704 is adopted under temporary procedures as follows:

2  
3 **15A NCAC 07M .0704 MITIGATION - SPECIFIC POLICIES**

4 (a) The policy statements in this Section are enforceable and shall be considered by local governments and DCM  
5 when issuing permits and implementing the coastal management program under this Subchapter and commenting on  
6 federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

7 (b) The Division of Coastal Management shall consider mitigation requests based on the following order of  
8 preference:

9 (1) Enhancement of coastal resources with created or restored systems determined to be more  
10 productive of the resources characteristic of unaltered North Carolina ecosystems than those  
11 destroyed.

12 (2) Creation or restoration of an area of similar ecological utility and potential biological value than that  
13 destroyed or altered.

14 (3) Creation or restoration of an area with a different ecological function or potential than that destroyed  
15 or altered.

16 (4) The following forms of mitigation shall be considered by the Division of Coastal Management and  
17 may be used in combination with Subparagraphs (1) through (3) of this Paragraph to achieve the  
18 stated goal set forth in 15A NCAC 07M .0703(d).

19 (A) Acquisition for public ownership of unique and ecologically important systems not  
20 protected by state or federal regulatory programs. The type of impacts to be mitigated and  
21 the quality of the area to be acquired will be considered on a case-by-case basis.

22 (B) Transfer of privately owned lands subject to state and federal regulation into public  
23 ownership.

24 (C) Provisions of funds for State, federal or accredited institution research or management  
25 programs.

26 (D) Increased public access to public trust resources for recreational use.

27 (c) Mitigation proposals may be the basis for approval of a development which is otherwise in conflict with general  
28 or specific use standards set forth in 15A NCAC 07H .0208.

29 (d) Mitigation proposals to offset losses of coastal resources due to publicly funded projects shall be reviewed by the  
30 Division of Coastal Management with the sponsoring agency and incorporated into the project by the State or federal  
31 agency.

32 (e) Approved mitigation proposals for all categories of development shall become a part of permit conditions  
33 according to G.S. 113A-120(b) and thereby subject to enforcement authority pursuant to G.S. 113A-126.

34  
35 *History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124; 113A-126;*

36 *Temporary Adoption April 5, 2024.*



# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

<b>1. Rule-Making Agency:</b> Coastal Resources Commission
<b>2. Rule citation &amp; name:</b> 15A NCAC 07M .1101 Declaration of General Policy
<b>3. Action:</b> <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal
<b>4. Was this an Emergency Rule:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Effective date:</b> January 3, 2024
<b>5. Provide dates for the following actions as applicable:</b> a. <b>Proposed Temporary Rule submitted to OAH:</b> December 14, 2023 b. <b>Proposed Temporary Rule published on the OAH website:</b> December 20, 2023 c. <b>Public Hearing date:</b> January 9 and 10, 2024 d. <b>Comment Period:</b> January 3, 2024 through February 22, 2024 e. <b>Notice pursuant to G.S. 150B-21.1(a3)(2):</b> December 19, 2023 f. <b>Adoption by agency on:</b> March 13, 2024 g. <b>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:</b>
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b>  <input checked="" type="checkbox"/> <b>A serious and unforeseen threat to the public health, safety or welfare.</b> <input checked="" type="checkbox"/> <b>The effective date of a recent act of the General Assembly or of the U.S. Congress.</b> Cite: S.L. 2023-134 s 21.2(m) Effective date: October 3, 2023 <input type="checkbox"/> <b>A recent change in federal or state budgetary policy.</b> Effective date of change: <input type="checkbox"/> <b>A recent federal regulation.</b> Cite: Effective date: <input type="checkbox"/> <b>A recent court order.</b> Cite order: <input type="checkbox"/> <b>Other:</b>  <b>Explain:</b> 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 not 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 summary, this rule provides enforceable policy statement that shall be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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 this rule is required to provide an enforceable policy statement to be considered by local governments and DCM when issuing permits and implementing the coastal management program under this Subchapter and commenting on federal permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

**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:** 919-707-8595

**E-Mail:** [Jennifer.Everett@deq.nc.gov](mailto:Jennifer.Everett@deq.nc.gov)

**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: Coastal Resources Commission

RULE CITATION: 15 NCAC 07M .1101 (Temporary)

RECOMMENDATION DATE: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

*While the Rules Review Commission does not consider "questions relating to the quality or efficacy" of a rule propounded by an agency pursuant to G.S. 150B-21.9, there are occasions where the language employed and the intentions of the agency are unclear and ambiguous. Such is the case with this rule.*

*Much of the language employed does not regulate, set a standard, implement or interpret an enactment, nor describe a procedure or practice requirement to meet the definition of a "rule" pursuant to G.S. 150B-2(8a). This language is nothing more than a mere statement of policy, belief, or opinion as the title 15 NCAC 07M .1101 suggests.*

*This temporary rule is substantially the same as the revision submitted to and objected by the Rules Review Commission in February 2023. While the Coastal Resources Commission (CRC) made some additions, significant ambiguity remains such that, considering the entirety of language adopted, it is unclear whether the CRC is adopting a "rule" as defined in G.S. 150B-2(8a) or a policy statement.*

*A notable addition is Paragraph (a) of the rule.*

William W. Peaslee  
Commission Counsel

*Paragraph (a) self-proclaims that “the policy statements in this Section are enforceable.”<sup>1</sup>*

*G.S. 150B-19.1(a)(1) states, “An agency may adopt only rules that are expressly authorized by federal and State law and that are necessary to serve the public interest” (emphasis added). The APA draws a bright line between a rule and a policy, defining the latter as:*

Any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

*G.S. 150B-2(7a) (2023). On the other hand, the APA defines a “rule” as:*

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 does not include the following:

- a. Statements concerning only the internal management of an agency . . . 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 . . .
- . . . .
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

*Thus, the APA explicitly commands that policies are not rules, and as such, may not be adopted in the North Carolina Administrative Code.*

*While an agency “policy” can become a “rule” in the North Carolina Administrative Code, the language must meet the definition of a “rule” pursuant to G.S. 150B-2(8a). It must also meet the standards of G.S. 150B-21.9(a).*

*Paragraph (a) of the rule also requires local governments and the Division of Coastal Management (DCM) to “consider” the policy statements when issuing permits and implementing “the coastal management program” or when commenting on federal permit and activities pursuant to Section 307 of the federal Coastal Zone Management Act.*

*“Coastal management program” is undefined in either Subchapter 07M or Chapter 113A of the North Carolina General Statutes. Presumably the CRC intends coastal management programs*

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*1 SECTION .1100 ENTITLED IS “BENEFICIAL USE OF DREDGED MATERIALS FROM NAVIGATIONAL CHANNEL MAINTENANCE AND EXCAVATION – GENERAL POLICES” CONTAINS TWO RULES. WHILE BOTH RULES ARE TITLED AS A “POLICY,” ONLY RULE .1101(B) SPECIFICALLY IDENTIFIES A POLICY OF THE COASTAL RESOURCES COMMISSION.*

*approved pursuant to 16 USC Ch. 33 §1455(d) ( the Federal Coastal Zone Act of 1972) however that is unclear.*

*The only specifically identified “policy” in either Rule of Section .1100 is in the last line of the Paragraph B, (Lines 14-16) to wit: “It is the policy of the State of North Carolina that material resulting from exaction or maintenance of navigation channels be used in a beneficial way whenever practicable.”*

*This “enforceable policy,” as it is so identified, is unclear and ambiguous. What constitutes a “beneficial” use of dredged material is undefined. The language fails to state who will be doing the enforcing or to whom its applies. Further, “wherever practicable” is unclear and ambiguous.*

*The balance of Paragraph (b) fails to meet the definition of a rule as defined in G.S. 150B-2(8a) in that it is a mere statement of opinion or fact.*

*To the extent this language in the Rule does not implement or interpret an enactment of the General Assembly, establish any requirements upon any person or entity not employed by the agency, directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency, it does not meet the definition of a “Rule” pursuant to G.S.150B-2(8a).*

*Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”*

*In short, the language of this policy/rule is a mix of policy, statements of opinion, and some language which may meet the definition of a rule as defined in G.S. 150B-2(8a); however, to the extent the language constitutes a “rule” it is unclear and ambiguous. Accordingly, staff recommends objection of all four bases of G.S. 150B-21.9(a).*

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

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

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

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

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

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

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

## § 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

- (1) Administrative law judge. – A person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1a) Adopt. – To take final action to create, amend, or repeal a rule.
- (1b) Agency. – An agency or an officer in the executive branch of the government of this State. The term includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1c) Codifier of Rules. – The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).
- (1d) Commission. – The Rules Review Commission.
- (2) Contested case. – An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) Hearing officer. – A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) License. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.
- (4) Licensing. – Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) Occupational license. – Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) Occupational licensing agency. – Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.
- (5) Party. – Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (5a) Person. – Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.



- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (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.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

**§ 150B-19.1. Requirements for agencies in the rule-making process.**

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.
- (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
- (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

- (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
- (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
- (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

(h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date. (2011-398, s. 2; 2012-187, s. 3; 2013-143, s. 1.1; 2014-120, s. 6(a).)

## 16 USC Ch. 33 §1455. Administrative grants

### (a) Authorization; matching funds

The Secretary may make grants to any coastal state for the purpose of administering that State's management program, if the State matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

(1) For those States for which programs were approved prior to November 5, 1990, 1 to 1 for any fiscal year.

(2) For programs approved after November 5, 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

### (b) Grants to coastal states; requirements

The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this chapter and has been approved in accordance with subsection (d).

### (c) Allocation of grants to coastal states

Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

### (d) Mandatory adoption of State management program for coastal zone

Before approving a management program submitted by a coastal state, the Secretary shall find the following:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this chapter and is consistent with the policy declared in section 1452 of this title.

(2) The management program includes each of the following required program elements:

(A) An identification of the boundaries of the coastal zone subject to the management program.

(B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(C) An inventory and designation of areas of particular concern within the coastal zone.

(D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.

(E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term "beach" and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this chapter; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development<sup>1</sup> to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 1455b of this title.

**(e) Amendment or modification of State management program for coastal zone**

A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment within that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 1456 of this title.

(Pub. L. 89-454, title III, §306, as added [Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1283](#); amended [Pub. L. 93-612, §1\(2\), Jan. 2, 1975, 88 Stat. 1974](#); [Pub. L. 94-370, §5, July 26, 1976, 90 Stat. 1017](#); [Pub. L. 96-464, §5\(a\), Oct. 17, 1980, 94 Stat. 2062](#); [Pub. L. 99-272, title VI, §6043\(b\)\(1\), \(c\), Apr. 7, 1986, 100 Stat. 124, 125](#); [Pub. L. 101-508, title VI, §6206\(a\), Nov. 5, 1990, 104 Stat. 1388-303](#); [Pub. L. 102-587, title II, §2205\(b\)\(1\)\(A\), \(B\), \(8\), Nov. 4, 1992, 106 Stat. 5050, 5051.](#))



1 15A NCAC 07M .1101 is adopted under temporary procedures as follows:

2  
3 **SECTION .1100 - BENEFICIAL USE OF DREDGED MATERIALS FROM NAVIGATIONAL CHANNEL**  
4 **MAINTENANCE AND EXCAVATION – GENERAL POLICIES**

5  
6 **15A NCAC 07M .1101 DECLARATION OF GENERAL POLICY**

7 (a) The policy statements in this Section are enforceable and shall be considered by local governments and DCM when  
8 issuing permits and implementing the coastal management program under this Subchapter and commenting on federal  
9 permits and activities pursuant to Section 307 of the federal Coastal Zone Management Act.

10 (b) Dredged material disposal practices may result in removal of material important to the sediment budget of ocean  
11 and inlet beaches. This activity may adversely impact natural beach functions especially during storm events and may  
12 increase long term erosion rates. Ongoing channel maintenance requirements throughout the coastal area also lead to  
13 the need to construct new or expanded disposal sites as existing sites fill. In addition, new sites for disposal are  
14 increasingly harder to find due to competition from development interests for suitable sites. Therefore, it is the policy  
15 of the State of North Carolina that material resulting from the excavation or maintenance of navigation channels be  
16 used in a beneficial way wherever practicable.

17  
18 *History Note: Authority G.S. 113A-107; 113-229;*

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