

Burgos, Alexander N

Subject: FW: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

From: Goebel, Christine A <Christine.Goebel@deq.nc.gov>

Sent: Thursday, October 12, 2023 12:22 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Lucasse, Mary L <mlucasse@ncdoj.gov>

Cc: Lopazanski, Mike <mike.lopezanski@deq.nc.gov>; Willis, Angela <angela.willis@deq.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

Just a correction- the CRC's meeting is actually 11/9 not 11/8. CG

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Thursday, October 12, 2023 11:25 AM

To: Lucasse, Mary L <mlucasse@ncdoj.gov>

Cc: Lopazanski, Mike <mike.lopezanski@deq.nc.gov>; Goebel, Christine A <Christine.Goebel@deq.nc.gov>; Willis, Angela <angela.willis@deq.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

Good morning,

Yes, because the CRC is a commission, it has until 10 days after its next regularly scheduled meeting to either change the rule to satisfy the Commission's objection and submit the revised rule to the Commission, or submit a written response indicating that the agency has decided not to change the rule.

If the CRC's next regularly scheduled meeting is on November 8, I will expect its response to the Commission's objections by November 18, 2023.

Since the time to respond has not expired, I anticipate this will be a no-action item at the October meeting.

Thank you,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

Burgos, Alexander N

Subject: FW: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Thursday, October 12, 2023 11:25 AM

To: Lucasse, Mary L <mlucasse@ncdoj.gov>

Cc: Lopazanski, Mike <mike.lopezanski@deq.nc.gov>; Goebel, Christine A <Christine.Goebel@deq.nc.gov>; Willis, Angela <angela.willis@deq.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

Good morning,

Yes, because the CRC is a commission, it has until 10 days after its next regularly scheduled meeting to either change the rule to satisfy the Commission's objection and submit the revised rule to the Commission, or submit a written response indicating that the agency has decided not to change the rule.

If the CRC's next regularly scheduled meeting is on November 8, I will expect its response to the Commission's objections by November 18, 2023.

Since the time to respond has not expired, I anticipate this will be a no-action item at the October meeting.

Thank you,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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From: Lucasse, Mary <MLucasse@ncdoj.gov>

Sent: Wednesday, October 11, 2023 11:50 AM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Lopazanski, Mike <mike.lopezanski@deq.nc.gov>; Goebel, Christine A <Christine.Goebel@deq.nc.gov>; Willis, Angela <angela.willis@deq.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>

Subject: [External] 15A NCAC 07H .0208, .0308, and 07M .0603

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Hi Brian,

Please confirm that under 150B-21.12(b) the CRC has until 10 days after its regularly scheduled Nov 8, 2023 meeting to respond to your August 21, 2023 letter forwarding the RRC's objections to these 3 rules. Accordingly, please confirm that I am correct that these three rules will not be considered by the RRC at its October 19, 2023 meeting.

Please include Phillip Reynolds on your response to this email (copied here) as I will be out on leave and unable to attend the October 19, 2023 meeting. Thank you. ~ Mary



Mary L. Lucasse (she/her)
Special Deputy Attorney General
NCDOJ - Environmental Division
PO Box 629
Raleigh, NC 27602
Direct: 919.716.6962
mlucasse@ncdoj.gov
www.ncdoj.gov

Please note messages to or from this address may be public records.

Burgos, Alexander N

From: Lucasse, Mary <MLucasse@ncdoj.gov>
Sent: Thursday, October 5, 2023 1:53 PM
To: Snyder, Ashley B; Liebman, Brian R; Peaslee, William W; Burgos, Alexander N
Cc: Everett, Jennifer
Subject: [External] Coastal Resources Commission

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

I am the counsel for the CRC. Please include me on any correspondence regarding that Commission's rules. Thank you. ~ Mary



Mary L. Lucasse (she/her)
Special Deputy Attorney General
NCDOJ - Environmental Division
PO Box 629
Raleigh, NC 27602
Direct: 919.716.6962
mlucasse@ncdoj.gov
www.ncdoj.gov

Please note messages to or from this address may be public records.

Burgos, Alexander N

Subject: FW: 15A NCAC 07H, I, J, M - Return Letter
Attachments: 15A NCAC 07H .0501.docx; 15A NCAC 07H .0502.docx; 15A NCAC 07H .0503.docx; 15A NCAC 07H .0505.docx; 15A NCAC 07H .0506.docx; 15A NCAC 07H .0507.docx; 15A NCAC 07H .0508.docx; 15A NCAC 07H .0509.docx; 15A NCAC 07H .0510.docx; 15A NCAC 07H .2305.docx; 15A NCAC 07I .0406.docx; 15A NCAC 07I .0506.docx; 15A NCAC 07I .0702.docx; 15A NCAC 07J .0203.docx; 15A NCAC 07J .0204.docx; 15A NCAC 07J .0206.docx; 15A NCAC 07J .0207.docx; 15A NCAC 07J .0208.docx; 15A NCAC 07J .0312.docx; 15A NCAC 07M .0201.docx; 15A NCAC 07M .0202.docx; 15A NCAC 07M .0401.docx; 15A NCAC 07M .0402.docx; 15A NCAC 07M .0403.docx; 15A NCAC 07M .0701.docx; 15A NCAC 07M .0703.docx; 15A NCAC 07M .0704.docx; 15A NCAC 07M .1001.docx; 15A NCAC 07M .1002.docx; 15A NCAC 07M .1101.docx

From: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Sent: Thursday, October 5, 2023 12:17 PM
To: Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>; Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: RE: 15A NCAC 07H, I, J, M - Return Letter

Jennifer,

See attached proofs reflecting the return of the CRC's readoptions. We are working on pushing the changes to the Code now.

Ashley Snyder
Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

SECTION .0500 - NATURAL AND CULTURAL RESOURCE AREAS

15A NCAC 07H .0501 GENERAL

*History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(4e) to (b)(4g); 113A-124;
Eff. September 9, 1977;
Amended Eff. June 1, 1979;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0502 SIGNIFICANCE

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4e) to (b)(4g); 113A-124;
Eff. September 9, 1977;
Amended Eff. June 1, 1979;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0503 NOMINATION AND DESIGNATION PROCEDURES

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4)e,f,g, and h; 113A-124;
Eff. September 9, 1977;
Amended Eff. June 1, 2005; May 1, 1988; May 1, 1985; February 1, 1982; June 1, 1979;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0505 COASTAL AREAS THAT SUSTAIN REMNANT SPECIES

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4)f; 113A-124;
Eff. September 9, 1977;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0506 COASTAL COMPLEX NATURAL AREAS

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4)e; 113A-24;
Eff. September 9, 1977;
Amended Eff. October 1, 1988; February 1, 1982;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0507 UNIQUE COASTAL GEOLOGIC FORMATIONS

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4)g.; 113A-124;
Eff. September 9, 1977;
Amended Eff. March 1, 1988;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0508 USE STANDARDS

*History Note: Authority G.S. 113A-107(a),(b); 113A-113(b)(4e) to (b)(4h); 113A-124;
Eff. September 9, 1977;
Amended Eff. February 1, 1982; June 1, 1979;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0509 SIGNIFICANT COASTAL ARCHAEOLOGICAL RESOURCES

*History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(4h); 113A-124;
Eff. June 1, 1979;
Amended Eff. October 1, 1988; January 1, 1985;
RRC September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .0510 SIGNIFICANT COASTAL HISTORIC ARCHITECTURAL RESOURCES

*History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(4h); 113A-124;
Eff. June 1, 1979;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07H .2305 SPECIFIC CONDITIONS

*History Note: Authority G.S. 113A-107; 113A-118.1; 113A-124;
Eff. June 1, 1996;
Amended Eff. May 1, 2010.
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07I .0406 APPLICATION FEES

*History Note: Authority G.S. 113A-112; 113A-119; 113A-124;
Eff. December 10, 1977;
Amended Eff. July 1, 2013; October 1, 1982; May 20, 1980; August 1, 1978;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07I .0506 ALLOCATION OF AUTHORITY

History Note: *Authority G.S. 113A-117(b); 113A-124(c)(5);
Eff. November 1, 1984;
Amended Eff. June 1, 2006; May 1, 1990;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07I .0702 WHEN AN ACTION EXCEEDS THE LOCAL AUTHORITY

History Note: *Authority G.S. 113A-118(e); 113A-120(c); 113A-124(c)(5);
Eff. November 1, 1984;
RRC objection Eff. September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07J .0203 PREPARATION OF WORK PLATS

*History Note: Authority G.S. 113A-119; 113A-124;
 Eff. March 15, 1978;
 Amended Eff. July 1, 1989;
 RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07J .0204 PROCESSING THE APPLICATION

*History Note: Authority G.S. 113-229; 113A-119; 113A-119.1; 113A-122(c); 113A-124;
Eff. March 15, 1978;
Amended Eff. November 1, 1991; March 1, 1991; July 1, 1990; July 1, 1989;
Temporary Amendment Eff. September 2, 1998;
Temporary Amendment Expired June 28, 1999;
Amended Eff. August 1, 2000;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07J .0206 PUBLIC NOTICE OF THE PROPOSED DEVELOPMENT

*History Note: Authority G.S. 113A-119(b);
Eff. March 15, 1978;
Amended Eff. January 1, 1990; October 1, 1988; November 1, 1983;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

**15A NCAC 07J .0207 AGENCY REVIEW/COMMENTS: MAJOR DEVELOPMENT/DREDGE AND
FILL**

*History Note: Authority G.S. 113-229; 113A-124(a)(1);
Eff. March 15, 1978;
Amended Eff. July 1, 1989; October 1, 1988; September 1, 1985; November 1, 1984;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07J .0208 PERMIT CONDITIONS

*History Note: Authority G.S. 113A-120(b); 113A-124(a)(1); 113A-124(c)(5);
Eff. March 15, 1978;
Amended Eff. March 1, 1985; November 1, 1984;
RRC objection Eff. September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07J .0312 SETTLEMENT

*History Note: Authority G.S. 113A-120; 113A-122; 113A-124;
Eff. April 1, 1987;
Amended Eff. July 1, 1989; October 1, 1988;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

SECTION .0200 - SHORELINE EROSION POLICIES

15A NCAC 07M .0201 DECLARATION OF GENERAL POLICY

*History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124; 16 U.S.C. Sec. 1453 (12);
Eff. March 1, 1979;
RRC Objection due to lack of necessity Eff. October 17, 1991;
Amended Eff. March 1, 1992;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07M .0202 POLICY STATEMENTS

*History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124; 16 U.S.C. Sec. 1453 (12);
Eff. March 1, 1979;
Amended Eff. March 1, 1985;
RRC Objection due to lack of necessity and unclear language Eff. October 17, 1991;
Amended Eff. March 1, 1992;
RRC Objection due to ambiguity and lack of necessity Eff. March 16, 1995;
Amended Eff. May 4, 1995;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

SECTION .0400 - COASTAL ENERGY POLICIES

15A NCAC 07M .0401 DECLARATION OF GENERAL POLICY

History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;
Eff. March 1, 1979;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. February 1, 2011; August 1, 2000;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.

15A NCAC 07M .0402 DEFINITIONS

History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;
Eff. March 1, 1979;
Amended Eff. October 1, 1988;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. March 1, 2011; August 1, 2000;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.

15A NCAC 07M .0403 POLICY STATEMENTS

History Note: Authority G.S. 113A-102(b); 113A-107; 113A-124;
Eff. March 1, 1979;
Amended Eff. April 1, 1992;
Amended Eff. November 3, 1997 pursuant to E.O. 121, James B. Hunt Jr., 1997;
Temporary Amendment Eff. July 8, 1999; December 22, 1998;
Amended Eff. February 1, 2011; August 1, 2000;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.

SECTION .0700 - MITIGATION POLICY

15A NCAC 07M .0701 DECLARATION OF GENERAL POLICY

*History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124;
Eff. January 1, 1984;
Amended Eff. September 1, 1985;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07M .0703 MITIGATION CANDIDACY

*History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124;
Eff. January 1, 1984;
Amended Eff. September 1, 1985;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07M .0704 POLICY STATEMENTS

*History Note: Authority G.S. 113A-102(b); 113A-107; 113A-113; 113A-120(a); 113A-124;
Eff. January 1, 1984;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

**SECTION .1000 - POLICIES ON WATER AND WETLAND BASED TARGET AREAS FOR MILITARY
TRAINING ACTIVITIES**

15A NCAC 07M .1001 DECLARATION OF GENERAL POLICY

*History Note: Authority G.S. 113A-102(b); 113A-107;
Eff. March 1, 1990.
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

15A NCAC 07M .1002 POLICY STATEMENTS

*History Note: Authority G.S. 113A-102(b); 113A-107;
Eff. March 1, 1990;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

**SECTION .1100 - POLICIES ON BENEFICIAL USE AND AVAILABILITY OF MATERIALS
RESULTING FROM THE EXCAVATION OR MAINTENANCE OF NAVIGATIONAL CHANNELS**

15A NCAC 07M .1101 DECLARATION OF GENERAL POLICY

*History Note: Authority G.S. 113A-107;
Eff. October 1, 1992;
RRC objection September 17, 2022 and rule returned to agency on October 5, 2023.*

Burgos, Alexander N

From: Liebman, Brian R
Sent: Thursday, October 5, 2023 11:36 AM
To: Everett, Jennifer
Cc: Snyder, Ashley B; Burgos, Alexander N; Peaslee, William W
Subject: 15A NCAC 07H, I, J, M - Return Letter
Attachments: 10.05.2023 Coastal Resources Commission Return Letter 07H, I, J, M.pdf

Good morning,

Attached, please find a letter formally returning the CRC's rules pursuant to S.L. 2023-134, s. 21.2.(m).

Please let me know if you have any further questions or concerns.

Best,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] RE: RRC October 2023 Special Meeting - Staff Opinion - 15A NCAC 07H, I, J, and M

From: Lucasse, Mary <MLucasse@ncdoj.gov>
Sent: Tuesday, October 3, 2023 1:58 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>; Everett, Jennifer <jennifer.everett@deq.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: RRC October 2023 Special Meeting - Staff Opinion - 15A NCAC 07H, I, J, and M

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Received. ~ Mary

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Tuesday, October 3, 2023 1:52 PM
To: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Lucasse, Mary <MLucasse@ncdoj.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RRC October 2023 Special Meeting - Staff Opinion - 15A NCAC 07H, I, J, and M

Good afternoon,

Attached please find a staff opinion concerning the above captioned rules from the Coastal Resources Commission which will be considered at the RRC Special meeting Thursday, October 5, 2023.

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

Best,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

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

Burgos, Alexander N

Subject: FW: RRC Objections

From: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Sent: Thursday, August 17, 2023 2:07 PM
To: Willis, Angela <angela.willis@deq.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: RRC Objections

Good afternoon, Angela,

Are you asking whether these rules will be removed from the Code for failure to comply with the Periodic Review process? If so, I think that question is moot at this point. The rules will continue to appear on RRC's agenda until the agency either satisfies the objections or requests the rules be returned. If the agency satisfies the objections, then the rules will appear in the Code as readoptions. If the agency requests the rules be returned, then any rule with an objection to existing language will be removed from the Code. This would result from the return, not the Periodic Review process.

Ashley Snyder
Codifier of Rules
Office of Administrative Hearings
(984) 236-1941

Burgos, Alexander N

Subject: FW: RRC Objections

From: Willis, Angela <angela.willis@deg.nc.gov>

Sent: Wednesday, August 16, 2023 2:08 PM

To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>

Subject: RRC Objections

Good afternoon Ashley,

The Division's leadership just met to discuss recent RRC objections. A question arose that I am hoping you can answer for us. During the Periodic Review process, we had several rules that received objections from the RRC. The history notes have been updated in the Code to reflect the objection. Since there is no "readoption" date in the history note due to an impasse with the RRC attorneys, have we satisfied the requirements for the readoption process? Thank you for any information you can provide. I look forward to hearing from you and I hope you have a great afternoon.

Angela

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Burgos, Alexander N

From: Duke, Lawrence
Sent: Wednesday, February 22, 2023 4:30 PM
To: Everett, Jennifer
Cc: Lucasse, Mary L; Lopazanski, Mike; Willis, Angela; Goebel, Christine A; Burgos, Alexander N; Ascher, Seth M; Liebman, Brian R; Peaslee, William W
Subject: Letter of Continued Objection - CRC - 15A NCAC 07H .2305
Attachments: 02.2023 - CRC Objection Letter.pdf

Jennifer,

Please see attached letter of continued objection to Coastal Resources Commission Rule 15A NCAC 07H .2305.

If you have any questions, please let me know.

Thank you,

Lawrence Duke



Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
Lawrence.Duke@osh.nc.gov
(919) 296-1938

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

Burgos, Alexander N

From: Everett, Jennifer
Sent: Wednesday, November 23, 2022 1:14 PM
To: Rules, Oah; Peaslee, William W; Liebman, Brian R; Duke, Lawrence
Cc: Burgos, Alexander N; Lucasse, Mary L; Lopazanski, Mike; Davis, Braxton C; Goebel, Christine A; Willis, Angela; Miller, Tancred; Wright, Alyssa N
Subject: CRC rules addressing objections Part 1 of 2
Attachments: 15A NCAC 07H .0501 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0502 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0503 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0505 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0506 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0507 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0508 with tech change Nov 23 2022.docx; 15A NCAC 07H .0509 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0510 with tech changes Nov 23 2022.docx; 15A NCAC 07H .2305 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0406 Nov 23 2022.docx; 15A NCAC 07I .0504 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0506 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0508 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0511 Nov 23 2022.docx; 15A NCAC 07I .0602 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0702 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0203 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07J .0204 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0206 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0207 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0208 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0210 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0312 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0201 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0202 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0401 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0403 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0601 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0603 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0701 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0703 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0704 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .1001 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1002 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1101 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1102 with tech changes Nov 23 2022.docx; 2022-11-23-CRC Letter responding to RRC Objections (signed with attachment).pdf

Hello,

Attached are rules and a letter from the Coastal Resources Commission in response to objections. This email addresses rules:

15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305;
15A NCAC 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702;
15A NCAC 07J .0203, .0206, .0207, .0208, .0210, .0312;
15A NCAC 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601

Tele: (919)-707-8614

<https://deg.nc.gov/permits-rules/rules-regulations/deg-proposed-rules>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

Burgos, Alexander N

From: Everett, Jennifer
Sent: Wednesday, November 23, 2022 1:19 PM
To: Rules, Oah; Peaslee, William W; Liebman, Brian R; Duke, Lawrence
Cc: Lucasse, Mary L; Davis, Braxton C; Lopazanski, Mike; Willis, Angela; Miller, Tancred; Goebel, Christine A; Burgos, Alexander N; Wright, Alyssa N
Subject: CRC rules addressing objections -Part 2 of 2
Attachments: 15A NCAC 07H .0504 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0601 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0603 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0604 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0503 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0801 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0802 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .1201 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .1202 repeal for RRC Nov 23 2022.docx; 2022-11-23 CRC Letter requesting repeal (signed).pdf

Hello,

Attached are rules and a second letter from the Coastal Resources Commission in response to objections. This email addresses rules:

15A NCAC 07H .0504, .0601, .0603, .0604, and
15A NCAC 07M .0503, .0801, .0802, .1201, .1202.

Jennifer Everett
DEQ Rulemaking Coordinator
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E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

1 15A NCAC 07H .2305 is readopted with changes as published in 34:09 NCR 760 as follows:

2
3 **15A NCAC 07H .2305 SPECIFIC CONDITIONS**

4 (a) This ~~general permit~~ **General Permit** is applicable to bridge replacement projects spanning no more than 400 feet
5 of estuarine water, public trust area, and coastal wetland AECs.

6 (b) Existing roadway deck width shall not be expanded to create additional lanes, with the exception that an existing
7 one lane bridge may be expanded to two lanes ~~where the Department of Environment and Natural Resources~~
8 ~~Environmental Quality determines that authorization is warranted and provided~~ the proposed project does not
9 ~~significantly affect the quality of the human and natural environment or unnecessarily endangers adjoining properties.~~
10 ~~create significant adverse impacts.~~

11 (c) Replacement of existing bridges with new bridges shall not reduce vertical or horizontal navigational clearances.

12 (d) All demolition debris shall be disposed of landward of all wetlands and the ~~normal water level (NWL)~~ **Normal**
13 **Water Level** or **Normal High Water** ~~normal high water (NHW) level~~ (as as defined in ~~15A NCAC 07H .0106~~), **15A**
14 **NCAC 07H .0106**, and shall employ soil stabilization measures to prevent entry of sediments in the adjacent water
15 bodies or wetlands.

16 (e) Bridges and culverts shall be designed to allow passage of anticipated high water flows.

17 (f) Measures sufficient to restrain sedimentation and erosion shall be implemented at each site.

18 (g) Bridge or culvert replacement activities involving excavation or fill in wetlands, public trust areas, and estuarine
19 waters shall meet the following conditions:

20 (1) Replacing bridges with culverts shall not be allowed in primary nursery areas as defined by the
21 Marine Fisheries or Wildlife Resources Commissions.

22 (2) The total area of public trust area, estuarine waters, and wetlands to be excavated or filled shall not
23 exceed 2,500 square feet except that the coastal wetland component shall not exceed 750 square
24 feet.

25 (3) Culverts shall not be used to replace bridges with open water spans greater than 50 feet.

26 (4) There shall be no temporary placement or double handling of excavated or fill materials within
27 waters or vegetated wetlands.

28 (5) No excavated or fill material shall be placed in any wetlands or surrounding waters outside of the
29 alignment of the fill area indicated on the work ~~plat(s), plat.~~

30 (6) All excavated materials shall be confined above **Normal Water Level** ~~NWL~~ or **Normal High Water**
31 **NHW** and landward of any wetlands behind dikes or other retaining structures to prevent spill-over
32 of solids into any wetlands or surrounding waters.

33 (7) No bridges with a clearance of four feet or greater above the NWL or NHW shall be allowed to be
34 replaced with ~~culvert(s)~~ **culverts** unless the culvert design maintains the existing water depth,
35 vertical clearance and horizontal clearance.

36 (8) If a bridge is being replaced by a ~~culvert(s)~~ **culvert** then the width of the waterbody shall not be
37 decreased by more than 40 percent.

1 (9) All pipe and culvert inverts placed within the Public Trust or the Estuarine Waters AECs shall be
2 buried at least one foot below normal bed elevation to allow for passage of water and aquatic life.
3 Culverts placed in wetlands are not subject to this requirement.

4
5 *History Note: Authority G.S. 113A-107; 113A-118.1; 113A-124;*
6 *Eff. June 1, 1996;*
7 *Amended Eff. May 1, 2010;*
8 *Readopted Eff. January 1, 2023.*

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
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MLUCASSE@NCDOJ.GOV

November 23, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702; 07J .0203, .0206, .0207, .0208, .0210, .0312; 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102.

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC") and pursuant to N.C. Gen. Stat. § 150B-21.12(a)(1) and (2), please accept this letter as the CRC's partial written response to the North Carolina Rules Review Commission ("RRC") September 17, 2022 letter objecting to the above referenced rules (the "Objection Letter"). The CRC will be submitting a second letter (dated November 23, 2022) addressing the remaining rules included in the Objection Letter.

While the CRC disagrees with the RRC's objections, this written response is not intended to be—and should not be interpreted as—a written request to return the above-referenced rules pursuant to N.C. Gen. Stat. § 150B-21.12(d). The CRC is not seeking the return of these rules at this time and, instead, appreciates the opportunity to continue working with the RRC and its staff to resolve the RRC's objections.

At its recent November 17, 2022 regularly scheduled meeting, the CRC decided to submit additional technical changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(1) to the following rules: 07H .0501, .0506, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0204, .0206, .0207, .0208, .0210, .0312, 07M .0601, .0603, .0703, and .0704. While the CRC disagrees with the RRC's objections to these rules, we have attempted to resolve the RRC's concerns through additional technical changes and are submitting the revised rules to the RRC along with this Response. Please do not hesitate to let us know if there are any additional technical changes requested.

In addition, the CRC decided not to submit changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(2), for the following rules: 15A NCAC 07H .0502, .0503, .0505, .0507, .2305, 07I .0406, .0506, 07M .0201, .0202, .0401, .0402, .0403, .0701, .1001, .1002, .1101, .1102. The CRC disagrees with the RRC's objections to these rules.

The CRC is submitting the following additional information in an effort to resolve the concerns raised in RRC Objection Letter to all the above-referenced rules.

1.C RC’s Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101 based on the allegation that “each of [these] . . . rules do not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a)” and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). *See* Objection Letter and attached RRC Staff Opinions. This argument is incorrect.

The CRC’s authority and duty to adopt “guidelines for the coastal area” consisting of “statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102” is well established and uniquely provided for under its enabling statute. N.C. Gen. Stat. § 113A-107. In 1978, the North Carolina Supreme Court concluded that “the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area.” *Adams v. NC Dep’t of Natural & Economic Resources*, 295 N.C. 683, 698, 249 S.E. 2d 402, 411 (1978). The Commission provided an initial response on this issue in its September 1, 2022 Memorandum to Brian Liebman and William W. Peaslee, RRC Commission Counsel attached is a copy for your convenience.

During the RRC’s September 15, 2022 meeting, RRC counsel was asked by one of the Commissioners for a response to the CRC’s claim that that it has authority to adopt rules to set policies and guidelines. RRC counsel responded that the CRC could set policies and guidelines as contemplated by statute—just not by rulemaking. This response completely misunderstands the authority provided by the legislature to the CRC. As explained by the North Carolina Supreme Court, “amendments to the State guidelines by the CRC are considered administrative rule-making.”¹ *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. (Emphasis added). This is consistent with the requirement that the CRC “shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement” unless it has “been adopted as a rule in accordance with this Article.” N.C. Gen. Stat. § 150B-18. Thus, as authorized by the North Carolina General Assembly in the CRC’s enabling statute and confirmed by the North Carolina Supreme Court, the CRC is authorized to set guidelines (including objectives, policies, and standards) regulating the public and private use of land and waters within the coastal area through rule-making.

These rules are not newly adopted but have been in existence for decades as part of the North Carolina Administrative Code pursuant to the very same statutory authority. This creates “a rebuttable presumption that” each “rule was adopted in accordance with Part 2 of the Article.” *See* N.C. Gen. Stat. § 150B-21.9(a1). For the RRC to change course in 2022 and now assert that the CRC’s long-standing rules are not within the authority

¹ This case was decided under an earlier iteration of the Administrative Procedure Act at N.C. Gen. Stat. 150A.

delegated to the agency by the General Assembly, is arbitrary and capricious and contrary to the North Carolina Supreme Court precedent.

In addition to addressing the RRC's generic objection regarding whether the rules are "Rules," the CRC has provided additional authority for specific rules that the RRC identified as lacking authority. For example, the RRC objected to 15A NCAC 07J .0208 claiming that CAMA does not authorize the circulation of CAMA permit application to other state agencies for review. However, the CRC was instructed by the General Assembly "to coordinate the issuance of permits" and consideration of variances under the Dredge & Fill Act and the Coastal Area Management Act "to avoid duplication and to create a single, expedited permitting process." N.C. Gen. Stat. § 113-229(e). Both statutes also provide for the CRC to adopt rules to implement these articles. *See* N.C. Gen. Stat. § 113-229(e) ("The CRC may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section.") and N.C. Gen. Stat. § 113A-124(c)(8) (The CRC has additional authority "[t]o adopt rules to implement this Article."). As noted by RRC counsel, a dredge and fill permit application is required to be circulated among State agencies and may be submitted to federal agencies. *See* RRC Staff opinion for 15A NCAC 07J .0208 attached to Objection Letter. Given the authority from the legislature requiring that the CRC create a single, expedited permitting process, this provision in the Dredge and Fill Act is sufficient to provide authorization for the CAMA permit applications to be circulated to state and federal agencies for review.

Based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the RRC rescind its earlier objection to these rules based on Section 150B-21.9(1).

2.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(2).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07J .0203, .0204, .0206, .0210, 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, and .1102 based on the claim that these rules were ambiguous. The majority of the RRC's objection to these rules is not specific to individual rules. To the extent that specific words or phrases were identified as ambiguous by the Objection Letter, the CRC has attempted to provide further clarifying language. *See e.g.*, technical changes provided for 15A NCAC 07J .0203, .0204, .0206, .0210, .0601, .0603, .0703, .0704. If there are other technical changes that the RRC believes would resolve any remaining ambiguity, the CRC is willing to consider further changes.

The perceived ambiguity that the RRC has identified in 15A NCAC 07H .2305 regarding the use of the phrase "significant adverse impact" continues to puzzle the CRC. The General Assembly has authorized denial of "an application for a dredge or fill permit upon finding . . . that there will be significant adverse effect" as a result of the proposed dredging and filling. N.C. Gen. Stat. §113-229(e) (emphasis added). The General Assembly clearly understands that determining whether there is a significant adverse impact is not ambiguous. As the CRC has previously explained, this phrase is "a term of art used in other rules and understood by the courts. *See, e.g., Shell Island Homeowners Assoc. v. Tomlinson*, 134 NC App. 217 (1999). The CRC has used this phrase, or similar phrase,

throughout its rules to require an assessment of the impact of the development on the natural resources. *See e.g.*, 15A NCAC 07H .0209 (throughout), 07H .0308, 07J .1101, .1102, 1201, 07K .0202, 07M .0402. Many, if not most, of these rules were recently readopted or amended without the RRC objecting to the rule language requiring an assessment of the impact. It is arbitrary and capricious for the RRC to claim the use of this phrase in one rule is ambiguous when that objection has not been consistently asserted by the RRC.

Based on the changes provided, as well as the clarifying information provided above, the CRC respectfully requests that the RRC rescind its earlier objection based on Section 150B-21.9(2).

3.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(3).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0406, .0506, 07J .0203, .0206, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101 on the grounds these rules were not “reasonably necessary” pursuant to N.C. Gen. Stat. §150B-21.9(3). The majority of these rules are those the RRC contends are not “Rules” and therefore, it also objects under section 3 claiming “only ‘Rules’ can be reasonably necessary.” *See* Objection Letter and attachments. In response, the CRC incorporates and relies on the arguments set forth above in Section 1 relating to N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objects to 15A NCAC 07I .0406 claiming that this rule simply restates information from “G.S. 113A-119.1 and in 15A NCAC 07J .0204.” *See* RRC Staff Opinion for 15A NCAC 07I .0406 attached to the Opinion Letter. Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly provides that “a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the “reasonably necessary” standard of review.” N.C. Gen. Stat. § 150B-19(4). In this rule, the CRC has provided a brief statement synthesizing information regarding the fee requirement found in two separate places. This is allowable under the Administrative Procedure Act. Moreover, the information included the middle sentence relating to “deficits” is not included elsewhere. Therefore, this rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

In its Objection Letter, the RRC also objects to 15A NCAC 07I .0506 on the basis that the rule is not reasonably necessary as it “re-states material regarding allocation of permit-letting authority that is contained in G.S. 113A-116, -118, and -121.” *See* RRC Staff Opinion for 15A NCAC 07I .0506 attached to Objection Letter (cleaned up). Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly has provided that “a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the “reasonably necessary” standard of review.” N.C. Gen. Stat. § 150B-19(4). Moreover, this rule provides additional clarifying information regarding boundaries and the extra-territorial zoning area subject to permit letting authority, and timeframes. This rule does not simply re-state material in the statute. Therefore, the rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

4.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(4).

In the Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07J .0203, .0204, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, .1102 for “failure to comply with the Part 2 of Article 2A of the Administrative Procedure Act pursuant to G.S. 150B-21.9(4).” This section of the NC Administrative Procedure Act provides procedures for the adoption of temporary rules, emergency rules, permanent rules, and the periodic review of existing rules. In the Objection Letter and the attachments to the Objection Letter, the RRC has not identified the manner in which it alleges the CRC failed to follow the rulemaking procedures set forth in Part 2 of this Article during its periodic review and re-adoption of these rules.

Moreover, if this objection is merely intended to indicate that the RRC does not believe these rules meet the definition of a “Rule,” that objection is based on N.C. Gen. Stat. § 150B-19 which lists restrictions on what can be adopted as a rule in Part 1 of Article 2A of the Administrative Procedure Act—not in Part 2 of Article 2A. Therefore, a reference to Part 1 of Article 2A is not a proper basis for alleging that the rules were not adopted in accordance with Part 2 of Article 2A as required by N.C. Gen. Stat. § 150B-21.9(a)(4).

To the extent that the RRC is objecting to the procedure by which these rules were adopted by the CRC, we are providing the following information to address any such concern. As required by N.C. Gen. Stat. § 150B-21.3A(c), the CRC conducted an analysis of each existing rule and made an “initial determination as to whether the rule is necessary or unnecessary.” The classifications were posted for public comment and submitted to the Office of Administrative Hearings for posting on its Web site. The CRC accepted public comment for sixty days after the determination was posted from February 20–April 20, 2017. The agency amended classifications, responded to all objections, and sent a final report to the RRC, including the public comments. Thereafter, the CRC re-adopted these rules as required by July 31, 2020 and sent them out for public comment. Twenty public hearings were held between November 17 and December 10, 2019 throughout the twenty coastal counties included within the Coastal Area Management Act. The public comment period ended December 31, 2019. No public comments were received, no changes were proposed, and no fiscal analysis was required. The CRC re-adopted the rules at its regularly scheduled meeting on February 12, 2020. Thereafter, the CRC began submitting its re-adopted rules to the RRC in manageable groupings. At the RRC's request, the last 132 re-adopted rules were submitted in one large group in June 2022. The RRC objected to 47 of the 132 rules in its September 2022 Objection Letter.

There are fifteen remaining rules for which the RRC's objection is based, in part, on an alleged failure to comply with Part 2 of Article 2A. However, the RRC has not identified any procedural flaws in the process used by the CRC to re-adopt these rules pursuant to the requirements for the periodic review of rules in Part 2 of Article 2A of the Administrative Procedure Act. In addition, an attachment to the specific objection for 15A NCAC 07M .1102 includes a highlighted reference to the procedures for adopting a permanent rule. Since the relevant procedure here relates to the periodic review of rules, the relevance of this attachment is unclear.

North Carolina Rules Review Commission

November 23, 2022

Page 6 of 6

If our understanding of the substance of this objection is incorrect, please provide specific information identifying the procedure established in N.C. Gen. Stat. § 150B-21.3A for the periodic review of existing rules or some other section included in Part 2 of Article 2A on which the RRC bases its objection. If there is no alleged flaw in the procedure by which these rules were re-adopted, the CRC respectfully requests that this objection be withdrawn.

In conclusion and based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the objections to each of the 38 rules addressed in this letter be withdrawn.

Sincerely,



Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
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MLUCASSE@NCDOJ.GOV

Memorandum

To: Brian Liebman & William W. Peaslee, Commission Counsel
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

From: Mary L. Lucasse,
Special Deputy Attorney General & Counsel for Coastal Resources Commission

Date: September 1, 2022

Re: 15A NCAC 07H .0501, .0502, .0503, ~~.0504~~, .0505, .0506, .0507, .0508, .0509, .0510
15A NCAC 07M .0201, .0202, .0401, .0403,¹ .0503, .0701, ~~.0801~~, ~~.0802~~², .1001, .1101,
1201, .1202

On July 14, 2022, Counsel for the Rules Review Commission (“RRC”) provided an opinion to the NC Coastal Resources Commission (“CRC”) that all of the above-listed rules “do not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a) because they “do not implement or interpret an enactment of the General Assembly”, establish any requirements upon any persons or entities not employed by the agency”, or “affect the procedural or substantive rights or duties of a person not employed by the agency.” As a result, RRC Counsel asserts that the CRC “lacks statutory authority to adopt [these rules,]” they are not in accordance with Article 2A of the Administrative Procedure Act and are not “reasonably necessary pursuant to G.S. 150B-21.9(a)(3) as only “rules” can be reasonably necessary. In addition, “assuming arguendo that one or more of the above-captioned Rules meets the definition of a “Rule”, RRC counsel asserts that each of the rules, as written, is unclear and ambiguous pursuant to 150B-21.9(a)(2). For these reasons, RRC counsel recommends the RRC object to the rules.

The CRC respectfully disagrees and requests that the RRC approve these rules because they are required by federal statute and the General Assembly provided specific authority to the CRC, upheld by the North Carolina Supreme Court, requiring the adoption of these rules as described in more detail below.

¹ The underlined rules (15A NCAC 07H .0508, 07M .0403, .0503, .1201, and .1202) were not included in the Omnibus July 14, 2022 Staff Opinion from RRC Counsel regarding multiple rules. However, individual Staff Opinions on the underlined rules also recommended the RRC object to these rules on the basis they did not meet the definition of a “Rule.” For that reason, they are included in this memo.

² The CRC intends to respond to any objection by the RRC to the rules that have been struck through (15A NCAC 07H .0504, and 07M .0602, .0802 and .0802) by repealing these four rules.

I. Description of the Rules.

In general, the rules at issue here establish the CRC's Areas of Environmental Concern—which are the geographic areas over which the CRC has jurisdiction—and, as required by the General Assembly, set policies through rulemaking to guide the implementation of the coastal management program. Such policies are general in nature and provide direction to both the regulated public and the Commission's staff at the Division of Coastal Management to whom the CRC has delegated the day-to-day work of implementing the policies articulated by the CRC.

II. The General Assembly provided specific authority to adopt these rules.

The Coastal Area Management Act of 1974 ("CAMA") provides clear guidance by the General Assembly to the CRC authorizing it to adopt the rules at issue here. Specifically, the General Assembly directed the CRC to adopt "guidelines for the coastal area" consisting of "statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102." N.C. Gen. Stat. § 113A-107 (emphasis added). In *Adams v. N.C. Dep't of Natural and Economic Resources*, the North Carolina Supreme Court held that the General Assembly's delegation "to the CRC to develop, adopt, and amend 'State guidelines' for the coastal area" is constitutional. *Id.*, 295 N.C. 683, 696-99, 249 S.E.2d 402, 410-11 (1978).

Each rule at issue in the RRC Staff Opinion provides a policy statement regarding a specific aspect of the North Carolina coastal management program (for example, the shoreline, coastal energy, mitigation, ocean mining, etc.) as authorized by G.S. § 113A-102(b). Additional authority is given to the CRC to designate geographic areas and areas of environmental concern in N.C. G. S. § 113A-103, -107, -113, -115, -119, and/or -124(b). The basic rule of statutory construction is that when a statute is clear and unambiguous, the language must be given its plain meaning. *See In re J.C.*, 372 N.C. 203, 208 (2019); *State v. Womble*, 277 N.C. App. 164, 176 (2021); *In re Spencer*, 140 N.C. App. 776, 778 (2000). These rules provide the CRC's policies for the use of our State's natural resources in the coastal area. As such, these rules implement or interpret an enactment of the General Assembly and meet the definition of a "Rule" in the Administrative Procedure Act on that basis alone.

To the extent that RRC Counsel interprets the CAMA authorization for the CRC to establish guidelines for the coastal area as somehow inconsistent with the requirements of the Administrative Procedure Act, the CRC disagrees. The North Carolina Supreme Court recognizes that since "amendments to the State guidelines by the CRC are considered administrative rule-making," the rule-making requirements in the Administrative Procedure Act "[complement] the procedural safeguards in [CAMA]." *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. The North Carolina Supreme Court has consistently applied the principles of statutory construction to hold that "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability," *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)), and that, "[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control," *id.* at 349, 435 S.E.2d at 534 (quotation omitted). In this case, the CAMA

directly and specifically authorizes the CRC to establish guidelines for the coastal area through its rules. The specific provisions in CAMA establish the intent of the General Assembly and control over the general provisions of the Administrative Procedure Act relating to rulemaking. Therefore, the RRC should approve these rules as authorized by the specific provisions of CAMA.

III. Federal Statute requires the adoption of these rules for consistency reviews.

The Coastal Zone Management Act (CZMA) of 1972 was enacted to address national coastal issues and establishes a voluntary partnership between the federal government and U.S. coastal and Great Lakes states, including North Carolina. 16 U.S.C. § 1451, *et. seq.* The federal statute requires each participating state to adopt its own coastal management program. In 1974, the General Assembly met this requirement by adopting the North Carolina coastal management program, which delegates the implementation of the program to the CRC and is administered by the Division of Coastal Management within what is now known as the Department of Environmental Quality. The CZMA allows North Carolina to ensure that any "federal activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." *See* 16 U.S.C. § 1456. Coordination and Cooperation (Section 307) (emphasis added). The federal statute authorizes the State of North Carolina to review and determine whether a proposed federal project is consistent with CZMA-approved state "enforceable policies," including the ones articulated by the CRC in these rules. Because the federal consistency process involves a negotiation between the State and the federal agency, these rules are sometimes written in more general terms and do not include specific or quantitative standards that must apply to all projects. However, without these rules, North Carolina may not have an opportunity to review large-scale federal coastal projects for potential impacts to natural, economic, and social resources in accordance with the federal consistency review process provided under the federal CZMA. This could impact a wide range of federal project reviews, including offshore energy proposals, large-scale dredging and beach nourishment projects undertaken by the U.S. Army Corps of Engineers, military activities, management of federal lands, changes to federal navigation channels, federal permits that do not trigger state CAMA permits, federal rule changes that may impact North Carolina, federal grants, and other federal actions in the 20 coastal counties.

IV. The CRC has submitted technical corrections to address any remaining issues.

As explained above, each of these rules is consistent with the definition of a "Rule" set forth in G.S. 150B-2(8a) because they implement or interpret "an enactment of the General Assembly or Congress" or describe the procedure or practice requirements of the CRC for the State's Coastal Management Program. RRC Counsel has raised concerns that assuming *arguendo* the RRC agrees with the CRC's position, the rules are objectionable because they are "unclear and ambiguous." To the extent that RRC counsel has identified specific words or phrases they consider "unclear and ambiguous", the CRC has provided technical corrections that address these concerns. Specifically, with the exception of the rules identified in footnote 2, the CRC has provided revised language to address concerns for 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510. 15A NCAC 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, 1201, and .1202. With these technical changes, any concerns over lack of clarity and ambiguity have been addressed. The CRC respectfully requests these rules be approved.

1 15A NCAC 07H .2305 is readopted with changes as published in 34:09 NCR 760 as follows:

2
3 **15A NCAC 07H .2305 SPECIFIC CONDITIONS**

4 (a) This ~~general permit~~ **General Permit** is applicable to bridge replacement projects spanning no more than 400 feet
5 of estuarine water, public trust area, and coastal wetland AECs.

6 (b) Existing roadway deck width shall not be expanded to create additional lanes, with the exception that an existing
7 one lane bridge may be expanded to two lanes ~~where the Department of Environment and Natural Resources~~
8 ~~Environmental Quality determines that authorization is warranted and provided~~ the proposed project does not
9 ~~significantly affect the quality of the human and natural environment or unnecessarily endangers adjoining properties.~~
10 ~~create significant adverse impacts.~~

11 (c) Replacement of existing bridges with new bridges shall not reduce vertical or horizontal navigational clearances.

12 (d) All demolition debris shall be disposed of landward of all wetlands and the ~~normal water level (NWL)~~ **Normal**
13 **Water Level** or **Normal High Water** ~~normal high water (NHW) level~~ **(as as** defined in **15A NCAC 07H .0106), 15A**
14 **NCAC 07H .0106**, and shall employ soil stabilization measures to prevent entry of sediments in the adjacent water
15 bodies or wetlands.

16 (e) Bridges and culverts shall be designed to allow passage of anticipated high water flows.

17 (f) Measures sufficient to restrain sedimentation and erosion shall be implemented at each site.

18 (g) Bridge or culvert replacement activities involving excavation or fill in wetlands, public trust areas, and estuarine
19 waters shall meet the following conditions:

20 (1) Replacing bridges with culverts shall not be allowed in primary nursery areas as defined by the
21 Marine Fisheries or Wildlife Resources Commissions.

22 (2) The total area of public trust area, estuarine waters, and wetlands to be excavated or filled shall not
23 exceed 2,500 square feet except that the coastal wetland component shall not exceed 750 square
24 feet.

25 (3) Culverts shall not be used to replace bridges with open water spans greater than 50 feet.

26 (4) There shall be no temporary placement or double handling of excavated or fill materials within
27 waters or vegetated wetlands.

28 (5) No excavated or fill material shall be placed in any wetlands or surrounding waters outside of the
29 alignment of the fill area indicated on the work ~~plat(s), plat.~~

30 (6) All excavated materials shall be confined above **Normal Water Level** ~~NWL~~ or **Normal High Water**
31 **NHW** and landward of any wetlands behind dikes or other retaining structures to prevent spill-over
32 of solids into any wetlands or surrounding waters.

33 (7) No bridges with a clearance of four feet or greater above the NWL or NHW shall be allowed to be
34 replaced with ~~culvert(s)~~ **culverts** unless the culvert design maintains the existing water depth,
35 vertical clearance and horizontal clearance.

36 (8) If a bridge is being replaced by a ~~culvert(s)~~ **culvert** then the width of the waterbody shall not be
37 decreased by more than 40 percent.

1 (9) All pipe and culvert inverts placed within the Public Trust or the Estuarine Waters AECs shall be
2 buried at least one foot below normal bed elevation to allow for passage of water and aquatic life.
3 Culverts placed in wetlands are not subject to this requirement.

4
5 *History Note: Authority G.S. 113A-107; 113A-118.1; 113A-124;*
6 *Eff. June 1, 1996;*
7 *Amended Eff. May 1, 2010;*
8 *Readopted Eff. January 1, 2023.*

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ATTORNEY GENERAL



REPLY TO:
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November 23, 2022

North Carolina Rules Review Commission
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: CRC's Response to RRC's Objections to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702; 07J .0203, .0206, .0207, .0208, .0210, .0312; 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102.

Dear Chair Doran and Commission Members:

On behalf of the North Carolina Coastal Resources Commission ("CRC") and pursuant to N.C. Gen. Stat. § 150B-21.12(a)(1) and (2), please accept this letter as the CRC's partial written response to the North Carolina Rules Review Commission ("RRC") September 17, 2022 letter objecting to the above referenced rules (the "Objection Letter"). The CRC will be submitting a second letter (dated November 23, 2022) addressing the remaining rules included in the Objection Letter.

While the CRC disagrees with the RRC's objections, this written response is not intended to be—and should not be interpreted as—a written request to return the above-referenced rules pursuant to N.C. Gen. Stat. § 150B-21.12(d). The CRC is not seeking the return of these rules at this time and, instead, appreciates the opportunity to continue working with the RRC and its staff to resolve the RRC's objections.

At its recent November 17, 2022 regularly scheduled meeting, the CRC decided to submit additional technical changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(1) to the following rules: 07H .0501, .0506, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0204, .0206, .0207, .0208, .0210, .0312, 07M .0601, .0603, .0703, and .0704. While the CRC disagrees with the RRC's objections to these rules, we have attempted to resolve the RRC's concerns through additional technical changes and are submitting the revised rules to the RRC along with this Response. Please do not hesitate to let us know if there are any additional technical changes requested.

In addition, the CRC decided not to submit changes as allowed by N.C. Gen. Stat. § 150B-21.12(a)(2), for the following rules: 15A NCAC 07H .0502, .0503, .0505, .0507, .2305, 07I .0406, .0506, 07M .0201, .0202, .0401, .0402, .0403, .0701, .1001, .1002, .1101, .1102. The CRC disagrees with the RRC's objections to these rules.

The CRC is submitting the following additional information in an effort to resolve the concerns raised in RRC Objection Letter to all the above-referenced rules.

1.C RC’s Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0504, .0508, .0511, .0602, .0702, 07J .0203, .0206, .0207, .0208, .0312, 07M .0201, .0202, .0401, .0403, .0701, .0704, .1001, .1002, and .1101 based on the allegation that “each of [these] . . . rules do not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a)” and therefore the agency lacks the statutory authority to adopt these rules based on N.C. Gen. Stat. 150B-19.1(a)(1). *See* Objection Letter and attached RRC Staff Opinions. This argument is incorrect.

The CRC’s authority and duty to adopt “guidelines for the coastal area” consisting of “statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102” is well established and uniquely provided for under its enabling statute. N.C. Gen. Stat. § 113A-107. In 1978, the North Carolina Supreme Court concluded that “the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area.” *Adams v. NC Dep’t of Natural & Economic Resources*, 295 N.C. 683, 698, 249 S.E. 2d 402, 411 (1978). The Commission provided an initial response on this issue in its September 1, 2022 Memorandum to Brian Liebman and William W. Peaslee, RRC Commission Counsel attached is a copy for your convenience.

During the RRC’s September 15, 2022 meeting, RRC counsel was asked by one of the Commissioners for a response to the CRC’s claim that that it has authority to adopt rules to set policies and guidelines. RRC counsel responded that the CRC could set policies and guidelines as contemplated by statute—just not by rulemaking. This response completely misunderstands the authority provided by the legislature to the CRC. As explained by the North Carolina Supreme Court, “amendments to the State guidelines by the CRC are considered administrative rule-making.”¹ *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. (Emphasis added). This is consistent with the requirement that the CRC “shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement” unless it has “been adopted as a rule in accordance with this Article.” N.C. Gen. Stat. § 150B-18. Thus, as authorized by the North Carolina General Assembly in the CRC’s enabling statute and confirmed by the North Carolina Supreme Court, the CRC is authorized to set guidelines (including objectives, policies, and standards) regulating the public and private use of land and waters within the coastal area through rule-making.

These rules are not newly adopted but have been in existence for decades as part of the North Carolina Administrative Code pursuant to the very same statutory authority. This creates “a rebuttable presumption that” each “rule was adopted in accordance with Part 2 of the Article.” *See* N.C. Gen. Stat. § 150B-21.9(a1). For the RRC to change course in 2022 and now assert that the CRC’s long-standing rules are not within the authority

¹ This case was decided under an earlier iteration of the Administrative Procedure Act at N.C. Gen. Stat. 150A.

delegated to the agency by the General Assembly, is arbitrary and capricious and contrary to the North Carolina Supreme Court precedent.

In addition to addressing the RRC's generic objection regarding whether the rules are "Rules," the CRC has provided additional authority for specific rules that the RRC identified as lacking authority. For example, the RRC objected to 15A NCAC 07J .0208 claiming that CAMA does not authorize the circulation of CAMA permit application to other state agencies for review. However, the CRC was instructed by the General Assembly "to coordinate the issuance of permits" and consideration of variances under the Dredge & Fill Act and the Coastal Area Management Act "to avoid duplication and to create a single, expedited permitting process." N.C. Gen. Stat. § 113-229(e). Both statutes also provide for the CRC to adopt rules to implement these articles. *See* N.C. Gen. Stat. § 113-229(e) ("The CRC may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section.") and N.C. Gen. Stat. § 113A-124(c)(8) (The CRC has additional authority "[t]o adopt rules to implement this Article."). As noted by RRC counsel, a dredge and fill permit application is required to be circulated among State agencies and may be submitted to federal agencies. *See* RRC Staff opinion for 15A NCAC 07J .0208 attached to Objection Letter. Given the authority from the legislature requiring that the CRC create a single, expedited permitting process, this provision in the Dredge and Fill Act is sufficient to provide authorization for the CAMA permit applications to be circulated to state and federal agencies for review.

Based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the RRC rescind its earlier objection to these rules based on Section 150B-21.9(1).

2.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(2).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305, 07J .0203, .0204, .0206, .0210, 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, and .1102 based on the claim that these rules were ambiguous. The majority of the RRC's objection to these rules is not specific to individual rules. To the extent that specific words or phrases were identified as ambiguous by the Objection Letter, the CRC has attempted to provide further clarifying language. *See e.g.*, technical changes provided for 15A NCAC 07J .0203, .0204, .0206, .0210, .0601, .0603, .0703, .0704. If there are other technical changes that the RRC believes would resolve any remaining ambiguity, the CRC is willing to consider further changes.

The perceived ambiguity that the RRC has identified in 15A NCAC 07H .2305 regarding the use of the phrase "significant adverse impact" continues to puzzle the CRC. The General Assembly has authorized denial of "an application for a dredge or fill permit upon finding . . . that there will be significant adverse effect" as a result of the proposed dredging and filling. N.C. Gen. Stat. §113-229(e) (emphasis added). The General Assembly clearly understands that determining whether there is a significant adverse impact is not ambiguous. As the CRC has previously explained, this phrase is "a term of art used in other rules and understood by the courts. *See, e.g., Shell Island Homeowners Assoc. v. Tomlinson*, 134 NC App. 217 (1999). The CRC has used this phrase, or similar phrase,

throughout its rules to require an assessment of the impact of the development on the natural resources. *See e.g.*, 15A NCAC 07H .0209 (throughout), 07H .0308, 07J .1101, .1102, 1201, 07K .0202, 07M .0402. Many, if not most, of these rules were recently readopted or amended without the RRC objecting to the rule language requiring an assessment of the impact. It is arbitrary and capricious for the RRC to claim the use of this phrase in one rule is ambiguous when that objection has not been consistently asserted by the RRC.

Based on the changes provided, as well as the clarifying information provided above, the CRC respectfully requests that the RRC rescind its earlier objection based on Section 150B-21.9(2).

3.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(3).

In its Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07I .0406, .0506, 07J .0203, .0206, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101 on the grounds these rules were not “reasonably necessary” pursuant to N.C. Gen. Stat. §150B-21.9(3). The majority of these rules are those the RRC contends are not “Rules” and therefore, it also objects under section 3 claiming “only ‘Rules’ can be reasonably necessary.” *See* Objection Letter and attachments. In response, the CRC incorporates and relies on the arguments set forth above in Section 1 relating to N.C. Gen. Stat. § 150B-21.9(a)(1).

In its Objection Letter, the RRC objects to 15A NCAC 07I .0406 claiming that this rule simply restates information from “G.S. 113A-119.1 and in 15A NCAC 07J .0204.” *See* RRC Staff Opinion for 15A NCAC 07I .0406 attached to the Opinion Letter. Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly provides that “a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the “reasonably necessary” standard of review.” N.C. Gen. Stat. § 150B-19(4). In this rule, the CRC has provided a brief statement synthesizing information regarding the fee requirement found in two separate places. This is allowable under the Administrative Procedure Act. Moreover, the information included the middle sentence relating to “deficits” is not included elsewhere. Therefore, this rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

In its Objection Letter, the RRC also objects to 15A NCAC 07I .0506 on the basis that the rule is not reasonably necessary as it “re-states material regarding allocation of permit-letting authority that is contained in G.S. 113A-116, -118, and -121.” *See* RRC Staff Opinion for 15A NCAC 07I .0506 attached to Objection Letter (cleaned up). Even if true, this does not provide a basis for rejecting the rule as unnecessary. The General Assembly has provided that “a brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the “reasonably necessary” standard of review.” N.C. Gen. Stat. § 150B-19(4). Moreover, this rule provides additional clarifying information regarding boundaries and the extra-territorial zoning area subject to permit letting authority, and timeframes. This rule does not simply re-state material in the statute. Therefore, the rule is necessary, and the CRC respectfully requests the RRC rescind its earlier objection.

4.C RC's Response to Objections based on N.C. Gen. Stat. § 150B-21.9(a)(4).

In the Objection Letter, the RRC objected to Rules 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, 07J .0203, .0204, 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, .1102 for “failure to comply with the Part 2 of Article 2A of the Administrative Procedure Act pursuant to G.S. 150B-21.9(4).” This section of the NC Administrative Procedure Act provides procedures for the adoption of temporary rules, emergency rules, permanent rules, and the periodic review of existing rules. In the Objection Letter and the attachments to the Objection Letter, the RRC has not identified the manner in which it alleges the CRC failed to follow the rulemaking procedures set forth in Part 2 of this Article during its periodic review and re-adoption of these rules.

Moreover, if this objection is merely intended to indicate that the RRC does not believe these rules meet the definition of a “Rule,” that objection is based on N.C. Gen. Stat. § 150B-19 which lists restrictions on what can be adopted as a rule in Part 1 of Article 2A of the Administrative Procedure Act—not in Part 2 of Article 2A. Therefore, a reference to Part 1 of Article 2A is not a proper basis for alleging that the rules were not adopted in accordance with Part 2 of Article 2A as required by N.C. Gen. Stat. § 150B-21.9(a)(4).

To the extent that the RRC is objecting to the procedure by which these rules were adopted by the CRC, we are providing the following information to address any such concern. As required by N.C. Gen. Stat. § 150B-21.3A(c), the CRC conducted an analysis of each existing rule and made an “initial determination as to whether the rule is necessary or unnecessary.” The classifications were posted for public comment and submitted to the Office of Administrative Hearings for posting on its Web site. The CRC accepted public comment for sixty days after the determination was posted from February 20–April 20, 2017. The agency amended classifications, responded to all objections, and sent a final report to the RRC, including the public comments. Thereafter, the CRC re-adopted these rules as required by July 31, 2020 and sent them out for public comment. Twenty public hearings were held between November 17 and December 10, 2019 throughout the twenty coastal counties included within the Coastal Area Management Act. The public comment period ended December 31, 2019. No public comments were received, no changes were proposed, and no fiscal analysis was required. The CRC re-adopted the rules at its regularly scheduled meeting on February 12, 2020. Thereafter, the CRC began submitting its re-adopted rules to the RRC in manageable groupings. At the RRC's request, the last 132 re-adopted rules were submitted in one large group in June 2022. The RRC objected to 47 of the 132 rules in its September 2022 Objection Letter.

There are fifteen remaining rules for which the RRC's objection is based, in part, on an alleged failure to comply with Part 2 of Article 2A. However, the RRC has not identified any procedural flaws in the process used by the CRC to re-adopt these rules pursuant to the requirements for the periodic review of rules in Part 2 of Article 2A of the Administrative Procedure Act. In addition, an attachment to the specific objection for 15A NCAC 07M .1102 includes a highlighted reference to the procedures for adopting a permanent rule. Since the relevant procedure here relates to the periodic review of rules, the relevance of this attachment is unclear.

North Carolina Rules Review Commission

November 23, 2022

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If our understanding of the substance of this objection is incorrect, please provide specific information identifying the procedure established in N.C. Gen. Stat. § 150B-21.3A for the periodic review of existing rules or some other section included in Part 2 of Article 2A on which the RRC bases its objection. If there is no alleged flaw in the procedure by which these rules were re-adopted, the CRC respectfully requests that this objection be withdrawn.

In conclusion and based on the clarification provided in this letter, as well as the information previously submitted to the RRC, the CRC respectfully requests that the objections to each of the 38 rules addressed in this letter be withdrawn.

Sincerely,



Mary L. Lucasse
Special Deputy Attorney General
Counsel to the CRC

cc: M. Renee Cahoon, CRC Chair, electronically
Braxton C. Davis, DCM Director, electronically
Mike Lopazanski, DCM Deputy Director, electronically
Angela Willis, CRC Rulemaking Coordinator, electronically
Jennifer Everett, DEQ Rulemaking Coordinator, electronically
William Peaslee, RRC Counsel, electronically
Brian Liebman, RRC Counsel, electronically
Lawrence Duke, RRC Counsel, electronically
Alex Burgos, Paralegal, Office of Administrative Hearings, electronically

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
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Memorandum

To: Brian Liebman & William W. Peaslee, Commission Counsel
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From: Mary L. Lucasse,
Special Deputy Attorney General & Counsel for Coastal Resources Commission

Date: September 1, 2022

Re: 15A NCAC 07H .0501, .0502, .0503, ~~.0504~~, .0505, .0506, .0507, .0508, .0509, .0510
15A NCAC 07M .0201, .0202, .0401, .0403,¹ ~~.0503~~, .0701, ~~.0801~~, ~~.0802~~², .1001, .1101,
1201, .1202

On July 14, 2022, Counsel for the Rules Review Commission (“RRC”) provided an opinion to the NC Coastal Resources Commission (“CRC”) that all of the above-listed rules “do not meet the definition of a “Rule” pursuant to G.S. 150B-2(8a) because they “do not implement or interpret an enactment of the General Assembly”, establish any requirements upon any persons or entities not employed by the agency”, or “affect the procedural or substantive rights or duties of a person not employed by the agency.” As a result, RRC Counsel asserts that the CRC “lacks statutory authority to adopt [these rules,]” they are not in accordance with Article 2A of the Administrative Procedure Act and are not “reasonably necessary pursuant to G.S. 150B-21.9(a)(3) as only “rules” can be reasonably necessary. In addition, “assuming arguendo that one or more of the above-captioned Rules meets the definition of a “Rule”, RRC counsel asserts that each of the rules, as written, is unclear and ambiguous pursuant to 150B-21.9(a)(2). For these reasons, RRC counsel recommends the RRC object to the rules.

The CRC respectfully disagrees and requests that the RRC approve these rules because they are required by federal statute and the General Assembly provided specific authority to the CRC, upheld by the North Carolina Supreme Court, requiring the adoption of these rules as described in more detail below.

¹ The underlined rules (15A NCAC 07H .0508, 07M .0403, .0503, .1201, and .1202) were not included in the Omnibus July 14, 2022 Staff Opinion from RRC Counsel regarding multiple rules. However, individual Staff Opinions on the underlined rules also recommended the RRC object to these rules on the basis they did not meet the definition of a “Rule.” For that reason, they are included in this memo.

² The CRC intends to respond to any objection by the RRC to the rules that have been struck through (15A NCAC 07H .0504, and 07M .0602, .0802 and .0802) by repealing these four rules.

I. Description of the Rules.

In general, the rules at issue here establish the CRC's Areas of Environmental Concern—which are the geographic areas over which the CRC has jurisdiction—and, as required by the General Assembly, set policies through rulemaking to guide the implementation of the coastal management program. Such policies are general in nature and provide direction to both the regulated public and the Commission's staff at the Division of Coastal Management to whom the CRC has delegated the day-to-day work of implementing the policies articulated by the CRC.

II. The General Assembly provided specific authority to adopt these rules.

The Coastal Area Management Act of 1974 ("CAMA") provides clear guidance by the General Assembly to the CRC authorizing it to adopt the rules at issue here. Specifically, the General Assembly directed the CRC to adopt "guidelines for the coastal area" consisting of "statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area . . . consistent with the goals . . . in G.S. 113A-102." N.C. Gen. Stat. § 113A-107 (emphasis added). In *Adams v. N.C. Dep't of Natural and Economic Resources*, the North Carolina Supreme Court held that the General Assembly's delegation "to the CRC to develop, adopt, and amend 'State guidelines' for the coastal area" is constitutional. *Id.*, 295 N.C. 683, 696-99, 249 S.E.2d 402, 410-11 (1978).

Each rule at issue in the RRC Staff Opinion provides a policy statement regarding a specific aspect of the North Carolina coastal management program (for example, the shoreline, coastal energy, mitigation, ocean mining, etc.) as authorized by G.S. § 113A-102(b). Additional authority is given to the CRC to designate geographic areas and areas of environmental concern in N.C. G. S. § 113A-103, -107, -113, -115, -119, and/or -124(b). The basic rule of statutory construction is that when a statute is clear and unambiguous, the language must be given its plain meaning. *See In re J.C.*, 372 N.C. 203, 208 (2019); *State v. Womble*, 277 N.C. App. 164, 176 (2021); *In re Spencer*, 140 N.C. App. 776, 778 (2000). These rules provide the CRC's policies for the use of our State's natural resources in the coastal area. As such, these rules implement or interpret an enactment of the General Assembly and meet the definition of a "Rule" in the Administrative Procedure Act on that basis alone.

To the extent that RRC Counsel interprets the CAMA authorization for the CRC to establish guidelines for the coastal area as somehow inconsistent with the requirements of the Administrative Procedure Act, the CRC disagrees. The North Carolina Supreme Court recognizes that since "amendments to the State guidelines by the CRC are considered administrative rule-making," the rule-making requirements in the Administrative Procedure Act "[complement] the procedural safeguards in [CAMA]." *Adams*, 295 N.C. at 702, 249 S.E.2d at 413. The North Carolina Supreme Court has consistently applied the principles of statutory construction to hold that "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability," *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)), and that, "[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control," *id.* at 349, 435 S.E.2d at 534 (quotation omitted). In this case, the CAMA

directly and specifically authorizes the CRC to establish guidelines for the coastal area through its rules. The specific provisions in CAMA establish the intent of the General Assembly and control over the general provisions of the Administrative Procedure Act relating to rulemaking. Therefore, the RRC should approve these rules as authorized by the specific provisions of CAMA.

III. Federal Statute requires the adoption of these rules for consistency reviews.

The Coastal Zone Management Act (CZMA) of 1972 was enacted to address national coastal issues and establishes a voluntary partnership between the federal government and U.S. coastal and Great Lakes states, including North Carolina. 16 U.S.C. § 1451, *et. seq.* The federal statute requires each participating state to adopt its own coastal management program. In 1974, the General Assembly met this requirement by adopting the North Carolina coastal management program, which delegates the implementation of the program to the CRC and is administered by the Division of Coastal Management within what is now known as the Department of Environmental Quality. The CZMA allows North Carolina to ensure that any "federal activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." *See* 16 U.S.C. § 1456. Coordination and Cooperation (Section 307) (emphasis added). The federal statute authorizes the State of North Carolina to review and determine whether a proposed federal project is consistent with CZMA-approved state "enforceable policies," including the ones articulated by the CRC in these rules. Because the federal consistency process involves a negotiation between the State and the federal agency, these rules are sometimes written in more general terms and do not include specific or quantitative standards that must apply to all projects. However, without these rules, North Carolina may not have an opportunity to review large-scale federal coastal projects for potential impacts to natural, economic, and social resources in accordance with the federal consistency review process provided under the federal CZMA. This could impact a wide range of federal project reviews, including offshore energy proposals, large-scale dredging and beach nourishment projects undertaken by the U.S. Army Corps of Engineers, military activities, management of federal lands, changes to federal navigation channels, federal permits that do not trigger state CAMA permits, federal rule changes that may impact North Carolina, federal grants, and other federal actions in the 20 coastal counties.

IV. The CRC has submitted technical corrections to address any remaining issues.

As explained above, each of these rules is consistent with the definition of a "Rule" set forth in G.S. 150B-2(8a) because they implement or interpret "an enactment of the General Assembly or Congress" or describe the procedure or practice requirements of the CRC for the State's Coastal Management Program. RRC Counsel has raised concerns that assuming *arguendo* the RRC agrees with the CRC's position, the rules are objectionable because they are "unclear and ambiguous." To the extent that RRC counsel has identified specific words or phrases they consider "unclear and ambiguous", the CRC has provided technical corrections that address these concerns. Specifically, with the exception of the rules identified in footnote 2, the CRC has provided revised language to address concerns for 15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510. 15A NCAC 07M .0201, .0202, .0401, .0403, .0701, .1001, .1101, 1201, and .1202. With these technical changes, any concerns over lack of clarity and ambiguity have been addressed. The CRC respectfully requests these rules be approved.

Burgos, Alexander N

From: Everett, Jennifer
Sent: Wednesday, November 23, 2022 1:14 PM
To: Rules, Oah; Peaslee, William W; Liebman, Brian R; Duke, Lawrence
Cc: Burgos, Alexander N; Lucasse, Mary L; Lopazanski, Mike; Davis, Braxton C; Goebel, Christine A; Willis, Angela; Miller, Tancred; Wright, Alyssa N
Subject: CRC rules addressing objections Part 1 of 2
Attachments: 15A NCAC 07H .0501 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0502 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0503 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0505 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0506 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0507 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0508 with tech change Nov 23 2022.docx; 15A NCAC 07H .0509 with tech changes Nov 23 2022.docx; 15A NCAC 07H .0510 with tech changes Nov 23 2022.docx; 15A NCAC 07H .2305 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0406 Nov 23 2022.docx; 15A NCAC 07I .0504 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0506 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0508 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0511 Nov 23 2022.docx; 15A NCAC 07I .0602 with tech changes Nov 23 2022.docx; 15A NCAC 07I .0702 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0203 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07J .0204 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0206 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0207 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0208 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0210 with tech changes Nov 23 2022.docx; 15A NCAC 07J .0312 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0201 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0202 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0401 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0403 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0601 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0603 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0701 with tech changes Nov 23 2022.docx; 15A NCAC 07M .0703 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .0704 (mll) with tech changes Nov 23 2022.docx; 15A NCAC 07M .1001 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1002 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1101 with tech changes Nov 23 2022.docx; 15A NCAC 07M .1102 with tech changes Nov 23 2022.docx; 2022-11-23-CRC Letter responding to RRC Objections (signed with attachment).pdf

Hello,

Attached are rules and a letter from the Coastal Resources Commission in response to objections. This email addresses rules:

15A NCAC 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510, .2305;
15A NCAC 07I .0406, .0504, .0506, .0508, .0511, .0602, .0702;
15A NCAC 07J .0203, .0206, .0207, .0208, .0210, .0312;
15A NCAC 07M .0201, .0202, .0401, .0402, .0403, .0601, .0603, .0701, .0703, .0704, .1001, .1002, .1101, .1102

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<https://deg.nc.gov/permits-rules/rules-regulations/deg-proposed-rules>

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

Burgos, Alexander N

From: Everett, Jennifer
Sent: Wednesday, November 23, 2022 1:19 PM
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Subject: CRC rules addressing objections -Part 2 of 2
Attachments: 15A NCAC 07H .0504 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0601 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0603 repeal for RRC Nov 23 2022.docx; 15A NCAC 07H .0604 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0503 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0801 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .0802 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .1201 repeal for RRC Nov 23 2022.docx; 15A NCAC 07M .1202 repeal for RRC Nov 23 2022.docx; 2022-11-23 CRC Letter requesting repeal (signed).pdf

Hello,

Attached are rules and a second letter from the Coastal Resources Commission in response to objections. This email addresses rules:

15A NCAC 07H .0504, .0601, .0603, .0604, and
15A NCAC 07M .0503, .0801, .0802, .1201, .1202.

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15A NCAC 07J .0203, .0206, .0207, .0208, .0210, .0312;
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