



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

April 8, 2024

Renee Cahoon, Chair
Coastal Resources Commission
Sent via email only: Renee.Cahoon@deq.nc.gov

Re: Objection to Rules 15A NCAC 07H .0507, .0508, and .0509; 15A NCAC 07I .0702; 15A NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15 NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

Dear Chair Cahoon:

At its meeting on April 8, 2024, the Rules Review Commission objected to the above-captioned temporary Rules in accordance with G.S. 150B-21.1(b). Specifically, the RRC adopted the opinions of counsel attached hereto and incorporated by reference.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Rules Review Commission's action, please let us know.

Sincerely,

/s/ Brian Liebman
Brian Liebman
Commission Counsel

/s/ William W. Peaslee
William Peaslee
Commission Counsel

cc: Jennifer Everett, Rulemaking Coordinator, via email
Mary Lucasse, NCDOJ, counsel to CRC, via email

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
Senior Administrative Law Judge

An Equal Employment Opportunity Employer
1711 New Hope Church Road, Raleigh, NC 27609
Telephone: (984) 236-1850 | Facsimile: (984) 236-1871
www.oah.nc.gov

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0507, .0508, and .0509; 15A NCAC 07I .0702; 15 NCAC 07J .0203, .0204, .0206, .0207, and .0208; 15A NCAC 07M .0401, .0402, .0403, .0701, .0703, .0704, and .1101.

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

Permanent rulemaking and the protections it affords the citizens of North Carolina is the preferred method of administrative rule promulgation. Temporary rulemaking is an exception provided only in certain limited circumstances. As such, the APA requires agencies seeking to adopt temporary rules to meet a two-part threshold prior to the adoption of a temporary rule. G.S. 150B-21.1(a) (2023). "An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest **and** that the immediate adoption of the rule is required by one or more of" a statutorily enumerated list of circumstances or events. *Id.* (emphasis added).

Brian Liebman
Commission Counsel

When it submits temporary rules to RRC for approval, an agency must also prepare and submit to RRC a “written statement of its findings of need for a temporary rule” explaining why the rule meets the two-part threshold laid out in G.S. 150B-21.1(a). G.S. 150B-21.1(a4). The RRC is explicitly tasked with reviewing the agency’s statement and the rule “to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in G.S. 150B-21.9.” G.S. 150B-21.1(b). In making this determination, the statute allows that the RRC “may consider any information submitted by the agency **or another person.**” *Id.* (emphasis added). If the RRC finds that the statement does not meet the criteria listed in 150B-21.1(a), the Commission must immediately notify the head of the agency, which may “supplement its statement of need with additional findings or submit a new statement . . .” G.S. 150B-21.1(b1). Thus, the agency’s findings of need must be substantiated in its statement, and the RRC’s examination of the statement exceeds a mere review of whether the agency has alleged the necessary items.

* * * * *

Here, the CRC’s statement of findings of need is largely conclusory and conflates the arguments for the two prongs of the G.S. 150B-21.1(a) test.¹ The CRC states the absence of these rules from the Code prevents the State from making permitting and enforcement decisions, and has resulted in the NC Coastal Management Program losing “the ability to protect coastal lands and waters.” However, this is contradicted by multiple public comments in opposition to these rules. Cedar Point Developers allege that public records show “at least twenty CAMA major permits” have been issued since the equivalent permanent rules were removed from the Code on October 5, 2023. Pub. Comment of Cedar Point Developers, LLC, p. 5. The North Carolina Homebuilders Association include in their comment communication between the Division of Coastal Management and a CRC member stating that “DCM issued 42 Major Permits in the period between Oct. 5, 2023 to Jan. 5, 2024 while the Commission’s rules were vacated *There were no permits that we could not issue because the rules were vacated*

¹ The agency lays out its arguments for the second prong of the test in Box 6 of the Statement of Findings of Need Form, and its arguments for the first prong in Box 7. However, the CRC “incorporates the explanation provided” in Box 6 in its response in Box 7. Thus, to the extent staff can read the agency’s intent, staff has attempted to apply the agency’s specific reasoning for why immediate adoption is required by a recent act of the General Assembly or by a serious and unforeseen threat to the public health, safety, and welfare to the question of why adherence to the notice and hearing requirements of permanent rulemaking are contrary to the public interest.

Brian Liebman
Commission Counsel

because CAMA requires us to accept, process, and issue or deny permit applications[.]” Pub. Comment of the N.C. Homebuilders Ass’n., pp. 3-4 (emphasis added).

Similarly, the CRC states that it can no longer review “certain federal projects for consistency with State law based on these rules.” Neither the rules themselves nor the statement makes clear what federal projects are impacted or how the rules before the Commission relate to those federal projects. It is equally unclear from the statement why the CRC’s inability to review these projects makes adherence to the notice and hearing requirements of G.S. 150B-21.2 contrary to the public interest. Moreover, when the equivalent permanent rules that were removed from the Code went through the first step of the periodic review process in 2017 and 2018, the CRC declined to designate any of these rules as necessary to “implement or conform to federal regulation.” The result of that designation could have prevented those rules from expiring should CRC have failed to meet its readoption deadlines. G.S. 150B-21.3A. Thus, to the extent that CRC now argues that these rules *are* necessary to implement or conform to federal regulation, their argument is unconvincing, and the time to make that designation has passed. *See* G.S. 150B-21.3A(d)(1) (giving the Commission the authority to set the timeline for completion of the periodic review process).

That said, in its public comment, the Southeastern Environmental Law Center (“SELC”) states that each of the sixteen rules before the Commission are vital to “North Carolina’s ability to fully participate in the federal Coastal Zone Management Act program.” Pub. Comment of the Southeastern Environmental Law Center, Attachment A, p. 2. According to the SELC, under the CZMA a state must submit its coastal management plan to the National Oceanic and Atmospheric Administration (“NOAA”) for approval, and receives federal funding and “the right to review federal actions for their consistency with enforceable state policies.” *Id.* Specifically, an applicant for a federal permit for an activity affecting the coastal zone must provide the State with a certification that “the proposed activity complies with the *enforceable policies* of the state’s approved program and that such activity will be conducted in a manner consistent with the program.” *Id.* The SELC alleges that without these sixteen rules, which “articulate the ‘enforceable policies’ that form the basis of CZMA consistency determinations for federal actions affecting North Carolina’s coastal resources,” the State will “lose the right to review federal agency activities under the CZMA based on these rules.” *Id.* at p.4. While the SELC’s comment provides much more information than the CRC’s statement, it continues to suffer from the same defect; there is no specific allegation as to how these sixteen rules relate

to any proposed federal project or activity that the CRC would otherwise be able to block, or how temporary rulemaking, as opposed to permanent rulemaking, is necessary for the public interest.

The CRC points to “numerous public comments [received] with the significant majority in favor of adopting the temporary rules” as the only explicit justification offered for why adherence to the permanent rulemaking notice and hearing requirements is contrary to the public interest. Far from justifying temporary rulemaking, it would appear that intense public concern for a particular set of rules indicates that permanent rulemaking, with a more robust publication requirement and longer mandated comment period, is more appropriate than temporary rulemaking.

Moreover, the agency’s ability to extend the public comment period from the fifteen business days mandated by G.S. 150B-21.1(a3)(3) to sixty-four calendar days (in excess of the sixty-day comment period required for permanent rulemaking by 150B-21.2(f)) cuts against any argument that adherence to the notice and comment provisions of G.S. 150B-21.2 should be avoided.² The explicit statutory purpose of temporary rulemaking is to expedite the rulemaking process when circumstances so require. While the agency claims that temporary rulemaking is necessary, it purposely extended the public comment period to more than sixty days and waited eighty-five days to formally adopt the rules. This extended timeline belies the apparent urgency expressed in the statement of findings of need.

Finally, in her April 4, 2024 memo to the Commission, counsel to the CRC Mary Lucasse responds to public comment and provides additional information regarding the adoption of these rules. To the extent that these arguments are intended to assert additional grounds in support of the CRC’s contention that adherence to the permanent rulemaking notice and hearing requirements would be contrary to the public interest, staff is of the opinion they are unpersuasive. First, the CRC asserts that the temporary rules “include changes to address objections raised by the RRC and counsel to the RRC.” As of the date of Ms. Lucasse’s memo, the Commission has not objected to these temporary rules. The rules to which the Commission objected were returned to the agency and removed from the Code in October 2023, and are the subject of pending litigation. The APA contains no mechanism for “addressing objections” *after*

² Staff would note that the CRC’s efforts to extend the public comment period “in order to widely solicit comments” are commendable. Staff’s opinion in no way intends to discourage any agency from taking any reasonable measure to solicit public input during the administrative rulemaking process.

the rules have been removed from the Code other than by pursuing judicial review of the Commission's decision in Wake County Superior Court, as the CRC has already elected to do.³ Session Law 2023-134, s. 21.2(m) ("If a rule is returned to the agency under this section, the agency may file an action for declaratory judgment within 30 days after the rule is returned to the agency in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes."). Moreover, G.S. 150B-21.1(a) does not recognize satisfying a previously lodged objection as a ground for temporary rulemaking.

Second, the CRC states that "Counsel for the RRC suggested that the CRC use the temporary rule process", claiming that during the hearing for the CRC's request for a temporary restraining order, counsel for the Commission and for the Codifier "suggested to the trial court that a TRO was unnecessary as the CRC had the option of proceeding with emergency or temporary rulemaking." Ms. Lucasse also draws attention to a letter issued by the Commission's outside counsel "reiterating this suggestion."⁴ Review of this letter indicates that outside counsel merely reminded the CRC that it could mitigate any alleged harm by pursuing either emergency or temporary rulemaking of "new rules" which contain "provisions in the Returned Rules to which the RRC did not object," and that the CRC "is entitled to draft its proposed rules in a way that places rule provisions over which the RRC did not previously object in one set of proposed rules[.]" Throughout the letter, counsel was clear that this suggestion was not a "forecast[] [of] the RRC's position on specific rules," that "any rules promulgated [must] meet the statutory criteria", that "the RRC would obviously have to conduct an independent analysis" of any rules submitted, and "such separation *is not a guarantee that the RRC would not object to them*" (emphasis added). Thus, it is inaccurate to state that the RRC "suggested" that the CRC readopt nearly identical rules to those that were removed from the Code. In any event, neither the letter nor any of outside counsel's statements at the TRO hearing, on their own, provide the CRC with the authority or justification to pursue temporary rulemaking.

Finally, the CRC's memo points to the number of public comments received in favor of these rules, and to the fact that the CRC unanimously voted to adopt these rules. As noted

³ It is staff's opinion that due to the pending litigation, it would be inappropriate and inadvisable to discuss the substance of the objections lodged against the returned rules in an open session of the Commission.

⁴ The November 8, 2023 letter from John Branch to Ms. Lucasse is attached at the end of this opinion for reference.

earlier, the intensity of support for these rules does not adequately justify deviating from the preferred permanent rulemaking process, and in fact, the Commission is barred from “consider[ing] questions relating to the quality or efficacy of the rule.” G.S. 150B-21.9(a).

Based on the foregoing, staff recommends that the Commission find that the CRC has not met its burden of showing that “adherence to the notice and hearing requirements of G.S. 150B-21.1 would be contrary to the public interest” and that the Commission object to the above-captioned rules on that basis.

* * * * *

As stated earlier, the temporary rulemaking threshold in G.S. 150B-21.1(a) is a two-part test. Because the agency has not met its burden on the first prong of the test, we need not consider whether the CRC has met the second prong. However, assuming *arguendo* that the CRC has met its burden on the first prong of the G.S. 150B-21.1(a) test, staff is also of the opinion that the CRC also has failed to meet its burden on the second prong, in that it has not shown that the immediate adoption of the rules is required by one of the enumerated list of triggering events in G.S. 150B-21.1(a).

As an initial matter, it is important to note that the relevant language of the APA does not provide that adoption of the rules be a consequence of one of the events listed in G.S. 150B-21.1(a), but that immediate adoption of the rules be “*required by*” one of those events. G.S. 150B-21.1(a). Thus, the agency must establish a specific and direct connection between the triggering event and the propounded temporary rules.

The CRC asserts two grounds justifying the immediate adoption of the rules. First is that the rules are required by a “serious and unforeseen threat to the public health, safety, and welfare.” Second is that the rules are required by the “effective date of a recent act of the General Assembly or the United States Congress.” The CRC cites Section 21.2(m). of Session Law 2023-134 as the relevant act of the General Assembly.

The CRC’s statement of findings of need avers that “removal of the rules [following the legislative changes in Session Law 2023-134] causes a serious threat to public safety and welfare because without this rule, the NC Coastal Management Program has lost the ability to protect coastal lands and waters[.]” It cannot be that the legislative act requiring the return and consequent removal of these rules from the North Carolina Administrative Code constitutes an unforeseen threat to the public’s health, safety, or welfare. Based on the specific language of the Session Law, the General Assembly commanded the Commission to return the

Brian Liebman
Commission Counsel

rules. “The Legislature is presumed to know the law.” *Purnell v. Page*, 133 N.C. 125, 130, 45 S.E. 534, 536 (1903) Thus, the necessary consequence of the return would be to remove these rules from the Code pursuant to the unchanged provisions of the APA. In this way, an act of the General Assembly cannot be the kind of “unforeseen threat” that allows an agency to avoid the requirements of permanent rulemaking under the APA.

Rather, there must be some factual basis related to the substance of the rules, such as a threat to the environment that the CRC is charged with protecting. As noted above, the statement of findings of need and the various public comments received allege no specific threat to the environment, and merely state in general terms what might happen in the absence of regulation. The CRC’s assertion that they are unable to protect coastal lands and waters insinuates that there *is* a threat but does not specifically identify that threat. As a result, the Commission cannot assess whether it is serious or unforeseen, or whether temporary rulemaking is required by that threat.

Even if the CRC was correct that the Session Law created a serious threat, the timeline of events suggests that the consequences of its passage were not “unforeseen.” The RRC objected to the original set of rules at its September 15, 2022 meeting, and renewed its objection at the February 16, 2023 meeting. The General Assembly ratified Session Law 2023-134 and presented it to the Governor on September 22, 2023, and the Session Law thereafter became law without his signature 10 days later, on October 3, 2023. While the CRC was certainly entitled to rely on the language in the APA requiring them to request return of the rules before they could be removed from the Code, it strains credulity to believe that the CRC had no level of awareness that their rules were threatened when they had been subject to objection for over a year by the time the General Assembly ratified the Session Law. Moreover, as the Commission had issued detailed staff opinions for each rule, the CRC was on notice as to what specific portions of their rules required change. Thus, it is staff’s opinion that the CRC has failed to show that immediate adoption of the rules is “required by” a serious and unforeseen threat to the public health, safety and welfare.

Alternatively, the agency asserts that the language of Session Law 2023-134 requiring return of the rules and consequent removal from the Code requires the immediate adoption of the rules through temporary rulemaking. This argument fails for several reasons. First, the language of Section 21.2(m). of Session Law 2023-134 provides the CRC with no rulemaking authority, does not direct the CRC to adopt rules, and does not change the CRC’s relevant

statutes in a way that would necessitate rulemaking. Second, as noted above, the natural consequence of the language was to remove nearly identical rules from the Code. To say that the Session Law *requires* the immediate adoption of rules which are largely unchanged from those removed from the Code, is fundamentally inconsistent with the language of the Session Law.

Based on the foregoing, staff recommends objection to all rules in this package pursuant to G.S. 150B-21.1(b)(1) on the basis that the CRC has not met its burden under G.S. 150B-21.1(a) of showing that adherence to the notice and hearing requirements of G.S. 150B-21.2 is contrary to the public interest.

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

....

- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed G.S. 150B-2 Page 3 by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

John E. Branch III
T: 919.329.3828
john.branch@nelsonmullins.com

301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
T: 919.329.3800 F: 919.329.3799
nelsonmullins.com

November 8, 2023

RE: *NC DEQ et al. v. NC RRC et al.*
CRC Post-TRO Hearing Options

Dear Ms. Lucasse,

At the hearing yesterday, you averred on behalf of the Coastal Resources Commission (“CRC”) that the public and North Carolina’s coastal resources are in peril in the absence of the rules returned by the Rules Review Commission (“RRC”) to the CRC on October 5, 2023 (the “Returned Rules”). As you are aware, the effect of the Returned Rules being returned to the CRC is that they have been removed from the Administrative Code and are no longer in effect. Regardless of the CRC’s litigation against the RRC, the RRC continues to stand ready (as it has over the last several months) to work with the CRC in the event that the CRC seeks to promulgate new rules addressing the subject matter of the Returned Rules.

Without forecasting the RRC’s position on specific rules or specific provisions within rules which we have not yet seen, the RRC reminds your client that, to the extent that the CRC wishes to mitigate any alleged harm to itself, its regulatory partners, or the regulated public, and assuming any rules promulgated meet the statutory criteria, the CRC may consider either emergency rulemaking under G.S. 150B-21.1A, or temporary rulemaking under G.S. 150B-21.1. Both of these alternatives provide the CRC with the opportunity to enter rules into the North Carolina Administrative Code under an expedited timeline. Forms for each of these options may be found as listed below:

- Temporary Rulemaking Flowchart may be found here: <https://www.oah.nc.gov/documents/rules/rulemaking-chart-temporary-rule/download>
- Temporary Rule Form (0700) may be found here: <https://www.oah.nc.gov/rules-form-0700-proposed-temporary-rule-publication-oah-website>

- Proposed Temporary Rulemaking Findings of Need (0500) may be found here: <https://www.oah.nc.gov/rules-form-0500-temporary-rulemaking-findings-need>
- Emergency Rulemaking Flowchart may be found here: <https://www.oah.nc.gov/documents/rules/rules-rulemakingchart-emergencyrule-0/download>
- Emergency Rulemaking Findings of Need may be found here: <https://www.oah.nc.gov/rules-form-0600-emergency-rulemaking-findings-need>
- Other resources (including electronic filing instructions) for potentially preparing the rules can be found in the “Information for Rulemaking Coordinators” section of the RRC’s website, here: <https://www.oah.nc.gov/rules-division/information-rulemaking-coordinators>

A number of arguments were made at the hearing yesterday about provisions in the Returned Rules, to which the RRC did not object, no longer being operative because the entire rule was returned to the CRC. The RRC notes that, as part of the potential emergency, temporary, or permanent rulemaking process, the CRC is entitled to draft its proposed rules in a way that places rule provisions over which the RRC did not previously object in one set of proposed rules, whereas the CRC could draft a separate set of proposed rules to which it is on notice that the RRC is more likely to object. The RRC would obviously have to conduct an independent analysis of these rules (if applicable) and such separation is not a guarantee that the RRC would not object to them, but given the concerns raised by the CRC at the hearing the RRC notes that separating proposed rules in that way could assist narrowing the issues.

Please let us know if you have any additional questions about this process.

Best regards,

John E. Branch III

JB

1 The Executive Director of the Board of Elections shall issue written opinions to candidates,
2 the communications media, political committees, referendum committees, or other entities upon
3 request, regarding filing procedures and compliance with this Article. Any such opinion so issued
4 shall specifically refer to this paragraph. If the candidate, communications media, political
5 committees, referendum committees, or other entities rely on and comply with the opinion of the
6 Executive Director of the Board of Elections, then prosecution or civil action on account of the
7 procedure followed pursuant thereto and prosecution for failure to comply with the statute
8 inconsistent with the written ruling of the Executive Director of the Board of Elections issued to
9 the candidate or committee involved shall be barred. Nothing in this paragraph shall be construed
10 to prohibit or delay the regular and timely filing of reports. The Executive Director shall file all
11 opinions issued pursuant to this section with the Codifier of Rules to be published unedited in
12 the North Carolina Register and the ~~North Carolina Administrative Code~~. State Board of Elections
13 website.

14 This section applies to ~~Articles and Article 22M of the General Statutes~~ this Chapter to the
15 same extent that it applies to this Article."

16 **SECTION 21.2.(l)** Any pending proposed temporary rule submitted to the Rules
17 Review Commission pursuant to G.S. 150B-21.1 on or before the day immediately prior to the
18 effective date of this act shall be returned to the agency by the Commission if:

- 19 (1) The Commission has notified the agency that the agency's statement of its
20 findings of need does not meet the criteria listed in G.S. 150B-21.1(a) or that
21 the rule does not meet the standards in G.S. 150B-21.9 or Article 2A of
22 Chapter 150B of the General Statutes;
- 23 (2) The agency has not supplemented its statement of need with additional
24 findings or submitted a new statement that meets the criteria listed in
25 G.S. 150B-21.1(a) or that the rule meets the standards in G.S. 150B-21.9 or
26 Article 2A of Chapter 150B of the General Statutes, as determined by the
27 Commission; and
- 28 (3) More than 60 days have passed since the Commission first notified the agency
29 that the statement does not meet the criteria listed in G.S. 150B-21.1(a) or that
30 the rule does not meet the standards in G.S. 150B-21.9 or Article 2A of
31 Chapter 150B of the General Statutes.

32 If a rule is returned to the agency under this section, the agency may file an action for
33 declaratory judgment within 30 days after the rule is returned in Wake County Superior Court
34 pursuant to Article 26 of Chapter 1 of the General Statutes and G.S. 150B-21.1(b2).

35 **SECTION 21.2.(m)** Any pending proposed permanent rule submitted to the
36 Commission pursuant to G.S. 150B-21.2 on or before the day immediately prior to the effective
37 date of this act shall immediately be returned to the agency if:

- 38 (1) The Commission has notified the agency that it has objected to the proposed
39 permanent rule.
- 40 (2) The agency has not submitted a change to the rule to satisfy the Commission's
41 objection.
- 42 (3) More than 60 days have passed since the Commission first notified the agency
43 of the Commission's objection to the proposed rule.

44 If a rule is returned to the agency under this section, the agency may file an action for
45 declaratory judgment within 30 days after the rule is returned to the agency in Wake County
46 Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

47 **SECTION 21.2.(n)** Subsection (e) of this section is effective when it becomes law
48 and applies to rules adopted on or after that date. Subsections (j) and (k) of this section are
49 effective when they become law and apply to filings on or after that date. The remainder of this
50 section is effective when it becomes law.

51

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0507

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule purports to describe “unique coastal geological formations”, explain their “significance”, lay out the CRC’s “objectives” for management of these formations, designate Jockey’s Ridge, a large sand dune in Nags Head, North Carolina, as a unique coastal geological formation, and finally to lay out specific use standards for development within the Jockey’s Ridge area of environmental concern (“AEC”). In addition to staff’s objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule on all four grounds of G.S. 150B-21.9.

In paragraph (a), the agency attempts to define “unique coastal geologic formations”, which are a type of AEC enumerated by the legislature in the Coastal Area Management Act. However, the definition offered is almost entirely self-referential: unique coastal geologic formations are “sites that contain *geologic formations* that are *unique* or significant

components of *coastal* systems, or that are notable examples of *geologic formations* or processes in the coastal area.” The rule does not explain what is and is not considered a “geologic formation”, does not define what degree of exclusivity transforms an ordinary geologic formation into a “unique” geologic formation, and does not define the coastal area in which these formations must be found. Further, to the extent that the definition contains words other than those in the term being defined, those words are equally vague and may impermissibly expand the statutory term. The agency does not explain what makes a geologic formation “notable” or “significant”, or how those qualifiers are different from “unique”. Nor does the agency explain how a geologic “process” differs from a “formation”. Without defining these terms, it is impossible for the regulated public, the agency, or a reviewing judge to determine whether the description offered in this rule remains within the meaning of “unique geologic formation” as used in G.S. 113A-113(b)(4)g.

Paragraph (b) purports to describe the significance of “unique coastal geological areas,” again using vague and ambiguous terms such as “unique,” “important,” “uncontrolled,” and “incompatible.” Without further specificity, this paragraph appears to be a mere policy statement, as opposed to a “regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency.” G.S. 150B-2(8a) (2023).

Similarly, paragraph (c) lays out the CRC’s objectives in preserving unique coastal geologic areas in impermissibly vague and unclear terms that are more akin to policy than rule. The agency states that its objective is to “preserve unique resources of more than local significance that function as key physical components of natural systems, as important scientific and educational sites, or as valuable scenic resources.” Terms such as “unique”, “more than local significance,” “key”, “important”, “valuable”, and even “scenic” are all undefined and as such are entirely subjective. Additionally, with the exception of the verb “preserve”, none of this sentence actually expresses an objective; to the contrary, it appears to continue to define—in equally vague terms as in paragraph (a)—what the CRC considers a “unique coastal geologic formation.”

Items (c)(1)-(3) contain the agency’s specific objectives for the functions of a unique coastal geologic formation. The CRC wishes that the formulation be able to “interact with other components of the identified systems”, “be preserved for study purposes”, and be preserved to “protect the values” of the feature “as expressed by the local government and

citizenry”. Again, the language used is vague, subjective, and appears to describe the agency’s policy preferences, rather than specific enactments of the Coastal Area Management Act or the CRC’s procedure or practice requirements. Moreover, there is no process specified for how the local government or citizenry is to express the “values” that are sought to be preserved.

Paragraph (d) is a designation of Jockey’s Ridge as a unique coastal geologic formation AEC. While portions of this paragraph meet the definition of a rule, namely the identification and location of the feature, lines 32-37, which include interesting facts about Jockey’s Ridge are “not statements of general applicability interpreting or implementing an act of the General Assembly or U.S. Congress” and as such are inappropriate for inclusion in a Rule.

In Paragraph (e)(1), the CRC requires developers seeking the removal of more than ten cubic yards of sand per year to seek “a permit” without specifying whether that is a CAMA major, minor, or general permit, or a fill and dredge permit under G.S. 113-229.

* * * * *

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .

....

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

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

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

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

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

....

- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed G.S. 150B-2 Page 3 by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0508

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule lays out use standards for development permits in fragile coastal resource areas. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule on all four grounds of G.S. 150B-21.9.

Item (1) and subitems (a)-(c) contain "policy" terms, as they give vague and unspecific terms for approval of permits. For instance, (a) states that "Development shall preserve the values of the individual resource as it functions as a critical component of a natural system." Similarly, in (b) and (c), the Rule seeks to preserve "values of the resource as a unique scientific, associative, or educational resource" and "the aesthetic values of a resource as identified by the local government and citizenry." The reference to "values" which are undefined and ultimately subjective turns this from a rule to a mere statement of policy.

Brian Liebman
Commission Counsel

Moreover, in item (1)(c), there is no process specified for how the local government or citizenry is to express the “values” that are sought to be preserved.

In item (4), the CRC states that development shall be approved only if it finds that the project is “of equal or greater public benefit than those benefits lost or damaged through development.” Because the terms used throughout this rule are so vague, it appears as if this language allows the CRC to essentially pick and choose winners at whim. The rule conditions granting of a permit on the CRC’s finding that an applicant’s project will be equally or more beneficial to the public than whatever portion of the area of environmental concern is damaged by its construction, without defining the contours of “public benefit” and without providing any guidance as to how the CRC will quantify and weigh these subjective “benefits” against each other.

* * * * *

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .

....

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

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

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

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

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

....

(7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

(8a) Rule. – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed G.S. 150B-2 Page 3 by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.

- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .0509

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule purports to define “significant coastal archaeological resources”, explain their “significance”, lay out the CRC’s “objectives” for management of these resources, describe specific use standards for development within such areas of environmental concern (“AEC”), and finally to designate Permuda Island as a significant coastal archaeological resource AEC. In addition to staff’s objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule on all four grounds of G.S. 150B-21.9.

In paragraph (a), the agency attempts to define “significant coastal archaeological resources”, which are a type of AEC enumerated by the legislature in the Coastal Area Management Act. However, the definition offered is self-referential: significant coastal archaeological resources are “areas that contain *archaeological* remains (objects, features,

Brian Liebman
Commission Counsel

and/or sites) that have more than local *significance* to history or prehistory.” The rule fails to define the term “more than local significance”, and as such offers no way for the regulated public, the agency, or a reviewing judge to determine whether a particular resource meets the description offered here or in G.S. 113A-113(b)(4)h.

Additionally, paragraph (a) delegates authority to “evaluate” significant coastal archaeological resources to the Department of Natural and Cultural Resources. Although the text of the Rule states that this is “in accordance with G.S. 113A-113”, that statute contains no mention of the Department of Natural and Cultural Resources and gives it no role in determining what shall be designated as an AEC. Beyond this apparent lack of statutory authority, the Rule does not say for what reasons DNCR would evaluate these resources, or what standards DNCR would use to perform such an evaluation.

Paragraph (b), like many of the “significance” paragraphs contained within Section .0500, is a blend of ambiguous or subjective terms and policy language. The rule states that these are “important educational, scientific, or aesthetic resources,” which would be “jeopardized” by “uncontrolled or incompatible development.” They are also “associated” with historic events or with the lives of historical figures. No detail as to the degree of association necessary is included here. The rule goes on to state that these resources “may yield” or have yielded “important” historical information. None of these terms are defined in this Rule, any statute in the History Note, or any other portion of Subchapter 07H. Without further specificity, this paragraph appears to be a mere policy statement, as opposed to a “regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency.” G.S. 150B-2(8a) (2023).

Similarly, paragraph (c) lays out the CRC’s objectives in preserving significant coastal archaeological resources in impermissibly vague and unclear terms that are more akin to policy than rule. The agency states that its objective is to “conserve coastal archaeological resources of more than local significance to history or prehistory that constitute important scientific sites or are valuable educational, associative, or aesthetic resources.” Terms such as “more than local significance”, “important”, and “valuable” are all undefined and as such are entirely subjective. Additionally, with the exception of the verb “conserve”, none of this sentence actually expresses an objective; to the contrary, it appears to continue to define—in equally

vague terms as in paragraph (a)—what the CRC considers a “significant coastal archaeological resource.”

In paragraph (d), the CRC sets out the general use standards for development in a significant coastal archaeological resource AEC. In Subparagraph (d)(1), the CRC requires applicants to consider one of three avoidance measures. The first requires use of “no impact” spaces in construction plans. However, the term “impact” is not defined, and as such, it is not clear what activities or effects would be prohibited in those spaces. The second would require the developer to limit “ground disturbing activities,” again without defining the term. Finally, the developer could donate a preservation easement to the State or “upon approval by the Department of Natural and Cultural Resources, [to] a historic preservation agency or organization.” None of the statutes cited in this Rule’s History Note give either the CRC or the DNCR authority to restrict the donation of private property. Subparagraph (d)(2) requires applicants to implement an “investigation and resource management plan,” which “*shall* be developed in consultation with the Department of Natural and Cultural Resources.” It is unclear what the CRC is asking applicants to do by requiring them to “consult” with DNCR, and how extensive that process may be. Subparagraph (d)(2)(B) requires an archaeological research design as part of any archaeological investigation. Those designs are “subject to the approval of the Department of Natural and Cultural Resources,” which is provided 30 days for “review and comment”. Finally, Subparagraph (d)(2)(C) requires that any data shall be recorded, and artifacts curated at “an approved repository in consultation with the Department of Natural and Cultural Resources.” While it may be good policy to involve a government agency such as DNCR in the investigation and preservation of archaeological resources, none of the statutes cited in this Rule’s History Note permit DNCR involvement in the designation of AECs or in the issuance of permits for development therein, and no statute cited provides the CRC with authority to delegate such authority to DNCR.

Paragraph (e) designates Permuda Island as a significant coastal archaeological resource area of environmental concern. While portions of this paragraph meet the definition of a rule, namely the identification and location of the feature, lines 7-11 on page 3, which include interesting facts about Permuda Island are not statements of general applicability interpreting or implementing an act of the General Assembly or U.S. Congress, and as such may not be adopted as a rule.

* * * * *

Brian Liebman
Commission Counsel

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .

. . . .

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

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

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

Consequently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to adopt anything other than a “Rule”; pursuant to G.S. 150B-21.9(a)(2) as the rule contains extensive use of vague and ambiguous language; pursuant to G.S. 150B-21.9(a)(3) as policy language by definition cannot be

“reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency; and pursuant to G.S. 150B-21.9(a)(4) as adoption of policy language as a rule violates Part 2 of Article 2A of the APA, given that G.S. 150B-21.1(a) states that the agency may only adopt a temporary “rule.”

Independently, staff recommends that the RRC object to this Rule pursuant to G.S. 150B-21.9(a)(1), as the CRC lacks statutory authority to allow DNCR involvement in the designation of AECs or in the issuance of permits for development therein.

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

....

- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

....

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

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
- k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed G.S. 150B-2 Page 3 by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
- l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. – An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- (6) The need for a rule establishing review criteria as authorized by G.S. 131E-183(b) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
- (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in G.S. 113-129(8a).
- (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
- (9) The need for the Commissioner of Insurance to implement the provisions of G.S. 58-2-205.
- (10) The need for the State Chief Information Officer to implement the information technology procurement provisions of Article 15 of Chapter 143B of the General Statutes.
- (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of G.S. 163-22.2.
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
- (12) Repealed by Session Laws 2015-264, s. 22, effective October 1, 2015.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
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- (17) To maximize receipt of federal funds for the Medicaid program within existing State appropriations, to reduce Medicaid expenditures, and to reduce Medicaid fraud and abuse.

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07I .0702

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

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

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

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Commission Counsel

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

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

§ 113A-117. Implementation and enforcement programs.

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

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

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

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

§ 113A-118. Permit required.

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

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

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

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

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

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

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

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

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

§ 113A-124. Additional powers and duties.

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

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

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

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0203

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule contains requirements for project plans or work plats submitted as part of a permit application. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule for lack of statutory authority and lack of clarity.

It appears that the statutes cited as authority for this Rule are insufficient for all of its provisions. G.S. 113-229(n)(3) merely contains the definition of "marshland." G.S. 113-230(a) gives the Secretary of DEQ authority to issue orders regarding activities in "coastal wetlands". Both appear to be inapposite. G.S. 113A-119 allows the Secretary and the CRC to set the form and content of Coastal Area Management Act (CAMA) permits, but is silent as to Dredge and Fill permits. Finally, G.S. 113A-124 contains several "additional powers and duties" granted to the Secretary of DEQ and the CRC, but does not appear to explicitly reach the issuance and

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Commission Counsel

conditioning of either CAMA or Dredge and Fill permits, as regulated by paragraph (d) of this Rule. Thus, to the extent that the statutes cited in the History Note are inapposite or insufficient, it is staff's opinion that the agency has failed to meet its burden of showing statutory authority for this Rule. To be clear, staff is not of the opinion that the agency lacks statutory authority to set the contents of a Dredge and Fill permit or to condition and issue both CAMA and Dredge and Fill permits; rather, the agency has merely failed to properly cite to the applicable statutes.

However, it is staff's opinion that the agency lacks statutory authority for this Rule to the extent that the CRC would require approval for projects that are outside the scope of its permitting authority. The final sentence of paragraph (d) permits an applicant to proceed with work outside an AEC "that is determined by the Division of Coastal Management to not have a *direct impact* on the AEC" (emphasis added) while the permit application is pending. Pursuant to G.S. 113A-118(a), CAMA permits are required only "before undertaking any development *in* any area of environmental concern" (emphasis added). Similarly, G.S. 113-229(a) states that dredge and fill permits are required only in "estuarine waters, tidelands, marshlands, or State-owned lakes[.]" The CRC is not authorized by Article 7 of Chapter 113A or by G.S. 113-229 to require developers to seek government approval for projects that are *outside* of an AEC, or which do not involve dredging or filling in the waters and lands enumerated above. Although the language of the Rule appears to conform to this principle, a careful reading shows the opposite; applicants are prohibited from proceeding with work outside an AEC until the Division of Coastal Management determines that no "direct impact" will occur in an AEC.

* * * * *

Beyond these issues with statutory authority, this Rule contains significant ambiguities. As an initial matter, it is unclear which kind of permit applications this Rule governs. To staff's knowledge, CAMA authorizes three kinds of permits, Major permits, Minor permits, and General permits. Additionally, G.S. 113-229 authorizes Dredge and Fill permits. The Rule appears to set additional requirements for CAMA Major and Dredge and Fill permits in paragraph (c), which supports an inference that the balance of the rule applies to all permits. However, Rule 07J .0204(c)(2) contains the separate requirement that "a work plan shall be attached to all CAMA minor permit applications" which largely echoes the requirements found in paragraph (a) of the instant Rule. Thus, it is unclear whether this Rule applies to all permits issued by the CRC, or only to CAMA Major and Dredge and Fill permits.

In paragraph (c), the CRC requires that applications for a Major or Dredge and Fill permit “include” a list of three types of information. Because the term “include” connotes an open-ended requirement, it is unclear whether this list of required information is exclusive, or whether CRC may augment its requirements on a case-by-case basis. Additionally, item (c)(3) contains the requirement that the applicant disclose the “amount of ground disturbance in the AEC measured in acres or square feet.” The term “ground disturbance” is undefined, and it is also unclear whether the term encompasses “ground disturbance” resulting from the development, or whether it refers to an existing quality “in the AEC”.

In paragraph (d), the Rule states that “[f]ollowing review of the permit application, a permit may be issued conditioned in accordance with G.S. 143B-279.4.” The use of the passive tense obscures *who* reviews and issues the permit, and *who* places the conditions on the permit. Given the contents of Rules 07J .0207 and .0208, which would permit the CRC to circulate permit applications to an unspecified universe of State, federal, and local agencies for review, comment, and “recommendations” for permit conditions, the failure to specify who issues and conditions the permit here is particularly problematic. Adding complexity to the ambiguity, a review of G.S. 143B-279.4 reveals that this statute provides only that the Secretary of Environmental Quality is the head of the Department of Environmental Quality, and that he or she may appoint two Deputy Secretaries. G.S. 143B-279.4 contains no mention of the conditioning of permits.

Finally, as mentioned above, the final sentence of paragraph (d) permits an applicant to proceed with work outside an AEC “that is determined by the Division of Coastal Management to not have a *direct impact* on the AEC” (emphasis added) while the permit application is pending. The term “direct impact” is undefined, and it is unclear what level of “impact” a project must have on an AEC before the applicant is allowed to proceed. More importantly, the Rule is silent as to the grounds the Division of Coastal Management will use to make its determination.

Based on the foregoing, staff recommends objection to this Rule pursuant to G.S. 150B-21.9(a)(1) for lack of statutory authority, and pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

- (1) The size of the development.
- (2) The impact of the development on areas of environmental concern.
- (3) How often the class of development is carried out.
- (4) The need for on-site oversight of the development.
- (5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii)

providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to

consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

- (1) "State-owned lakes" include man-made as well as natural lakes.
- (2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.
- (3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh

and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*). (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55.)

§ 113A-118. Permit required.

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

(1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environmental Quality, the Department of Administration, the North Carolina Oil and Gas Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

(2) A "minor development" is any development other than a "major development."

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

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). The fees

associated with any permit issued pursuant to this subsection or rules adopted pursuant to this subsection shall be waived. (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a); 2007-485, s. 5; 2012-143, s. 1(d); 2014-4, s. 4(c); 2015-241, s. 14.30(u).)

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

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

whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

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

- (1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;
- (2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;
- (3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

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

§ 113A-124. Additional powers and duties.

(a) The Secretary shall have the following additional powers and duties under this Article:

- (1) To conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.
- (2) To cooperate with the Secretary of the Department of Administration in drafting State guidelines for the coastal area.
- (3) Repealed by Session Laws 2021-158, s. 2(b), effective July 1, 2021, and applicable to permit applications received on or after that date.
- (4) To propose rules to implement this Article for consideration by the Commission.
- (5) To delegate such of his powers as he may deem appropriate to one or more qualified employees of the Department or to any local government, provided that the provisions of any such delegation of power shall be set forth in departmental rules.
- (6) To delegate the power to conduct a hearing, on his behalf, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the record of the hearing to the Secretary for decision or action.

(b) In order to carry out the provisions of this Article the Secretaries of Administration and of Environmental Quality may employ such clerical, technical and professional personnel, and consultants with such qualifications as the Commission may prescribe, in accordance with the State personnel rules and budgetary laws, and are hereby authorized to pay such personnel from any funds made available to them through grants, appropriations, or any other sources. In addition, the said secretaries may contract with any local governmental unit or lead regional organization to carry out the planning provisions of this Article.

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

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified

employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

- (5) Repealed by Session Laws 1987, c. 827, s. 141.
 - (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
 - (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
 - (8) To adopt rules to implement this Article.
 - (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.
- (d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

§ 113A-127. Coordination with the federal government.

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0204

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule contains requirements for permit applications and the process by which the CRC will process these applications. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule for lack of clarity.

In paragraph (b)(1), the CRC lists the required information for an application for either a CAMA Major permit or a Major Modification to a Major permit. Among these, in (b)(1)(H), the applicant is required to state the "total ground disturbance resulting from the proposed development" However, the term "ground disturbance" is not defined, and in contrast to Rule .0203, it is unclear what units (i.e. acres or square feet) the applicant is to use. Additionally, the agency uses the term "land disturbance" in (c)(1)(F), again without definition and without noting what the difference is, if any, between these terms.

Brian Liebman
Commission Counsel

In paragraph (b)(1)(N), the CRC requires the applicant to provide “a signed AEC Hazard Notice if the project is in the Ocean Hazard AEC if applicable[.]” First, there is no reference to an AEC Hazard Notice in Subchapter 07 of CRC’s Rules, and staff could not find reference to that document in Article 7 of Chapter 113A of the General Statutes. It is unclear what this document is or who must sign it. Further, the use of “if applicable” at the end of the sentence creates further ambiguity as to when it is required to submit this document.

In paragraph (c)(1)(J), the applicant is required to submit a “project drawing that includes the details stated in 15A NCAC 07H .0204(2)[.]” That rule expired on April 1, 2018 and is no longer in the North Carolina Administrative Code. As such, the details of the required drawing are undefined.

In paragraph (c)(1)(M), the agency requires “indication” that the applicant is an owner of the property. It is unclear what would satisfy that requirement, and the term “indication” differs from the requirement in (b) that the applicant provide specific details from the property deed.

Based on the foregoing, staff recommends objection to this Rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

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

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

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

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

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

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

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

15A NCAC 07H .0204 AECS WITHIN THE ESTUARINE AND OCEAN SYSTEM

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-124;
Eff. September 9, 1977;
Amended Eff. August 1, 1998;
Expired Eff. April 1, 2018 pursuant to G.S. 150B-21.3A.

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0207

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule governs the process by which the CRC reviews applications for CAMA major permits, as well as fill and dredge permits issued under G.S. 113-229. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule for lack of statutory authority and for lack of clarity.

The Rule states that, "[i]n order to comply with G.S. 113A-120(a)(4)," the Department of Environmental Quality "will circulate major development permit applications to the several state review agencies having expertise in the criteria enumerated in G.S. 113A-113(b)(1) through (b)(9)." Upon circulation, the Rule not only authorizes "each reviewing agency" to make an independent analysis of the project and submit recommendations to the Department

Brian Liebman
Commission Counsel

of Environmental Quality for use in the Department's review of a permit application, but to "request additional information" related to the project.

However, none of the statutes cited by the agency for statutory authority directs CRC to provide applications to any other state agency for review. While G.S. 113-229 states that CRC "shall" circulate fill and dredge permit applications "among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have" this statutory provision does not appear to reach CAMA permits issued under G.S. 113A-118.

The reference to G.S. 113A-120(a)(4) is also inapposite; far from authorizing CRC to circulate CAMA permits to any State agency it chooses, G.S. 113A-120(a)(4) states only that a permit shall be denied if the CRC or local permitting authority finds that the development will occur in a "fragile or historic area, or other area containing environmental or natural resources of more than local significance," and will result in "major or major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4)."

G.S. 113A-124(a)(1) provides that the Secretary of Environment Quality is empowered to "conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments." Nowhere within this language is the Secretary empowered to circulate permit applications to any number of unspecified State agencies.

Finally, G.S. 113A-127 requires only that State agencies "shall keep informed of federal and interstate agency plans, activities, and procedures" and take "reasonable steps . . . to preserve the integrity" of their policies where they conflict with federal or interstate agency plans. Again, the statute provides no authority to circulate permit applications to any other State agency for review. As such, it is staff's opinion that the agency lacks statutory authority for this Rule.

Assuming *arguendo* that the CRC possesses statutory authority for this Rule, there are many instances of unclear or ambiguous language which obscure its meaning. In Paragraph (b), the CRC states that the Department shall circulate major development permits to "the State review agencies having expertise in the criteria enumerated in G.S. 113A-113(b)(1)

through (b)(9). While G.S. 113A-113(b) mentions several agencies such as the Environmental Management Commission and the Wildlife Resources Commission, the language of the Rule does not make clear whether the agencies mentioned in G.S. 113-113(b) are the only agencies to which the Department will circulate permits, or how the Department determines that a particular agency has relevant expertise.

Similarly, in Paragraph (c), the Department is authorized to circulate dredge and fill permit applications to “the State review agencies having expertise in those matter enumerated in G.S. 113-229(e)(1) through (e)(5). Here, G.S. 113-229(e)(1) through (5) contains no explicit reference to another State agency, providing even less clarity as to which agencies the Department will select to review dredge and fill permits, and how those agencies will be chosen.

In Paragraph (e), the Rule states that if a “reviewing agency” submits a request for additional information that “is deemed necessary for a complete review of the application,” the applicant will be notified and “permit processing suspended according to 15A NCAC 07J .0204(d).” It is unclear who makes the determination that the request for additional information is “necessary” for review of the application. Given the interplay of several different State departments and agencies contemplated by this Rule, the lack of specificity here is particularly problematic.

Based on the foregoing, staff recommends objection to this Rule pursuant to G.S. 150B-21.9(a)(1) for lack of statutory authority, and pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

- (1) The size of the development.
- (2) The impact of the development on areas of environmental concern.
- (3) How often the class of development is carried out.
- (4) The need for on-site oversight of the development.
- (5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii)

providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to

consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

- (1) "State-owned lakes" include man-made as well as natural lakes.
- (2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.
- (3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh

and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*). (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55.)

§ 113A-118. Permit required.

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

(1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environmental Quality, the Department of Administration, the North Carolina Oil and Gas Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

(2) A "minor development" is any development other than a "major development."

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

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). The fees

associated with any permit issued pursuant to this subsection or rules adopted pursuant to this subsection shall be waived. (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a); 2007-485, s. 5; 2012-143, s. 1(d); 2014-4, s. 4(c); 2015-241, s. 14.30(u).)

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

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

whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

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

- (1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;
- (2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;
- (3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

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

§ 113A-124. Additional powers and duties.

(a) The Secretary shall have the following additional powers and duties under this Article:

- (1) To conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.
- (2) To cooperate with the Secretary of the Department of Administration in drafting State guidelines for the coastal area.
- (3) Repealed by Session Laws 2021-158, s. 2(b), effective July 1, 2021, and applicable to permit applications received on or after that date.
- (4) To propose rules to implement this Article for consideration by the Commission.
- (5) To delegate such of his powers as he may deem appropriate to one or more qualified employees of the Department or to any local government, provided that the provisions of any such delegation of power shall be set forth in departmental rules.
- (6) To delegate the power to conduct a hearing, on his behalf, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the record of the hearing to the Secretary for decision or action.

(b) In order to carry out the provisions of this Article the Secretaries of Administration and of Environmental Quality may employ such clerical, technical and professional personnel, and consultants with such qualifications as the Commission may prescribe, in accordance with the State personnel rules and budgetary laws, and are hereby authorized to pay such personnel from any funds made available to them through grants, appropriations, or any other sources. In addition, the said secretaries may contract with any local governmental unit or lead regional organization to carry out the planning provisions of this Article.

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

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified

employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

- (5) Repealed by Session Laws 1987, c. 827, s. 141.
 - (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
 - (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
 - (8) To adopt rules to implement this Article.
 - (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.
- (d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

§ 113A-127. Coordination with the federal government.

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Coastal Resources Commission

RULE CITATION: 15A NCAC 07J .0208

DATE ISSUED: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

The above-captioned temporary rule governs the process by which the CRC reviews applications for CAMA major permits under G.S. 113A-120, as well as fill and dredge permits issued under G.S. 113-229. In addition to staff's objection to this rule for failure to show justification for temporary rulemaking, staff recommends objection to this rule for lack of statutory authority and for lack of clarity.

The Rule states that, "[i]n compliance with G.S. 113A-120(a)(4) and G.S. 113A-120(a)(2), each of the State, federal, and local reviewing agencies" are empowered to submit specific recommendations as to the development, operation, and maintenance of a project, which may be enforced against the applicant by the Department of Environmental Quality as permit conditions.

Brian Liebman
Commission Counsel

While G.S. 113-229 states that CRC “shall” circulate fill and dredge permit applications “among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have” this statutory provision does not appear to reach CAMA permits issued under Article 7, Chapter 113A of the General Statutes, and none of the other statutes referenced by the agency appear to confer this authority.

The CRC references G.S. 113A-120(a) in the body of the Rule. To the extent the agency intends this reference to confer statutory authority, it fails.¹ Far from authorizing the Department to circulate CAMA permit applications to any State, federal, or local agency it chooses for the purpose of soliciting “specific recommendations” that could apply for the life of the completed project, G.S. 113A-120(a)(2) and (a)(4) impose specific grounds for the denial of a permit.

Similarly, G.S. 113A-120(b) provides only that a permit may be “conditioned upon whatever terms of operation or use of the development that are reasonably necessary to protect the public interest” It is silent as to *who* may impose those conditions, and as such does not empower the CRC or the Department to circulate permit applications and solicit permit conditions.

G.S. 113A-124(a)(1) provides that the Secretary of Environment Quality is empowered to “conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.” Nowhere within this language is the Secretary empowered to circulate permit applications to any number of unspecified State, federal, or local agencies.

Finally, G.S. 113A-127 requires only that State agencies “shall keep informed of federal and interstate agency plans, activities, and procedures” and take “reasonable steps . . . to preserve the integrity” of their policies where they conflict with federal or interstate agency plans. Again, the statute provides no authority to circulate permit applications to any other State agency for review. As such, it is staff’s opinion that the agency lacks statutory authority for this Rule.

¹ The agency cites G.S. 113A-120 in the History Note, but specifies paragraph (b), rather than (a).

Assuming *arguendo* that the CRC possesses statutory authority for this Rule, it also contains impermissibly vague and ambiguous language. In Paragraph (a), the CRC repeatedly references “each of the State, federal, and local reviewing agencies” without providing a list of these agencies. It should also be noted that this is broader language than used in 07H .0207, which referred only to “State review agencies having experience expertise” in the relevant subject matter. Here, that is seemingly expanded to *any* State, federal, or local agency to which CRC or the Department circulates the permit application.

Based on the foregoing, staff recommends objection to this Rule pursuant to G.S. 150B-21.9(a)(1) for lack of statutory authority, and pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider all of the following:

- (1) The size of the development.
- (2) The impact of the development on areas of environmental concern.
- (3) How often the class of development is carried out.
- (4) The need for on-site oversight of the development.
- (5) The need for public review and comment on individual development projects.

(c2) General permits may be issued by the Commission as rules under the provisions of G.S. 113A-118.1. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall notify the owner of each tract of riparian property that adjoins that of the applicant. An applicant may satisfy the required notification of adjoining riparian property owners by either (i) obtaining from each adjoining riparian property owner a signed statement that the adjoining riparian property owner has no objection to the proposed project or (ii)

providing a copy of the applicant's permit application to each adjoining riparian property owner by certified mail. If the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, publication in accordance with the rules of the Commission shall serve to satisfy the notification requirement. An owner may file written objections to the permit with the Department for 30 days after the owner is served with a copy of the application by certified mail. In the case of a special emergency dredge or fill permit the applicant must certify that the applicant took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in subsection (e) of this section, upon the express understanding from the applicant that the applicant will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 and the granting of variances under this section and G.S. 113A-120.1 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to

consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the issuance of a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) Except as provided in subsection (h2) of this section, all construction and maintenance dredgings of beach-quality sand may be placed on the affected downdrift ocean beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift ocean beaches.

(h2) Clean, beach quality material dredged from navigational channels within the active nearshore, beach or inlet shoal systems shall not be removed permanently from the active nearshore, beach or inlet shoal system. This dredged material shall be disposed of on the ocean beach or shallow active nearshore area where it is environmentally acceptable and compatible with other uses of the beach.

(i) Subject to subsections (h1) and (h2) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(l) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

- (1) "State-owned lakes" include man-made as well as natural lakes.
- (2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.
- (3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh

and marsh plant species: Smooth or salt water Cordgrass (*Spartina alterniflora*), Black Needlerush (*Juncus roemerianus*), Glasswort (*Salicornia* spp.), Salt Grass (*Distichlis spicata*), Sea Lavender (*Limonium* spp.), Bulrush (*Scirpus* spp.), Saw Grass (*Cladium jamaicense*), Cattail (*Typha* spp.), Salt-Meadow Grass (*Spartina patens*), and Salt Reed-Grass (*Spartina cynosuroides*). (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c); 2000-172, ss. 3.1, 3.2; 2002-126, ss. 29.2(h)-(j); 2011-398, s. 36; 2013-413, s. 55.)

§ 113A-118. Permit required.

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

(1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environmental Quality, the Department of Administration, the North Carolina Oil and Gas Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

(2) A "minor development" is any development other than a "major development."

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

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). The fees

associated with any permit issued pursuant to this subsection or rules adopted pursuant to this subsection shall be waived. (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a); 2007-485, s. 5; 2012-143, s. 1(d); 2014-4, s. 4(c); 2015-241, s. 14.30(u).)

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

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

whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

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

- (1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;
- (2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;
- (3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or
- (4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

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

§ 113A-124. Additional powers and duties.

(a) The Secretary shall have the following additional powers and duties under this Article:

- (1) To conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.
- (2) To cooperate with the Secretary of the Department of Administration in drafting State guidelines for the coastal area.
- (3) Repealed by Session Laws 2021-158, s. 2(b), effective July 1, 2021, and applicable to permit applications received on or after that date.
- (4) To propose rules to implement this Article for consideration by the Commission.
- (5) To delegate such of his powers as he may deem appropriate to one or more qualified employees of the Department or to any local government, provided that the provisions of any such delegation of power shall be set forth in departmental rules.
- (6) To delegate the power to conduct a hearing, on his behalf, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the record of the hearing to the Secretary for decision or action.

(b) In order to carry out the provisions of this Article the Secretaries of Administration and of Environmental Quality may employ such clerical, technical and professional personnel, and consultants with such qualifications as the Commission may prescribe, in accordance with the State personnel rules and budgetary laws, and are hereby authorized to pay such personnel from any funds made available to them through grants, appropriations, or any other sources. In addition, the said secretaries may contract with any local governmental unit or lead regional organization to carry out the planning provisions of this Article.

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

- (1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.
- (2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.
- (3) To hold such public hearings as the Commission deems appropriate.
- (4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified

employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

- (5) Repealed by Session Laws 1987, c. 827, s. 141.
 - (6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).
 - (7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.
 - (8) To adopt rules to implement this Article.
 - (9) To delegate the power to approve land-use plans in accordance with G.S. 113A-110(f) to any qualified employee of the Department.
- (d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a); 2015-241, s. 14.30(v); 2017-209, s. 5(a); 2021-158, s. 2(b).)

§ 113A-127. Coordination with the federal government.

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A 07M .0401 Temporary

RECOMMENDATION DATE: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

William W. Peaslee
Commission Counsel

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

G.S. 150B-2

...

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

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

16 USC Ch 33 §1455. Administrative grants

(a) Authorization; matching funds

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

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

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

(b) Grants to coastal states; requirements

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

(c) Allocation of grants to coastal states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The State has—

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

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

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

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

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

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

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

(I) shall consider the comments;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) The management program provides for—

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

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

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

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

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

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

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A NCAC 07M .0402 Temporary

RECOMMENDED ACTION: April 5, 2024

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

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

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A 07M .0403 Temporary

RECOMMENDATION DATE: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .
. . . .
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

G.S. 150B-2

...

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

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

16 USC Ch 33 §1455. Administrative grants

(a) Authorization; matching funds

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

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

(b) Grants to coastal states; requirements

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

(c) Allocation of grants to coastal states

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

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

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

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

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

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

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

(3) The State has—

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

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

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

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

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

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

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

(I) shall consider the comments;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) The management program provides for—

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

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

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

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

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

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

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A 07M .0701 Temporary

RECOMMENDATION DATE: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .*
-*
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

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

- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (8a) Rule. – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 - 1. Declaratory rulings under G.S. 150B-4.
 - 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

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

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

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

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

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

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

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

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

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

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

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

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

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

16 USC Ch. 33 §1455. Administrative grants

(a) Authorization; matching funds

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

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

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

(b) Grants to coastal states; requirements

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

(c) Allocation of grants to coastal states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The State has—

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

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

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

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

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

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

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

(I) shall consider the comments;

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

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

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

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

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

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

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

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

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

(A) to administer land use and water use regulations to control development¹ to ensure compliance with the management program, and to resolve conflicts among competing uses; and

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

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

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

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

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

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

(13) The management program provides for—

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

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

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

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

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

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

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

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

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

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

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

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

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

RULE CITATION: 15A 07M .0704 Temporary

RECOMMENDATION DATE: April 5, 2024 RECOMMENDED ACTION:

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

COMMENT:

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

Paragraph (a) self-proclaims that "the policy statements in this Section are enforceable."¹

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

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

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

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

William W. Peaslee
Commission Counsel

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .
-
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

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

- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy.** – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (8a) Rule.** – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 1. Declaratory rulings under G.S. 150B-4.
 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

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

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

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

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

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

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

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

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

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

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

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

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

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

16 USC Ch. 33 §1455. Administrative grants

(a) Authorization; matching funds

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

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

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

(b) Grants to coastal states; requirements

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

(c) Allocation of grants to coastal states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The State has—

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

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

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

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

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

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

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

(I) shall consider the comments;

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

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

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

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

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

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

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

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

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

(A) to administer land use and water use regulations to control development¹ to ensure compliance with the management program, and to resolve conflicts among competing uses; and

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

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

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

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

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

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

(13) The management program provides for—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G.S. 150B-2

...

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

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

William W. Peaslee
Commission Counsel

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Coastal Resources Commission

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

RECOMMENDATION DATE: April 5, 2024

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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

William W. Peaslee
Commission Counsel

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

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

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

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

Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term does not include the following:

- a. Statements concerning only the internal management of an agency . . . including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency . . .
-
- c. nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

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

- (6) Person aggrieved. – Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.
- (7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.
- (7a) Policy. – Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) Residence. – Domicile or principal place of business.
- (8a) Rule. – Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 - 1. Declaratory rulings under G.S. 150B-4.
 - 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

- i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.
 - l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) Substantial evidence. – Relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3, 30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

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

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

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

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

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

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

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

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

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

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

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

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

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

16 USC Ch. 33 §1455. Administrative grants

(a) Authorization; matching funds

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

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

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

(b) Grants to coastal states; requirements

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

(c) Allocation of grants to coastal states

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The State has—

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

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

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

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

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

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

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

(I) shall consider the comments;

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

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

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

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

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

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

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

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

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

(A) to administer land use and water use regulations to control development¹ to ensure compliance with the management program, and to resolve conflicts among competing uses; and

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

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

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

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

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

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

(13) The management program provides for—

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

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

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

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

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

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

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

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

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

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

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

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