



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

February 22, 2023

Jennifer Everett, Rulemaking Coordinator  
North Carolina Coastal Resources Commission  
217 West Jones Street  
Raleigh, NC 27603  
**Sent via email only to: [jennifer.everett@ncdenr.gov](mailto:jennifer.everett@ncdenr.gov)**

Re: Continued Objection to 15A NCAC 07H .2305

Dear Ms. Everett:

At its meeting on February 16, 2023, the Rules Review Commission (“RRC”) adopted the attached staff recommendation by voting to continue the objection made at the September 2022 Meeting. The RRC determined that the Coastal Resources Commission (“CRC”) had neither satisfied the September 2022 RRC objection, nor made any changes to the language of this Rule to attempt to satisfy the original objection, and, therefore, the RRC continues to object pursuant to G.S. 150B-21.12(c) for the reasons set forth in the staff recommendation.

The attached staff memoranda further delineates the ambiguity of the language used in this Rule, to which the RRC has and continues to object pursuant to G.S. 150B-21.10 and G.S. 150B-21.9(a)(2).

If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,

Lawrence R. Duke  
Commission Counsel

Attachments: 09/2022 Staff Opinion - Rule 15A NCAC 07H .2305  
01/17/2023 Staff Memoranda – Rule 15A NCAC 07H .2305

**Donald R. van der Vaart**, Director  
Chief Administrative Law Judge

**Fred G. Morrison, Jr.**  
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](http://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: Coastal Resources Commission

RULE CITATION: 15A NCAC 07H .2305

RECOMMENDED ACTION:

- 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:

*This Rule sets out the specific conditions governing General Permits applicable to bridge and culvert replacement projects over estuarine water or in public trust areas and coastal wetland AEC's.*

*In staff's opinion, the text of the Rule is unclear and ambiguous as to the limit placed on whether or not the General Permit shall be granted. The limiting language from Rule .2305(b) states that a bridge roadway deck shall not be expanded<sup>1</sup>, "provided the proposed project does not create significant adverse impacts."*

*"[S]ignificant adverse impact" is undefined. It is counsel's position that the phrase is unclear and ambiguous, and this language could be used to deny an applicant's permit. The regulated public must understand exactly what is required of them and by what criteria a permit may be denied.*

*Coastal Resources has taken the position that this is a term of art, used in other rules, understood by the courts, and "is based on the goals of CAMA which require the CRC to balance the protection of natural resources with development. So, if the development will significantly adversely impact resources, then the two are not balanced." Even though "I know it when I see it" may work for Justice Potter Stewart when identifying obscenity, it is not sufficient for the North Carolina code.*

*Accordingly, staff recommends that the RRC object to 15A NCAC 07H .2305.*

---

<sup>1</sup> Except a one-lane bridge may be expanded to two lanes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4  
5     *History Note:*     *Authority G.S. 113A-107; 113A-118.1; 113A-124;*  
6                   *Eff. June 1, 1996;*  
7                   *Amended Eff. May 1, 2010;*  
8                   *Readopted Eff. October 1, 2022.*

To: All RRC Commissioners  
From: Lawrence R. Duke, Commission Counsel  
In re: 15A NCAC 07H .2305  
Date: January 17, 2023

**The RRC objected to Rule .2305 finding the term “significant adverse impact” unclear and ambiguous.**

Similar to other Coastal Resources Commission rules before the RRC at this January Meeting, the RRC issued an objection at the September 2022 meeting to Rule 07H .2305. On November 23, 2022, CRC submitted a letter stating it would not be revising Rule .2305, would not be withdrawing this Rule, and requested that the RRC rescind its earlier objection to this Rule. It sent a second letter on January 18, 2023, restating the same argument.

At the December 2022 meeting, the RRC indicated it was willing to take the novel step of considering this matter anew, presumably based on the arguments CRC made in its November 23<sup>rd</sup> and January 18<sup>th</sup> letters, each of which are addressed below.

I. Statutory Argument

CRC argues that because the statute granting it authority to regulate dredge and fill permits uses “significant adverse effect”, this and similar phrases are unambiguous. In .2305 it uses “significant adverse impact”. CRC uses “significant adverse impact” and “significant adverse effect” interchangeably in both letters. It would seem that this would cut against CRC’s argument and only makes this ambiguity more profound.

The General Assembly uses the specific phrase from Rule .2305 in only *one* statute, G.S. 143-215.120, which regulates wind energy facilities. ***It is not used in the statute cited in CRC’s most recent letter, even though that letter incorrectly states that G.S. 113-229(e) “uses the very same phrase”.*** Furthermore, our legislature is under no obligation to meet the specificity requirements of G.S. 150B-21.9. It may choose language that empowers a rulemaking body to flesh out with clarity and unambiguity how the statute will be applied via administrative rules. The RRC has been tasked with ensuring the Administrative Code is “clear and unambiguous”. G.S. 150B-21.9(a)(2). Statutes and administrative rules are not held to the same standard.

Furthermore, in using “significant adverse impact”, G.S. 143-215.120 does not use the phrase as a general term, but in each instance states specifically to what the impact would apply. For instance: “a significant adverse impact on the mission, training, or operations of any major military installation or branch of military in North Carolina and result in a detriment to continued military presence in the State.” G.S. 143-215.120(a)(2). Federal regulations use the term in a similar way. However, Rule .2305 does not limit the term in any way and leaves it open to interpretation by the regulator.

The result will be the arbitrary regulation of property owners, against whom the process will be the punishment. Permits denied must then be either abandoned or litigated, both of which will have high costs for the regulated public. Surprisingly, one such example of this litigation is used in CRC’s next argument.

## II. Term of Art Argument

CRC next argues in its letter that “significant adverse impact” “is “a term of art used in other rules and understood by the courts.[”] *See, e.g., Shell Island Homeowners Assoc. v. Tomlinson*, 134 NC App. 217 (1999).” However, the cited case only uses this phrase once, and only when quoting the CRC Rule at issue in that case. The phrase is not discussed further and does not impact the outcome of the case.

In *Shell Island Homeowners Assoc.*, the regulated entity (a homeowners’ association) was denied a permit to erect permanent erosion control structures and had to litigate this denial. The association’s claims were dismissed on jurisdictional and constitutional grounds, with no relation to the rule under which the permit was denied. There is no way to read this case and come to the conclusion that “significant adverse impact” is a term of art understood by the courts because the term is neither defined nor even discussed in the case.

## III. Rules Argument

Finally, CRC’s letter essentially argues that it should be allowed to use “significant adverse impact” because it uses that phrase and similar phrases in its rules. It stated in its response to the requests for changes that it should be allowed because “[t]he term of art is used through out [*sic*] the CRC rules and has been for 40 years.” The letter continues, “[i]t is arbitrary and capricious for the RRC to claim the use of this phrase in one rule is ambiguous when that objection has not been consistently asserted by the RRC.”

To the extent that the CRC avers that its regulated public understands this term despite its ambiguity, it should be noted that the CRC has had over thirty years to educate the regulated of the meaning of the term as subjectively determined by the CRC. Long-standing ambiguous language in the code, and the enforcement thereof by the caprices of the agency training the regulated, do not permit the language to escape from subsequent review. Indeed, this goes to the very heart of the decennial periodic review.

This argument is not compelling unless the RRC wishes to exclude language in the Code, which have been used historically by a regulatory body, from its review. This argument would effectively nullify the standards under which the RRC makes its determinations on rules that come before it. *See G.S. 150B-21.9*. This will likely have far-reaching ramifications, with the effect of grandfathering in matters already in the code. This seems to run afoul of the periodic review mandated by the legislature.

## **Conclusion**

As stated above, each of CRC’s arguments fail: its use of interchangeable phrases, its conflation of standards applied to statute verses the administrative code, its use of caselaw that is inapplicable, its “we’ve always done it and you’ve let us” argument. Under closer review, not one of these arguments is compelling. Therefore, my opinion has not changed: Rule .2305, as well as the other rules containing “significant adverse impact”, should be objected to and continue under the objection until CRC alters the language so that the regulated public can understand clearly and unambiguously what is required of them.