

## Burgos, Alexander N

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**Subject:** FW: [External] Comments in Support of CRC coastal management rules  
**Attachments:** SELC Comments in Support of CRC Rules.pdf

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**From:** Julie Youngman <[jyoungman@selcnc.org](mailto:jyoungman@selcnc.org)>  
**Sent:** Thursday, February 9, 2023 3:40 PM  
**To:** rrc.comments <[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)>; Jeanette Doran ([Jeanette.k.doran@gmail.com](mailto:Jeanette.k.doran@gmail.com)) <[jeanette.k.doran@gmail.com](mailto:jeanette.k.doran@gmail.com)>; [aatkins@smithlaw.com](mailto:aatkins@smithlaw.com); [bobbymonica@bellsouth.net](mailto:bobbymonica@bellsouth.net); Wayne Ronald Boyles III ([wboyles@aol.com](mailto:wboyles@aol.com)) <[wboyles@aol.com](mailto:wboyles@aol.com)>; [jh@hemphillgelderlaw.com](mailto:jh@hemphillgelderlaw.com); [justicebarbarajackson@gmail.com](mailto:justicebarbarajackson@gmail.com); NC Rules Review Commission ([jeff.hyde@aestheticimages.net](mailto:jeff.hyde@aestheticimages.net)) <[jeff.hyde@aestheticimages.net](mailto:jeff.hyde@aestheticimages.net)>; Randy O. Overton ([overton.ro@gmail.com](mailto:overton.ro@gmail.com)) <[overton.ro@gmail.com](mailto:overton.ro@gmail.com)>; [bobrucho20@gmail.com](mailto:bobrucho20@gmail.com); Wm. Paul Powell Jr. ([ppowell@apbev.com](mailto:ppowell@apbev.com)) <[ppowell@apbev.com](mailto:ppowell@apbev.com)>  
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**Subject:** [External] Comments in Support of CRC coastal management rules

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Dear Chair Doran and Commissioners:

Please find attached comments in support of the Coastal Resources Commission rules being considered at next week's RRC meeting.

**Julie Furr Youngman**  
Senior Attorney

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February 9, 2023

*Via Email*

North Carolina Rules Review Commission  
Office of Administrative Hearings  
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Raleigh, NC 27609  
[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)

**Re: Letter of Support for the following Coastal Resources Commission Rules:  
15A N.C.A.C. 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510  
15A N.C.A.C. 07H .2305  
15A N.C.A.C. 07I .0406, .0506, .0508, .0511, .0702  
15A N.C.A.C. 07J .0203, .0204, .0206, .0207, .0208, .0312  
15A N.C.A.C. 07M .0201, .0202, .0401, .0402, .0403, .0701, .0703, .0704, .1001,  
.1002, .1101, .1102**

Dear Chair Doran and Commissioners:

Please accept these comments in support of the above-referenced rules that have been duly readopted by the Coastal Resources Commission. The Southern Environmental Law Center submits these comments on its own behalf and on behalf of North Carolina Coastal Federation and North Carolina Conservation Network. Our organizations have a longstanding interest in maintaining and preserving North Carolina's coastal resources and in advocating for a robust and effective permitting program to authorize and manage responsible development at North Carolina's coast.

We write to request that you withdraw your objection and reconsider the mistaken conclusion that any rule that uses the terms "significant adverse impact" is ambiguous and that any rule that states policies and guidelines is unnecessary and/or does not constitute a rule as that term is defined by the North Carolina Administrative Procedure Act ("APA").

First, it appears that the Rules Review Commission ("RRC") counsel continues to recommend that you object to any rules that use the term "significant adverse impact," according to RRC staff opinions dated December 14, 2022, which incorporate previous staff opinions dating back to July 2022. To the contrary, the term "significant adverse impact" is a term of art that is commonly used in North Carolina regulations, statutes, and court opinions without creating confusion.

Whether an impact is “significant” necessarily depends on the facts of a given situation, including for instance, the nature of the resource or use that will be affected, the size and nature of the proposed development or other project, the nature of its impact, special protections that may apply to the resource or use, etc. Consequently, the term is not susceptible to a more precise definition that will fit all situations that come before a commission, and any attempt to craft such a precise definition would surely lead to unintended consequences.

Yet all branches of North Carolina government have proven their ability and comfort with applying the term. At least seven North Carolina appellate court decisions have applied the term in a variety of contexts with no apparent confusion, including two Supreme Court cases<sup>1</sup> and five Court of Appeals cases.<sup>2</sup> The North Carolina General Assembly has employed the term in the General Statutes in a variety of contexts,<sup>3</sup> and several executive branch agencies besides the Coastal Resources Commission have likewise used the term in their administrative regulations.<sup>4</sup> Last but not least, the term has been used in the coastal management rules currently before you for decades without causing confusion for agency staff or the regulated community.

To conclude that the term is impermissibly ambiguous and to use that supposed ambiguity as a basis for objecting to longstanding rules are therefore unjustified. Rules under review that use the term “significant adverse impact” include 15A N.C. Admin. Code 07H .0508, .0509, .2305; 07J .0203; and 07M .0202, .0401, .0402, .0403, .0703. Accordingly, please approve those rules and any others for which the inclusion of the term “significant adverse impact” was the basis for objection.

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<sup>1</sup> *Town of Midland v. Wayne*, 368 N.C. 55, 59, 773 S.E.2d 301, 305 (2015) (discussing whether an easement would have “significant adverse impact” on a property owner’s ability to develop his land); *Shell Island Homeowners Ass’n, Inc. v. Tomlinson*, 134 N.C. App. 217, 219, 517 S.E.2d 406, 409 (1999) (discussing whether an installation of erosion control structures would cause “significant adverse impact” on adjacent properties).

<sup>2</sup> *Hagerman v. Union Cnty. Bd. of Adjustment*, 258 N.C. App. 564, 811 S.E.2d 242 (2018) (discussing whether operating an animal boarding business would have “significant adverse impact” on residential neighbors); *State ex rel. Utilities Comm’n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 124, 738 S.E.2d 187, 190 (2013) (discussing whether an action of the utility commission would have a “significant adverse impact” on the rates of utility customers); *Stark v. N.C. Dep’t of Env’t & Nat. Res., Div. of Land Res.*, 224 N.C. App. 491, 512, 736 S.E.2d 553, 567 (2012) (discussing whether a mining operation had any “significant adverse impact” on groundwater); *Clark Stone Co. v. N.C. Dep’t of Env’t & Nat. Res., Div. of Land Res.*, 164 N.C. App. 24, 32, 594 S.E.2d 832, 837–38 (2004) (discussing whether an entity’s mining operations would have “significant adverse impact” on the Appalachian Trail); *Visual Outdoor Advert., Inc. v. Town of Franklinton Bd. of Comm’rs*, 159 N.C. App. 469, 583 S.E.2d 427 (2003) (discussing whether proposed billboards would have “significant adverse impact” on neighboring properties).

<sup>3</sup> N.C. Gen. Stat. § 113A-115.1 (Limitations on erosion control measures); N.C. Gen. Stat. § 113-229 (Permits to dredge or fill in or about estuarine waters or State-owned lakes); N.C. Gen. Stat. § 143-215.120 (Criteria for permit removal; time frame; permit conditions; other approvals required); N.C. Gen. Stat. § 143-355.7 (Water supply development; State-local cooperation).

<sup>4</sup> 1 N.C. Admin. Code 25 .0502 (N.C. Environmental Policy Act: Environmental Assessment: Content); 4 N.C. Admin. Code 19L .1012 (N.C. Community Development Block Grant Program: Compliance Requirements: Clearinghouse Review); 15A N.C. Admin. Code 1C .0208 (Conformity with NC Environmental Policy Act: Incomplete or Unavailable Information); 19A N.C. Admin. Code 02F .0103 (NC Department of Transportation’s Minimum Criteria: Exceptions to Minimum Criteria).

Second, the RRC counsel appears to continue to recommend that you object to any rule that sets out guidelines or policies on the grounds that such a rule supposedly does not meet the definition of a “rule” set out in the APA, according to RRC staff opinions dated December 14, 2022, which incorporate previous staff opinions dating back to July 2022. To the contrary, each of those rules does satisfy the APA’s definition. The APA definition of “rule” includes “[a]ny agency 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.” N.C. Gen. Stat. § 150B-2(8a).

The General Assembly specifically tasked the Coastal Resources Commission with developing exactly the type of policies and guidelines that the RRC counsel is erroneously labeling objectionable. Section 113A-107(a) of the North Carolina General Statutes requires that “State *guidelines* for the coastal area shall consist of statements of objectives, *policies*, and standards to be followed in public and private use of land and water areas within the coastal area,” and it goes on to provide that those “guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102.” Section 113A-107(b) then specifically tasks the Coastal Resources Commission with developing those guidelines and policies, stating, “The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines.” Thus, each of the coastal rules adopted by the Coastal Resources Commission that states policies or guidelines undeniably qualifies as a “statement of general applicability that implements ... an enactment of the General Assembly ....” Moreover, it has long been established by the North Carolina Supreme Court that the General Assembly delegated the authority “to develop, adopt and amend State guidelines for the coastal area” to the Coastal Resources Commission. *Adams v. N.C. D.E.N.R.*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978).

Contrary to RRC counsel’s advice, the APA does not require every rule to “directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies;” rather, the General Assembly merely used that phrase to explain when internal management statements found in an agency’s internal “policies and procedures manual” would not count as a “rule.” N.C. Gen. Stat. § 150B-2(8a)(a). As the coastal regulations at issue before the RRC are not part of an internal manual of the Coastal Resources Commission, the RRC counsel’s focus on that phrase is misplaced.

Accordingly, objection to any of the coastal rules on the basis that, by setting out generally-applicable policies and guidelines, they somehow do not constitute rules is mistaken. Please therefore approve any rules subject to that objection, including: 15A N.C. Admin. Code 07H .0501, .0502, .0503, .0505, .0506, .0507, .0508, .0509, .0510; 15A N.C. Admin. Code 07I .0508; 15A N.C. Admin. Code 07J .0203; 15A N.C. Admin. Code 07M .0201, .0202, .0401, .0402, .0403, .0701, .0703, .0704, .1001, .1002, .1101, .1102; and any other rules to which this objection applied.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink that reads "Julie Youngman". The signature is written in a cursive, flowing style.

Julie Furr Youngman  
Senior Attorney

cc (via email):

Jennifer Everett, DEQ Rulemaking Coordinator  
Mary Lucasse, Counsel to the Coastal Resources Commission  
Ana Živanović-Nenadović, North Carolina Coastal Federation  
Grady McCallie, North Carolina Conservation Network