To: All RRC Commissioners
From: Lawrence R. Duke, Brian Liebman, and William W. Peaslee, Commission Counsel
In re: 15A NCAC 07H .2305, 15A NCAC 07H .0508 and.0509, 15A NCAC 07M .0202, .0401, .0402, and .0403.
Date: February 15, 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 23rd and January 18th letters, each of which are addressed below.

Moreover, following RRC's objections to 15A NCAC 07H .0508 and .0509, 15A NCAC 07M .0202, .0401, .0402, and .0403 on other grounds, CRC added the term "significant adverse impact" to these rules. Thus, this memo is intended to reach those the use of "significant adverse impact" in those rules to the extent the agency uses the same term in the same way.

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.