

RRC STAFF OPINION II

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 Department of Public Safety

RULE CITATION: 14B NCAC 03 .0502

RECOMMENDATION DATE:

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:

In the published Rule, the "State Mission Assignment" was defined as "a [North Carolina Emergency Management division] approved request for assistance to deploy program resources at the request of a local unit of government."

Staff counsel inquired by what procedure the NCEM would accept and approve requests. NCEM revised the rule to include "approved pursuant to internal agency policy".

Incorporating or referring to a policy rather than stating the contents in the Rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. Additionally, the language makes it unclear the process and criteria used in making the determination to approve a request.

Accordingly, staff recommends the Rules Review Commission object to the rule pursuant to G.S. 150B-21.9(a)(2) and (4).

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.)

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COMMENT:

In the published Rule, the "Responsible Party" was defined as "the entity whose actions or inactions caused and event as determined by the authority having jurisdiction..."

In response to a question posed in a Request for Changes regarding 14B NCAC 03 .0506 the agency amended the definition.

As revised the "Responsible Party" is determined "by [the North Carolina Division of Emergency Management in coordination with the authority having jurisdiction...]

Pursuant to G.S. 1510B-21.2(g), the revised rule produces an effect that could not have been reasonably expected based upon the proposed text of the rule and is therefore differs substantially from the proposed text.

Accordingly, staff recommends the Rules Review Commission object to the rule pursuant to G.S. 150B-21.9(a)(4) as it was not adopted in accordance with Part 2 of Article 2A of Chapter 150B.

William W. Peaslee
Commission Counsel

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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.

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§ 150B-21.2. Procedure for adopting a permanent rule.

(a) Steps. - Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

- (1) Publish a notice of text in the North Carolina Register.
- (2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.
- (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
- (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. - A notice of the proposed text of a rule must include all of the following:

- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with G.S. 150B-21.3A.
- (2) A short explanation of the reason for the proposed rule.
- (2a) A link to the agency's website containing the information required by G.S. 150B-19.1(c).
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (5) The date, time, and place of any public hearing scheduled on the rule.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The (i) period of time during which and (ii) person within the agency to whom written comments may be submitted on the proposed rule.
- (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
- (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.

(d) Mailing List. - An agency must maintain a mailing list of persons that have requested notice of rulemaking. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice of text to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been

published in the North Carolina Register and that public hearing has been cancelled, the agency must publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency must review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. - An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. - An agency must keep a record of a rulemaking proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; 1989, c. 5, s. 1; 1991, c. 418, s. 1; 1995, c. 507, s. 27.8(d); 1996, 2nd Ex. Sess., c. 18, s. 7.10(e); 2003-229, s. 4; 2011-398, s. 5; 2013-143, s. 1; 2013-413, s. 3(a); 2021-88, s. 17.)

1 14B NCAC 03 .0502 is proposed for adoption as follows:

2 **CHAPTER 03 – EMERGENCY MANAGEMENT**

3
4 **14B NCAC 03 .0502 ABBREVIATIONS AND DEFINITIONS**

5 As used in this section, the following abbreviations and terms mean:

- 6 (1) “Activation” means the status of a program resource placed at the direction, control, and funding of NCEM as
7 part of the NC RRT Program.
- 8 (2) “All-hazards Disaster Response Model” means a response methodology where program resources provide all
9 applicable capability to respond to any threat or hazard that is impacting the state or is forecasted to impact
10 the State as determined by the NCEM Director.
- 11 (3) “Authority Having Jurisdiction” (AHJ) means those local, State, tribal or federal entities having a duty to act
12 over a specific aspect of hazardous materials in a specific geographic area.
- 13 (4) “County to County Mutual Aid” means public safety resource sharing under the conditions of the NC
14 Statewide Mutual Aid Agreement or another similar agreement between political subdivisions.
- 15 (5) “Federal Emergency Management Agency” (FEMA) means is an agency of the United States Department of
16 Homeland Security with the responsibility to coordinate the federal response to a Presidentially-declared
17 disaster that has occurred in the United States and that overwhelms the resources of local and State authorities.
- 18 (6) “FEMA Public Assistance Program” means a federal reimbursement grant program that provides federal
19 funding to help communities respond to and recover from disasters.
- 20 (7) “Functionally equivalent” means an item or group of items that can be used in the same basic manner as
21 another item or items to perform a task to the same standard.
- 22 (8) “Incident Commander” (IC) means the individual responsible for all incident activities, including the
23 development of strategies and tactics and the ordering and release of resources. The IC has overall authority
24 and responsibility for conducting incident operations and is responsible for the management of all incident
25 operations at the incident site.
- 26 (9) “Local Emergency Management Coordinator” (LEMC) means the County Emergency Management
27 Coordinator as defined in G.S. 166A-19.15 who is responsible for all local disaster preparedness, response,
28 and recovery activities in a specific geographic area. county.
- 29 (10) “North Carolina Hazardous Materials Regional Response Team Technical Advisory Committee” (NC RRT
30 TAC) means an advisory committee established in Article 2 of Chapter 166A of the North Carolina General
31 Statutes to advise the Secretary of the North Carolina Department of Public Safety and the North Carolina
32 Division of Emergency Management on the management of hazardous materials emergencies.
- 33 (11) “North Carolina Division of Emergency Management” (NCEM) means a division of the North Carolina
34 Department of Public Safety established in G.S. 143B-1000 with the responsibility to coordinate the
35 mitigation, planning, preparedness, response, and recovery to a disaster or emergency that has or is forecasted
36 to occur in the State as determined by the NCEM Director.
- 37 (12) “North Carolina Emergency Management Operations Chief” (NCEM OSC) means the Assistant Director of
38 Operations for the North Carolina Division of Emergency Management.

1 (13) “North Carolina Emergency Management Director” (NCEM Director) means the Director of the North
2 Carolina Division of Emergency Management.

3 (14) “National Incident Management System” (NIMS) means a federal policy that provides a systematic, proactive
4 approach guiding government agencies at all levels, nongovernmental organizations, and the private sector to
5 work to prevent, protect against, respond to, recover from, and mitigate the effects of incidents, regardless of
6 cause, size, location, or complexity, to reduce the loss of life or property and harm to the environment.

7 (15) “On-duty” means when a person is **acting** functioning, paid or unpaid, as an agent of their Sponsoring Agency
8 or of the NC Division of Emergency Management as part of the NC RRT Program.

9 (16) “Program agreements” means contracts, memoranda of agreements, or memoranda of understanding between
10 NCEM and regional response teams for the purposes of establishing and maintaining the NC RRT Program.

11 (17) “Program costs” means training, equipment, personnel, or administrative expenses incurred by a Sponsoring
12 Agency during activities of the NC RRT Program.

13 (18) “Program personnel” means human resources from a regional response team with an active program
14 agreement with the Division of Emergency Management for hazardous materials response or human resources
15 employed on a full-time or part-time basis by the Division of Emergency Management with a responsibility
16 for hazardous materials response.

17 (19) “Program resource” means personnel or equipment from a regional response team that is participating in the
18 NC RRT Program with an active program agreement with the North Carolina Division of Emergency
19 Management for hazardous materials response.

20 **(20) “Qualifying event” means an incident that system personnel have been charged, arrested, pleads no contest,
21 pleads guilty, or is convicted of a crime that would require notification to the Sponsoring Agency.**

22 **(20)(21)** “Qualified personnel” means an individual that meets the training and medical monitoring requirements
23 established by 29 CFR 1910.120(a)(3) which are adopted and are incorporated by reference with subsequent
24 changes or amendments pursuant to G.S. 150B-21.6 and can be found at no cost at:
25 <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.120>; National Fire Protection
26 Association Standard 470 as it relates to Hazardous Materials Technicians which are adopted and are
27 incorporated by reference with subsequent changes or amendments pursuant to G.S. 150B-21.6 and can be
28 found for ninety dollars \$90 at: [https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-
29 codes-and-standards/detail?code=470](https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=470); and 29 CFR 1910.134 which are adopted and are incorporated by
30 reference with subsequent changes or amendments pursuant to G.S. 150B-21.6 and can be found at no cost at:
31 <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134>

32 **(21) (22)** “Resource typing” means a document defining and categorizing, by capability, the program resources
33 requested, deployed, and used in incidents.

34 **(22) (23)** “Responsible Party” means the entity whose actions or inactions caused **an event a hazardous materials
35 incident** as determined by **NCEM in coordination with** the authority having jurisdiction requiring program
36 resources to respond and incur costs.

1 ~~(23)~~ (24) “Sensitive information” means any information, to include but not limited to audio recordings, images,
2 and video ~~recordings~~ recordings, obtained during an activation that has not been released to the public by the
3 AHJ.

4 (24) (25) “Sponsoring Agency” means a local or tribal unit of government or a corporation with an active response
5 agreement with a local unit of ~~government~~ government, that organizes and coordinates a regional response
6 team in the NC RRT Program.

7 (25) (26) “State Emergency Operations Plan” (SEOP) means a document maintained under the authority of G.S.
8 166A-19.12(2) that details how the State of North Carolina will respond to a disaster or emergency requiring
9 State assistance utilizing an established comprehensive, all-hazards approach All-Hazards Disaster Response
10 Model.

11 (26) (27) “State Mission Assignment” (State Mission) means a NCEM approved ~~request-~~ request pursuant to
12 ~~internal agency policy~~ for assistance to deploy program resources at the request of a local unit of government.

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16 *History Note:* Authority G.S. 166A-22; 166A-23; 166A-25; 166A-26; 166A-27;
17 Eff. ~~{Date}~~ March 1, 2024
18