

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; 15A NCAC 07J .1401, .1402, .1403, .1404, .1405, .1501, .1502, and .1503

DATE ISSUED: December 16, 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:

The North Carolina Administrative Procedure Act creates a “uniform system of administrative rule making and adjudicatory procedures for agencies.” G.S. 150B-1(a). Among other things, the requirements imposed by this system are designed to ensure that the public has the ability to learn about and comment on administrative rules that may affect them. *See, e.g.,* G.S. 150B-19.1(c), 150B-21.2. Consequently, because it appears to staff that the Coastal Resources Commission (CRC) failed to (1) send the notice of text for the above-captioned rules to its interested persons mailing list as required by G.S. 150B-21.2(d) and (2) post the information required by G.S. 150B-19.1(c) on its website, staff recommends objection pursuant to G.S. 150B-21.9(a)(4) for failure to comply with Part 2 of Article 2 of the APA.

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G.S. 150B-21.2(d) requires:

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.

The APA defines a notice of text for permanent rulemaking as containing “all of the following”: (1) the text of the proposed rule, (2) a short explanation of the reason for the proposed rule, (3) a link to the agency’s website containing the information required by G.S. 150B-19.1(c), (4) citation to the law giving the agency rulemaking authority, (5) the proposed effective date of the rule, (6) the date, time, and place of any public hearing scheduled, (7) instructions for demanding a public hearing if one was not scheduled, (8) the comment period and person to whom the public may submit written comments, and (9) a statement that a fiscal note, if prepared, may be obtained from the agency. G.S. 150B-21.2(c).

The Commission has received multiple comments from members of the public claiming that the CRC did not send a notice of text to its interested persons email listserv as required by G.S. 150B-21.2(d). Based upon those comments, staff requested that the CRC provide documentation that it satisfied this requirement. The CRC’s responses show that it sent out emails regarding the above-captioned rules to its interested persons listserv on April 17, 2024, April 22, 2024, August 1, 2024, August 15, 2024, August 26, 2024, November 1, 2024, and November 8, 2024. As the CRC published these rules in the September 3, 2024 edition of the North Carolina Register, only the April and August emails could satisfy the requirements of G.S. 150B-21.2(d).¹ Examination of these emails shows that they neither contain the elements of a notice of text nor a link to the agency’s website where such information was available.

The two April emails appear to give notice of the CRC’s April 24-25, 2024 regular meeting, where “recommendations for permanent rulemaking” for the above-captioned rules were considered. The emails contain a link to the April meeting agenda, which contains a further link only to a document describing the proposed rules. No notice of text, as described in G.S. 150B-21.2(c) appears in either email or on the CRC agenda.

¹ Regardless, the content of the November 1, 2024 and November 8, 2024 emails is substantially similar to the August emails, and even if timely, both would fail to satisfy the G.S. 150B-21.2(c) requirement.

With respect to the August 1, 2024 email, rather than giving the public notice of rulemaking, it states that “[t]he N.C. Coastal Resources Commission (CRC) will hold a special meeting August 6 by web conference to *review fiscal analyses* associated with permanent rulemaking” (emphasis added). The email lists the title of each of the above-captioned rules and contains a link to the “meeting agenda and briefing materials” but neither the email nor the link contains any of the nine elements required by G.S. 150B-21.2(c). Moreover, the email contains the date, time, and virtual location of the August 6, 2024 special meeting of the CRC, but this is different from the public hearing on the rules. The agency held two separate public hearings, one on September 25, 2024, for rules 07J .1401-.1405 and .1501-.1503, and another on October 15, 2024 for rule 07H .0508. Neither of these public hearings are noticed in the August 1, 2024 email.

In the August 15 and August 26, 2024 emails, the CRC advises of its regular meeting in Beaufort on August 27 and 28. There is no explicit mention by name of any of the above-captioned rules. While there is a link to the CRC’s agenda for the August 27-28 meeting, review of that agenda shows no mention of the above-captioned rules.

In response to staff’s specific question as to where the notice of text could be found in the August 1, 2024 email², the agency responded:

The “Interested Persons” mailing list is not the same as a list of persons who have requested notification of rule-making. The online form used to sign up for the “Interested Persons” mailing list does not include an affirmative request to receive notice of rule-making. The notice of text described in G.S. 150B-21.2(c) was published in the North Carolina Register as required under G.S. 150B-21.2(a)(1). The required information was included on the DEQ website for rule-making and provided through a link on the CRC web page.

From these responses, staff concludes that the agency did not send a notice of text to its interested persons mailing list, as required by G.S. 150B-21.2(d).³ It is staff’s opinion that the

² Staff asked only about the August 1, 2024 email because he had not yet been provided with the April emails and because the August 15 and August 26 emails appear to have no relevance to these rules.

³ As an alternative, the agency’s response could be read to mean that it does not maintain a “mailing list of persons that have requested notice of rulemaking” in violation of G.S. 150B-21.2(d), although staff cannot make that determination with certainty based upon the information currently before the Commission.

As a further alternative, the agency’s response could be read to mean that the CRC maintains an “interested persons” mailing list and a separate mailing list for those requesting notification of rulemaking. However, such an interpretation requires staff to conclude that the agency has intentionally provided the Commission with inapposite

agency has failed to comply with G.S. 150B-21.2(d), and as such, this rule is subject to objection pursuant to G.S. 150B-21.9(a)(4) for failure to comply with Part 2 of Article 2 of the APA.

* * * * *

G.S. 150B-19.1(c) requires that “[e]ach 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” (1) the text of the proposed rule, (2) an explanation of and reason for the proposed rule, (3) any federal certification required by the APA, (4) instructions on how and where to submit oral or written comments, including instructions for subjecting the rule to legislative review, and (5) any fiscal note prepared for the proposed rule.

As above, the Commission received public comment indicating that the materials required by G.S. 150B-19.1(c) were posted on the website for the Department of Environmental Quality (DEQ) rather than the website for the CRC. Although the CRC is a commission housed under the Department of Environmental Quality, it remains an independent agency for rulemaking purposes, and it does have its own website where it posts “recent actions”, its meeting schedule, links to its meeting agendas and minutes, and links to various studies the CRC has conducted. In response to staff’s inquiries on this point, the agency confirmed that the materials were posted only on the DEQ’s website and were not posted on the CRC’s website, but that they included a “link on the CRC’s website that connects to the proposed rules that are centralized on DEQ’s website for all divisions and DEQ commissions.” While staff did not observe any such link on the CRC website, and the agency did not point staff to where this link could be found in any of its responses, at least one public comment in response to this rule does reference the link. Thus, staff declines to opine as to whether the posting on the DEQ, rather than the CRC website, violates G.S. 150B-19.1(c).

Regardless of whether the posting on the DEQ website was improper, an examination of the materials posted on the DEQ website shows that they did not contain all of the elements required by G.S. 150B-19.1(c). In its responses to staff’s inquiries, the CRC pointed staff to the DEQ “Proposed Rules Webpage” and provided screenshots of the same. In those postings, the agency posted the text of the proposed rules, the text of the fiscal notes, and the date and time of the public hearings. However, it failed to post any instructions for submitting oral or written

responses relevant to the “interested persons” mailing list and has withheld the appropriate responses relevant to the notification of rulemaking mailing list. As this is contrary to the agency’s interests, staff concludes this is possible but highly unlikely.

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comments. Thus, those members of the public who were otherwise aware of the rulemaking and knew to look on the DEQ website, rather than the CRC website, may not have known that they could submit comments, where to submit those comments, to whom to address the comments, and what constitutes an acceptable comment. It is of note that on the DEQ website, postings for other commissions appear to contain all of the information required by G.S. 150B-19.1(c).⁴

Section 19.1(c) is not in Part 2 of Article 2 of the APA. However, G.S. 150B-21.2(a) explicitly requires that “[b]efore an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1[.]” Consequently, because the agency failed to post all of the material required by G.S. 150B-19.1(c) on the DEQ website, it is staff’s opinion that the agency has failed to comply with G.S. 150B-21.2(a), and as such, this rule is subject to objection pursuant to G.S. 150B-21.9(a)(4) for failure to comply with Part 2 of Article 2 of the APA. Staff does not opine as to whether providing a link on the CRC website to the DEQ website satisfies the requirements of G.S. 150B-19.1(c).

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If, in response to this staff opinion, the CRC argues that it adopted these rules in substantial compliance with the APA as provided by G.S. 150B-18, staff recommends that the Commission conclude that the CRC did not substantially comply with the APA.

The purpose of the requirements of G.S. 150B-19.1(c) and 150B-21.2(d) is to enable public participation in the rulemaking process by allowing those who are interested in a particular regulatory topic to remain abreast of agency rulemaking developments. This includes the public’s right to request a public hearing if one was not scheduled, to submit written comments during the comment period, to make oral comments at a public hearing, and to request an explanation for why the agency adopted the proposed rule. *See* G.S. 150B-21.2(d), (e), (f), and (h). Here, the Commission has received multiple public comments from those on the CRC’s mailing list and with a professed interest in the topic addressed by the above-captioned rules, who claim that they were unaware of the proposed rulemaking and thus

⁴For instance, the Environmental Management Commission’s posting for “Proposed Amendments to 15 NCAC 02L.0202 Groundwater Quality Standards” contains links to the text of the rule and the fiscal note, the dates of the comment period, the name, mailing address, and email address of the person accepting comments on behalf of EMC, the date, time, and location of the public hearing, instructions for making oral comments at the public hearing, and the procedure for subjecting a proposed rule to legislative review. There is no mention of a federal certification, but it is not apparent that one was required for this rule. *See* <https://www.deq.nc.gov/accessdeq/rules-regulations/deq-proposed-rules/proposed-rules#ProposedAmendmentsto15ANCAC02L0202GroundwaterQualityStandards-17075> (accessed December 16, 2024).

prevented from attending and commenting at the public hearing or submitting written comments to the CRC.

Thus, while the CRC may point to the several emails it did send to its interested persons mailing list, or the posting on the DEQ website, or the references to these rules on the various CRC meeting agendas between April and November 2024, these were insufficient to effectuate notice to these commenters who include a major trade association involved in residential construction and a large law firm representing a client engaged in litigation with the State regarding the very topic at issue in these rules. If the CRC's efforts failed to reach these sophisticated interested parties, and prevented them from participating in the rulemaking process, it stands to reason that they certainly failed to reach all ordinary members of the public interested in the topic governed by these rules. As such, staff recommends that if the CRC makes the argument, the Commission not conclude that the CRC substantially complied with the APA.

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§ 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-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-21.2. 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 but not later than 60 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.

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(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; 2023-134, s. 21.2(b).)