

TEMPORARY RULE

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: Office of the State Fire Marshall

RULE CITATION: 11 NCAC 05A .1001

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

COMMENT:

Staff recommends approval of the proposed temporary rule. G.S. 150B-21.1(a) sets forth a two-part test to engage in temporary rulemaking: (1) adherence to the notice and hearing requirements of the permanent rulemaking process would be contrary to the public interest; and the immediate adoption of the rule is required by (2) a serious and unforeseen threat to the public health, safety, or welfare or (2b) the effective date of a recent act of the General Assembly or the United States Congress. The Office of State Fire Marshall (OSFM) has submitted a written statement of its findings of need stating why adherence to the notice and hearing requirements would be contrary to the public interest and why the immediate adoption of the rule is required. The OSFM has met the requirements of G.S. 150B-21.1 and has filed this temporary rule in response to a recent session law, S.L 2024-57, Section 1F.4. Session Law 2024-57 makes modifications to The Disaster Recovery Act of 2024.

After S.L. 2024-57 became effective on December 11, 2024, the OSFM took immediate action, and this rule went into the North Carolina Administrative Code (NCAC) as an emergency rule on January 7, 2025. On December 23, 2024, this proposed temporary rule was submitted to the Codifier of Rules and OSFM notified the inspections departments of every county, or jurisdiction located therein, in which the Federal Emergency Management Agency's (FEMA) Transportable Temporary Housing Units (TTHUs) are being installed in response to Hurricane Helene.

Pursuant to G.S. 143-143.15(a), OSFM is responsible for the adoption of rules for the North Carolina Regulations for Manufactured Homes. The Manufactured Building Division at the OFSM serves as the administrative agency for the United States Department of Housing and Urban Development. The OSFM advises and provides guidance to local governments that are responsible for enforcing the State of North Carolina Regulations for Manufactured Homes and the North Carolina State Building Code, including those that apply to the TTHUs that are the subject of this proposed rule.

OSFM relies on both the general rulemaking authority granted to it pursuant to G.S. 58-78A-2 and the specific rulemaking authority granted to it pursuant to Section 1F.4 of S.L. 2024-57 to promulgate temporary rule 11 NCAC 05A .1001.

§ 143-143.15. Set-up requirements.

- (a) Manufactured homes shall be set up in accordance with the standards entitled **State of North Carolina Regulations for Manufactured Homes adopted by the State Fire Marshal**.

§ 58-78A-2. Execution of laws; adopt rules to enforce laws.

The State Fire Marshal shall see that all laws he is responsible for administering are faithfully executed and, to that end, **the State Fire Marshal is authorized to adopt rules in accordance with Chapter 150B of the General Statutes in order to enforce, carry out, and make effective the provisions of those laws. The State Fire Marshal is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the State Fire Marshal's regulatory authority from engaging in practices injurious to the public.** (2023-151, s. 10.1(a).)

SESSION LAW 2024-57 (SB 382)

AUTHORIZE THE OFFICE OF THE STATE FIRE MARSHAL TO PROMULGATE RULES FOR TEMPORARY MANUFACTURED AND MODULAR DWELLINGS

SECTION 1F.4.(a) Notwithstanding G.S. 143-139.1, G.S. 160D-911, or any other law to the contrary, **the Office of the State Fire Marshal may adopt rules, and prepare guidance for local governments enforcing the North Carolina State Building Code and the State of North Carolina Regulations for Manufactured Homes, that relate to the placement, construction, installation, and connection of temporary manufactured and modular dwellings.** Approval of temporary manufactured and modular dwellings shall be evidenced by labels or seals acceptable to the Office of the State Fire Marshal. All temporary manufactured and modular dwellings bearing labels or seals shall be deemed to meet the requirements of the North Carolina State Building Code, except as may be required for the enforcement of the Code relative to utility service connections to temporary manufactured and modular dwellings and enforcement of local ordinances governing zoning, utility service connections, and foundation permits. **The Office of the State Fire Marshal may also adopt rules to ensure that any person that places, constructs, installs, and connects a temporary manufactured and modular dwelling meets the manufacturer's installation instructions and applicable provisions of the North Carolina State Building Code and the State of North Carolina Regulations for Manufactured Homes.** For the purposes of this section, a "temporary manufactured and modular dwelling" is a

manufactured housing unit that is designed for utilization as a temporary dwelling in the affected area.

SECTION 1F.4.(b) Rulemaking. – The Office of the State Fire Marshal shall adopt emergency rules to implement the provisions of this section.

SECTION 1F.4.(c) Expiration. – This section expires on March 1, 2025.

The expiration of Section 1F.4 on March 1, 2025, pursuant to Section 1F.4(c), is not a legal impediment to the OSFM's statutory authority to "adopt" a temporary rule prior to the deadline. There is no provision in Section 1F.4 that requires review by the Rules Review Commission (RRC), or entry of such a rule into the NCAC, prior to the expiration of the OSFM's statutory authority to adopt the rule. Nor is there any provision that imposes an expiration date for rules adopted pursuant to Section 1F.4. Imposing such requirements appears contrary to the legislature's intent.

Pursuant to Section 1F.4(c), OSFM's authority to adopt rules described in Section 1F.4(a) expires on March 1, 2025. OSFM complied with this deadline and exercised the authority required to promulgate the rule when it adopted 11 NCAC 05A.1001 on February 7, 2025. The plain meaning of Section 1F.4(c) does not prevent the entry of rules in the NCAC properly adopted by the OSFM before the statutorily prescribed deadline.

There is support for the interpretation that Section 1F.4(c) does not prevent promulgation of a rule adopted by the OSFM prior to March 1, 2025, with an effective date March 1, 2025, or thereafter. The General Assembly enacted S.L. 2024-53 that provided express expiration dates for rules adopted pursuant to the rulemaking authority granted therein. Session Law 2024-53 made modifications to The Natural Disaster Recovery Act of 2024, the same bill modified with the enactment of 1F.4 of S.L. 2024-57. Section 4E.1(e) of S.L. 2024-53 provides that, "Notwithstanding G.S. 150B-21.1A(d), an emergency rule adopted pursuant to this section shall expire March 1, 2025." See S.L. 2024-53, s. 4E.1(e). Section 4E.1(f) of the same session law provides that the preceding subsections granting emergency rulemaking authority to various agencies also expire March 1, 2025. *Id.* at s. 4E.1(f).

The General Assembly has shown that it will expressly provide an expiration date for rules adopted pursuant to a session law granting specific rulemaking authority when it intends for such rules to expire by a certain date. The inclusion of both (1) an expiration date for rules adopted pursuant to Section 4E.1 of S.L. 2024-53 and (2) an expiration date for the authority to adopt rules described therein demonstrates that the General Assembly understands the difference between an expiration of the authority to adopt rules and the expiration of the rules themselves. The General Assembly provided no such expiration date in Section 1F.4 of S.L. 2024-57 and instead chose to impose a deadline by which the OSFM's authority to adopt rules expires.

The OSFM acted to draft this rule after S.L. 2024-57 became effective on December 11, 2024. The rule was sent to the Office of Administrative Hearings (OAH) on December 23, 2024. The comment period ended January 31, 2025, and the OSFM adopted the rule February 7, 2025. It strains credulity that the General Assembly would allow temporary rules to be adopted prior to March 1, 2025, but not allow them to be effective after that date. Interpreting Section 1F.4 to require expiration of the rules themselves on March 1, 2025, defeats the purpose of The Disaster

Recovery Act of 2024. Considering the devastation caused by Hurricane Helene to western North Carolina, TTHUs will be needed for a significant period of time.

Pursuant to G.S. 150B-21.1(a2), the General Assembly has given agencies 210 days from the effective date of a session law, under the authority of the session law, to submit temporary rules to the RRC for review. A temporary rule adopted under 150B-21.1(a2), pursuant to S.L. 2024-57, that became effective December 11, 2024, could be submitted to the RRC as late as July 2025. Under 150B-21.1(d)(5), temporary rules may be effective for as long as 12 months after they are approved by the RRC. The General Assembly's willingness to allow other temporary rules to remain in the NCAC is counter to an interpretation of Section 1F.4 that requires any rules, adopted pursuant to the rulemaking authority therein, to expire on March 1, 2025.

This proposed temporary rule meets all the criteria in G.S. 150B-21.19(a). Staff recommends that the RRC review and approve 11 NCAC 05A .1001 at its February 2025 meeting.

§ 150B-21.1.1 PROCEDURE FOR ADOPTING A TEMPORARY RULE

(a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.

(d) Effective Date and Expiration. — A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the earliest of the following dates:

- (1)** The date specified in the rule.
- (2)** The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
- (3)** The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
- (4)** The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
- (5)** 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.
- (6)** Notwithstanding subdivision (5) of this subsection, 12 months after the effective date of the temporary rule.

§ 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.