

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: N.C. Commission for Public Health

RULE CITATION: 15A NCAC 18C .1540

RECOMMENDATION DATE: June 19, 2025

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:

The rule under consideration incorporates by reference 40 C.F.R. 141, Subpart Z, (hereinafter "Subpart Z.")

The adoption published pursuant to G.S. 150B-21.2(a)(1) in the North Carolina Register stated, "Copies are available for public inspection as set forth in Rule .0102(a) and (b) of this Subchapter."

Rule .0102(a) does not provide any information on "where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material," as required by G.S. 150B-21.6.1

Rule .0102(b) addresses the requirements of G.S. 150B-21.6 by referring to United States Environmental Protection Agency (hereinafter "EPA") internet homepage and provides an active link.

The EPA homepage is entitled "Drinking Water Regulations" and provides links to a variety of chemical and microbial contaminants among which one titled "per- and Polyfluoroalkyl Substances (PFAS) Rule." This link takes you to another Page on the EPA webpage entitled "Per- and Polyfluoroalkyl Substances (PFAS)."

1 G.S. 150B-21.6 WAS LAST AMENDED IN 1997.

The PFAS webpage provides a summary and background of the Federal rule and long list of links for "Supporting Materials," one of which is a link to the Federal Register and the actual language to be incorporated by reference.

Following counsel's Request for Changes dated May 30, 2025, the agency replied, "UPON REEXAMINATION OF 18C .0102 (A) AND (B), WE AGREE THAT THE STATUTES INCLUDED IN (A), AND THE SPECIFIC CITATION OF "40 C.F.R 141.2" IN (B), ARE INADEQUATE TO PROVIDE AN UNAMBIGUOUS OPPORTUNITY FOR PUBLIC INSPECTION OF THE NEW FEDERAL PFAS REGULATIONS."

The agency revised the rule to address the requirements of G.S. 150B-21.6 by removing the reference to Rule 102 and including a link to the EPA "Drinking Water Regulations" as described hereinabove. This reduced by one the number of webpages to reach the language to be incorporated by reference.

There are two issues before the Commission.

1) whether referencing only the Title and Part of the Code of Federal Regulations in the Rule, constitutes substantial compliance with Part 2 of Article 2A of the Administrative Procedure Act, specifically G.S. 150B-21.2(a)(1)(hereinafter "Part 2.") If so, the Commission should approve the rule notwithstanding the revision. Stated differently, if the published rule was satisfactory, the revision is as well.

2) Whether the agency adopted the rule in accordance with Part 2.

The statutory framework governing rule adoption emphasizes transparency and accessibility. G.S. 150B-21.6 requires agencies to "specify" where referenced materials can be obtained. By mandating specificity, the General Assembly intended that agencies must clearly and precisely identify the details and procedures necessary for public access. Notwithstanding how well known the location of the materials may be, the General Assembly removed from the public the burden to seek out the materials and placed the burden upon the promulgating agency to specify, within the rule, where the referenced materials can be obtained.

By requiring the public to follow multiple links and review multiple webpages to obtain the incorporated material when it could have provided one link directly to the material, the agency failed to meet its obligation to "specify" in G.S. 150B-21.6.

Beyond ensuring public access to incorporated materials after codification, it is reasonable to infer from the language of G.S.150B-21.2 that the General Assembly intended for the public to have ready access to referenced materials during the comment period. Amending the rule after the comment period does not cure the deficiency of public access at the critical time for review and comment, which the statute is designed to protect.

Accordingly, staff recommends that the Commission find that published rule did not satisfy the requirements of G.S. 150B-21.6 and object to the rule pursuant to G.S. 150B-21.9(a)(4), as agency did not adopt the rule in accordance with Part 2, notwithstanding its post-publication revision.

§ 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-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. **A rule is not valid unless it is adopted in substantial compliance with this Article.** An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with this Article. (1991, c. 418, s. 1; 2011-398, s. 1; 2012-187, s. 2.)

§ 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.
- (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).)

§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Laws 1997-34, s. 5.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64; 1981 (Reg. Sess., 1982), c. 1359, s. 5; 1983, c. 641, s. 3; c. 768, s. 19; 1985, c. 746, s. 1; 1987, c. 285, s. 13; 1991, c. 418, s. 1; 1997-34, s. 5.)

1 15A NCAC 18C .1540 is adopted as published in 39:12 NCR 767-768 with changes as follows:

2
3 **15A NCAC 18C .1540 CONTROL OF PER- AND POLYFLUOROALKYL SUBSTANCES**

4 The provisions of 40 C.F.R. 141, Subpart Z – Control of Per- and Polyfluoroalkyl Substances (PFAS) are
5 hereby incorporated by reference including any subsequent amendments and editions. Copies ~~are available for~~
6 public inspection are available at no cost from the United States Environmental Protection Agency's (EPA)
7 homepage for drinking water regulations at <http://water.epa.gov/lawsregs/rulesregs/sdwa/index.cfm> or from the
8 EPA's Drinking Water Hotline at 1-800-426-4791, as set forth in Rule .0102(a) and (b) of this Subchapter.

9
10 *History Note: Authority G.S. 130A-315; 130A-320(c); P.L. 93-523; 40 C.F.R. 141;*
11 *Eff. July 1, 2025.*