

## **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

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
- Extend the period of review

COMMENT:

*On June 26, 2025, the Commission objected to 15A NCAC 18C.1540 for failure to comply with the Administrative Procedure Act (APA). The Commission's objection is detailed in the attached staff opinion of the June 2025 Commission meeting. Staff avers that the agency's changes to the Rule comply with the requirements in G.S. 150B-21.6 and, thus, satisfies the Commission's objection. Further, staff recommends the Commission determine that the proposed changes are not substantial because the changes do not produce an effect that could not reasonably have been expected based on the published text of the Rule. Therefore, staff recommends approval of the Rule.*

*G.S. 150B-21.12(c) requires the Commission to determine whether a change satisfies the Commission's objection. If it does, the Commission must approve the rule. The Commission is also required to determine whether the change is substantial within the meaning of G.S. 150B-21.2(g). If a change is substantial, the rule will be required to go through the notice, hearing, and publication process for permanent rules as set forth in G.S. 150B-21.2. Following that process, the rule would come back to the Commission for review.*

*The published text of 15A NCAC 18C.1540 referenced the Title, Part, and Subpart of 40 C.F.R. 141.2 to be incorporated by reference under G.S. 150B-21.6 and stated, "Copies are available for public inspection as set forth in Rule .0102(a) and (b) of this Subchapter." The Commission*

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*objected, at least in part, due to the multiple clicks and webpages required to access the referenced C.F.R. The C.F.R. text was obtainable in the published version, albeit more burdensome than necessary. The adopted version of the Rule now before you contains a direct link to incorporate the referenced provisions of 40 C.F.R. 141.2.*

*G.S. 150B-21.2(g) states, “an adopted rule differs substantially from a proposed rule if it does one or more of the following:*

- (1) Affects the interests of persons who, 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.”*

*Staff is unable to contemplate a logical reason why the lack of a direct link to the referenced C.F.R. in the published text would affect the interests of different people than the adopted version. Further, the adopted text does not address a different subject matter or issue than the published text. Lastly, it strains credulity to think a more direct link to the referenced C.F.R. would “produce(s) an effect that could not reasonably have been expected based on the proposed text of the rule.”*

*15A NCAC 18C .1540 was accessible for public comments when it was published in the North Carolina Register and when it was linked to the Commission’s agenda for the June, July, and now August meetings. To Staff’s knowledge, there have been no public questions or comments about how to obtain the text of the C.F.R. referenced in the Rule. The regulated public has had ample notice of 15A NCAC 18C .1540 and sufficient opportunity to comment on the text therein.*

*Pursuant to G.S. 150B-18, Staff recommends approval of the Rule as it was adopted in substantial compliance with the APA, specifically G.S. 150B-21.2(a)(1).*

### **§ 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-21.12. Procedure when Commission objects to a permanent rule.**

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). **If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).**

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

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

...

(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 shall 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 who, 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.

**§ 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.)

**15A NCAC 18C .0102 Definitions**

(a) The definitions contained in G.S. 130A-2, G.S. 130A-290, and G.S. 130A-313 shall apply to this Subchapter.

(b) The definitions contained in 40 C.F.R. 141.2 are hereby incorporated by reference including any subsequent amendments and editions except the following definitions are not adopted:

- (1) "Contaminant;"
- (2) "Maximum contaminant level;"
- (3) "Person;"
- (4) "Public Water System;" and
- (5) "Supplier of water."

Copies of governing federal regulations may be obtained at no cost from the United States Environmental Protection Agency's (USEPA) homepage at <http://water.epa.gov/lawsregs/rulesregs/sdwa/index.cfm> or from the USEPA's Drinking Water Hotline at 1-800-426-4791.

1 15A NCAC 18C .1540 is adopted as published in 39:12 NCR 767-768 with changes following RRC June 26, 2025,  
2 objection as follows:

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4 **15A NCAC 18C .1540 CONTROL OF PER- AND POLYFLUOROALKYL SUBSTANCES**

5 The provisions of 40 C.F.R. 141, Subpart Z – Control of Per- and Polyfluoroalkyl Substances (PFAS) are  
6 hereby incorporated by reference including any subsequent amendments and editions. Copies ~~are available for~~  
7 public inspection are available at no cost from the United States Federal Register at  
8 [https://www.federalregister.gov/documents/2024/04/26/2024-07773/pfas-national-primary-drinking-water-](https://www.federalregister.gov/documents/2024/04/26/2024-07773/pfas-national-primary-drinking-water-regulation#p-amd-25)  
9 [regulation#p-amd-25](https://www.federalregister.gov/documents/2024/04/26/2024-07773/pfas-national-primary-drinking-water-regulation#p-amd-25) or from the EPA's Drinking Water Hotline at 1-800-426-4791, as set forth in Rule .0102(a)  
10 ~~and (b) of this Subchapter.~~

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12 *History Note: Authority G.S. 130A-315; 130A-320(c); P.L. 93-523; 40 C.F.R. 141;*  
13 *RRC Objection Eff: June 26, 2025;*  
14 *Eff. [Month Day, Year. TBD]*  
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