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: Cape Fear Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0118-.0123 and 04 NCAC 15 .0125-.0128

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:

The Cape Fear River Navigation and Pilotage Commission ("Agency") submitted rules 04 NCAC 15 .0118-.0123 and 04 NCAC 15 .0125-.0128 (the "rules"), with accompanying Submission for Permanent Rule forms (Form 0400), on October 20, 2026. As part of the rules review process, the RRC must determine whether the submitted rules were "adopted in accordance with Part 2 of this Article (2A)" of the Administrative Procedures Act (the "APA").

Failure to Comply with G.S. 150B-21.2(d)

Under G.S. 150B-21.2(d), agencies "must maintain a mailing list of persons that have requested notice of rulemaking." Commission Counsel asked the Agency to send us the notice of text sent "to each person on the mailing list that has requested notice on the subject matter described in the notice or the rule affected." The Agency responded to the request as follows:

> "To my knowledge, there is no "mailing list" or "comment/commentor list", nor am I familiar with such list(s). So far, through this 2025 rules review process, there have been the two, 60 day public postings and three public commission meetings with this 2025 rules review process on every agenda, with zero public comment from postings or meetings."

The Agency's apparent position is they aren't aware of the mailing list requirement in G.S. 150B-21.2(d), which states, "An agency must maintain a mailing list of persons that have requested notice of rulemaking". State agencies utilize mailing lists to notify interested parties of rulemaking so the public knows how to get more information about proposed rules, and how to submit comments or objections to them. Without a mailing list, the public may not be aware of the proposed rules unless they periodically go to the agency's website.

Travis Wiggs
Commission Counsel

It's certainly possible, considering the Agency is small with a local nexus, that no one has ever "requested notice of rulemaking". If so, the Agency has complied with G.S. 150B-21.2(d).

Commission Counsel asked the Agency, "Is www.cfpilot.com the Commission's website? Who maintains this website? I don't see any reference to the Commission on the website." The Agency's response was, in part:

> "www.cfpilot.com belongs to the Pilot's Association that the Commission regulates. The Commission does not have a website. This cfpilot.com website was used for rules review process 2015 and now again for 2025."

Failure to Comply with G.S. 150B-21.2(c)

Commission Counsel inquired of the Agency, "Do you have copies of the rulemaking notice that was required to be posted on the Commission's website pursuant to G.S. 150B-19.1(c) and 150B-21.2(c)?" The Agency replied as follows:

> "Then from July 15 thru Sept 14, 2026 the "NOTICE OF TEXT" form 300 was posted. This form 300 NOTICE OF TEXT ran simultaneously on/in the NC Public Register. Both of these postings were removed from the cfpilot.com website following their posting expirations. No comments were received from either posting."

Pursuant to G.S. 150B-21.2(c), a notice of the proposed text of a rule must include:

1. "A short explanation of the reason for the proposed rule."
2. "A link to the agency's website containing the information required by G.S. 150B-19.1(c)."
3. "The proposed effective date of the rule."

Currently, the Agency's website does not contain the information required to be posted under G.S. 150B-21.2(c). However, the Agency has indicated on Form 0400 that the "requirements listed in G.S. 150B-19.1(c)(1)-(5) were posted on the Agency's website no later than the publication date of the notice of text in the N.C. Register". Further, the Agency's rule-making coordinator signed Form 0400, attesting that "I have verified that the information contained on this form is true and accurate to the best of my knowledge." Commission Counsel has no reason to doubt the veracity of the rule-making coordinator's signed attestation.

Commission Counsel has recommended that agencies leave the required information on their websites until the RRC review of the applicable rules is completed or preserve time-stamped copies of the posted information

Recommendation

The Agency has not demonstrated strict compliance with G.S. 150B-21.2(c) and (d). Therefore, the rules were arguably not "adopted in accordance with Part 2" of the APA. However, Commission Counsel recommends that the RRC approve the rules because they were adopted in "substantial compliance" with Article 2A (G.S. 150B-18).

Travis Wiggs
Commission Counsel

§ 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-21.9. 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.
In the event that a proposed temporary or permanent rule fails to comply with any of the standards set forth in this section, the Commission shall object to the temporary or permanent rule.
(a1) Repealed by Session Laws 2023-134, s. 21.2(g), effective October 3, 2023.
(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; 2023-134, s. 21.2(g).)

§ 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.)