

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: Commission for Public Health

RULE CITATION: 10A NCAC 43D .0205

RECOMMENDATION DATE: November 14, 2025

RECOMMENDED ACTION:

- No action
- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - X Unnecessary
 - X Failure to comply with the APA
- Extend the period of review

COMMENT:

The text of this rule is as follows:

(a) The state agency shall promulgate policies, guidelines and manuals to facilitate operation of the WIC Program in accordance with the contract with FNS, the guidelines and instructions issued by FNS in policy letters and management evaluations, and the North Carolina State WIC Program Plan of Operations and the rules contained in this Subchapter.

(b) The policies, guidelines and manuals maintained under (a) of this Rule are available for inspection at the state agency during regular business hours, and online at www.ncdhhs.gov/ncwic.

In communication with the agency, staff had the following exchange about this rule:

Staff question: It appears that this rule is purely about the internal management of an agency, and thus not within the definition of a rule under G.S. 150B-2(8a)a. Am I missing something?

Response: We wish to repeal this rule.

*However, since the rule was originally submitted, the Court of Appeals has determined that legislative changes have rendered the makeup of Commission for Public Health unconstitutional. *Stein v. Berger*, No. COA23-440, slip op. at 17 (Oct. 15, 2025) (available at*

Seth Ascher
Commission Counsel

appellate.nccourts.org/opinions/?c=2&pdf=44470). As a result, the Commission cannot currently repeal the rule.

Because of this circumstance, the RRC must address the rule as submitted. It is my opinion that the rule is purely a statement of internal management and thus does not meet the definition of a rule under G.S. 150B-2 (8a)a. (The term rule does not include “Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.”)

Because the “rule” does not meet the definition of rule under the statute, it is not “within the authority delegated by the General Assembly” to make rules (G.S. 150B-21.9(a)(1)), it is “not reasonably necessary to implement or interment” another law (G.S. 150B -21.9(a)(2)), and it was not adopted “in accordance with Part 2 of this Article” (G.S. 150B-21.9(a)(4)). Therefore, I recommend that the RRC object to this rule.

1 10A NCAC 43D .0205 is amended as published in 39:23 NCR 1502-1516 as follows:

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3 **10A NCAC 43D .0205 POLICIES: GUIDELINES AND MANUALS**

4 (a) The state agency shall promulgate policies, guidelines and manuals to facilitate operation of the WIC Program in
5 accordance with the contract with FNS, the guidelines and instructions issued by FNS in policy letters and
6 management evaluations, and the North Carolina State WIC Program Plan of Operations and the rules contained in
7 this Subchapter.

8 (b) The policies, guidelines and manuals maintained under (a) of this Rule are available for inspection at the state
9 agency during regular business ~~hours.~~ hours, and online at www.ncdhhs.gov/ncwic.

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11 *History Note: Authority G.S. 130A-361;*

12 *Eff. July 1, 1981;*

13 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*

14 *23, ~~2017~~, 2017;*

15 *Amended Eff. April 1, 2026.*

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AGENCY: Commission for Public Health

RULE CITATION: 10A NCAC 43D .0304

RECOMMENDATION DATE: November 14, 2025

RECOMMENDED ACTION:

No action

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The text of this rule is as follows:

Local WIC agencies that plan to increase the number of persons served shall submit a written request to the Community Nutrition Services Section. The availability of funds and the Affirmative Action Plan contained in the North Carolina State WIC Program Plan of Operation will be considered in making the decision to approve or deny the request.

In communication with the agency, staff had the following exchange about this rule:

Staff Question: Are there any additional criteria to what is listed in lines 5-7 of this rule? If so, where are they identified?

Response: We wish to repeal this rule.

In conversation with staff, the rulemaking coordinator reported that the agency wanted to repeal the rule because it covered a process which was out of date, and thus the rule was not necessary.

*However, since the rule was originally submitted, the Court of Appeals has determined that legislative changes have rendered the makeup of Commission for Public Health unconstitutional. *Stein v. Berger*, No. COA23-440, slip op. at 17 (Oct. 15, 2025) (available at*

Seth Ascher
Commission Counsel

appellate.nccourts.org/opinions/?c=2&pdf=44470). As a result, the Commission cannot currently repeal the rule.

Because of this circumstance, the RRC must address the rule as submitted. Based on communications with the agency, this rule is not necessary.

Therefore, I recommend that the RRC object to this rule pursuant to G.S. 150B-21.9(a)(3) (the rule is not “reasonably necessary to implement or interpret” another law.)

1 10A NCAC 43D .0304 is amended as published in 39:23 NCR 1502-1516 as follows:

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3 **10A NCAC 43D .0304 EXPANSION OF LOCAL WIC PROGRAMS**

4 Local WIC agencies that plan to increase the number of persons served shall submit a written request to the ~~Nutrition~~
5 ~~Services Section.~~ Community Nutrition Services Section. The availability of funds and the Affirmative Action Plan
6 contained in the North Carolina State WIC Program Plan of Operation will be considered in making the decision to
7 approve or deny the request.

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9 *History Note: Authority G.S. 130A-361;*

10 *Eff. July 1, 1981;*

11 *Amended Eff. December 6, 1991; November 1, 1990;*

12 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
13 *23, ~~2017~~, 2017;*

14 *Amended Eff. April 1, 2026.*