

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
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Memorandum

To: North Carolina Coastal Resources Commission
From: Mary L. Lucasse, Esq.
Date: January 23, 2022
Re: Petition for Rulemaking Procedures (CRC-22-01)

The North Carolina Administrative Procedures Act (“Act”) provides that “[a] person may petition an agency to adopt a rule.” N.C. Gen. Stat. §150B-20(a). The Act requires that an agency establish rules setting forth the procedure it “follows in considering a rule-making petition.” *Id.* The North Carolina Coastal Resources Commission did so in 15A N.C. Admin. Code 07J .0605. The Commission requires that a petition for rulemaking include a draft of the proposed rule, the reason for the request, a statement of the effect on existing rules, any data in support of the request, a statement of the effect of the proposed rule on existing practices, and the name and address of the petitioner. *Id.*

Following receipt of a petition for rulemaking, the Chair of the Commission, in consultation with counsel and staff, reviews the petition to determine whether it is complete. In this case, the Chair determined that the petition submitted by Mr. Paul included the required information and scheduled it for a hearing at the Commission’s next regularly scheduled meeting. *See* January 12, 2022 letter to Nelson G. Paul from Mary L. Lucasse attached. As required by the Commission’s rule, the Chair requested the Director of the Division of Coastal Management “prepare a recommended response to the petition for the Commission’s consideration” no later than February 4, 2022. *See* 15A NCAC 7J .0605(b).

Under the Act, the Commission is required to grant or deny a rule-making petition within 120 days of the date the petition is submitted. N.C. Gen. Stat. § 150B-20(b). The Commission received the petition for rulemaking on December 29, 2021. Therefore, the Commission must provide a written final agency decision granting or denying the petition on or before April 28, 2022. Counsel for the Commission will draft the written final agency decision based on the Commission's decision made by motion during this meeting.

If the Commission denies the rule-making petition, the written final agency decision "must inform the person who submitted the rule-making petition of the reasons for denying the petition." N.C. Gen. Stat. § 150B-20(c). A petitioner may request judicial review in the North Carolina superior court of a final agency decision denying the request to initiate rulemaking. N.C. Gen. Stat. §150B-20(d).

If the Commission "grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings." N.C. Gen. Stat. § 150B-20(c). If the petition is granted, the Division of Coastal Management would begin the usual rule-making activities required by N.C. Gen. Stat. § 150B-21.2 including publishing the proposed amendment, obtaining, or preparing a fiscal note, and sending out the proposed amendment for public comment and/or hearing. The Commission may include in the published notice a statement that the agency is initiating rulemaking because of a petition for rulemaking and the name of the person who submitted the petition. *Id.* The Commission may also state whether it supports the proposed text amendment or not.

The matter would eventually come back to the Commission for a final decision on whether to adopt the proposed amendment to 15A N.C. Admin. Code 07H .0205. Only then, will the Commission decide whether to adopt the proposed amendment based on Staff's recommendation and its own deliberations. After the proposed revision to the rule has gone through this process, the Commission may decide not to amend the rule. The Commission's

decision not to adopt the proposed amendment to a rule is not subject to judicial review. “[N.C. Gen. Stat. §] 150B-2(2) expressly excludes ‘rulemaking’ from its definition of a ‘contested case.’” *North Carolina Chiropractic Ass’n v. North Carolina State Board of Education*, 122 N.C. App. 122, 123, 468 S.E.2d 539, 541 (1996). Once the Commission decides whether to amend the rule, the issue is finished. There is no right to appeal the Commission’s decision to adopt or amend a rule or leave it unchanged.

Attachments:

1. N.C. Gen. Stat. § 150B-20
2. 15A N.C. Admin. Code 07J .0605
3. January 12, 2022 letter to Nelson G. Paul from Mary L. Lucasse regarding Petition for Rulemaking - 15A NCAC 7H .0205(e)

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. – A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition. An agency receiving a rule-making petition shall, within three business days of receipt of the petition, send the proposed text of the requested rule change and the statement of the effect of the requested rule change to the Office of Administrative Hearings. The Office of Administrative Hearings shall, within three business days of receipt of the proposed text of the requested rule change and the statement of the effect of the requested rule change, distribute the information via its mailing list and publish the information on its Web site.

(b) Time. – An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. – If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) Review. – Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b). (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; c. 477, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 7.10(b); 1997-34, s. 2; 2003-229, s. 1; 2017-211, s. 1(a).)

(a) Any person wishing to request the adoption, amendment, or repeal of a rule shall make this request in a petition addressed to the Division of Coastal Management. The petition shall specify it is filed pursuant to G.S. 150B-20 and shall contain the following information:

- (b) The petition will be placed on the agenda for the next regularly scheduled commission meeting, if received at least four weeks prior to the meeting, and the director shall prepare a recommended response to the petition for the Commission's consideration. Petitions will be considered in accordance with the requirements of G.S. 150B-20.

*History Note: Authority G.S. 113A-124; 150B-20;
Eff. January 1, 1989;
Amended Eff. October 1, 1992.*

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
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January 12, 2022

Via Email: nelson@nelsonpaul.com

Nelson G. Paul
307 Misty Grove Circle
Morrisville, NC 275160

Re: Petition for Rulemaking - 15A NCAC 7H .0205(e)

Dear Mr. Paul,

I am the attorney representing the North Carolina Coastal Resources Commission and am writing regarding your Petition for Rulemaking which was received by the North Carolina Division of Coastal Management ("DCM") on December 29, 2021. As required by N.C. Gen. Stat. §150B-20, the proposed text of the requested rule change and the statement of the effect of the requested change has been forwarded to the Office of Administrative Hearings and the petition is posted on its website.

After reviewing your Petition, M. Renee Cahoon, Chair of the Commission determined that the Petition is complete and that it will be heard during the Commission's regularly scheduled meeting on February 10, 2022 which will take place at the Beaufort Hotel, 2440 Lennoxville Road, Beaufort, North Carolina, 28516. The agenda for that meeting has not yet been finalized. I will be in contact as we get closer to the meeting date to provide additional information regarding what time the hearing on your petition is scheduled to occur.

The Chair has requested that DCM provide its recommendation regarding the Petition for Rulemaking as provided by 15A NCAC 07J .0605, no later than February 4, 2022.

As the Petitioner, you will be allowed to speak to the Commission in support of your petition during the Commission meeting. A representative of DCM will also be allowed to speak to the Commission regarding DCM's recommendation. Both Petitioner and DCM will have fifteen minutes at the meeting with Petitioner going first. There will not be an opportunity for rebuttals or replies. The Commission may ask questions during the hearing. Please let me know if you do not plan to attend the meeting or speak to the Commission.

Pursuant to N.C. Gen. Stat. §150B-20, the Commission has 120 days from the date the petition was submitted to grant or deny the request to initiate rulemaking proceedings to consider changes to its rule. Accordingly, the Commission must issue its decision by April 28, 2022.

Please let me know if you have any questions or comments regarding this information.
The best way to reach me is by sending an email to me at mlucasse@ncdoj.gov.

Sincerely,



Mary L. Lucasse, Counsel
North Carolina Coastal Resources Commission

cc: M. Renee Cahoon, Chair of the NC Coastal Resources Commission
Braxton Davis, Director, DCM
Christy Goebel, Counsel to DCM