

JEFF JACKSON
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
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Memorandum

To: North Carolina Coastal Resources Commission
From: Mary L. Lucasse, Esq.
Date: February 7, 2025
Re: Petition for Rulemaking Procedure (CRC-25-11)

Issue: At its February 2025 meeting, the Commission will decide whether or not to grant the petition for rulemaking to revise 15A NCAC 7H .0206(a) (estuarine waters). The Commission is not adopting the text of the proposed rule which would only occur if the Commission proceeded with rulemaking.

Process: The N.C. Administrative Procedure 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, in this case the Coastal Resources Commission (“Commission”), establish rules setting forth the procedure it “follows in considering a rulemaking petition.” *Id.* The Commission did so in 15A N.C. Admin. Code 07J .0605. The Act and the Commission’s rules establish the process used to consider petitions for rulemaking. This memo outlines the process and takes no position on the merits of the petition for rulemaking.

The Commission is required to grant or deny a rulemaking petition within 120 days of the date the petition as submitted. N.C. Gen. Stat. §150B-20(b). In this case, the Commission received the petition requesting an amendment to 15A N.C.A.C. 07H .0206(a) (estuarine waters) on December 6, 2024. The Commission Chair with DCM staff determined that the Petition was complete and scheduled it for hearing at your February meeting. The Commission must provide a written final agency decision granting or denying the petition by April 6, 2025.

At its February 2025 meeting, the Commission will consider whether to grant the request. The Commission’s reasons for its decision should not be arbitrary or capricious and should be based on the substantive merits of the proposed rule amendment. The Commission may choose to consider the following issues (or others) when it decides whether to grant the request:

1. Whether the Commission reviewed, revised, or readopted the rule recently;
2. Whether the Commission has authority to make the requested revision.
3. Whether the Commission received public comments regarding the rule;
4. What impact the proposed rule revision would have on the Commission’s coastal management program;
5. Whether the proposed revision would have unintended consequences;
6. Whether the requested revisions address Petitioner’s concern;

Following the meeting, Commission Counsel will draft the final agency decision stating the Commission's decision and serve it on Petitioner. If the Commission denies the rulemaking petition, the written final agency decision provide the reasons for denying the petition. N.C. Gen. Stat. §150B-20(c). A petitioner may request judicial review in superior court if the Commission denies the request to initiate rulemaking. N.C. Gen. Stat. §150B-20(d).

If the Commission "grants a rulemaking petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rulemaking." N.C. Gen. Stat. §150B-20(c). When initiating rule making, the Commission may include in the published notice a statement "that the agency is initiating rule making as a result of a rulemaking petition" and "the name of the person who submitted the petition." *Id.* The Commission may also state whether it supports the proposed text amendment.

If the Commission decides to grant the petition, the Division of Coastal Management would begin the usual rulemaking 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 matter would eventually come back to the Commission for a final decision on whether to adopt the proposed amendment to 15A NCAC 07H .0206(a) Estuarine Waters. Only then, will the Commission decide whether to adopt the revised rule. Once the Commission either adopts or does not adopt the proposed amendment, the issue is finished. There is no right to appeal the Commission's decision about whether to adopt a rule. *See 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).

Attachments:

1. N.C. Gen. Stat. § 150B-20
2. 15A N.C. Admin. Code 07J .0605
3. December 13, 2024 letter to Petitioner Nelson G. Paul from Mary L. Lucasse re Petition for Rulemaking
4. *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).

§ 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).)

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
MARY L. LUCASSE
(919) 716-6962
MLUCASSE@NCDOJ.GOV

December 13, 2024

Via Email: nelson@nelsonpaul.com

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

Re: Petition for Rulemaking - 15A NCAC 7H .0206(a)

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 6, 2024. 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, Commission Chair determined that the Petition is complete. It will be heard during the Commission's regularly scheduled meeting on February 26-27, 2025 which will take place at a location to be determined. The agenda for that meeting has not yet been set. I will be in contact as we get closer to the meeting date to provide additional information. The Chair has requested that DCM provide its recommendation regarding the Petition as provided by 15A NCAC 07J .0605, no later than February 14, 2025.

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 6, 2025. 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

Nelson G. Paul
December 13, 2024
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cc: M. Renee Cahoon, Chair of the NC Coastal Resources Commission
Tancred Miller, DCM Director
Christine Goebel, Assistant General Counsel, NC Department of Environment Quality

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [ACT-UP Triangle v. Commission for Health Services of the State of N.C.](#), N.C., April 11, 1997

122 N.C.App. 122

Court of Appeals of North Carolina.

NORTH CAROLINA CHIROPRACTIC
ASSOCIATION, Petitioner,

v.

NORTH CAROLINA STATE BOARD
OF EDUCATION, Respondent.

No. COA95-422.



|
March 19, 1996.

Synopsis

Association of chiropractors sought review of order of the State Board of Education which declined to amend rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. The Superior Court, Wake County, [Robert L. Farmer](#), J., dismissed, and association appealed. The Court of Appeals, [John C. Martin](#), J., held that Board's decision was "rulemaking" decision and was not subject to judicial review.

Affirmed.

West Headnotes (4)

- [1] **Administrative Law and Procedure**
 Findings;reason or explanation
Administrative Law and Procedure
 Rules, regulations, and other policymaking

If agency denies rule-making petition, it must send the person who submitted the petition a written statement of reasons for denial, and statute then provides for judicial review of the denial. *G.S. § 150B-20(c, d)*.


2 Cases that cite this headnote

- [2] **Administrative Law and Procedure**

Procedure for Adoption

If agency grants rule-making petition, it must inform the person who submitted the petition of its decision and must initiate rule-making proceedings.

1 Cases that cite this headnote

- [3] **Administrative Law and Procedure**
 Rules, regulations, and other policymaking

If agency grants rule-making petition, but then does not adopt or amend the rule after following the required procedures, judicial review is not available. *G.S. §§ 150B-21.1, 150B-21.2, 150B-43*.

2 Cases that cite this headnote

- [4] **Education**
 Appeals from decisions

Board of Education's decision not to amend rule to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes was rulemaking decision and was not subject to judicial review. *G.S. §§ 150B-21.1, 150B-43; N.C. Admin. Code title 16, r. 6E.0202(a)(4)*.

1 Cases that cite this headnote

****540 *122** Appeal by petitioner from order and judgment entered 16 February 1995 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 25 January 1996.

Attorneys and Law Firms

Allen & Pinnix, P.A. by [M. Jackson Nichols](#), Raleigh, and [Vance C. Kinlaw](#), Greensboro, for petitioner-appellant.

Attorney General [Michael F. Easley](#) by Special Deputy Attorney General [Thomas J. Ziko](#), for respondent-appellee.

Opinion

*123 JOHN C. MARTIN, Judge.

The North Carolina Chiropractic Association (“NCCA”) appeals from the dismissal of its petition seeking judicial review of a decision of the North Carolina State Board of Education. The matter comes before us upon the following factual and procedural history: On 28 October 1992, the NCCA petitioned the State Board of Education, pursuant to G.S. § 150B–20(a), to amend Rule 16 N.C.A.C. 6E.0202(a)(4) to allow doctors of chiropractic to perform required annual physical examinations of prospective interscholastic athletes. At its meeting on 7 January 1993, the Board granted the petition pursuant to G.S. § 150B–20(b) and initiated public rule-making procedures.

On 18 March 1993, the Board held a public hearing and received comments on the proposed amendment. At its regular monthly Issues Session on 6 May 1993, the Board accepted the recommendation of the Department and Program Committee not to adopt the amendment, but “to leave the subject policy as it currently exists.” The Board subsequently sent the NCCA notice of its decision on 15 November 1993. In December 1993, the NCCA petitioned for judicial review of the Board’s decision, excepting to the decision on the following grounds:

- a. The Board’s denial was made upon unlawful procedure in that the Board failed to provide the NCCA with a written statement of the reasons for denying the NCCA’s rule-making petition, as required by G.S. 150B–20(c);
- b. The Board’s denial was unsupported by substantial evidence in view of the entire record; and
- c. The Board’s denial was arbitrary and capricious.

The trial court denied and dismissed the petition, finding that the case was not subject to review under G.S. §§ 150B–20(d) or 150B–43, and that the court did not have subject matter jurisdiction over the petition.

conclude the trial court had no jurisdiction and affirm its order dismissing the petition.

G.S. § 150B–20(c) provides in relevant part:

If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons *124 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.

Thus, if a rule-making petition is denied, the agency must provide the petitioner with a written statement of the reasons for the denial. G.S. § 150B–20(d) then provides for judicial review of the denial.

[4] If, however, as in this case, the agency grants a rule-making petition, subsequent **541 procedures for considering and adopting the rule are governed by either G.S. § 150B–21.1 for temporary rules, or § 150B–21.2 for permanent rules. Notably, neither of these sections provides for judicial review if the agency does not adopt or amend the rule after following the required procedures. Nor is judicial review available in such a case under G.S. § 150B–43, which provides a right to judicial review for “[a]ny person who is aggrieved by the final decision in a contested case.” However, G.S. § 150B–2(2) expressly excludes “rulemaking” from its definition of a “contested case.” Thus, inasmuch as the Board of Education’s decision not to amend the rule was a “rulemaking” decision, it is not subject to judicial review and the trial court properly dismissed the NCCA’s petition for judicial review for lack of jurisdiction. Accordingly, the decision of the trial court is

Affirmed.

JOHNSON and MARK D. MARTIN, JJ., concur.

[1] [2] [3] The dispositive issue is whether the trial court erred in dismissing the petition for lack of jurisdiction. We

All Citations

122 N.C.App. 122, 468 S.E.2d 539, 108 Ed. Law Rep. 972

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