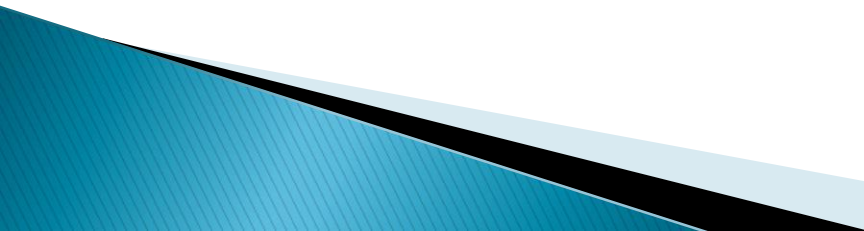


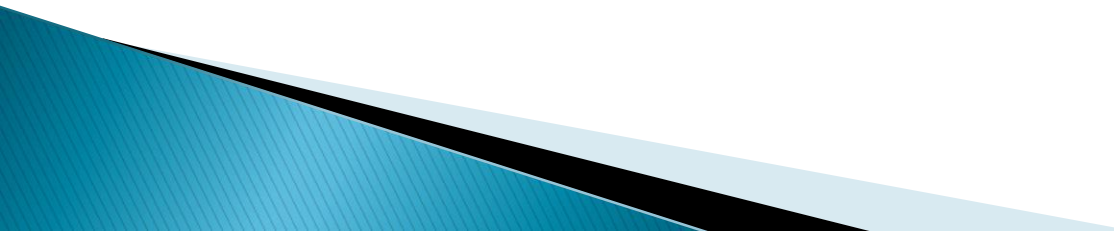
Petition for Rulemaking Process and Considerations

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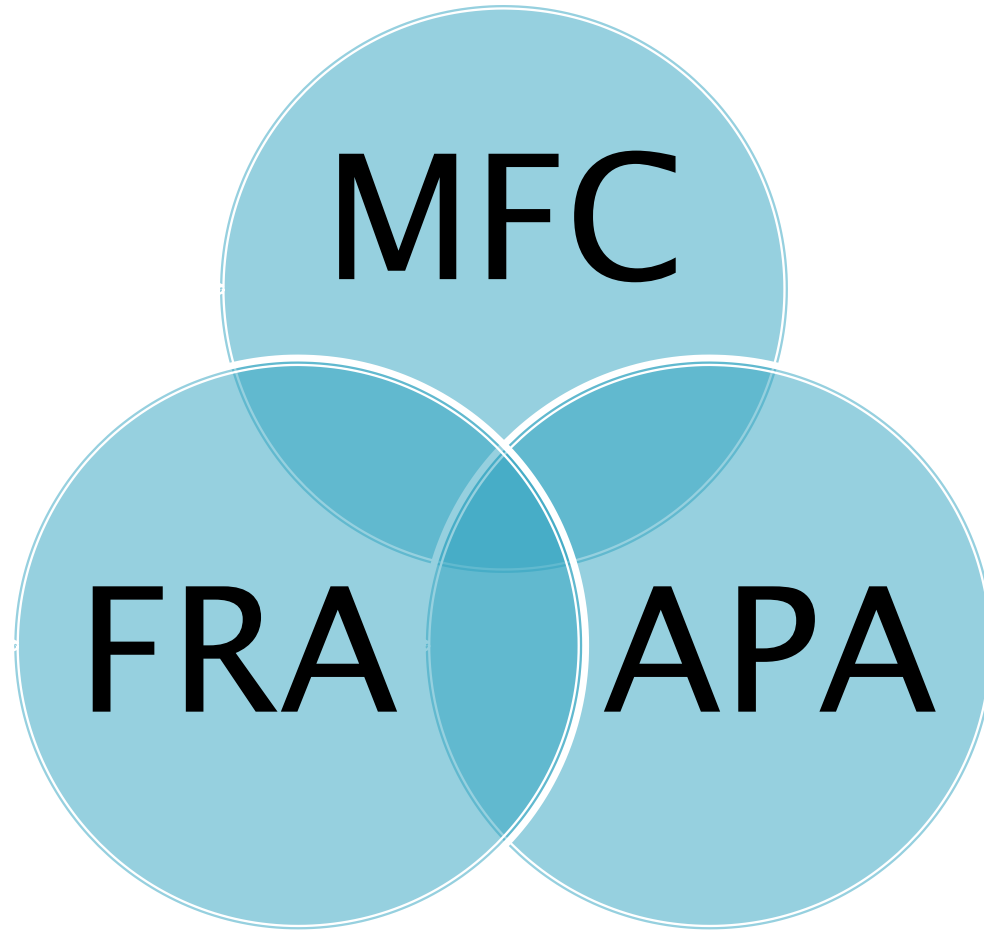
Purpose

- ▶ Overview of Petition Process and Rulemaking Requirements
 - ▶ Forecast of Potential Outcomes
 - ▶ *This information does not constitute a formal or informal opinion of the Attorney General's Office
 - ▶ Not an endorsement, recommendation, or comment as to the petition's merits or as to how the Commission should vote
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NC Administrative Procedure Act

- ▶ Establishes the requirements for making rules
 - ▶ Establishes broad requirements for what can be adopted as a rule
 - ▶ Does not replace the Commission's authority regarding rulemaking through the FMP process
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Interaction



“Point of Order!”

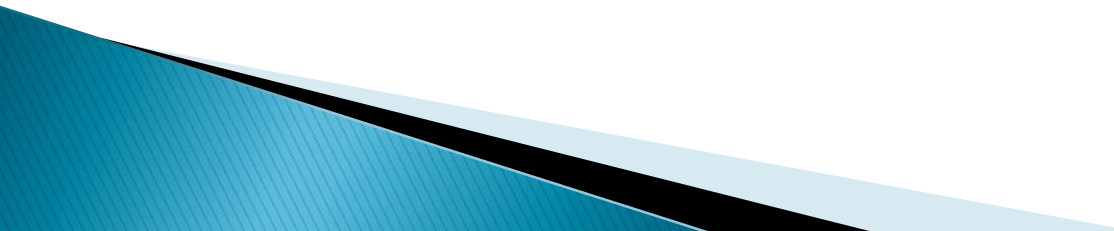
Rule

Statute

Constitution



The Issue Before the Commission

- ▶ The petition before the Commission seeks to have the Commission initiate the rulemaking process for the proposed rules.
 - ▶ Petition process provided by the APA.
 - ▶ Involves the permanent rulemaking process.
 - ▶ This is a quasi-legislative function.
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N.C. Gen. Stat. § 150B-20

- ▶ (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.**

15A NCAC 03P .0301

- ▶ (a) Any person wishing to request the adoption, amendment, or repeal of a rule of the Marine Fisheries Commission (hereinafter referred to as the Commission) shall make his request in a written petition addressed to the Chairman of the Marine Fisheries Commission and submitted to the Commission staff ...

- ▶ (b) The petition shall contain the following information:
 - (1) the text of the proposed rule(s);
 - (2) the statutory authority for the agency to promulgate the rule(s);
 - (3) a statement of the reasons for adoption of the proposed rule(s);
 - (4) a statement of the effect on existing rules;
 - (5) copies of any documents and data supporting the proposed rule(s);
 - (6) a statement of the effect of the proposed rule(s) on existing practices in the area involved, including an estimate of cost factors for persons affected by the proposed rule(s);
 - (7) a description of those most likely to be affected by the proposed rule(s); and
 - (8) the name(s) and address(es) of the petitioner(s).

15A NCAC 03P .0303

Presentation to the Commission

- ▶ (a) Petitions for rulemaking, **when deemed complete** by the Marine Fisheries Commission Chairman, shall be **presented** to the Marine Fisheries Commission for its consideration and determination **at the next regularly scheduled meeting of the Commission.**

- ▶ (b) **Within 120 days** following submission of the petition requesting rulemaking, the Marine Fisheries Commission shall:
 - (1) initiate rulemaking proceedings in accordance with G.S. 150B-20 and notify the person(s) who submitted the petition of the decision in writing; or
 - (2) deny the petition in writing, stating the reason or reasons for the denial, and send the written denial to the person(s) who submitted the petition.

Petition was submitted May 20, decision due by September 17

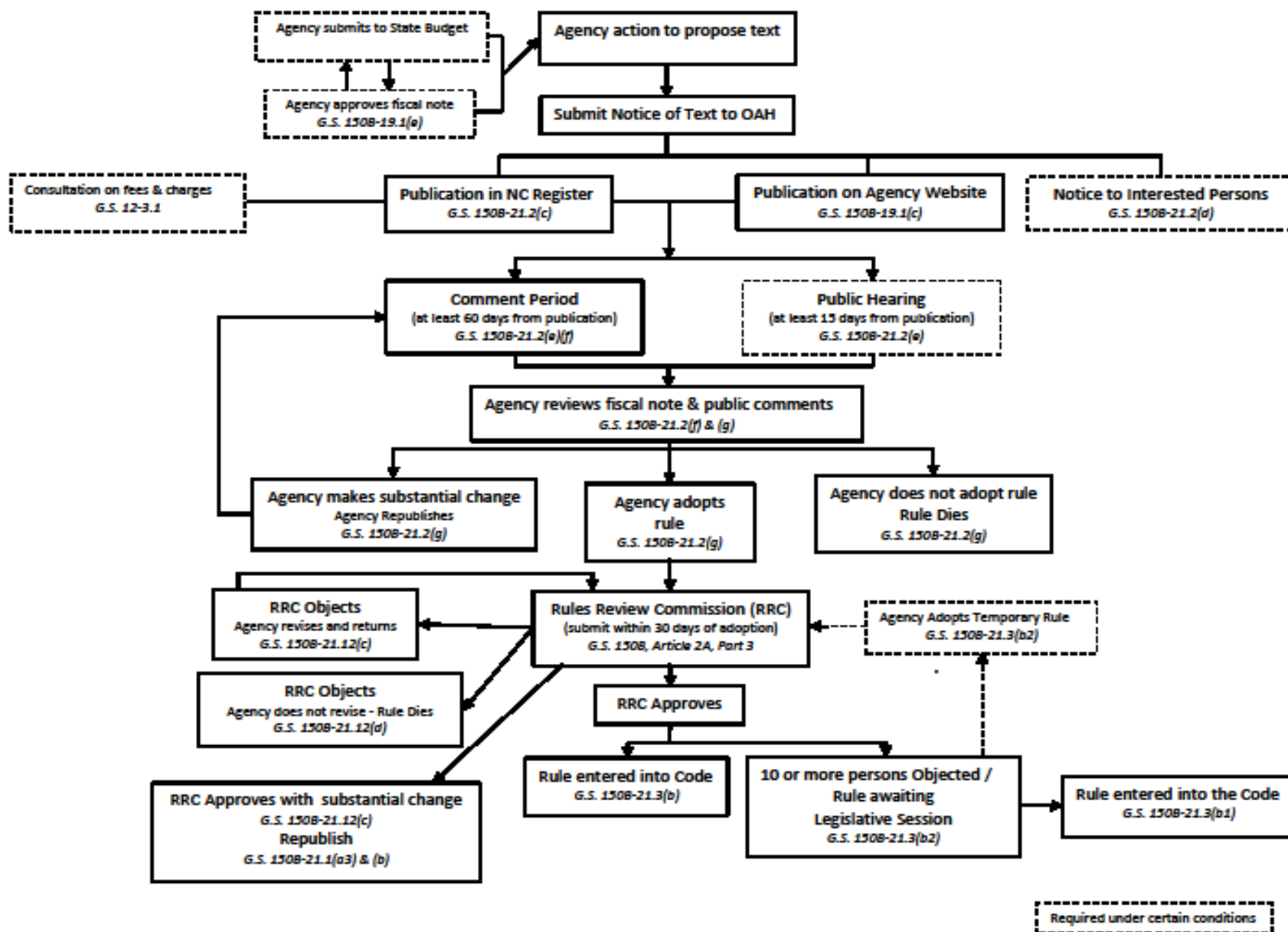
If Denied

- ▶ N.C. Gen. Stat. § 150B-20(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.**
- ▶ Judicial Review in Superior Court

If Petition is granted, Initiate ≠ Adopt

- ▶ North Carolina Chiropractic Association, v. North Carolina State Board of Education, 122 N.C. App. 122, 468 S.E.2d 539 (1996)
- ▶ The plain language of the statute does not require the Commission to adopt the rules if it grants the petition, only that it initiate rulemaking
- ▶ Must initiate the permanent rulemaking process as provided in the APA

PERMANENT RULEMAKING PROCESS



Where Do We Start?

§ 150B-19.1. Requirements for agencies in the rule-making process

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

(1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.

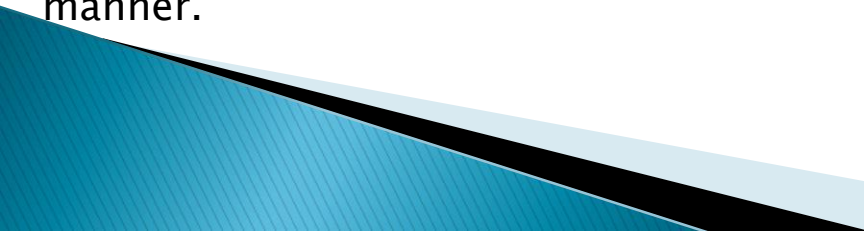
(2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.

(3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.

(4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.

(5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).

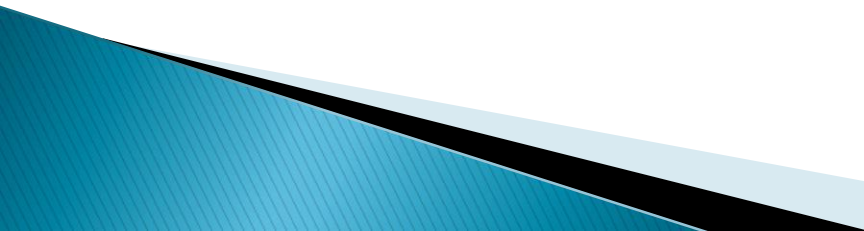
(6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.



§ 150B-21.4(b1) Substantial Economic Impact.

- ▶ **Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management. ...**

§ 150B-21.4(b2) Fiscal Note

- ▶ Content. -- A fiscal note required by subsection (b1) of this section must contain the following:
 - ▶ (1) A description of the persons who would be affected by the proposed rule change.
 - ▶ (2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
 - ▶ (3) A description of the purpose and benefits of the proposed rule change.
 - ▶ (4) An explanation of how the estimate of expenditures was computed.
 - ▶ (5) A description of at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected. The alternatives may have been identified by the agency or by members of the public.
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N.C. Gen. Stat. § 150B-21.2

- ▶ (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.
 - ...
 - (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.

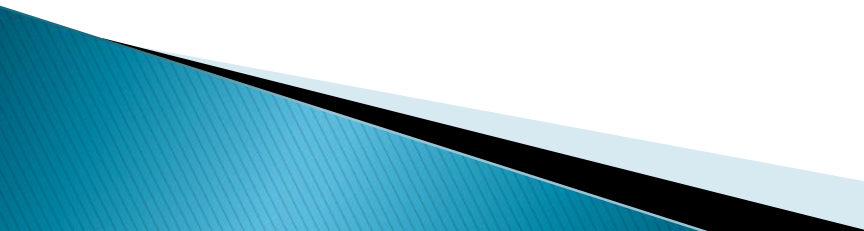
What is “Notice of Text”

- ▶ § 150B–21.2(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
 - (2) A short explanation of the reason for the proposed rule.
 - (2a) A link to the agency's Web site 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 period of time during which and the 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.

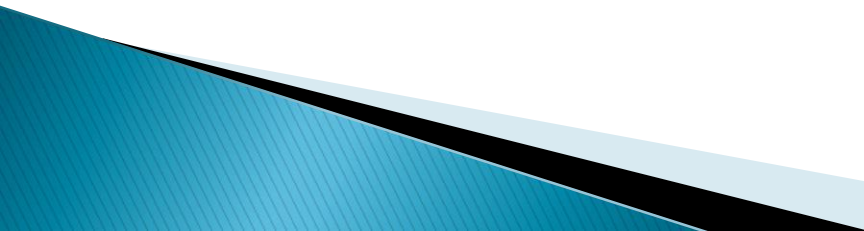
If Granted

- ▶ **§ 150B-20(c) ... 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.**

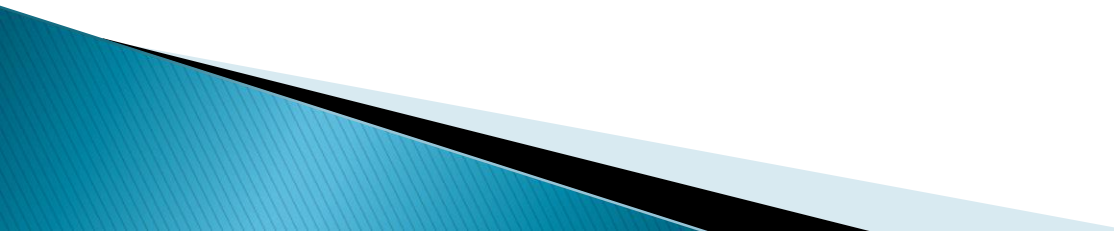
But, ok, let's assume we do all that, what then?

- ▶ Generally, an agency can adopt the proposed rules in the petition, but is not required to by the APA.
 - ▶ If adopt, then the rules go to the RRC for review under the normal process.
 - ▶ If RRC approves, then becomes effective, unless 10 letters of objection are received.
 - ▶ If objections made, then moves to the legislature.
 - ▶ Still must consider FMP process
- 

Fishery Management Plans

- ▶ The granting of a petition for rulemaking pursuant to the APA does not supersede or otherwise replace the Commission's statutory authority or limitations, it only requires the initiation of the rulemaking process
 - ▶ The Commission is tasked with the responsibility of adopting FMPs for "all commercially or recreationally significant species or fisheries that comprise State marine or estuarine resources." N.C. Gen. Stat. § 113-182.1(a)
 - ▶ FMPs contain management goals and objectives, recommended management actions, conservation and management measures, among other information.
 - ▶ "The Marine Fisheries Commission shall adopt rules to implement Fishery Management Plans in accordance with Chapter 150B of the General Statutes." N.C. Gen. Stat. §113-182.1(f)
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Shrimp FMP

- ▶ Adopted in 2015, rules went into effect January 1, 2017
 - ▶ To the extent that the proposed rules conflict with what is currently authorized in the Shrimp FMP, the FMP would need to be revised before the Commission could adopt the proposed rules.
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Timeline of previous petition

- ▶ NCWF's previous petition
 - Nov. 2, 2016 – Filed
 - Jan. 12, 2017 – Amended
 - Feb. 15/16, 2017 meeting – Approved
 - DMF drafted fiscal note
 - Reviewed by OSBM
 - Jan. 4, 2019– OSBM notified DMF that it could not certify the fiscal note due to a lack of available funds to implement the proposed rules
 - Feb. 21/22, 2019 meeting – MFC referred the contents of the petition to the AC for consideration in development of Amendment 3 to the Shrimp FMP

The Issue Before the Commission

- ▶ The decision before you today is whether to grant the petition or deny it.
 - ▶ Questions?
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