

# ***RULEMAKING UPDATE***



ROY COOPER  
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April 27, 2020

## MEMORANDUM

**TO:** N.C. Marine Fisheries Commission

**FROM:** Catherine Blum, Fishery Management Plan and Rulemaking Coordinator  
Fisheries Management Section

**SUBJECT:** Rulemaking Update

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### Issues

Update the Marine Fisheries Commission (MFC) on the status of rulemaking in support of the Periodic Review and Expiration of Existing Rules per G.S. 150B-21.3A and request the MFC vote on approval to begin the rule readoption process for a portion of rules in 15A NCAC 18A.

### Findings

- Periodic Review and Readoption of Rules – Requirements
  - North Carolina G.S. 150B-21.3A, adopted in 2013, requires state agencies to review existing rules every 10 years.
  - The initial review comment period on the 164 MFC rules in 15A NCAC 18A was held from Feb. 26 - May 7, 2018; no public comments were received. All rules were determined to be necessary with substantive public interest and must be readopted as though they are new rules.
  - On Jan. 16, 2020, the Rules Review Commission (RRC) approved the readoption schedule for these rules requested by the MFC of June 30, 2024. The MFC must readopt all rules by this deadline or the rules will expire and be removed from the N.C. Administrative Code.
- Recreational Water Quality Program Rules – Changes Needed
  - The first group of rules in 15A NCAC 18A being considered for readoption is found in Section .3400, Coastal Recreational Waters Monitoring, Evaluation, and Notification.
  - These rules were adopted in 2004 and need updating to bring the N.C. Recreational Water Quality (RWQ) Program into compliance with new U.S. Environmental Protection Agency (EPA) criteria and standards and to be more efficient as a program in protecting public health.
  - The intended effective date for readoption of these rules (April 1, 2021) coincides with the start of the 2021 recreational swimming season, creating a smooth transition for the regulated public and division staff in implementing the updated standards.

### Recommendation

Staff recommends the MFC vote on approval to begin the rule readoption process for the seven rules in 15A NCAC 18A .3400, Coastal Recreational Waters Monitoring, Evaluation, and Notification. For more information, please refer to the [Rulemaking](#) section of the briefing materials.

## **Rulemaking Update**

### 15A NCAC 18A - Sanitation

#### *Periodic Review and Readoption of Rules – Readoption Schedule Update*

The process of rule readoption for MFC rules in 15A NCAC 18A is scheduled to begin at the MFC's May 2020 business meeting. Given the large number of rules subject to readoption, the wide variety of issues regulated by these rules, and the generally controversial nature of the rules, this will be the first of four years to readopt rules. On Jan. 16, 2020, the RRC approved the readoption schedule requested by the MFC of June 30, 2024. The MFC is now ready to begin the rule readoption process at its May 2020 business meeting.

#### *2020-2021 Rulemaking Cycle*

##### *Recreational Water Quality Program Rules – Changes Needed*

The first group of rules in 15A NCAC 18A being considered for readoption is found in Section .3400, Coastal Recreational Waters Monitoring, Evaluation, and Notification. These rules were adopted in 2004 and need updating to bring the RWQ Program into compliance with new EPA criteria and standards and to be more efficient as a program in protecting public health. The purpose of the program is to protect public health by monitoring recreational coastal waters and to notify the public when samples collected exceed the safe swimming standard. The intended effective date for readoption of these rules (April 1, 2021) coincides with the start of the 2021 recreational swimming season, creating a smooth transition for the regulated public and division staff in implementing the updated standards.

In 2014, the EPA updated its regulations on marine recreational water quality standards, known as the National Beach Guidance and Required Performance Criteria for Grants. This not only provides specific rules and criteria related to beach water quality, but also provides a grant-based funding pathway to assist states in ongoing monitoring and reporting. The RWQ Program is already following a portion of this 2014 guidance in terms of monitoring and enforcement.

Additional monitoring requirements and notification requirements need to be implemented in rule to comply with the federal program and remain grant eligible. These new requirements would simply shift the protocols in place for both monitoring recreational waters and notifying the public of swimming alerts. The proposed changes would ensure equal protection for swimmers by requiring that the same bacteriological threshold triggers public health advisories for all swimming locations, regardless of usage frequency. Modifications to the notification processes would also minimize delays and reduce confusion.

Staff recommends the MFC begin the rule readoption process at its May 2020 business meeting for the seven rules in 15A NCAC 18A, Coastal Recreational Waters Monitoring, Evaluation, and Notification, by voting on Notice of Text for Rulemaking for readoption and readoption through repeal of 15A NCAC 18A .3400. For more information, please refer to the 2020-2021 rulemaking cycle and the fiscal analysis of the proposed rules that are in the [Rulemaking](#) section of the briefing materials.

Due to protective measures to help prevent the spread of COVID-19 and subsequent impacts to staff workload, rulemaking to begin readoption of additional rules in 15A NCAC 18A is scheduled for the MFC's August 2020 business meeting.

## 15A NCAC 03 - Marine Fisheries

### 2019-2020 Rulemaking Cycle

At its February 2020 meeting, the MFC approved final readoption of 15A NCAC 03M .0509, Tarpon, and 03O .0108, License and Commercial Fishing Vessel Registration Transfers, as originally published in the Oct. 1, 2019 issue of the *N.C. Register*. Following the MFC meeting, at least 10 letters that objected to the tarpon rule and requested review of the rule by the legislature were received by the RRC. On April 16, 2020, the RRC approved both rules. The tarpon rule is subject to legislative review per G.S. 150B-21.3, Effective date of rules. Both rules are subject to legislative review per S.L. 2019-198 and G.S. 14-4.1, Legislative review of regulatory crimes. Due to the proximity of the RRC approval of the rules to the start of the 2020 legislative session, these rules will likely not be considered until the 2021 legislative session.

### 2020-2021 Rulemaking Cycle

Due to protective measures to help prevent the spread of COVID-19 and subsequent impacts to staff workload, rulemaking to begin readoption of additional rules in 15A NCAC 03 is scheduled for the MFC's August 2020 business meeting.

## Background Information

### Periodic Review and Expiration of Existing Rules per G.S. 150B-21.3A

Session Law 2013-413, the Regulatory Reform Act of 2013, implemented requirements known as the "Periodic Review and Expiration of Existing Rules." These requirements are codified in a new section of Article 2A of Chapter 150B of the General Statutes in G.S. 150B-21.3A. Under the requirements, each agency is responsible for conducting a review of all its rules at least once every 10 years in accordance with a prescribed process.

The review has two parts. The first is a report phase, which has concluded, followed by the readoption of rules. An evaluation of the rules under the authority of the MFC was undertaken in two lots (see Figure 1.) The MFC has 211 rules in Chapter 03 (Marine Fisheries), of which 172 are subject to readoption, and 164 rules in Chapter 18, Subchapter 18A (Sanitation) that are also subject to readoption. The MFC is the body with the authority for the approval steps prescribed in the process.

Rules	2017	2018	2019	2020	2021	2022	2023	2024
Chapter 03 (172 rules)	Report	41 Rules Readopted	2 Rules Readopted	Rule Readoption (129)		6/30/22 deadline		
Subchapter 18A (164 rules)			Report	Rule Readoption (164)				6/30/24 deadline

Figure 1. Marine Fisheries Commission rule readoption schedule to comply with G.S. 150B-21.3A, Periodic Review and Expiration of Existing Rules.

### Action Needed

The MFC is scheduled to begin the rule readoption process for rules in 15A NCAC 18A by voting on Notice of Text for Rulemaking for readoption and readoption through repeal of 15A NCAC 18A .3400.

# N.C. Marine Fisheries Commission 2020-2021 Annual Rulemaking Cycle Package A

May 2020

Time of Year	Action
February-April 2020	Fiscal analysis of rules prepared by DMF staff and approved by Office of State Budget and Management
May 2020	MFC approves Notice of Text for Rulemaking
August 2020	Publication of proposed rules in the <i>North Carolina Register</i>
August-October 2020	Public comment period held
September 2020	Public hearing held (details to be determined)
November 2020	MFC considers approval of permanent rules
January 2021	Rules reviewed by Office of Administrative Hearings Rules Review Commission
April 1, 2021	Proposed effective date of rules
April 1, 2021	Rulebook supplement available online
April 15, 2021	Commercial license sales begin

## Fiscal Impact Analysis of Proposed Recreational Water Quality Rule Amendments

**Rule Amendments:** 15A NCAC 18A .3400

**Name of Commission:** N.C. Marine Fisheries Commission

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**Impact Summary:** State government: Yes  
Local government: No  
Federal government: No  
Substantial impact: No

### Authority:

#### North Carolina General Statutes

G.S. 113-134. Rules.  
G.S. 113-182. Regulation of fishing and fisheries.  
G.S. 113-221.3. Monitoring program for State coastal fishing and recreation waters; removal or destruction of warning signs.  
G.S. 143B-289.52. Marine Fisheries Commission - powers and duties.

#### Federal Regulations

Beaches Environmental Assessment and Coastal Health Act (BEACH Act) of 2000

### I. Necessity:

The proposed amendments readopt and repeal through readoption seven rules in 15A NCAC 18A .3400 pursuant to requirements of G.S. 150B-21.3A. Additionally, North Carolina recreational water quality rules established in 2004 require text amendments to align with federal U.S. Environmental Protection Agency (EPA) criteria and standards that were updated in 2014. These changes ensure equal protection for swimmers by requiring that the same bacteriological threshold triggers public health advisories for all swimming locations, regardless of usage frequency. Notification processes modifications will also reduce delays and confusion, without generating an increased frequency of swimming advisories for the public. Additional changes are proposed to more logically align with new criteria and create more efficient protocols for the program.

### II. Summary

These rules have been reviewed to conform to the requirements of G.S. 150B-21.3A, Periodic Review and Expiration of Existing Rules. In 2014, the EPA updated its regulations on marine

recreational water quality standards, known as the National Beach Guidance and Required Performance Criteria for Grants. This not only provides specific rules and criteria related to beach water quality, but also provides a grant-based funding pathway to assist states in ongoing monitoring and reporting. The N.C. Recreational Water Quality (RWQ) Program is already following a portion of this 2014 guidance in terms of monitoring and enforcement. Additional monitoring requirements and notification requirements need to be implemented in rule to comply with the federal program. These new requirements would not incur any additional time or material costs to the state; instead, they simply shift the protocols in place for both monitoring recreational waters and notifying swimming alerts to the public. In tandem with these amendments, other changes are proposed to improve RWQ Program efficiency in relation to these federal requirements and eliminate redundancies within rules to N.C. statutes.

### **III. Introduction and Purpose of Rule Changes**

The purpose of the Marine Fisheries Commission (MFC) is to manage, restore, develop, cultivate, conserve, protect, and regulate the marine and estuarine resources within its jurisdiction, as described in G.S. 113-132, including commercial and recreational fisheries resources (Chapter 143B, Article 7, Part 5D). The MFC is also required to adopt rules to provide for a water quality monitoring program for the coastal recreation waters of the state and to allow the Department of Environmental Quality to implement the federal Beaches Environmental Assessment and Coastal Health Act of 2000 (G.S. 113-221.3). North Carolina G.S. 150B-21.3A, adopted in 2013, requires state agencies to review existing rules every 10 years. Following an initial review, rules will be reviewed on a 10-year review cycle. The initial review comment period on all MFC rules in 15A NCAC 18A was held from Feb. 26 - May 7, 2018; no public comments were received. The MFC subsequently approved the report on the review of the rules at its August 2018 meeting. The final report for rules in 15A NCAC 18A was reviewed and approved by the Rules Review Commission at its January 2019 meeting. The report was forwarded to the Joint Legislative Administrative Procedure Oversight Committee for final determination. The committee met March 24, 2019, completing the review process for these rules.

The final determinations were unchanged from how they were originally submitted. As a result, all 164 rules were determined to be necessary with substantive public interest and must be readopted as though they were new rules. On Jan. 16, 2020, the Rules Review Commission approved the readoption schedule requested by the MFC of June 30, 2024 for these rules. This document addresses the first group of rules in 15A NCAC 18A being considered for readoption.

In July of 1999, North Carolina first began permanently funding recreational water quality monitoring and public notification; these standards at the time were based on the U.S. EPA's Clean Water Act guidelines. However, one year later the U.S. Congress passed the BEACH Act, which formalized recreational water quality rules, mandating each state have a beach monitoring program in place by 2004, and established a federal grant program for state monitoring. With a successful program already in place, North Carolina applied for and received federal funding in 2002 which was aimed at helping the state meet the new requirements of the BEACH Act.

In that same year, coastal states expressed to the EPA the need for guidance with which to run the beach monitoring programs. In 2002, the first National Beach Guidance and Required Performance Criteria was published, which required all states to implement it in order to remain grant eligible. To comply, North Carolina needed to change the bacteriological indicator and

action levels for which advisories were issued. These amendments were put into rule and adopted in 2004. Adhering to the EPA's guidance document is a necessity because the grant now funds more than half of the RWQ Program, funding items like salaries, equipment, and supplies for day to day operations. Currently, the RWQ Program's rules that were adopted in 2004 reflect the performance criteria published in 2002.

From 2002 to 2014, the EPA and coastal states created a solid foundation that successfully implemented the national and state BEACH Act monitoring and notification programs. This included an increase in consistency among the states as well as the quality, quantity, and timeliness of beach water quality data. These successes prompted the conception of the updated National Beach Guidance and Required Performance Criteria for Grants in 2014. Significant changes were made with the release of this updated document. One of the changes was to ensure the equal protection for swimmers by recommending the same bacteriological threshold for all swimming locations regardless of usage category. These bacteriological limits will primarily impact how the Division of Marine Fisheries issues public notifications when samples collected exceed the safe swimming standard.

These changes need to be addressed in North Carolina rules to remain compliant and grant eligible. Firstly, the state's Tier II and III beaches, defined by usage frequency, would be combined and have their monitoring criteria changed to match Tier I beaches, which are already in compliance with federal standards. This would reclassify all Tier III beaches as Tier II, and conform all monitoring and notification standards to conform with federal standards and generate a more efficient and logical process. Additionally, the state's "Swimming Alert" notification would be changed to a "Pending Swimming Advisory". This would allow for notification immediately following a non-compliant sample via social media, rather than a formal news media release, which would create a faster and more understandable approach for the public. These rule amendments to meet federal standards are found in 15A NCAC 18A .3402, .3403 and .3405.

The idea behind these changes is due to continuous delays in the media reporting on a news release, often a day or two later. The EPA has approved that issuing a social media release is an acceptable form of public notification, which is a requirement under the performance criteria. Once a swimming area exceeds the bacteriological limit, a resample is collected immediately. Statistically, from data compiled between 2013 and 2019, 84% of resamples collected fell below the bacteriological limit. This means alerts typically last for 24 hours and are rescinded the next day. The delay in reporting caused confusion to the public. With the proposed changes to the rules, a news release will be issued only when a "Swimming Advisory" is issued, which will happen after the resample exceeds the bacteriological limit. This will remain in place for a minimum of a week. If the news media is delayed in reporting by a day or two, the swimming advisory will still be active. Removing the language involving the "Swimming Alert" classification from the rules, and adding a "Pending Swimming Advisory" and assigning the same bacteriological standard to all use categories in the rules will meet the necessary requirements for EPA compliance. These proposed changes would also allow the RWQ Program to operate more efficiently in protecting public health. Initially, when the 2014 performance guidance was released, there were concerns that there would be an increase in the number of advisories issued, but in fact there will not be any change based on the RWQ Program statistics of samples and resamples. Therefore, these proposed rule amendments would not produce any significant changes in recreational swimming behavior or access.

Lastly, other rule amendments are proposed to make minor improvements to the operational efficiency of the RWQ Program and eliminate unnecessary redundancies within rules to N.C. statute. Rule .3401 proposes changes to definitions to conform to the other rule changes and increase efficiency and simplicity. Rule .3404 codifies requirements to notify the swimming public about health risks associated with wastewater spills, which the RWQ Program is already implementing. Finally, rules .3406 and .3407 are repealed as those requirements can already be found in G.S. 113-221.3.

In summary, there are seven rules in 15A NCAC 18A .3400. Rules .3402, .3403 and .3405 contain proposed changes to bring the RWQ Program into compliance with new EPA criteria and standards. Additionally, rules .3403 and .3405 are simplified by pointing to the bacteriological limits provided in .3402 instead of repeating the limits in each rule. Rule .3401 proposes changes to definitions to conform to the other rule changes. Proposed changes to Rule .3404 would codify requirements to notify the swimming public about health risks associated with wastewater spills. Finally, Rules .3406 and .3407 are proposed for repeal, as they merely repeat requirements of G.S. 113-221.3. Additional proposed changes to rules make minor and conforming changes, including punctuation, grammar, capitalization, and consistent use of terms.

#### **IV. Fiscal Impact**

##### *Benefits*

These proposed rule amendments would generate small economic benefits to the state across a range of categories. Specifically, they would lead to benefits to the public in terms of improved information exchange and potential improvements to public health in relation to recreational water access. Additionally, approval of these proposed rule amendments would lead to a guarantee of annual federal grant monies that support half of the RWQ program budget.

The main focus of these amendments is to use the same federal bacteriological threshold for all swimming locations regardless of usage category, which in turn impacts how the Division of Marine Fisheries issues public notifications when samples collected exceed the safe swimming standard. While this will benefit the public by generating a more timely and efficient notification process, it will also not result in an increased frequency of pending swimming advisories. Thus, this proposed rule amendment would likely lead to non-quantifiable, negligible benefits in information timing and access, which can aid public health in terms of recreational water use, without any offsetting costs of decreased recreational activity as notification frequency would remain static.

Additionally, this would also better assure future grant monies from the EPA's National Beach Guidance and Required Performance Criteria for Grants, which currently provides roughly \$277,000 annually. This grant package represents approximately 50% of the RWQ Program's budget and is critical towards supporting its activities. The U.S. EPA allows states three years to adopt new federal criteria in rule after it's issued, after which grant eligibility becomes endangered. However, due to the ongoing communication between states and the EPA, a demonstration of action towards rule change has been accepted as enough compliance to be grant eligible annually. The newest EPA criteria was issued in 2014. Since 2017, the RWQ Program has demonstrated an ongoing process of adopting these criteria and forming them into rule. This has allowed the Program to remain grant eligible under the EPA's approval. However, now that these proposed rule amendments have been finalized in the state, they must be approved and codified in order to maintain these federal grants into the future. Lastly, the additional proposed

rule amendments to definition changes, text edits, and rule repeal all contribute to increased efficiency for the RWQ Program as it better aligns itself with federal guidelines.

### *Costs*

These proposed rule amendments do not incur any state costs in terms of enforcement, staff labor, or environmental damage, and therefore should not be considered. Staff already samples the water quality of swimming areas and notifies the public when bacteriological limits are exceeded.

There is a negligible cost component to the amendments proposed in 15A NCAC 18A .3404 related to signage purchasing. Specifically, the RWQ Program estimates that \$1,743.50 over the next five years will need to be spent to replace signage due to vandalism or natural degradation, which would align the rule text with current practice. Additionally, proposed rule changes would codify requirements to post signs to alert the public of the health risk associated with swimming in areas impacted by wastewater spills, with an estimated cost of \$500. Additional staff labor would not be required as this signage would be posted during ongoing monitoring activities. While these two requirements would incur a small cost to the Program, these are negligible cost components that are required to remain federally compliant, and would also be entirely funded by federal grant monies.

## V. Appendix

15A NCAC 18A .3401 is proposed for readoption with substantive changes as follows:

### SECTION .3400 - COASTAL RECREATIONAL WATERS MONITORING, EVALUATION, AND NOTIFICATION

#### 15A NCAC 18A .3401 DEFINITIONS

The following definitions shall apply ~~throughout to~~ Section 18A-.3400 of this Subchapter:

- (1) "Division" means the Division of Marine Fisheries or its authorized agent.
- ~~(1)(2)~~ (2) "Enterococcus" means a gram positive coccoid-shaped bacteria that is found in the intestinal tracts of warm-blooded animals that include *Enterococcus faecalis*, *Enterococcus faecium*, *Enterococcus avium*, and *Enterococcus gallinarium*.
- ~~(2)(3)~~ (3) "Geometric mean" means the mean of "n" positive numbers obtained by taking the "~~n~~"<sup>th</sup>-"n"<sup>th</sup>" root of the product of the numbers with at least five samples collected within a ~~30-day~~ 30-day period.
- (4) "Pending swimming advisory" means a notification to the public that recommends no primary contact with the water in a specific swimming area when bacteriological limits are exceeded but, does not close a swimming area to the public. A pending swimming advisory shall include a public notification via social media release to notify the public of the risks of swimming in the area. A pending swimming advisory is followed by a resample that will determine if a swimming advisory will be issued.
- ~~(3)(5)~~ (5) "Point source discharge" means the discharge of liquids through a pipe, drain, ~~ditch-ditch~~, or other conveyance into a swimming area.
- ~~(4)(6)~~ (6) "Primary contact" means an activity in water in which a person's head is partially or completely submerged.
- (7) "Resample" means a water sample that is collected after the results of the initial water sample collected are processed and the results are analyzed.
- ~~(5)(8)~~ (8) "Storm water discharge" means any natural or manmade conveyance of rainwater or the resultant runoff into coastal recreational waters.
- ~~(6)(9)~~ (9) "Swimming advisory" means a notification to the public that recommends no primary contact with the water in a specific swimming area ~~for public health reasons when bacteriological limits are exceeded~~, but does not close a swimming area to the public. A swimming advisory shall include a sign posted at the site of the advisory and a ~~press release~~ public notification via social media and news release to notify the public of the risks of swimming in the area.
- ~~(7)~~ "Swimming alert" means a notification to the public by media contact including a press release to warn the public of risks of swimming in an area that exceeds bacteriological swimming area levels.

- ~~(8)~~(10) "Swimming area" means a coastal recreation area that is used for primary contact located within waters classified by the Division of Water ~~Quality Resources~~ as ~~SA, SB, or SC~~ SC, SA, or SB as set forth in 15A NCAC 02B .0220-.0222.
- ~~(9)~~(11) "Swimming season" means from April 1 through October 31 of each year.
- ~~(10)~~(12) "Tier I swimming area" means a swimming area used daily during the swimming season, ~~including any public access swimming area and any other swimming area where people use the water for primary contact,~~ including all oceanfront beaches. ~~beaches that are monitored by the Division.~~
- ~~(11)~~(13) "Tier II swimming area" means a swimming area ~~used an average of three days a week that is not used daily~~ during the swimming season.
- ~~(12)~~ "Tier III swimming area" means a swimming area ~~used an average of four days a month during the swimming season.~~
- ~~(13)~~(14) "Winter season" means from November 1 through March 31 of each year.

*History Note: Authority G.S. ~~130A-233.1; 113-134; 113-182; 113-221.3; 143B-289.52;~~  
Eff. February 1, 2004;  
Readopted Eff. April 1, 2021.*

15A NCAC 18A .3402 is proposed for reoption with substantive changes as follows:

**15A NCAC 18A .3402 BACTERIOLOGICAL LIMITS FOR SWIMMING AREAS**

(a) The enterococcus level in a Tier I swimming area shall not equal or exceed either:

- (1) ~~A~~ a geometric mean of 35 enterococci per 100 ~~milliliter~~ milliliters of ~~water,~~ water; ~~that includes a minimum of at least five samples collected within 30 days; or~~
- (2) ~~A~~ a single sample of 104 enterococci per 100 ~~milliliter~~ milliliters of water.

(b) The enterococcus level in a Tier II swimming area shall not equal or exceed a single sample of ~~276~~ 104 enterococci per 100 ~~milliliter~~ milliliters of water.

~~(c) The enterococcus level in a Tier III swimming area shall not exceed two consecutive samples of 500 enterococci per 100 milliliter of water.~~

*History Note:* Authority ~~G.S. 130A-233.1; 113-134; 113-182; 113-221.3; 143B-289.52;~~  
*Eff. February 1, 2004;*  
*Readopted Eff. April 1, 2021.*

15A NCAC 18A .3403 is proposed for reoption with substantive changes as follows:

**15A NCAC 18A .3403 PUBLIC NOTICE OF INCREASED HEALTH RISKS IN SWIMMING AREAS**

(a) Tier I Swimming areas:

- ~~(1) A swimming advisory shall be issued by the Division when samples of water from a swimming area exceeds a geometric mean of 35 enterococci per 100 milliliter during the swimming season.~~
- ~~(2) A swimming alert shall be issued by the Division when a single sample of water from a swimming area exceeds 104 enterococci per 100 milliliter and does not exceed 500 enterococci per 100 milliliter during the swimming season.~~
- ~~(3) A swimming advisory shall be issued by the Division when a sample of water from a swimming area exceeds a single sample of 500 enterococci per 100 milliliter during the swimming season.~~
- ~~(4) A swimming advisory shall be issued by the Division when at least two of three concurrent water samples collected at a swimming area exceeds 104 enterococci per 100 milliliter during the swimming season.~~
- (1) A pending swimming advisory shall be issued by the Division of Marine Fisheries if a water sample from a swimming area is equal to or exceeds the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section, during the swimming season.
- (2) A swimming advisory shall be issued by the Division if either of the following standards are exceeded during the swimming season:
  - (A) Both the initial water sample and resample collected from a swimming area is equal to or exceeds the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section; or
  - (B) The most recent five water samples collected within a 30-day period from a swimming area is equal to or exceeds the bacteriological limit set forth in Subparagraph (a)(1) of Rule .3402 of this Section.

(b) Tier II swimming areas:

- ~~(1) A swimming alert shall be issued by the Division when a single sample of water from a swimming area exceeds 276 enterococci per 100 milliliter and does not exceed 500 enterococci per 100 milliliter during the swimming season.~~
- (1) A pending swimming advisory shall be issued by the Division if a water sample from a swimming area is equal to or exceeds the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section during the swimming season.
- (2) A swimming advisory shall be issued by the Division ~~when a single sample~~ if both the initial water sample and resample collected ~~of water~~ from a swimming area is equal to or exceeds 500 enterococci per 100 milliliter the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section during the swimming season.

~~(c) A Tier III swimming area with a water sample result of 500 enterococci per 100 milliliter or higher on the first sample shall be resampled the following day. If the laboratory results of the second sample exceed 500 enterococci per 100 milliliter a swimming advisory shall be issued by the Division.~~

~~(c)~~ Signs posted pursuant to this Section shall be placed or erected in open view where the public may see the ~~sign(s)~~ sign prior to entering the water.

~~(d)~~ Signs shall ~~convey~~ state the following:

ATTENTION: SWIMMING IN THIS AREA IS NOT RECOMMENDED. BACTERIA TESTING INDICATES LEVELS OF CONTAMINATION THAT MAY BE HAZARDOUS TO YOUR HEALTH. THIS ADVISORY AFFECTS WATERS WITHIN 200' OF THIS SIGN.  
OFFICE OF THE STATE HEALTH DIRECTOR.

*History Note: Authority G.S. ~~130A-233.1~~; 113-134; 113-182; 113-221.3; 143B-289.52;*

*Eff. February 1, 2004;*

*Readopted Eff. April 1, 2021.*

15A NCAC 18A .3404 is proposed for reoption with substantive changes as follows:

**15A NCAC 18A .3404 SWIMMING ADVISORIES FOR POINT SOURCE DISCHARGES INTO SWIMMING AREAS**

(a) A wastewater treatment plant that discharges into swimming waters shall be posted by the Division of Marine Fisheries with at least one sign until the discharge is removed. The ~~sign(s)~~ sign for a wastewater treatment plant discharge shall ~~convey~~ state the following:

~~ATTENTION: THESE WATERS MAY BE CONTAMINATED BY HUMAN OR ANIMAL WASTE. SWIMMING IS NOT ADVISED IN THESE WATERS BECAUSE OF THE INCREASED RISK OF ILLNESS. OFFICE OF THE STATE HEALTH DIRECTOR.~~  
WARNING! SEWAGE TREATMENT EFFLUENT DISCHARGE SITE. SWIMMING IS NOT ADVISED IN THESE WATERS BECAUSE OF THE INCREASED RISK OF ILLNESS. OFFICE OF THE STATE HEALTH DIRECTOR.

(b) A swimming advisory shall be issued by the Division and at least one sign shall be posted at the public access to swimming waters that have been impacted by a wastewater system failure. The sign for waters impacted by a wastewater spill shall state the following:

WARNING! WASTEWATER SPILL. SWIMMING IS NOT ADVISED IN THESE WATERS BECAUSE OF THE INCREASED RISK OF ILLNESS. OFFICE OF THE STATE HEALTH DIRECTOR.

~~(b)~~(c) A swimming advisory shall be issued by the Division and at least ~~two signs~~ one sign shall be posted at a storm drain or storm water discharge that is ~~actively~~ discharging into a Tier 1 swimming area. ~~Signs~~ A sign shall be placed to advise the public as they enter the area impacted by the ~~drain~~ storm drain or storm water discharge. For dry weather discharges, ~~The signs~~ the sign for a storm drain or storm water discharge shall ~~convey~~ state the following:

~~SWIMMING IS NOT RECOMMENDED BETWEEN SIGNS. WATERS MAY BE CONTAMINATED BY DISCHARGE FROM PIPE. OFFICE OF THE STATE HEALTH DIRECTOR.~~  
WARNING! STORM WATER DISCHARGE AREA. SWIMMING WITHIN 200 YARDS OF THIS SIGN MAY INCREASE THE RISKS OF WATERBORNE ILLNESS. OFFICE OF THE STATE HEALTH DIRECTOR.

For wet weather discharges, the sign shall state the following:

WARNING! STORM WATER DISCHARGE AREA. WATERS MAY BE CONTAMINATED BY DISCHARGE FROM PIPE. SWIMMING IS NOT RECOMMENDED WITHIN 200 YARDS OF THIS SIGN DURING ACTIVE DISCHARGE. FOR MORE INFORMATION, CALL 252-726-6827. OFFICE OF THE STATE HEALTH DIRECTOR.

~~(e)~~(d) A swimming advisory shall be issued by the Division and at least two signs shall be posted at a storm drain where flood waters are being pumped into a swimming area. ~~The signs shall remain posted for at least 24 hours after the pumping of flood waters has ceased.~~ The signs shall ~~convey~~ state the following:

SWIMMING IS NOT RECOMMENDED BETWEEN SIGNS. WATERS MAY BE CONTAMINATED BY DISCHARGE FROM PIPE. OFFICE OF THE STATE HEALTH DIRECTOR.

~~(d)~~(e) A swimming advisory shall be issued by the Division and at least two signs shall be posted at an area receiving dredge material on a swimming beach ~~when~~if the dredge material is being pumped from an area closed to shellfish harvesting. The signs shall ~~convey~~state the following:

SWIMMING IS NOT RECOMMENDED BETWEEN SIGNS. WATERS MAY BE CONTAMINATED BY DISCHARGE FROM PIPE. OFFICE OF THE STATE HEALTH DIRECTOR.

*History Note: Authority G.S. ~~130A-233.1; 113-134; 113-182; 113-221.3; 143B-289.52;~~  
Eff. January 1, 2004;  
Readopted Eff. April 1, 2021.*

15A NCAC 18A .3405 is proposed for readoption with substantive changes as follows:

**15A NCAC 18A .3405    RESCINDING A PENDING SWIMMING ADVISORY OR SWIMMING ALERT  
ADVISORY**

(a) A pending swimming advisory shall be rescinded by the Division of Marine Fisheries via social media release when the resample collected meets bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section.

~~(a)(b)~~ A Tier I swimming area advisory shall be rescinded by the Division via social media and news release, including the removal of signs, when two consecutive weekly water samples and the geometric mean meet the bacteriological limits in Rule 18A .3402(a) of this Section. A swimming alert shall be rescinded within 24 hours of compliance with Rule 18A .3402(a)(2) of this Section, both of the following conditions are met:

(1) The geometric mean has met the bacteriological limit set forth in Subparagraph (a)(1) of Rule .3402 of this Section.

(2) Two consecutive weekly water samples meet the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section.

~~(b)(c)~~ A Tier II or Tier III swimming area advisory or alert shall be rescinded by the Division via social media and news release, including the removal of signs, after water samples meet the bacteriological standard in Rule 18A .3402(b) or (c) of this Section, limit set forth in Subparagraph (b) of Rule .3402 of this Section.

~~(c)(d)~~ A swimming advisory resulting from a point source flood water discharge or the discharge of dredge material shall be rescinded by the Division via social media and news release 24 hours after the discharge has ceased, ceased, to allow for tidal dispersion.

(e) A swimming advisory resulting from a wastewater system failure shall be rescinded by the Division via social media and news release, including the removal of signs, when failure has been corrected and water samples collected meet the bacteriological limit set forth in Subparagraph (a)(2) of Rule .3402 of this Section.

~~(d)~~ When a swimming advisory or alert has been rescinded, the Division shall issue a press release to announce the lifting of the advisory or the alert and the sign(s) shall be removed immediately by the Division.

*History Note: Authority G.S. 130A-233.1; 113-134; 113-182; 113-221.3; 143B-289.52;*

*Eff. January 1, 2004;*

*Readopted Eff. April 1, 2021.*

15A NCAC 18A .3406 is proposed for repeal as follows:

**15A NCAC 18A .3406 DESTRUCTION OF SIGNS**

~~A person shall not mutilate, deface, pull down, destroy, hide, or steal any sign posted pursuant to this Section.~~

*History Note:* Authority G.S. 130A-233.1;

*Eff. January 1, 2004;*

*Repealed Eff. April 1, 2021.*

