

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: Mining Commission and Oil and Gas Commission

RULE CITATION: 15A NCAC 05C

DATE ISSUED: October 18, 2023

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The Mining Commission and Oil and Gas Commission have filed a joint request to reassign Subchapter 05C from the Mining Commission to the Oil and Gas Commission for the purposes of the 2014-2023 Periodic Review Schedule.

These rules were originally assigned to the Mining Commission and added to the schedule in 2016. However, as the governor and General Assembly had not yet appointed a quorum of members to the Mining Commission, the rules were removed from the schedule until such time as the Commission was fully reconstituted. DEQ informed staff that the Mining Commission was fully staffed and holding its first meeting in June 2022. Consequently, at its August 2022 meeting, RRC added these rules to the Periodic Review Schedule with a due date of December 2023. RRC staff sent the report containing these rules to the Mining Commission on August 31, 2022, well over a year ago.

On September 28, 2023, the chairs of both the Mining and Oil and Gas Commission submitted the aforementioned request to reassign the 05C rules on the basis that they are predicated on the Oil and Gas Conservation Act (G.S. 113A-391) and are within the Oil and

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Gas Commission's rulemaking authority. The chairs also ask RRC to extend the due date for the 05C rules to November 2024.

While staff agrees that the rules should be reassigned to the Oil and Gas Commission, the extension to November 2024 is unwarranted. Under G.S. 150B-21.3A(c), "[e]ach agency . . . shall conduct a review of the agency's existing rules at least **once every 10 years**" in accordance with the Periodic Review process. The 2014-2023 schedule went into effect in July 2014. Thus, the latest the agency could submit its report would be June 2024. However, under 26 NCAC 05 .0203, an agency "shall have 10 business days after the report is sent to review it for accuracy and completeness. An agency shall notify the Commission staff by email at oah.rules@oah.nc.gov of any errors or missing rules within the 10 business days following the date the RRC sent the report." The report was sent to the agency on August 31, 2022, and thus their request should have been sent no later than **September 15, 2022**. We received it on September 28, 2023, over a year late.

In light of the fact that the 05C rules would be entirely removed from the Code should the Oil and Gas Commission not have the opportunity to submit a report, G.S. 150B-21.3A(b) ("any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission . . ."), and that the Commission "shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances," G.S. 150B-21.3A(d)(1), staff recommends transferring the 05C rules to the Oil and Gas Commission, but placing them back on the schedule at the soonest practicable time.

Under G.S. 150B-21.3A(c)(1), the agency must receive public comment on its report for at least 60 days, and the completed report must be filed with RRC "on or before the 20th day of the month for Commission review of the report at its meeting the following month[.]" 26 NCAC 05 .0203. Thus, the earliest the agency could complete and file its report would be January 20, 2024, in time for review at the February 2024 RRC.

§ 150B-21.3A. Periodic review and expiration of existing rules.

(a) Definitions. - For purposes of this section, the following definitions apply:

- (1) Commission. - Means the Rules Review Commission.
- (2) Committee. - Means the Joint Legislative Administrative Procedure Oversight Committee.
- (2a) Necessary rule. - Means any rule other than an unnecessary rule.
- (3), (4) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.
- (5) Public comment. - Means written comments objecting to the rule, in whole or in part, or objecting to an agency's determination of the rule as necessary or unnecessary, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.
- (6) Unnecessary rule. - Means a rule that the agency determines to be obsolete, redundant, or otherwise not needed.

(b) Automatic Expiration. - Except as provided in subsection (e) of this section, any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission pursuant to subsection (d) of this section.

(c) Review Process. - Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:

- (1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is necessary or unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:
 - a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
- (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule. The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:
 - a. The agency's initial determination.

- b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - d. A summary of the Commission's determinations regarding public comments.
 - e. Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.
 - f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.
 - g. A determination that all rules that the agency determined to be necessary or that the Commission designated as necessary shall be readopted as though the rules were new rules in accordance with this Article.
- (3) Step 3: The final determination report shall not become effective until the agency has consulted with the Committee. The determinations contained in the report pursuant to sub-subdivisions f. and g. of subdivision (2) of this subsection shall become effective on the date the report is reviewed by the Committee. If the Committee does not hold a meeting to hear the consultation required by this subdivision within 60 days of receipt of the final determination report, the consultation requirement is deemed satisfied, and the determinations contained in the report become effective on the 61st day following the date the Committee received the report. If the Committee disagrees with a determination regarding a specific rule contained in the report, the Committee may recommend that the General Assembly direct the agency to conduct a review of the specific rule in accordance with this section in the next year following the consultation.

(d) Timetable. - The Commission shall establish a schedule for the review and readoption of existing rules in accordance with this section on a decennial basis as follows:

- (1) With regard to the review process, the Commission shall assign each Title of the Administrative Code a date by which the review required by this section must be completed. In establishing the schedule, the Commission shall consider the scope and complexity of rules subject to this section and the resources required to conduct the review required by this section. The Commission shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances. Except as provided in subsections (e) and (f) of this section, if the agency fails to conduct the review by the date set by the Commission, the rules contained in that Title which have not been reviewed will expire. The Commission shall report to the Committee any agency that fails to conduct the review. The Commission may exempt rules that have been adopted or amended within the previous 10 years from the review required by this section. However, any rule exempted on this basis must be reviewed in accordance with this section no more than 10 years following the last time the rule was amended.

(2) With regard to the readoption of rules as required by sub-subdivision (c)(2)g. of this section, once the final determination report becomes effective, the Commission shall establish a date by which the agency must readopt the rules. The Commission shall consult with the agency and shall consider the agency's rule-making priorities in establishing the readoption date. The agency may amend a rule as part of the readoption process. If a rule is readopted without substantive change or if the rule is amended to impose a less stringent burden on regulated persons, the agency is not required to prepare a fiscal note as provided by G.S. 150B-21.4.

(e) Exclusions. - The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection. The following rules shall not expire as provided in this section:

- (1) Rules adopted to conform to or implement federal law.
- (2) Rules deemed by the Boards of Trustees established under G.S. 128-28 and G.S. 135-6 to protect inchoate or accrued rights of members of the Retirement Systems administered by the State Treasurer.

(e1) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.

(f) Other Reviews. - Notwithstanding any provision of this section, an agency may subject a rule that it determines to be unnecessary to review under this section at any time by notifying the Commission that it wishes to be placed on the schedule for the current year. The Commission may also subject a rule to review under this section at any time by notifying the agency that the rule has been placed on the schedule for the current year. (2013-413, s. 3(b); 2014-115, s. 17; 2014-120, s. 2; 2015-164, s. 7; 2015-286, s. 1.6(a); 2019-140, s. 3(a).)

26 NCAC 05 .0203

DEADLINES

(a) The Commission shall submit by email to the rulemaking coordinator of an agency subject to the review a report containing its existing rules. Agencies shall have 10 business days after the report is sent to review it for accuracy and completeness. An agency shall notify the Commission staff by email at oah.rules@oah.nc.gov of any errors or missing rules within the 10 business days following the date the RRC sent the report.

(b) An agency shall complete the report as set out in Rule .0206(b) of this Section. The agency shall then submit its initial report to the Office of Administrative Hearings at the above email address and OAH shall post the report on its website within five business days of receipt.

(c) All reports shall be filed on or before the 20th day of the month for Commission review of the report at its meeting the following month, using the schedule set forth in Rule .0211 of this Section. Commission counsel shall notify an agency if he or she intends to recommend reviewing this report at a later meeting. The Commission may delay reviewing a report until a later meeting if the workload of the Commission and its staff makes the review impracticable. If the Commission delays reviewing a report, it shall notify the agency. In rescheduling any review, the Commission shall consider the date on which the report was filed with the Commission.

(d) All deadlines that require filing or notification as set forth in this Rule shall be by 5:00 p.m. Eastern Time on the business day of the deadline or the next business day following the deadline if the deadline falls on a non-business day.

History Note: *Authority G.S. 150B-21.3A;*
 Eff. April 1, 2014;
 Amended Eff. June 1, 2023