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NORTH CAROLINA  
Environmental Quality

March 20, 2023

**VIA E-MAIL (brian.liebman@oah.nc.gov)**

Brian Liebman,  
North Carolina Rules Review Commission  
171 New Hope Church Rd.  
Raleigh, NC 27609

RE: DEQ's comments on proposed RRC rules

Dear Mr. Liebman:

The Department of Environmental Quality (DEQ) has reviewed the Rules Review Commission's (RRC) proposed rule changes in sections 26 NCAC 05 .0100 and .0200. We respectfully submit the following comments:

**26 NCAC 05 .0101 DEFINITIONS**

Throughout the proposed rules, the terms "commission counsel" and "RRC staff" are used. The difference between these terms is unclear. DEQ recommends defining these terms in the rules.

In (6)(b)(v), if the term "catchline" refers to the title of the rule, the term "catchline" should be deleted.

**26 NCAC 05 .0105 REQUIRED NOTICE PRIOR TO ORAL RRC PRESENTATION**

DEQ recommends adding a comma in Paragraph (a) after "rule" to clarify that the reference to "Rule .0206 of this Chapter" refers only to the "report" and not "a rule." Without this comma, the sentence is confusing and if applied strictly could be used to prohibit an agency or person from making oral statements in support of or in opposition to a rule, since Rule .0206 does not address this.

**26 NCAC 05 .0107 WITHDRAWAL OR AMENDMENT OF RULES AFTER FILING WITH RRC**

DEQ objects to the proposed rule changes. The intent of the proposed changes appears to be requirements of the rule readoption process otherwise set forth in Section 26 NCAC 05 .0200. If so, the proposed changes could diminish the public process for other rulemaking actions under the Administrative Procedure Act by: 1) preventing an agency from withdrawing a rule to address public comments received after submission to the RRC (including oral presentations to the RRC), and 2) unnecessarily lengthening the process, particularly when a simple error or omission has occurred in the proposed rule content or rulemaking process



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and is discovered after submission to the RRC. Under the proposed rule, an agency that learns of a defect either on its own or after consulting with RRC staff has no alternative but to proceed with the review and receive an objection from the RRC. This process is decidedly less efficient with respect to both the agency's resources and the RRC's time. DEQ recommends leaving this rule as is other than to add a statement that requirements for withdrawal or amendment of rules proposed for re-adoption shall prevail. Such requirements could be proposed in a new rule in Section .0200.

#### **26 NCAC 05 .0109 COMMUNICATIONS WITH RRC STAFF**

DEQ objects to the proposed repeal of this rule. The proposed repeal appears to discourage agency communication with RRC staff. This rule should be preserved to allow communication with RRC staff during regular business hours.

#### **26 NCAC 05 .0114 RRC RULE APPROVAL CONTINGENT ON TECHNICAL CHANGE**

The APA does not provide authority for approval of a rule to be contingent on making all technical changes requested by RRC staff. DEQ recommends changing Paragraph (a) to read "When the Commission approves a rule, the approval is contingent on an agency's making all ~~requested technical changes~~. changes requested by the Commission."

#### **26 NCAC 05 .0115 EXTENSIONS OF TIME**

DEQ does not object to the proposed adoption of this rule for requirements pertaining to an agency making a request to extend the period for review of rules by the RRC; however, there are two components of the rule with which DEQ has concerns. First, the title of the rule is ambiguous and could be made clearer as "REQUESTS TO EXTEND THE PERIOD FOR RULE REVIEW"; this title matches the corresponding requirements in N.C.G.S. § 150B-21.10(3). Second, proposed changes to Rule .0115 appear to conflict with requirements in Rule .0108, SUBMISSION OF REWRITTEN RULES OR RULES WITH TECHNICAL CHANGES. Specifically, Paragraph (c) of Rule .0108 requires all rules containing technical changes be submitted to the RRC staff by the earlier of 5 p.m. 10 business days after RRC staff submits the request to the agency or 5 p.m. of the Friday before the RRC meeting, the latter of which addresses the situation when the RRC staff submits the technical change request to an agency less than 10 business days before a RRC meeting. The proposed changes to Rule .0115 restrict the period for submitting responses to the request for technical changes to no later than 10 business days prior to a RRC meeting, precluding the ability for an agency to submit responses by 5 p.m. of the Friday before the RRC meeting when the RRC staff made a request less than 10 business days before a commission meeting. DEQ recommends the pertinent proposed language in Rule .0115 instead refer to the requirements already set forth in Rule .0108, with conforming changes as needed.

#### **26 NCAC 05 .0201 SCOPE**

DEQ recommends retaining this rule, or otherwise clarifying the scope of Section 26 NCAC .0200.

#### **26 NCAC 05 .0202 DEFINITIONS**



DEQ objects to the definition of "existing rules" to mean rules currently in the Code as of January 1, 2024. As an example, the readoption deadline for the Marine Fisheries Commission's (MFC) rules in 15A NCAC 18A is not until June 30, 2024. As such, the readoption requirements will not have been completed for 79 of the MFC's rules as of January 1, 2024. Of these, 23 MFC rules are being proposed for repeal but will not be effective by the proposed control date. As a result, 23 MFC rules will be subject to the reporting requirements under the second iteration of the requirements in N.C.G.S. § 150B-21.3A, Periodic Review and Expiration of Existing Rules, but will be repealed by the time the public comment period for the report is held. This would result in unnecessary burden on the agency and confusion for regulated stakeholders while potentially undermining the effectiveness of the periodic review. DEQ recommends the proposed date be the date immediately following the last rule readoption deadline for the Code from the first iteration of the periodic review requirements.

### **26 NCAC 05 .0204 EXTENSION OF TIME**

DEQ recommends three additions to the existing text of the rule. First is the addition to Subparagraph (a)(5) for arguments by members of the public "for or" against a delay in an agency's meeting the stated filing deadlines, to be consistent with the same addition proposed by the RRC to Rule .0205(c)(3) for requests for an earlier review. It is reasonable to provide for consideration of adjusting a deadline to occur earlier or later, not just earlier. Second is the addition of an email address for RRC staff to Paragraph (d), for clarity to the regulated public and for consistency with other commission rules that set requirements for submitting comments by email, i.e., "and to the RRC staff at [oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov)". Finally, in Paragraph (d) DEQ recommends insertion of "the agency rulemaking coordinator."

### **26 NCAC 05 .0211 SCHEDULE**

DEQ notes that the proposed scheduling for 15A NCAC 13B splits these rules into three different sections with three different due dates (January, April, and May 2027). Although 13B .1500 will be in a separate report because these rules are under DEQ's authority instead of the EMC. However, DEQ urges all these rules in Subchapter 13B be placed under the same deadline to avoid confusion.

### **26 NCAC 05 .0212 READOPTIONS**

DEQ generally does not object to the components of the rule that attempt to clarify expectations for all parties for establishing a readoption date pursuant to N.C.G.S. § 150B-21.3A(d)(2), including the requirement in Subparagraph (a)(2) for the agency's rulemaking priorities, which the statute contemplates; however, the proposed period of "within 60 days" for an agency to submit to the RRC the required documentation does not accommodate boards or commissions that meet only quarterly. DEQ recommends either a longer period of "within 120 days" or the addition of a statement like that found in N.C.G.S. § 150B-21.12(b): "or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later" so that all agencies can comply. Additionally, DEQ objects to the inclusion of the "planned dates for all steps required by G.S. 150B-21.2" for the permanent rulemaking process for what constitutes "written documentation of the agency's planned timeline for readoption." Agencies are required to comply with the requirements of the APA; reporting to the RRC a set of planned internal deadlines creates an unnecessary burden on



agencies, yields dates that will likely change, and does not appear to add any value for agencies, the regulated public, or the RRC and its staff.

Thank you for the opportunity to provide these comments.

Sincerely,

*Bill Lane*

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Deputy Secretary/General Counsel



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March 2, 2023

**Via E-Mail: [brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)**

Jeanette Doran, Chair  
Andrew P. Atkins, Vice Chair  
Robert A. Bryan, Second Vice Chair  
Rules Review Commission  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

Re: Proposed Rule Changes

Dear Chair Doran and Vice Chairs Atkins and Bryan:

Please accept this letter in response to your request for comments on proposed changes to the Rules Review Commission's rules published in the North Carolina Register, Volume 37, Issue 14, January 17, 2023. We are writing as counsel and rulemaking coordinators for the North Carolina State Board of Dental Examiners. We appreciate the opportunity to provide our comments and perspectives regarding the proposed changes to the RRC's rules.

A number of the proposed changes reflect helpful clarifications that would benefit the Commission and agencies in the rulemaking process. For the sake of brevity, this letter will not review the helpful clarifications, and instead will discuss the proposed changes and existing rule language regarding which we have questions or objections.

### **1. 26 NCAC 05 .0114 RRC Rule Approval Contingent on Technical Change**

Rule 26 NCAC 05 .0114 conditions approval of a rule on the agency making all "technical changes" requested. With regard to the proposed amendment, we agree with the thorough, excellent comments submitted by Ann B. Wall, General Counsel, State of North Carolina Department of the Secretary of State, in her letter dated December 12, 2022.

This Rule contains existing language that is ambiguous, and the existing language should be reviewed consistent with RRC practice under G.S. 150B-21.8(c). The language is ambiguous as to what technical change request is at issue. Does this Rule mean the request for technical changes issued by RRC staff prior to Commission review? Or does this mean a request for technical changes issued after the Commission has reviewed and approved the rule?

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As Ms. Wall discussed, not all technical change requests from RRC staff are actual change requests, and not all technical change requests are appropriate to be made. Sometimes a change request is the product of the staff's lack of specialized knowledge, which is entirely understandable. Language in an agency's rule is often the product of careful deliberation as to every word and every punctuation mark. A simple punctuation change, which might be the subject of a technical change request, could result in a marked change such that the rule no longer has the intended meaning. In addition, RRC staff may send a request for technical changes that delves into questions relating to the quality or efficacy of the rule, which are beyond the scope of Commission review.

Requiring agencies to make all "technical changes" requested could result in unintended substantive change to a rule and would exceed the Commission's authority. The ambiguity in this Rule draws attention to the problematic existing definition of "technical changes" in 26 NCAC 05 .0101(6).

## **2. 26 NCAC 05 .0101(6) Definition of "Technical Changes"**

Rule 26 NCAC 05 .0101 is proposed for amendment. The Rule's definition of "Technical Changes" is not being amended, but should be reviewed because it exceeds G.S. 150B-21.10 and the Commission's authority, and is unclear and ambiguous.

G.S. 150B-21.10 states:

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

G.S. 150B-21.10 does not define "technical changes." However, G.S. 150B-21.3(f) refers to a "technical change" as "a permanent rule for which no notice or hearing is required under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b)." It is a well-established canon of statutory interpretation that, ordinarily, "words used in one place in the statute have the same meaning in every other place in the statute." *Campbell v. First Baptist Church of City of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (citations omitted). The provisions of the APA are clearly intended to be read together and consistently in order to "establish[] a uniform system of administrative rule making." G.S. 150B-1(a). Therefore, the meaning of "technical changes" in G.S. 150B-21.10 must be consistent with the meaning of the term in

G.S. 150B-21.3(f): "technical changes" are rule changes under G.S. 150B-21.5(a)(1) through (a)(5) or G.S. 150B-21.5(b).

G.S. 150B-21.5(b) addresses repeal of a rule and therefore does not apply to this discussion. "Technical changes" under G.S. 150B-21.5(a)(1) through (a)(5) are rule amendments that do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address, email address, a telephone number, or a Web site.
- (5) Correct a typographical error.

These are truly "technical" changes that do not involve rephrasing rules. These changes may be made without notice or hearing, and may be made by the Codifier of Rules under G.S. 150B-21.20. It is reasonable to presume that G.S. 150B-21.10 authorizes the Commission to request these types of technical changes and to condition approval of a rule upon making these technical changes – they are changes to ensure a rule contains accurate, up-to-date factual information and does not contain typographical errors. These types of changes are consistent with the prescribed scope of the Commission's review and the prohibition against the Commission "consider[ing] questions relating to the quality or efficacy of the rule." G.S. 150B-21.9(a).

26 NCAC 05 .0101(6) purports to define "technical changes" as the changes set out in G.S. 150B-21.10, but it far exceeds this statute and the Commission's authority by considering questions relating to the quality or efficacy of the rule. In addition, this definition contains vague, ambiguous terms.

Sub-Item (6)(a)(ii) includes "correcting errors" of "preferred English or legal usage." This is unclear and ambiguous. What is "preferred" usage? Who decides that? The Commission's Style Guide offers guidance regarding standard usage, but its Chapter 1.3 specifically disclaims:

This document is intended only as a guide and is not binding or controlling. As it is not a rule, it is not mandatory to use the style guide in rule drafting. This style guide does not have the force of law and cannot be used to challenge the validity of a rule.

Using a non-standard or non-preferred term in a rule is not an "error" to be "corrected." It goes to the quality of the rule, which is beyond the scope of Commission review. If the rule is clear and unambiguous, then it exceeds the Commission's authority to require an agency to rephrase the rule to use the Commission's "preferred" English.

Sub-Item(6)(b) contains another list of "errors" to be "corrected," all of which involve changing the wording of a rule for purposes of clarity. These are not "technical changes" within the meaning of G.S. 150B-21.10. Rather, these are potential objections to the rule as unclear or ambiguous.

Sub-Item(6)(c) is not a "technical change." If "the meaning and application of the rule is known and understood," then requesting an agency to rewrite the rule goes to the quality of the rule and exceeds the scope of Commission review.

Sub-Item(6)(d) and (e) are not a "technical changes." These are challenges to the clarity or necessity of a rule.

It creates confusion when requests for "technical changes" are conflated with requests to rephrase a rule to flow better, or to clarify a rule to avoid a Commission objection. Prior to Commission review, agencies may receive a long list of questions and change requests from a staff attorney, and there is no indication as to whether any given change must be made to avoid a staff recommendation that the Commission object to the rule. It is valuable for an agency to be able to work with RRC staff to clarify rules and head off potential objections. Those requests for clarification, however, need to be designated as such and as distinct from requests for "technical changes" that must be made for the Commission to approve a rule or amendment.

In summary, many of the sub-items in this definition are not properly included as "technical changes" as that term is used in the APA. As such, the definition of "technical changes" exceeds the Commission's authority, as does 26 NCAC 05 .0114 to the extent it conditions approval of a rule on the agency making changes that go to the quality or efficacy of the rule. A narrowed definition of "technical changes" that is consistent with G.S. 150B-21.5(a)(1) through (a)(5) likely would clarify 26 NCAC 05 .0114.

### **3. 26 NCAC 05 .0107 Withdrawal or Amendment of Rules After Filing With RRC**

With regard to the proposed amendments to Rule 26 NCAC 05 .0107, again, we agree with the comments submitted by Ms. Wall. In addition, this Rule contains provisions that lack clarity.

Under Paragraph (b), an agency may make changes to a rule in response to a staff "request for technical changes." Under Paragraph (c), the agency may not make any changes to a rule once they receive a "staff recommendation" to object to the rule. These terms are not defined and there are no procedures or descriptions of how these occur or how they interact.

This lack of clarity raises many questions. For example, when is the staff recommendation issued? What is it based on? Would a staff recommendation to object occur only if an agency declined to make the technical changes set out in G.S. 150B-21.5(a)(1) through (a)(5)? Would such a staff recommendation also result if the agency declined to use the



"preferred" word choices set out in the Style Guide or declined to rewrite a rule where the meaning and application is already clear and understood? How does an agency know what will trigger a staff recommendation to object? When will the agency be notified of an impending staff recommendation to object? Will the agency have the opportunity to make further changes after receiving notice of an impending recommendation and before the recommendation is issued? If not, why not? What value is there in refusing to allow a willing agency to make changes to a rule to avoid a Commission objection? The lack of clarity around this process creates confusion and likely would increase the burden on agencies and the Commission.

#### **4. 26 NCAC 05 .0108 Submission of Rewritten Rules or Rules with Technical Changes**

Rule 26 NCAC 05 .0108 covers two entirely different topics. As we read the Rule, Paragraph (a) deals with rules which the Commission has reviewed at a regular meeting and determined to issue an objection. Paragraph (b) deals with rules that have not yet been reviewed by the Commission, but have been submitted for review and are then the subject of a "Request for Technical Changes." Paragraph (c) is unclear, but appears to come back to rules to which the Commission objected, which the agency has rewritten and submitted for re-review by the Commission. Paragraph (d) appears to apply to both categories of rules.

The structure and vague terminology make this Rule confusing and difficult to follow. In addition, the use of capital letters in "Request for Technical Changes" would appear to mean this is a defined term. As noted above, this term and process are unclear and should be clarified.

#### **5. 26 NCAC 05 .0115 Extensions of Time**

In Rule 26 NCAC 05 .0115(b)(1), there appears to be a typographical error in the phrase "at the first regularly scheduled." The space between "first" and "regularly" appears to be missing. In addition, "Requests for Technical Changes" should not be capitalized unless the term is defined. A clear definition of the term would be helpful, as discussed above.

#### **6. 26 NCAC 05 .0106 Limitations on Oral Presentations**

With respect to Rule 26 NCAC 05 .0106, we oppose the blanket amendment reducing the time allowed for presentations from ten minutes to five minutes. For agencies facing objections to rules, it is critical that they have a full opportunity to address all objections and advocate for their rules. This is especially the case when there is a staff recommendation to object to the rule. Such recommendations may be lengthy and detailed, and a full response requires more than five minutes.

In addition, Paragraph (c)(6) is unclear. What is "the level of agreement within their positions or relationships"? How is this different from "the variations in the speakers' arguments"?

## 7. Proposed Repeals of 26 NCAC 05 .0102, .0109, and .0201

In the notice published in the NC Register, the reasons given for the proposed action are to clarify rules and to conform rules to the RRC's Style Guide and the APA. There is no reason given for the proposed repeal of 26 NCAC 05 .0102, .0109, and .0201. Without knowing the reason for the proposed repeal, it is impossible to submit a fully informed comment.

Each of these rules serves a valuable purpose for commissioners, RRC staff, rulemaking coordinators, State agency personnel, lobbyists, and the general public. The effect of their repeal is unclear and potentially detrimental. As such, we oppose their repeal.

**A. Rule 05 .0102** provides an overview of acceptable communication with the Commission. This is the only RRC rule that addresses the permissibility of oral communication with individual commissioners outside of RRC meetings. As such, this rule is necessary to ensure that rulemaking coordinators, State agency personnel, lobbyists, and the general public are aware that there may be commissioners willing to discuss rules outside of RRC meetings and that those discussions are permissible. Such discussions may be critical when an agency is facing recommended objections and needs more time to explain and defend its rules than is generally permitted during the RRC meetings. This may become even more important if the RRC adopts the proposed rule change reducing the time limit for oral presentations (see comments to 26 NCAC 05 .0106 above).

**B. Rule 05 .0109** provides an overview of acceptable communication with the RRC staff. Again, this is the only RRC rule addressing the permissibility of such communications. This rule serves several important functions. It notifies all interested persons that they can communicate directly with RRC staff, but that RRC staff is not available on demand. Under this rule, there is no question that agencies are able to reach out to RRC staff to, for example, request informal pre-reviews, ask questions about the rulemaking process, or brainstorm rule changes in the early stages to avoid vagueness, ambiguities, or other potential pitfalls. This rule also ensures transparency in the process by not only allowing such discussions, but also notifying interested persons that any such discussions are not confidential and may be shared with other interested persons for rebuttal.

**C. Rule 05 .0201** sets out the purpose of Section .0200 for implementing the periodic review of existing rules. Generally, statements related to the scope of rules are helpful to interested persons.

**Conclusion**

Thank you for the opportunity to comment on the proposed rule changes. We look forward to hearing further discussion of the rules and to having the opportunity to comment further. We appreciate your kind attention.

Sincerely,

Handwritten signature of Douglas J. Brocker in black ink, written over a faint, light-colored watermark logo.

Douglas J. Brocker

Handwritten signature of Dauna L. Bartley in black ink, written over a faint, light-colored watermark logo.

Dauna L. Bartley



*State of North Carolina  
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ELAINE F. MARSHALL  
SECRETARY OF STATE

ANN B. WALL  
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By E-Mail

Jeanette Doran, Chair  
Andrew P. Atkins, Vice Chair  
Robert A. Bryan, Second Vice Chair

Rules Review Commission  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

December 12, 2022

Re: Proposed changes to Rules Review Commission rules

Dear Chair Doran, Vice Chairs Atkins and Bryan:

I write in response to your request for comments on proposed changes to the Rules Review Commission's (RRC) rules published in the RRC's November 17, 2022, meeting agenda.

I write from the perspective of someone who has engaged in rulemaking for small State agencies. My first rulemaking was in 1977. Indeed, my historical files include a copy of the RRC's "Policies and Procedures" initially created in 2006 and modified in 2007. Those Policies and Procedures preceded the RRC's current APA-style rules and include provisions adopted by RRC as early as 1997.

I request that you allow time for submission of additional comments after your December meeting. Your explanation of the basis for the proposed changes may well warrant additional comments that would be useful to you as you decide whether to adopt the proposed rule changes.

**1. Proposed changes to 26 NCAC 05 .0102 Communications with Commissioners and 26 NCAC 05 .0109 Communications with RRC Staff**

I write in opposition to the repeal of these two rules. These rules appear to have initially been adopted to address ethical, Due Process, and transparency concerns with titles in the aforementioned Policies and Procedures document including the phrase "Ex-Parte Communications" (emphasis added).

**A. .0102 Communications with Commissioners**

The existing rule is similar to its predecessor, which I have attached. The public, the regulated community, lobbyists, and State agency personnel need this rule. It provides an overview of whether,

when, and how one may acceptably communicate with the Commission. In addition, the rule specifically addresses a type of communication not otherwise mentioned in RRC rules – oral communication with individual commissioners outside of Commission meetings. RRC is not a quasi-judicial agency. There is a legitimate need for RRC members to take the time to painstakingly go through significant agency defenses to recommended objections when that time is often not available during the formal meeting process. The public, regulated community, lobbyists, and agencies need to know that there are commissioners willing to discuss rules outside of RRC meetings.

### **B. .0109 Communications with RRC Staff**

This is a much-needed rule that has been in place since 1996. The existing rule differs only by the omission of the phrase “ex parte.” This rule has well-served OAH, its attorneys, agencies, and others. It is the rule on which agencies have relied in requesting pre-reviews that are of value to both agencies and RRC staff as they promote better work product acceptable to all. Repeal of this rule would appear to have the effect of eliminating pre-reviews of rules. See my July 2022 letter in support of continuation of pre-reviews.<sup>1</sup>

Staff need the protection of this rule. The rule puts agencies on notice that attorneys assigned to serve as staff to the RRC are not available on demand. It also protects agencies by ensuring they have the opportunity to sit down and talk with staff whether for a pre-review, to discuss concepts for rulemaking early in the process, or to gain better understanding of staff requests for changes or recommended objections.

The rule ensures transparency in the process. It puts the public and agencies on notice that if they meet with or talk to staff about rules, the information exchanged is not confidential and that what they say may be shared with agencies or the regulated community for rebuttal purposes.

## **2. 26 NCAC 05 .0106 Limitations on Oral Presentations**

Reducing the time limit for oral presentations to RRC from ten (10) minutes to a mere five (5) minutes is not helpful, particularly when complicated or difficult rules are under consideration and often merit larger discussion. I oppose the amendment.

If and when RRC accepts a staff recommendation to object to an agency’s rule, in most instances, the rule is dead. The consequences are significant for an agency that has tried in good faith to comply with the APA and the directives to the agency by the General Assembly. An agency has limited options if RRC adopts a staff-recommended objection:

1. The agency can fix the alleged APA noncompliance or alleged ambiguity.
2. The agency can give up the rule, request its return from RRC, and take no further action.
3. The agency can start over and try to satisfy both the RRC objection and its statutory duties.
4. The agency can go to the General Assembly for a legislative change.

Given the severity of the consequences of an objection, agencies should have more than ten (10) minutes to orally present their opposition to recommended objections.

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<sup>1</sup> My letter is included in the July 2022 RRC meeting agenda at: [Rules Copier-20220720134443 \(nc.gov\)](#)

RRC has an obligation to its appointing bodies, to the agencies whose rules it reviews, and to the regulated community and the public, to give careful consideration to its decisions when based upon staff recommendations. As noted in my July letter, I acknowledge the professionalism of the staff attorneys assigned to RRC by OAH. However, I am certain that all of us can acknowledge that the recommendations of those attorneys can be mistaken.<sup>2</sup>

An agency's explanation is not the type of written or oral comment anticipated by RRC's rules on oral, written, and rebuttal comments. RRC has no rule with regard to when, how, and in how much depth agencies should respond to staff-recommended objections. An agency's explanation why staff-recommended objections should not be accepted is more a comment on the recommended objections than a comment on the rule, as contemplated by existing RRC rules.<sup>3</sup>

Smaller boards may have only one (1) full-time or part-time employee<sup>4</sup> who may not be an attorney. Their rulemaking duties may be limited to ministerial functions after the rules have been drafted by their legislatively or Governor-appointed board members. Many State agencies also have rulemaking coordinators who are not attorneys and who may only have ministerial duties. Non-attorney rulemaking coordinators may provide initial responses to recommended objections without fully understanding the legal ramifications. Smaller agencies may only seek assistance from counsel only after their coordinator's initial response to recommended objections does not lead to reversal or withdrawal of the recommended objection. The proposed change to this rule does not distinguish between an agency's defense against a staff-recommended objection and oral presentations from the public on the rule itself. Attorneys brought in later to respond to recommended objections may not have been involved in the rulemaking and may not be familiar with the RRC processes. They may assume that they will have an opportunity to present what amounts to an oral argument to RRC opposing the recommended objection. They may not understand that their time may be better spent by submitting a written response, which will be the only way to make a complete argument to RRC.

In a process that has typically taken an agency anywhere from six months to a year or more to develop and propose substantive rules<sup>5</sup>, surely RRC can take the time to hear from agencies and thoroughly consider their responses before objecting to their rules.

### **3. 26 NCAC 05 .0107 Withdrawal or Amendment of Rules after Filing with RRC**

The proposed changes to this rule are difficult to understand. The net effects of the change from "may" withdraw or amend to "shall not" withdraw or amend after submission of an adopted rule to RRC are:

1. To potentially significantly lengthen the rulemaking process, regardless of the need for a rule;

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<sup>2</sup> See, e.g., [N.C. Bd. of Pharmacy v. Rules Review Comm'n](#), 360 N.C. 638, 638, 637 S.E.2d 515, 515 (2006).

<sup>3</sup> 26 NCAC 05 .0103, .0104, .0106.

<sup>4</sup> See Program Evaluation Division Report to October 4, 2016 meeting of the Joint Administrative Procedures Oversight Committee, Exhibit 4, pp. 8-9, [Occupational Licensing Agencies Should Not be Centralized, but Stronger Oversight is Needed](#) (last reviewed December 10, 2012).

<sup>5</sup> My own agency is presently engaged in rulemaking for a new law with at least 25 statutorily mandated rule topics. My current estimate, based on time spent on the process since the Governor signed the law in July, is that the rulemaking process will take thousands of hours before we ever present adopted rules to RRC.

2. To add to RRC's workload;
3. To potentially delay the effective date of a rule from months to a year or more;<sup>6</sup> and,
4. To potentially deprive the public and regulated communities of the protections and certainty of the rule. To prohibit an agency from withdrawing a rule submitted, for any or no reason, seems to be bad public policy. This will prevent agencies from corrective deficiencies and responding to public comments that can drive legitimate reconsideration of proposed rules.

Finally, the aggregate impact of the parts of this rule will have a significant negative impact on agencies' ability to fulfill the very missions assigned to them by the General Assembly.

**A. Proposed amendment to .0107(a)(1) – barring withdrawal of readoptions after submission to RRC and before RRC consideration**

An agency that classifies a rule as “necessary” in the Existing Rules Review (ERR) process has to go through the entire rulemaking process to readopt the rule, potentially including developing a fiscal note and getting it approved by OSBM. This must all take place by a deadline established by the RRC after it consults with the agency. Therefore, by the time the readopted rule is submitted to RRC, there have been at least two 60-day public comment periods.<sup>7</sup>

While recognizing that G.S. § 150B-21.2(g) says that agencies are not to take action on adopted rules without following the APA's rulemaking procedures, and an exceptionally strict interpretation of that provision is the basis for RRC's proposed amendment, that strict interpretation is neither necessary nor productive. As just one example of the harm this amendment may cause, consider, for example, the plight of a newly elected or appointed department head who takes office in January. If the predecessor readopted a rule in December and submitted it for January RRC review, this amendment would bar that new official from withdrawing the readopted rule from RRC consideration even if the new official is diametrically opposed. As an example prior to the ERR process: In his final months in office, Labor Commissioner Harry Payne adopted an OSHA ergonomics rule that his successor, Commissioner Cheri Berry, promptly withdrew on taking office. If that had been a readoption under the proposed amendment and RRC approved it, Commissioner Berry would have had to enforce a greatly opposed rule at least until it could go through the repeal process.

**B. Proposed amendment to .0107(a)(2) – barring withdrawal of a rule if staff recommends objection to existing language in the rule**

The RRC has the authority pursuant to G.S. § 150B-21.8 to review existing language of a rule that is being amended. The proposed change would have the potential to harm the public and the regulated community, not just the agency. I have been told by businesses that are “good actors” that as much as they may grumble about agency rules, they appreciate rules that provide certainty and clarity, with an emphasis on certainty. Such rules level the playing field and help to ease the competitive disadvantage they are suffering because of “bad actors”.

When an agency publishes the text of a proposed amendment to existing rules, the public and

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<sup>6</sup> G.S. §§ 150B-21.3A(c)(1), 150B-21.3A(d)(2), 150B-21.2(e)-(f).

<sup>7</sup> The public has 60 days to comment on the rule and the agency's classification of the rule as necessary. G.S. § 150B-21.3A(c)(1). Then, in the readoption process, the public has another 60 days to comment on the rule, as well as make comments in the usual public hearing. G.S. § 150B-21.2(e), (f).

regulated communities typically provide comments only on the proposed amendment, not on the existing rules themselves. They do not anticipate a need to comment on the existing rules because that would, in essence, create a state of costly uncertainty, as each amendment would be the equivalent of a new rulemaking on the entire text of the rule. Quite logically, they assume that they can rely upon the existing rule that has been through a thorough vetting and public comment in a process in which:

- The General Assembly has given the agency rulemaking authority after the public and regulated community have had opportunity to comment and lobby.
- The agency has published rule text giving the public at least 60 days to comment and usually held at least one public hearing at which oral comments could be made.
- The OAH staff attorneys assigned to assist RRC have reviewed the rule and requested technical corrections and possibly even recommended RRC objections.
- RRC itself has, with or without public comment, either:
  - Approved the rule without receiving 10 public objections, or
  - Approved the rule with 10 objections and sent it to the General Assembly.
- If the rule being amended has been in effect, that means the public and General Assembly have not found it objectionable.<sup>8</sup>
- In addition, since 2013, the public has also had the opportunity to comment on existing rules through the existing rules review process (ERR).

There is nothing in the process for amending a rule that tells the public that they should be commenting on the existing rule text rather than just the amendment. Only what the Chair recently termed “RRC groupies” or administrative law practitioners would likely be aware of that provision of law. Seldom do those experts comment on the existing rules rather than just a proposed amendment.

RRC now posts its agenda and staff-recommended objections on its website. The mere inclusion of the document title “staff opinion” on the posted RRC agenda is not notice of a recommended objection. Members of the public and regulated community are not specifically put on notice that they are likely to lose an existing rule on which they have relied and which they thought was only being amended.

The current rule allows an agency to withdraw the rule if staff recommends objections to the existing language. This procedure essentially stays the process, keeping the rule in place and maintaining certainty for the regulated community and public. The agency can then decide on its next steps: repealing the rule; requesting help from the General Assembly; or going through the process to modify the rule to meet the recommended objection, including the previously proposed amendment. Each of these options provides the public and regulated community opportunity for comment on existing language of the rule.

If RRC adopts the proposed ban on withdrawal of rules if staff recommends objecting to existing language, many State government attorneys will likely advise their agency clients against amending existing rules unless critical. Rather than risk losing the existing rule, if an amendment is truly needed, they will likely advise their clients to consider alternative measures such as: seeking a legislative solution; proposing the language as a new rule rather an amendment to an existing rule; or

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<sup>8</sup> If the rule has been in effect and the RRC did not receive 10 objections, the public did not object. If the rule has been in effect after RRC approved it, received 10 objections, and the General Assembly did not enact a bill to disapprove the rule, the General Assembly does not object to it.



waiting to amend the rule until it has to be readopted in the Existing Rules Review process. The risk posed by the proposed RRC rule change is that high. Of course, it would be up to the policymakers whether to accept the risk of amending the rule.

### **C. Proposed repeal of .0107(a)(3) and (a)(4)**

There is no obvious reason why agencies should not be allowed to withdraw rules after filing with the RRC if they suddenly realize that there is a problem but staff have not recommended an objection. Compliance with the APA in rulemaking is not easy. It is not uncommon for new rulemaking coordinators, for example, to suddenly realize a proposed rule fails consequentially and needs to be corrected through withdrawal. People have miscounted the days for the 60-day comment period and submitted rules early. Recently appointed General Counsel have submitted rules adopted by their departments instead of by the appropriate commission in their departments. This seems to occur most often with recently appointed General Counsel, formerly in private practice and unfamiliar with the APA and their agency's less active boards or commissions. In both instances, the people making those errors were trying their best to follow the APA's requirements and simply made a mistake out of a lack of understanding.

In the years since 1977 when I was first involved with the APA, I have never encountered an agency, board, or commission employee who deliberately tried to circumvent requirements of the APA that they knew were applicable to their agencies. Most are dedicated public servants trying to do the work on behalf of the public that is required of them by the General Assembly. Why should they not be allowed to withdraw a rule for which they made an error and immediately begin the process of fixing it? Why should the RRC have to review the rule twice? Why not allow the agency to withdraw the rule and take the necessary steps to fix it, and then, when fixed, submit the corrected rule proposal to RRC for approval?

### **D. Proposed new rule 26 NCAC 05 .0107(c)**

Again, this proposal will make more work for RRC and lengthen the rulemaking process. If an OAH attorney assigned to staff RRC recommends an objection, the agency should be able to withdraw the rule before RRC consideration. See my comments above.

## **4. 26 NCAC 05 .0108 Submission of Rewritten Rules or Rules with Technical Changes**

This proposal will lengthen the time that rulemaking takes and add to its workload. RRC should want to ease its workload by reviewing corrected rules as soon as they are submitted rather than considering them twice. As evidenced by recent RRC meetings, some agencies will be able to immediately submit corrected rules while others will need extra time. An agency that is able to quickly and effectively respond to staff-recommended technical changes should be able to submit changes promptly and avoid unnecessary delays in rule consideration.

## 5. 26 NCAC 05 .0110 Filing Objection Letters

This rule is not the standard familiar to all attorneys and used by many agencies – Rule 4 of the North Carolina Rules of Civil Procedure<sup>9</sup> - allowing service by hand-delivery or delivery via “designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).” Use of a widely known and accepted standard reduces confusion and errors.

## 6. 26 NCAC 05 .0114 RRC Rule Approval Contingent on Technical Change

In practice, RRC has never required that an agency make all technical changes suggested by the attorneys assigned by OAH to RRC. In fact, the technical change letters sent by staff attorneys to agency rulemaking coordinators always include this language<sup>10</sup>:

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved.

You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:  
(emphasis added)

To state the obvious, requests and recommendations are not requirements.

### A. Authority

Requiring that agencies make all recommended technical changes exceeds RRC’s statutory authority. N.C. Gen. Stat. § 150B-21.10 gives RRC the authority to “*request* an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the *requested* technical changes.” (Emphasis added.) RRC’s rules define a technical change as:

[T]he changes made by an agency to reply to a request from the Commission or its staff as set out in G.S. 150B-21.10. Technical changes shall not result in a substantive change in the meaning, interpretation, or application of a rule and include the following categories of changes:

(a) Correcting errors of a general nature including:

....

(b) Correcting errors that would appear to be substantive changes except that they do not change the intended or accepted meaning, interpretation or application of the rule including:

....

(c) Requesting agencies to rewrite a rule, paragraph, or portions of a rule to more clearly express the intent of the agency when the meaning and application of the rule is known and understood.

(d) Acting on agencies' requests on behalf of citizens or agency staff to clarify the intent, requirements, or prohibition of a rule that would not result in a change in the rule's enforcement.

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<sup>9</sup> N.C. Gen. Stat. § 1A-1, Rule 4.

<sup>10</sup> See, e.g., [RRC Meeting Agenda December 2022](#) and the Request for Changes posted as part of the agenda.

(e) Deleting or rewriting portions of rules that are not necessary rather than raising objections. 26 NCAC 05 .0101(5).

The APA expressly states that “[t]he Commission shall not consider questions relating to the quality or efficacy of the rule . . .” N.C. Gen. Stat. § 150B-21.9(a). Some staff recommendations for technical changes, as well as the definition of technical change itself, go to the quality or substance of the rule rather than its clarity or ambiguity. For example, a staff request for a technical change pursuant to paragraph (c) of the definition of technical change is a request to clarify something in a rule “when the meaning and application of the rule is known and understood”. If the meaning and application of the rule is “known and understood,” then that rule is clear and unambiguous. RRC lacks authority to make an agency change a rule that is neither unclear nor ambiguous to make it even more clear. Therefore, requiring agencies to make all technical changes would exceed RRC authority.

### **B. Clarity and ambiguity**

The proposed amendment is unclear and ambiguous. Staff make many recommendations and requests for changes to rules. For example, the first item on the substantive portion of the December 15, 2022 RRC agenda: “Department of Administration - 01 NCAC 05A .0112; 05E .0101, .0102, .0103, .0104, .0105, .0106 (Peaslee),” includes “[Request for Changes Pursuant to G.S. 150B-21.10 December 6, 2022](#).” That one staff request for changes includes: questions; statements; a recommended striking of a word (aka, deletion), and suggested alternative rule language that the document suggests that the agency “consider.” The proposed RRC rule amendment would require that an agency make all of those “changes” when some of them are not really technical changes at all.

Under the current rule, agencies have never actually been required by RRC to accept all recommended technical changes—just respond to them by:

- Making the exact change requested.
- Making an alternative change that accomplishes the purpose of the request.
- Withdrawing the rule.
- Requesting an extension of time to respond.
- Explaining why the request is not technical in nature and the change will, therefore, not be made.
- Explaining why the requested change is unnecessary.

In the case of the last two types of responses listed, unless there is substantial ambiguity, staff have seldom, if ever, recommended that RRC object to the rules because the agency did not make all of the requested changes. Rather, staff-recommended objections have more often focused on agency authority, APA compliance, and reasonable necessity. This is because the changes not made were not worth objection because they were not material, were explained by the agency, or went to the quality and substance of the rule rather than clarity or ambiguity. For example, the rules of grammar have changed over the decades, and it is not uncommon for experienced agency staff (or their policymakers) to want to use the rules they learned. Staff would be unlikely to recommend, or RRC to adopt, an objection based on an agency’s insistence on use of the adjective “which” rather than the more recent grammar rule of the adjective “that.” “Which” is, after all, clear and unambiguous. Therefore, the proposed rule change is ambiguous with regard to the changes an agency would be required to make.

Agencies often choose to respond to staff-recommended technical changes that are actually direct or implied questions because the questions are helpful. Agencies may respond with an explanation that helps staff understand something about the law, the industry, or agency processes. For example, a word, phrase, or paragraph that staff initially thinks unclear or ambiguous may actually be:

- Widely understood in an industry, so that to attempt to define it or use another word will confuse people and make the rule less clear.
- Due to a lack of information.
- Included to help lay people understand, *e.g.*, scope paragraphs, rules repeating law, overview rules, and examples.

The proposed RRC rule amendment provides no guidance as to how agencies are to make “all changes” when the change requested by staff is a question or a statement.

Staff recommendations for changes are sometimes reflective of staff misunderstanding. For example, staff recommendations for wording changes may interfere with carefully and deliberately chosen language. Under the existing rule, staff attorneys have often been amenable to reason and have not pursued recommendations for change when the agency explanation was sufficient. For example, when our department adopted the PACES Act (securities crowdfunding) rules<sup>11</sup>, I spent many hours negotiating wording with departmental subject matter experts. I often found that words I was suggesting had an entirely different meaning within the highly regulated specialty field of federal securities law. Our rules were highly anticipated and welcomed by an industry hoping to use them to raise capital while avoiding federal securities law violations. Our rules were carefully crafted to make it possible for friends and neighbors capital-raising through clear guidelines to claim a small capital-raising effort as federally exempt. If the proposed amendment had applied to our PACES rules and RRC staff had recommended technical wording changes, we would have been in an impossible situation. We would have been required to make the changes or lose the rule, yet making such recommended changes could have subjected businesses to federal securities law rather than exempted them.

If the amendment is intended to refer only to a subset of staff-recommended changes, then it is decidedly unclear and ambiguous. The rule does not delineate which recommended changes must be made by 5 p.m. on the day after RRC meets. It may be that the intent of the amendment is that RRC will specifically note which changes must be made by 5 p.m. on the day after its meeting, but the amendment does not say that and could leave agencies thinking they have to make all changes requested by staff. On the other hand, the intent may be to delegate to staff the decision of which changes must be made by 5 p.m. the next day. If that is the intent, then the rule is unclear and ambiguous because it does not set out the factors to be taken into account by staff in exercising the delegated discretion.

## **7. 26 NCAC 05 .0115 Extensions of Time**

Elements of the new rule are helpful and will provide much-needed guidance. I assume that the deadlines for agency response set out in the new rule will be waived, as in the past, on those hopefully rare occasions when staff are not able to get their requests for technical changes to agencies until shortly before the deadlines for the agencies to respond. I note that the word “subsequently” on line 12

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<sup>11</sup> 18 NCAC 06A, Sections .2000 and .2100.

seems to be unnecessary and not in keeping with the Style Guide.

## **8. 26 NCAC 05 .0201 Scope**

I am curious as to why the scope paragraph for the Periodic Review of Existing Rules Section is being repealed. In my experience, the public finds scope paragraphs useful.

## **9. 26 NCAC 05 .0203 Deadlines and 26 NCAC 05 .0205 Agency Request to Reschedule Reports for Earlier Review and Add Unnecessary Rules to the Schedule**

The amendments harmonizing the dates for filing with RRC should eliminate some missteps and missed deadlines by agencies. The proposed amendment to 26 NCAC 05 .0205, adding arguments for earlier rescheduling of ERR review to factors considered by RRC, is helpful.

## **10. 26 NCAC 05 .0212 Readoptions**

I recognize that RRC and its staff have sometimes been frustrated by agency responses to the scheduled deadlines for readoption pursuant to ERR. The new rule will require that agencies submit “written documentation of the agency’s planned timeline for readoption, providing planned dates for all steps required by G.S. 150B-21.2” and “written documentation of any of the agency’s rulemaking priorities that the agency determines to be relevant to the timeline for readoption.”

The proposed requirement is daunting and will require an enormous amount of work by agencies. Rulemaking timelines are of necessity fluid, requiring constant modification.

In all my years of rulemaking, I cannot recall a single time when the initial rulemaking timeline that I created held true. I offer these examples of why preparing such detailed timelines and documentation will require an extraordinary amount of work and will produce at most, highly speculative documents:

- Legislative action directing an agency to do something may upend an agency’s rulemaking priorities and schedule.<sup>12</sup> This has recently happened to my own agency. In July 2022, the General Assembly enacted the new Remote Electronic Notarization Act.<sup>13</sup> It requires that we engage in such extensive rulemaking and use of resources that we can do no other rulemaking until we have completed the entire rulemaking process in a minimum of 25 different categories.
- For a small agency like my own,<sup>14</sup> the illness-related absence of a single employee who is a subject matter expert can delay a rulemaking timeline by months. As just one example, our Trademarks Section has only two employees engaged in statutorily mandated duties with

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<sup>12</sup> This has recently happened to my own agency with the General Assembly’s enactment of the new Remote Electronic Notarization Act requiring such extensive rulemaking that my department will be unable to do anything else by way of rulemaking for what looks to be more than a year.

<sup>13</sup> [HB 776, S.L. 2022-54](#).

<sup>14</sup> The Department of the Secretary of State is a lean one with approximately 175 employees, most of whom are engaged in complying with statutorily mandated deadlines for providing services to the public and businesses. As General Counsel, I do not have an assistant or paralegal and must rely on others being able to fit rulemaking assistance to me in with their normal, statutorily mandated duties.

regard to registering the State trademarks that are a valuable source of capital for North Carolina businesses. One of those employees performs purely administrative duties and would not be able to assist with reviewing and revising the trademark rules. Our re-adoption of the rules would be delayed by many months if the subject matter expert employee were to separate from our employ or be seriously ill and out of work for a period of time. Yet under RRC's extension of time rule, 26 NCAC 05 .0204, that employee's situation is not a listed factor for consideration of an extension.

- As an example of one seemingly tiny element in a rulemaking timeline, an agency cannot submit rules for publication until it has the url for the website on which the rules will be published<sup>15</sup> and can be assured that IT will be able to post them to the website on or before the date of publication in the Register.<sup>16</sup> The ability of internal or external IT to provide precise timelines is often out of an agency's control. Therefore, any date that I put in the proposed rule's required timeline for the notice of text will be speculative.
- For re-adopted rules for which a fiscal note will be required, agencies are seldom able to predict how long it will take them to research the fiscal note, write it, and get it approved by OSBM.<sup>17</sup>
- Changes in rulemaking coordinators due to the anticipated wave of Baby Boomer retirements will inevitably lead to turnover of subject matter experts and hiring of inexperienced rulemaking coordinators, causing re-adoptions to move more slowly.
- Changes in agency heads, whether by appointment or election, may completely change a rulemaking schedule.

The proposed new rule must be read in tandem with 26 NCAC 05 .0204 Extension of Time. That rule requires that the RRC consider illness or incapacity of the person who submits the rules to RRC as well as changes to composition of the agency<sup>18</sup> or its staff. Yet RRC's rules would not allow for consideration of the incapacity of the subject matter expert employee as a factor in granting an extension for re-adoption of the rules. The limited set of allowable factors for an extension do not even allow consideration of public comments in support of an extension for re-adoption. The businesses most likely to comment on our Department's rules during re-adoption would rather have existing rules in place a little longer – providing certainty – than have poorly written rules. But any effort by those businesses to support a request for an extension of time for re-adoption would be rejected by RRC because its rules only allow consideration of comments in opposition to re-adoption extensions of time.<sup>19</sup>

No agency, large or small, will be able to accurately do more than provide best guesses at such extraordinarily detailed timelines and priorities as the proposed rule requires. And the factors in the

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<sup>15</sup> G.S. § 150B-21.2(c)(2a).

<sup>16</sup> G.S. § 150B-19.1(c).

<sup>17</sup> Few, if any, agencies have economists on staff or experts in meeting the requirements of the State Budget Manual for fiscal notes, *e.g.*, delineating net present value and opportunity costs of a re-adopted rule.

<sup>18</sup> "Changes of composition to the agency" is an ambiguous phrase. Does it mean changes such as the recent General Assembly shuffling of units among agencies? Does it mean the separation of an essential subject matter expert, perhaps enticed by the money to be made elsewhere? Does it mean situations in which there is a newly elected or appointed agency head, or newly appointed board or commission members?

<sup>19</sup> 26 NCAC 05 .0204(a): "The Commission's decision shall be made on a case by case basis, considering the justification offered by the agency requesting the extension, which may include: (5) arguments against the delay by members of the public."

RRC extension of time rule are not adequate to allow for the many reasons an agency's wishful projected timeline can slip, no matter how hard the agency tries to stick to it.<sup>20</sup>

The unrealistic requirements of the proposed rule changes set up agencies for failure. The agencies' failure to stick to what were, from the start, impossible-to-meet timelines will necessarily increase work for RRC and increase the frustration of RRC and its staffers dealing with agencies, and of the agencies dealing with RRC.

### **Conclusion**

I thank you for the opportunity to provide these comments on the proposed RRC rule amendments and new rules. I look forward to hearing the explanation for the proposed changes and to having the opportunity to comment further, if necessary, after hearing the explanations.

Regards,



Ann B. Wall  
General Counsel

### **Attachment**

Cc: Wayne Ronald Boyles, III, Commissioner  
Barbara A. Jackson, Commissioner  
Jeffrey T. Hyde, Commissioner  
Randy O. Overton, Commissioner  
Robert A. Rucho, Commissioner  
Wm. Paul Powell, Jr., Commissioner  
John (Jay) Hemphill, Commissioner

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<sup>20</sup> As another example, RRC's extension rule does not require that it consider changes to an agency's duties, priorities, or resources, made by rightful action of the General Assembly.

## **POLICIES AND PROCEDURES OF THE NORTH CAROLINA RULES REVIEW COMMISSION**

### **RULE #1**

#### **EX-PARTE ORAL COMMUNICATIONS WITH COMMISSIONERS**

The Rules Review Commission encourages all persons desiring to address the Commission to do so openly and to all commissioners and preferably in writing. The Rules Review Commission discourages ex-parte communications with the commissioners. However, to the extent that any individual commissioner is willing to allow ex-parte communications, then such communication is permitted. (Adopted June 21, 1996)

### **RULE #2**

#### **SUBMISSION OF WRITTEN COMMENTS TO THE RRC**

Any person desiring to submit written comments concerning a rule shall submit such comments to the individual commissioners and RRC staff (and any others as required below) by 5:00 p.m. of the Monday prior to the next RRC meeting. Such written submissions shall specify how a rule either complies with or fails to comply with the statutory grounds for the RRC's review set out in G.S. § 150B-21.9.

The deadlines set out above shall be waived and the deadlines set out below applying to rebuttal comments shall apply if the agency makes a change in the rule after the rule is filed with the RRC and the comments apply to the change.

In addition to the RRC commissioners and staff, persons submitting comments shall submit a copy of such comment to any other person who has notified the RRC in writing that they wish to be informed concerning the status of a particular rule. If the submission is in opposition to a rule, the person also shall submit a copy of the comments to the agency.

A person may submit rebuttal comments to such written comments by the earlier of the time of the meeting or seventy-two (72) hours after receiving a copy of the comments. A person may also, at the discretion of the Chairman, address the commission to respond to comments received within one-week of the commission meeting.

The RRC staff shall provide mailing or delivery addresses and fax, e-mail, or other electronic addresses, for delivery to the commissioners and those who have notified the Commission. The staff shall also provide a copy of these procedural rules concerning oral and written comment to anyone who requests such.

This rule may be waived by the chairman upon a finding that the person desiring to submit comment is not reasonably aware of and familiar with the RRC process and its role in the rulemaking process. (Adopted June 21, 1996; amended August 15, 1996)

### **RULE #3**

#### **REQUIRE NOTICE PRIOR TO ORAL RRC PRESENTATION**

Anyone desiring to make an oral presentation concerning a rule shall notify the RRC in writing at least 24 hours prior to the start of the meeting. Such notice shall include their name, address, telephone number, and fax number. In addition to notifying the RRC the person shall also notify the agency proposing the rule and any other person who has notified the RRC in writing that they wish to be informed concerning the status of a particular rule.

The RRC staff shall provide mailing or delivery addresses, or telephone numbers, or fax, e-mail, or other electronic addresses, for notifying the required parties. The staff shall also provide a copy of these procedural rules concerning oral and written comment to anyone who requests such.

This rule may be waived by the Chairman upon a finding that the person desiring to submit comment is not reasonably aware of and familiar with the RRC process and its role in the rulemaking process. (Adopted June 21, 1996; amended August 15, 1996)

### **RULE #4**

#### **LIMITATIONS ON ORAL PRESENTATIONS**

The RRC Chairman may set time limits on oral presentations before the RRC. Factors that the Chairman may use in determining such limits include the length of the agenda; the number of contested rules; the complexity of the issues; the public interest in a particular rule; the number of people desiring to address the RRC over the issue, the variations in their arguments (i.e., are they adding additional information to the debate or merely being repetitive of earlier speakers?), and the level of agreement within their positions or relationships; the nature of the arguments advanced in relation to the RRC scope of review; the amount of notice given to the agency; and any other factors the Chairman deems appropriate. (Adopted June 21, 1996)

### **RULE #5**



## **WITHDRAWAL OF RULES AFTER FILING WITH RRC**

An agency may withdraw a proposed rule after filing with the RRC when the rule is an adoption or when the staff recommendation against a proposed rule is directed at the amendment to the proposed rule and not at the existing language. (Adopted June 21, 1996)

### **RULE # 6**

#### **SUBMISSION OF REWRITTEN RULES**

Agencies shall not submit rewritten rules until the meeting following the meeting at which a rule was originally reviewed by the RRC. Agencies may submit technical changes at the meeting at which a rule is originally reviewed. (Adopted June 21, 1996)

### **RULE #7**

#### **DEADLINE FOR SUBMISSION OF REWRITTEN RULES**

All rewritten rules or rules containing technical changes shall be submitted to the RRC by 5:00 p.m. of the second day before the RRC meeting.

This rule may be waived by RRC staff where the agency does not meet until the day of this deadline or later or when the original submission is deficient and requires further changes. However, no rewritten rules or technical changes shall be accepted after 5:00 p.m. the day before the RRC meeting. (Adopted June 21, 1996)

### **RULE #8**

#### **EX-PARTE COMMUNICATIONS WITH RRC STAFF**

Any person desiring to confer with RRC staff may do so on an ex-parte basis at any time that staff is available. However, this shall not be a confidential communication and staff may inform agency members and any other person of such communication and may invite rebuttal response. (Adopted June 21, 1996)

### **RULE #9**

#### **COMMUNICATIONS CONCERNING STAFF RECOMMENDATIONS**

Any person may contact any RRC staff member prior to the Commission's meeting to determine the staff recommendation concerning any rule. Staff shall not initiate any contact to inform an agency or any other person concerning the staff recommendations. (Adoption June 21, 1996)

### **RULE #10**

#### **FILING RECEIPTS**

(a) When an agency files a permanent rule for which there is a temporary rule it shall obtain a dated and signed receipt from the RRC.

(b) When an agency files any other permanent rule, it may obtain a dated and signed receipt from the RRC.

(c) If the agency fails to obtain a receipt, the date of filing shall be considered the next 20<sup>th</sup> day of the month.

### **RULE #11**

#### **FILING OBJECTION LETTERS**

(a) The RRC shall not accept any letter objecting to a rule and requesting review by the legislature (objection letter) which is written prior to the time the agency adopts the rule.

(b) The RRC shall not accept any objection letter to a rule which has not been filed with the RRC and the agency has indicated is not likely to be filed within the next 30 days.

### **RULE #12**

#### **RETURN OF OBJECTION LETTERS**

(a) The RRC shall return any objection letter timely written and filed and for which no rule has been received by the RRC within thirty (30) days after the filing of the objection letter.

(b) The RRC shall instruct the letter writer of a letter returned under this rule how to contact the RRC on a monthly basis to determine the status of a rule filing and whether to refile the objection letter.

## Burgos, Alexander N

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**Subject:** FW: [External] Comments to 2022 Readoption Schedule  
**Attachments:** ATT00001.txt

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**From:** Laura Rowe <[Laura.Rowe@nctreasurer.com](mailto:Laura.Rowe@nctreasurer.com)>  
**Sent:** Tuesday, December 13, 2022 2:24 PM  
**To:** Snyder, Ashley B <[ashley.snyder@oah.nc.gov](mailto:ashley.snyder@oah.nc.gov)>; Liebman, Brian R <[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)>  
**Cc:** Garner, Ben <[ben.garner@nctreasurer.com](mailto:ben.garner@nctreasurer.com)>  
**Subject:** [External] Comments to 2022 Readoption Schedule

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Good Afternoon,  
Related to the email below, our office is submitting the following comments on the draft schedule for periodic review (submission of classification reports required under G.S. 150B-21.3A(d)(1)):

Rules	Comments
20 NCAC 02	The re-adoption of 99 rules from this Chapter was recently completed (currently pending RRC consideration). In addition, the entire Chapter was reviewed and updated as part of the re-adoption (127 rules total) (currently also pending RRC consideration). Given the recent updates to this Chapter, we would request a review date of June 2027.
20 NCAC 12	The North Carolina State Health Plan for Teachers and State Employees is exempt from Article 2A rulemaking requirements, including periodic review, pursuant to G.S. 150B-1(d)(7). We would request to remove these rules from the periodic review calendar.

Thank you for your consideration.

Laura

**Laura Rowe**  
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**NORTH CAROLINA**  
DEPARTMENT OF STATE TREASURER



*Dale R. Folwell, CPA*  
STATE TREASURER OF NORTH CAROLINA  
DALE R. FOLWELL, CPA

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March 20, 2023

*Via Email*

Brian Liebman, Staff Attorney  
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[brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)

Re: Proposed Changes to Rules of the Rules Review Commission, 26 N.C. Admin.  
Code 05 .0101-.0212

Dear Mr. Liebman:

Please accept these comments on proposed changes to the rules of the Rules Review Commission's ("RRC") at 26 N.C. Admin. Code 05 .0101-.0202. The Southern Environmental Law Center submits these comments on its own behalf and on behalf of Cape Fear River Watch, North Carolina Conservation Network, and Yadkin Riverkeeper, Inc. Our organizations have a longstanding interest in advocating for robust administrative regulations to maintain and preserve North Carolina's natural resources and protect the health and safety of all North Carolinians from environmental hazards.

We are concerned that the proposed amendments to the RRC's rules are designed to make the rulemaking process more onerous for the state's administrative agencies in ways that do not foster efficiency, fairness, and deference to the agencies' expertise within the realms for which they are responsible. Rather, the amendments appear to be designed to eliminate flexibility in the rules review process, introduce rigidity into the process, and empower the RRC to review pre-existing language in current rules in ways not intended by the North Carolina Administrative Procedure Act ("APA").

The RRC was created by N.C. Gen. Stat. § 143B-30.2 for the purpose of reviewing administrative rules in accordance with the APA, and thereby implementing and furthering the purpose of the APA. It is well-settled that the appropriate purposes of a state administrative procedure act include "simplify[ing] the administrative process and provide the public with a more certain administrative procedure, thereby insuring that the public will receive due process and significantly improve the fairness of treatment." 2 Am. Jur. 2d Administrative Law § 15 (2023). Further, state administrative procedure acts should seek "to balance a state's interest in efficient administration against individuals' interest in fairness" and provide for "fair and appropriate procedures for agencies that are responsible for both the administration and adjudication of their respective statutes." *Id.*

The proposed RRC rule changes, however, fail to satisfy these goals. They do not promote efficiency, foster fair and appropriate procedures for agencies, or improve the fairness of the rulemaking process. They will likely harm members of the public – both those subject to regulations and those who are protected by them – by creating unpredictability and inconsistency in the state’s regulatory framework. Our concerns with specific proposed amendments are below.

**26 N.C. Admin. Code 05 .0102 (Communications with Commissioners) and .0109 (Communications with RRC Staff)**

We are concerned about the repeal of 26 N.C. Admin. Code 05 .0102 and .0109. Section .0102 currently allows oral communications with individual *commissioners* regarding rules before the commission (at the discretion of the individual commissioners) but states that such communications are not encouraged, while a prior version of the rule encouraged communications with commissioners to be in writing. Section .0109 currently provides for oral communications with RRC *staff*, and it includes a reminder that such communications are not confidential.

Repeal of section .0102 could be taken to encourage oral communications with commissioners, for which there is likely to be no record created that is subject to the state Public Records Act, N.C. Gen. Stat. Ch. 132, thereby potentially reducing the transparency of the RRC’s conduct of its business and impeding the public’s ability to understand the basis for its decision-making. If the intent is to prohibit members of the public from orally communicating with individual commissioners, we do not support the amendment. If the intent is to encourage members of the public to orally communicate with individual commissioners, again it would be better to retain the rule and revise it to say so, adding a provision encouraging or even requiring commissioners to keep records of such communications and, like section .0109, including a reminder that such communications are not confidential, both of which would promote transparency.

In contrast, section .0109 involves communications with RRC *staff*, and, because they are not the ultimate decision-makers, there is not the same threat to decision-making transparency, even with oral communications. Rather, to the extent that any such communications affect a staff members’ recommendation to the RRC, it should be reflected in the written staff opinion provided to the commissioners and published with the RRC meeting agendas. Moreover, direct and frank communications between RRC staff and agency rulemaking coordinators in particular can actually facilitate the process, create greater opportunities to resolve differences of opinion during pre-review discussions and promoting efficiency in the rulemaking process generally. Requiring every communication between agencies and RRC staff to be in writing could chill the opportunity for full expression of ideas and efficient rulemaking, especially when combined with the proposed changes to 26 N.C. Admin. Code 05 .0106 and .0107 discussed below.

In sum, we recommend that 26 N.C. Admin. Code 05 .0102 and .0109 be retained, with the addition of an explicit provision allowing agency rulemaking coordinators to communicate orally with the RRC staff and the afore-mentioned clarifications to section .0102.

### **26 N.C. Admin. Code 05 .0106 (Limitations on Oral Presentations)**

Reducing the time for agency representatives and others to speak at RRC meetings to five minutes from the current ten minutes undermines the fairness and efficiency of the rulemaking process and prioritizes speed over the quality of decision-making by the RRC. Currently, RRC meetings already typically take far less than the full day envisioned by the statute creating the RRC, N.C. Gen. Stat. 143B030.1(d). With a typical RRC meeting agenda containing 20 or fewer items, some of which may be “no-action” items, maintaining the current ten-minute limit on oral presentations will hardly be a burden to the commissioners. Moreover, as many items on a typical agenda may involve the review of the readoption of the entire body of an agency’s existing rules pursuant to N.C. Gen. Stat. § 150B-21.3A, subject to numerous different recommended objections described in RRC staff opinions, five minutes is an undeniably insufficient time for an agency representative to address all necessary issues. The risk that the RRC will erroneously object to and therefore repeal numerous longstanding rules and thereby disrupt an entire regulatory framework vastly outweighs any advantage of preventing the agency representative from speaking for an extra five minutes or more. Indeed, in many instances, even ten minutes is not sufficient when an entire regulatory scheme comprising hundreds or thousands of individual rules subject to numerous recommended objections in lengthy staff opinions is at stake.

### **26 N.C. Admin. Code 05 .0107 (Withdrawal of Rules After Filing)**

The proposed amendment to 26 N.C. Admin. Code 05 .0107 is particularly problematic. The amendment would change the language from “An agency *may* withdraw a rule after filing with the RRC and before review by the RRC” in a list of circumstances to “An agency *shall not* withdraw a rule after filing with the RRC and before review with the RRC” when the rule is a readoption or when the staff has recommended objection to existing rule language. The amendment also purports to eliminate subsections .0107(a)(3) and (a)(4), which currently allow agencies to withdraw rules after submitting them to the RRC, either when there is no staff opinion or when the agency realizes it has not fully complied with the APA. The amendment also adds new subsections .0107(b) and (c), which provide that an agency may not make any changes to any rule after filing it with the RRC before it is reviewed by the RRC, except for technical changes requested by the RRC, even in response to a staff opinion recommending objection and pointing out substantive flaws that the agency could easily correct. These amendments to section .0107 will force the expenditure of unnecessary time and resources by both the RRC and agencies in various ways and create uncertainty and unpredictability for the public.

For instance, particularly in combination with the repeal of 26 N.C. Admin. Code 05 .0109 and its elimination of the opportunity for fruitful pre-review discussions of rules between the agency and the RRC, the amendment to section .0107(a) will prevent an agency from withdrawing a rule that it has reconsidered or wishes to rewrite, for instance after learning of a legitimate basis for objection to a readopted rule or existing language from RRC staff. It may also prevent an agency from making minor amendments to a rule in order to respond to a staff opinion that recommends objection and points out substantive flaws that the agency could correct. In those circumstances, the amendment could pointlessly force the RRC to take the time

to complete its review process of a rule and formally object to the rule, before the agency can either make simple amendments to a rule to address the objection or, depending on the circumstances, begin work on the rulemaking process for a new rule, unnecessarily prolonging agency rulemaking.

Finally, by eliminating subsections .0107(a)(3) and (a)(4) and adding subsections .0107(b) and (c), the amendment could also prevent an agency from self-correcting if it realizes, for instance, that the data supporting the rule contains errors, that the agency has made a mistake in APA compliance (for example, by miscalculating deadlines for public comment), that new information justifies a new fiscal note, that the rule contains ambiguous language that could easily be clarified, that the factual or legal basis for a rule has disappeared (for example, because of a change of federal law), etc.

Each of these scenarios deprives the public of the benefits of an orderly and efficient rulemaking process. In the many ways described above, the amendments to section .0107 will unnecessarily prolong the rulemaking process, potentially forcing rules that should have been withdrawn and/or amended prior to RRC action instead to go into effect or be blocked temporarily, while the agency belatedly is allowed to act. Final approval and enforcement of rules that are needed for the public good may be delayed. Each of these scenarios creates confusion and uncertainty for members of the public – both those who are subject to regulation and those who would be protected by regulation, all of whom have a legitimate interest in regulatory consistency, stability, and predictability so that they can know what the law requires and act accordingly.

Additionally, we are concerned that the amendments to section .0107 are designed to expand the RRC's purview to emphasize review of existing rule language in ways not intended by the APA. Admittedly, the APA does provide that "when the Commission reviews an amendment to a permanent rule, it may review the entire rule that is being amended." N.C. Gen. Stat. § 150B-21.8. But this power to review existing language in an existing rule is only ancillary and secondary to its primary authority to review new rules and rule amendments presented by agencies. We are concerned about the amendments to section .0107 to the extent they may be used by the RRC to engage in overreach and force the review of existing rules and language that the agency does not wish to present.

In sum, the proposed amendments to 26 N.C. Admin. Code 05 .0107 will create inefficiency for both the RRC and agencies, unnecessarily extend the total time for the rulemaking process, impose inappropriate limits on the agencies' ability to respond to staff opinions and otherwise manage their rulemaking process, and, as a consequence of the foregoing, harm the public.

### **26 N.C. Admin. Code 05 .0204 (Extensions of Time) and .0212 (Readoptions)**

The new proposed section 26 N.C. Admin. Code 05 .0212 creates an apparently rigid timeline for the massive undertaking that is the review and readoption process required by N.C. Gen. Stat. 150B-21.3A. Such rigidity is unwise given the gravity of the penalty to the public for an agency missing the deadlines: expiration of entire sets of rules established for the health and

safety of the public and the orderly conduct of business within the state. Section .0204 provides for agencies to secure extensions of time, but by its terms only applies to extend “deadlines set forth in Rules .0203(c) and .0211.” It also contains a short list of acceptable justifications for extensions, such as “illness or incapacity of the staff member assigned responsibility for submitting the report.”

At a minimum, the proposed new rule .0212 and existing rule .0204 should be amended to clarify that the opportunity for securing an extension of time under section .0204 is also available and applies to deadlines under section .0212 as well, that is shall be freely given, that the categories of justifications listed in .0204(a) are merely examples, and that that list is not exhaustive.

Some agencies have hundreds or more rules to review and readopt, many of which may depend upon complex and time-consuming processes such as scientific analysis, data gathering, fiscal analysis, etc., or may attract extensive public comment that must be addressed. Agencies may need additional time to react to newly published scientific advances, to gather additional data, to make changes to fiscal analyses, to respond to public comment, etc. Agency staff members involved in the rulemaking *other than* the “staff member assigned responsibility for submitting a report” may suffer lengthy incapacitation or illness or be entitled to take leave under the federal Family and Medical Leave Act. Agency staffing shortages caused by budget shortfalls may create difficulties for the agency in both meeting deadlines and performing other non-discretionary duties. Myriad valid reasons may justify an agency not meeting its original deadlines.

In such circumstances, the likelihood that the agency will need additional time for review and readoption is high and the list of potential reasons for needing an extension of time is longer than what is currently included in section .0204. Consequently, the proposed amendment to section .0212 introduces an enormous risk that necessary and important rules will expire by operation of law. Consequently, the potential harm to members of the public who depend on the protection of administrative regulations is simply too enormous to adopt the amendment as written. We therefore recommend amending sections .0204 and the proposed section .0212 as outlined above.

### **Conclusion**

For the foregoing reasons, we respectfully request that you consider the above-described concerns and abandon or amend the proposed rule amendments accordingly. Thank you for considering our comments.

Sincerely,



Julie Furr Youngman  
Senior Attorney



Brian Liebman  
March 20, 2023  
Page 6

cc:

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March 20, 2023

Brian Liebman  
Commission Counsel  
Office of Administrative Hearings  
1711 New Hope Church Rd  
Raleigh, NC 27609

**Sent only by email to [brian.liebman@oah.nc.gov](mailto:brian.liebman@oah.nc.gov)**

Dear Mr. Liebman:

Please accept the comments below on the rules proposed by the Rules Review Commission. I appreciate the opportunity for public comment. I also want to thank you for taking the time to discuss the amendment to Rule .0107 when the rules were originally published.

**26 NCAC 05 .0102 – communications with commissioners**

I initially understood the intent behind the repeal of Rule .0102 to be a way of further discouraging agencies from verbally communicating directly with commissioners, beyond the discouragement in Paragraph (b). However, it is possible that you intended to eliminate any discouragement of verbal communication, opening it up to interested parties to contact individual commissioners directly. While I have no opposition to the repeal, it may be helpful to communicate with agencies the impact of this repeal, specifying which of the two readings above is correct.

**26 NCAC 05 .0107 – withdrawal or amendment of rules after filing with RRC**

As mentioned above, thank you for discussing the purpose of this amendment.

If Paragraph (b) were adopted, and an agency were to notice technical issues with the rule, I trust that the commission staff will make (additional) technical-change requests to incorporate the agency's observation, unless the commission staff disagrees with the agency. Sometimes an agency may notice issues that have been overlooked and are not substantive in nature, despite the agency's best efforts to catch errors.

I recommend that Paragraph (b) be removed from the amendment or changed as discussed below. The current practice has been to ask agencies to make technical changes, even when the commission counsel recommends objection. This approach allows the rule to be ready for entry into the code in case the Commission disagrees with the staff opinion. I appreciate your explanation that the rule can still be approved by the Commission as set forth in G.S. § 150B-21.10, conditioned on the agency making technical changes. However, there often is back-and-forth communication between the agency and commission counsel as the agency attempts to address the technical-change requests.

- Will this process of complying with technical-change requests still occur before the Commission meeting, even though the Commission will only consider the rule as it was originally submitted; and after the meeting, the revised rule will be filed for entry into the code? If so, I believe it would be advisable to specify that in the rule so that this process is clear to agencies rather than being a staff policy that may be subject to change.
- Or will all discussion of technical changes occur after the Commission approves the rule (despite the recommendation to object), at which point that back-and-forth will occur? If so, and all back-and-forth revising occurs after the Commission meeting, the short time frame in Rule .0114(b) will force agencies and commission counsel to rush through revisions. This is especially true when the Commission meeting falls shortly before the 20th day of the month, at which point commission counsel will need to turn to the next month's filings. The result will be a significant increase in rules being calendared for the next month's agenda. Not only might this clog your docket, but it will negatively affect agencies' ability to make reasonable assessments of when rules will go into effect.

Please also see my comments below on Rule .0115, which may conflict with this rule.

### **26 NCAC 05 .0115 – extensions of time**

If the RRC staff has recommended objection and the agency requests an extension, how will the agency meet the time frames in Paragraphs (b)(2) or (d) if the agency is prohibited under Rule .0107 from making technical changes?

As a minor point, I recommend replacing the word "its" in Paragraph (b)(1) with "the agency's" to eliminate ambiguity. However, I acknowledge that the context—both this sentence and Paragraph (c)—suggests that "its" refers to "the agency" rather than "RRC staff."

### **26 NCAC 05 .0212 – readoptions**

I understand from this rule that it will be up to agencies to decide on the format of the "written documentation" required in Subparagraphs (1) and (2). If that is not correct, I believe the rule should clarify the requirements for written documentation.

I realize that the phrase "rulemaking priorities" in Paragraph (a)(2) comes from G.S. § 150B-21.3A(d)(2). However, I admit the phrase is less clear than it may appear to be at first glance. If an agency does not have a specific priority of rules that need to be passed before others, will Subparagraph (2) simply not apply and the agency will not be required to submit written documentation?

Thank you for your consideration and the time you have put into drafting these rules. I know that sometimes public comments can seem like criticisms, but please accept these comments in the spirit of constructive collaboration. If you have any questions, please contact me at (919) 814-0641 or [dennis.seavers@nc.gov](mailto:dennis.seavers@nc.gov).

Sincerely,



Dennis Seavers  
Executive Director



NC DEPARTMENT OF  
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HUMAN SERVICES**

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By E-Mail

Brian Liebman, Commission Counsel

Rules Review Commission  
1711 New Hope Church Road  
Raleigh, North Carolina 27609

March 20, 2023

Re: NC Department of Health and Human Services Comments on Proposed Rule Changes to Title 26, Chapter 05 - Rules Review Commission

Dear Commission Counsel Liebman:

I write in response to the period for public comment on proposed changes to the Rules Review Commission's (RRC) rules published in the January 17, 2023 issue of the NC Register.

**26 NCAC 05 .0103-.0105**

- Periodically, RRC staff attorneys have submitted items to rulemaking coordinators *after* 5:00pm Eastern Time which decreases the amount of time to address technical corrections, address concerns, etc. As an example, technical changes for the hospital readoption rules were received from RRC Counsel at 7:53pm on a Friday (6/3/22) and a follow up email asking if the technical changes were received was received from RRC Counsel on Saturday 6/4/22. Adhering to a 5:00pm Eastern Time deadline would be adverse if RRC staff sends requests for responses after that time.

**26 NCAC 05 .0106**

- There should not be a decrease of time in oral presentations to the RRC from 10 minutes to five minutes. Oral presentations may not need the entire 10 minutes, however strictly limiting presentations to five minutes is too short of a time to present a detailed argument or explanation, especially where it is critical to convey multiple points to the commission. Additionally, an oral presentation may cover multiple rules that relate to complex and

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critical programs or services and maintaining a ten minute allotment of time is crucial to the administrative process.

- If and when RRC accepts a staff recommendation to object to an agency's rule, in many instances, the rule is dead. The consequences are significant for an agency that has tried in good faith to comply with the APA and the statutory mandates of the agency as prescribed by the General Assembly. An agency has limited options if RRC adopts a staff-recommended objection:
  1. The agency can fix the alleged APA noncompliance or alleged ambiguity.
  2. The agency can give up the rule, request its return from RRC, and take no further action.
  3. The agency can start over and try to satisfy both the RRC objection and its statutory duties.
  4. The agency can go to the General Assembly for a legislative change.
- Given the severity of the consequences of an objection, agencies should have more than five (5) minutes to orally present their opposition or rebuttal to recommended objections.

#### **26 NCAC 05 .0107**

- Permitting the agency to address the technical corrections requested by the RRC staff attorney, even when the rule is objected to, would permit the rule to be entered into the code should RRC disagree with RRC staff attorney's objection.
- Not permitting the agency to address an objection by the RRC attorney in their technical corrections would delay a rule being entered into the Code if the RRC disagrees with the RRC staff attorney objection. The delay could have ramifications to other rules being approved (i.e., issues of interconnectivity, such as the rule being held out was critical to the comprehensiveness of the entire set of rules or was necessary to enforcement of the rules).

#### **26 NCAC 05 .0114**

- This proposed rule does not include the additional language "Eastern Time" as referenced in the proposed rule changes to 26 NCAC 05 .0103 - .0105. No comment except this rule does not make a change to say "Eastern Time."

#### **26 NCAC 05 .0115**

- Suggest adding in (b), (b)(1), (b)(2), (c), and (d) "following the extension approved by the RRC" because there is no context on the time from when the second regularly scheduled meeting would start.

## **26 NCAC 05 .0202**

- This rule previously defined “existing rules” as the rules that were in the code at the time the periodic review schedule was made effective and were not “repealed, transferred, expired, or reserved.” Changing this to “rules currently in the Code as of January 1, 2024” is an expansion of this previous methodology. As these new rules (including the periodic review schedule) are expected to go into effect June 1, 2023, this would capture rules in the latter part of 2023 that would otherwise be appropriately excluded as recently reviewed by the agency. This language also loses the clarifying language about repealed, transferred, expired, and reserved rules.

## **26 NCAC 05 .0211**

- N.C.G.S. § 150B-21.3A(d) states:  
“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.”
- It is not apparent that the Commission, in proposing the new readoption schedule, has adhered to either the decennial period or the consideration of the scope and complexity of rules subject to periodic review as required by statute.
- The proposed readoption schedule for the next periodic review in 2024-2027 was developed by OAH staff without input from the agencies that will be carrying out this work. The first cycle of the periodic review conducted in 2014-2019 was developed in collaboration between OAH staff (RRC staff attorneys) and agency rulemaking coordinators. Developing a schedule without collaboration from rulemaking coordinators creates significant challenges for agencies across state government.
- The initial periodic review schedule was completed in a five-year time period, from 2014-2019. The proposed second cycle of the periodic review is to be conducted in less than a three-year time period, from 2024-2027. Again, this schedule was developed without input from agency rulemaking coordinators and without taking into consideration any time constraints or other work duties the rule making coordinators and requisite subject matter experts within the agencies may be dealing with that will hinder their ability to complete all the periodic review tasks in less than a three-year period. Compressing the schedule from a five-year time period for completing the review to less than a three-year

time period causes more work for the rulemaking coordinators, agency staff, and rulemaking authorities.

- A time of less than three-year time period to complete all the periodic review reports is unreasonable when the initial cycle time period was five years. There are some rulemaking coordinators with a few reports to complete, while others have multiple (20 or more). While it may be reasonable for those with a minimal number of reports to complete the work, those with multiple reports due to RRC at the same time is unreasonable and overly burdensome to agencies. Please consider revising the schedule with input from rulemaking coordinators and extending the schedule to five years.
- The proposed less than three-year schedule was developed with regard to the number of rules the RRC will be reviewing each month and without regard to the number of reports a rulemaking coordinator will be completing each month throughout- all the steps of the process of the periodic review in accordance with G.S. 150B-21.3A(c) and rules 26 NCAC 05 .0206, .0207, and .0208 leading up to submission to the RRC for review. While it is true that the number of rules in each report a rulemaking coordinator must complete will vary (with some containing many rules and others containing few), all reports are required to go through an extended and cumbersome process, including agency review and approval of an initial determination, filing and public notice and comment, review and consideration of comments, approval by the agency of the final determination, and submission to the RRC. Adding to this burden is the fact that the rules, determinations, and comments must be manually entered into OAH reporting forms. Having to complete multiple reports at the same time in accordance with the proposed schedule is overly burdensome for rulemaking coordinators because this is an increase in the amount of work that was done in the initial cycle.
- While the RRC is permitted to establish the schedule, having the readoption schedule, which was previously adopted via Rule, posted solely on the RRC website raises questions about proper notice to agencies affected and compliance with the APA. Specifically, having the schedule posted solely on the website seems to permit modifications to the schedule without proper notice to the agencies impacted by the change particularly given that the proposed changes to this Rule do not address whether or how that notice will be provided.

#### **26 NCAC 05 .0212**

- Requirements in Paragraph (a) are unrealistic. To determine a deadline date for readoption for a Subchapter or Chapter of rules is reasonable. However, to determine the timelines for all the steps listed in G.S. 150B-21.2 for the rulemaking of the rules is an unrealistic ask. The publication schedule from OAH is only made out for one year at a time. To ask agencies to project dates for North Carolina Register publication, public hearing dates, comment period timeframes, etc. when the publication schedule from OAH is not available is unreasonable. Agency rulemaking staff do not have rulemaking as their sole duty, it is an added on duty. There are many unexpected events that occur



during the year that take priority in ensuring the health, welfare and safety of our vulnerable residents, therefore adding to the difficulty of pinpointing exact dates for readoption activities to occur.

- In addition, having the agency submit this information to the RRC within 60 days of the Commission's consultation request does not take into consideration that the agency in question may be a Board or Commission which may not convene within 60 days of the Commission's consultation request.
- The proposed rule does not describe the ramifications of readoption phase timeline needing to be altered. For example, in a recent rulemaking, we had four phases identified for forty rules to be readopted in. Because it unexpectedly took over three years to get our stakeholders on board with the language changes for the Phase 1 rules, we readopted Phases 2 and 3 before we readopted Phase 1. How will the RRC view that? Also, the pandemic put a hold on many of our rulemaking efforts. The safety of the citizens of NC came first. We may not have another pandemic, but one never knows what might put an unexpected curve into the original plans.
- By identifying a target date readoption deadline approved by the RRC and not having to identify all the steps for the readoption process, we have readopted our rules in advance of our deadline dates. The rule may unintentionally forestall efforts to get ahead on rulemaking timelines.
- The phrase "written documentation" is vague and ambiguous and does not provide clear direction or guidance to agencies.
- Suggest to revise the Paragraph and delete Subparagraphs (1) and (2). Or, if the RRC has reservations, allow agencies to send it a basic, estimated outline of how they anticipate their rulemaking will progress.
- The proposed new rule must be read in tandem with 26 NCAC 05 .0204 Extension of Time. That rule requires that the RRC consider illness or incapacity of the person who submits the rules to RRC as well as changes to the composition of the agency or its staff. Yet RRC's rules would not allow for consideration of the incapacity of the subject matter expert employee as a factor in granting an extension for readoption of the rules. The limited set of allowable factors for an extension do not even allow consideration of public comments in support of an extension for readoption. The businesses and public most likely to comment on DHHS-related rules during readoption would rather have existing rules in place a little longer – providing certainty – than have poorly written rules that were forced through an expedited process. But any effort by those businesses or public to support a request for an extension of time for readoption would be rejected by RRC because its rules only allow consideration of comments in opposition to readoption extensions of time.

The requirements of the proposed rule changes set up agencies for failure. The agencies' failure to stick to what were, from the start, impossible-to-meet timelines will necessarily increase work for RRC, increase the frustration of RRC and its staffers dealing with agencies, and increase the frustration of the agencies dealing with RRC. Consequently, the regulated public of each set of rules will suffer the most because the readopted rules will be more

tioned to meeting the requirements of the rule-making process than attempting to ensure the rule provides clarity and mandates accountability from providers and recipients of funding.

I thank you for the opportunity to provide these comments on the proposed RRC rule amendments and new rules.

Respectfully,



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March 20, 2023

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Re: Proposed changes to Rules Review Commission rules

Dear Rules Review Commission,

I write to you regarding the proposed changes to the Rules Review Commission rules and from the perspective of the attorney for the North Carolina Board of Physical Therapy Examiners. I object to the proposed rules in 26 NCAC 04 .0107 and 26 NCAC 05 .0212 for the following reasons.

**26 NCAC 04 .0107 Withdrawal or Amendment of Rules after Filing with RRC**

Rules are withdrawn or amended by agencies for many different reasons. The proposed changes would limit the ability of agencies to respond to comments from RRC staff and from the public. Comments sometimes bring to light problems or concerns not previously considered by the agency. Considering comments is an important component in the rulemaking process and is required by GS §150B-21.2(g). The proposed rule would limit an agency's ability to address comments and would also serve to unnecessarily prolong the process and add to the workload of both the agency and the RRC. As such, I believe the proposed rule fails to comply with GS §150B-21.9(4) in that it is not necessary to serve the public interest as required by GS §150B-19.1.

**26 NCAC 05 .0212 Readoptions**

In order to meet the readoption deadline in GS §150B-21.3A(d)(2), the proposed rule requires agencies adopt "planned dates" for steps required by GS §150B-21.2 within sixty days of request of the RRC. It can often be difficult for agencies to know exactly how long it will take to adopt rules, often due to the need to address comments from the public and questions and comments from RRC staff. The time it takes to adopt rules which require fiscal notes is also often unknown, particularly for small agencies with limited staff.

The North Carolina Board of Physical Therapy Examiners has a staff of ten. The staff member assigned to rulemaking has many other duties in addition to working on Board rules. If that staff member were to leave or become sick during the readoption process, the Board may be

unable to meet the deadlines while also handling its statutorily mandated duties. In addition, if a delay occurs which is beyond the control of the agency such as a delay in approval by OSBM of a fiscal note, the delay may cause the agency to miss the deadline thereby causing existing rules to expire.

While I believe it may be helpful to both the agency and RRC to establish a general timeline to complete rulemaking, GS §150B-21.3A(d)(2) already requires the RRC set a date by which rules must be adopted. Adding deadlines for each step of the rulemaking process is unnecessary and sets the agency up for failure. It may also cause agencies to overestimate deadlines for fear of running out of time, thereby delaying readoptions. For these reasons, I believe the proposed 26 NCAC 05 .0212 fails to comply with GS §150B-21.9(4) in that it is not necessary to serve the public interest as required by GS §150B-19.1.


Pursuant to GS §150B-21.3A(b), if the agency does not readopt a rule by the deadline established in GS §150B-21.3A(d), then the rule shall expire. In addition to the deadline in GS §150B-21.3A(d), the proposed rule requires deadlines or “planned dates” to be established for publishing in the North Carolina Register, preparing and obtaining a fiscal note, hold a public hearing and accepting comments on the rule. If one of the deadlines is missed, then under this proposed rule, the agency rule would expire, as it would not meet the readoption deadline as required in the proposed rule. For example, if a fiscal note is not obtained by the planned date established in the initial consultation with RRC, the rule would expire, despite the deadline established in GS §150B-21.3A(d) having not yet passed.

The General Assembly expressly states when rules will expire due to failure of an agency to readopt rules. RRC does not have statutory authority to place additional deadlines on rulemaking which would also cause rules to expire, when the deadline created by the General Assembly has not yet passed.

Thank you for the opportunity to comment on the proposed rules. I look forward to further discussion if desired by the Commission.

Yours truly,

SATISKY & SILVERSTEIN, LLP



David C. Gadd