



*State of North Carolina  
Department of the Secretary of State*

ELAINE F. MARSHALL  
SECRETARY OF STATE

ANN B. WALL  
General Counsel

March 14, 2016

NC Rules Review Commission  
Attention: Amanda J. Reeder  
6714 Mail Service Center  
Raleigh, NC 27699-6700  
BY Hand Delivery and Email

Re: Comment on Proposed RRC Rules

Dear Ms. Reeder:

I am writing on behalf of the North Carolina Department of the Secretary of State to comment on proposed amendments to two RRC rules: 26 NCAC 05 .0302, Temporary Rulemaking Findings Of Need Form and 26 NCAC 05 .0303, Filing A Temporary Rule. Although I question the interpretation of G.S. § 143B-10(a) as applied in those rules, I am limiting these comments to the conflict with the General Statutes as it pertains directly to the North Carolina Department of the Secretary of State.

The proposed rules would appear to attempt to limit the authority of Constitutional officers of principal departments of State government, such as the Secretary of State, to delegate the authority to sign temporary rules forms on her behalf. Simply put, this proposal is contrary to established law. N.C. General Stat. § 147-36.1 includes language that clearly authorizes the Secretary of State to delegate authority to her Chief Deputy. In fact, in the past, when there has been a question about a filing signed by the Chief Deputy, all we have had to do is provide OAH with a copy of the statute below and then the filing was accepted without further ado.

§ 147-36.1. Deputy Secretary of State.

The duly classified Deputy Secretary of State as reflected by the records of the State Department of Personnel, appointed by the Secretary of State to aid him in the discharge of his duties, **shall have the authority to perform all acts and duties of the office in the absence of his chief, or in the case of his inability to act, or under his direction.** In exercising such authority, certificates relating to documents and other filings, shall be issued in the name of the Secretary of State, printed, typed, stamped or facsimile signature, and signed by the Deputy Secretary of State. **(Emphasis Added).**

Employees in the office of the Secretary of State designated as deputy or director of specific divisions in the Department, are empowered to issue certificates relating to documents and other filings within the scope of their division. In exercising such authority the certificates shall be issued in the name of the Secretary of State, printed, typed, stamped or facsimile signature, and signed by the deputy or director indicating his approved title. Provided, however, that if the volume of documents or certificates to be issued makes an embossed seal and the autograph signature of the deputy or director impractical, the documents may be certified and certificates issued under the facsimile signature and seal of the Secretary of State only. (1967, c. 1265; 1987, c. 349.)

Therefore, I request that you amend your proposed rules to accurately reflect that the Secretary of State can, by law, delegate signature authority to, at a minimum, her Chief Deputy. I note that it is likely that there may be other similarly situated agencies and departments in State government.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann B. Wall". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Ann B. Wall  
General Counsel



North Carolina Department of Health and Human Services  
Division of Health Service Regulation

Pat McCrory  
Governor

Richard O. Brajer  
Secretary

Mark Payne  
Assistant Secretary for Audit and  
Health Service Regulation

March 28, 2016

Via Email and US Mail

Ms. Amanda Reeder, Commission Counsel  
N.C. Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, N.C. 27699-6700

Re: Comments to Rules Review Commission Rule Proposed Amendments and Adoptions

Dear Ms. Reeder:

As the Rule-review Manager for the Department of Health and Human Services, Division of Health Service Regulation (DHSR), serving as the agency rule-making coordinator for the N.C. Medical Care Commission, the N.C. Radiation Protection Commission, and the Department of Health and Human Services/Director DHSR, these comments are being submitted for the Rules Review Commission rules that were published on pages 1821-1823 in Volume 30, Issue 16 of the North Carolina Register on February 15, 2016.

Mastering the rule-making process as an agency rule-making coordinator takes time and experience. One must not only follow the Administrative Procedure Act in G.S. 150B, but also follow the rules for the Office of Administrative Hearings' Rules Division for submission procedures and formatting in 26 NCAC Subchapter 02C. In addition, a third set of rules in 26 NCAC Chapter 05 for the Rules Review Commission (RRC) is followed, when applicable, for processes related to public comments, objection letters and communications with the commission. Whenever there is something, or whatever can be developed, to further assist rule-making coordinators, agencies, and the public with the administrative rule-making process, it is welcomed.

The DHSR oversees the health and safety of all North Carolinians through needed facilities and services with 1688 rules currently in the North Carolina Administrative Code. The proposed amendments to rule 26 NCAC 05 .0103 (Submission of Written Comments Concerning



Office of the Director

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Permanent Rules to the RRC), would cause an increased burden to the division. In addition, an alternative to the proposed adoption of the three rules in the new Section .0300 – Temporary Rules for RRC Review (rule 26 NCAC 05 .0301 Formatting Requirements, rule 26 NCAC 05 .0302 Temporary Rulemaking Findings of Need Form, and rule 26 NCAC 05 .0303 Filing a Temporary Rule), would be to ask the Office of Administrative Hearings' Rule Division to amend their rules in 26 NCAC 02C by incorporating the proposed RRC rule adoption text that clearly describes the process for temporary rule submission to the RRC. The RRC could subsequently propose rule adoptions in 26 NCAC 05 by reference to the OAH Rules Division's 26 NCAC 02C amended rules. By doing so, it would accomplish the intended goal of assisting agencies with temporary rule submission to the RRC, it would establish rules for the RRC, and it would also maintain only two references for rule-making coordinators to follow for submission procedures instead adding a third, thus keeping the process less cumbersome.

I. Comment Reasons for RRC proposed rule amendment: 26 NCAC 05 .0103 (a), (c), and (d)

The proposed amendments to RRC rule 26 NCAC 05 .0103(a) will change the timeframe for submission of written comments to the RRC for permanent rules from 5:00 p.m. the Tuesday the week prior to the RRC meeting to 5:00 p.m. the second business day before the RRC meeting. The result of this change has a direct effect on the actions our agency takes in submitting rebuttal comments in accordance with Paragraph (d) of this Rule as historically, our experience has shown the majority of comments for the division's permanent rules were submitted to the RRC and the Rulemaking Coordinator on the deadline day.

As the rule is currently written in 26 NCAC 05 .0103 Paragraphs (a), (c), and (d), following the deadline for the RRC's and the Rulemaking Coordinator's receipt of comments, an agency may submit rebuttal comments to comments to the RRC prior to the day of the RRC meeting. The agency has a total of eight calendar days (six business days and two weekend days) to prepare and submit these comments by 5:00 p.m. the day prior to the RRC meeting; however, they may also submit these comments at the RRC meeting which is the ninth calendar day (or the seventh business day). The rule allows for the electronic submission of rebuttal comments to comments to the RRC. Nothing in the current rule prohibits an agency from submitting rebuttal comments to comments to the RRC in advance of the deadline.

In the proposed rule amendment, the deadline for submission of comments to the RRC will extend to 5:00 p.m. on the second business day prior to the RRC meeting. While it is understood the Rulemaking Coordinator will receive the comments at the same time as the RRC, following the deadline, the agency will have only one business day to prepare and submit rebuttal comments at the RRC meeting that is held on business day two. As stated previously, historically, the majority of the comments for the division's permanent rules have been submitted to the RRC and the Rulemaking Coordinator on the deadline day. In lengthening the timeframe for comment submission, and shortening the timeframe for rebuttal comment preparation and submission, the RRC is assuming agencies have staff resources available to prepare rebuttal comments to meet the shortened timeframe. The proposed amendment creates an undue burden on the agency by decreasing the time the agency has to prepare rebuttal comments from six business days to one and submit to the RRC meeting on business day two.

There is no avenue in the proposed rule amendment for the agency to submit rebuttal comments electronically to the RRC and to submit them prior to the RRC meeting as there is in the current rule. Only a person may submit rebuttal comments electronically and prior to the RRC meeting.

Preparing rebuttal comments with 16 copies to distribute at the RRC meeting is labor intensive and burdensome for the agency. In addition, as the rule is currently written, it allows the RRC commissioners and staff counsel time to review and consider the agency's rebuttal comments to comment. As the proposed rule amendment is written, to have the agency's rebuttal comments submitted and distributed at the RRC meeting, there is question as to whether it will give the RRC commissioners or staff counsel enough time to review and consider the agency's rebuttal comments.

Another concern with the proposed rule amendment is for persons submitting comments in accordance with Paragraph (c) via US Postal Service only. Although most often submitted electronically, comments may be submitted only in hard copy. In the cases of mail in only hard copy comments, there will be a delay in delivery of those comments to the Rulemaking Coordinator and the RRC due to the delay in processing at the State's Mail Service Center. Increasing the time for comment submission has the potential to have some comments not be considered due to late arrival because of Mail Service Center processing delays.

In last 12 months to date, the three rulemaking agencies within DHSR have submitted 10 rule packages (157 rules including 114 repeals) to the RRC for consideration and approval subject to the receipt of written comments. Of those, written comments were submitted to the RRC, and Rule-review Manager, for two of those rule packages. In response, rebuttal comments to comments were submitted to the RRC for both of those packages.

At DHSR, comments for permanent rules have typically been received on the last day for submission to RRC. Once comments are received by the RRC and the Rule-review Manager, a rebuttal response is prepared by staff counsel at the Department of Justice (DOJ) and approved by DHSR management as well as the rulemaking agency head. Once the rebuttal response is approved by all, it is submitted to the RRC by the Rule-review Manager. The current process for development of a rebuttal response and submission to the RRC takes several days.

The timeframes in the rule as it is currently written allows for the staff counsel at DOJ to develop a rebuttal response based on their work schedule. The short turnaround time to submit rebuttal comments to the RRC as proposed in the rule amendment would lessen the likelihood of the DOJ staff's ability to provide assistance to the agency due to their work duties with scheduled depositions and other legal matters.

While it has not been a common practice for comments to be submitted for the DHSR rules, the following are two examples using business days in the timeline to illustrate that they are submitted on, or close to the deadline for submission: 1) Four Adult Care Home and four Family Care Home rules for medication packaging and labeling were submitted for the RRC meeting held on 3/19/15. Comments on these rules were submitted on 3/10/15, the deadline date. Our rebuttal response was three pages long, developed by staff counsel at the DOJ, and was approved by the DHSR Division Director and the N.C. Medical Care Commission Chairman before being submitted to the RRC five business days later. The rebuttal was also carbon copied to two N.C. Legislators. Five business days were needed to develop a thorough response to these comments. Two business days would not have given us enough time to submit rebuttal comments. 2) 20 Certification of Clinics for Abortion rules were submitted for the RRC meeting held on 9/17/15. A total of 10 comments on these rules were submitted with eight of them submitted on 9/8/15, the deadline date. These comments focused on five issues and resulted in text changes to a rule to satisfy the concerns voiced in the comments. Our rebuttal response was developed by staff counsel at the DOJ, and was approved by the Division Director and the DHHS Secretary before

being submitted to the RRC six business days later. Six business days were needed to develop a thorough response to these comments. Two business days would not have given us enough time to submit rebuttal comments and make rule text changes to satisfy the commenters.

Recommendations:

- Leave rule timeframes as the rule currently requires, “to submit comments by 5:00 p.m. of the Tuesday of the week prior to the next RRC meeting.....” because changing to a longer period for comment submission and a shorter timeframe for agencies to submit rebuttal comments following the deadline of comment submission would cause an undue burden on agencies by making it difficult to develop a response in one business day and submit rebuttal comments at the RRC meeting.
- If timeframes are changed with the rule amendment, add language to allow for electronic submission of rebuttal comments for agencies and allow rebuttal comments to be submitted prior to the RRC meeting to lessen the burden on agency staff.

II. Comment Reasons for RRC proposed adoptions:

Section .0300 – Temporary Rules for RRC Review

Rule: 26 NCAC 05 .0301 Formatting Requirements

Rule: 26 NCAC 05 .0302 Temporary Rulemaking Findings of Need Form

Rule: 26 NCAC 05 .0303 Filing a Temporary Rule

Rules in 26 NCAC in Chapter 05 for the Rules Review Commission did not exist in the Code until August 1, 2008. Since attending the first rulemaking training provided by OAH in October of 2004, the two references that have continued to be invaluable as DHSR’s Rule-review Manager, and used by other staff in DHSR for rulemaking procedures, are the Administrative Procedure Act in G.S. 150B and the submission procedures and formatting found in the OAH Rules Division 26 NCAC 02C rules. The only times the rules in 26 NCAC Chapter 05 for the RRC are referenced for rulemaking procedures by the division is when comments on the division’s rules have been submitted to the RRC.

Although the proposed rule adoptions for the RRC in 26 NCAC 05 articulate the process well for submission of a temporary rule to the RRC, these rules are redundant and unnecessary as written, as there are already rules in the Code for submission of a temporary rule in the OAH Rules Division rules in 26 NCAC 02C. It is understood there is a distinction between the proposed rule adoptions for temporary rule submission being RRC rules and are located in a different Chapter of Title 26 of the Code than the OAH Rules Division’s rules for temporary rule submission that are located in Subchapter 02C of Title 26. However some of the text as well as one rule title of the RRC proposed rule adoptions mirror or is similar to that of the rules found in the OAH Rules Division 26 NCAC 02C rules. Should these proposed rule adoptions become effective there would be a high likelihood of increased confusion, especially among new rulemaking coordinators, in utilizing three references (G.S. 150B, 26 NCAC 02C and 26 NCAC 05) as well as having some rules with text and a rule with title duplication, or text with similarity in the different rule Chapters. Instead, utilizing just two references (G.S. 150B and 26 NCAC 02C) that have no rule text or rule title duplication, would be less likely to cause confusion to ensure the submission of a temporary rule is followed in accordance with the correct rulemaking procedure.

There is conflict between the RRC proposed rule adoptions and the OAH Rules Division 26 NCAC 02C rules currently in the Code for temporary rule filing procedures. If the RRC proposed rule adoptions become effective in the Code without amendments to the OAH Rules Division rules in 26 NCAC 02C, there will be a conflict in the Code for temporary rule filing procedures between the rules in the two Chapters in Title 26, further increasing the likelihood for confusion among rulemaking coordinators in submitting temporary rules to the RRC.

For Title 26 of the Code, rather than the RRC propose new rules in a new Section of Chapter 05, an alternative is to ask the OAH Rules Division to amend their rules in 26 NCAC 02C for temporary rule submission to the RRC by incorporating the proposed RRC rule adoption text for clarity of the process for temporary rule submission to the RRC. Subsequently, the RRC could propose rule adoptions by reference in 26 NCAC 05 to the OAH Rules Division 26 NCAC 02C amended rules. By doing so, the use of an additional reference with rule text duplication for rulemaking coordinators will be alleviated and it will lessen the potential for confusion by not having multiple rules in different Chapters within Title 26 of the Code addressing the procedure in detail for submitting a temporary rule to the RRC.

#### Specific RRC Proposed Rule Adoptions Comments:

##### **26 NCAC 05 .0301 Formatting Requirements**

The RRC proposed rule adoption references formatting criteria within four Sections of the OAH Rules Division rules in 26 NCAC 02C; however, the proposed rule does not reference Section .0500, Temporary Rules, in 26 NCAC 02C. In the OAH Rules Division rule 26 NCAC 02C .0502(3)(a)(b) and (c), criteria for a temporary rule's text and format can be found as well as references to rule 26 NCAC 02C .0108, General Format Instructions. Titled "Formatting Requirements", this RRC proposed rule adoption has a similar rule title to that of the OAH Rules Division rule 26 NCAC 02C .0502. The RRC proposed rule provides clarity that the submission of temporary rules is to the Rules Review Commission for review.

#### Recommendation:

- Delay RRC proposed rule adoption for formatting requirements.
- Suggest the RRC ask the Office of Administrative Hearings Rules Division to amend rule 26 NCAC 02C .0502 for clarity by incorporating the RRC proposed rule adoption text, "submitting rules to be reviewed by the RRC" to their rule.
- Once the OAH Rules Division rule 26 NCAC 02C .0502 is amended, propose RRC rule adoption for a new Section .0300 – Temporary Rules for RRC Review, and propose rule adoption by reference for 26 NCAC 05 .0301 Formatting Requirements to the Sections in the OAH Rules Division rules in 26 NCAC 02C as currently proposed but also add a reference to Section .0500.

##### **26 NCAC 05 .0302 Temporary Rulemaking Findings of Need Form**

The RRC proposed rule adoption rule name "Temporary Rulemaking Findings of Need Form" mirrors that of OAH Rules Division rule 26 NCAC 02C .0503. In addition, several paragraphs

in the proposed rule adoption have the same requirements that are also in OAH Rule Division rule 26 NCAC 02C .0503. This duplication in the Code is unnecessary, may be confusing especially to new rule-making coordinators, and it also necessitates the cumbersome use of a third reference for following the process of submitting a temporary rule to the RRC.

Paragraphs (a) and (c) of the RRC proposed rule adoption contain text that is an exact duplicate of text found in the OAH Rules Division rule 26 NCAC 02 .0503(a) and (b), with the exception that Paragraph (a) of the RRC proposed rule adoption has some additional clarifying text.

Paragraph (d) of the RRC proposed rule adoption has text that is similar to OAH Rules Division rule 26 NCAC 02C .0113; however in the text of the RRC proposed rule adoption, the agency names have been updated so when the proposed rule is effective on May 1 2016, there will be a conflict between the two rules in the Code. In addition, the text in Paragraphs (b) and (e) of the RRC proposed rule adoption clarify the requirements of the temporary rule submission form whereas this clarity is not found in the OAH Rules Division rules in 26 NCAC 02C.

Recommendation:

- Delay RRC proposed rule adoption for the temporary rule form.
- Suggest the RRC ask the Office of Administrative Hearings Rules Division to amend rule 26 NCAC 02C .0503 by incorporating all the text from Paragraphs (b) and (e) of the RRC proposed rule adoption in their rule.
- Suggest the RRC ask the Office of Administrative Hearings Rules Division to amend rule 26 NCAC 02C .0113 to update the department names and clarify the agency head title that can sign the forms by incorporating the text from Paragraph (d) of the RRC proposed rule adoption.
- Once the OAH Rules Division rules 26 NCAC 02C .0113 and .0503 are amended, propose RRC rule adoption by reference for 26 NCAC 05 .0302 Temporary Rulemaking Findings of Need Form to the amended OAH Rules Division rules 26 NCAC 02C .0113 and .0503.

### **26 NCAC 05 .0303 Filing a Temporary Rule**

The text of the RRC proposed rule adoption has many of the same requirements found in the text of two OAH Rules Division rules, 26 NCAC 02 .0502 and .0503. This duplication in the Code is unnecessary, may be confusing especially to new rule-making coordinators, and it also necessitates the cumbersome use of a third reference for following the process of submitting a temporary rule to the RRC.

With the exception of Item (3), the text of the RRC proposed rule adoption has many of the same requirements that are also in OAH Rules Division rules 26 NCAC 02C .0502(3)(a)(b)(c), .0502(4), and .0503(a)(b); however, the RRC proposed rule adoption has additional language that clarifies the process of filing a temporary rule.

The text of Items (1) and (2) of the RRC proposed rule adoption is similar, or just a rewording, of the text of another RRC proposed rule adoption, 26 NCAC 05 .0302(c). This similar or reworded text is unnecessary in this rule.



Recommendation:

- Delay RRC proposed rule adoption for the process of filing a temporary rule.
- Suggest the RRC ask the Office of Administrative Hearings Rules Division to amend two rules, 26 NCAC 02C .0502 and .0503, to clarify the process for filing a temporary rule by merging the text from the RRC proposed rule adoption with that of their current rules.
- Once the OAH Rules Division rules 26 NCAC 02C .0502 and .0503 are amended, propose RRC rule adoption by reference for 26 NCAC 05 .0303 Filing a Temporary Rule to the amended OAH Rules Division rules 26 NCAC 02C .0502 and .0503.

III. Conclusion

We can all agree that having rules that clearly define the procedures to follow for the Rules Review Commission not only satisfy G.S. 150B-2(8a), but they are also good for the public, rule-making coordinators, and others working with rulemaking to know, so they can abide by them when needed. In the APA process, agency staff receive input from the public, which at times achieving consensus with is challenging. The avenue for anyone to submit comments to the RRC is another method where the rulemaking process works for the betterment of sound rules for the citizens of North Carolina. By amending rule 26 NCAC 05 .0103 and increasing the time frame for when a person may submit comments to the RRC to 5:00 p.m. the second business day prior to the RRC meeting, this places an undue burden on the agency for having enough resources and time to develop rebuttal comments, make copies of the comments and submit them at the RRC meeting.

Following the APA can be a daunting task for someone new to rulemaking and unfamiliar with reading statutes. To understand all the steps involved, know how to format a rule, and the process for filing it, rulemaking coordinators need to adhere to G.S. 150B and the OAH Rules Division rules in 26 NCAC 02C.

Rather than adopt new rules now for the RRC for the submission of a temporary rule that have duplicate text of or that are similar to those that are in the Code under the OAH Rules Division rules in 26 NCAC 02C, it would be beneficial to have amendments be made to the OAH Rules Division rules in 26 NCAC 02C for the temporary rules submission process incorporating the text from these RRC proposed rule adoptions. Subsequently, the RRC could propose rule by reference adoptions in 26 NCAC 05 to the amended OAH Rules Division 26 NCAC 02C rules. By doing so, it would alleviate conflicts for the temporary rule process between the two Chapters in the Code. Rulemaking coordinators would continue using only two references for the temporary rule process (G.S. 150B and 26 NCAC 02C) thereby alleviating the need for a third reference that would increase the likelihood of confusion, especially with those new to rulemaking.

Thank you for the opportunity to comment on these proposed rule amendments and adoptions.

Sincerely,



Nadine Pfeiffer  
Rule-review Manager



PAT MCCRORY  
*Governor*

DONALD R. VAN DER VAART  
*Secretary*

SAM M. HAYES  
*General Counsel*

April 14, 2016

Amanda J. Reeder, Esq.  
Rules Review Commission Counsel  
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Raleigh, North Carolina 27699-6700  
[Amanda.Reeder@oah.nc.gov](mailto:Amanda.Reeder@oah.nc.gov)

Dear Ms. Reeder:

This letter provides comments on behalf of the NC Department of Environmental Quality (DEQ) on the proposal by the Rules Review Commission (RRC) to amend 26 NCAC 05 .0103. DEQ also respectfully notes that issues similar to those arising under proposed 26 NCAC 05 .0103 arise under 26 NCAC 05 .0105 as well.

Proposed 26 NCAC 05 .0103 extends the deadline by which interested persons may submit written comments on an agency's proposed rule coming before the RRC. In the now-effective rule, written comments are due by close of business on the Tuesday of the week prior to the upcoming RRC meeting. RRC meetings are typically scheduled on the third Thursday of the month. Meeting dates can, therefore, occur as early as the 15<sup>th</sup> of the month. In 2016, for instance, the meetings will occur on September 15 and December 15. In addition, the RRC has traditionally scheduled its June meeting on Tuesday or Wednesday. So, the June meeting of the RRC might occur as early as 13<sup>th</sup> of that month. Thus, under the most extreme scenario, if an interested person submits written comments by no later than 5:00 p.m. on the Tuesday of the week prior to a scheduled RRC meeting, the agency has no less than four business days to analyze and prepare a response to the comment. In the other eleven months of the year, that period will be six business days, assuming no intervening holiday.

For example, from the date that a rule is approved by the agency, a commenter could have been preparing his or her comments to the RRC. In our experience, comments to the RRC might resemble an appellate brief. Under the proposed rule, the commenter can submit to the RRC and to the agency rulemaking coordinator an extensively researched written comment at 4:59 p.m. on the Tuesday before the RRC meeting on Thursday. The agency rulemaking coordinator might get notification of the comment no earlier than Wednesday morning and would then circulate the comments to various offices in the agency for analysis and preparation of rebuttal comments. With many agencies, the proposed rebuttal would be assembled collaboratively among the different offices and then be reviewed by multiple levels of managers and legal counsel. The rule provides no more than one working day to accomplish these tasks. There is no opportunity to revise schedules to accommodate the various tasks

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involved in the course of one day. If critical staff, managers, or legal counsel are traveling or otherwise committed on that day, the ability of the agency to properly respond is seriously compromised.

In many, if not most, cases the agency submitting the proposed rule will wish, or be expected, to respond to written comments submitted by the public for consideration by the RRC. Comments can range from a single page to 20 or more pages, depending on the complexity of the issue and the sophistication of the commenter. It is unreasonable to expect an agency to properly prepare a rebuttal to lengthy or complex comments in one business day. Submittal of a written rebuttal would become virtually impossible for all but the simplest of comments. Responses from the agency before the RRC would effectively become extemporaneous, impairing the RRC's capacity to properly assess those comments. It should be of paramount importance to the RRC that an agency is prepared to thoroughly and thoughtfully respond to detailed comments on a rule proposed by that agency.

DEQ concedes that agency staff are thoroughly familiar with the substantive aspects of the rules it proposes and, therefore, do not need an overly lengthy time frame in order to respond to comments. However, comments germane to review by the RRC can be entirely different from the substantive matters previously considered by the agency in the course of rulemaking. Those comments will often be less substantive and more procedural in nature. The staff responding will likely be agency counsel or DOJ lawyers who have not necessarily become conversant in the substance of the rule. The time for counsel to review, analyze and respond to comments on the statutory factors considered by RRC in respect to the agency rulemaking is effectively reduced to hours rather than days.

We note that this same issue arises with Rule .0105. Although Rule .0105 is not proposed for amendment, it appears that the two-day time frame for submittal of written comments conforms to the two-day notice for oral comments. Note that a commenter may have prepared and researched extensively his or her comment on a rule, but might elect to present the comment orally with no written complement. In this case, the agency can only speculate on the nature and substance of the comment in the one day it may have to prepare. Obviously, time limits on oral presentations authorized by Rule .0106 operate to limit the complexity of a comment, so the two-day notice period for oral comments may not be quite as unreasonable as a two-day notice period for written comments. However, if the notification time frames for oral and written comments are to be conformed, it is more reasonable to conform them to the existing time frame in Rule .0103.

DEQ suggests that the deadline for submittal of written comments be set no later than two weeks prior to the RRC meeting at which the proposed rule is scheduled to be considered. The agency could then be required to submit any written rebuttal no later than the Tuesday before the scheduled RRC meeting for those months in which the meetings are scheduled on Thursday, or no later than Monday for months in which meetings are scheduled earlier in the week. For oral comments, DEQ suggests that, if oral presentations are allowed, a deadline of Monday of the week of the scheduled RRC meeting be established.

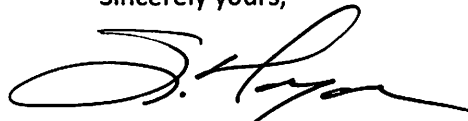
Amanda J. Reeder, Esq.  
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Page 3

In submitting these comments, DEQ notes that the Administrative Procedure Act (APA) provides that the RRC may call a public hearing on a rule at N.C. Gen. Stat. § 150B-21.14. No other section in Part 3 of Article 2A of Chapter 150B, or in Part 3 of Article 1 of Chapter 143B, explicitly provides for, or even suggests, an opportunity for public participation at this stage in the rule review process. Authorizing submittal of written comment affords the public an opportunity to participate in the review process; however, allowing oral presentations at this stage could undermine the integrity of the process as there is limited time to verify information provided in this manner.

A deadline for submittal of thoughtful written comments should be set with sufficient time for consideration by RRC members, RRC counsel, and agency staff. Issues raised can then be addressed, and RRC members can decide in a careful, deliberative fashion whether such issues have been sufficiently answered. It should be noted that public comments have historically been allowed, on an *ad hoc* basis, well in advance of codification of a process in rule (indeed, the RRC is exempt from the APA rulemaking process at N.C. Gen. Stat. § 150B-1(d)(1)).

DEQ is grateful for the opportunity to submit comments on the proposed rules and to participate in the rulemaking process in a meaningful way. We would be happy to discuss these comments further at your request.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. Hayes", with a stylized flourish extending to the right.

Sam M. Hayes