



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

June 19, 2014

Via Email and U.S. Mail: f.pete@me.com

Felice Pete, Chairperson
North Carolina Commission for Public Health
1627 St. Marys Street
Raleigh, North Carolina 27608

Re: 10A NCAC 43K .0101; .0102; .0103

Dear Chairperson Pete:

At the July 18, 2014 meeting of the Rules Review Commission, the Commission reviewed the three temporary rules filed by the North Carolina Commission for Public Health. The Findings of Need forms filed indicates that the reason for the temporary rulemaking action is pursuant to a recent act of the General Assembly. The Commission declined to approve the above-captioned temporary rules based on the failure to comply with the Administrative Procedure Act (APA) in accordance with G.S. 150B-21.1(a) and 150B-21.9.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Commission's action, please do not hesitate to contact me.

Sincerely,

Abigail M. Hammond
Abigail M. Hammond
Commission Counsel

Enclosure: Filing for 10A NCAC 43K .0101; .0102; .0103

cc: Chris Hoke, Rule-making Coordinator – chris.hoke@dhhs.nc.gov

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
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Judges and
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Clerk's Office
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Rules Review
Commission
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Civil Rights
Division
919/431-3036
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TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

ORIGINAL 6/04/14

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Commission for Public Health

2. RULE CITATION & NAME: 10A NCAC 43K .0101 DEFINITIONS

3. Action: ☒ Adoption ☐ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: March 31, 2014
- b. Proposed Temporary Rule published on the OAH website: April 7, 2014
- c. Public Hearing date: April 21, 2014
- d. Comment Period: April 7 – May 2, 2014
- e. Notice pursuant to G.S. 150B-21.1(a3)(2):
- f. Adoption by agency on: May 14, 2014
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: July 1, 2014
- h. Rule approved by RRC as a permanent rule:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: SL 2013-45
Effective date: May 2, 2013
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

FILED
2014 JUN -4 PM 4:11
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ADMIN HEARINGS

Explain:

...
TO EXPAND THE NEWBORN SCREENING PROGRAM ESTABLISHED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO INCLUDE NEWBORN SCREENING FOR CONGENITAL HEART DISEASE UTILIZING PULSE OXIMETRY, AS RECOMMENDED BY THE NORTH CAROLINA CHILD FATALITY TASK FORCE, THE COMMISSION FOR PUBLIC HEALTH SHALL ADOPT TEMPORARY AND PERMANENT RULES TO INCLUDE NEWBORN HEARING SCREENING AND PULSE OXIMETRY SCREENING IN THE NEWBORN SCREENING PROGRAM ...

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

Immediate adoption of a temporary rule while the permanent rule is in process provides expedited implementation of screening for congenital heart disease, which potentially affects up to 200 newborns each year in North Carolina. Timely diagnosis can prevent major disease complications if gone undetected.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Chris Hoke, JD

Phone: 919 707-5006

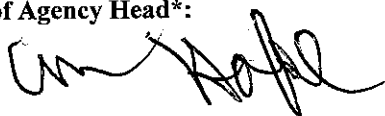
E-Mail: Chris.hoke@dhhs.nc.gov

Agency contact, if any: Bob Martin

Phone: 919 707-5179

E-Mail: bob.martin@dhhs.nc.gov

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Chris Hoke, JD

Title: Chief, Legal and Regulatory Affairs

RULES REVIEW COMMISSION USE ONLY

Action taken:

OBJECTED JUN 18 2014

☐ Date returned to agency:

Submitted for RRC Review:

ORIGINAL
6/04/14

CHAPTER 43 – PERSONAL HEALTH

SUBCHAPTER 43K – NEWBORN SCREENING FOR CRITICAL CONGENITAL HEART DEFECTS

10A NCA 43K.0101 is adopted under temporary procedures as follows:

10A NCAC 43K .0101 DEFINITIONS

As used in this Section:

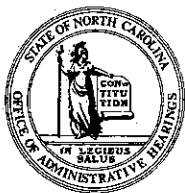
- (1) "Neonate" means any term infant less than 28 days of age or any preterm infant less than 28 days corrected age.
- (2) "Infant" means a person who is less than 365 days of age.
- (3) "Critical congenital heart defects" (CCHD) means heart conditions present at birth that are dependent on therapy to maintain patency of the ductus arteriosus for either adequate pulmonary or systemic blood flow and that require catheter or surgical intervention in the first year of life. These heart defects are associated with significant morbidity and mortality and may include but are not limited to hypoplastic left heart syndrome, pulmonary atresia, tetralogy of Fallot, total anomalous pulmonary venous return, transposition of the great arteries, tricuspid atresia, and truncus arteriosus.
- (4) "Medical facility" means a birthing center, licensed hospital, or licensed ambulatory surgery center where scheduled or emergency births occur or where inpatient neonatal services are provided.
- (5) "Pulse oximetry" means a non-invasive transcutaneous assessment of arterial oxygen saturation using near infrared spectroscopy. This screening test measures with high reliability and validity the percentage of hemoglobin that is oxygenated also known as the blood oxygen saturation.
- (6) "Positive screening" means the final result is a failed or abnormal pulse oximetry screening for critical congenital heart defects for a neonate or infant using a screening protocol based on the most current American Academy of Pediatrics and American Heart Association (AAP/AHA) recommendations. This includes neonates or infants who have not yet been confirmed to have critical congenital heart defects or have other conditions to explain abnormal pulse oximetry results.
- (7) "Negative screening" means the final result is a passed or normal pulse oximetry screening for critical congenital heart defects for a neonate or infant using a screening protocol based on the most current AAP/AHA recommendations.
- (8) "Attending providers of the neonate or infant" means the health care providers (i.e., such as pediatricians, family physicians, physician assistants, midwives, nurse practitioners, neonatologists and other specialty physicians) who perform neonatal and infant assessments and review positive and negative pulse oximetry screening results to determine an appropriate evaluation and plan of care for the neonate or infant prior to discharge from the care of the health

1 care provider. This includes health care providers who attend to neonates or infants in hospitals,
2 birthing centers, homes or other locations.

3

4 *History Note: Authority G.S. 130A-125.*

5 *Eff. July 1, 2014*



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

ORIGINAL 6/04/14

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Commission for Public Health

2. RULE CITATION & NAME: 10A NCAC 43K .0102 SCREENING REQUIREMENTS

3. Action: ☒ Adoption ☐ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: March 31, 2014
- b. Proposed Temporary Rule published on the OAH website: April 7, 2014
- c. Public Hearing date: April 21, 2014
- d. Comment Period: April 7 – May 2, 2014
- e. Notice pursuant to G.S. 150B-21.1(a3)(2):
- f. Adoption by agency on: May 14, 2014
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: July 1, 2014
- h. Rule approved by RRC as a permanent rule:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite: SL 2013-45
Effective date: May 2, 2013
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☐ A recent court order.
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain:

...
TO EXPAND THE NEWBORN SCREENING PROGRAM ESTABLISHED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO INCLUDE NEWBORN SCREENING FOR CONGENITAL HEART DISEASE UTILIZING PULSE OXIMETRY, AS RECOMMENDED BY THE NORTH CAROLINA CHILD FATALITY TASK FORCE, THE COMMISSION FOR PUBLIC HEALTH SHALL ADOPT TEMPORARY AND PERMANENT RULES TO INCLUDE NEWBORN HEARING SCREENING AND PULSE OXIMETRY SCREENING IN THE NEWBORN SCREENING PROGRAM ...

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2014 JUN -4 PM 4:12
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ADMIN HEARINGS

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

Immediate adoption of a temporary rule while the permanent rule is in process provides expedited implementation of screening for congenital heart disease, which potentially affects up to 200 newborns each year in North Carolina. Timely diagnosis can prevent major disease complications if gone undetected.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Chris Hoke, JD

Phone: 919 707-5006

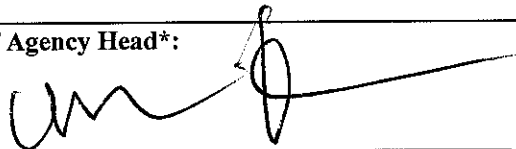
E-Mail: Chris.hoke@dhhs.nc.gov

Agency contact, if any: Bob Martin

Phone: 919 707-5179

E-Mail: bob.martin@dhhs.nc.gov

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Chris Hoke, JD

Title: Chief, Legal and Regulatory Affairs

RULES REVIEW COMMISSION USE ONLY

Action taken:

OBJECTED JUN 18 2014

Submitted for RRC Review:

☐ Date returned to agency:

CR1 6-2012
6/24/12

10A NCA 43K.0102 is adopted under temporary procedures as follows:

10A NCAC 43K .0102 SCREENING REQUIREMENTS

(a) All medical facilities and attending providers of the neonate or infant shall assure:

(1) Screening of every neonate for critical congenital heart defects (CCHD) using pulse oximetry must be performed at 24 to 48 hours of age using a protocol based upon and in accordance with the most current recommendations from the American Academy of Pediatrics and American Heart Association (AAP/AHA) which are incorporated by reference including subsequent amendments and editions, unless a diagnostic neonatal echocardiogram has been performed. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at: <http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72>.

(2) Screening of neonates and infants in neonatal intensive care units for critical congenital heart defects using pulse oximetry screening must be performed using a protocol based on the AAP/AHA recommendations as soon as the neonate or infant is stable and off oxygen and before discharge unless a diagnostic echocardiogram is performed on the neonate or infant after birth and prior to discharge from the medical facility.

(3) FDA approved pulse oximetry equipment is used and maintained to screen the neonate or infant for the presence of critical congenital heart defects.

(b) Parents or guardians may object to the critical congenital heart defects screening in accordance with G.S. 130A-125.

(c) All medical facilities and attending providers of the neonate or infant shall have and implement a plan for evaluation and follow up of positive critical congenital heart defect screenings.

(1) Evaluation and follow up of a positive screening for all neonates shall be in accordance with the most current published recommendations from the American Academy of Pediatrics and American Heart Association (AAP/AHA) which is incorporated by reference including subsequent amendments and editions. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at: <http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72>.

(2) For neonates with positive screenings who are born in a birthing facility, a home or other location, the AAP/AHA recommended evaluation and follow up should occur as soon as possible but no later than 24 hours after obtaining the positive screening result.

1 (3) Attending providers of neonates and infants in neonatal intensive care units must have a process
2 for evaluation and follow up of positive screenings in place at their medical facility.

3 (4) Options for neonatal or infant echocardiograms can include on-site, telemedicine, or by transfer or
4 referral to an appropriate medical facility with the capacity to perform and interpret a neonatal or
5 infant echocardiogram. Echocardiograms must be interpreted as recommended by the most current
6 recommendations from the AAP/AHA which are incorporated by reference including subsequent
7 amendments and editions. A copy of the recommendations is available for inspection at the NC
8 Division of Public Health, Women's and Children's Health Section, Children and Youth Branch,
9 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at
10 the American Academy of Pediatrics website at:
11 [http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-](http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72)
12 [a352-479168895a72.](http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72)

13
14 *History:* *Authority G.S. 130A-125;*
15 Eff. July 1, 2014.



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

ORIGINAL 6/04/14
OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: Commission for Public Health	
2. RULE CITATION & NAME: 10A NCAC 43K .0103 REPORTING REQUIREMENTS	
3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal	
4. Was this an Emergency Rule: <input type="checkbox"/> Yes Effective date: <input checked="" type="checkbox"/> No	
5. Provide dates for the following actions as applicable:	
a. Proposed Temporary Rule submitted to OAH: March 31, 2014	
b. Proposed Temporary Rule published on the OAH website: April 7, 2014	
c. Public Hearing date: April 21, 2014	
d. Comment Period: April 7 – May 2, 2014	
e. Notice pursuant to G.S. 150B-21.1(a3)(2):	
f. Adoption by agency on: May 14, 2014	
g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: July 1, 2014	
h. Rule approved by RRC as a permanent rule:	
6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.	
<input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input checked="" type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: SL 2013-45 Effective date: May 2, 2013 <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input type="checkbox"/> A recent federal regulation. Cite: Effective date: <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other:	
Explain:	
... TO EXPAND THE NEWBORN SCREENING PROGRAM ESTABLISHED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO INCLUDE NEWBORN SCREENING FOR CONGENITAL HEART DISEASE UTILIZING PULSE OXIMETRY, AS RECOMMENDED BY THE NORTH CAROLINA CHILD FATALITY TASK FORCE, THE COMMISSION FOR PUBLIC HEALTH SHALL ADOPT TEMPORARY AND PERMANENT RULES TO INCLUDE NEWBORN HEARING SCREENING AND PULSE OXIMETRY SCREENING IN THE NEWBORN SCREENING PROGRAM ...	

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7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

Immediate adoption of a temporary rule while the permanent rule is in process provides expedited implementation of screening for congenital heart disease, which potentially affects up to 200 newborns each year in North Carolina. Timely diagnosis can prevent major disease complications if gone undetected.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Chris Hoke, JD

Phone: 919 707-5006

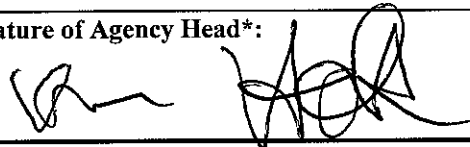
E-Mail: Chris.hoke@dhhs.nc.gov

Agency contact, if any: Bob Martin

Phone: 919 707-5179

E-Mail: bob.martin@dhhs.nc.gov

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Chris Hoke, JD

Title: Chief, Legal and Regulatory Affairs

RULES REVIEW COMMISSION USE ONLY

Action taken:

OBJECTED JUN 18 2014

☐ Date returned to agency:

Submitted for RRC Review:

ORIG. M12
6/24/14

10A NCA 43K.0103 is adopted under temporary procedures as follows:

10A NCAC 43K .0103 REPORTING REQUIREMENTS

(a) All medical facilities and attending providers of neonates or infants performing critical congenital heart defect screening shall report to the NC Birth Defects Monitoring Program the following information within seven days of all positive screenings:

(1) Name, date and time of birth of the neonate or infant, the medical facility or birth location, and the medical record number of the neonate or infant;

(2) Age in hours at time of screening, all pulse oximetry saturation values, which include initial, subsequent and final screening results, final diagnosis if known, any known interventions and treatment and any need for transport or transfer, and the location of the transfer or transport if known.

(b) All medical facilities and attending providers of neonates or infants performing critical congenital heart defect screening shall report aggregate information related to critical congenital heart defect screenings quarterly using a web-based system to the Perinatal Quality Collaborative of North Carolina (PQCNC).

(c) PQCNC shall report aggregate information to the NC Birth Defects Monitoring Program within 30 days after the end of each quarter during a calendar year.

(d) The required quarterly aggregate information from medical facilities and attending providers of neonates or infants reported to PQCNC and that PQCNC must report to the NC Birth Defects Monitoring Program shall include the total unduplicated counts of:

(1) Live births

(2) Neonates and infants who were screened

(3) Negative screenings

(4) Positive screenings

(5) Neonates or infants whose parents or guardians objected to the critical congenital heart defect screening

(6) Transfers into the medical facility, not previously screened, and

(7) Neonates and infants not screened due to diagnostic echocardiograms being performed after birth and prior to discharge, transfer out of the medical facility, missed screening, death or other reasons.

History: Authority G.S. 130A-125;

Eff. July 1, 2014.



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

June 19, 2014

Cheryl Walker
NC Department of Public Safety
Sent via email to Cheryl.Walker@ncdps.gov

Re: Objection to Rule 14B NCAC 07A .0116

Dear Ms. Walker:

At its meeting yesterday, the Rules Review Commission objected to the above-captioned Rule in accordance with G.S. 150B-21.10.

The Commission found the Rule is ambiguous and exceeds statutory authority, as stated in the Staff Opinion issued by the undersigned counsel on June 16, 2014. A copy of the Staff Opinion was sent to your agency on the same date; it is also enclosed in this correspondence for your convenience.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Amanda J. Reeder
Commission Counsel

cc: Joe Dugdale, Counsel, Department of Public Safety

Enclosure

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
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Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Department of Public Safety/ State Highway Patrol

RULE CITATION: 14B NCAC 07A .0116

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☒ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

In the initial review of the Rule, staff asked for several technical changes. Many of these were to address issues of grammar or to ensure clarity. However, several were requested in order to allow the agency to address staff's concerns regarding ambiguity and statutory authority. Several of the changes relating to ambiguity and statutory authority were not made. When the Department submitted the rewritten Rule, it also submitted a letter explaining that it was not comfortable making multiple changes to the Rule at this time, given the intense interest in the regulated public over any changes to this Rule. Staff understands that substantive changes should not be made at this time and certainly does not want to burden the agency or create confusion among the regulated public. However, given that staff's concerns related to statutory authority and ambiguity that were not addressed in the rewritten Rule, staff is recommending objection to this Rule based upon the following:

In Subparagraphs (a)(1), (5) and (10), forms are referenced that govern an applicant's ability to join the rotation wrecker list and supply information to the Highway Patrol regarding prices. The Rule

does not tell what is in the forms, where they can be obtained or give any reference to a rule or statute that sets forth those requirements. G.S. 150B-2(8a) defines the term “rule” as:

“Rule” means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- d. A form, the contents or substantive requirements of which are prescribed by rule or statute.*

Without setting out the information about the forms in the text, or giving a reference to other rules or statutes that contain this information, staff believes the Rule is ambiguous as written.

In addition, staff believes there are several terms that are ambiguous within the Rule. Those terms are:

- 1. In Subparagraph (a)(8), “timely” [line 17]. Staff notes that failure to respond in a “timely” manner results in a loss of funds for the service. What is timely to a service could be very different from what is timely to the Department, and staff believes a clear standard is needed in the Rule.*
- 2. In Subparagraph (a)(10), “reasonable” [line 32] as it relates to a determination by the District First Sergeant that the prices submitted are in fact “reasonable.” It is possible that the Department is using the term to mirror the statutory language in G.S. 20-188, which speaks to “reasonable charges.” However, the Department did not respond to staff’s requests to verify this; therefore, at this time, staff is not satisfied the term is clear and unambiguous.*
- 3. In Subparagraph (a)(14), “timely,” “efficient,” [line 24] and “unauthorized” [line 26]. Staff has particular concerns about the prohibition against “unauthorized” passengers on the calls, as staff cannot determine who that may be. One might presume “unauthorized passengers” means anyone who is not an employee of the service, but that is not clear in this Rule as written. Therefore, is one friend of the driver authorized, but another friend is not? Are all employees of the service authorized? (Staff notes that only the owner and drivers are subject to criminal record checks, so what if an employee who is not a driver that has a criminal history rides along. Is that allowed?) Further, who will authorize these individuals – the Department or the wrecker service?*
- 4. In Subparagraph (a)(22), “willful failure” [line 22]. Staff notes that “willful” failure to report, rather than just “failure” results in removal of a wrecker service from the rotation wrecker list.*

Staff also believes this Rule’s organization is confusing and recommended moving or separating multiple subparagraphs within the Rule to make it easier to read. The Department has indicated that it is unwilling to make these changes to the Rule at this time, citing concerns that its regulated public will be confused and upset with the changes. Staff understands the Department’s concern. However, staff remains concerned about specific portions of the language and organization of certain subparagraphs and believes there are areas where the Rule is not clear and unambiguous as written.

1. Subparagraph (a)(7) states that wrecker services shall be available on a 24 hour basis and calls shall not go unanswered for any reason. That is contradicted by Subparagraph (a)(16) that states that if the service cannot respond to calls, they must notify the Patrol. It is further contradicted by (a)(28), which states that failing to respond to a call means the service will be placed at the end of the wrecker rotation list. If this is intended to convey that calls must be answered [(a)(10)] unless prior notice is given [(a)(16)] and that failure to comply with (a)(10) will result in penalty [(a)(28)], then staff strongly believes that should be clearer in Rule and these three should be near each other in the Rule. Staff does not believe doing any of this will amount to an actual change to the effect of the Rule, other than making it clearer and easier to understand.
2. In Subparagraph (a)(6), the Department appears to be spelling out how Hazardous Materials Teams will be billing the Department. (Note – the Rule states on line 12 that hazardous materials must be handled by local Hazardous Material Teams.) Unless the wrecker service can also qualify as such a team (and staff does not know if that is what is anticipated by the language here), then the only individuals picking up hazardous materials (line 12) will be the people on the Teams. It does not appear that this information belongs in this Rule, as the Rule sets forth the requirements for wrecker services, not Hazardous Materials Teams.
3. In (a)(10), there is language regarding internal management. “Each Troop Commander shall designate a Troop Lieutenant to serve as a Rotation Wrecker Liaison for his or her respective Troop.” Paragraph (a) states that in order to be on the list, each service must agree in writing to the provisions in the Subparagraphs. No wrecker service can agree in writing to an internal management policy of the Highway Patrol over which the service will have no control or input. Staff further notes that the rest of the Subparagraph is unclear as to who will distribute the price list to the motorists. Staff assumes it will be the wrecker driver, but believes including the sentence about the Liaison in the middle of the verbiage about charging the consumers makes it unclear.
4. Subparagraph (a)(17), which speaks to notifications by the Department (presumably) to wrecker company, seems unnecessary in light of the language in (a)(2). If Subparagraph (a)(17) does not speak to notifications by the Department, then it is unclear as written.
5. Subparagraph (a)(22) references “periodic wrecker inspections” [line 17]. Staff requested the Department cite other rules or statutes that give guidance on this, including who conducts it, what is inspected, and where it takes place. Staff has not received a response to repeated requests for the information.

Also in the Request for Technical Changes, staff raised concerns regarding the Department's authority for certain requirements in the Rule.

1. In Subparagraph(a)(10) [lines 36-37], staff inquired about the agency's authority to state that the storage fees cannot accrue until the next calendar day. G.S. 20-188 states, in relevant part, “Towing, storage, and related fees charged may not be greater than fees charged for the same service for nonrotation calls that provide the same service, labor, and conditions.”

What if the wrecker service usually does this for nonrotation calls?

2. *In Subparagraph (a)(14), staff inquired about the authority of the Department to determine who will be employed and the standard of conduct at all times (not just during rotation calls.) Staff asked if the Patrol was relying upon G.S. 20-188, which states:*

The State Highway Patrol recognizes the need to utilize private wrecker services to remove vehicles from public roadways as part of its public safety responsibility. In order to assure that this public safety responsibility is accomplished, the Troop Commander shall include on the Highway Patrol's rotation wrecker list only those wrecker services which agree in writing to impose reasonable charges for work performed and present one bill to the owner or operator of any towed vehicle. Towing, storage, and related fees charged may not be greater than fees charged for the same service for nonrotation calls that provide the same service, labor, and conditions.

The Department has not responded to staff's inquiries on this topic.

3. *In Subparagraph (a)(21), staff inquired about the Department's authority to bar the wrecker service from employing any wrecker driver who has been convicted of, pled guilty to, or received a prayer for judgment continued for multiple crimes, including fraud, misdemeanor drunk and disruptive or disorderly conduct.*

Staff believes that since the Department and the Highway Patrol is required to uphold traffic laws in G.S. 20-188, it is reasonable for the Department to state that someone who violated those laws would not qualify to be on the rotation wrecker list. Further, staff spoke with a member of the Highway Patrol on June 6, 2014, and was informed that the Patrol does not want to send someone with a history of criminal assaults to rescue stranded motorists. Staff understands that this appears to be in the interest of public safety.

Staff asked in the Request for Technical Change and again in a separate email sent June 12, 2014, if the Department was relying upon G.S. 20-188 to ensure public safety, and therefore, is setting forth the crimes listed in the Subparagraph. The Department has not responded to staff's request. As such, staff is not satisfied that the agency has the authority to set this requirement in Rule.

Staff believes that many of these issues could be resolved by the Department giving an explanation of these areas and/or making minor clarifying changes to the Rule. However, the Department stated it prefers not to do this and will instead present its arguments to the Commission at the meeting.

Without the requested changes and explanations, staff cannot recommend approval of the Rule as initially filed or as rewritten. Staff therefore recommends the Commission object to the Rule as it is unclear and ambiguous and exceeds statutory authority as written.

Article 4.
State Highway Patrol.

§ 20-184. Patrol under supervision of Department of Public Safety.

The Secretary of Public Safety, under the direction of the Governor, shall have supervision, direction and control of the State Highway Patrol. The Secretary shall establish in the Department of Public Safety a State Highway Patrol Section, prescribe regulations governing the Section, and assign to the Section such duties as the Secretary may deem proper. (1935, c. 324, s. 2; 1939, c. 387, s. 1; 1941, c. 36; 1975, c. 716, s. 5; 1977, c. 70, ss. 13, 14, 15; 2011-145, s. 19.1(g), (hh).)

§ 20-185. Personnel; appointment; salaries.

(a) The State Highway Patrol shall consist of a commanding officer, who shall be appointed by the Governor and whose rank shall be designated by the Governor, and such additional subordinate officers and members as the Secretary of Public Safety, with the approval of the Governor, shall direct. Members of the State Highway Patrol shall be appointed by the Secretary, with the approval of the Governor, and shall serve at the pleasure of the Governor and Secretary. The commanding officer, other officers and members of the State Highway Patrol shall be paid such salaries as may be established by the Division of Personnel of the Department of Administration. Notwithstanding any other provision of this Article, the number of supervisory personnel of the State Highway Patrol shall not exceed a number equal to twenty-one percent (21%) of the personnel actually serving as uniformed highway patrolmen. Nothing in the previous sentence is intended to require the demotion, reassignment or change in status of any member of the State Highway Patrol presently assigned in a supervisory capacity. If a reduction in the number of Highway Patrol personnel assigned in supervisory capacity is required in order for the State Highway Patrol to meet the mandatory maximum percentage of supervisory personnel as set out in the fourth sentence of this subsection, that reduction shall be achieved through normal attrition resulting from supervisory personnel resigning, retiring or voluntarily transferring from supervisory positions.

(a1) Applicants for employment as a State Trooper shall be at least 21 years of age and not more than 39 years of age as of the first day of patrol school. Highway Patrol enforcement personnel hired on or after July 1, 2013, shall retire not later than the end of the month in which their 62nd birthday falls.

(b) to (f) Repealed by Session Laws 1979, 2nd Session, c. 1272, s. 2.

(g), (h) Struck out by Session Laws 1961, c. 833, s. 6.2.

(i) Positions in the Highway Patrol Section approved by the General Assembly in the first fiscal year of a biennium to be added in the second fiscal year of a biennium may not be filled before adjustments to the budget for the second fiscal year of the budget are enacted by the General Assembly. If a position to be added in the Highway Patrol Section for the second fiscal year of the biennium requires training, no applicant may be trained to fill the position until the budget adjustments for the second fiscal year are enacted by the General Assembly. (1929, c. 218, s. 1; 1931, c. 381; 1935, c. 324, s. 1; 1937, c. 313, s. 1; 1941, c. 36; 1947, c. 461, s. 1; 1953, c. 1195, s. 1; 1955, c. 372; 1957, c. 1394; 1959, cc. 370, 1320; 1961, c. 833, s. 6.2; 1973, c. 59; 1975, c. 61, ss. 1, 2; c. 716, s. 5; 1977, c. 70, ss. 6-8, 13; c. 329, ss. 1-3; cc. 749, 889; 1979, 2nd Sess., c. 1272, s. 2; 1989 (Reg. Sess., 1990), c. 1066, s. 133; 2011-145, s. 19.1(g), (p); 2013-289, s. 9.)

§ 20-187. Orders and rules for organization and conduct.

The Secretary of Public Safety is authorized and empowered to make all necessary orders, rules and regulations for the organization, assignment, and conduct of the members of the State Highway Patrol. Such orders, rules and regulations shall be subject to the approval of the Governor. (1929, c. 218, ss. 1, 3; 1931, c. 381; 1933, c. 214, ss. 1, 2; 1939, c. 387, s. 2; 1941, c. 36; 1977, c. 70, s. 13; 2011-145, s. 19.1(g).)

§ 20-188. Duties of Highway Patrol.

The State Highway Patrol shall be subject to such orders, rules and regulations as may be adopted by the Secretary of Public Safety, with the approval of the Governor, and shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel and the use of vehicles upon the highways of the State and all laws for the protection of the highways of the State. To this end, the members of the Patrol are given the power and authority of peace officers for the service of any warrant or other process issuing from any of the courts of the State having criminal jurisdiction, and are likewise authorized to arrest without warrant any person who, in the presence of said officers, is engaged in the violation of any of the laws of the State regulating travel and the use of vehicles upon the highways, or of laws with respect to the protection of the highways, and they shall have jurisdiction anywhere within the State, irrespective of county lines. The State Highway Patrol shall enforce the provisions of G.S. 14-399.

The State Highway Patrol shall have full power and authority to perform such additional duties as peace officers as may from time to time be directed by the Governor, and such officers may at any time and without special authority, either upon their own motion or at the request of any sheriff or local police authority, arrest persons accused of highway robbery, bank robbery, murder, or other crimes of violence.

The Secretary of Public Safety shall direct the officers and members of the State Highway Patrol in the performance of such other duties as may be required for the enforcement of the motor vehicle laws of the State.

Members of the State Highway Patrol, in addition to the duties, power and authority hereinbefore given, shall have the authority throughout the State of North Carolina of any police officer in respect to making arrests for any crimes committed in their presence and shall have authority to make arrests for any crime committed on any highway.

Regardless of territorial jurisdiction, any member of the State Highway Patrol who initiates an investigation of an accident or collision may not relinquish responsibility for completing the investigation, or for filing criminal charges as appropriate, without clear assurance that another law-enforcement officer or agency has fully undertaken responsibility, and in such cases he shall render reasonable assistance to the succeeding officer or agency if requested.

The State Highway Patrol recognizes the need to utilize private wrecker services to remove vehicles from public roadways as part of its public safety responsibility. In order to assure that this public safety responsibility is accomplished, the Troop Commander shall include on the Highway Patrol's rotation wrecker list only those wrecker services which agree in writing to impose reasonable charges for work performed and present one bill to the owner or operator of any towed vehicle. Towing, storage, and related fees charged may not be greater than fees charged for the same service for nonrotation calls that provide the same service, labor, and conditions. (1929, c. 218, s. 4; 1933, c. 214, ss. 1, 2; 1935, c. 324, s. 3; 1939, c. 387, s. 2; 1941, c. 36; 1945, c. 1048; 1947, c. 1067, s. 20;

1973, c. 689; 1975, c. 716, s. 5; 1977, c. 70, ss. 10, 13; c. 887, s. 3; 2009-461, s. 3; 2011-145, s. 19.1(g).)



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June 19, 2014

Curtis E. Aldendifer
North Carolina Real Estate Commission
Sent via email to Curtis@ncrec.gov

Re: Objection to Rule 21 NCAC 58A .1709

Dear Mr. Aldendifer:

At its meeting yesterday, the Rules Review Commission objected to the above-captioned rule in accordance with G.S. 150B-21.10.

The Commission objected to the Rule, finding it was ambiguous. Specifically, in the language on lines 17 through 20 of the Rule, it states that the length of any extension granted and the requirements for education would be "wholly discretionary" on the behalf of the agency. The language gives no guidance to the regulated public regarding the possible lengths of time or requirements.

Further, the Commission determined the language stating that the decisions will be made outside of rulemaking is beyond the statutory authority of the agency.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Amanda J. Reeder
Commission Counsel

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