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 Labor

RULE CITATION: 13 NCAC 19 .0101, .0102, .0201, .0301, .0302, .0401, .0402, .0501, .0502, .0601, .0602, .0603, .0604, .0605, .0701, .0702

RECOMMENDATION DATE: June 19, 2026

RECOMMENDED ACTION:

No action

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

X Failure to comply with the APA

[X] Extend the period of review

COMMENT:

The Department of Labor has proposed to repeal these rules without publishing a notice of text in the Register or holding a public hearing. The agency defends these actions because it has "declared" these rules to be in excess of its statutory authority. Specifically, the agency claims that this "declaration" occurred when it was written in the explanation section of the form for submitting permanent rules (Form 0400). The agency claims that this satisfies the requirements of G.S. 150B-21.5(b)(3), reproduced in full below:

> *Repeal. – An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:*
> *(1) The law under which the rule was adopted is repealed.*
> *(2) The law under which the rule was adopted or the rule itself is declared unconstitutional.*
> *(3) The rule is declared to be in excess of the agency's statutory authority.*

To Staff's knowledge, the RRC has never been asked to approve rule repeals under this particular APA provision. The application of this section turns on the meaning of the term "declared" in this context. In Staff's view, the term "declare" as used here cannot be satisfied by the agency stating its opinion in the explanation section of an OAH form. As a result, it is Staff's opinion that this statute

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does not justify the agency's failure to publish a notice of text, and thus the RRC should object to these repeals. If the RRC disagrees with this recommendation, staff recommends extending the period of review for further review as discussed in part II of this opinion.

I. *"Declare" in G.S. 150B-21.5(b)(3) should be read to refer to action by a court.*

As an initial matter, Staff has not identified any court cases which provide clarification on this provision of the APA. However, there have been cases examining the meaning of the term "declare" in the context of insurance declarations. For example:

> *The term "declare" is neither technical nor ambiguous; it is defined in the American Heritage College Dictionary as: "1. To make known formally or officially. 2. To state emphatically or authoritatively; affirm. 3. To reveal or make manifest: show . . . ." The American Heritage College Dictionary (Third Edition 1997). Each of these definitions requires an affirmative action on the part of the declarant."*
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> *Allstate Ins. Co. v. Chatterton, 135 N.C. App. 92, 95, 518 S.E.2d 814, 817 (1999)*.

Applied to the APA, the question then is how is a rule "formally", "officially", or "authoritatively" stated to be in excess of statutory authority. The text of the APA is silent as to how, as well as who, may make such a declaration. However, applying ordinary canons of statutory construction, it is Staff's opinion that "declare" here most clearly refers to an action by a court (such as a declaratory judgment).

The most important applicable canon is "the presumption of consistent usage and meaningful variation." Courts have described this canon thusly:

> *The rules of statutory interpretation require statutes to be "construed as a whole, and not by the wording of any particular section or part." McLeod v. Board of Comm'rs of Carthage, 148 N.C. 77, 85, 61 S.E. 605, 607 (1908). Thus, words that carry a specific definition in one part of a statute are presumed to carry that same definition in all other parts.*
>
> *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment, 354 N.C. 298, 310, 554 S.E.2d 634, 642 (2001)*

G.S. 150B-21.5(b)(2) uses the term "declare" in close proximity to the provision at issue here, stating: "The law under which the rule was adopted or the rule itself is declared unconstitutional." Case law recognizes that, "North Carolina courts have the authority and responsibility to declare a law unconstitutional." Hart v. State, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015). In (b)(2), then, the word "declared" should be read to mean "declared by a court." This suggests that "declare" in (b)(3) should also be read to mean "declared by a court."1 This reading also appears to be

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1 ONE COULD ALSO ARGUE THAT A "DECLARATORY RULING" MADE BY AN AGENCY UNDER G.S. 150B-4 SATISFIES THIS STATUTE, SINCE AGENCIES CAN USE THAT STATUTE TO ISSUE "DECLARATORY RULINGS AS TO THE VALIDITY OF A RULE" UNDER PROCEEDINGS THAT MAY BE CONSIDERED QUASI-JUDICIAL. THE AGENCY INFORMED STAFF THAT IT HAS MADE NO SUCH RULING IN REGARD TO THE RULES IN QUESTION, AND SO THIS DOES NOT CHANGE STAFF'S RECOMMENDATION.

consistent with the definition of "declare" set forth in the Allstate Ins. Co. v. Chatterton opinion mentioned above.

Requiring this kind of formal action to constitute "declaring" would also prevent potential mischief and ambiguity over who can make such a declaration. Because the statute is silent as to who can declare a rule in excess of statutory authority, one can imagine that agencies with finely divided authority might be interested in declaring each other's rules outside of authority. Requiring court action would allow judicial oversight over such potential problems.

It is also worth noting that accepting the agency's reading of "declare" would create a situation where the first time anyone outside the agency considered the appropriateness of repealing the rules would be at the RRC review level. The traditional means of repeal through permanent rulemaking involves notice and an opportunity to comment from the public, which is core to the purpose, structure, and text of the APA. It is consistent with this purpose to limit the application of G.S. 150B-21.5(b) to situations where public comment would be pointless, i.e. a legislature or court has already made a determination.

The agency noted that accelerated repeal is available to the agency through the periodic review report process. This is true but does not justify the action taken by the agency here. Repeal through the periodic review process requires an opportunity for the public to comment on the reports before the reports are approved by the RRC. Notably, this would apply even if the agency subjected itself to review pursuant to G.S. 150B-21.3A.

For the reasons stated above, it is Staff's opinion that the agency cannot repeal these rules without publishing a notice of text in the register because the requirements of G.S. 150B-21.5(b)(3) have not been met. Because they did not publish a notice of text in the register, these rules have failed to meet the procedural requirements for repeal of a permanent rule pursuant to G.S. 150B-21.2. Therefore, the Commission should object to these rules pursuant to G.S. 150B-21.9(4) for failure to comply with the APA.

II. *Even if the RRC disagrees and accepts this "declaration", RRC review of these rules should be extended.*

If the Commission disagrees with Staff's analysis above, review of these rules should be extended to allow time for Staff to conduct a complete review under § 150B-21.9. While G.S. 150B-21.5(b) allows for repeal without notice, that repeal is still required to go through normal review at the Commission. Consistent with how repeals are traditionally filed, the text of the repealed rules has not been provided to the Commission and Staff has not had time to fully review the rules that currently exist in the code.

At first glance, some issues were immediately apparent with the agency's assertion that these rules were in excess of statutory authority. For example, 13 NCAC 19 .0101 is an address rule, which appears to fall squarely within the agency's authority. In their response to Staff's questions, the agency indicated that 13 NCAC 19 .0501 repeats the contents of a law in violation of G.S. 150B-19(4), which this Commission usually considers to be a problem of necessity (G.S. 150B-21.9(a)(3)), not authority (G.S. 150B-21.9(a)(1)). The agency also contends that "the cumulative effect of this Chapter of rules [set] forth an inefficient process, and the Department is seeking to reform that process to comply with statutory mandates". While this may be true, and could justify rule revision or repeal, the question here is whether these rules can be repealed because they ***are in excess of the agency's statutory authority****.*

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Commission Counsel

Staff has doubts that the entirety of this rule package could be reasonably understood to be in excess of the agency's statutory authority, but given the novelty of these arguments and Staff's recommendation above, if the Commission believes that this action is potentially permissible under the APA, it would be necessary to extend the period of review to allow for a rule-by-rule review.

Therefore, if the Commission does not object as recommended above, the Commission should extend the period of review.

Seth Ascher
Commission Counsel

13 NCAC 19 .0101-.0702 are proposed for repeal pursuant to G.S. 150B-21.5(b)(3) as follows:

13 NCAC 19 .0101	**RETALIATORY EMPLOYMENT DISCRIMINATION BUREAU**
13 NCAC 19 .0102	**FORMS**
13 NCAC 19 .0201	**DEFINITIONS**
13 NCAC 19 .0301	**CONTENTS OF COMPLAINT**
13 NCAC 19 .0302	**FILING OF COMPLAINTS**
13 NCAC 19 .0401	**INVESTIGATION**
13 NCAC 19 .0402	**INTERVIEWS**
13 NCAC 19 .0501	**RIGHT-TO-SUE LETTERS**
13 NCAC 19 .0502	**REQUESTS FOR RIGHT-TO-SUE LETTERS**
13 NCAC 19 .0601	**ADMINISTRATIVE CLOSINGS**
13 NCAC 19 .0602	**WITHDRAWALS**
13 NCAC 19 .0603	**RIGHT-TO-SUE DISMISSALS**
13 NCAC 19 .0604	**RIGHT-TO-SUE CLOSURE**
13 NCAC 19 .0605	**SETTLEMENTS**
13 NCAC 19 .0701	**SETTLEMENT**
13 NCAC 19 .0702	**LITIGATION**

History Note: *Authority G.S. 95-245;*
Eff. April 1, 1999;
Amended Eff. September 1, 1999;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 22, 2018;
Amended Eff. March 1, 2025; August 1, 2020;
Repealed eff. July 1, 2026.