

## 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: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0208

RECOMMENDED ACTION: September 13, 2022

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

*At its August 18, 2022, meeting, the Rules Review Commission (hereinafter "the Commission") objected to this Rule for its lack of clarity and ambiguousness pursuant to G.S. 150B-21.9(a)(2).*

*The Board of Agriculture (hereinafter "the Board") was sent a statement of objection pursuant to G.S. 150B-21.12(a) on August 19, 2022, by staff counsel.*

*The Board changed the Rule pursuant to G.S. 150B-21.12(a) to attempt to satisfy the Commission's objection, and timely submitted the revised Rule to the Commission on September 9, 2022.*

*As changed post-objection, the Rule continues to require the facility to employ an "adequate" number of employees "adequately" trained to care for animals in a facility.*

*Notwithstanding the definition of "adequate" in 02 NCAC 52J .0104, the Rule remains facially ambiguous and is more like a broad statement of policy than a substantive requirement. The regulated public would be left to either guess at the number of employees required thus expose itself to a penalty by the Animal Welfare Division (AWD) or make further inquiry to AWD, "how many employees must we have?" Further, the Board's Rule provides no guidance to the employees of the regulator regarding the number of employees a facility is required to have. The lack of an objective standard opens the door to caprice and inequity.*

*Staff recommends that the Commission find that, pursuant to G.S. 150B-21.12(c), the change to the rule does not satisfy the Commission's August 2022 objection.*

William W. Peaslee  
Commission Counsel

**§ 150B-21.9. Standards and timetable for review by Commission.**

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**02 NCAC 52J .0104 DEFINITIONS (with proposed revisions.)**

(2) “Adequate” means a condition which, when met, does not jeopardize an animal’s comfort, safety, or health. Adequate veterinary care means provision of veterinary care sufficient to address relief of pain and/or suffering experienced by the animal and sufficient to address the medical condition.

1 02 NCAC 52J .0208 is readopted with changes as published in 36:12 NCR 1009 as follows:

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3 **02 NCAC 52J .0208 EMPLOYEES**

4 An adequate number of employees shall be utilized to care for the animals in a facility and maintain the prescribed  
5 level of husbandry practices set forth in this Rule. A sufficient number of employees shall be utilized to [sufficiently  
6 care for the animals in the facility and ]maintain the prescribed level of husbandry practices set forth in this Rule. Such  
7 practices shall be under the supervision of an animal caretaker individual who has a background in animal husbandry  
8 ~~or care.~~ is adequately trained and/or experienced in animal husbandry and care and has read and acknowledged their  
9 understanding of these rules and the NC Animal Welfare Act. "Supervision as used in this Rule requires that the  
10 individual:

- 11 (1) ensure employees have access to written or printed direction for providing animal care and maintaining  
12 the prescribed level of husbandry;  
13 (2) ensure employees have access to written or printed instructions describing all procedures that must be  
14 followed; and  
15 (3) ensure employees have access to instructions for how to contact the supervising individual should an  
16 issue or question arise.  
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18 *History Note: Authority G.S. 19A-24;*  
19 *Eff. April 1, 1984;*  
20 *Readopted Eff. October 1, 2022.*

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 15A NCAC 07M .0704 Post Objection

RECOMMENDED ACTION: September 14, 2022

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

### COMMENT:

*At its August 18, 2022, meeting, the Rules Review Commission (hereinafter "the Commission") objected to this Rule for its lack of clarity and ambiguousness pursuant to G.S. 150B-21.9(a)(2).*

*The Board of Agriculture (hereinafter "the Board") was sent a statement of objection pursuant to G.S. 150B-21.12(a) on August 19, 2022, by staff counsel.*

*The Board changed the Rule pursuant to G.S. 150B-21.12(a) to attempt to satisfy the Commission's objection, and timely submitted the revised Rule to the Commission on September 9, 2022.*

*The Board struck the ambiguous language which required unspecified training. This language was replaced with a requirement that "shelter employees" euthanize "animals as set forth and in accordance with the American Veterinary Medical Association **and/or** (emphasis added) Humane Society of the United States..."*

*While the Board satisfied the Commission's objection concerning one ambiguity, it has created another. The inclusion of "and/or" is facially ambiguous.<sup>1</sup>*

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<sup>1</sup> STAFF ASKED THE BOARD TO RESOLVE THIS AMBIGUITY. THE BOARD DENIED THE REQUEST, AS IS ITS PREROGATIVE, AVERRING THAT IT INTENDED TO REPEAL THE RULE IN THE FUTURE.

William W. Peaslee  
Commission Counsel

*Further, staff inquired of the Board whether the Rule, as amended, was necessary considering other Board rules, specifically 02 NCAC 52J .0702. In response the Board agreed that the Rule was not necessary and communicated its intention to repeal the Rule in the future.*

*Accordingly, staff recommends that the Commission find that the Board has not satisfied the Commission's objection for lack of clarity and unambiguity pursuant to G.S. 150B-21.9(a)(2). Staff further recommends that the Commission object to the Rule, as amended, for lack of reasonable necessity pursuant to G.S. 150B-21.9(a)(3).*

William W. Peaslee  
Commission Counsel

1 02 NCAC 52J .0704 is readopted with changes as published in 36:12 NCR 1017 as follows:

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3 **02 NCAC 52J .0704      TECHNICIAN NOT REQUIRED**

4 If an extraordinary circumstance ~~or situation~~ occurs and euthanasia is necessary, the ~~person~~ shelter employee  
5 performing the euthanasia is not required to be a Certified Euthanasia Technician at a certified ~~facility~~ facility so long  
6 as the shelter employee ~~is trained in the euthanasia method for that species that was used in the situation,~~ euthanizes  
7 the animal as set forth and in accordance with the American Veterinary Medical Association and/or Humane Society  
8 of the United States incorporated by reference in 02 NCAC 52J .0401.

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10 *History Note:      Authority G.S. 19A-24;*  
11 *Eff. March 23, 2009;*  
12 *Readopted Eff. October 1, 2022.*