

To: All RRC Commissioners
From: Brian Liebman and William Peaslee, Commission Counsel
In re: Returning rules under G.S. 150B-21.12
Date: July 29, 2024

I. Issue Presented

When may staff return rules to an agency without direct action by the Commission?

II. History

Until it was changed in late 2023, G.S. 150B-21.12(d) stated that any rule to which the Commission objected remained under review until the agency that adopted the rule decided not to satisfy the Commission's objection "and makes a written request to the Commission to return the rule to the agency."

In Session Law 2023-134, s.21.2.(h), the General Assembly amended G.S. 150B-21.12(d), changing the relevant language. A rule now remains under review "until the agency that adopted the rule satisfies the Commission's objection or submits a written response to the Commission indicating that the agency has decided not to change the rule." Where an agency does not submit a revised rule to satisfy the Commission's objection within the time allotted under G.S. 150B-21.12(b) or submits a written response indicating that they have decided not to change the rule within the time allotted under the statute, the Commission "shall" return the rule.

III. Analysis and Recommendation

The effect of the changes to G.S. 150B-21.12(d) is to permit the Commission to return rules to an agency independently of a request from the agency under certain circumstances. While the statute no longer explicitly references a "written request" from the agency, it does not bar an agency from requesting return of a rule under review by the Commission.

In staff's opinion, returns under these circumstances do not require the Commission to vote, given that the return is essentially a ministerial act. Once the conditions of G.S. 150B-21.12(d) have been met, a rule is no longer "under review" by the Commission, and the APA requires that the rule be returned to the agency. There is no other act the Commission may take other than returning the rule.

In contrast, when the agency submits a revised rule, the Commission must, under G.S. 150B-21.12(c), consider the revision and determine 1) whether it satisfies the objection and 2) whether it represents a substantial change under G.S. 150B-21.2(g).

Consequently, it is staff's opinion that the Commission may authorize staff to immediately return any rule to which the Commission has objected, and the agency has either submitted a written response clearly indicating that they will not change the rule or has taken no action within the timeframe specified under G.S. 150B-21.12(b). This would include instances where an agency explicitly requests the return of the rule.

Returning rules immediately, rather than waiting for the next Commission meeting to do so, serves good public policy by minimizing the time a rule that no longer carries the force of law may be visible to the public and enforced by the agency.

Staff suggests that if the Commission agrees, it adopt the following resolution:

Pursuant to G.S. 150B-21.12(d), staff is authorized on behalf of the Commission to return rules to agencies without delay and without further Commission consideration when the agency submits a response to a Commission objection which clearly indicates that the agency has decided not to change the rule or if the agency fails to submit any response within the time limit established by G.S. 150B-21.12(b). Otherwise, staff shall bring the question before the Commission for its consideration.

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission must use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule must be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.2.

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule satisfies the Commission's objection or submits a written response to the Commission indicating that the agency has decided not to change the rule. If the agency does not submit a revised rule to satisfy the Commission's objection within the time limit established in subsection (b) of this section, or submits a written response indicating that the agency has decided not to change the rule within the time limit established by subsection (b) of this section, the Commission shall return the rule to the agency and notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule. (1991, c. 418, s. 1; 1995, c. 415, s. 5; c. 507, s. 27.8(h), (y); 2003-229, s. 10; 2011-291, s. 2.60; 2011-398, s. 8; 2023-134, s. 21.2(h).)