

Burgos, Alexander N

From: Ann Wall <awall@sosnc.gov>
Sent: Monday, December 12, 2022 3:19 PM
To: rrc.comments
Cc: Burgos, Alexander N; Snyder, Ashley B
Subject: [External] Comments on Proposed RRC rule changes
Attachments: FINAL comment on proposed RRC rule changes.pdf; Attachment to letter - RRC Policies and Procedures.doc

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Please see the attached. In order to preserve the operability of the links in the comment letter, I have not combined it with the attachment as a single document.

Let me know if you want me to combine the two documents into a single pdf.

Regards,

Ann

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

ELAINE F. MARSHALL
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ANN B. WALL
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By E-Mail

Jeanette Doran, Chair
Andrew P. Atkins, Vice Chair
Robert A. Bryan, Second Vice Chair

Rules Review Commission
1711 New Hope Church Road
Raleigh, North Carolina 27609

December 12, 2022

Re: Proposed changes to Rules Review Commission rules

Dear Chair Doran, Vice Chairs Atkins and Bryan:

I write in response to your request for comments on proposed changes to the Rules Review Commission's (RRC) rules published in the RRC's November 17, 2022, meeting agenda.

I write from the perspective of someone who has engaged in rulemaking for small State agencies. My first rulemaking was in 1977. Indeed, my historical files include a copy of the RRC's "Policies and Procedures" initially created in 2006 and modified in 2007. Those Policies and Procedures preceded the RRC's current APA-style rules and include provisions adopted by RRC as early as 1997.

I request that you allow time for submission of additional comments after your December meeting. Your explanation of the basis for the proposed changes may well warrant additional comments that would be useful to you as you decide whether to adopt the proposed rule changes.

1. Proposed changes to 26 NCAC 05 .0102 Communications with Commissioners and 26 NCAC 05 .0109 Communications with RRC Staff

I write in opposition to the repeal of these two rules. These rules appear to have initially been adopted to address ethical, Due Process, and transparency concerns with titles in the aforementioned Policies and Procedures document including the phrase "Ex-Parte Communications" (emphasis added).

A. .0102 Communications with Commissioners

The existing rule is similar to its predecessor, which I have attached. The public, the regulated community, lobbyists, and State agency personnel need this rule. It provides an overview of whether,

when, and how one may acceptably communicate with the Commission. In addition, the rule specifically addresses a type of communication not otherwise mentioned in RRC rules – oral communication with individual commissioners outside of Commission meetings. RRC is not a quasi-judicial agency. There is a legitimate need for RRC members to take the time to painstakingly go through significant agency defenses to recommended objections when that time is often not available during the formal meeting process. The public, regulated community, lobbyists, and agencies need to know that there are commissioners willing to discuss rules outside of RRC meetings.

B. .0109 Communications with RRC Staff

This is a much-needed rule that has been in place since 1996. The existing rule differs only by the omission of the phrase “ex parte.” This rule has well-served OAH, its attorneys, agencies, and others. It is the rule on which agencies have relied in requesting pre-reviews that are of value to both agencies and RRC staff as they promote better work product acceptable to all. Repeal of this rule would appear to have the effect of eliminating pre-reviews of rules. See my July 2022 letter in support of continuation of pre-reviews.¹

Staff need the protection of this rule. The rule puts agencies on notice that attorneys assigned to serve as staff to the RRC are not available on demand. It also protects agencies by ensuring they have the opportunity to sit down and talk with staff whether for a pre-review, to discuss concepts for rulemaking early in the process, or to gain better understanding of staff requests for changes or recommended objections.

The rule ensures transparency in the process. It puts the public and agencies on notice that if they meet with or talk to staff about rules, the information exchanged is not confidential and that what they say may be shared with agencies or the regulated community for rebuttal purposes.

2. 26 NCAC 05 .0106 Limitations on Oral Presentations

Reducing the time limit for oral presentations to RRC from ten (10) minutes to a mere five (5) minutes is not helpful, particularly when complicated or difficult rules are under consideration and often merit larger discussion. I oppose the amendment.

If and when RRC accepts a staff recommendation to object to an agency’s rule, in most instances, the rule is dead. The consequences are significant for an agency that has tried in good faith to comply with the APA and the directives to the agency by the General Assembly. An agency has limited options if RRC adopts a staff-recommended objection:

1. The agency can fix the alleged APA noncompliance or alleged ambiguity.
2. The agency can give up the rule, request its return from RRC, and take no further action.
3. The agency can start over and try to satisfy both the RRC objection and its statutory duties.
4. The agency can go to the General Assembly for a legislative change.

Given the severity of the consequences of an objection, agencies should have more than ten (10) minutes to orally present their opposition to recommended objections.

¹ My letter is included in the July 2022 RRC meeting agenda at: [Rules Copier-20220720134443 \(nc.gov\)](https://www.nc.gov/rulemaking/20220720134443)

RRC has an obligation to its appointing bodies, to the agencies whose rules it reviews, and to the regulated community and the public, to give careful consideration to its decisions when based upon staff recommendations. As noted in my July letter, I acknowledge the professionalism of the staff attorneys assigned to RRC by OAH. However, I am certain that all of us can acknowledge that the recommendations of those attorneys can be mistaken.²

An agency's explanation is not the type of written or oral comment anticipated by RRC's rules on oral, written, and rebuttal comments. RRC has no rule with regard to when, how, and in how much depth agencies should respond to staff-recommended objections. An agency's explanation why staff-recommended objections should not be accepted is more a comment on the recommended objections than a comment on the rule, as contemplated by existing RRC rules.³

Smaller boards may have only one (1) full-time or part-time employee⁴ who may not be an attorney. Their rulemaking duties may be limited to ministerial functions after the rules have been drafted by their legislatively or Governor-appointed board members. Many State agencies also have rulemaking coordinators who are not attorneys and who may only have ministerial duties. Non-attorney rulemaking coordinators may provide initial responses to recommended objections without fully understanding the legal ramifications. Smaller agencies may only seek assistance from counsel only after their coordinator's initial response to recommended objections does not lead to reversal or withdrawal of the recommended objection. The proposed change to this rule does not distinguish between an agency's defense against a staff-recommended objection and oral presentations from the public on the rule itself. Attorneys brought in later to respond to recommended objections may not have been involved in the rulemaking and may not be familiar with the RRC processes. They may assume that they will have an opportunity to present what amounts to an oral argument to RRC opposing the recommended objection. They may not understand that their time may be better spent by submitting a written response, which will be the only way to make a complete argument to RRC.

In a process that has typically taken an agency anywhere from six months to a year or more to develop and propose substantive rules⁵, surely RRC can take the time to hear from agencies and thoroughly consider their responses before objecting to their rules.

3. 26 NCAC 05 .0107 Withdrawal or Amendment of Rules after Filing with RRC

The proposed changes to this rule are difficult to understand. The net effects of the change from "may" withdraw or amend to "shall not" withdraw or amend after submission of an adopted rule to RRC are:

1. To potentially significantly lengthen the rulemaking process, regardless of the need for a rule;

² See, e.g., [N.C. Bd. of Pharmacy v. Rules Review Comm'n](#), 360 N.C. 638, 638, 637 S.E.2d 515, 515 (2006).

³ 26 NCAC 05 .0103, .0104, .0106.

⁴ See Program Evaluation Division Report to October 4, 2016 meeting of the Joint Administrative Procedures Oversight Committee, Exhibit 4, pp. 8-9, [Occupational Licensing Agencies Should Not be Centralized, but Stronger Oversight is Needed](#) (last reviewed December 10, 2012).

⁵ My own agency is presently engaged in rulemaking for a new law with at least 25 statutorily mandated rule topics. My current estimate, based on time spent on the process since the Governor signed the law in July, is that the rulemaking process will take thousands of hours before we ever present adopted rules to RRC.

2. To add to RRC's workload;
3. To potentially delay the effective date of a rule from months to a year or more;⁶ and,
4. To potentially deprive the public and regulated communities of the protections and certainty of the rule. To prohibit an agency from withdrawing a rule submitted, for any or no reason, seems to be bad public policy. This will prevent agencies from corrective deficiencies and responding to public comments that can drive legitimate reconsideration of proposed rules.

Finally, the aggregate impact of the parts of this rule will have a significant negative impact on agencies' ability to fulfill the very missions assigned to them by the General Assembly.

A. Proposed amendment to .0107(a)(1) – barring withdrawal of readoptions after submission to RRC and before RRC consideration

An agency that classifies a rule as “necessary” in the Existing Rules Review (ERR) process has to go through the entire rulemaking process to readopt the rule, potentially including developing a fiscal note and getting it approved by OSBM. This must all take place by a deadline established by the RRC after it consults with the agency. Therefore, by the time the readopted rule is submitted to RRC, there have been at least two 60-day public comment periods.⁷

While recognizing that G.S. § 150B-21.2(g) says that agencies are not to take action on adopted rules without following the APA's rulemaking procedures, and an exceptionally strict interpretation of that provision is the basis for RRC's proposed amendment, that strict interpretation is neither necessary nor productive. As just one example of the harm this amendment may cause, consider, for example, the plight of a newly elected or appointed department head who takes office in January. If the predecessor readopted a rule in December and submitted it for January RRC review, this amendment would bar that new official from withdrawing the readopted rule from RRC consideration even if the new official is diametrically opposed. As an example prior to the ERR process: In his final months in office, Labor Commissioner Harry Payne adopted an OSHA ergonomics rule that his successor, Commissioner Cheri Berry, promptly withdrew on taking office. If that had been a readoption under the proposed amendment and RRC approved it, Commissioner Berry would have had to enforce a greatly opposed rule at least until it could go through the repeal process.

B. Proposed amendment to .0107(a)(2) – barring withdrawal of a rule if staff recommends objection to existing language in the rule

The RRC has the authority pursuant to G.S. § 150B-21.8 to review existing language of a rule that is being amended. The proposed change would have the potential to harm the public and the regulated community, not just the agency. I have been told by businesses that are “good actors” that as much as they may grumble about agency rules, they appreciate rules that provide certainty and clarity, with an emphasis on certainty. Such rules level the playing field and help to ease the competitive disadvantage they are suffering because of “bad actors”.

When an agency publishes the text of a proposed amendment to existing rules, the public and

⁶ G.S. §§ 150B-21.3A(c)(1), 150B-21.3A(d)(2), 150B-21.2(e)-(f).

⁷ The public has 60 days to comment on the rule and the agency's classification of the rule as necessary. G.S. § 150B-21.3A(c)(1). Then, in the readoption process, the public has another 60 days to comment on the rule, as well as make comments in the usual public hearing. G.S. § 150B-21.2(e), (f).

regulated communities typically provide comments only on the proposed amendment, not on the existing rules themselves. They do not anticipate a need to comment on the existing rules because that would, in essence, create a state of costly uncertainty, as each amendment would be the equivalent of a new rulemaking on the entire text of the rule. Quite logically, they assume that they can rely upon the existing rule that has been through a thorough vetting and public comment in a process in which:

- The General Assembly has given the agency rulemaking authority after the public and regulated community have had opportunity to comment and lobby.
- The agency has published rule text giving the public at least 60 days to comment and usually held at least one public hearing at which oral comments could be made.
- The OAH staff attorneys assigned to assist RRC have reviewed the rule and requested technical corrections and possibly even recommended RRC objections.
- RRC itself has, with or without public comment, either:
 - Approved the rule without receiving 10 public objections, or
 - Approved the rule with 10 objections and sent it to the General Assembly.
- If the rule being amended has been in effect, that means the public and General Assembly have not found it objectionable.⁸
- In addition, since 2013, the public has also had the opportunity to comment on existing rules through the existing rules review process (ERR).

There is nothing in the process for amending a rule that tells the public that they should be commenting on the existing rule text rather than just the amendment. Only what the Chair recently termed “RRC groupies” or administrative law practitioners would likely be aware of that provision of law. Seldom do those experts comment on the existing rules rather than just a proposed amendment.

RRC now posts its agenda and staff-recommended objections on its website. The mere inclusion of the document title “staff opinion” on the posted RRC agenda is not notice of a recommended objection. Members of the public and regulated community are not specifically put on notice that they are likely to lose an existing rule on which they have relied and which they thought was only being amended.

The current rule allows an agency to withdraw the rule if staff recommends objections to the existing language. This procedure essentially stays the process, keeping the rule in place and maintaining certainty for the regulated community and public. The agency can then decide on its next steps: repealing the rule; requesting help from the General Assembly; or going through the process to modify the rule to meet the recommended objection, including the previously proposed amendment. Each of these options provides the public and regulated community opportunity for comment on existing language of the rule.

If RRC adopts the proposed ban on withdrawal of rules if staff recommends objecting to existing language, many State government attorneys will likely advise their agency clients against amending existing rules unless critical. Rather than risk losing the existing rule, if an amendment is truly needed, they will likely advise their clients to consider alternative measures such as: seeking a legislative solution; proposing the language as a new rule rather an amendment to an existing rule; or

⁸ If the rule has been in effect and the RRC did not receive 10 objections, the public did not object. If the rule has been in effect after RRC approved it, received 10 objections, and the General Assembly did not enact a bill to disapprove the rule, the General Assembly does not object to it.

waiting to amend the rule until it has to be readopted in the Existing Rules Review process. The risk posed by the proposed RRC rule change is that high. Of course, it would be up to the policymakers whether to accept the risk of amending the rule.

C. Proposed repeal of .0107(a)(3) and (a)(4)

There is no obvious reason why agencies should not be allowed to withdraw rules after filing with the RRC if they suddenly realize that there is a problem but staff have not recommended an objection. Compliance with the APA in rulemaking is not easy. It is not uncommon for new rulemaking coordinators, for example, to suddenly realize a proposed rule fails consequentially and needs to be corrected through withdrawal. People have miscounted the days for the 60-day comment period and submitted rules early. Recently appointed General Counsel have submitted rules adopted by their departments instead of by the appropriate commission in their departments. This seems to occur most often with recently appointed General Counsel, formerly in private practice and unfamiliar with the APA and their agency's less active boards or commissions. In both instances, the people making those errors were trying their best to follow the APA's requirements and simply made a mistake out of a lack of understanding.

In the years since 1977 when I was first involved with the APA, I have never encountered an agency, board, or commission employee who deliberately tried to circumvent requirements of the APA that they knew were applicable to their agencies. Most are dedicated public servants trying to do the work on behalf of the public that is required of them by the General Assembly. Why should they not be allowed to withdraw a rule for which they made an error and immediately begin the process of fixing it? Why should the RRC have to review the rule twice? Why not allow the agency to withdraw the rule and take the necessary steps to fix it, and then, when fixed, submit the corrected rule proposal to RRC for approval?

D. Proposed new rule 26 NCAC 05 .0107(c)

Again, this proposal will make more work for RRC and lengthen the rulemaking process. If an OAH attorney assigned to staff RRC recommends an objection, the agency should be able to withdraw the rule before RRC consideration. See my comments above.

4. 26 NCAC 05 .0108 Submission of Rewritten Rules or Rules with Technical Changes

This proposal will lengthen the time that rulemaking takes and add to its workload. RRC should want to ease its workload by reviewing corrected rules as soon as they are submitted rather than considering them twice. As evidenced by recent RRC meetings, some agencies will be able to immediately submit corrected rules while others will need extra time. An agency that is able to quickly and effectively respond to staff-recommended technical changes should be able to submit changes promptly and avoid unnecessary delays in rule consideration.

5. 26 NCAC 05 .0110 Filing Objection Letters

This rule is not the standard familiar to all attorneys and used by many agencies – Rule 4 of the North Carolina Rules of Civil Procedure⁹ - allowing service by hand-delivery or delivery via “designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).” Use of a widely known and accepted standard reduces confusion and errors.

6. 26 NCAC 05 .0114 RRC Rule Approval Contingent on Technical Change

In practice, RRC has never required that an agency make all technical changes suggested by the attorneys assigned by OAH to RRC. In fact, the technical change letters sent by staff attorneys to agency rulemaking coordinators always include this language¹⁰:

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved.

You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:
(emphasis added)

To state the obvious, requests and recommendations are not requirements.

A. Authority

Requiring that agencies make all recommended technical changes exceeds RRC’s statutory authority. N.C. Gen. Stat. § 150B-21.10 gives RRC the authority to “*request* an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the *requested* technical changes.” (Emphasis added.) RRC’s rules define a technical change as:

[T]he changes made by an agency to reply to a request from the Commission or its staff as set out in G.S. 150B-21.10. Technical changes shall not result in a substantive change in the meaning, interpretation, or application of a rule and include the following categories of changes:

(a) Correcting errors of a general nature including:

....

(b) Correcting errors that would appear to be substantive changes except that they do not change the intended or accepted meaning, interpretation or application of the rule including:

....

(c) Requesting agencies to rewrite a rule, paragraph, or portions of a rule to more clearly express the intent of the agency when the meaning and application of the rule is known and understood.

(d) Acting on agencies' requests on behalf of citizens or agency staff to clarify the intent, requirements, or prohibition of a rule that would not result in a change in the rule's enforcement.

⁹ N.C. Gen. Stat. § 1A-1, Rule 4.

¹⁰ See, e.g., [RRC Meeting Agenda December 2022](#) and the Request for Changes posted as part of the agenda.

(e) Deleting or rewriting portions of rules that are not necessary rather than raising objections. 26 NCAC 05 .0101(5).

The APA expressly states that “[t]he Commission shall not consider questions relating to the quality or efficacy of the rule . . . ” N.C. Gen. Stat. § 150B-21.9(a). Some staff recommendations for technical changes, as well as the definition of technical change itself, go to the quality or substance of the rule rather than its clarity or ambiguity. For example, a staff request for a technical change pursuant to paragraph (c) of the definition of technical change is a request to clarify something in a rule “when the meaning and application of the rule is known and understood”. If the meaning and application of the rule is “known and understood,” then that rule is clear and unambiguous. RRC lacks authority to make an agency change a rule that is neither unclear nor ambiguous to make it even more clear. Therefore, requiring agencies to make all technical changes would exceed RRC authority.

B. Clarity and ambiguity

The proposed amendment is unclear and ambiguous. Staff make many recommendations and requests for changes to rules. For example, the first item on the substantive portion of the December 15, 2022 RRC agenda: “Department of Administration - 01 NCAC 05A .0112; 05E .0101, .0102, .0103, .0104, .0105, .0106 (Peaslee),” includes “[Request for Changes Pursuant to G.S. 150B-21.10 December 6, 2022](#).” That one staff request for changes includes: questions; statements; a recommended striking of a word (aka, deletion), and suggested alternative rule language that the document suggests that the agency “consider.” The proposed RRC rule amendment would require that an agency make all of those “changes” when some of them are not really technical changes at all.

Under the current rule, agencies have never actually been required by RRC to accept all recommended technical changes—just respond to them by:

- Making the exact change requested.
- Making an alternative change that accomplishes the purpose of the request.
- Withdrawing the rule.
- Requesting an extension of time to respond.
- Explaining why the request is not technical in nature and the change will, therefore, not be made.
- Explaining why the requested change is unnecessary.

In the case of the last two types of responses listed, unless there is substantial ambiguity, staff have seldom, if ever, recommended that RRC object to the rules because the agency did not make all of the requested changes. Rather, staff-recommended objections have more often focused on agency authority, APA compliance, and reasonable necessity. This is because the changes not made were not worth objection because they were not material, were explained by the agency, or went to the quality and substance of the rule rather than clarity or ambiguity. For example, the rules of grammar have changed over the decades, and it is not uncommon for experienced agency staff (or their policymakers) to want to use the rules they learned. Staff would be unlikely to recommend, or RRC to adopt, an objection based on an agency’s insistence on use of the adjective “which” rather than the more recent grammar rule of the adjective “that.” “Which” is, after all, clear and unambiguous. Therefore, the proposed rule change is ambiguous with regard to the changes an agency would be required to make.

Agencies often choose to respond to staff-recommended technical changes that are actually direct or implied questions because the questions are helpful. Agencies may respond with an explanation that helps staff understand something about the law, the industry, or agency processes. For example, a word, phrase, or paragraph that staff initially thinks unclear or ambiguous may actually be:

- Widely understood in an industry, so that to attempt to define it or use another word will confuse people and make the rule less clear.
- Due to a lack of information.
- Included to help lay people understand, *e.g.*, scope paragraphs, rules repeating law, overview rules, and examples.

The proposed RRC rule amendment provides no guidance as to how agencies are to make “all changes” when the change requested by staff is a question or a statement.

Staff recommendations for changes are sometimes reflective of staff misunderstanding. For example, staff recommendations for wording changes may interfere with carefully and deliberately chosen language. Under the existing rule, staff attorneys have often been amenable to reason and have not pursued recommendations for change when the agency explanation was sufficient. For example, when our department adopted the PACES Act (securities crowdfunding) rules¹¹, I spent many hours negotiating wording with departmental subject matter experts. I often found that words I was suggesting had an entirely different meaning within the highly regulated specialty field of federal securities law. Our rules were highly anticipated and welcomed by an industry hoping to use them to raise capital while avoiding federal securities law violations. Our rules were carefully crafted to make it possible for friends and neighbors capital-raising through clear guidelines to claim a small capital-raising effort as federally exempt. If the proposed amendment had applied to our PACES rules and RRC staff had recommended technical wording changes, we would have been in an impossible situation. We would have been required to make the changes or lose the rule, yet making such recommended changes could have subjected businesses to federal securities law rather than exempted them.

If the amendment is intended to refer only to a subset of staff-recommended changes, then it is decidedly unclear and ambiguous. The rule does not delineate which recommended changes must be made by 5 p.m. on the day after RRC meets. It may be that the intent of the amendment is that RRC will specifically note which changes must be made by 5 p.m. on the day after its meeting, but the amendment does not say that and could leave agencies thinking they have to make all changes requested by staff. On the other hand, the intent may be to delegate to staff the decision of which changes must be made by 5 p.m. the next day. If that is the intent, then the rule is unclear and ambiguous because it does not set out the factors to be taken into account by staff in exercising the delegated discretion.

7. 26 NCAC 05 .0115 Extensions of Time

Elements of the new rule are helpful and will provide much-needed guidance. I assume that the deadlines for agency response set out in the new rule will be waived, as in the past, on those hopefully rare occasions when staff are not able to get their requests for technical changes to agencies until shortly before the deadlines for the agencies to respond. I note that the word “subsequently” on line 12

¹¹ 18 NCAC 06A, Sections .2000 and .2100.

seems to be unnecessary and not in keeping with the Style Guide.

8. 26 NCAC 05 .0201 Scope

I am curious as to why the scope paragraph for the Periodic Review of Existing Rules Section is being repealed. In my experience, the public finds scope paragraphs useful.

9. 26 NCAC 05 .0203 Deadlines and 26 NCAC 05 .0205 Agency Request to Reschedule Reports for Earlier Review and Add Unnecessary Rules to the Schedule

The amendments harmonizing the dates for filing with RRC should eliminate some missteps and missed deadlines by agencies. The proposed amendment to 26 NCAC 05 .0205, adding arguments for earlier rescheduling of ERR review to factors considered by RRC, is helpful.

10. 26 NCAC 05 .0212 Readoptions

I recognize that RRC and its staff have sometimes been frustrated by agency responses to the scheduled deadlines for readoption pursuant to ERR. The new rule will require that agencies submit “written documentation of the agency’s planned timeline for readoption, providing planned dates for all steps required by G.S. 150B-21.2” and “written documentation of any of the agency’s rulemaking priorities that the agency determines to be relevant to the timeline for readoption.”

The proposed requirement is daunting and will require an enormous amount of work by agencies. Rulemaking timelines are of necessity fluid, requiring constant modification.

In all my years of rulemaking, I cannot recall a single time when the initial rulemaking timeline that I created held true. I offer these examples of why preparing such detailed timelines and documentation will require an extraordinary amount of work and will produce at most, highly speculative documents:

- Legislative action directing an agency to do something may upend an agency’s rulemaking priorities and schedule.¹² This has recently happened to my own agency. In July 2022, the General Assembly enacted the new Remote Electronic Notarization Act.¹³ It requires that we engage in such extensive rulemaking and use of resources that we can do no other rulemaking until we have completed the entire rulemaking process in a minimum of 25 different categories.
- For a small agency like my own,¹⁴ the illness-related absence of a single employee who is a subject matter expert can delay a rulemaking timeline by months. As just one example, our Trademarks Section has only two employees engaged in statutorily mandated duties with

¹² This has recently happened to my own agency with the General Assembly’s enactment of the new Remote Electronic Notarization Act requiring such extensive rulemaking that my department will be unable to do anything else by way of rulemaking for what looks to be more than a year.

¹³ [HB 776, S.L. 2022-54](#).

¹⁴ The Department of the Secretary of State is a lean one with approximately 175 employees, most of whom are engaged in complying with statutorily mandated deadlines for providing services to the public and businesses. As General Counsel, I do not have an assistant or paralegal and must rely on others being able to fit rulemaking assistance to me in with their normal, statutorily mandated duties.

regard to registering the State trademarks that are a valuable source of capital for North Carolina businesses. One of those employees performs purely administrative duties and would not be able to assist with reviewing and revising the trademark rules. Our re-adoption of the rules would be delayed by many months if the subject matter expert employee were to separate from our employ or be seriously ill and out of work for a period of time. Yet under RRC's extension of time rule, 26 NCAC 05 .0204, that employee's situation is not a listed factor for consideration of an extension.

- As an example of one seemingly tiny element in a rulemaking timeline, an agency cannot submit rules for publication until it has the url for the website on which the rules will be published¹⁵ and can be assured that IT will be able to post them to the website on or before the date of publication in the Register.¹⁶ The ability of internal or external IT to provide precise timelines is often out of an agency's control. Therefore, any date that I put in the proposed rule's required timeline for the notice of text will be speculative.
- For re-adopted rules for which a fiscal note will be required, agencies are seldom able to predict how long it will take them to research the fiscal note, write it, and get it approved by OSBM.¹⁷
- Changes in rulemaking coordinators due to the anticipated wave of Baby Boomer retirements will inevitably lead to turnover of subject matter experts and hiring of inexperienced rulemaking coordinators, causing re-adoptions to move more slowly.
- Changes in agency heads, whether by appointment or election, may completely change a rulemaking schedule.

The proposed new rule must be read in tandem with 26 NCAC 05 .0204 Extension of Time. That rule requires that the RRC consider illness or incapacity of the person who submits the rules to RRC as well as changes to composition of the agency¹⁸ or its staff. Yet RRC's rules would not allow for consideration of the incapacity of the subject matter expert employee as a factor in granting an extension for re-adoption of the rules. The limited set of allowable factors for an extension do not even allow consideration of public comments in support of an extension for re-adoption. The businesses most likely to comment on our Department's rules during re-adoption would rather have existing rules in place a little longer – providing certainty – than have poorly written rules. But any effort by those businesses to support a request for an extension of time for re-adoption would be rejected by RRC because its rules only allow consideration of comments in opposition to re-adoption extensions of time.¹⁹

No agency, large or small, will be able to accurately do more than provide best guesses at such extraordinarily detailed timelines and priorities as the proposed rule requires. And the factors in the

¹⁵ G.S. § 150B-21.2(c)(2a).

¹⁶ G.S. § 150B-19.1(c).

¹⁷ Few, if any, agencies have economists on staff or experts in meeting the requirements of the State Budget Manual for fiscal notes, *e.g.*, delineating net present value and opportunity costs of a re-adopted rule.

¹⁸ "Changes of composition to the agency" is an ambiguous phrase. Does it mean changes such as the recent General Assembly shuffling of units among agencies? Does it mean the separation of an essential subject matter expert, perhaps enticed by the money to be made elsewhere? Does it mean situations in which there is a newly elected or appointed agency head, or newly appointed board or commission members?

¹⁹ 26 NCAC 05 .0204(a): "The Commission's decision shall be made on a case by case basis, considering the justification offered by the agency requesting the extension, which may include: (5) arguments against the delay by members of the public."

RRC extension of time rule are not adequate to allow for the many reasons an agency's wishful projected timeline can slip, no matter how hard the agency tries to stick to it.²⁰

The unrealistic requirements of the proposed rule changes set up agencies for failure. The agencies' failure to stick to what were, from the start, impossible-to-meet timelines will necessarily increase work for RRC and increase the frustration of RRC and its staffers dealing with agencies, and of the agencies dealing with RRC.

Conclusion

I thank you for the opportunity to provide these comments on the proposed RRC rule amendments and new rules. I look forward to hearing the explanation for the proposed changes and to having the opportunity to comment further, if necessary, after hearing the explanations.

Regards,



Ann B. Wall
General Counsel

Attachment

Cc: Wayne Ronald Boyles, III, Commissioner
Barbara A. Jackson, Commissioner
Jeffrey T. Hyde, Commissioner
Randy O. Overton, Commissioner
Robert A. Rucho, Commissioner
Wm. Paul Powell, Jr., Commissioner
John (Jay) Hemphill, Commissioner

²⁰ As another example, RRC's extension rule does not require that it consider changes to an agency's duties, priorities, or resources, made by rightful action of the General Assembly.

POLICIES AND PROCEDURES

OF THE

NORTH CAROLINA

RULES REVIEW COMMISSION

RULE #1
EX-PARTE ORAL COMMUNICATIONS WITH COMMISSIONERS

The Rules Review Commission encourages all persons desiring to address the Commission to do so openly and to all commissioners and preferably in writing. The Rules Review Commission discourages ex-parte communications with the commissioners. However, to the extent that any individual commissioner is willing to allow ex-parte communications, then such communication is permitted.

(Adopted June 21, 1996)

RULE #2
SUBMISSION OF WRITTEN COMMENTS TO THE RRC

Any person desiring to submit written comments concerning a rule shall submit such comments to the individual commissioners and RRC staff (and any others as required below) by 5:00 p.m. of the Monday prior to the next RRC meeting. Such written submissions shall specify how a rule either complies with or fails to comply with the statutory grounds for the RRC's review set out in G.S. § 150B-21.9.

The deadlines set out above shall be waived and the deadlines set out below applying to rebuttal comments shall apply if the agency makes a change in the rule after the rule is filed with the RRC and the comments apply to the change.

In addition to the RRC commissioners and staff, persons submitting comments shall submit a copy of such comment to any other person who has notified the RRC in writing that they wish to be informed concerning the status of a particular rule. If the submission is in opposition to a rule, the person also shall submit a copy of the comments to the agency.

A person may submit rebuttal comments to such written comments by the earlier of the time of the meeting or seventy-two (72) hours after receiving a copy of the comments. A person may also, at the discretion of the Chairman, address the commission to respond to comments received within one-week of the commission meeting.

The RRC staff shall provide mailing or delivery addresses and fax, e-mail, or other electronic addresses, for delivery to the commissioners and those who have notified the Commission. The staff shall also provide a copy of these procedural rules concerning oral and written comment to anyone who requests such.

This rule may be waived by the chairman upon a finding that the person desiring to submit comment is not reasonably aware of and familiar with the RRC process and its role in the rulemaking process.

(Adopted June 21, 1996; amended August 15, 1996)

RULE #3

REQUIRE NOTICE PRIOR TO ORAL RRC PRESENTATION

Anyone desiring to make an oral presentation concerning a rule shall notify the RRC in writing at least 24 hours prior to the start of the meeting. Such notice shall include their name, address, telephone number, and fax number. In addition to notifying the RRC the person shall also notify the agency proposing the rule and any other person who has notified the RRC in writing that they wish to be informed concerning the status of a particular rule.

The RRC staff shall provide mailing or delivery addresses, or telephone numbers, or fax, e-mail, or other electronic addresses, for notifying the required parties. The staff shall also provide a copy of these procedural rules concerning oral and written comment to anyone who requests such.

This rule may be waived by the Chairman upon a finding that the person desiring to submit comment is not reasonably aware of and familiar with the RRC process and its role in the rulemaking process.

(Adopted June 21, 1996; amended August 15, 1996)

RULE #4

LIMITATIONS ON ORAL PRESENTATIONS

The RRC Chairman may set time limits on oral presentations before the RRC. Factors that the Chairman may use in determining such limits include the length of the agenda; the number of contested rules; the complexity of the issues; the public interest in a particular rule; the number of people desiring to address the RRC over the issue, the variations in their arguments (i.e., are they adding additional information to the debate or merely being repetitive of earlier speakers?), and the level of agreement within their positions or relationships; the nature of the arguments advanced in relation to the RRC scope of review; the amount of notice given to the agency; and any other factors the Chairman deems appropriate.

(Adopted June 21, 1996)

RULE #5

WITHDRAWAL OF RULES AFTER FILING WITH RRC

An agency may withdraw a proposed rule after filing with the RRC when the rule is an adoption or when the staff recommendation against a proposed rule is directed at the amendment to the proposed rule and not at the existing language.

(Adopted June 21, 1996)

RULE # 6

SUBMISSION OF REWRITTEN RULES

Agencies shall not submit rewritten rules until the meeting following the meeting at which a rule was originally reviewed by the RRC. Agencies may submit technical changes at the meeting at which a rule is originally reviewed.

(Adopted June 21, 1996)

RULE #7

DEADLINE FOR SUBMISSION OF REWRITTEN RULES

All rewritten rules or rules containing technical changes shall be submitted to the RRC by 5:00 p.m. of the second day before the RRC meeting.

This rule may be waived by RRC staff where the agency does not meet until the day of this deadline or later or when the original submission is deficient and requires further changes. However, no rewritten rules or technical changes shall be accepted after 5:00 p.m. the day before the RRC meeting.

(Adopted June 21, 1996)

RULE #8

EX-PARTE COMMUNICATIONS WITH RRC STAFF

Any person desiring to confer with RRC staff may do so on an ex-parte basis at any time that staff is available. However, this shall not be a confidential communication and staff may inform agency members and any other person of such communication and may invite rebuttal response.

(Adopted June 21, 1996)

RULE #9
COMMUNICATIONS CONCERNING STAFF RECOMMENDATIONS

Any person may contact any RRC staff member prior to the Commission's meeting to determine the staff recommendation concerning any rule. Staff shall not initiate any contact to inform an agency or any other person concerning the staff recommendations.

(Adoption June 21, 1996)

RULE #10
FILING RECEIPTS

(a) When an agency files a permanent rule for which there is a temporary rule it shall obtain a dated and signed receipt from the RRC.

(b) When an agency files any other permanent rule, it may obtain a dated and signed receipt from the RRC.

(c) If the agency fails to obtain a receipt, the date of filing shall be considered the next 20th day of the month.

RULE #11
FILING OBJECTION LETTERS

(a) The RRC shall not accept any letter objecting to a rule and requesting review by the legislature (objection letter) which is written prior to the time the agency adopts the rule.

(b) The RRC shall not accept any objection letter to a rule which has not been filed with the RRC and the agency has indicated is not likely to be filed within the next 30 days.

RULE #12
RETURN OF OBJECTION LETTERS

(a) The RRC shall return any objection letter timely written and filed and for which no rule has been received by the RRC within thirty (30) days after the filing of the objection letter.

(b) The RRC shall instruct the letter writer of a letter returned under this rule how to contact the RRC on a monthly basis to determine the status of a rule filing and whether to refile the objection letter.