



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

August 19, 2022

Anna R. Hayworth
North Carolina Board of Agriculture
Sent via email only to: anna.hayworth@ncagr.gov

Re: Objection to 02 NCAC 52J .0201, 0205, .0208, .0301, .0408, .0418, .0419, 0702, .0704.

Dear Ms. Hayworth:

At its meeting on August 18, 2022, the Rules Review Commission objected to the above captioned rules in accordance with G.S. 150B-21.10.

Specifically, the RRC adopted the opinions of counsel attached hereto and incorporated by reference regarding the issues of the agency exceeding its authority, and clarity and ambiguousness pursuant to G.S. 150B-21.9.

Please respond to these objections 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,
/s/ William W. Peaslee
William W. Peaslee
Commission Counsel

Cc: Dr. Patricia Norris

Attachments

Donald R. van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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1711 New Hope Church Road, Raleigh, NC 27609
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www.oah.nc.gov

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 .0201

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:

Paragraph (m) requires licensees and agents of regulated facilities to "cooperate".

Paragraph (n) of the Rule prohibits applicants for licensure, licensees, and employees of regulated facilities from abusing, harassing, delaying or obstructing any agency official in the performance of their duties.

"Cooperate", "Abuse" and "harass" are undefined terms in the Animal Welfare Act in relation to humans. Without a definition of these terms, it is unclear what activities the agency wants to require or prohibit. The enforcement of these paragraphs would be subjective.

Section 52J contains prescriptions and requirements, which, if complete, already compel compliance to the agency's desired prescriptions and requirements. What else does the agency wish to compel "cooperation" with?

Could persistent contact from the regulated public seeking redress be considered harassment? If a facility employee used profanity to express themselves, could this be considered abuse?

By way of comparison, G.S.14-277.3A(b)(2), defines "harasses or harassment". This clarifies the law in that context.

The use of these terms implies that there are additional requirements and prohibitions the agency seeks to enforce which are not specified or disclosed to the regulated public for consideration or commentary pursuant to the Administrative Procedures Act.

William W. Peaslee
Commission Counsel

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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.)

§ 14-277.3A. Stalking.

(a) Legislative Intent. - The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(b) Definitions. - The following definitions apply in this section:

- (1) Course of conduct. - Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- (2) Harasses or harassment. - Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.
- (3) Reasonable person. - A reasonable person in the victim's circumstances.
- (4) Substantial emotional distress. - Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) Offense. - A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:

- (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
- (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

(d) Classification. - A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking

when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

(e) Jurisdiction. - Pursuant to G.S. 15A-134, if any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the victim, then the defendant may be prosecuted in this State. (2008-167, s. 2.)

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0408

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:

The Rule requires that Certified Euthanasia Technician training be provided by either the Animal Welfare Section, or companies or individuals meeting four criteria.

The four criteria are ambiguous. The Rule requires all trainers to "possess a working knowledge of euthanasia", "actual experience in euthanasia", "experience training personnel", and references from previous trainees attesting to the "satisfactory euthanasia experience" of the applicant-trainer. However, the Rule contains no objective test by which the agency will determine whether an applicant-trainer has met the four criteria.

For instance, what information does the agency consider determining whether a trainer-applicant has "working knowledge of euthanasia"? What criteria does the agency apply in making the determination.

Further, the Board's Rule provides no objective guidance to the employees of the regulator.

Either the Board or AWS has a standard which is not revealed to the public in the Rule, or there is no objective standard, and the regulated public awaits the AWD's subjective determinations. This of course opens the door to caprice and inequity.

In response to the Request for Changes, the agency requires the trainer-applicant to "submit an application for approval"; however, the substantive requirements of the application do not appear in the Subchapter.

William W. Peaslee
Commission Counsel

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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.
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- (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.

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0418

RECOMMENDED ACTION:

- 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:

The Rule requires Certified Euthanasia Technicians ("CET") to "prepare animals for euthanasia". This language is facially ambiguous.

The Rule further requires CETs to "document" attempts to reach owners of animals associated with any microchip found. Curiously it does so without specifically mandating that an attempt be made. However, the Rule further requires the CET to document "emergency circumstances which preclude [attempts to reach the owner]. Therefore, the implication is that the CET shall make "attempts". The manner, number of attempts, and over what time period does not appear to be regulated.

Notwithstanding the implied existence or lack of the aforesaid mandate, the agency does not specify what information must be documented. The language is facially ambiguous.

Either the Board or AWS has a standard which is not revealed to the public in the Rule, or there is no objective standard, and the regulated public awaits the AWD's subjective determinations, in this instance most likely after the euthanasia has occurred.

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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:

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0419

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:

The Rule lists the reasons why the agency may impose discipline on, or refuse to license or renew a license for a Certified Euthanasia Technician CET.

Paragraph (4) states that the CET or applicant may be disciplined for "allowing uncertified individuals to euthanize animals." This Subparagraph is vague. "Allowing" could mean anything from abetting to failure to report to physically preventing an uncertified euthanasia. If it is the latter, the agency lacks the authority require a CET enforce the code.

Paragraph (6)states that the CET or applicant may be disciplined for "unethical or unprofessional conduct and then defines the conduct .

Paragraph (6)(a) defines the conduct as engaging in conduct of a character likely to deceive or defraud the public or the Animal Welfare Section. This language is vague.

Paragraph (6)(d) defines the conduct as euthanizing animals in a manner that endangers the health or welfare of the public. This language is vague.

Paragraph (6)(e) defines the conduct as "ignorance, incompetence or inefficiency in the euthanizing of animals." This language is vague. The CET is certified by the agency and presumably part of that certification is a test of competency and skill. Staff counsel cannot phantom what "efficiency in euthanizing animals" is. Further, there is no mention of how the agency will make this determination.

William W. Peaslee
Commission Counsel

Paragraph (13) states that a CET can be disciplined for failure to “cooperate” during any investigation or inspection. This is vague. Section 52J contains prescriptions and requirements, which, if complete, already compel compliance to the agency’s desired prescriptions and requirements. What else does the agency wish to compel “cooperation” with?

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

William W. Peaslee
Commission Counsel

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- (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.

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0702

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:

The rule, which is permissive in nature, provides that a shelter employee "adequately" trained in the euthanasia method for the species to be euthanized "may" use extreme methods of euthanasia under "extraordinary circumstances" which is a term defined in 02 NCAC 52J .0701.

While the agency has defined "adequate" in 02 NCAC 52J .0104, the Rule remains facially ambiguous. The regulated public would be left to either guess what training was required as a pre-requisite to the employee using extreme methods to euthanize an animal under extraordinary circumstances. Further, during an extraordinary circumstance, the regulated public isn't going to have the time to contemplate the agency's intention behind the vague language of the rule much less contact the agency for clarification.

Either the Board or AWS has a standard which is not revealed to the public in the Rule, or there is no objective standard, and the regulated public awaits the AWD's subjective determinations, in this instance most likely after the euthanasia has occurred.

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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:

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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.

RRC STAFF OPINION

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0704

RECOMMENDED ACTION:

- 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:

In 02 NCAC 52J .0702, which is also subject to a staff opinion recommending objection, a shelter employee "adequately trained in the euthanasia method for the species" "may" use extreme methods of euthanasia under "extraordinary circumstances" which is a term defined in 02 NCAC 52J .0701.

*This Rule .0704 adds the requirement that the employee must have training "in the euthanasia method for that species **that was used** (emphasis added) during the extraordinary circumstances."*

The implication is that the training was necessary prior to the euthanasia performed during the extraordinary circumstance, however it could be read that the training was required after the event, unless the employee was also a Certified Euthanasia Technician.

The agency was unresponsive to a Request for Changes in which staff inquired about the type of training and the criteria by which the agency would make its determination whether an employee was "trained"; however the agency added "during the extraordinary circumstance" as a modifier of the training required.

This addition did not resolve any ambiguity. The type and amount of training required remain unclear. For example, as revised, the non-CET employee who employed a gunshot to euthanize the animal would require some sort of firearms training.

William W. Peaslee
Commission Counsel

The regulated public would be left to either guess what “training” was necessary. Would a 5 minute Youtube video suffice? Further, the Board’s Rule provides no guidance to the employees of the regulator.

Either the Board or AWS has a standard of the training required which is not revealed to the public in the Rule, or there is no objective standard and the regulated public awaits the AWD’s subjective determinations . This of course opens the door to caprice and inequity.

It appears to staff that the Board should be able to qualify the training it believes is “adequate”. Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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

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AGENCY: North Carolina Board of Agriculture

RULE CITATION: 02 NCAC 52J .0205

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:

As written, the Rule applies to all dogs, cats, puppies, and kittens without regard to their status in commerce.

In relevant part, the agency has authority to "adopt rules to implement [Article 3 of G.S. 19A]." See G.S. 19A-24.

In relevant part G.S. 19A-21 limits the agency's authority to "animals, as items of commerce". If the General Assembly had intended Article 3 to apply to all dogs, cats, puppies, and kittens, it would not have included the language "as items of commerce".

There is no other rule limiting the applicability of the Rule to animals in commerce.

In response to a Request for Changes inquiry into the agency's authority, the agency opined that, in summa, G.S. 19A-24 limits the agency's authority and therefore adopted rules exceeding that authority will be interpreted accordingly. Therefore, the Rule, as written, is understood.

If the agency's line of logic is to be followed, a review of rules by the Rules Review Commission would be meaningless. Any agency could adopt a rule, which by its plain reading exceeds the agency's authority, as the rule will be interpreted within the agency's authority. Presumably the RRC, the regulated public, and the general public should accept the agency's assurances that agency will be self-limiting in enforcement of the rule.

As written, the agency has exceeded its authority in adopting the Rule.

William W. Peaslee
Commission Counsel

Staff recommends objection to the above-referenced rule as the Rule exceeds the agency's authority pursuant to G.S. 150B-21.9(a)(1).

William W. Peaslee
Commission Counsel

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

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- (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.)

§ 19A-21. Purposes.

The purposes of this Article are (i) to protect the owners of dogs and cats from the theft of such pets; (ii) to prevent the sale or use of stolen pets; (iii) **to insure that animals, as items of commerce,** are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use; (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment; (v) to prohibit the sale, trade or adoption of those animals which show physical signs of infection, communicable disease, or congenital abnormalities, unless veterinary care is assured subsequent to sale, trade or adoption. (1977, 2nd Sess., c. 1217, s. 2.)

§ 19A-24. Powers of Board of Agriculture.

(a) The Board of Agriculture shall:

- (1) Establish standards for the care of animals at animal shelters, boarding kennels, pet shops, and public auctions. A boarding kennel that offers dog day care services and has a ratio of dogs to employees or supervisors, or both employees and supervisors, of not more than 10 to one, shall not as to such services be subject to any regulations that restrict the number of dogs that are permitted within any primary enclosure.
- (2) Prescribe the manner in which animals may be transported to and from registered or licensed premises.
- (3) Require licensees and holders of certificates to keep records of the purchase and sale of animals and to identify animals at their establishments.
- (4) Adopt rules to implement this Article, including federal regulations promulgated under Title 7, Chapter 54, of the United States Code.
- (5) Adopt rules on the euthanasia of animals in the possession or custody of any person required to obtain a certificate of registration under this Article. An animal shall only be put to death by a method and delivery of method approved by the American Veterinary Medical Association, the Humane Society of the United States, or the American Humane Association. The Department shall establish rules for the euthanasia process using any one or combination of methods and standards prescribed by the three aforementioned organizations. The rules shall address the equipment, the process, and the separation of animals, in addition to the animals' age and condition. If the gas method of euthanasia is approved, rules shall require (i) that only commercially compressed carbon monoxide gas is approved for use, and (ii) that the gas must be delivered in a commercially manufactured chamber that allows for the individual separation of animals. Rules shall also mandate training for any person who participates in the euthanasia process.

(b) In addition to rules on the euthanasia of animals adopted pursuant to subdivision (5) of subsection (a) of this section, the Board of Agriculture shall adopt rules for the certification of euthanasia technicians. The rules may provide for:

- (1) Written and practical examinations for persons who perform euthanasia.
- (2) Issuance of certification to persons who have successfully completed both training and examinations to become a euthanasia technician.
- (3) Recertification of euthanasia technicians on a periodic basis.
- (4) Standards and procedures for the approval of persons who conduct training of euthanasia technicians.
- (5) Approval of materials for use in euthanasia technician training.
- (6) Minimum certification criteria for persons seeking to become euthanasia technicians including, but not limited to: age; previous related experience;

criminal record; and other qualifications that are related to an applicant's fitness to perform euthanasia.

- (7) Denial, suspension, or revocation of certification of euthanasia technicians who:
 - a. Violate any provision of this Article or rules adopted pursuant to this Article;
 - b. Have been convicted of or entered a plea of guilty or nolo contendere to:
 1. Any felony;
 2. Any misdemeanor or infraction involving animal abuse or neglect; or
 3. Any other offense related to animal euthanasia, the duties or responsibilities of a euthanasia technician, or a euthanasia technician's fitness for certification;
 - c. Make any false statement, give false information, or omit material information in connection with an application for certification or for renewal or reinstatement of certification as a euthanasia technician; or
 - d. Otherwise are or become ineligible for certification.
- (8) Provision of the names of persons who perform euthanasia at animal shelters and for the animal shelter to notify the Department when those persons are no longer affiliated, employed, or serving as a volunteer with the shelter.
- (9) Certified euthanasia technicians to notify the Department when they are no longer employed by or are serving as a volunteer at an animal shelter.
- (10) The duties, responsibilities, and standards of conduct for certified euthanasia technicians.

(c) Regardless of the extent to which the Board exercises its authority under subsection (b) of this section, the Department may deny, revoke, or suspend the certification of a euthanasia technician who has been convicted of or entered a plea of guilty or nolo contendere to a felony involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, or narcotic.

(d) Persons seeking certification as euthanasia technicians, or a renewal of such certification, shall provide the Department a fingerprint card in a format acceptable to the Department, a form signed by the person consenting to a criminal record check and the use of the person's fingerprints, and such other identifying information as may be required by the State or national data banks. The Department may deny certification to persons who refuse to provide the fingerprint card or consent to the criminal background check. Fees required by the Department of Public Safety for conducting the criminal background check shall be collected by the Department and remitted to the Department of Public Safety along with the fingerprint card and consent form. (1977, 2nd Sess., c. 1217, s. 5; 1987, c. 827, s. 62; 2004-

199, s. 12; 2005-276, s. 11.5(b); 2005-345, s. 22; 2008-198, s. 2(a); 2010-127, ss. 2, 3; 2014-100, s. 17.1(o).)

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:

- 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:

The rule requires the facility to employ an "adequate" number of employees "adequately" trained to "adequately" care for animals in the 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.

Either the Board or AWS has a standard which is not revealed to the public in the Rule, or there is no objective standard and the regulated public awaits the AWD's subjective determinations. This of course opens the door to caprice and inequity.

It appears to staff that the Board should be able to quantify the number of employees required by establishing a ratio or some other method for the transparency of the agency and the enlightenment of the public.

Staff recommends objection to the above-referenced rule as the Rule is not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

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.

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 .0301

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:

As written, the Rule applies to all vehicles transporting dogs, cats, puppies, and kittens without regard to their status in commerce.

In relevant part, the agency has authority to "adopt rules to implement [Article 3 of G.S. 19A]." See G.S. 19A-24.

In relevant part, G.S. 19A-21 limits the agency's authority to "animals, as items of commerce". If the General Assembly had intended Article 3 to apply to all dogs, cats, puppies, and kittens, it would not have included the language "as items of commerce".

There is no other rule limiting the applicability of the Rule to animals in commerce.

In response to a Request for Changes inquiry into the agency's authority, the agency opined that, in summa, G.S. 19A-24 limits the agency's authority and therefore adopted rules exceeding that authority will be interpreted accordingly. Therefore, the Rule, as written, is understood.

If the agency's line of logic is to be followed, a review of rules by the Rules Review Commission would be meaningless. Any agency could adopt a rule which by its plain reading exceeds the agency's authority, as the rule will be interpreted and enforced within the agency's authority. Presumably the RRC, the regulated public, and the general public should accept the agency's assurances that agency will be self-limiting in enforcement of the rule.

As written, the agency has exceeded its authority in adopting the Rule.

William W. Peaslee
Commission Counsel

Staff recommends objection to the above-referenced rule as the Rule exceeds the agency's authority pursuant to G.S. 150B-21.9(a)(1).

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.)

§ 19A-21. Purposes.

The purposes of this Article are (i) to protect the owners of dogs and cats from the theft of such pets; (ii) to prevent the sale or use of stolen pets; (iii) **to insure that animals, as items of commerce,** are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use; (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment; (v) to prohibit the sale, trade or adoption of those animals which show physical signs of infection, communicable disease, or congenital abnormalities, unless veterinary care is assured subsequent to sale, trade or adoption. (1977, 2nd Sess., c. 1217, s. 2.)

§ 19A-24. Powers of Board of Agriculture.

(a) The Board of Agriculture shall:

- (1) Establish standards for the care of animals at animal shelters, boarding kennels, pet shops, and public auctions. A boarding kennel that offers dog day care services and has a ratio of dogs to employees or supervisors, or both employees and supervisors, of not more than 10 to one, shall not as to such services be subject to any regulations that restrict the number of dogs that are permitted within any primary enclosure.
- (2) Prescribe the manner in which animals may be transported to and from registered or licensed premises.
- (3) Require licensees and holders of certificates to keep records of the purchase and sale of animals and to identify animals at their establishments.
- (4) Adopt rules to implement this Article, including federal regulations promulgated under Title 7, Chapter 54, of the United States Code.
- (5) Adopt rules on the euthanasia of animals in the possession or custody of any person required to obtain a certificate of registration under this Article. An animal shall only be put to death by a method and delivery of method approved by the American Veterinary Medical Association, the Humane Society of the United States, or the American Humane Association. The Department shall establish rules for the euthanasia process using any one or combination of methods and standards prescribed by the three aforementioned organizations. The rules shall address the equipment, the process, and the separation of animals, in addition to the animals' age and condition. If the gas method of euthanasia is approved, rules shall require (i) that only commercially compressed carbon monoxide gas is approved for use, and (ii) that the gas must be delivered in a commercially manufactured chamber that allows for the individual separation of animals. Rules shall also mandate training for any person who participates in the euthanasia process.

(b) In addition to rules on the euthanasia of animals adopted pursuant to subdivision (5) of subsection (a) of this section, the Board of Agriculture shall adopt rules for the certification of euthanasia technicians. The rules may provide for:

- (1) Written and practical examinations for persons who perform euthanasia.
- (2) Issuance of certification to persons who have successfully completed both training and examinations to become a euthanasia technician.
- (3) Recertification of euthanasia technicians on a periodic basis.
- (4) Standards and procedures for the approval of persons who conduct training of euthanasia technicians.
- (5) Approval of materials for use in euthanasia technician training.
- (6) Minimum certification criteria for persons seeking to become euthanasia technicians including, but not limited to: age; previous related experience;

criminal record; and other qualifications that are related to an applicant's fitness to perform euthanasia.

- (7) Denial, suspension, or revocation of certification of euthanasia technicians who:
 - a. Violate any provision of this Article or rules adopted pursuant to this Article;
 - b. Have been convicted of or entered a plea of guilty or nolo contendere to:
 1. Any felony;
 2. Any misdemeanor or infraction involving animal abuse or neglect; or
 3. Any other offense related to animal euthanasia, the duties or responsibilities of a euthanasia technician, or a euthanasia technician's fitness for certification;
 - c. Make any false statement, give false information, or omit material information in connection with an application for certification or for renewal or reinstatement of certification as a euthanasia technician; or
 - d. Otherwise are or become ineligible for certification.
- (8) Provision of the names of persons who perform euthanasia at animal shelters and for the animal shelter to notify the Department when those persons are no longer affiliated, employed, or serving as a volunteer with the shelter.
- (9) Certified euthanasia technicians to notify the Department when they are no longer employed by or are serving as a volunteer at an animal shelter.
- (10) The duties, responsibilities, and standards of conduct for certified euthanasia technicians.

(c) Regardless of the extent to which the Board exercises its authority under subsection (b) of this section, the Department may deny, revoke, or suspend the certification of a euthanasia technician who has been convicted of or entered a plea of guilty or nolo contendere to a felony involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, or narcotic.

(d) Persons seeking certification as euthanasia technicians, or a renewal of such certification, shall provide the Department a fingerprint card in a format acceptable to the Department, a form signed by the person consenting to a criminal record check and the use of the person's fingerprints, and such other identifying information as may be required by the State or national data banks. The Department may deny certification to persons who refuse to provide the fingerprint card or consent to the criminal background check. Fees required by the Department of Public Safety for conducting the criminal background check shall be collected by the Department and remitted to the Department of Public Safety along with the fingerprint card and consent form. (1977, 2nd Sess., c. 1217, s. 5; 1987, c. 827, s. 62; 2004-

199, s. 12; 2005-276, s. 11.5(b); 2005-345, s. 22; 2008-198, s. 2(a); 2010-127, ss. 2, 3; 2014-100, s. 17.1(o).)

William W. Peaslee
Commission Counsel



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

August 22, 2022

Nadine Pfeiffer
North Carolina Medical Care Commission
Sent via email only to: Nadine.pfeiffer@dhhs.nc.gov

Re: Objection to 10A NCAC 13B .3801, .3903, .4103, .4104, .4106, .4305, .4603, .4801, .4805, .5102, .5105, .5406, .5408, .5411

Dear Ms. Pfeiffer:

At its meeting on August 18, 2022, the Rules Review Commission (RRC) objected to each of the above-captioned Rules, finding that the Rules were not within the statutory authority delegated to the Medical Care Commission pursuant to G.S. 150B-21.9(a)(1). Additionally, the RRC objected to Rule .4805 on the basis that the Rule was not clear and unambiguous pursuant to G.S. 150B-21.9(a)(2).

Specifically, the RRC adopted the opinions of counsel attached hereto and incorporated by reference.

Please respond to this objection 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,

Brian Liebman
Commission Counsel

cc: Kim Randolph, NCDOJ

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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www.oah.nc.gov



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

August 19, 2022

Jennifer Everett
Environmental Management Commission
Sent via email only to: Jennifer.everett@ncdenr.gov

Re: Extension of the Period of Review for 15A NCAC 02P .0101, .0102, .0103, .0201, .0202, .0301, .0302, .0401, .0402, .0403, .0404, .0405, .0406, and .0407.

Dear Ms. Everett:

At its meeting yesterday, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the agency to extend the period of review in order to allow the Commission additional time to address change requests.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Brian Liebman
Commission Counsel

Cc: Jessica Montie

Donald R. van der Vaart, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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