Periodic Review and Readoption of Rules

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Commission Counsel



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What is the Periodic Review Process?

- Prior to 2013, North Carolina's Administrative Procedure Act did not have expiration dates for rules.
- Session Law 2013-413
- G.S. 150B-21.3A requires that all rules adopted under G.S. 150B, Article 2A, be reviewed every 10 years by the agency that promulgated the rules to ensure rules are necessary and within the agency's statutory authority.



2

Who is subject to the review?

Agencies who are subject to Article 2A of Chapter 150B, the Administrative Procedure Act including:

Many state agencies;	Many licensing boards; and	The Building Code.

Exemptions in G.S. 150B and other statutes.

3

Classifications

S.L. 2019-140

The General Assembly changed the classifications for agency reports submitted on or after October 1, 2019.

Unnecessary

"A rule the agency determines to be obsolete, redundant, or otherwise not needed." G.S. 150B-21.3A(a)(6).

Removed from the Code.

Necessary

"Any rule other than an unnecessary rule." G.S. 150B-21.3A(a)(2a).

Must be readopted as if they are new rules using the permanent rulemaking process, pursuant to G.S. 150B, Article 2A.

4

2024-2027 Periodic Review Schedule

- https://www.oah.nc.gov/documents/rules/periodic-review-report-schedule-2024-2027/open
- Can I get an exemption? 26 NCAC 05 .0209
  - Agency can make an exemption request for an entire Section, Subchapter, Chapter or Title if all rules were adopted or amended within previous 10 years
  - Request must come from the head of the agency.
  - NOT GRANTED OFTEN – extenuating circumstances
- Can I request to amend the schedule?
  - RRC has granted a few requests to amend where an agency has pointed to an exemption from 150B or moving a report to line up with a related report

5

Step 1: Agency Review Report provided by OAH

OAH Staff will provide each agency with a report that it must use in conducting the review.

Do not alter report

Make sure the Agency name is correct on line 2.

Agency must review their report for errors.

Notify OAH Staff of any errors or missing rules within 10 business days.

6

G.S. 150B-21.3A Report for 01 NCAC 01, DEPARTMENTAL RULES

Agency - Department of Administration

Comment Period -

Date Submitted to APO - Filled in by RRC staff

Subchapter	Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Required to Implement or Conform to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]	RRC Determination of Public Comments [150B-21.3A(c)(2)	RRC Final Determination of Status of Rule for Report to APO [150B-21.3A(c)(2)]	OAH Next Steps
SUBCHAPTER 01A - ORGANIZATION OF THE DEPARTMENT	SECTION .0300 - DEPARTMENTAL PERSONNEL PROCEDURES	01 NCAC 01A .0301	DEPARTMENTAL PERSONNEL OFFICE	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
		01 NCAC 01A .0302	RESPONSIBILITIES	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
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		01 NCAC 01B .0306	TIMING OF NOTICE	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
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7

G.S. 150B-21.3A Report for 01 NCAC 01, DEPARTMENTAL RULES

Agency - Department of Administration

Comment Period -

Date Submitted to APO - Filled in by RRC staff

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After this, notify OAH (oah.rules@oah.nc.gov) of any errors.

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Step 1: Agency Review

Review	Review Existing Rules to make initial classifications on report provided by OAH.
Report on	Post report on Agency's and OAH's website and notify interested persons.
Comment	Take public comments for at least 60 days.
Review and respond	Review and respond to any comments received.
Finalize	Make final classifications following the public comment period.

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Step 1: Agency Review
Summary of the agency report to RRC

- The agency will insert the following information in the report for each rule:
  - The agency's initial classification.
  - Whether the rule is required to implement or conform to federal law.
    - If so, the agency must cite the federal law.
  - The agency's response to all comments.
  - The agency's final classification of the rule following public comment.

G.S. 150B-21.3A(c)(2) and 26 NCAC 05 .0206.

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G.S. 150B-21.3A Report for 01 NCAC 01, DEPARTMENTAL RULES

Agency - Department of Administration

Comment Period -

Date Submitted to APO - Filled in by RRC staff

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G.S. 150B-21.3A Report for 01 NCAC 01, DEPARTMENTAL RULES

Agency - Department of Administration

Comment Period -

Date Submitted to APO - Filled in by RRC staff

Subchapter	Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Required to Implement or Conform to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]	RRC Determination of Public Comments [150B-21.3A(c)(2)	RRC Final Determination of Status of Rule for Report to APO [150B-21.3A(c)(2)]	OAH Next Steps
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		01 NCAC 01A .0302	RESPONSIBILITIES	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
SUBCHAPTER 1B - DEPARTMENTAL ADMINISTRATIVE PROCEDURES		01 NCAC 01B .0107	SCOPE OF RULES	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
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		01 NCAC 01B .0208	CONTENTS OF PETITION	Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016	Select One	Select One		Select One	Select One	Select One	Select One	Select One
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After this, post for 60 day public comment period, notify interested persons, and file with OAH.

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G.S. 150B-21.3A Report for 01 NCAC 01, DEPARTMENTAL RULES

Agency - Department of Administration

Comment Period -

Date Submitted to APO - Filled in by RRC staff

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EXAMPLE

Agency	Rule	Name	Type of Comment	Comment	Agency Response	RRC Staff Recommendation	RRC Determination [150B-21.3A(c)(2)
Copy all columns in this row to the right of this yellow cell and paste in new rows			Select One			Select One	Select One
Environmental Management Commission	15A NCAC 02B .0101	GENERAL PROCEDURES	Public Coment as defined in G.S. 150B-21.3A(a)(5)	From: Doe, Jane Sent: Friday, October 18, 2013 2:37 PM To: Doe, John Subject: RE: public comment Lorem ipsum dolor sit amet, consectetur adipisicing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum. Lorem ipsum dolor sit amet, consectetur adipisicing elit, sed do eiusmod tempor incididunt ut labore et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.	We agree	Comment has merit	Comment has merit
			Other Statement	Got a call from a guy who said he didn't like this agency.	We're sorry you feel that way.	Comment is without merit	Comment without merit

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Tips for Classifying Rules on Report

- Determine if a comment fits the definition of a "public comment": "written comments objecting to the rule, in whole or in part, or objecting to an agency's determination of the rule as necessary or unnecessary".
- A "public comment" has "merit" if it "addresses the specific substance of the rule." Only determine if a "public comment" has "merit" if your agency designated the rule as "unnecessary".
- So, if your agency designated a rule as "necessary" and a "public comment" was received that "addresses the specific substance of the rule", the public comment will not change the rule's designation as "necessary" on the report.
- Rules which your agency determined were unnecessary and received no "public comment", or the comment didn't have "merit", will expire automatically from the NCAC.
- Rules that your agency determined were "necessary", or the RRC designated them as "necessary", are required to go through readoption.
- Review the RRC rules in 26 NCAC 05 .0201-.0211.

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Step 2: RRC Review

Agency shall file the report with RRC on or before the 20th of the month prior to the scheduled review. 26 NCAC 05 .0203

Need an extension of the filing deadline?

- May submit a written request in accordance with 26 NCAC 05 .0204
  - (1) the efforts of the agency to comply with the review;
  - (2) any illness or incapacity of the staff member assigned responsibility for submitting the report;
  - (3) changes of composition to the agency or its staff that resulted in a delay of the review;
  - (4) whether the agency received a volume of comments that requires additional time to respond; and
  - (5) arguments for or against the delay by members of the public.

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Step 2: RRC Review

The RRC will review the report and all public comments received. For purposes of the periodic review, public comment means "written comments objecting to the Rule… or objecting to an agency's determination of the Rule as either necessary or unnecessary."

If the public comment relates to a rule that the agency determined to be unnecessary, then the RRC will determine whether the public comment has merit. A comment has "merit" when it addresses the "specific substance of the Rule."

If the RRC determines the comment has merit, then it will reclassify the rule as necessary. G.S. 150B-21.3A(c)(2)

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- The RRC prepares a final report and submits it to the APO for consultation.
- The RRC report will include everything submitted to it by the agency, and:
  - A determination that all rules that the RRC agrees are unnecessary shall expire on the first day of the month following the effective date of the report.
  - A determination that all rules the RRC agrees or determines are necessary must be readopted as if the rules are new rules.
  - The RRC is also required to report annually all rules that are exempt from expiration pursuant to G.S. 150B-21.3A(e).

Step 2: RRC Review

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- The classifications become effective either:
  - The date the report is reviewed by APO; or
  - The 61st day after the report is sent to APO, if APO does not hold a meeting.
- The statute requires the agency to consult with APO.
  - The agency will need to appear at APO meeting (if any) to answer questions about its rules.
  - RRC will notify the agency when it sends the report.
  - It is not RRC's responsibility to alert the agency to APO meetings.
- *Caveat:* APO may disagree with the classification of a rule. If so, it may recommend that the General Assembly direct the agency to conduct a review of the specific rule within the next year, in accordance with G.S. 150B-21.3A(c)(3).

STEP 3: APO Review

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What happens if an agency does not conduct the Review?

Automatic Expiration

- If an agency is subject to the review and does not conduct the review by the date set by the schedule of the Rules Review Commission, the rules will expire.
- 150B-21.3A(b)

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Common Misconceptions

Assuming the agency conducts the review:

An agency's rule will not come out of the Code unless the agency classified that rule as unnecessary.

The rule stays in the Code, despite agency classification, if there is public comment with merit that disagrees with this classification.

The RRC cannot determine a rule is unnecessary when an agency says that it is needed.

Per the APA, the RRC does not review a rule under the 150B-21.9 standards until the rule is readopted.

If the RRC designates rules as "necessary" that the agency determined to be "unnecessary", the agency may still repeal those rules through the readoption process.

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Overview of the Process

- Step 1 – Agency Review
- Step 2 – RRC Review
- Step 3 – APO Review
- Readoption

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Readoption

RRC will set the readoption deadline date after consultation with the agency. This is the date by which the agency must readopt all necessary rules.

26 NCAC 05 .0212 provides the information required to be submitted to the RRC "within 60 days of receipt of the RRC's consultation request." The Rule requires every agency to submit a general timeline of when your agency intends to complete each step in the permanent rulemaking process and any rulemaking priorities the agency believes is relevant.

During the consultation about your readoption schedule, an email will be sent by RRC Counsel with a proposed readoption deadline. The 60-day clock will not start until the email is sent by RRC Counsel. The readoption deadline date will always be the first of the month. Consultation can be done informally over email, phone call, or both.

Does your agency require board or commission approval? 26 NCAC 05 .0212(b) gives your agency 10 days after the board or commission's next regularly scheduled meeting, after receipt of the RRC's consultation request, to submit the documentation described in (a)(1) and (a)(2).

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Readoption

There are several factors your agency should consider when setting the readoption deadline:

26 NCAC 05.0212(c)(2) requires agencies to file rules with the RRC within 30 days of adoption.

Whether your agency will need to prepare any fiscal notes as required by G.S. 150B-21.4.

Whether your agency will want to amend any rules after the public comment period and rulemaking hearing that may constitute a substantial change under 150B-21.2(g).

Plan accordingly for all rules to be readopted as close as possible to the agreed upon deadline date. The RRC may not be able to review and vote on your readopted rules before the date. Any agency that seeks to have their rules considered by RRC before their deadline date will be at the mercy of other agencies that have earlier dates.

Consider 150B-21.2(g) when spreading out your readoption timeline. Once you publish a rule in the Register, it starts the 1-year clock for adoption, or the publication expires.

The proposed readoption date will be presented to the RRC at a scheduled meeting.

The date is not official until the RRC has set the readoption date. A letter will be sent to your agency with the readoption deadline after the RRC approves it.

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Questions about Fiscal Notes

- We suggest discussing the fiscal note process with OSBM prior to agreeing to a readoption deadline date with RRC.
- Consider giving your agency at least 4 weeks built-in the readoption process after submitting the complete draft of a fiscal note to OSBM.
- An agency will violate RRC rules/deadlines if a fiscal note was never sought and the RRC determines it was required for a rule.
- 150B-21.4(a) State Funds- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes, it must submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office of State Budget and Management and obtain certification from the Office of State Budget and Management that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed are available to cover the expenditure or distribution required by the proposed rule change.

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Fiscal Notes

(b1) Substantial Economic Impact. — Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact…the agency shall prepare a fiscal note for the proposed rule change and have the note approved by the Office of State Budget and Management. The agency must also obtain from the Office a certification that the agency adhered to the regulatory principles set forth in G.S. 150B-19.1(a)(2), (5), and (6). The agency may request the Office of State Budget and Management to prepare the fiscal note only after, working with the Office, it has exhausted all resources, internal and external, to otherwise prepare the required fiscal note. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change shall prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management. If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management shall review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency shall ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact. Failure to prepare or obtain approval of the fiscal note as required by this subsection shall be a basis for objection to the rule under **G.S. 150B-21.9(a)(4)**.

(b2) Content. — A fiscal note required by subsection (b1) of this section must contain the following:**(1)** A description of the persons who would be affected by the proposed rule change.

(2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.

(3) A description of the purpose and benefits of the proposed rule change.

(4) An explanation of how the estimate of expenditures was computed.

(5) A description of at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected. The alternatives may have been identified by the agency or by members of the public.

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REINS ACT(S.L. 2025-82/HB 402)

LIMITATIONS ON RULES WITH SUBSTANTIAL FINANCIAL COSTS



The Act applies to all permanent rules, except for "rules required by federal law, including a rule or set of rules necessary to maintain compliance with a program delegated from a federal agency."



Agencies and the RRC must determine if permanent rules would have an "aggregate financial cost" "on all persons affected" of at least $20 million dollars in a five-year period.



The total must combine all types of economic impact to determine if the aggregate costs reach $20 million during the first five years following rule enactment. This includes direct and indirect costs across all impacted individuals, businesses, or organizations, but is "not inclusive of benefits".



The agency proposing the permanent rule will conduct a "substantial economic impact analysis" according to G.S. 150B-21.4(b1).

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"Substantial Economic Impact Analysis"

G.S. 150B-21.4(b1)

- "Substantial economic impact" means an aggregate financial impact on all persons affected of at least one million dollars ($1,000,000) in a 5-year period. In analyzing substantial economic impact, an agency shall do the following:
- **(1)** Determine and identify the appropriate time frame of the analysis.
- **(2)** Assess the baseline conditions against which the proposed rule is to be measured.
- **(3)** Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
- **(4)** Estimate any additional costs that would be created by implementation of the proposed rule by measuring the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.
- **(5)** For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

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REINS ACT Continued

If the "substantial economic impact analysis" confirms the $20 million threshold is met, the RRC must refer the rule for legislative ratification; otherwise, the rule may proceed through the normal review process.

G.S. 150B-21.9(a) requires two-thirds approval for rules expected to cost at least 1 million dollars over five years, and (b) requires unanimous approval for rules at or above 10 million dollars over five years.

G.S. 150B-21.9(a) and (b) says the vote counts are "of the board or commission members present and voting on the rule or set of rules."

OAH is considering adding a statement to Forms 0300 and 0400 for agencies to sign/endorse that the proposed permanent rule does/does not create a "substantial economic impact"; also, the Forms will list the monetary thresholds for agencies to check if met.

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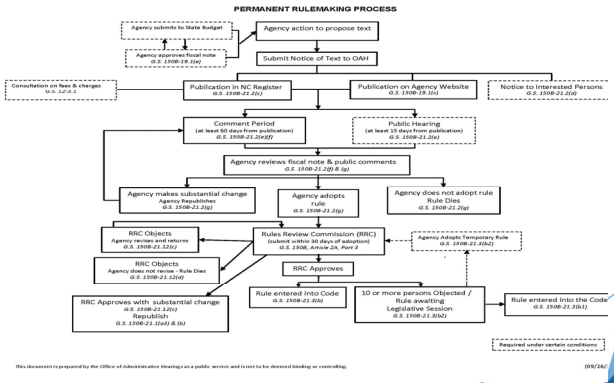
Once RRC has set the readoption date, you are now ready to begin the readoption process

- You will readopt each rule as if it were a new rule, following the permanent rulemaking process in the chart.



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Common Questions

- What has to be done by the readoption deadline?
  - *Your agency must adopt the final, post-comment, version of the rule.*
- When do readopted rules need to be filed with the RRC?
  - *Within thirty days of the final adoption (same as all rules under N.C.G.S. 150B-21.2(g)).*
- What will RRC review look like?
  - *Same as for any other rule, including an opportunity to update the rule in response to objections.*
- Can we readopt rules early?
  - *Please don't (especially for rulesets >50 rules.)*
- What if we need to make updates to individual rules before the readoption deadline?
  - *Go ahead.*
- Can we readopt related rules early if we make an amendment?
  - *Talk to staff before going forward with this plan.*

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Questions?

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