

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: Mining Commission

RULE CITATION: 15A NCAC 05A, 05B, 05F, 05G

RECOMMENDATION DATE: December 5, 2023

RECOMMENDED ACTION:

See Reports for specific staff recommendations.

COMMENT:

Staff has prepared determination reports containing staff's specific recommendations as to these rules. The periodic review process is different from the Commission's normal review and this staff opinion briefly summarizes the standards applicable to the RRC's role in the periodic review reports. The intent is not that every report will be accompanied by a staff opinion, but rather that we are entering into the periodic review period and a brief refresher may be of use to the Commission and the public.

Periodic review is governed by G.S. 150B 21.3A. Subsection (c)(1) directs the agency to prepare a report categorizing rules as necessary or unnecessary, take public comments on the report, and respond to those public comments.

Subsection (c)(2) directs the Commission to review these reports, make specific determinations related to public comment, and submit the final report to the Joint Legislative Administrative Procedure Oversight Committee. Effectively, there are two questions that the Commission must answer at this stage of the periodic review process.

First, has the agency submitted a report prepared pursuant to subsection (c)(1)? Implicit in section (c)(2) is a requirement that the Commission only review and forward reports prepared according to (c)(1). Here, it appears that the agency followed the requirements of subsection (c)(1) and the Commission can review the report.

Second, does a public comment on a rule which the agency has determined was unnecessary "address[] the specific substance of the rule"? Per the statute, if the answer is yes, the "public comment has merit" and the Commission shall "designate the rule as necessary." Notably, the statute does not direct the Commission to consider the agency's response to the public comment. Here, as reflected in the reports, it is staff's opinion that several rules which the agency determined were unnecessary received public comments that require the Commission to designate those rules as necessary in the report.

The statutory text of (c)(2) f. and g. direct the determinations made by the Commission in this report. Rules which the agency determined were unnecessary and received no public comments, or

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for which the Commission determines received no public comments which “address[] the specific substance of the rule” expire automatically. Rules that the agency determined were necessary or that the Commission designated as necessary are required to go through readoption. Staff’s recommendations as to those determinations are also reflected in the prepared reports.

The structure of this statute has several counterintuitive effects that are worth noting. First, the Commission does not review the agency’s determination that rules are necessary at this stage. As a result, a rule which the agency determined was necessary in periodic review may still be objectionable as unnecessary under G.S. 150B-21.9(a)(3). Per the APA, the Commission does not review a rule under the 21.9(a) standards until the rule is readopted.

Second, even if the agency determines that a rule is unnecessary for reasons that would render it objectionable under G.S. 150B-21.9(a)(3), a public comment addressing the specific substance of the rule will cause the Commission to designate a rule as necessary. Staff’s recommendation explicitly does not relate to the G.S. 150B-21.9 standards which will be applied at readoption. Here, there is a peculiar situation where the agency’s response to public comment indicates that the unnecessary rules duplicate statute, which if true means the rules would likely be objected to under G.S. 150B-21.9(a)(3) if they were not ultimately repealed. However, at this stage the APA requires the Commission to designate rules as necessary based solely on the existence of a public comment which “addresses the specific substance of the rule.”

To be clear, although staff is recommending that the Commission designate several rules as necessary, the agency is still free to repeal those rules through the readoption process. In fact, if the agency is correct that the rules do not meet the standards under G.S. 150B-21.9(a), the agency must repeal or rewrite these rules. The Commission’s designation in this circumstance would simply have the effect of requiring the agency to repeal through readoption rather than through periodic review.

§ 150B-21.3A. Periodic review and expiration of existing rules.

- (a) Definitions. – For purposes of this section, the following definitions apply:
- (1) Commission. – Means the Rules Review Commission.
 - (2) Committee. – Means the Joint Legislative Administrative Procedure Oversight Committee.
 - (2a) Necessary rule. – Means any rule other than an unnecessary rule.
 - (3), (4) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.
 - (5) Public comment. – Means 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, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.
 - (6) Unnecessary rule. – Means a rule that the agency determines to be obsolete, redundant, or otherwise not needed.
- (b) Automatic Expiration. – Except as provided in subsection (e) of this section, any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission pursuant to subsection (d) of this section.
- (c) Review Process. – Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:
- (1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is necessary or unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:
 - a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule. The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:
 - a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.

- d. A summary of the Commission's determinations regarding public comments.
 - e. Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.
 - f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.
 - g. A determination that all rules that the agency determined to be necessary or that the Commission designated as necessary shall be readopted as though the rules were new rules in accordance with this Article.
- (3) Step 3: The final determination report shall not become effective until the agency has consulted with the Committee. The determinations contained in the report pursuant to sub-subdivisions f. and g. of subdivision (2) of this subsection shall become effective on the date the report is reviewed by the Committee. If the Committee does not hold a meeting to hear the consultation required by this subdivision within 60 days of receipt of the final determination report, the consultation requirement is deemed satisfied, and the determinations contained in the report become effective on the 61st day following the date the Committee received the report. If the Committee disagrees with a determination regarding a specific rule contained in the report, the Committee may recommend that the General Assembly direct the agency to conduct a review of the specific rule in accordance with this section in the next year following the consultation.
- (d) Timetable. – The Commission shall establish a schedule for the review and readoption of existing rules in accordance with this section on a decennial basis as follows:
- (1) With regard to the review process, the Commission shall assign each Title of the Administrative Code a date by which the review required by this section must be completed. In establishing the schedule, the Commission shall consider the scope and complexity of rules subject to this section and the resources required to conduct the review required by this section. The Commission shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances. Except as provided in subsections (e) and (f) of this section, if the agency fails to conduct the review by the date set by the Commission, the rules contained in that Title which have not been reviewed will expire. The Commission shall report to the Committee any agency that fails to conduct the review. The Commission may exempt rules that have been adopted or amended within the previous 10 years from the review required by this section. However, any rule exempted on this basis must be reviewed in accordance with this section no more than 10 years following the last time the rule was amended.
 - (2) With regard to the readoption of rules as required by sub-subdivision (c)(2)g. of this section, once the final determination report becomes effective, the Commission shall establish a date by which the agency must readopt the rules. The Commission shall consult with the agency and shall consider the agency's rule-making priorities in establishing the readoption date. The agency may

amend a rule as part of the readoption process. If a rule is readopted without substantive change or if the rule is amended to impose a less stringent burden on regulated persons, the agency is not required to prepare a fiscal note as provided by G.S. 150B-21.4.

(e) Exclusions. – The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection. The following rules shall not expire as provided in this section:

- (1) Rules adopted to conform to or implement federal law.
- (2) Rules deemed by the Boards of Trustees established under G.S. 128-28 and G.S. 135-6 to protect inchoate or accrued rights of members of the Retirement Systems administered by the State Treasurer.

(e1) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.

(f) Other Reviews. – Notwithstanding any provision of this section, an agency may subject a rule that it determines to be unnecessary to review under this section at any time by notifying the Commission that it wishes to be placed on the schedule for the current year. The Commission may also subject a rule to review under this section at any time by notifying the agency that the rule has been placed on the schedule for the current year. (2013-413, s. 3(b); 2014-115, s. 17; 2014-120, s. 2; 2015-164, s. 7; 2015-286, s. 1.6(a); 2019-140, s. 3(a).)