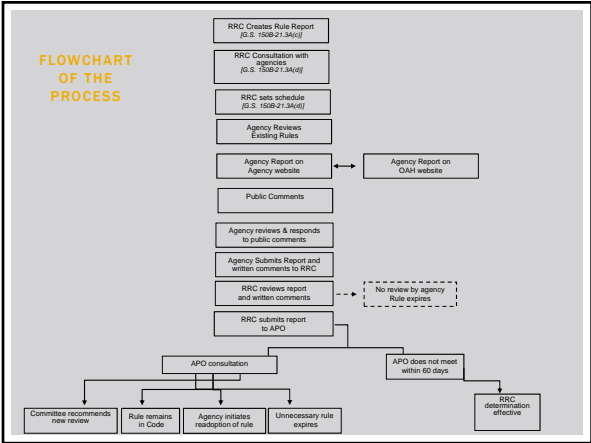


**G.S. 150B-21.3A:
PERIODIC REVIEW AND
EXPIRATION OF
EXISTING RULES**

**S.L. 2013-413
Part 1,
Section 3.(b)**



BACKGROUND AND OVERVIEW

- Until the 2013 legislative session, North Carolina's Administrative Procedure Act did not have expiration dates for rules.
 - There were previous efforts by the General Assembly and the Executive Branch to ensure agencies reviewed their rules and removed unnecessary ones, but there were no statutory consequences if the agency did not take action.
- Therefore, agencies have been able to keep rules that are out of date or unnecessary in the Code.
- G.S. 150B-21.3A will now require all rules adopted pursuant to G.S. 150B Article 2A be reviewed **every 10 years** to make sure the rules are still necessary and within the agency's authority and address programs that still exist.
- This review will be continuous and ensure that rules are current.

GLOSSARY

- "Agency" – the rulemaking agency adopting rules pursuant to G.S. 150B, Article 2A. The individual agency, board or commission must classify rules and respond to comments.
- "APA", "Chapter 150B" - The North Carolina Administrative Procedure Act established by G.S. 150B.
- "APO" – Administrative Procedure Oversight Committee at the General Assembly.
- "RRC", "Commission" - The Rules Review Commission as established by G.S. 143-30.1.
- "Existing Rules" - All rules the agency has currently in effect in the NC Administrative Code. This does not include repealed rules.

"PUBLIC COMMENT"

<p>Generally in the APA....</p> <ul style="list-style-type: none"> ■ In rulemaking under 150B, we generally refer to "public comment" as any comment received on the rule or the fiscal note, whether opposing or supporting the action. 	<p>For the purposes of this review...</p> <ul style="list-style-type: none"> ■ G.S. 150B-21.3A specifically defines "public comment" for the purposes of the review as "A written comment <u>objecting</u> to all or any part of the rule..." <p style="text-align: right; font-size: small;">[G.S. 150B-21.3(a)(5)]</p>
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WHO IS SUBJECT TO THE REVIEW?

- Agencies who are subject to Article 2A of Chapter 150B, the Administrative Procedure Act.
- This includes:
 - Many state agencies;
 - Many licensing boards; and
 - The Building Code.

Rule of thumb – if the agency is exempt from the review, it should know.

IF AN AGENCY DOES NOT CONDUCT THE REVIEW

- If an agency that is subject to the review does not conduct the review in the timeframe required by the Commission, then the rules will automatically expire and be removed from the Code.
 - G.S. 150B-21.3A(b)
- If a rule is required to implement or conform to federal law, then the rule will not expire. The Commission will report all rules that do not expire under this exception.
 - G.S. 150B-21.3A(d1)
- NOTE: The Commission will not know if the rule is required to implement or conform to a federal law unless the agency tells them this, so it is very possible that if the Commission does not hear anything from an agency, the rule will expire.

CATEGORIES OF RULES

- Necessary with Substantive Public Interest
- Necessary without Substantive Public Interest
- Unnecessary

NECESSARY WITH SUBSTANTIVE PUBLIC INTEREST

1. Any rule for which the agency has received public comments within the past two years; or
2. Any rule that affects the property interest of the regulated public and the agency knows or suspects any person may object to the rule.
 - "Property interest" is a broad term that includes ability to earn a living. Therefore, this can affect licenses for occupations, to operate facilities or the issuance of permits.

■ The intent behind this categorization is that the agency should know if it has rules that cause "grumbling" and categorize them as necessary with substantive public interest.

G.S. 150B-21.3A(a)(3)

NECESSARY WITHOUT SUBSTANTIVE PUBLIC INTEREST

- A rule for which the agency has not received a public comment concerning the rule within the past two years.
- The example in statute is “a rule that merely identifies information that is readily available to the public, such as an address or telephone number.”

G.S. 150B-21.3A(a)(4)

UNNECESSARY

- A rule that the agency determines to be obsolete, redundant, or otherwise not needed.

G.S. 150B-21.3A(a)(6)

STEP 1: AGENCY REVIEW

- The first step is review by the agency of all of its existing rules.
- The Rules Review Commission will supply every agency with a report that it must use in conducting the review.
 - The report presented to the agency will include the following information:
 - The agency name
 - All active rules by citation and name
 - The last action taken on the rule and the effective date of that action
 - The agency will receive the report and have a specified time to review it for accuracy.

STEP 1: AGENCY REVIEW (CONTINUED)

- The agency must review all rules listed in the report.
- The agency must classify each rule as:
 - Unnecessary;
 - Necessary without substantive public interest; or
 - Necessary with substantive public interest
- The agency must state whether the rule is necessary to implement or conform to federal law.
 - If so, the agency must submit the citation.
- The agency is required to post the report with the classifications on agency website and OAH website.
 - Must submit to OAH at least 5 business days before the comment period begins.
- The agency must accept public comment on the classification for at least 60 days from the date of posting.
 - G.S. 150B-21.3A(c)(1)

STEP 1: AGENCY REVIEW (CONTINUED)

- The public is invited to comment on the classifications.
 - The agency must notify all interested persons that the report is posted and open for public comment.
 - G.S. 150B-21.2(d)
- The agency must respond to every comment received.
 - Recall, comment in this statute means an **objection** to all or part of the rule.
 - Agency responses to the comments need to be **substantive** – not just pat “Thank you and we appreciate your insight.”
- In reviewing the comments, the agency may decide to change the designation.
 - If it does, then the agency will state the new designation on the report.
- The report, and all public comments received, will be forwarded to the Rules Review Commission.

SUMMARY OF THE AGENCY REPORT TO RRC

- The agency will insert the following information in the report for each rule:
 - The agency’s initial determination.
 - Whether the rule is required to implement or conform to federal law.
 - If so, the agency must provide a citation to the law.
 - Whether public comment was received.
 - A copy of every written statement (whether an objection or not) shall be included in the report.
 - The agency’s response to all comments that are objections.
 - The agency’s final determination of the rule following public comment.
- G.S. 150B-21.3A(c)(2)

STEP 2: RRC REVIEW AND DETERMINATION

- The Commission will review the report and all public comments received.
- If the public comment relates to a rule that the agency determined to be:
 - Necessary and without substantive public interest; or
 - Unnecessary
 Then the Commission shall determine whether the public comment has merit, using the standards of review set forth in G.S. 150B-21.9 and addresses the specific substance of the rule.
- If the Commission determines the comment has merit, then the Commission will designate the rule as necessary with substantive public interest.

RRC REVIEW (CONTINUED)

- The Commission shall prepare a final determination report and submit it to the APO for consultation.
- The Commission report will include everything submitted to it by the agency, and:
 - A summary of the Commission's determinations regarding the public comments for each rule.
 - A determination that all rules that the Commission agrees are necessary without substantive public interest will stay in effect without further action.
 - A determination that all rules that the Commission 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 Commission agrees or determines are necessary with substantive public interest must be readopted as if the rules are new rules.
 - All rules that are exempt from expiration pursuant to G.S. 150B-21.3A(d1).

150B-21.3A(c)(2)

STEP 3: APO REVIEW

- The Commission's determination does not become effective until the report is sent to the APO.
- The determinations become effective either:
 - The date the report is reviewed by the 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. As such, the agency needs to appear at the meeting (if any) to answer questions about its rules.
 - RRC will notify you when it sends the report.
 - It is not RRC's responsibility to alert you to APO meetings.
- Caveat: The APO may disagree with the determination of a rule. If so, it may recommend that the General Assembly direct the agency to conduct a review of the specific rule in accordance with G.S. 150B-21.3A(c)(3) within the next year.

WHAT THIS REALLY MEANS

- Rules that are designated as “necessary without substantive public interest” will stay in the Code as they are written.
 - Agencies are encouraged to amend the rules to update them as needed, but that will be done using the permanent rulemaking process within Article 2A of G.S. 150B.
- Rules that are designated as “unnecessary” will come out of the Code without further agency action.
- Rules that are designated as “necessary with substantive public interest” must be readopted as if they are new rules pursuant to G.S. 150B, Article 2A, using the permanent rulemaking process.

WHAT THIS DOES NOT MEAN

Assuming the agency conducts the review:

- An agency's rule will **not** come out of the Code unless the agency designated that rule as unnecessary and there is no public comment that has merit and disagrees with this designation.
- The RRC **cannot** determine a rule is unnecessary when an agency or the public says that it is needed.
- The RRC of its own motion **cannot** designate a rule as necessary without substantive public interest.
- The “worst” thing that can happen is that the rule will need to be readopted.
- The agency is **not** automatically required to re-adopt all rules.

COMMISSION AUTHORITY TO SET THE TIMETABLE FOR THIS REVIEW

- The Commission will establish the schedule to review all existing rules in accordance with the statute.
 - This will be done in Rule.
- The review shall take place on a decennial basis.
 - The first set of reviews will be completed within **five years** and reset to 10 years thereafter.
- In establishing the schedule, the Commission is required to consider the scope and complexity of the rules subject to the review and the resources required to conduct the review.
- The Commission has broad authority to modify the schedule and extend time for the review in appropriate circumstances.
- The Commission may exempt rules from the review if they have been adopted or amended within the last 10 years.
 - The Commission will only consider exemptions for entire Chapters, Subchapters or Sections of Rules.
 - It will **not** grant exemptions for individual rules scattered within the Code.

EXEMPTIONS FROM THE REVIEW

- G.S. 150B-21.3A(d) allows the Commission to exempt rules that have been adopted or amended in the previous ten years from the review.
 - However, any rule granted the exemption must be reviewed no more than ten years following the last rule action.
- The Commission will establish rules for granting this exemption.
 - The agency must request the exemption.
 - The agency must send notice of this request to interested persons and post notice on the agency website.
 - The Commission will hold a hearing on the matter.
 - The Commission will only consider requests when an entire Chapter, Subchapter or Section will qualify for the exemption.
 - There will not be exemptions granted for individual rules.

WHAT TO TAKE AWAY FROM THIS PRESENTATION

- Don't panic!
- If you work with a licensing board or agency, become better acquainted or re-acquainted with your rules in order to begin classification.
 - Do NOT begin writing your own report – it will be provided to you.
- The RRC will work with agencies to set the schedule, mindful of the agency's resources required to conduct the review.
- Be mindful of who the agency is in this review – it is the body with the rulemaking authority. The *agency* must classify and respond to all comments.
- This process is intended to ensure the Code has rules that are current and appropriate for the regulated public now.
- **Encourage the regulated public to participate in this process. Spread the word!**
