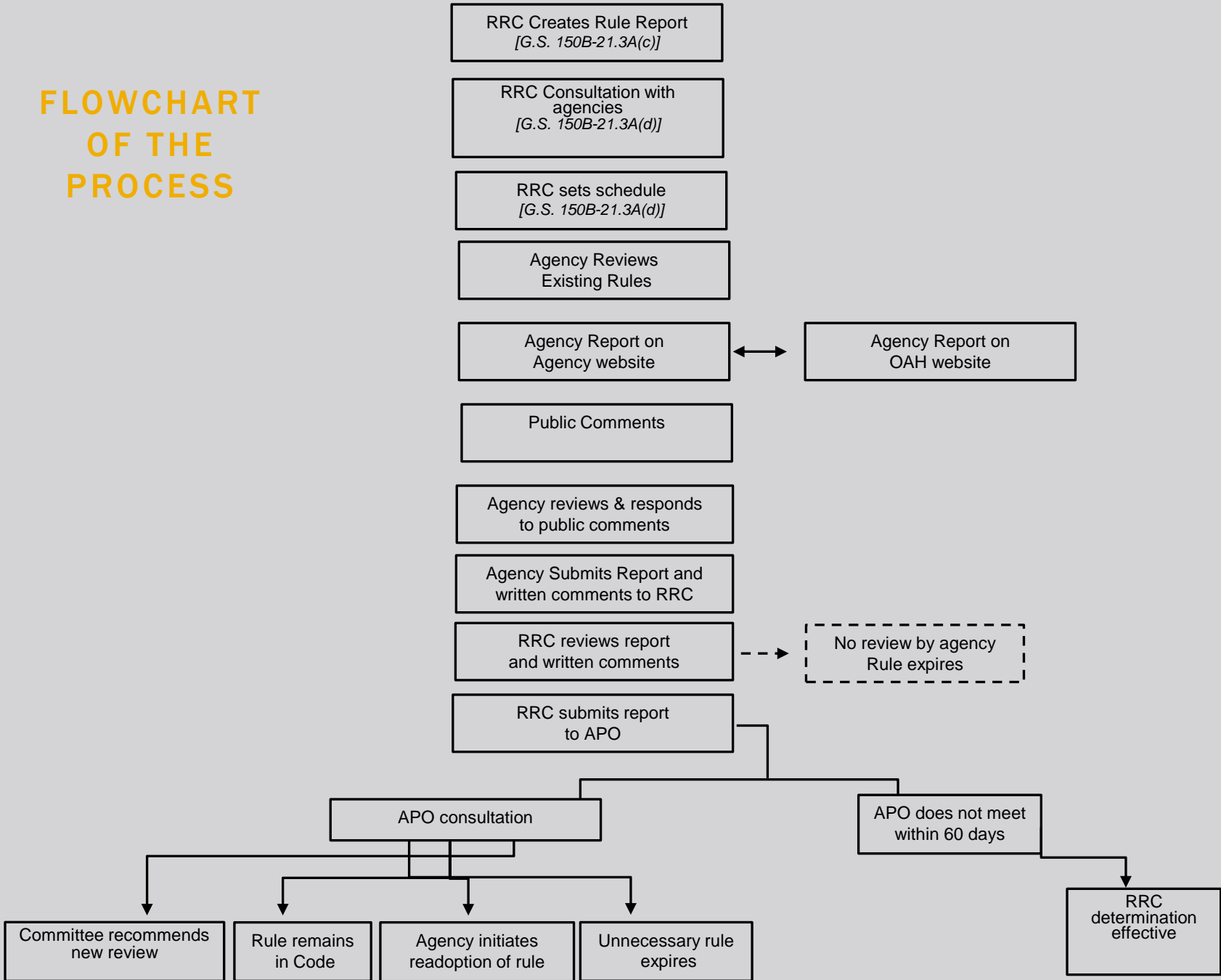


**G.S. 150B-21.3A:
PERIODIC REVIEW AND
EXPIRATION OF
EXISTING RULES**

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

FLOWCHART OF THE PROCESS



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- Therefore, agencies have been able to keep rules that are out of date or unnecessary in the Code.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 that 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 This does not include repealed rules.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”

Generally in the APA....

- 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.

For the purposes of this review...

- G.S. 150B-21.3A specifically defines “public comment” for the purposes of the review as “A written comment objecting to all or any part of the rule...”

[G.S. 150B-21.3(a)(5)]

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(e)
 - 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)

PROPOSED LEGISLATION AFFECTING THIS DETERMINATION

- In 2014, Senate Bill 734 proposed amending the definition of necessary with substantive public interest:

SECTION 1.1.(b) § 150B-21.3A. Periodic review and expiration of existing rules.

(a) Definitions. – For purposes of this section, the following definitions apply:...

(3) Necessary with substantive public interest. – Means any rule for which the agency has received public comments within the past two years. A rule is also "necessary with substantive public interest" if either or both of the following applies:

a. ~~the~~ The rule affects the property interest of the regulated public and the agency knows or suspects that any person may object to the rule.

b. The rule imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted.

SECTION 1.1.(c) Section 1.1(a) of this section becomes effective July 1, 2014, and applies to rules adopted or readopted on or after that date. Section 1.1(b) of this section becomes effective August 23, 2013, and applies to rules reviewed on or after that date.

- This language was removed in subsequent editions of the bill, which still has not been ratified. OAH staff is aware that the process is subject to change.

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 is supplying 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
 - Once the agency's rulemaking coordinator receives the report, he or she has 10 business days to review for accuracy and let staff know of any problems with the report. (26 NCAC 05 .0203(a))

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 is required to notify all interested persons that the report is posted and open for public comment.
G.S. 150B-21.2(d) and 26 NCAC 05 .0207(b).
- The agency must respond to comments received.
 - Recall, comment in this statute means an **objection** to all or part of the rule.
 - Agency responses to the comments within the report body. (26 NCAC 05 .0208(b))
- 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 Commission interprets the law to allow an agency to designate a rule as “necessary with substantive public interest” after comment period; it does not interpret the law to allow an agency to designate a rule published as “with” substantive public interest to be re-designated as “without” substantive public interest or unnecessary.
- The report, and all public comments received, will be forwarded to the Rules Review Commission.

AGENCY REPORTS THUS FAR

- As of June 30, 2014, 21 agencies have posted reports listing the initial determination for 1448 rules.
- Of those 1448 rules:
 - 705 have been designated as “necessary with substantive public interest”;
 - 586 have been designated as “necessary without substantive public interest”; and
 - 157 have been designated as “unnecessary.”
- OAH staff is aware of at least two agencies that did not conduct the review and post the initial determination on the OAH website. Those rules will expire and be removed from the Code, pursuant to G.S. 150B-21.3A(b).

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.
 - If comment was received, a copy of every comment 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) and 26 NCAC 05 .0206.

COMPLETED REPORT SUBMITTED BY AN AGENCY FOR RRC REVIEW

G.S. 150B-21.3A Report for 21 NCAC Chapter 37, BOARD OF NURSING HOME ADMINISTRATORS									
Agency - Board of Nursing Home Administrators									
Comment Period - April 4, 2014 - June 4, 2014									
Date Submitted to APD - 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]	Implements or Conforms 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)]
Copy all columns in this row to the right of this yellow cell and paste in new rows					Select One	Select One		Select One	Select One
SUBCHAPTER 37A - BOARD OF NURSING HOME ADMINISTRATORS	SECTION .0600 - EXAMINATION	21 NCAC 37A .0606	DISQUALIFICATION	Amended Eff. May 1, 1991	Unnecessary	No		No	Unnecessary
		21 NCAC 37A .0912	RECIPROCIITY/ENDORSEMENT	Transferred and Recodified .0912(a) to 21 NCAC 37E .0101, .0912(b) to 21 NCAC 37E .0102 and .0912(c) to 21 NCAC 37E .0103 Eff. April 1, 1996.	Unnecessary	No		No	Unnecessary
SUBCHAPTER 37B - DEPARTMENTAL RULES	SECTION .0100 - GENERAL PROVISIONS	21 NCAC 37B .0101	AUTHORITY: NAME & LOCATION OF BOARD	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0102	ELECTION OF OFFICERS	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0103	LICENSED ADMINISTRATOR REQUIRED	Eff. April 1, 1996	Necessary without substantive public interest	Yes If yes, include the citation to the federal law	42 C.F.R. 431.701; 42 C.F.R. 431.703	No	Necessary without substantive public interest
	SECTION .0200 - DEFINITIONS	21 NCAC 37B .0201	ADMINISTRATOR OF RECORD	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0202	LICENSE	Transferred and Recodified from 21 NCAC 37A .0909 Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0203	NATIONAL EXAM	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0204	PRACTICE OF NURSING HOME ADMINISTRATION	Transferred and Recodified from 21 NCAC 37A .0105 Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37B .0205	STATE EXAM	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
SUBCHAPTER 37C - RULEMAKING AND DECLARATORY RULINGS	SECTION .0100 - ADOPTION OF RULES	21 NCAC 37C .0101	PETITIONS FOR ADOPTION OF RULES	Amended Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37C .0102	PROCEDURE FOR ADOPTION OF RULES	Amended Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37C .0103	DECLARATORY RULINGS	Amended Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
SUBCHAPTER 37D - NEW LICENSES	SECTION .0100 - GENERAL	21 NCAC 37D .0101	OVERVIEW	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37D .0102	STEPS FOR NEW LICENSE APPLICANTS	Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
	SECTION .0200 - APPLICATION FOR LICENSE	21 NCAC 37D .0201	APPLICATION PACKAGE	Amended Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest
		21 NCAC 37D .0202	INITIAL LICENSURE FEE	Amended Eff. September 1, 2004	Necessary with substantive public interest	No		No	Necessary with substantive public interest
		21 NCAC 37D .0203	REFERENCES	Amended Eff. April 1, 1996	Necessary without substantive public interest	No		No	Necessary without substantive public interest

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.
 - G.S. 150B-21.3A(c)(2)

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)

SAMPLE REPORT FOLLOWING RRC REVIEW

G.S. 150B-21.3A Report for 21 NCAC Chapter 37, BOARD OF NURSING HOME ADMINISTRATORS

Agency - Board of Nursing Home Administrators

Comment Period - April 4, 2014 - June 4, 2014

Date Submitted to APO - Filled in by RRC staff

Subchapter	Rule Citation	Rule Name	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 37A - BOARD OF NURSING HOME ADMINISTRATORS	21 NCAC 37A .0606	DISQUALIFICATION	No	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	21 NCAC 37A .0912	RECIPROCITY/ENDORSEMENT	Yes	Unnecessary	One or more comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
SUBCHAPTER 37B - DEPARTMENTAL RULES	21 NCAC 37B .0101	AUTHORITY: NAME & LOCATION OF BOARD	No	Necessary without substantive public interest	No comments with merit	Necessary without substantive public interest and should remain in effect without further action	Keep in Code - Update History Note
	21 NCAC 37B .0102	ELECTION OF OFFICERS	No	Necessary without substantive public interest	Agency did not conduct the review	Select One	Rule expired - remove from Code

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 the agency when it sends the report.
 - It is not RRC's responsibility to alert the agency 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 free to amend the rules to update them, but that will be under 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, here is the reality of 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 ESTABLISH THE SCHEDULE FOR THIS REVIEW

- The Commission established the schedule to review all existing rules in accordance with the statute.
- 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 was 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.

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 adopted a rule for granting this exemption.
 - 26 NCAC 05 .0209.
 - No agency has requested an exemption at this time.

THE PROCESS AND PROGRESS THUS FAR

- In order to implement the process, the staff of the Office of Administrative Hearings held multiple information sessions for agency staff and the public.
- OAH staff regularly updated the General Assembly of its progress and unresolved issues affecting the review process.
- The Commission adopted **11** rules to implement the review.
 - Rules 26 NCAC 05 .0201 - .0210 set forth the process for agencies and the Commission in the review.
 - Rule 26 NCAC 05 .0211 establishes the schedule for review. The review is arranged by Title and Chapter or Subchapter.
 - The Commission will review reports for approximately 350 rules each month.
 - The Commission will review the first reports at its meeting on **July 17, 2014.**

UNRESOLVED ISSUES

- Currently, once an agency commits to readopt a rule, there is no deadline for the agency to do so.
 - OAH staff alerted the General Assembly of this concern.
- In this session, several bills have been introduced (H 1109, S 734 and 779) to give the RRC the authority to work with the agencies to set this readoption schedule.
 - As of June 30, 2014, none of the bills have been ratified.
- North Carolina requires fiscal notes for rules that affect state or local funds, or create a “substantial economic impact” (affecting \$1 million or more in private funds). Agencies have asked if readopting rules will require fiscal notes.
 - The bills referenced above state that a fiscal note is not required, so long as the agency is not making a substantive change to the rule.

QUESTIONS?



NO?



§ 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.
- (3) Necessary with substantive public interest. - Means any rule for which the agency has received public comments within the past two years. A rule is also "necessary with substantive public interest" if the rule affects the property interest of the regulated public and the agency knows or suspects that any person may object to the rule.
- (4) Necessary without substantive public interest. - Means a rule for which the agency has not received a public comment concerning the rule within the past two years. A "necessary without substantive public interest" rule includes a rule that merely identifies information that is readily available to the public, such as an address or a telephone number.
- (5) Public comment. - Means written comments objecting to the rule, in whole or in part, 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 (i) necessary with substantive public interest, (ii) necessary without substantive public interest, or (iii) 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 necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a). 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. A determination that all rules that the agency determined to be necessary and without substantive public interest and for which no public comment was received or for which the Commission determined that the public comment was without merit be allowed to remain in effect without further action.
 - 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 with substantive public interest or that the Commission designated as necessary with public interest as provided in this subdivision 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 subdivisions e., 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 of existing rules in accordance with this section on a decennial basis by assigning 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 subsection (e) 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 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.

(e) **Rules to Conform to or Implement Federal Law.** - Rules adopted to conform to or implement federal law shall not expire as provided by this section. The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection.

(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).)