


Rulemaking Authority: Canards, Conundrums & Conclusions

By Richard Whisnant
UNC School of Government
919.962.9320

School of Government richard_whisnant@unc.edu (919) 962-9320

Overview



Three canards.
Many conundrums...add your own!
A few conclusions...let's figure it out together.

School of Government richard_whisnant@unc.edu (919) 962-9320

Three canards

- ❖ Authority for rulemaking is rarely in question; more critical is question of "adequate guiding standards"
- ❖ Rules have the same power as statutes, *inter alia* binding the agency as well as persons outside the agency
- ❖ Rulemaking processes should be *consistent* from authorization to judicial review

School of Government richard_whisnant@unc.edu (919) 962-9320

Authority for rulemaking not a problem

- ❖ the key is “adequate guiding standards”.
Rulemaking is “filling interstitial gaps”



School of Government richard_whisnant@unc.edu (919) 962-9320

Conundrums

GS 150B-19(1) An agency may not adopt a rule that “(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to *do so*.”



School of Government richard_whisnant@unc.edu (919) 962-9320

Other 150B-19 bars: any rule that

- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission [without specific authority]...
- (4) Repeats the content of a law, a rule, or a federal regulation. ...
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following: [5 enumerated exceptions]
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific

School of Government richard_whisnant@unc.edu (919) 962-9320

More conundrums

- Judicial disbelief:
Halifax Smoking case.
A common law of
rulemaking?
- Rulemaking is often a
substitute for
legislative “hard calls”
-?



School of Government

richard_whisnant@unc.edu (919) 962-9320

Conclusions 1

- Can't count on general grants of authority in
NC
- Pay attention to statutory requirements
- No certain formula or magic language in
making specific grants of rulemaking authority
- General statements of legislative policy or
intent do count, especially in dealing with
powerful interest groups
-?

School of Government

richard_whisnant@unc.edu (919) 962-9320

Rules have the same power as statutes



- Among other things, they bind the agency just
as they bind persons outside the agency

School of Government

richard_whisnant@unc.edu (919) 962-9320

Conundrums

- Maybe not always, so much
-



School of Government richard_whisnant@unc.edu (919) 962-9320

Conclusions 2

- Rules do generally have the legal impact of statutes, but not always:
 - Judges (like legislators) will forever resist this conclusion if they dislike the rule.
 - If the outcome seems fair to a court, it will let an agency disregard its own rules.

School of Government richard_whisnant@unc.edu (919) 962-9320

Rulemaking (like all ad law processes) should be consistent



School of Government richard_whisnant@unc.edu (919) 962-9320

Conundrum: how about this

GS 150B-1 (c) Full Exemptions. - This Chapter applies to every agency except: **[list of 8 or so]**

(d) Exemptions from Rule Making. - Article 2A of this Chapter does not apply to the following: **[list of 26 or so]**

School of Government richard_whisnant@unc.edu (919) 962-9320

Or this:

§ 150B-19.3. **Limitation on certain environmental rules.**

(a) An agency authorized to implement and enforce State and federal environmental laws **may not adopt a rule for the protection of the environment or natural resources that 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, unless adoption of the rule is required by one of the subdivisions of this subsection. A rule required by one of the following subdivisions of this subsection shall be subject to the provisions of G.S. 150B-21.3(b1) as if the rule received written objections from 10 or more persons under G.S. 150B-21.3(b2):....

School of Government richard_whisnant@unc.edu (919) 962-9320

Or this:

S.L. 2014-4

PART II. EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE ACT

....

SECTION 2.(e) G.S. 150B-19.3 shall not apply to rules adopted by the Mining and Energy Commission, the Environmental Management Commission, the Sedimentation Control Commission, and the Commission for Public Health for the management of oil and gas exploration, development, and production activities in the State, including the use of horizontal drilling and hydraulic fracturing for that purpose.

School of Government richard_whisnant@unc.edu (919) 962-9320

Or this:

§ 130A-309.207. General rule making for Part [Coal Ash rules].

The Environmental Management Commission shall adopt rules as necessary to implement the provisions of the Part. **Such rules shall be exempt from the requirements of G.S. 150B-19.3.** (2014-122, s. 3(a).)

School of Government

richard_whisnant@unc.edu (919) 962-9320

Or this:

- **H765 (2015) SECTION 54.(c)** The Environmental Management Commission shall adopt rules to amend 15A NCAC 02H .1300 through 15A NCAC 02H .1305 consistent with Section 54(b) of this act. Notwithstanding G.S. 150B-19(4), **the rule adopted by the Commission pursuant to this subsection shall be substantively identical to the provisions of Section 54(b) of this act.** Rules adopted pursuant to this subsection are not subject to Part 3 of Article 2A of Chapter 150B of the General Statutes. Rules adopted pursuant to this subsection shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

School of Government

richard_whisnant@unc.edu (919) 962-9320

Conundrum: there has never been consistency in NC rulemaking

- Consider the exemptions
- The inconsistencies get bigger every year
- Who cares about process consistency?
- Judges tend to make distinctions into meaningful differences

School of Government

richard_whisnant@unc.edu (919) 962-9320

Other conundrums (conundra?)

-



School of Government richard_whisnant@unc.edu (919) 962-9320

Conclusions 3

- Consistency is not the holy grail in NC rulemaking authority
- **Fidelity** (to legislative intent for agencies) would be a better holy grail
- Courts should be urged to give meaning to process differences in rulemaking
-



School of Government richard_whisnant@unc.edu (919) 962-9320

How detailed is "adequate" when it comes to guiding standards?



Traditional view



Ok if and only if adequate guiding process

School of Government richard_whisnant@unc.edu (919) 962-9320

Contact me:

Richard Whisnant
UNC School of Government
919.962.9320
richard_whisnant@unc.edu

Blog: elinc.sog.unc.edu
"elinc"="environmental law in context"

School of Government

richard_whisnant@unc.edu (919) 962-9320
