

Burgos, Alexander N

From: Everett, Jennifer
Sent: Monday, December 4, 2023 6:53 PM
To: Liebman, Brian R
Cc: Rules, Oah; Burgos, Alexander N; Snyder, Ashley B; Montie, Jessica
Subject: Periodic Review Schedule
Attachments: DEQ comments to RRC proposed rules_20230320.pdf

Hi Brian,

During the 2023 RRC's public comment period for its proposed rule amendments, DEQ submitted comments (attached). Specifically, our comment on 26 NCAC 05 .0211, we requested that the sections in 15A NCAC 13B which were split out with different deadlines be moved to all line up with the same deadline. The RRC did just that, thankfully, however it appears that 15A NCAC 13B .1500 was removed altogether and is no longer scheduled. We would like 13B .1500 be placed with the rest of the 13B rules which are due April 2027 but as a stand-alone item since these are under the Department's authority and not the EMC.

Also, please note that Sections .0700, .0900, .1000, and .1300 for 13B which appear on the schedule for April 2027 were repealed or expired several years ago.

Let me know if you have any questions.

Thanks.

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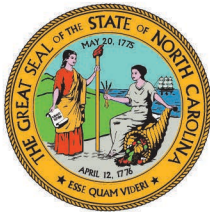
Governor

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NORTH CAROLINA
Environmental Quality

March 20, 2023

VIA E-MAIL (brian.liebman@oah.nc.gov)

Brian Liebman,
North Carolina Rules Review Commission
171 New Hope Church Rd.
Raleigh, NC 27609

RE: DEQ's comments on proposed RRC rules

Dear Mr. Liebman:

The Department of Environmental Quality (DEQ) has reviewed the Rules Review Commission's (RRC) proposed rule changes in sections 26 NCAC 05 .0100 and .0200. We respectfully submit the following comments:

26 NCAC 05 .0101 DEFINITIONS

Throughout the proposed rules, the terms "commission counsel" and "RRC staff" are used. The difference between these terms is unclear. DEQ recommends defining these terms in the rules.

In (6)(b)(v), if the term "catchline" refers to the title of the rule, the term "catchline" should be deleted.

26 NCAC 05 .0105 REQUIRED NOTICE PRIOR TO ORAL RRC PRESENTATION

DEQ recommends adding a comma in Paragraph (a) after "rule" to clarify that the reference to "Rule .0206 of this Chapter" refers only to the "report" and not "a rule." Without this comma, the sentence is confusing and if applied strictly could be used to prohibit an agency or person from making oral statements in support of or in opposition to a rule, since Rule .0206 does not address this.

26 NCAC 05 .0107 WITHDRAWAL OR AMENDMENT OF RULES AFTER FILING WITH RRC

DEQ objects to the proposed rule changes. The intent of the proposed changes appears to be requirements of the rule readoption process otherwise set forth in Section 26 NCAC 05 .0200. If so, the proposed changes could diminish the public process for other rulemaking actions under the Administrative Procedure Act by: 1) preventing an agency from withdrawing a rule to address public comments received after submission to the RRC (including oral presentations to the RRC), and 2) unnecessarily lengthening the process, particularly when a simple error or omission has occurred in the proposed rule content or rulemaking process



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and is discovered after submission to the RRC. Under the proposed rule, an agency that learns of a defect either on its own or after consulting with RRC staff has no alternative but to proceed with the review and receive an objection from the RRC. This process is decidedly less efficient with respect to both the agency's resources and the RRC's time. DEQ recommends leaving this rule as is other than to add a statement that requirements for withdrawal or amendment of rules proposed for re-adoption shall prevail. Such requirements could be proposed in a new rule in Section .0200.

26 NCAC 05 .0109 COMMUNICATIONS WITH RRC STAFF

DEQ objects to the proposed repeal of this rule. The proposed repeal appears to discourage agency communication with RRC staff. This rule should be preserved to allow communication with RRC staff during regular business hours.

26 NCAC 05 .0114 RRC RULE APPROVAL CONTINGENT ON TECHNICAL CHANGE

The APA does not provide authority for approval of a rule to be contingent on making all technical changes requested by RRC staff. DEQ recommends changing Paragraph (a) to read "When the Commission approves a rule, the approval is contingent on an agency's making all ~~requested technical changes~~. changes requested by the Commission."

26 NCAC 05 .0115 EXTENSIONS OF TIME

DEQ does not object to the proposed adoption of this rule for requirements pertaining to an agency making a request to extend the period for review of rules by the RRC; however, there are two components of the rule with which DEQ has concerns. First, the title of the rule is ambiguous and could be made clearer as "REQUESTS TO EXTEND THE PERIOD FOR RULE REVIEW"; this title matches the corresponding requirements in N.C.G.S. § 150B-21.10(3). Second, proposed changes to Rule .0115 appear to conflict with requirements in Rule .0108, SUBMISSION OF REWRITTEN RULES OR RULES WITH TECHNICAL CHANGES. Specifically, Paragraph (c) of Rule .0108 requires all rules containing technical changes be submitted to the RRC staff by the earlier of 5 p.m. 10 business days after RRC staff submits the request to the agency or 5 p.m. of the Friday before the RRC meeting, the latter of which addresses the situation when the RRC staff submits the technical change request to an agency less than 10 business days before a RRC meeting. The proposed changes to Rule .0115 restrict the period for submitting responses to the request for technical changes to no later than 10 business days prior to a RRC meeting, precluding the ability for an agency to submit responses by 5 p.m. of the Friday before the RRC meeting when the RRC staff made a request less than 10 business days before a commission meeting. DEQ recommends the pertinent proposed language in Rule .0115 instead refer to the requirements already set forth in Rule .0108, with conforming changes as needed.

26 NCAC 05 .0201 SCOPE

DEQ recommends retaining this rule, or otherwise clarifying the scope of Section 26 NCAC .0200.

26 NCAC 05 .0202 DEFINITIONS



DEQ objects to the definition of "existing rules" to mean rules currently in the Code as of January 1, 2024. As an example, the readoption deadline for the Marine Fisheries Commission's (MFC) rules in 15A NCAC 18A is not until June 30, 2024. As such, the readoption requirements will not have been completed for 79 of the MFC's rules as of January 1, 2024. Of these, 23 MFC rules are being proposed for repeal but will not be effective by the proposed control date. As a result, 23 MFC rules will be subject to the reporting requirements under the second iteration of the requirements in N.C.G.S. § 150B-21.3A, Periodic Review and Expiration of Existing Rules, but will be repealed by the time the public comment period for the report is held. This would result in unnecessary burden on the agency and confusion for regulated stakeholders while potentially undermining the effectiveness of the periodic review. DEQ recommends the proposed date be the date immediately following the last rule readoption deadline for the Code from the first iteration of the periodic review requirements.

26 NCAC 05 .0204 EXTENSION OF TIME

DEQ recommends three additions to the existing text of the rule. First is the addition to Subparagraph (a)(5) for arguments by members of the public "for or" against a delay in an agency's meeting the stated filing deadlines, to be consistent with the same addition proposed by the RRC to Rule .0205(c)(3) for requests for an earlier review. It is reasonable to provide for consideration of adjusting a deadline to occur earlier or later, not just earlier. Second is the addition of an email address for RRC staff to Paragraph (d), for clarity to the regulated public and for consistency with other commission rules that set requirements for submitting comments by email, i.e., "and to the RRC staff at oah.rules@oah.nc.gov". Finally, in Paragraph (d) DEQ recommends insertion of "the agency rulemaking coordinator."

26 NCAC 05 .0211 SCHEDULE

DEQ notes that the proposed scheduling for 15A NCAC 13B splits these rules into three different sections with three different due dates (January, April, and May 2027). Although 13B .1500 will be in a separate report because these rules are under DEQ's authority instead of the EMC. However, DEQ urges all these rules in Subchapter 13B be placed under the same deadline to avoid confusion.

26 NCAC 05 .0212 READOPTIONS

DEQ generally does not object to the components of the rule that attempt to clarify expectations for all parties for establishing a readoption date pursuant to N.C.G.S. § 150B-21.3A(d)(2), including the requirement in Subparagraph (a)(2) for the agency's rulemaking priorities, which the statute contemplates; however, the proposed period of "within 60 days" for an agency to submit to the RRC the required documentation does not accommodate boards or commissions that meet only quarterly. DEQ recommends either a longer period of "within 120 days" or the addition of a statement like that found in N.C.G.S. § 150B-21.12(b): "or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later" so that all agencies can comply. Additionally, DEQ objects to the inclusion of the "planned dates for all steps required by G.S. 150B-21.2" for the permanent rulemaking process for what constitutes "written documentation of the agency's planned timeline for readoption." Agencies are required to comply with the requirements of the APA; reporting to the RRC a set of planned internal deadlines creates an unnecessary burden on



agencies, yields dates that will likely change, and does not appear to add any value for agencies, the regulated public, or the RRC and its staff.

Thank you for the opportunity to provide these comments.

Sincerely,

Bill Lane

William F. Lane
Deputy Secretary/General Counsel



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