

**G.S. 150B-21.3A Report for 15A NCAC Subchapter 01N, Drinking Water State Revolving Fund Rules**

Agency - Environmental Quality, Department of

Comment Period - September 18, 2015 - November 30, 2015

Date Submitted to APO - 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]	Required to Implement or Conform 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)]
SUBCHAPTER 01N - DRINKING WATER STATE REVOLVING FUND RULES	SECTION .0100 - GENERAL PROVISIONS	15A NCAC 01N .0101	PURPOSE	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0102	DEFINITIONS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0103	APPLICABLE PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
	SECTION .0200 - AVAILABILITY OF LOANS	15A NCAC 01N .0201	AVAILABILITY OF LOANS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0202	LOANS RESTRICTIONS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0203	ADMINISTRATIVE EXPENSES	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
	SECTION .0300 - ELIGIBILITY REQUIREMENTS	15A NCAC 01N .0301	DETERMINATION OF ELIGIBILITY	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0302	ELIGIBLE PROJECTS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0303	ELIGIBLE PROJECT COSTS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
	SECTION .0400 - APPLICATIONS	15A NCAC 01N .0401	FILING DEADLINES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0402	APPLICATION PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
	SECTION .0500 - REVIEW AND ASSIGNMENT OF PRIORITIES	15A NCAC 01N .0501	PRIORITY REVIEW PERIOD	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0502	ASSIGNMENT OF PRIORITIES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0503	INTENDED USE PLAN	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary

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	<b>SECTION .0700 - AWARD, COMMITMENT AND DISBURSEMENT OF LOANS</b>	15A NCAC 01N .0701	DETERMINATION OF AWARDS AND BYPASS PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0702	CERTIFICATION OF ELIGIBILITY	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0703	CRITERIA FOR LOAN ADJUSTMENTS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0704	DISBURSEMENT OF LOANS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0705	TERMINATION OF LOANS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
	<b>SECTION .0800 - LOAN REPAYMENTS</b>	15A NCAC 01N .0801	INTEREST RATES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0802	REPAYMENT OF PRINCIPAL AND INTEREST	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the	33 USC 1381-1388	Yes	Unnecessary
	<b>SECTION .0900 - INSPECTION AND AUDIT OF PROJECTS</b>	15A NCAC 01N .0901	INSPECTION	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary
		15A NCAC 01N .0902	AUDIT	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary

# SOUTHERN ENVIRONMENTAL LAW CENTER

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November 30, 2015

Jennifer Everett  
DEQ Rule Comments  
1601 Mail Service Center  
Raleigh, NC 27699

RE: Initial Determination that Every Rule in 15A N.C. Admin. Code 01N is “Unnecessary”

Dear Ms. Everett,

The Southern Environmental Law Center submits these comments on behalf of the North Carolina Conservation Network in response to the initial determination by the North Carolina Department of Environmental Quality (“DEQ”) that all of the rules in Subchapter 01N of Chapter 15A of the North Carolina Administrative Code (“DWSRF Rules” or “the Rules”) are “unnecessary.” We appreciate the opportunity to participate in the rules review process,<sup>1</sup> and write to urge DEQ to reconsider its conclusion that rules governing access to, and the administration of, a fund containing millions of tax dollars (including federal funds and state matching funds), are “obsolete, redundant, or otherwise not needed.”<sup>2</sup>

## **I. The Rules Were Adopted to Implement and Conform to the Safe Drinking Water Act**

The necessity of the Rules is strongly suggested by the motivation for their adoption. The Rules were adopted to govern the administration of a revolving loan fund, the creation of which was a prerequisite to the receipt of federal funding for drinking water infrastructure projects. The 1996 amendments to the federal Safe Drinking Water Act (“SDWA”) authorized the U.S. Environmental Protection Agency to make capitalization grants to states to enable the provision of financial assistance to public water systems for infrastructure improvements.<sup>3</sup> To be eligible for this federal funding under the SDWA, states were required to establish a “drinking water treatment revolving loan fund.”<sup>4</sup> Accordingly,

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<sup>1</sup> Pursuant to statute, the agency has invited “the public to comment on the rules and the agency's initial determination.” N.C. Gen. Stat. § 150B-21.3A(c)(1).

<sup>2</sup> *Id.* § 150B-21.3A(a)(6).

<sup>3</sup> *See* 42 U.S.C. § 300j-12(a)(1)(A).

<sup>4</sup> 42 U.S.C. § 300j-12(a)(1)(B).

the North Carolina General Assembly established the Drinking Water State Revolving Fund (“the Fund”).<sup>5</sup> The Fund has been capitalized since 1997.<sup>6</sup>

However, eligibility for federal funding under the SDWA was not ensured simply by establishing the Fund. Rather, eligibility depends on compliance with additional requirements of the SDWA and its implementing regulations.<sup>7</sup> The DWSRF Rules govern loans to public water systems made from the Fund and are an important means of ensuring the requisite compliance.<sup>8</sup> The Rules ensure conformity with federal requirements by both the Division of Water Infrastructure (“Division”), which administers loans made from the Fund,<sup>9</sup> and applicants for loans from the Fund. The Rules also implement federal law by clarifying, elaborating upon, and providing for compliance with various SDWA requirements.

Notably, DEQ concedes that the Rules were adopted to implement or conform to federal law.<sup>10</sup> This is particularly important in the context of the review of existing rules commanded by G.S. 150B-21.3A. Pursuant to that statute, rules deemed “unnecessary” will expire unless “adopted to conform to or implement federal law.”<sup>11</sup> Because the DWSRF Rules were adopted to implement or conform to federal law, they are exempt from automatic expiration. This fact draws into question the agency’s decision to label them “unnecessary” nonetheless. If the agency wishes to repeal these rules, it must undergo notice

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<sup>5</sup> N.C. Gen. Stat. § 159G-22(c) (“The [NC DWSRF] is established under and must be managed in accordance with section 130 of Title 1 of the federal Safe Drinking Water Act of 1996 as amended, 42 U.S.C. § 300J-12, to achieve the purposes of that act.”). The Fund “receives federal funds for public water systems and the State funds required to match the federal funds.” N.C. Gen. Stat. § 159G-22(c).

<sup>6</sup> Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), *available at* [http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015\\_03\\_26](http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015_03_26)

<sup>7</sup> 42 U.S.C. § 300j-12(a)(1)(B) (“To be eligible to receive a capitalization grant under this section, a State shall establish a drinking water treatment revolving loan fund . . . and comply with the other requirements of this Section.”) (emphasis added); *see also* 40 C.F.R. § 35.3510 (“To be eligible to receive a capitalization grant, a State must establish a Fund and comply with the other requirements of section 1452 of the [SDWA] and this subpart.”).

<sup>8</sup> 15A N.C. Admin. Code 01N .0101.

<sup>9</sup> “The Department of Environmental Quality, through the Division of Water Infrastructure, administers loans and grants made from the Drinking Water State Revolving Fund.” N.C. Gen. Stat. § 159G-30.

<sup>10</sup> Despite opining that the rules are all “unnecessary,” the agency notes in its initial determinations that each of the Rules “Implements or Conforms to Federal Regulation.” *See* DEQ, G.S. 150B-21.3A Report for 15A NCAC Subchapter 01N, Drinking Water State Revolving Fund Rules (2015), *available at* [http://portal.ncdenr.org/web/ogc/rules-review/subchapter?json=/c/document\\_library/get\\_file?p\\_1\\_id=1169848&folderId=21310265&name=DLFE-117258.js](http://portal.ncdenr.org/web/ogc/rules-review/subchapter?json=/c/document_library/get_file?p_1_id=1169848&folderId=21310265&name=DLFE-117258.js); *see also* DEQ, *Drinking Water State Revolving Fund (DWSRF) Overview*, <http://portal.ncdenr.org/web/wi/drinkingwater/srf> (last visited Nov. 30, 2015) (“15A NCAC 01N implements the DWSRF in North Carolina.”).

<sup>11</sup> *See* N.C. Gen. Stat. § 150B-21.3A.

and comment rulemaking pursuant to the N.C. Administrative Procedures Act.<sup>12</sup> It cannot, under the guise of rules review, simply strike an entire body of rules established to ensure compliance with federal law.

Moreover, we question the agency's underlying conclusion that rules adopted to implement or conform to federal law are "obsolete, redundant, or otherwise not needed."<sup>13</sup> As explained below, the continued utility of the DWSRF Rules further counsels against labeling them "unnecessary." Because the Rules are critical to the operation of the Fund and have met with no public objection, we encourage the agency to label them as "necessary without substantive public interest."<sup>14</sup>

## **II. The Rules Are Not Obsolete**

Rules ensuring the effective management and continued viability of the Fund are not obsolete. Because the Rules primarily address access to, and the conditions of, loans made from the Fund, any contention that they are obsolete is belied by the continued and anticipated provision of financial assistance through the Fund.

The Fund is the largest source of financing for drinking water infrastructure projects in North Carolina. The loan program offered under the Fund accounts for almost half of the annual disbursements from the Water Infrastructure Fund; in fiscal year 2013-2014, 46.35% of the funds awarded from the Water Infrastructure Fund came from the DWSRF.<sup>15</sup> There is no indication that allocations to the Fund or reliance by public water systems on loans from the Fund will decrease in coming years. According to the 2015 Intended Use Plan (IUP), the Fund received 2.34% of the latest national appropriation.<sup>16</sup> In

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<sup>12</sup> See N.C. Gen. Stat. § 150B-18 ("A rule is not valid unless it is adopted in substantial compliance with this Article."); see also 150B-2(8a) (defining "rule" to include the repeal of a rule).

<sup>13</sup> N.C. Gen. Stat. § 150B-21.3A(a)(6) (defining "unnecessary").

<sup>14</sup> Labeling the rules "necessary without substantive public interest" would have a similar effect as labeling them "unnecessary." Compare N.C. Gen. Stat. § 150B-21.3A(c)(2) (providing that rules deemed "necessary without substantive public interest" and for which no public comment was received will remain in effect without further action") with *id.* § 150B-21.3A(e) ("Rules adopted to conform to or implement federal law shall not expire as provided by this section."). However, by labeling the rules "unnecessary" despite the motivation for their adoption, the agency would obligate itself to submit a report regarding the Rules each year to the Joint Legislative Administrative Procedure Oversight Committee. *Id.* § 150B-21.3A(e).

<sup>15</sup> DEQ, Division of Water Infrastructure, *Fiscal Year 2013-2014* (Sept. 20, 2014).

<sup>16</sup> DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015), available at [http://portal.ncdenr.org/c/document\\_library/get\\_file?uuid=8efbd789-5dfe-4c27-859e-363402f3aaef&groupId=14655572](http://portal.ncdenr.org/c/document_library/get_file?uuid=8efbd789-5dfe-4c27-859e-363402f3aaef&groupId=14655572). According to the Director of the Division, the State typically receives "+/- 2.4%" of the allocations available to the States. Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), available at <http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015>

addition, there has been a recent increase in the amount of financial assistance provided to public water systems from the Fund. In fiscal year 2007-08, a total of \$33,233,880 was appropriated to the DWSRF by the federal and state governments.<sup>17</sup> In contrast, the State plans to lend \$292,285,725 for drinking water infrastructure projects during the current funding cycle.<sup>18</sup> In fiscal year 2013-2014 alone, the DWSRF offered loan funding totaling \$104,713,919.<sup>19</sup>

The growing need for financing for drinking water infrastructure further underscores the need for the Rules. The most recent survey of drinking water needs identified infrastructure needs in North Carolina totaling \$10 billion.<sup>20</sup> The high demand for improvements to North Carolina's drinking water supply infrastructure suggests the DWSRF Rules are needed now more than ever.<sup>21</sup> Yet according to DEQ, infrastructure financing from the DWSRF "has only met a small percentage of the drinking water infrastructure need for public water supply systems in North Carolina."<sup>22</sup> The Rules will only increase in importance and use if, as suggested by the General Assembly's Program Evaluation Division, the State commits to "using state loan programs and relying less on grants when determining state appropriations for water and wastewater infrastructure."<sup>23</sup>

### **III. The Rules Are Not Redundant**

Rules specific to the governance of North Carolina's DWSRF are not redundant. As noted above, and explicitly stated by the General Assembly, the Fund must be managed in compliance with federal

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03 26 These allocations are made pursuant to "a formula that reflects the infrastructure needs of public water systems identified in the most recent Needs Survey submitted in accordance with section 1452(h) of the [SDWA]." 40 C.F.R. § 35.3515.

<sup>17</sup> N.C. General Assembly, Program Evaluation Division, North Carolina's Water and Wastewater Infrastructure Funding Lacks Strategic Focus and Coordination 6 (Jan. 27, 2009).

<sup>18</sup> DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015).

<sup>19</sup> DEQ, Division of Water Infrastructure, *Annual Reports, Fiscal Year 2013-2014* 3 (Sept. 20, 2014).

<sup>20</sup> Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), available at

[http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015\\_03\\_26](http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015_03_26) ;

<sup>21</sup> See NC State Water Infrastructure Commission, 2010 Annual Report (Dec. 15, 2010) ("The NC Rural Economic Development Center's Water 2030 Report estimated that over \$16,000,000,000 needed to be invested in North Carolina's drinking water, wastewater and stormwater systems between 2010 and 2030.").

<sup>22</sup> DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015).

<sup>23</sup> N.C. General Assembly, Program Evaluation Division, North Carolina's Water and Wastewater Infrastructure Funding Lacks Strategic Focus and Coordination (Jan. 27, 2009).

law.<sup>24</sup> However, the General Assembly also recognized that neither existing State nor federal law speaks fully to the specific governance of the Fund. Thus, pursuant to N.C. Gen.Stat. § 159G-35, DEQ was “directed to establish through negotiation with the United States Environmental Protection Agency the criteria for evaluating applications for loans and grants from the . . . DWSRF and the priority assigned to the criteria.”<sup>25</sup> The negotiated criteria and priorities must then be incorporated into a “Capitalization Grant Operating Agreement between the Department and the United States Environmental Protection Agency.”<sup>26</sup> Although State rules are incorporated into the Operating Agreement,<sup>27</sup> and the Agreement is the “principal instrument by which the State commits to manage the DWSRF program in accordance with federal law,”<sup>28</sup> the Agreement itself is not enforceable against third parties, such as loan applicants.<sup>29</sup> Under the North Carolina Administrative Procedures Act, “an agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement” that meets the definition of a rule unless the policy, guideline, or interpretive statement has been adopted as a rule in accordance with the Act.<sup>30</sup> As such, the DWSRF rules are necessary to ensure that the commitments made to the US EPA in the Operating Agreement are enforceable by the State of North Carolina.

#### **IV. The Rules Are Not “Otherwise Not Needed”**

Since the Rules are neither obsolete nor redundant, it is difficult, given the lack of any explanation provided by the agency, to speculate as to why, the agency may nonetheless view them as “otherwise not needed.” However, it bears mention that the creation of the State Water Infrastructure Authority (“SWIA”) does not render the Rules unnecessary. The SWIA was created in 2013 and empowered to, *inter alia*, “establish priorities for making loans and grants,” rank grant and loan applications, and “select the applications that are eligible to receive grants and loans.”<sup>31</sup> However, the

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<sup>24</sup> See, e.g., N.C. Gen. Stat. § 159G-36(a) (“Federal law governs loans and grants from the CWSRF and the DWSRF. An award of a loan or grant from one of these accounts must be consistent with federal law.”); N.C. Gen. Stat. 159G-32(a) (“Federal law determines whether a project is eligible for a loan or grant from the CWSRF and the DWSRF. A project must meet the eligibility requirements set under federal law.”).

<sup>25</sup> N.C. Gen. Stat. § 159G-35(a).

<sup>26</sup> *Id.*

<sup>27</sup> NC DENR, DWR, Public Water Supply Section, Drinking Water State Revolving Loan Fund Operating Agreement with U.S. Environmental Protection Agency Region IV, § C (July 18, 2013) (“To the extent possible, detailed information concerning State laws, rules and procedures of either NCDENR or the PWS Section will be incorporated.”).

<sup>28</sup> 40 C.F.R. § 35.3545.

<sup>29</sup> Although the State may legally bind itself to the terms of the Agreement, 40 C.F.R. § 35.3545(d)(1), it cannot enforce the agreement against third parties.

<sup>30</sup> N.C. Gen. Stat. § 150B-18; see also *id.* § 150B-2(8a) (“‘Rule’ means any agency regulation, standard, or statement of general applicability that implements or interprets an Act of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.”).

<sup>31</sup> N.C. Gen. Stat. § 159G-71.

Division still retains a critical role in the review of loan applications.<sup>32</sup> Moreover, the SWIA lacks rulemaking authority and, as explained above, the Rules are necessary to ensure compliance with federal law.

## **V. Conclusion**

Elimination of the Rules would deprive the public of useful regulatory guidance designed to ensure that DWSRF funds are available and utilized to the maximum benefit of public health in North Carolina. Fortunately, because the Rules were adopted to implement and conform to the federal Safe Drinking Water Act, they will not automatically expire even if labeled “unnecessary” by the agency. Still, we encourage DENR to reconsider its decision to label these rules “unnecessary,” and, in recognition of their value as currently codified, classify them as “necessary without substantive public interest.”<sup>33</sup>

Thank you in advance for your thoughtful consideration of these comments.

Respectfully,

Will Hendrick  
Associate Attorney

DWH/lap

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<sup>32</sup> By law, the Division must (1) review all applications filed for a loan; (2) rank each application in accordance with the points assigned to the evaluation criteria; (3) make a written determination of an application’s rank; and (4) submit the determination for consideration by the SWIA. N.C. Gen. Stat § 159G-39(a).

<sup>33</sup> N.C. Gen. Stat. § 150B-21.3A(a)(4) (defining “necessary without substantive public interest”).



## 15A NCAC 01N – DRINKING WATER STATE REVOLVING FUNDS RULES

Commenter Name: Will Hendrick

Company/Organization: Southern Environmental Law Center

Comment was received in letter. Original letter is attached.

### Agency Response:

The Division of Water Infrastructure of the Department of Environmental Quality (DEQ) determined the rules in Subchapter 01N to be “unnecessary,” within the meaning of that term as it appears in N.C. Gen. Stat. §150B-21.3A(a)(6). The bases for these determinations are that:

- The statute(s) cited as authority for rules .0203, .0302, .0304, .0501, .0503, .0702, .0703, .0705, .0802, and .0901 have been repealed.
- Rules .0301, .0801, and .0902 are duplicative of the authorizing statutes or statutes referenced within the text of the rule.
- Rule .0303 essentially duplicates the language in N.C. Gen. Stat. §153G-20(1a).
- Rule .0704 is substantively duplicative of the language in N.C. Gen. Stat. §153G-42.
- The applicable procedures referenced in rule .0103 are provided in federal rules.
- Criteria and priorities are set in the Capitalization Grant Operating Agreement with the Environmental Protection Agency (EPA), pursuant to N.C. Gen. Stat. §159G-35, rendering superfluous rule .0202, .0303, .0401, and .0502.
- Rules .0201, .0402, .0701, .0704, and .0902 are subsumed in the annual “intended use plan” submitted to EPA. The annual nature of the Intended Use Plans (IUP) makes rulemaking impracticable.
- The substance of Rule .0201(c) is thoroughly addressed in Part E of the Safe Drinking Water Act, 42 U.S.C. §300j, *et seq.*
- Rule .0902 is redundant to the federal Single Audit Act (P.L. 98-502, amended at P.L. 104-156) and the federal uniform grant administration regulations.

The commenter asserts that because the rules in Subchapter 01N were adopted to implement or conform to federal regulation, the rules do not expire pursuant to N.C. Gen. Stat. §150B-21.3A and cannot be categorized as unnecessary.

The commenter’s interpretation of N.C. Gen. Stat. §150B-21.3A is overly narrow and simplistic. As the comment points out, N.C. Gen. Stat. §150B-21.3A(e) provides that “[r]ules adopted to conform to or implement federal law shall not expire as provided by this section.” However, N.C. Gen. Stat. §150B-21.3A(b) refers explicitly to subsection (e), as an exception to the automatic expiration of rules that have not been timely reviewed by the rulemaking agency. Read as the commenter suggests, rules which “implement or conform to federal regulation” would be perpetual unless the agency affirmatively repealed the rule.

That interpretation would waste a good deal of agency time and resources weeding out old, out-of-date rules which otherwise would frustrates the intent of N.C. Gen. Stat. §150B-23A to clean up and revitalize the administrative code by sunseting rules which no longer perform a useful function informing the public of their rights and obligations under the laws as implemented by the agency.

DEQ's interpretation of N.C. Gen. Stat. §150B-21.3A(e) is that it was intended to prevent the inadvertent expiration of rules that have implications for programs required to conform to or to implement certain requirements under federal law. In the case of the 01N rules, the federal regulations will be effective irrespective of whether the 01N rules are in effect or not. The rules are categorized as "conform[ing] to or implementing federal law" because of the federal component of the Drinking Water State Revolving Fund program. However, unlike a rule necessary to implement requirements under federal law, these rules implemented a state program which received and disbursed federal funds. The structure for that purpose exists in the IUP annually submitted to EPA, and the federal rules governing the grant program. Therefore, the rules are unnecessary. If a rule is determined to be unnecessary, the federal component does not block expiration of that rule. The linkage of subsections (b) and (e) makes it clear that the "savings clause" for rules which "conform to or implement federal law" was intended to prevent expiration of those rules by inadvertence or failure by the agency to timely review those rules.

If the RRC was to determine that the language of N.C. Gen. Stat. §150B-21.3A(e) acted to prevent the expiration of the rules in 01N, the proper correction would be to the categorization as "required to implement or conform to federal law." These rules are not necessary to conform to or implement the federal grant program. They were adopted in response to N.C. Gen. Stat. §159G-44, which allowed, but did not compel, the adoption of rules consistent with federal law, for the administration of the grant program. They are now redundant, out-of-date, superseded by the annually-submitted IUP, or superfluous. To read N.C. Gen. Stat. §150B-21.3A(e) as compelling the agency to keep the rules in perpetuity, or go through a lengthy process for their repeal notwithstanding their superfluity, simply ignores the intent and worthy purpose of N.C. Gen. Stat. §150B-21.3A.