



**North Carolina Department of Natural and Cultural Resources
Office of the Secretary**

Governor Pat McCrory

Secretary Susan Kluttz

March 14, 2016

Abigail Hammond, Commission Counsel
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Dear Ms. Hammond,

I. Introduction

The Department of Natural and Cultural Resources (hereinafter "Agency") respectfully moves the North Carolina Rules Review Commission (hereinafter "Commission"), pursuant to 26 N.C.A.C 05.0112, as follows: (i) to waive the Agency's obligations, under 26 N.C.A.C 05.0211(a), for all rules codified in subchapters 12A to 12D, 12F to 12G, and 12I to 12K (hereinafter "DPR Rules")¹ of Title 15A of the North Carolina Administrative Code (hereinafter "Code"); (ii) to nullify the Department of Environment and Natural Resources' (hereinafter "DENR")² "November 24, 2014 Existing Rules Review Report" (hereinafter "November Report") for all DPR Rules; (iii) to allow the Agency to submit an updated report for all DPR Rules, in accordance with N.C. Gen. Stat. 150B-21.3A; and (iv) to adopt a new rules review schedule for all DPR Rules.³ In support of its motion, the Agency shows as follows:

II. Background

On November 24, 2014, DENR submitted a periodic rules review report to the Commission for all DPR Rules. The November Report included approximately 109 rules. DENR initially determined thirty-eight (38) of the rules as "Unnecessary", sixty-eight (68) as "Necessary with substantive public interest" and three (3) of the rules as "Necessary without substantive public interest."⁴ Following the Review Process, consisting of a 60-day public comment period and review by the Commission⁵, DENR revised the November Report changing

¹ Chapter 12 of Title 15A of the North Carolina Administrative Code, Parks and Recreation.

² See North Carolina S.L. 2015-241, 2015 Appropriations Act, Page 238, (renaming the Department of Environment and Natural Resources the Department of Environmental Quality.).

³ N.C. Gen. Stat. § 150B-21.3A (d) ("The commission shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances.").

⁴ N.C. Gen. Stat. § 150B-21.3A (a).

⁵ N.C. Gen. Stat. § 150B-21.3A(c).

all but three (3) DPR Rules to “Necessary with substantive public interest.” The effect of these changes required DENR to re-adopt 106 DPR Rules as though they were new.⁶

On September 18, 2015, the General Assembly passed the “Current Operations and Capital Improvements Appropriations Act of 2015” (hereinafter “Appropriations Act”).⁷ The Appropriations Act, *inter alia*, transferred all “functions, powers, duties, and obligations” of the Division of Parks and Recreation and the North Carolina Parks Authority to the Agency (hereinafter “Division”), effective July 1, 2015.⁸ As a result of the transfer, the Agency assumed the rulemaking responsibilities and obligations for all DPR Rules—including those flowing from the November Report.

After discussions with the Division, a review of the November Report, and a review of all public comments collected during the initial Review Process, the Agency (and Division) believes it would have reached different determinations for some of or all DPR Rules. As such, the Agency respectfully requests the opportunity to submit an independent report to the Commission for all rules requiring re-adoption based on the November Report.

III. Waiver Factors

a. Necessity for the Waiver

The necessity for waiver is one factor authorized by statute. Under N.C. Gen. Stat. § 113-35, the [Agency] is vested with the authority to adopt reasonable rules governing the use of State parks under its charge.⁹ The essence of rulemaking is contingent upon an agency’s ability to operate with the independence and self-governance authorized to it under the law. Here, the Agency deserves an impartial opportunity to collaborate with its Division and staff, and make its own determinations concerning DPR Rules. The Agency would be unfairly usurped of its authority if bound by the determinations in DENR’s November Report. Waiver is necessary in order to provide the Agency with an independent opportunity to streamline the review process for DPR Rules.

b. Applicant’s responsibility for the conditions requiring waiver

The conditions requiring waiver stem solely from the determinations made by DENR in its November Report and the consequences flowing therefrom. As a consequence, DENR’s actions resulted in 106 DPR Rules requiring re-adoption as though they were new.¹⁰

c. Applicant’s previous request for waiver

The Agency has not previously requested waiver from the Commission with regard to DPR Rules.

⁶ Referencing N.C. Gen. Stat. § 150B-21.3A (g). (“A determination that all rules that the agency...or the Commission designated as necessary with public interest...shall be readopted as though the rules were new [.]”).

⁷ See, North Carolina S.L. 2015-241.

⁸ *Id.* at 238. See N.C. Gen. Stat. § 143A-6.

⁹ N.C. Gen. Stat. § 113-35. (The Appropriations Act re-codified N.C. Gen. Stat. § 113-35 to N.C. Gen. Stat 143B-135.6).

¹⁰ N.C. Gen. Stat. § 150B-21.3A (g).

d. Applicant's knowledge of or experience with rulemaking

The Agency is a "principle department" under Article 1 of Chapter 143B (Executive Organization Act of 1973) of the North Carolina General Statutes. Notwithstanding the Appropriations Act transfer, the Agency is responsible for all rules enumerated in Title 7 of the North Carolina Administrative Code.¹¹ The Agency is intimately familiar with the rulemaking process and recognizes the challenges that re-adopting 106 rules presents. Here, the Agency had knowledge of the November Report, but was not afforded an opportunity to offer input on the report's determinations.

e. Precedential value of such waiver

The Commission may waive any rule for which no specific waiver is set out.¹² In essence, the Commission has wide discretion in deciding whether to approve or disapprove a waiver request. The circumstances presented in the instant case are unique and infrequent to state government. Granting the Agency's request will have a de minimis impact on the Commission's governance and presents no significant precedential value as it relates to future requests.

f. Harm to the Agency if waiver denied

The rulemaking process serves an essential function within State government. However, the process contains many complexities that often make it time consuming. Here, the Agency would be overly burdened if forced to send all 106 DPR Rules through the re-adoption process without having the opportunity to consult with its Division and submit an updated report to the Commission. Finally, the Agency respectfully incorporates sections *a. thru e.*, above, as part of its justification for harm if the request for waiver is denied.

IV. Conclusion

In conclusion, the Agency request that the Commission grant all relief sought in Part I above and any other relief it deems appropriate.

Respectfully submitted,

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*Karin Cochran on
behalf of Secretary Kluttz*

¹¹ Title 7 of the North Carolina Administrative Code is entitled "Cultural Resources."

¹² 26 N.C.A.C. 05.0112.