



STATE OF NORTH CAROLINA
DEPARTMENT OF HEALTH AND HUMAN SERVICES

ROY COOPER
GOVERNOR

MANDY COHEN, MD, MPH
SECRETARY

October 23, 2018

Via Hand Delivery and E-Mail

Garth K. Dunklin, Chair
N.C. Rules Review Commission
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Re: N.C. Department of Health and Human Services and Commission for Public Health
Periodic Review of Existing Rules 15A NCAC 18A

Dear Mr. Dunklin:

The North Carolina General Assembly passed Session Law 2013-413 which established the Periodic Review and Expiration of Existing Rules codified at N.C.G.S. § 150B-21.3A. This process requires all state agencies to conduct a decennial review of its administrative rules. The intent of this law is to remove any unnecessary regulations from the Administrative Code and ensure only those rules which are necessary for the administration of state agencies remain in effect.

The Commission for Public Health (CPH) has rulemaking authority over the rules contained in 15A NCAC 18A pertaining to environmental health and sanitation programs administered by The North Carolina Department of Health and Human Services (NC DHHS). These rules, referred to as the Environmental Health Rules, are critical to protecting the public health in areas including, but not limited to, sanitation standards at food service establishments and child care centers. The Environmental Health Rules are set for review in November 2018 pursuant to the schedule established by the Rules Review Commission (Commission) as part of the periodic review process. The Commission derives its authority to establish the review schedule from N.C.G.S. 150B-21.3A. The Commission has scheduled a meeting on November 15, 2018 to

conduct its review of the Environmental Health Rules, along with several other rules from various agencies.

The Commission's review relies upon the submission of an agency report pursuant to N.C.G.S. § 150B-21.3A(c)(1). This agency report on the Environmental Health Rules was due on October 15, 2018 pursuant to the timeline set forth in the North Carolina Administrative Code. On October 18, 2018 the Commission denied a request for a Waiver of the Deadline to file this report. However, as explained more fully herein, the law gives the Commission broad authority and discretion in the administration of the periodic review process, including the granting of an extension of time to file the agency report.

Further, N.C.G.S. § 150B-18 requires substantial compliance with rulemaking procedures set forth in the Administrative Procedures Act (APA). CPH and NC DHHS have completed the following requirements of the periodic rules review process as set forth in the APA: made initial determinations pertaining to the Environmental Health Rules, adhered to the public comment period requirements, and responded to public comments. The final requirement is to submit to the Commission an agency report for the Commission to conduct its review in November 2018. Enclosed with this correspondence is the completed agency report, fully satisfying the agency's requirements of the periodic rules review process under N.C.G.S. § 150B-21.3A(c)(1) and in substantial compliance with the APA. This completed report is submitted to the Commission more than three weeks ahead of the date scheduled for review.

Any rule for which an agency fails to conduct the review process in accordance with § 150B-21.3A expires upon the date scheduled for review. The Environmental Health Rules are scheduled for review on November 15, 2018 and therefore have not yet expired. The CPH and NC DHHS have now submitted the agency report in substantial compliance with the review process, and these rules should not expire upon the date set for review.

N.C.G.S. § 143B-30.1(c) states that the Chair of the Commission "shall designate the times and places at which the Commission shall meet." The CPH and NC DHHS request that an emergency or intervening meeting of the Commission be called as such meeting is necessary for consideration of these requests prior to the next regularly scheduled meeting of November 15. The Chair of the Commission is duly authorized to call such a meeting. We are fully willing and able to participate in such a meeting as necessary. In the alternative, the Commission has the express authority to modify the review schedule. A modification would be necessary for the Commission to conduct its review of the Environmental Health Rules upon receipt of the enclosed, complete agency report.

Given the Commission's broad authority and discretion over the periodic review process and the fully completed agency report being submitted to the Commission in substantial compliance with the law, CPH and NC DHHS jointly submit the following requests to the Rules Review Commission:

1. CPH and NC DHHS respectfully submit a Request for Acceptance and Review of the agency report for the Environmental Health Rules contained in 15A NCAC 18A pertaining to environmental health and sanitation programs administered by NC DHHS in order to protect fundamental public health and safety needs.

2. CPH and NC DHHS respectfully submit a request that the Chair of the Commission exercise his authority to schedule a Commission meeting for consideration of the requests contained herein prior to November 15. Alternatively, CPH and NC DHHS respectfully request the Commission to exercise its discretion under North Carolina General Statutes 150B-21.3A(d) to modify the periodic rules review schedule as it pertains to the Environmental Health Rules in order to allow additional time for the Commission to consider the agency report for the Environmental Health Rules and to complete the process for the periodic review of the Environmental Health Rules.

BACKGROUND

Pursuant to N.C.G.S. § 130A-29, the Commission for Public Health is the statewide agency vested with “the authority and duty to adopt rules to protect and promote the public health.” The CPH’s expansive public health rulemaking authority includes adoption of rules necessary to implement the public health programs administered by NC DHHS and set forth in Chapter 130A of the North Carolina General Statutes. G.S. 130A-29(b). The Environmental Health Rules adopted by CPH are necessary to implement public health programs administered by NC DHHS. These rules have been in effect and operation for many years and are key to protecting fundamental public health and safety interests.

The CPH has conducted the required periodic review and analysis of the Environmental Health Rules and approved the agency report, which sets forth the CPH’s determinations regarding which of the Environmental Health Rules are necessary to continue in effect to protect public health and safety. The rules contained in 15A NCAC 18A are rules promulgated by the Public Health Commission to implement critical environmental health and sanitation programs administered by NC DHHS, including without limitation food establishments, child care centers, lead poisoning prevention standards, and other important sanitation programs which are key to ensuring public health and safety throughout the State of North Carolina. Thus, both CPH and DHHS have a direct and significant interest in ensuring that the Environmental Health Rules continue in effect to protect the essential public health and safety interests which they were adopted to address, and that they do not expire. Completion of the review of the Environmental Health Rules in a manner which allows those Rules determined by CPH to be necessary to continue in effect in accordance with N.C.G.S. § 150B-21.3A(c) is required to achieve the legislative objective and intent of the periodic rules review mandated by the General Assembly in N.C.G.S. § 150B-21.3A.

In keeping with the review schedule established by the Commission, CPH and NC DHHS have been diligent in completing initial determinations and engaging in the public comment period for the Environmental Health Rules. The CPH completed its initial determinations of Environmental Health Rules on February 7, 2018. A report of the initial determination was

posted on the Commission's website on February 13, 2018. The Environmental Health Rules were then posted for public comment, in accordance with 26 NCAC 05 .0207, from February 19, 2018 until April 20, 2018. Several comments were received during this public comment period for consideration and responded to by the CPH.

The final step of the review process under N.C.G.S. § 150B-23.1A(c)(1) requires the CPH to submit its agency report to the Commission. Under the timeframe established in administrative rule by the Commission for the periodic rules review process, this agency report was due to the Commission on October 15, 2018 for Commission review of the report the following month. CPH relies upon and works in coordination with NC DHHS staff to complete rulemaking obligations, including reviewing the agency report for the Environmental Health Rules. CPH needed additional time to complete and submit its agency report due to myriad reasons explained further below, and a Request for a Waiver of Filing Deadline was submitted pursuant to 26 NCAC 05 .0204.

On October 18, 2018, the Commission denied the Request for a Waiver of the Filing Deadline regarding the Environmental Health Rules. Notably, 26 NCAC 05 .0204 is silent as to the time in which a request for an extension of time is to be filed with the Commission. After learning of the Commission's October 18, 2018 decision to deny the requested extension of time, CPH and NC DHHS convened an emergency meeting of the CPH on the morning of Saturday, October 20, 2018, during which the CPH considered and approved the agency report for the Environmental Health Rules. CPH and NC DHHS submit the agency report, attached hereto, for the Commission's acceptance and consideration.

REQUEST FOR ACCEPTANCE AND DISCRETIONARY REVIEW OF AGENCY REPORT TO PROTECT FUNDAMENTAL PUBLIC HEALTH AND SAFETY INTERESTS

After careful consideration of the Commission's denial of the Waiver for the Filing Deadline, the CPH and NC DHHS request that the Commission act within its statutory authority to accept and conduct a review of the agency report for the Environmental Health Rules, in order to protect fundamental and substantial public health and safety needs. Completion of the review of the Environmental Health Rules is required to achieve the legislative objective and intent of the periodic rules review mandated by the General Assembly in N.C.G.S. § 150B-21.3A.

As the body charged with overseeing and implementing rulemaking for the State of North Carolina, the Commission is vested with broad authority and discretion to work collaboratively with State agencies and commissions to implement the periodic review of existing agency rules in a manner which accomplishes the underlying legislative objectives. Chiefly, pursuant to N.C.G.S. 150B-21.3A(d)(1), the Commission has broad authority to modify the schedule and extend the time for the periodic review of agency rules in appropriate circumstances. It is squarely within the Commission's statutory authority to exercise its discretion in determining the timeframe set for a review of the Environmental Health Rules.

The discretion of the Commission as it relates to the periodic rules review process is further reflected in the Commission's own rules. Under 26 NCAC 05 .0206(e) the Commission must return any incomplete reports to the agency for completion. This rule, therefore, allows for an

agency to correct any incomplete report and presumably resubmit to the Commission for consideration and review. While the rule states that such incomplete report shall be deemed “late,” by providing an agency with an opportunity to correct the deficiency, the Commission is necessarily allowing the late report to be further considered in the review process. Thus, in lieu of providing the Commission with an incomplete report, which CPH would have had the opportunity to later correct, and did correct less than a week later, a Waiver of the Deadline request was made. It seems inconsistent to allow for one circumstance to proceed with the rules review process and the other to have a potentially devastating effect on the health and safety of North Carolinians.

Additionally, 26 NCAC 05 .0204 allows for an agency to submit a request for extension of time but is silent as to the time in which a request for an extension of time is to be filed with the Commission. The only guiding factor in this rule is that an agency cannot meet the filing deadlines. However, the rule itself is silent as to whether a request for an extension must be received, reviewed or considered by the Commission prior to the deadline in question. Necessarily, if an agency files such an extension request in lieu of filing the requisite documentation, the agency should not be held to submission on the deadline. For example, if an agency submits an extension request to be considered by the Commission, and the next Commission meeting is not held for several weeks, yet the deadline comes and goes, the rule allowing for an extension would be rendered meaningless if the agency is penalized for not meeting the deadline. Inherent in this rule is the notion that filing an extension request tolls the deadline for submission. Thus, .0204 is a prime example of the Commission’s broad authority and discretion over the periodic review process and its flexibility in the administration of the process.

Further, 26 NCAC 05 .0210 states that when an agency representative does not appear at a Commission hearing where the agency’s report is being reviewed and a question regarding the report is raised, then the Commission shall defer the review to a subsequent meeting. This rule allows the Commission to alter its review schedule despite an agency’s shortcomings, i.e. failure to attend the hearing for review of the rules and allow the rules to remain active through the review process. Lastly, 26 NCAC 05 .0203 provides that the Commission may delay reviewing a report until a later meeting if the workload of the Commission and its staff makes the review impracticable and shall notify the agency of any such delayed review. Again, the Commission’s own rules allow for it to exercise its broad discretion in amending the schedule for the periodic review of the rules.

As noted above CPH and NC DHHS timely initiated and completed all previous steps of the periodic review process for the Environmental Health Rules. CPH and NC DHHS, therefore, provide the Commission with the following additional information in support of its request for the acceptance of its agency report:

Substantial Public Health and Safety Interests. The Environmental Health Rules promulgated by CPH set forth the detailed process and standards for critical environmental health and sanitation programs administered by NC DHHS, including without limitation food establishments, child care centers, lead poisoning prevention standards, and other important sanitation programs. These environmental health and sanitation programs are essential to ensuring public health and

safety throughout the State of North Carolina. Should the Commission refuse to accept the enclosed agency report and disallow the Environmental Health Rules from continuing through the review process with nothing to take their place, such action will have potentially far reaching and extremely negative public health implications, the scope of which cannot be predicted at this time.

Changes in Agency Staff. For approximately 38 years, Chris Hoke, an employee with the NC DHHS Division of Public Health (DPH), served as the Division's rulemaking coordinator and worked closely with the CPH on all rules which implemented the public health programs administered by NC DHHS through DPH, including the Environmental Health Rules. In his role with DPH, Mr. Hoke, who is an attorney, helped manage and address a wide variety of legal issues pertaining to the services provided and programs administered by DPH. Mr. Hoke retired from public service on September 30, 2018, and other staff assumed the role of rulemaking coordinator for CPH effective October 1, 2018. There were several changes made in the months preceding Mr. Hoke's retirement to the personnel who would assume his responsibilities overseeing the rules coordination process. The transition of rulemaking responsibilities to new personnel in connection with Mr. Hoke's retirement resulted in delay of completing the proposed agency report for consideration and approval by CPH. Moreover, on September 23, 2018, Danny Staley who has served as Director of DPH for many years, began a period of personal leave and ceased working for DPH in connection with his impending retirement. In his role as Director, Mr. Staley managed and oversaw all aspects of DPH operations, including the public health programs addressed by the Environmental Health Rules and rulemaking for DPH.

Natural Disaster and State of Emergency. Additionally, on September 7, 2018, Governor Roy Cooper declared North Carolina to be under a State of Emergency in relation to the pending landfall of Hurricane Florence. President Donald Trump likewise declared a State of Emergency in North Carolina on September 10, 2018. Both the CPH and NC DHHS, including Mr. Hoke and Mr. Staley, spent countless time and resources engaging with local communities before and after Hurricane Florence made landfall to ensure the general health and safety of those impacted. The substantial time and resources expended to address the impacts of Hurricane Florence further contributed to delay in completing the proposed agency report for consideration and approval by CPH.

World Equestrian Games. On September 11-23, 2018, North Carolina hosted the World Equestrian Games, and DPH staff, including Mr. Hoke and Mr. Staley, dedicated substantial time and resources to address related public health and safety needs, both during the World Equestrian Games and for many months prior in preparation for the international event.


REQUEST FOR ADJUSTMENT OF PERIODIC RULES REVIEW SCHEDULE

As previously stated, N.C.G.S. § 143B-30.1(c) provides that the Chair of the Commission "shall designate the times and places at which the Commission shall meet." The CPH and NC DHHS request that an emergency or intervening meeting of the Commission be called as such meeting is necessary for consideration of these requests prior to the next regularly scheduled meeting of November 15. The Chair of the Commission is duly authorized to call such a meeting. For the

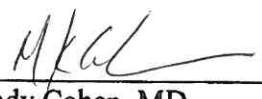
Environmental Health Rules to be timely reviewed at the November 15, 2018 Commission meeting, such interim actions are necessary. We are fully willing and able to participate in such a meeting as may be required.

In the alternative, should the Chair decide not to exercise his authority to hold an emergency meeting, the Commission has the express authority to modify the periodic rule review schedule. A modification would be necessary for the Commission to conduct its review of the Environmental Health Rules upon receipt of the enclosed complete agency report and to ensure that the Environmental Health Rules do not expire on November 15, 2018 under the current schedule. As previously mentioned, the expiration of these rules will have a severe negative impact on the health of the general public.

Respectfully submitted,



Ronald May, MD
Chair, North Carolina Commission for Public Health



Mandy Cohen, MD
Secretary, North Carolina Department of Health and Human Services



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

October 25, 2018

Virginia Niehaus, Rulemaking Coordinator
Commission for Public Health
Sent via email only: virginia.niehaus@dhhs.nc.gov

Re: 10A NCAC 18A, Sections .1000, .1300, .1400, .1500, .1600, .1700, .1900, .2100, .2300, .2400, .2500, .2600, .2800, .2900, .3100, .3200, .3300, .3500, .3600 and .3800

Dear Ms. Niehaus:

At its meeting on October 18, 2018, the Rules Review Commission (RRC) considered a request of the Commission for Public Health (CPH) for an extension of the filing deadline to submit the Existing Rules Report (Report) for the rules referenced above. The RRC determined that the Report was not submitted in a timely manner, that the CPH has not fully conducted the review required by G.S. 150B-21.3A, and that the rules included in that Report expired pursuant to G.S. 150B-21.3A(b). Finally, the RRC determined that the rules expired as of October 15, 2018.

Pursuant to G.S. 150B-21.3A(d)(1), the RRC must establish a date by which review of titles of the Administrative Code is to be completed. If an agency fails to conduct the review by the date set by the RRC, the rules contained in that Title expire. The RRC set its November 2018 meeting as the date on which it would review the Report, pursuant to 26 NCAC 05 .0211. Under this schedule and pursuant to 26 NCAC 05 .0203(c), CPH was required to file the Report on or before October 15, 2018.

Administration 919/431-3000 fax:919/431-3100	Rules Division 919/431-3000 fax: 919/431-3104	Judges and Assistants 919/431-3000 fax: 919/431-3100	Clerk's Office 919/431-3000 fax: 919/431-3100	Rules Review Commission 919/431-3000 fax: 919/431-3104	Civil Rights Division 919/431-3036 fax: 919/431-3103
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On October 16, 2018, I received by attachment to email a letter dated October 15, 2018, in which Mr. Bob Martin, the former rulemaking coordinator for CPH, requested an extension of the Report filing deadline pursuant to 26 NCAC 05 .0204. The RRC denied this request.¹

In response to a question from the Codifier of Rules regarding the date on which the rules expired by operation of statute, the RRC determined that the rules expired on October 15, 2018, the date the Report was required to be filed pursuant to 26 NCAC 05 .0203(c).²

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,



Jason Thomas
Commission Counsel

Cc: Dr. Ronald B. May, Chair (rmay@carolinaeasthealth.com)
Joel Johnson, Assistant General Counsel (joel.johnson@dhhs.nc.gov)
Julie Cronin, Assistant General Counsel (julie.cronin@dhhs.nc.gov)
John P. Barkley, Assistant Attorney General (jbarkley@ncdoj.gov)

¹ Commissioners Atkins, Bryan, Currin, Doran, and Dunklin voted to deny the request for extension. Commissioners Choi and Hyde voted against the denial of the request.

² Commissioners Atkins, Bryan, Currin, and Doran voted in favor of October 15, the date the report was required to be filed. Commissioners Choi, Dunklin, and Hyde voted no and favored of November 15, 2018, the date the Report was scheduled to be reviewed by the RRC pursuant to 26 NCAC 05 .0211.



NC DEPARTMENT OF
**HEALTH AND
HUMAN SERVICES**

ROY COOPER • Governor

MANDY COHEN, MD, MPH • Secretary

BETH LOVETTE, MPH, BSN, RN • Acting Director

Division of Public Health

October 15, 2018

Via Electronic Mail Only

Garth K. Dunklin, Chair
North Carolina Rules Review Commission
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6700
Oah.rules@nc.gov

RE: Request for Waiver of Filing Deadline for the Periodic Review and Expiration of Existing Rules Report for 15A NCAC 18A.

Pursuant to 26 NCAC 05 .0204 the Division of Public Health (DPH) requests an extension of the filing deadline established by 26 NCAC 05 .0203© for submitting the above-referenced Periodic Review and Expiration of Existing Rules Report. Since the time of submittal date was established our Commission for Public Health has moved its regularly scheduled 4th Quarter meeting from the first Wednesday of October to the first Wednesday of November. We have completed a review analysis of all public comments received. On November 7, 2018, the Commission will make their final determination regarding the set of rules based on the rule comments and analysis. Unfortunately, this date is beyond the report submission date of October 15, 2018. We would request that the final determination still be reviewed at the November 15, 2018.

DPH regrets its inability to meet the original submission deadline, and respectfully asks the Commission consider our request for this waiver.

Sincerely,

Robert Martin
NC Division of Public Health, Public Health Manager and Rule Making Coordinator.

NC DEPARTMENT OF HEALTH AND HUMAN SERVICES • DIVISION OF PUBLIC HEALTH

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AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER

Thomas, Jason S

From: Martin, Bob
Sent: Tuesday, October 16, 2018 11:00 AM
To: Thomas, Jason S
Cc: Rules, Oah; Martin, Bob
Subject: RE: Existing Rules Report

Jason, please see attached request for waiver as we discussed.

Thanks, bob



request for waiver
10-15-18.pd...

Bob Martin

Public Health Program Manager
Division of Public Health, Administrative, Local, and Community Support
North Carolina Department of Health and Human Services

919 707-5179 office
919 614-8546 mobile
919-870-4840 fax
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Unauthorized disclosure of juvenile, health, legally privileged, or otherwise confidential information, including confidential information relating to an ongoing State procurement effort, is prohibited by law. If you have received this e-mail in error, please notify the sender immediately and delete all records of this e-mail.

From: Thomas, Jason S
Sent: Monday, October 15, 2018 12:13 PM
To: Martin, Bob <bob.martin@dhhs.nc.gov>
Subject: Existing Rules Report

As we discussed, your best option is probably to request an extension of time in which to file the report that will not affect the time that the RRC will review the report. Make this request in compliance with 26 NCAC 05 .0204 (attached). I have also attached an example of such a request. Please submit your request asap.

<< File: 26 ncac 05 .0204.pdf >> << File: Request for Waiver 07 NCAC 13A-I.pdf >>

Jason Thomas
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
919-431-3081

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