



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

June 26, 2025

Elly Young, Assistant Attorney General
Environmental Management Commission
Sent via email only to: esyoung@ncdoj.gov

Re: Objection to 15A NCAC 02B .0733

Dear Ms. Young:

This letter will serve as the written notice of objection pursuant to G.S. 150B-21.12.

At its meeting on June 26, 2025, the Rules Review Commission (RRC) objected to 15A NCAC 02B .0733. Specifically, the Commission objected for the rule failing to meet the standards in G.S. 150B-21.9(a)(1), (3), and (4). The attached staff opinion provides additional context for the Commission's objection.

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

Sincerely,

/s/ Seth Ascher

Seth Ascher

Commission Counsel

CC:

Donald Robert van der Vaart, Director
Chief Administrative Law Judge

John C. Evans
Senior Administrative Law Judge

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RRC STAFF OPINION

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02B .0733

RECOMMENDATION DATE: June 20, 2025

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☒ Lack of statutory authority
 - ☐ Unclear or ambiguous
 - ☒ Unnecessary
 - ☒ Failure to comply with the APA
 - ☐ Extend the period of review

COMMENT:

This rule amendment adds existing individual facility permit limitations to the text of a rule. Because individual facility permit limitations are not of “general applicability”, and in light of the language of G.S. 150B-2(8a) and a recent Court of Appeals opinion interpreting that language, I recommend objection for the reasons outlined below.

Factual Background

This rule relates to a system of water quality regulation involving federal law, EPA action, state law, and state regulation. In short, pursuant to the federal Clean Water Act and EPA action, the State of North Carolina is under an obligation to improve specific elements of water quality in the Tar-Pamlico River basin (primarily around chlorophyll-a in this case). State law has created administrative processes to address that obligation. The EMC has rulemaking authority relevant to this issue and has determined what wastewater elements (phosphorous and nitrogen) to limit in order to address this obligation. The EMC and the Division of Water Resources (DEQ) are involved in the permitting process related to these limitations, with some oversight by the EPA.

Seth Ascher
Commission Counsel

Currently, there is an association permit that establishes discharge limits distributed between 15 wastewater treatment facilities. As a practical matter, EMC and DEQ take the values established in that permit into account when considering new or altered permits. In significant part, the amendment before the RRC codifies the limits established by that permit into the rule.

Legal Background

G.S. 150B-19.1(a)(1) states, “An agency may adopt only **rules** that are expressly authorized by federal and State law and that are necessary to serve the public interest.” **(Emphasis added)**

Pursuant to G.S. 150B-2(8a) a “rule” is defined as:

“Any agency regulation, standard, or statement of **general applicability** that implements or interprets an enactment 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...**(Emphasis added)**

A recent Court of Appeals case has elaborated that “a ‘regulation’ must have ‘general applicability’ to be a ‘rule’.” NC DEQ v. N.C. Farm Bureau, 291 N.C. App. 188, 194 (2023). That case goes on to point out that the phrase “general applicability” is not defined and must be given its ordinary meaning, which the Court summarizes as “A rule is generally applicable if it applies to most situations.” *Id.* at 195.¹ See also, Wal-Mart Stores East v. Hinton, 197 N.C. App. 30, 56 (2009) (noting that in a taxation context, “the Secretary’s decision to combine plaintiff’s financial results with its related corporations is not and could not have been a standard of ‘general applicability’ as described in the APA, and is therefore by definition not a ‘Rule.’ ”

Here, an individual permit limit only applies to a specific facility. So, it does not apply to “most situations.” So, while the processes outlined in this rule may be appropriate as generally applicable, I do not believe the individual facility values fall within the definition of a rule. These permit values are explicitly included in items 4 and 5 on page 2, but the entirety of the rule as written is interconnected with those items.

Practical Consequences of Including Individual Permits in Rule

I do note, that although this Commission is not called upon to consider this issue and I have not thoroughly researched the question, I have no reason to believe that the agency has acted outside of its **permitting** authority in establishing these facility specific values. But that does not mean they have the authority to set these values by **rule**.²

¹ While this case is currently valid law, the case was appealed and is currently awaiting an opinion from the NC Supreme Court. I cannot speculate how and if that will alter the reasoning applied here.

² The agency has pointed out to me that similarly structured rules are already in the Code. However, this Commission must consider the legality of each rule on its own merits, not with reference to what is

While this may seem like a technical distinction, it has practical implications for the quality of the administrative code. Permitting and rulemaking have distinct procedural requirements, and modifications via one method do not automatically modify the other. By its own text, this rule contemplates that the agency would need to waive or modify the individual values codified in rule in circumstances where permitting decisions alter these numbers. The APA contemplates agencies waiving or modifying a rule when the “rule established specific guidelines that the agency must follow in determining whether to waive or modify the requirement.” G.S. 150B-19(6). However, such a waiver or modification does not change the text of the administrative code. Meaning, if the agency went through their permitting process to change the values of an individual permit that was codified in this rule and waived the values to do so in this rule, the numbers in the rule would be rendered inaccurate and misleading to the public.

Practically, the text of the APA as well as the overall scheme of rulemaking laid out by the General Assembly leads me to the conclusion that the General Assembly did not intend for individualized permit values to be rules under the APA. Instead, the rules should be confined to the processes and standards for the issuance of permits, while the substance of the permits themselves exist in separate agency material.

Conclusion

As discussed above, it is my opinion that the individualized permitting values that are core to this rule do not meet the definition of a rule under the Administrative Procedure Act. Therefore, 15A NCAC 02B .0733 is not a “Rule” and the agency lacks statutory authority to adopt it. Further, the adoption of 15A NCAC 02B .0733 was not in accordance with Article 2A of G.S.150B as only “Rules” can be adopted. Lastly, as 15A NCAC 02B .0733 is not a “Rule” it cannot be “reasonably necessary” pursuant to G.S. 150B-21.9(a)(3) as only “Rules” can be reasonably necessary. For those reasons, I am recommending that the RRC object to 15A NCAC 02B .0733.

already in the code. Additionally, it appears to me that at least some of these rules were reviewed by this Commission prior to at least one appellate case informing this opinion. If the RRC objects to this rule and the agency believes other rules would suffer from similar issues, my unsolicited advice would be for the agency to update those rules, either independently or through readoption.

Seth Ascher
Commission Counsel