Burgos, Alexander N

Subject: FW: [External] Public Comments in Opposition to Rule Adopted by the Environmental Management Commission
Attachments: 2026.04.21 SELC Public Comments in Opposition to Rule Adopted by the Environmental Management Commission.pdf

From: Melissa Harrison <mharrison@selc.org>
Sent: Tuesday, April 21, 2026 4:51 PM
To: rrc.comments <rrc.comments@oah.nc.gov>
Cc: Everett, Jennifer <jennifer.everett@deq.nc.gov>; Miller, Christopher S <christopher.miller@oah.nc.gov>; Abraczinskas, Michael <michael.abraczinskas@deq.nc.gov>; Quinlan, Katherine L <katherine.quinlan@deq.nc.gov>; Caroline Cress <ccress@selc.org>; Jeffrey Robbins <jeff@cleanairenc.org>
Subject: [External] Public Comments in Opposition to Rule Adopted by the Environmental Management Commission

Good afternoon,

On behalf of the Southern Environmental Law Center and CleanAIRE NC, I am writing to submit comments in opposition to 15A N.C. Admin. Code 02Q .0114, a rule adopted by the Environmental Management Commission that authorizes the construction of sources of air pollution without an air permit. The Rules Review Commission will review this rule during its meeting on Tuesday, April 28, 2026. Please see attached for our comments.

Pursuant to 26 N.C. Admin. Code 05 .0103(c), I've copied the Environmental Management Commission's rulemaking coordinator.

Thank you,

Melissa Harrison (she/her)
Legal/Administrative Assistant
mharrison@selc.org

Southern Environmental Law Center
136 E Rosemary St, #500
Chapel Hill, NC 27514

Office 919 967 1450
Direct 919 874 5637

www.selc.org

SOUTHERN ENVIRONMENTAL LAW CENTER

136 East Rosemary Street, Suite 500
Chapel Hill, NC 27514

Telephone 919-967-1450
Facsimile 919-929-9421

April 21, 2026

Commissioner Jake Parker
Rules Review Commission Chair
rrc.comments@oah.nc.gov

Christopher Miller
Rules Review Commission Counsel
christopher.miller@oah.nc.gov

Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Jennifer Everett
Rulemaking Coordinator
Environmental Management Commission
1601 Mail Service Center
Raleigh, NC 27699
jennifer.everett@deq.nc.gov

Re: Public Comments in Opposition to the Environmental Management Commission's Rule Incorporating the Pre-Permitting Construction Provisions of the 2023–2024 State Budget Act, Sec. 12.11

Dear Commissioner Parker:

The Southern Environmental Law Center and CleanAIRE NC submit these comments in opposition to the rule adopted by the Environmental Management Commission that authorizes the construction of new and modified sources of air pollution before such sources obtain an air permit. This rule directly conflicts with federal law, lacks statutory authority under state law, and is neither clear nor unambiguous. Accordingly, the Rules Review Commission must object to the rule pursuant to N.C. GEN. STAT. § 150B-21.9(a).

In the 2023–2024 State Budget Act, the General Assembly amended certain provisions of the State's Air Pollution Control Act. In particular, Section 12.11(e) of the State Budget Act amended N.C. GEN. STAT. § 143-215-108A to allow the proponent of a new or modified source of air pollution to construct their new source or modification once their permit application is deemed "administratively complete," before the Department of Environmental Quality ("DEQ") has issued the requested permit or even completed a technical review of the application.

The following spring, the General Assembly enacted N.C. SESS. LAWS 2024-1 to amend Section 12.11 of the 2023–2024 State Budget Act. This law directs DEQ to submit to the U.S. Environmental Protection Agency ("EPA") a proposed revision of North Carolina's Clean Air Act State Implementation Plan "based on the changes to the air permitting program" reflected in the amendment of N.C. GEN. STAT. § 143-215-108A. This law also postpones the effective date of 12.11 of the 2023–2024 State Budget Act—and thus postpones the amendment of N.C. GEN. STAT. § 143-215-108A—until at least 60 days after DEQ certifies that EPA "has approved" the State Implementation Plan revision.

In October 2025, DEQ initiated a public comment period on a proposed rule implementing the 2023–2024 State Budget Act's amendment of N.C. GEN. STAT. § 143-215-108A. The Southern Environmental Law Center, CleanAIRE NC, and several other organizations submitted detailed comments about the serious deficiencies in the proposed rule and its conflict with the federal Clean Air Act.[1] Notably, no members of the regulated community submitted comments on the proposed rule, either in support or opposition.[2]

In March 2026, DEQ presented the rule as originally proposed to the Environmental Management Commission. Half of the Commissioners voted against adoption, and the other half voted in support. The Chair of the Environmental Management Commission broke the tied vote in favor of rule adoption.

The rule adopted by the Environmental Management Commission and proposed for approval by the Rules Review Commission would interfere with the State's ability to maintain compliance with the National Ambient Air Quality Standards ("NAAQS") and to enforce applicable requirements under the federal Clean Air Act. Because of these serious deficiencies, EPA cannot legally approve the incorporation of these changes into North Carolina's State Implementation Plan.[3] As a result, the amendment of N.C. GEN. STAT. § 143-215-108A cannot go into effect pursuant to N.C. SESS. LAWS 2024-1.

If the Rules Review Commission nevertheless approves this rule, the prohibition on constructing a new or modified source without an air permit will continue to apply under the federally enforceable State Implementation Plan and under N.C. GEN. STAT. § 143-215-108A, resulting in a rule that directly conflicts with applicable federal and state law. Accordingly, we urge the Commission to object to the rule.

I. The rule directly conflicts with the Clean Air Act and federal regulations.

The Clean Air Act prohibits EPA from approving a proposed revision of a State Implementation Plan "if the revision would interfere with any applicable requirement concerning attainment."[4] Allowing new and modified sources of air pollution to be constructed before obtaining an air permit would impede the State's ability to attain (and maintain attainment of) the NAAQS. As a result, the proposed rule cannot be legally incorporated into North Carolina's State Implementation Plan.

Section 110(a)(2)(C) of the Clean Air Act requires every State Implementation Plan to include "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality

[1] *See* N.C. Dep't of Env't Quality, Div. of Air Quality, *Report of Proceedings of Public Hearing on Proposed Adoption of Rule 15A N.C. ADMIN. CODE 02Q .0114*, at A-7 to A-11 (Dec. 2, 2025), https://perma.cc/A9RY-H2YW.
[2] *See id.* at A-7 (noting that "one comment letter" was received during the comment period). The lack of any supportive comments from the regulated community was also noted during DEQ's presentation of the proposed rule to the Environmental Management Commission.
[3] *See* 42 U.S.C. § 7410(l) ("The [EPA] Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of [the Clean Air Act].")
[4] 42 U.S.C. § 7410(l).

standards are achieved."[5] Similarly, federal rules implementing the Clean Air Act require every State Implementation Plan to include:

> Legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in . . . [i]nterference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.[6]

These federal rules also require that every State Implementation Plan "must include *means by which the State* or local agency responsible for final decisionmaking on an application for approval to construct or modify *will prevent such construction or modification* if . . . [i]t will interfere with the attainment or maintenance of a national standard."[7] The existing prohibition on construction without an air permit[8] is the "means by which" DEQ can "prevent" construction of a source that would interfere with NAAQS compliance, as required by 40 C.F.R. § 51.160(b).

According to DEQ, its air permitting staff "would be unable to verify that a proposed source (or modification) would not violate applicable requirements or interfere with attainment or maintenance of a standard" prior to completing a full "technical review" of the permit application.[9] That technical review cannot *begin* until the application is "administratively complete." As a result, allowing construction to occur immediately upon an application being deemed administratively complete would unlawfully eliminate the "means by which" DEQ can prevent construction of a source that would cause or contribute to a NAAQS violation, in violation of 40 C.F.R. § 51.160(b).

Notably, in September 2024, EPA denied DEQ's request to begin processing a proposed revision of the State Implementation Plan to incorporate the change in air permitting requirements reflected in the 2023–2024 State Budget Act.[10] EPA also provided written comments detailing its concerns about the amendment of N.C. GEN. STAT. § 143-215-108A.[11] EPA wrote that this amendment "appear[s] to be in opposition to applicable Clean Air Act (CAA) requirements" as well as "longstanding EPA guidance for major and minor source permitting."[12] First, EPA noted that the amendment conflicts with Section 110(a)(2)(C) of the Clean Air Act and 40 C.F.R. § 51.160 for the same reasons discussed

---

[5] 42 U.S.C. § 7410(a)(2)(C).
[6] 40 C.F.R. § 51.160(a).
[7] *Id.* § 51.160(b) (emphasis added).
[8] This prohibition is currently set forth in N.C. GEN. STAT. § 143-215-108A(a)–(b), 15A N.C. ADMIN. CODE 02Q .0501(b)–(c), and 15A N.C. ADMIN. CODE 02Q .0507.
[9] N.C. Dep't of Env't Quality, Div. of Air Quality, *Regulatory Impact Analysis for Amendments to Incorporate Pre-permitting Provisions pursuant to 2023-134, Section § 12.11(e)-(g), as amended by 2024-1, Section § 4.13*, at 22 (undated), https://perma.cc/EDC9-WJG2 ("Regulatory Impact Analysis").
[10] *See* Letter from Lynorae Benjamin, EPA Air Planning & Implementation Brach, to Michael Abraczinskas, DEQ Div. of Air Quality Dir., at 1 (Sept. 30, 2024), https://perma.cc/QV22-B44J.
[11] *Id.* at 2–3.
[12] *Id.* at 2.

above.[13] Second, EPA noted that the amendment conflicts with federal requirements for permitting "major" sources of air pollution, despite the purported exclusion of such sources from the amendment.[14] EPA explained that "with no technical review required to determine if an application is technically and scientifically correct, there is no verification on the part of the permitting authority that a source would be minor."[15] EPA noted that this "is particularly problematic with proposed synthetic minor sources that may require strict limits or controls to retain minor source status."[16] Third, EPA noted that the amendment does not fully exclude from its applicability all sources subject to facility-specific Maximum Achievable Control Technology standards and thus "would allow a major source of hazardous air pollutants to construct without technical review," in violation of Section § 112(g) of the Clean Air Act.[17]

Because the rule adopted by the Environmental Management Commission directly conflicts with the federal Clean Air Act and EPA's implementing regulations, the Rules Review Commission cannot determine that the rule is "reasonably necessary to implement or interpret an enactment . . . of Congress, or a regulation of a federal agency" as required by N.C. GEN. STAT. § 150B-21.9(a)(3). Accordingly, the Commission must object to the rule pursuant to N.C. GEN. STAT. § 150B-21.9(a).

II. The rule lacks statutory authority under state law.

For all the reasons described above, EPA cannot legally approve a revision of North Carolina's State Implementation Plan that incorporates this unlawful change in the State's air permitting requirements.[18] This means that the amendment of N.C. GEN. STAT. § 143-215-108A will not go into effect pursuant to N.C. SESS. LAWS 2024-1. As a result, the adopted rule directly conflicts with the statutory language that is currently in effect—and that will remain in effect—under N.C. GEN. STAT. § 143-215-108A, which clearly prohibits construction of a source of air pollution without a permit.

N.C. SESS. LAWS 2024-1 amended Section 12.11 of the 2023–2024 State Budget Act to make the effective date of that section contingent upon certification of EPA's approval of a State Implementation Plan revision incorporating this change:

> **Section 12.11.(g)** This section becomes effective on the first day of a month that is 60 days after the Secretary of the Department of

[13] *Id.*
[14] *Id.* at 2–3.
[15] *Id.* at 2.
[16] *Id.*
[17] *Id.* at 3; *see also* 42 U.S.C. § 7412(g)(2)(A) ("[N]o person may modify a major source of hazardous air pollutants in such State [with an approved Title V permitting program], unless the [EPA] Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator."); *id.* § 7412(g)(2)(B) (same but applicable to "construct[ing] or reconstruct[ing]" a source subject to such standards for "new sources"); *id.* § 7412(g)(3) ("The [EPA] Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.").
[18] If EPA nevertheless attempts to approve such a revision, that decision will be challenged in court. Given EPA's own written comments describing the rule's myriad conflicts with the Clean Air Act, it is hard to imagine that any court would uphold such a blatantly unlawful decision.

> Environmental Quality certifies to the Revisor of Statutes that the United State Environmental Protection Agency has approved an amendment to the North Carolina State Implementation Plan submitted as required by subsection (f)[19] of this section.[20]

Because Section 12.11 contains the amendment of N.C. GEN. STAT. § 143-215-108A, that amendment cannot go into effect until at least 60 days after certification that EPA has approved the State Implementation Plan revision. And because EPA cannot legally approve such a revision as described above, the amendment of N.C. GEN. STAT. § 143-215-108A will never go into effect.

The current version of N.C. GEN. STAT. § 143-215-108A clearly prohibits the construction of a new or modified source of air pollution before obtaining the required air permit:

> (a) New Facilities. A person may not, without obtaining a permit under G.S. 143-215-108, construct or operate an air contaminant source, equipment, or associated air cleaning device at a site or facility where, at the time of construction, there is no other air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143-215-108.
>
> (b) Permitted Facilities. A person who holds a permit under G.S. 143-215-108 may apply to the Commission for a modification of the permit to allow the person to alter or expand the physical arrangement or operation of an air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of air contaminants. The permittee may not operate the altered, expanded, or additional air contaminant source, equipment, or associated air cleaning device in a manner that alters the emission of any air contaminant without obtaining a permit modification under G.S. 143-215-108.

In contrast, the rule adopted by the Environmental Management Commission allows new and modified sources that are required to obtain a permit under N.C. GEN. STAT. 143-215-108 to be constructed before obtaining that required permit. The rule expressly provides that "the construction . . . of a new air contaminant source, equipment, or associated air cleaning or emission control devices *may commence prior to permit issuance*."[21] This provision directly conflicts with the plain statutory language of N.C. GEN. STAT. § 143-215-108A(a)–(b).

---

[19] Subsection (f) provides: "No later than July 1, 2025, the Department of Environmental Quality shall prepare and submit to the United States Environmental Protection Agency for approval by that agency a proposed North Carolina State Implementation Plan amendment based on the changes to the air permitting program provided in this section."

[20] N.C. SESS. LAWS 2024-1, Sec. 4.13.(a).

[21] 15A N.C. ADMIN. CODE 02Q .0114.

Because the rule directly conflicts with the clear statutory prohibition in G.S. § 143-215-108A—which is currently in effect and will remain in effect—the Environmental Management Commission did not have statutory authority to adopt the rule. The Rules Review Commission, therefore, cannot determine that the rule is "within the authority delegated to the agency by the General Assembly" as required by N.C. GEN. STAT. § 150B-21.9(a)(2). Accordingly, the Commission must object to the rule pursuant to N.C. GEN. STAT. § 150B-21.9(a).

III. The rule language is neither clear nor unambiguous.

While the rule language authorizing new and modified sources of air pollution to be constructed before obtaining an air permit is unambiguous (and clearly in direct conflict with federal and state law), the rule language excluding certain types of sources from that authorization is anything but clear.

As we noted during the public comment period on DEQ's proposed rule, the agency's characterization of one of these exclusionary provisions does not align with the rule language or the statutory language on which it is based. In its regulatory analysis, DEQ characterized the language in 15A N.C. ADMIN. CODE 02Q .0114(a) as excluding "[s]ources subject to Prevention of Significant Deterioration (PSD) or Nonattainment New Source Review (NNSR) standards" from the "allowance to construct prior to issuance of a permit."[22] While this may have been the General Assembly's intent, it is not at all clear that this is the legal effect of the statutory language it enacted. And because the rule incorporates that ambiguous statutory language verbatim without providing further clarification, it could be interpreted as allowing for the construction of a new major source or a major modification without a permit, which would constitute another violation of the Clean Air Act.

There are two primary sources of ambiguity in the statutory language, both of which were incorporated into the rule. First, the exclusionary provision uses an undefined term—"emissions source"—that could be subject to various interpretations. Because there are applicable statutory and regulatory definitions for similar (but distinct) terms such as "air contamination source,"[23] "stationary source,"[24] "source,"[25] and "facility,"[26] the General Assembly's use of the specific phrase "emissions source" could be interpreted as indicative

[22] Regulatory Impact Analysis at 7.
[23] *See* N.C. GEN. STAT. § 143-213(4) (defining "air contamination source" to mean "any source at, from, or by reason of which there is emitted into the atmosphere any air contaminant") (incorporated by reference in N.C. GEN. STAT. 143-215.105).
[24] *See* 40 C.F.R. § 51.166(b)(5) (defining "stationary source" to mean "any building, structure, facility, or installation which emits or may emit a regulated [New Source Review] pollutant") (incorporated by reference in 15A N.C. ADMIN. CODE 02D .0530(b)).
[25] *See* 15A N.C. ADMIN. CODE 02D .0101(37) (defining "source" to mean "any stationary article, machine, process equipment, or other contrivance, singly or in combination, or any tank-truck, trailer, or railroad tank car, from which air pollutants emanate or are emitted, either directly or indirectly"); *id.* 02Q .0103(32) (defining "source" to mean "any stationary article, machine, process equipment, or other contrivance, or combination thereof, from which air pollutants emanate or are emitted, either directly or indirectly").
[26] *See* 15A N.C. ADMIN. CODE 02D .0101(16) (defining "facility" to mean "all of the pollutant-emitting activities, except transportation facilities, that are located on one or more adjacent properties under common control").

of legislative intent for this term to have a distinct meaning—which could be anything from a single piece of equipment to an entire facility.

Second, the statute uses imprecise language to describe the applicability of major source permitting requirements. It excludes sources that are "subject to . . . permit limits set pursuant to programs for the prevention of significant deterioration and for the attainment of air quality standards in nonattainment areas." This phrase could be interpreted narrowly as only describing sources that have existing permits, with "permit limits" that were previously "set" pursuant to PSD or NNSR rules. According to that interpretation, the exclusionary provision would not capture a proposed new major source subject to PSD or NNSR review simply because it is not yet subject to such permit limits.

The combination of these ambiguities in the statutory language, which were adopted verbatim into the rule, could support an interpretation that would allow for a new major source of air pollution to be constructed without an air permit. This would result in yet another direct conflict with the plain language of the Clean Air Act and its implementing regulations, which clearly prohibit the proponent of a new major source from beginning construction without a major source permit.[27]

Because this imprecise rule language could be interpreted in a way that conflicts with the agency's characterization of its intended effect, the Rules Review Commission cannot determine that the rule "is clear and unambiguous" as required by N.C. GEN. STAT. § 150B-21.9(a)(2). Accordingly, the Commission must object to the rule pursuant to N.C. GEN. STAT. § 150B-21.9(a).

* * *

For the reasons described above, the Rules Review Commission cannot make the determinations that are required by N.C. GEN. STAT. § 150B-21.9(a)(1)–(3) to approve the Environmental Management Commission's rule that allows new and modified sources of air pollution to be constructed before obtaining the required air permit, in clear violation of federal and state law. Accordingly, the Commission "shall object" to the rule.[28]

Respectfully submitted,

/s/ Caroline Cress
Caroline Cress, Senior Attorney
SOUTHERN ENVIRONMENTAL LAW CENTER
136 East Rosemary Street, Suite 500
Chapel Hill, NC 27514
ccress@selc.org
(919) 967-1450

[27] *See* 42 U.S.C. §§ 7475(a), 7502(c)(5); 40 C.F.R. §§ 51.165(b)(1), 51.166(a)(7)(iii).
[28] *See* N.C. GEN. STAT. § 150B-21.9(a) ("In the event that a proposed temporary or permanent rule fails to comply with any of the standards set forth in this section, the Commission shall object to the temporary or permanent rule.").

Jeff Robbins, Executive Director
CLEANAIRE NC
P.O. Box 5311
Charlotte, NC 28299
jeff@cleanairenc.org

cc: Mike Abraczinskas, Director, DEQ Division of Air Quality,
Michael.Abraczinskas@deq.nc.gov

Katherine Quinlan, Rule Development Branch Supervisor, DEQ Division of Air Quality,
Katherine.Quinlan@deq.nc.gov