Burgos, Alexander N

Subject: FW: EMC Review - 15A NCAC 02H .0804

From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Wednesday, February 15, 2023 2:35 PM
To: Everett, Jennifer <jennifer.everett@ncdenr.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Swanson, Beth <beth.swanson@ncdenr.gov>; Ostendorff, Anna C <Anna.Ostendorff@ncdenr.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

Jennifer,

Seems prudent. Thank you for letting me know.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

From: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Sent: Wednesday, February 15, 2023 2:12 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Swanson, Beth <beth.swanson@ncdenr.gov>; Ostendorff, Anna C <Anna.Ostendorff@ncdenr.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

Lawrence,

The Environmental Management Commission is requesting the withdrawal of 15A NCAC 02H .0804 pursuant to 26 NCAC 05 .0107.

Let us know if you have any questions.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties.

Burgos, Alexander N

Subject: FW: EMC Review - 15A NCAC 02H .0804
Attachments: EMC - 02.2023 - 15A NCAC 02H .0804 - RRC Final Reply to EMC 02-14-23.docx

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From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Tuesday, February 14, 2023 5:46 PM
To: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Swanson, Beth <beth.swanson@ncdenr.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

See attached. Without any changes to the text of the Rule, I will be recommending objection at the RRC meeting. Please let me know what you plan to do because I will be drafting the staff opinion first thing tomorrow morning.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .0804

DEADLINE FOR RECEIPT: Friday, February 10, 2023

***PLEASE NOTE:* This request may extend to several pages. Please be sure you have reached the end of the document.**

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Related to the Fiscal Note: If the analysis of this amendment is based on the fiscal impact of adding certification requirements promulgated by the EPA, and the EPA's own website states that it "does not have any laboratory certification requirements for PFAS", how was the fiscal impact calculated and how was this in compliance with the APA?

EMC Response: While it is not clear which part of the EPA's website the referenced language appears or the date that language was published, the EPA has published Method 533, 537, and 537.1 for PFAS testing for drinking water (https://www.epa.gov/pfas/epa-pfas-drinking-water-laboratory-methods), as well as Method 8327 for testing non-potable water and other environmental media (https://www.epa.gov/water-research/pfas-analytical-methods-development-and-sampling-research). EPA has also published the Third Draft of Method 1633 in December 2022 with the fourth and then final version of Method 1633 in 2023 (https://www.epa.gov/cwa-methods/cwa-analytical-methods-and-polyfluorinated-alkyl-substances-pfas). The Department of Defense and the EPA have already prepared what is referred to as a "single-laboratory validation" study report for Method 1633, which is typically one of the final steps before a test method is published in the federal register, and the method is currently being recommend for use in individual permits. (*see* link above)

Generally, commercial and "in-house" laboratories across the State, including the State Chemistry Laboratory, are already testing wastewater samples for PFAS and other contaminants of emerging concern, but laboratories cannot report "certified" data as required by their permits without having first being certified by the State Wastewater/ Ground Water Laboratory Certification Branch (WW/GW LCB). NPDES permits currently include a condition that, once the EPA publishes the final version of Method 1633 in the federal register, permittees will have six months to begin submitting certified sampling data for PFAS. Because the rulemaking process typically takes much longer than six months to be completed and because a certification application typically takes at least one month to be approved, the EMC acted to address the pending certification-gap in order to allow laboratories to become certified as soon as the method is published in the federal register. Certification staff polled stakeholders to determine an approximate number of laboratories that would seek certification and the timeframe within which certification applications would

likely be submitted. No less than eleven laboratories responded stating their intent to become certified for PFAS testing and would do so as soon as the final test method was published. It is anticipated that the number will increase, as there are approximately 42 laboratories that are currently certified for testing organic Parameters.

It is also anticipated that the final version of Method 1633 will look substantially similar to the Third Draft version, as the EPA is currently recommending its use in individual discharge permits. To be clear, the rule at issue does not establish the method for analyzing PFAS in wastewater samples, nor does it require that PFAS sampling be done. Instead, the proposed rule allows the Water Sciences Section to certify a laboratory to use the EPA's approved test method to analyze samples as required by DWR issued permits. While a commercial laboratory or other "in-house" laboratories are not required to become certified for testing for a particular parameter, including PFAS, data derived from samples cannot be certified unless the laboratory has been certified for that specific Parameter method.

As provided in the RIA, the EMC relied on the existing rule as the baseline and concluded that it is unlikely that the amended rule will result in additional costs to permittees. The anticipated costs for laboratories applying for certification will consist of application fee(s), which are already established through existing rules. (*see* Tables 1 and 2, pages 4-5 of the RIA) The RIA also analyzed the cost to the State (*see* RIA pages 6-8) as required by N.C. Gen. Stat. § 150B-21.4(a). As such, the EMC complied with the requirements of N.C. Gen. Stat. § 150B-21.4 and received approval of the RIA prior to the publishing of the text of the proposed amendment. As such, the EMC has undertaken all required steps in adopting the amended rule.

RRC Response: Anticipated methods are not actual methods. This response confirms what is being asked: The RIA is allegedly based on promulgated methods, except that this response states clearly that they are draft methods, regardless of whether a third or fourth draft may potentially become final this year.

EMC Reply: This issue might be the result of confusion regarding the distinction between a method and a "Parameter". While the initial question and response focused on "methods", it is important to note that a "Parameter" and a "Parameter Method" are different things. The proposed amendment does not add a specific method that must be used but, rather, a "Parameter", which is the substance being analyzed regardless of the method being used. In other words, while Method 1633 is an actual method that is currently recommended and already being used by laboratories, the addition of the PFAS "Parameter" is not adding a requirement that Method 1633 be used, only that a laboratory may be certified to analyze PFAS, along with all of the other substances (Parameters) listed in the rule. As provided in 15A NCAC 2H .0803(21), ""'Parameter' means the analyte, element, compound, or property being measured," and 02H .0803(22) defines "Parameter Method" as the "type of analytical technique".

Additionally, the proposed amendment does not impose an additional requirement on the regulated community as to the specific method but is instead a delegation of authority by the EMC to the NC Wastewater/ Ground Water Laboratory Certification Branch that allows regulatory data submitted by a laboratory to be considered 'certified', which is a requirement of permit conditions. In other words (and in general terms), unless PFAS is included among the substances that can be certified, it makes no difference as to which method is approved

or used in the analysis of PFAS because the Certification Branch would not be able to certify the laboratory for that substance. If Method 1633 were promulgated in 40 CFR Part 136 tomorrow by the EPA, the Certification Branch would still not be able to grant certification for any laboratories because PFAS is not included among the Parameters in 02H .0804. As stated in the fiscal note, "This precludes laboratories from producing certified regulatory data **for these Parameters** for North Carolina permits. The aforementioned Parameters must be added to the Rule for permittees to submit this type data in compliance with permits requiring regulatory data to be produced by a certified laboratory. … The Parameter known as "PFAS" is not currently codified in Certification rule 02H .0804(d); as such, the NC WW/GW Laboratory Certification Branch does not currently have the authority to certify laboratories for this Parameter. Adding this Parameter to the Certification rule is a necessary precursor to allowing commercial, municipal and industrial laboratories to request certification from the State." EMC RIA, pp 1-2 (emphasis added).

The fiscal note was prepared using the current list of Parameters as the baseline, which is appropriate since the proposed amendment adds PFAS and Organic Fluorine as Parameters within the existing list. It also noted that the inclusion of the Parameters does not require a laboratory to seek certification but analyzed the cost for applying for certification and the related process. RRC counsel's response does not identify any specific issues related to the fiscal note's analysis of adding PFAS (or Organic Fluorine) as a Parameter and does not provide any additional explanation as to how the fiscal note's analysis fails to consider any additional costs or benefits and does not identify a different baseline or how the conclusions might be impacted.

Moreover, the EMC submitted the fiscal note to OSBM, which reviewed it in accordance with the State Budget Manual before approving it. The APA requires an agency to prepare a fiscal note and submit it to OSBM prior to the publication of the notice of text, which the EMC did. N.C. Gen. Stat. § 150B-21.2 and -21.4. As such, the EMC fully complied with all applicable requirements of the APA in adopting the amendments.

RRC Response: The issue here is not the fiscal note, although that is problematic. The issue is that the rule states in Paragraph (d) that "Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section." As stated in EMC's reply above, there is only a draft method for organic fluorine and PFAS. That means that it is impossible for a regulated entity to follow the rule. Once the EPA has approved a method, then .0805(a)(1) would incorporate that method into the rule. However, before that has happened, this amendment is premature because it violates N.C. Gen. Stat. § 150B-19.3, 150B-21.6, and therefore the 150B-21.9 standards for which the RRC reviews the rule.

In Paragraph (a), there is much repetitive language, for instance "shall obtain Certification for Parameter Methods used to generate data that will be reported by the client to the State in accordance with the rules of this Section". For clarity, can this Paragraph be consolidated in a way that preserves what it requires.
EMC Response: No, it would not preserve the intent because there are two types of labs; commercial labs, who submit data to the permittee and in-house labs operated by the permittee.

Paragraph (b), (c), and (d) need to be reworded with an active verb. It does not make sense to change active verbs in this case. Who is required to do what?
EMC Response: We are not sure what you are asking for. These are lists of parameters that a lab can analyze using multiple methods.
RRC Response: This is an issue of clarity. For instance, (b) reads: "Each of the inorganic, physical characteristic, and microbiological analytes listed in this Paragraph shall be considered a certifiable parameter." Considered by whom? This is unclear. Second sentence: "Analytical methods shall be determined…" Determined by whom? Why do these requirements matter if there is no entity "considered" or "determined"?

EMC Reply: The rules are a delegation of authority to the Laboratory Certification Branch and provides the criteria within which the Laboratory Certification Branch must act, including the list of Parameters for which analytical data can be certified. As such, the Laboratory Certification Branch would be the entity required to consider the list of Parameters as being substances for which a laboratory may be certified.

RRC Response: Nowhere in the rule does it mention the Laboratory Certification Branch. Don't simply put this in your response. Amend the language of the rule so that the rule is clear and unambiguous. For example, start with "(b) Inorganics: The Laboratory Certification Branch (LCB) shall consider each of the inorganic, physical characteristic, and microbiological analytes listed in this Paragraph to be a certifiable parameter. The LCB shall determine the analytical methods to be used from the sources listed in Rule .0805(a)(1) of this Section. The LCB may list one or more analytical methods or Parameter Methods with a laboratory's certified Parameters…" Now do (c) and (d).

Is the sentence in each stating "Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section." necessary?
EMC Response: Yes.

In the Subparagraphs of (a), why do the Subparagraphs start with capital letters? Unless it is a proper noun, all should be lower-case. This applies to Paragraphs (b), (c), and (d).
EMC Response: They are capitalized and consistent with EPA's listing of them.
RRC Response: How the EPA writes its rules is not relevant to style in which North Carolina writes its Administrative Code. Try again.

EMC Reply: The term "Parameter" as used in these rules is a proper noun and is also a defined term, which specifically refers to the classes of substances or physical characteristic identified in the rule. *See* 15A NCAC 02H .0803. The EMC's earlier response was only intended to provide additional clarification that the term is both supposed to be capitalized and that it is also capitalized in the federal code as a means of providing additional context, not unlike the RRC counsel's earlier response related to language used by the EPA's website, which is also not controlling. The response was not intended to assert that its use in the federal code dictates the use in the Administrative Code.

RRC Response: The Subparagraphs are those that start with a (1), (2), (3), etc. The issue is not with the capitalization of "Parameter" or any other defined term. The issue is with, for example, "acidity; alkalinity; biochemical oxygen demand; bromide;" etc. These are not proper nouns and should, therefore, not be capitalized.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: February 1, 2023

Do the sources listed in .0805(a)(1) have reliable methods for identifying and measuring the two certified organic parameters added to Paragraph (d)? It appears that the sources referenced do not. If so, why have these been added before these methods have been promulgated?

EMC Response: They are currently in draft form and can viewed on EPA's website here: https://www.epa.gov/cwa-methods. Once finalized, they will be published in the federal register. Once that happens, permittees required to test for those parameters will have 6 months to begin reporting certified data. The WW/GW LCB is positioning itself to be ready to offer certification at that time so that permittees have the full 6 months to be in compliance with their permits.

RRC Response: For a standard to be used in the Administrative Code, it must be incorporated by reference pursuant to G.S. 150B-21.6. Putting the link into your response above is not sufficient, even if this draft method may be approved at some future date. The text of the amendment to Rule .0804 adds parameters for which there is not a method in any of those listed in Rule .0805(a)(1). Therefore, this amendment would violate the APA.

EMC Reply: As noted in the EMC's reply, above, there is a distinction between adding a "Parameter" and a "Parameter Method." The initial question focused on "methods", which is not being addressed by the proposed amendments to 02H .0804. The proposed rule amendments add PFAS and Organic Fluorine as Parameters (i.e., class of substances) for which a laboratory may be certified. The EMC is not currently proposing any amendments to Rule 02H .0805, which provides various sources of acceptable Parameter Methods but does not associate a specific Parameter Method with each of the listed Parameters in 02H .0804. Rule 02H .0805 already incorporates by reference, for example, the applicable portions of the federal code and other acceptable Parameter Method sources. In promulgating 02H .0805, the EMC specifically provided that, "[t]he procedures and methods listed in this Subparagraph are incorporated by reference, including subsequent amendments and editions". (*see* 15A NCAC 02H .0805(a)(1)(G)) This approach is specifically allowed by N.C. Gen. Stat. § 150B-21.6, "In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material". While Rule 02H .0805 is not before the RRC, the EMC nevertheless has complied with the APA by incorporating subsequent amendments to the referenced material. The inclusion of the link in the EMC's response was simply to provide additional information regarding methods, which was the focus of the question. The use of the link was not intended to "re-incorporate" by reference existing methods promulgated by, for example, the EPA. Again, the proposed rule amendments to Rule 02H .0804 are to add PFAS and Organic Fluorine as Parameters for which a laboratory may be certified, and the EMC is not proposing to amend Rule 02H .0805.

RRC Response: Yes, Rule .0805 is not before the RRC. However, as stated above, in Paragraph (d) Rule .0805(a)(1) is the reference for the approved methods. If there are not approved methods, then compliance is impossible. This rule amendment is premature for the reasons stated above and should be withdrawn until there is an approved method by which these added parameters may be measured. EMC is attempting to incorporate a Parameter which does not have an approved method, incorporated by reference, by which it can be measured as admitted above by EMC. The methods are not yet part of the "subsequent amendments and editions" because they are in draft form. Once they are finalized and

included in the approved “subsequent amendments and editions”, then these parameters may be added, not before.

Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: February 1, 2023

Burgos, Alexander N

Subject: FW: EMC Review - 15A NCAC 02H .0804
Attachments: EMC - 02.2023 - 15A NCAC 02H .0804 - EMC Reply to RRC Responses 02-14-23.docx

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From: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Sent: Tuesday, February 14, 2023 3:56 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>; Swanson, Beth <beth.swanson@ncdenr.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

Lawrence,

We intend to have the RRC's review of 15A NCAC 02H .0804 at this Thursday's meeting. Attached are replies to your RRC Responses.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .0804

DEADLINE FOR RECEIPT: Friday, February 10, 2023

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Moreover, the EMC submitted the fiscal note to OSBM, which reviewed it in accordance with the State Budget Manual before approving it. The APA requires an agency to prepare a fiscal note and submit it to OSBM prior to the publication of the notice of text, which the EMC did. N.C. Gen. Stat. § 150B-21.2 and -21.4. As such, the EMC fully complied with all applicable requirements of the APA in adopting the amendments.

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EMC Response: No, it would not preserve the intent because there are two types of labs; commercial labs, who submit data to the permittee and in-house labs operated by the permittee.

Paragraph (b), (c), and (d) need to be reworded with an active verb. It does not make sense to change active verbs in this case. Who is required to do what?
EMC Response: We are not sure what you are asking for. These are lists of parameters that a lab can analyze using multiple methods.
RRC Response: This is an issue of clarity. For instance, (b) reads: "Each of the inorganic, physical characteristic, and microbiological analytes listed in this Paragraph shall be considered a certifiable parameter." Considered by whom? This is unclear. Second sentence: "Analytical methods shall be determined…" Determined by whom? Why do these requirements matter if there is no entity "considered" or "determined"?

EMC Reply: The rules are a delegation of authority to the Laboratory Certification Branch and provides the criteria within which the Laboratory Certification Branch must act, including the list of Parameters for which analytical data can be certified. As such, the Laboratory Certification Branch would be the entity required to consider the list of Parameters as being substances for which a laboratory may be certified.

Is the sentence in each stating "Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section." necessary?
EMC Response: Yes.

In the Subparagraphs of (a), why do the Subparagraphs start with capital letters? Unless it is a proper noun, all should be lower-case. This applies to Paragraphs (b), (c), and (d).
EMC Response: They are capitalized and consistent with EPA's listing of them.
RRC Response: How the EPA writes its rules is not relevant to style in which North Carolina writes its Administrative Code. Try again.

EMC Reply: The term "Parameter" as used in these rules is a proper noun and is also a defined term, which specifically refers to the classes of substances or physical characteristic identified in the rule. *See* 15A NCAC 02H .0803. The EMC's earlier response was only intended to provide additional clarification that the term is both supposed to be capitalized and that it is also capitalized in the federal code as a means of providing additional context, not unlike the RRC counsel's earlier response related to language used by the EPA's website, which is also not controlling. The response was not intended to assert that its use in the federal code dictates the use in the Administrative Code.

Do the sources listed in .0805(a)(1) have reliable methods for identifying and measuring the two certified organic parameters added to Paragraph (d)? It appears that the sources referenced do not. If so, why have these been added before these methods have been promulgated?
EMC Response: They are currently in draft form and can viewed on EPA's website here: https://www.epa.gov/cwa-methods. Once finalized, they will be published in the federal register. Once that happens, permittees required to test for those parameters will have 6 months to begin reporting certified data. The WW/GW LCB is positioning itself to be ready to offer certification at that time so that permittees have the full 6 months to be in compliance with their permits.
RRC Response: For a standard to be used in the Administrative Code, it must be incorporated by reference pursuant to G.S. 150B-21.6. Putting the link into your response above is not sufficient, even if this draft method may be approved at some future date. The text of the amendment to Rule .0804 adds parameters for which there is not a method in any of those listed in Rule .0805(a)(1). Therefore, this amendment would violate the APA.

EMC Reply: As noted in the EMC's reply, above, there is a distinction between adding a "Parameter" and a "Parameter Method." The initial question focused on "methods", which is not being addressed by the proposed amendments to 02H .0804. The proposed rule amendments add PFAS and Organic Fluorine as Parameters (i.e., class of substances) for which a laboratory may be certified. The EMC is not currently proposing any amendments to Rule 02H .0805, which provides various sources of acceptable Parameter Methods but does not associate a specific Parameter Method with each of the listed Parameters in 02H .0804. Rule 02H .0805 already

incorporates by reference, for example, the applicable portions of the federal code and other acceptable Parameter Method sources. In promulgating 02H .0805, the EMC specifically provided that, "[t]he procedures and methods listed in this Subparagraph are incorporated by reference, including subsequent amendments and editions". (*see* 15A NCAC 02H .0805(a)(1)(G)) This approach is specifically allowed by N.C. Gen. Stat. § 150B-21.6, "In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material". While Rule 02H .0805 is not before the RRC, the EMC nevertheless has complied with the APA by incorporating subsequent amendments to the referenced material. The inclusion of the link in the EMC's response was simply to provide additional information regarding methods, which was the focus of the question. The use of the link was not intended to "re-incorporate" by reference existing methods promulgated by, for example, the EPA. Again, the proposed rule amendments to Rule 02H .0804 are to add PFAS and Organic Fluorine as Parameters for which a laboratory may be certified, and the EMC is not proposing to amend Rule 02H .0805.

Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: February 1, 2023

Burgos, Alexander N

Subject: FW: EMC Review - 15A NCAC 02H .0804
Attachments: EMC - 02.2023 - 15A NCAC 02H .0804 - RRC Responses.docx

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From: Duke, Lawrence <lawrence.duke@oah.nc.gov>
Sent: Monday, February 13, 2023 5:45 PM
To: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

Please see responses. They have been included in red beneath EMC's responses. Given that we are so near the date of the RRC meeting, if you are unable to constructively respond with enough time for this rule to be ready for Thursday, I will gladly advocate for an extension of time on this Rule.

Lawrence Duke
Counsel, NC Rules Review Commission
Office of Administrative Hearings
(984) 236-1938

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .0804

DEADLINE FOR RECEIPT: Friday, February 10, 2023

***PLEASE NOTE:* This request may extend to several pages. Please be sure you have reached the end of the document.**

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Related to the Fiscal Note: If the analysis of this amendment is based on the fiscal impact of adding certification requirements promulgated by the EPA, and the EPA's own website states that it "does not have any laboratory certification requirements for PFAS", how was the fiscal impact calculated and how was this in compliance with the APA?

EMC Response: While it is not clear which part of the EPA's website the referenced language appears or the date that language was published, the EPA has published Method 533, 537, and 537.1 for PFAS testing for drinking water (https://www.epa.gov/pfas/epa-pfas-drinking-water-laboratory-methods), as well as Method 8327 for testing non-potable water and other environmental media (https://www.epa.gov/water-research/pfas-analytical-methods-development-and-sampling-research). EPA has also published the Third Draft of Method 1633 in December 2022 with the fourth and then final version of Method 1633 in 2023 (https://www.epa.gov/cwa-methods/cwa-analytical-methods-and-polyfluorinated-alkyl-substances-pfas). The Department of Defense and the EPA have already prepared what is referred to as a "single-laboratory validation" study report for Method 1633, which is typically one of the final steps before a test method is published in the federal register, and the method is currently being recommend for use in individual permits. (*see* link above)

Generally, commercial and "in-house" laboratories across the State, including the State Chemistry Laboratory, are already testing wastewater samples for PFAS and other contaminants of emerging concern, but laboratories cannot report "certified" data as required by their permits without having first being certified by the State Wastewater/ Ground Water Laboratory Certification Branch (WW/GW LCB). NPDES permits currently include a condition that, once the EPA publishes the final version of Method 1633 in the federal register, permittees will have six months to begin submitting certified sampling data for PFAS. Because the rulemaking process typically takes much longer than six months to be completed and because a certification application typically takes at least one month to be approved, the EMC acted to address the pending certification-gap in order to allow laboratories to become certified as soon as the method is published in the federal register. Certification staff polled stakeholders to determine an approximate number of laboratories that would seek certification and the timeframe within which certification applications would

likely be submitted. No less than eleven laboratories responded stating their intent to become certified for PFAS testing and would do so as soon as the final test method was published. It is anticipated that the number will increase, as there are approximately 42 laboratories that are currently certified for testing organic Parameters.

It is also anticipated that the final version of Method 1633 will look substantially similar to the Third Draft version, as the EPA is currently recommending its use in individual discharge permits. To be clear, the rule at issue does not establish the method for analyzing PFAS in wastewater samples, nor does it require that PFAS sampling be done. Instead, the proposed rule allows the Water Sciences Section to certify a laboratory to use the EPA's approved test method to analyze samples as required by DWR issued permits. While a commercial laboratory or other "in-house" laboratories are not required to become certified for testing for a particular parameter, including PFAS, data derived from samples cannot be certified unless the laboratory has been certified for that specific Parameter method.

As provided in the RIA, the EMC relied on the existing rule as the baseline and concluded that it is unlikely that the amended rule will result in additional costs to permittees. The anticipated costs for laboratories applying for certification will consist of application fee(s), which are already established through existing rules. (*see* Tables 1 and 2, pages 4-5 of the RIA) The RIA also analyzed the cost to the State (*see* RIA pages 6-8) as required by N.C. Gen. Stat. § 150B-21.4(a). As such, the EMC complied with the requirements of N.C. Gen. Stat. § 150B-21.4 and received approval of the RIA prior to the publishing of the text of the proposed amendment. As such, the EMC has undertaken all required steps in adopting the amended rule.
RRC Response: Anticipated methods are not actual methods. This response confirms what is being asked: The RIA is allegedly based on promulgated methods, except that this response states clearly that they are draft methods, regardless of whether a third or fourth draft may potentially become final this year.

In Paragraph (a), there is much repetitive language, for instance "shall obtain Certification for Parameter Methods used to generate data that will be reported by the client to the State in accordance with the rules of this Section". For clarity, can this Paragraph be consolidated in a way that preserves what it requires.
EMC Response: No, it would not preserve the intent because there are two types of labs; commercial labs, who submit data to the permittee and in-house labs operated by the permittee.

Paragraph (b), (c), and (d) need to be reworded with an active verb. It does not make sense to change active verbs in this case. Who is required to do what?
EMC Response: We are not sure what you are asking for. These are lists of parameters that a lab can analyze using multiple methods.
RRC Response: This is an issue of clarity. For instance, (b) reads: "Each of the inorganic, physical characteristic, and microbiological analytes listed in this Paragraph shall be considered a certifiable parameter." Considered by whom? This is unclear. Second sentence: "Analytical methods shall be determined…" Determined by whom? Why do these requirements matter if there is no entity "considered" or "determined"?

Is the sentence in each stating "Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section." necessary?
EMC Response: Yes.

In the Subparagraphs of (a), why do the Subparagraphs start with capital letters? Unless it is a proper noun, all should be lower-case. This applies to Paragraphs (b), (c), and (d).
EMC Response: They are capitalized and consistent with EPA's listing of them.
RRC Response: How the EPA writes its rules is not relevant to style in which North Carolina writes its Administrative Code. Try again.

Do the sources listed in .0805(a)(1) have reliable methods for identifying and measuring the two certified organic parameters added to Paragraph (d)? It appears that the sources referenced do not. If so, why have these been added before these methods have been promulgated?
EMC Response: They are currently in draft form and can viewed on EPA's website here: https://www.epa.gov/cwa-methods. Once finalized, they will be published in the federal register. Once that happens, permittees required to test for those parameters will have 6 months to begin reporting certified data. The WW/GW LCB is positioning itself to be ready to offer certification at that time so that permittees have the full 6 months to be in compliance with their permits.
RRC Response: For a standard to be used in the Administrative Code, it must be incorporated by reference pursuant to G.S. 150B-21.6. Putting the link into your response above is not sufficient, even if this draft method may be approved at some future date. The text of the amendment to Rule .0804 adds parameters for which there is not a method in any of those listed in Rule .0805(a)(1). Therefore, this amendment would violate the APA.

Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: February 1, 2023

Burgos, Alexander N

Subject: FW: EMC Review - 15A NCAC 02H .0804
Attachments: EMC - 02.2023 - 15A NCAC 02H .0804_Responses.docx; 15A NCAC 02H .0804.docx

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From: Everett, Jennifer <jennifer.everett@ncdenr.gov>
Sent: Friday, February 10, 2023 4:22 PM
To: Duke, Lawrence <lawrence.duke@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Crawford, Todd <todd.crawford@ncdenr.gov>; Reynolds, Phillip T <preynolds@ncdoj.gov>
Subject: RE: EMC Review - 15A NCAC 02H .0804

Lawrence,

Attached are responses to your technical change requests for 15A NCAC 02H .0804. No further edits were made to the original rule submission but is attached as well.

Jennifer

Jennifer Everett
DEQ Rulemaking Coordinator
N.C. Depart. Of Environmental Quality
Office of General Counsel
1601 Mail Service Center
Raleigh, NC 27699-1601
Tele: (919)-707-8614
https://deq.nc.gov/permits-rules/rules-regulations/deq-proposed-rules

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Environmental Management Commission

RULE CITATION: 15A NCAC 02H .0804

DEADLINE FOR RECEIPT: Friday, February 10, 2023

***PLEASE NOTE:* This request may extend to several pages. Please be sure you have reached the end of the document.**

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Related to the Fiscal Note: If the analysis of this amendment is based on the fiscal impact of adding certification requirements promulgated by the EPA, and the EPA's own website states that it "does not have any laboratory certification requirements for PFAS", how was the fiscal impact calculated and how was this in compliance with the APA?

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likely be submitted. No less than eleven laboratories responded stating their intent to become certified for PFAS testing and would do so as soon as the final test method was published. It is anticipated that the number will increase, as there are approximately 42 laboratories that are currently certified for testing organic Parameters.

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EMC Response: We are not sure what you are asking for. These are lists of parameters that a lab can analyze using multiple methods.

Is the sentence in each stating "Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section." necessary?
EMC Response: Yes.

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Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel
Date submitted to agency: February 1, 2023

15A NCAC 02H .0804 is amended as published in 37:07 NCAC 538 as follows:

15A NCAC 02H .0804 PARAMETERS FOR WHICH CERTIFICATION MAY BE REQUESTED

(a) Commercial Laboratories shall obtain Certification for Parameter Methods used to generate data that will be reported by the client to the State in accordance with the rules of this Section. Municipal and Industrial Laboratories shall obtain Certification for Parameter Methods used to generate data that will be reported to the State in accordance with the rules of this Section. Commercial Laboratories shall obtain Certification for Field Parameter Methods used to generate data that will be reported by the client to the State in accordance with the rules of this Section. Municipal and Industrial laboratories shall obtain Certification for Field Parameter Methods used to generate data that will be reported to the State in accordance with the rules of this Section.

(b) Inorganics: Each of the inorganic, physical characteristic, and microbiological analytes listed in this Paragraph shall be considered a certifiable parameter. Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section. One or more analytical methods or Parameter Methods may be listed with a laboratory's certified Parameters. Certifiable inorganic, physical characteristic, and microbiological Parameters are as follows:

(1) Acidity;
(2) Alkalinity;
(3) Biochemical Oxygen Demand;
(4) Bromide;
(5) Carbonaceous Biochemical Oxygen Demand;
(6) Chemical Oxygen Demand;
(7) Chloride;
(8) Chlorine, Free Available;
(9) Chlorine, Total Residual;
(10) Chlorophyll;
(11) Coliform, Fecal;
(12) Coliform, Total;
(13) Color;
(14) Conductivity/Specific Conductance;
(15) Cyanide;
(16) Dissolved Organic Carbon;
(17) Dissolved Oxygen;
(18) Enterococci;
(19) Escherichia Coliform (E. coli);
(20) Flash Point;
(21) Fluoride;
(22) Hardness, Total;
(23) Ignitability;

(24) Surfactants as Methylene Blue Active Surfactants;
(25) Nitrogen, Ammonia;
(26) Nitrogen, Nitrite plus Nitrate;
(27) Nitrogen, Nitrate;
(28) Nitrogen, Nitrite;
(29) Nitrogen, Total Kjeldahl;
(30) Oil and Grease;
(31) Orthophosphate;
(32) Paint Filter Liquids;
(33) pH;
(34) Phenols;
(35) Phosphorus, Total;
(36) Residue, Settleable;
(37) Residue, Total;
(38) Residue, Total Dissolved;
(39) Residue, Total Suspended;
(40) Residue, Volatile;
(41) Salinity;
(42) Salmonella;
(43) Silica;
(44) Sulfate;
(45) Sulfide;
(46) Sulfite;
(47) Temperature;
(48) Total Organic Carbon;
(49) Turbidity;
(50) Vector Attraction Reduction: Option 1;
(51) Vector Attraction Reduction: Option 2;
(52) Vector Attraction Reduction: Option 3;
(53) Vector Attraction Reduction: Option 4;
(54) Vector Attraction Reduction: Option 5;
(55) Vector Attraction Reduction: Option 6;
(56) Vector Attraction Reduction: Option 7;
(57) Vector Attraction Reduction: Option 8; and
(58) Vector Attraction Reduction: Option 12.

(c) Metals: Each of the metals listed in this Paragraph shall be considered a certifiable Parameter. One or more Parameter Methods shall be listed with a laboratory's certified Parameters. Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section. Certifiable metals are as follows:

(1) Aluminum;
(2) Antimony;
(3) Arsenic;
(4) Barium;
(5) Beryllium;
(6) Boron;
(7) Cadmium;
(8) Calcium;
(9) Chromium, Hexavalent (Chromium VI);
(10) Chromium, Total;
(11) Chromium, Trivalent (Chromium III);
(12) Cobalt;
(13) Copper;
(14) Hardness, Total (Calcium + Magnesium);
(15) Iron;
(16) Lead;
(17) Lithium;
(18) Magnesium;
(19) Manganese;
(20) Mercury;
(21) Molybdenum;
(22) Nickel;
(23) Potassium;
(24) Phosphorus;
(25) Selenium;
(26) Silica;
(27) Silver;
(28) Sodium;
(29) Strontium;
(30) Thallium;
(31) Tin;
(32) Titanium;
(33) Vanadium; and
(34) Zinc.

(d) Organics: Each of the organic Parameters listed in this Paragraph shall be considered a certifiable Parameter. One or more Parameter Methods shall be listed with a laboratory's certified Parameters. Analytical methods shall be determined from the sources listed in Rule .0805(a)(1) of this Section. Certifiable organic Parameters are as follows:

(1) 1,2-Dibromoethane (EDB); 1,2-Dibromo-3-chloro-propane (DBCP); 1,2,3-Trichloropropane (TCP);
(2) Acetonitrile;
(3) Acrolein, Acrylonitrile;
(4) Adsorbable Organic Halides;
(5) Base/Neutral and Acid Organics;
(6) Benzidines;
(7) Chlorinated Acid Herbicides;
(8) Chlorinated Hydrocarbons;
(9) Chlorinated Phenolics;
(10) Explosives;
(11) Extractable Petroleum Hydrocarbons;
(12) Haloethers;
(13) N-Methylcarbamates;
(14) Nitroaromatics and Isophorone;
(15) Nitrosamines;
(16) Nonhalogenated Volatile Organics;
(17) Organic Fluorine;
~~(17)~~(18) Organochlorine Pesticides;
~~(18)~~(19) Organophosphorus Pesticides;
(20) Per- and Polyfluoroalkyl Substances (PFAS);
~~(19)~~(21) Phenols;
~~(20)~~(22) Phthalate Esters;
~~(21)~~(23) Polychlorinated Biphenyls;
~~(22)~~(24) Polynuclear Aromatic Hydrocarbons;
~~(23)~~(25) Purgeable Aromatics;
~~(24)~~(26) Purgeable Halocarbons;
~~(25)~~(27) Purgeable Organics;
~~(26)~~(28) Total Organic Halides;
~~(27)~~(29) Total Petroleum Hydrocarbons – Diesel Range Organics;
~~(28)~~(30) Total Petroleum Hydrocarbons – Gasoline Range Organics; and
~~(29)~~(31) Volatile Petroleum Hydrocarbons.

History Note: *Authority G.S. 143-215.3(a)(1); 143-215.3(a)(10);*

Eff. February 1, 1976;
Amended Eff. November 2, 1992; December 1, 1984;
Temporary Amendment Eff. October 1, 2001;
Amended Eff. August 1, 2002;
Readopted Eff. July 1, 2019;
Amended Eff. March 1, 2023.

Burgos, Alexander N

From: Duke, Lawrence
Sent: Wednesday, February 1, 2023 4:30 PM
To: Everett, Jennifer; Crawford, Todd
Cc: Burgos, Alexander N
Subject: EMC Review - 15A NCAC 02H .0804
Attachments: EMC - 02.2023 - 15A NCAC 02H .0804 - Change Requests.docx

Jennifer,

Please see attached request for changes. If you intend to have this Rule reviewed at the February meeting, please respond with changes made by Friday, February 10.

Thank you,

Lawrence Duke

Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
Lawrence.Duke@oah.nc.gov
(984) 236-1938