

July 31, 2000

To: Permit Engineers
Regional Supervisors
Regional Permit Coordinators
Chiefs
Local Programs
DAQ Webpage

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Chief

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Subject: Zoning Consistency Determination

Background

North Carolina General Statute § 143-215.108(f) requires that applications for air quality permits for new or expanded facilities include a request for a zoning consistency determination. Under this requirement the applicant must identify each local government having jurisdiction over any part of the land on which the facility and its appurtenances are to be located and must request a determination (zoning consistency determination) as to whether the local government has in effect a zoning or subdivision ordinance applicable to the facility and whether the proposed facility would be consistent with the ordinance. The request to the local government, to be delivered to the clerk of the local government personally or by certified mail, must include a copy of the draft permit application. The statute prohibits the Division from acting upon the application until it has received a zoning consistency determination from each local government agency requested to make a determination, or the applicant submits a certified (or clerk stamped and signed) request and 15 days have passed since the application was received by the clerk.

Discussion

In the past the General Statute requirement has been implemented primarily by reviewing the determination provided by the local government. In many cases the Division considered the statutory provision to be satisfied by a statement from the local government that there were no zoning ordinances for the property on which the new or expanded facility was to be located. In such cases it was felt that the intent of the Statute was satisfied; that is, the permittee did not rely simply on the air quality permit for permission to construct, but that the company had contacted the local government with respect to any potential zoning ordinances in effect prior to construction. It is interesting to note that

even if the local government has zoning ordinances in effect that would prohibit the source from constructing or operating, the Division may still issue the air quality permit. In those instances the statute simply requires that a condition be placed in the permit stating that prior to construction or operation of the facility the permittee will comply with all lawfully adopted ordinances.

New Procedure

On March 9, 2000 the Environmental Management Commission (EMC) decided that failure to make a written request to the local government and include a copy of the application, despite a written response from the local government stating that there were no zoning ordinances in effect, failed to satisfy requirements of N.C.G.S. § 143-215.108(f) and as a result a permit should not have been issued. Consistent with this approach, the Division is now implementing three procedural changes to ensure compliance with the statutory requirement. First, as part of an application the applicant must identify, and certify in writing, all local governments having jurisdiction over any part of the land on which the facility and its appurtenances are to be located. Second, the statute prohibits the Division from acting upon an application until the zoning consistency determination requirements are satisfied. Consistent with the plain language of the statute, when an application is submitted without satisfying this requirement, the application will be deemed incomplete. The application will be entered into the ATS and an incompleteness letter will be sent to the applicant allowing 30 days to cure the defect. Third, consistent with the statutory language, we will remove the consistency determination condition from the general conditions of the permit and place it in the permit as a specific condition only if the local government states that the facility is inconsistent with a zoning or subdivision ordinance.

Zoning Consistency Requirements

The following are the general items to review to determine if the applicant has satisfied the statutory requirements for zoning consistency and to determine if the Division can begin to process the permit application, information that must be submitted with the application, and what conditions should go into the permit:

1. North Carolina General Statute 143-215.180(f) requires that applications for air quality permits for new or expanded facilities include a request for a zoning consistency determination.
2. To prevent unnecessary delays in the review process, all applications received by DAQ, except for renewals without modifications, name/ownership changes, administrative changes, initial Title V applications without modifications, etc. will be required to include a zoning consistency determination.
3. The applicant shall identify and certify in writing, all local governments having jurisdiction over any part of the land on which the facility and its appurtenances are to be located.
4. The applicant is required to send a zoning consistency determination request to each and every local government entity identified.
5. The zoning consistency request must be delivered to the clerk of the local government personally or by certified mail. Personal delivery should be evidenced by a transmittal letter from the facility stamped received by the local government, dated, and signed by the official designated by the local government to make such a determination.
6. The zoning consistency determination request from the applicant to the local government shall include a copy of the permit application.
7. The required zoning consistency determination in response to the request by the applicant must be signed by the official designated by the local government to make such a determination. If the local government states that

the facility is inconsistent with a zoning or subdivision ordinance, the General Statutes requires that a copy of such a determination shall be submitted to the applicant and the DAQ with a copy of the ordinance and the specific reasons for the determination of inconsistency.

8. Unless the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the proposed facility is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the DAQ shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the facility under the permit, comply with all lawfully adopted local ordinances, including those cited in the determination, that apply to the facility at the time of construction or operation of the facility.
9. The DAQ shall not act upon an application for a permit until it has received a determination from each local government having jurisdiction to make a determination. If the local government fails to make such a determination within 15 days after receipt of the zoning consistency request, the DAQ may proceed without regard to local zoning. *However, if we have not heard from the local government after the 15 day period, the review engineer shall make one last attempt to contact the local government authority by phone to make sure that the determination simply has not be misplaced or delayed.*

Application Content (the application will be considered incomplete without the following information and subject to being returned if not completed within 30 days after receipt of an incompleteness letter)

1. A statement signed by the applicant listing any and all local governments having jurisdiction over any part of the land on which the facility and its appurtenances are to be located (e.g., I hereby certify that xyz local zoning board is the zoning authority for which my facility must obtain a zoning consistency determination).
2. A copy of the request from the applicant for zoning consistency determination. The request must be stamped received by the local government, dated, signed, and title specified by the official designated by the local government. Furthermore, a statement is required by the local government stating they also received a copy of the air permit application.
3. A zoning consistency determination from the local government indicating that all zoning or subdivision ordinances are met by the facility. This determination must also include the information required in number 2 above. The determination shall be verified or supported by affidavit signed and title specified by the official designated by the local government to make the determination.
4. If the local government states that the facility is inconsistent with a zoning or subdivision ordinance, the determination shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. This determination must also include the information required in number 2 above. The determination shall be verified or supported by affidavit signed and title specified by the official designated by the local government to make the determination.
5. A statement that there is no local zoning ordinance applicable to the proposed facility. This determination must also include the information required in number 2 above.

Permit Content

1. Future permits will not contain a general condition relating to a zoning consistency determination.
2. If the local government provides a consistency determination stating that the facility is inconsistent with a zoning or subdivision ordinance, the permit shall contain the following specific condition (not general) language:

Prior to construction and operation of the facility under this permit, the Permittee shall comply with all lawfully adopted local ordinances, including those cited in the determination, that apply to the facility at the time of construction or operation of the facility. The local zoning authority shall have the responsibility of enforcing all lawfully adopted local zoning or subdivision ordinances.

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It is the responsibility of the local zoning authority, and not the DAQ, to determine compliance with the local zoning or subdivision ordinances. The DAQ does not plan to use this condition to force the local government to enforce their own ordinances. This is still their responsibility, and hopefully we will not be faced with a situation where we will need to take enforcement action for a violation of this condition.

If you have any questions regarding this procedure, please call Laura S. Butler, P.E., Chief, Permits Section in Raleigh.