

Memorandum:

Subject: Addition of Section .0400 Declaratory Rulings.

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Date: July 17, 2023

Rule to be addressed: 15A NCAC 05A Section .0400 DECLARATORY RULINGS

The committee requested a comparison to be made between the proposed insertion of Section .0400 – Declaratory Rulings (found On page 3, line 32 to page 4, line 2) and the Declaratory Rulings section within the Erosion and Sediment Control rules.

Section 0.0400 - Declaratory Rules and are rules that will have to be adopted to ensure the Mining Rules will be in compliance with G.S. 150. The rules within Section .0400 do not currently exist and should be addressed in the Phase 2 portion of the rule making process.

Staff recommends that this request be made in Phase 2 of the rule making process.

FOR REERENCE: Sediment rules on the subject are shown below:

SECTION .0500 - DECLARATORY RULINGS

15A NCAC 04E .0501 DECLARATORY RULINGS: GENERALLY

At the request of any person aggrieved, as defined in G.S. 150B-2(6), the Sedimentation Control Commission may issue a declaratory ruling as provided in G.S. 150B-4 and the rules of this Section.

History Note: Authority G.S. 113A-54; 150B-4;

Eff. March 14, 1980;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016;

Amended Eff. April 1, 2020

15A NCAC 04E .0502 PROCEDURE FOR REQUESTING DECLARATORY RULINGS

(a) All requests for a declaratory ruling shall be filed with the Director, Division of Energy, Mineral, and Land Resources, Department of Environmental Quality, 1612 Mail Service Center, Raleigh, NC 27699-1612.

(b) All requests shall include the following:

- (1) name and address of petitioner(s);
- (2) the rule, statute, or order upon which a ruling is desired;
- (3) a statement as to whether the request is for a ruling on the validity of a rule or on the applicability of a rule, statute, or order to a given factual situation;
- (4) arguments or data that demonstrate that the petitioner is aggrieved by the rule, statute, or order, or its potential application to petitioner;
- (5) a statement of the consequences of a failure to issue a declaratory ruling in favor of the petitioner;
- (6) a statement of the facts proposed for adoption by the Commission;
- (7) a draft of the proposed ruling; and
- (8) a statement of whether an oral argument is desired, and, if so, the reason(s) for requesting such an oral argument.

(c) A request for a ruling on the applicability of a rule, order or statute shall include a description of the specific factual situation on which the ruling is to be based and documentation supporting those facts. A request for a ruling on the validity of a Commission rule shall state the aggrieved person's reason(s) for questioning the validity of the rule and a brief or legal memorandum supporting the aggrieved person's position. A person may ask for both types of declaratory rulings in a single request.

(d) In the manner provided in G.S. 150B-23(d), any other person may request to intervene in the request for declaratory ruling. The request to intervene shall be determined by the Chairman.

*History Note: Authority G.S. 113A-54; 150B-4;
Eff. March 14, 1980;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016;
Amended Eff. April 1, 2020*

15A NCAC 04E .0503 DISPOSITION OF REQUEST

- (a) The Commission Chairman shall make a determination on the completeness of the request for declaratory ruling based on the requirements of Rule .0502 of this Section, and the Chairman shall make a recommendation to the Commission on whether to grant or deny a request for a declaratory ruling.
- (b) Before deciding the merits of the request, the Commission may:
- (1) request additional written submissions from the petitioner(s);
 - (2) request a written response from the Department, or any other person; and
 - (3) hear oral arguments from the petitioner(s) and the Department or their legal counsel.
- (c) Whenever the Commission believes for good cause that the issuance of a declaratory ruling is undesirable, the Commission may refuse to issue such ruling. The Commission shall notify in writing the person requesting the ruling, stating the reason(s) for the refusal to issue a ruling on the request.
- (d) "Good cause" as the term is used in Paragraph (c) of this Rule shall include:
- (1) finding that there has been a similar determination in a previous contested case or declaratory ruling;
 - (2) finding that the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court;
 - (3) finding that no genuine controversy exists as to the application of a rule, statute, or order to the specific factual situation presented; or
 - (4) finding that the factual context put forward as the subject of the declaratory ruling was considered upon the adoption of the rule being questioned, as evidenced by the rulemaking record.
- (e) The Commission, through the Department, shall keep a record of each declaratory ruling, which shall include at a minimum the following items:
- (1) the request for a ruling;
 - (2) any written submission by a party;
 - (3) the given state of facts on which the ruling was based;
 - (4) any transcripts or recordings of oral proceedings, or, in the absence of a transcript or recording, a summary of all arguments;
 - (5) any other matter considered by the Commission in making the decision; and
 - (6) the declaratory ruling, or the decision to refuse to issue a declaratory ruling.
- (f) For purposes of this Section, a declaratory ruling shall be deemed to be in effect until:
- (1) the statute or rule interpreted by the declaratory ruling is repealed or the relevant provisions of the statute or rule are amended or altered;
 - (2) any court of the Appellate Division of the General Court of Justice shall construe the statute or rule that is the subject of the declaratory ruling in a manner irreconcilable with the declaratory ruling;
 - (3) the Commission changes the declaratory ruling prospectively; or
 - (4) any court sets aside the declaratory ruling in litigation between the Commission or Department of Environmental Quality and the party requesting the ruling.
- (g) The party requesting a declaratory ruling may agree to allow the Commission to extend any of the deadlines beyond the timeframes provided in G.S. 150B-4.
- (h) A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. Unless the requesting party consents to the delay, failure of the Commission to issue a decision or a ruling on the merits within the time provided in G.S. 150B-4 shall constitute a denial of the request as well as a denial on the merits of the request and shall be subject to judicial review.

*History Note: Authority G.S. 113A-54; 113A-55; 150B-4
Eff. March 14, 1980;*

Amended Eff. August 1, 1988; June 5, 1981;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016;

Amended Eff. April 1, 2020