

SUBCHAPTER 02I - HEARINGS

SECTION .0100 - SCOPE: DEFINITIONS: DELEGATIONS

15A NCAC 02I .0101 PURPOSE OF THIS SUBCHAPTER

In instances where Rules related to hearings conducted by a Division are not codified, these Rules authorize the designation of employees of the Department as hearing officers, set out the types of hearings which the designated employees are authorized to conduct, and delineate and reference the rules of procedure for conducting rulemaking or other hearings.

*History Note: Authority G.S. 143-215.3(a)(1),(3);
Eff. February 1, 1976;
Amended Eff. November 1, 1978;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0102 DEFINITIONS

The terms used herein shall be as defined in G.S. 143-213 and 150B-2 and as follows:

- (1) "Commission" means the North Carolina Environmental Management Commission.
- (2) "Department" means the Department of Environmental Quality, and its successor.
- (3) "Director" means Director of the Division of Air Quality, Director of the Division of Energy, Mineral, and Land Resources, Director of the Division of Mitigation Services, Director of the Division of Water Resources, or Director of the Division of Waste Management and their successors.
- (4) "Division" means the Division of Air Quality, the Division of Energy, Mineral, and Land Resources, the Division of Mitigation Services, the Division of Water Resources, or the Division of Waste Management and their successors.

*History Note: Authority G.S. 143-215.3(a)(1); 143B-282;
Eff. February 1, 1976;
Amended Eff. July 1, 1988; November 1, 1978;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0103 DELEGATIONS

Unless otherwise directed by the Chair of the Commission, pursuant to Rule .0105 of this Section, the Director is authorized to designate hearing officers, establish the hearings, issue notices and perform other administrative functions in accordance with these Rules. The Director shall advise the Commission at its regularly scheduled meetings of any public hearings held or scheduled since the Commission's last meeting.

*History Note: Authority G.S. 143-215.3(a)(3),(4);
Eff. February 1, 1976;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0105 REQUIREMENTS OF HEARING OFFICER OR PANEL

Notwithstanding Rule .0103 of this Section, the Chair of the Commission may designate one or more of Commission members as hearing officer(s) for any hearing. A Commission member may be designated based on factors such as availability, expertise, interest, or the subject matter of the Rule(s).

*History Note: Authority G.S. 143-215.3(a)(3);
Eff. February 1, 1976;
Amended Eff. July 1, 1988;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest
Eff. February 16, 2019;
Amended Eff. February 1, 2021.*

SECTION .0200 - RULE MAKING HEARINGS: NOTICE: PROCEDURES

15A NCAC 02I .0203 PROCEDURES

(a) Any person desiring to comment on the proposed action may do so either in writing or by oral presentation. Any person may file a written statement or argument concerning the proposed action prior to the close of the hearing record.

(b) The hearing officer(s) shall consider all written and oral submissions and submit recommendations concerning the proposed action to the Commission following the close of the hearing record.

*History Note: Authority G.S. 143-214.1(e); 143-215.13(c);
Eff. February 1, 1976;
Amended Eff. July 1, 1988;
Readopted Eff. February 1, 2021.*

SECTION .0500 - PETITIONS FOR RULEMAKING

15A NCAC 02I .0501 FORM AND CONTENTS OF PETITION

(a) Any person wishing to request the adoption, amendment, or repeal of a rule of the Commission shall make the request in a petition addressed to the Director of the appropriate division of the Department of Environmental Quality, and a copy in electronic form shall also be sent to the Recording Clerk of the Commission:

Director
Division of Air Quality
1641 Mail Service Center
Raleigh, North Carolina 27699-1641

Director
Division of Energy, Mineral, and Land Resources
1612 Mail Service Center
Raleigh, North Carolina 27699-1612

Director
Division of Mitigation Services
1652 Mail Service Center
Raleigh, North Carolina 27699-1652

Director
Division of Waste Management
1646 Mail Service Center
Raleigh, North Carolina 27699-1646

Director
Division of Water Resources
1611 Mail Service Center
Raleigh, North Carolina 27699-1611

Recording Clerk of the Commission
Directors Office
Division of Water Resources
1611 Mail Service Center
Raleigh, NC 27699-1611
EMCclerk@ncdenr.gov

(b) The petition shall contain the following information:

- (1) the text of the proposed rule(s) for adoption or amendment;
- (2) a statement of the reasons for adoption or amendment of the proposed rule(s), or the repeal of an existing rule(s);
- (3) a statement of the effect on existing rules or orders;
- (4) the name(s) and address(es) of the petitioner(s); and
- (5) a request to present the petition to the committee in accordance with Rule .0502 of this Section, if desired.

(c) In its review of the proposed rule, the Commission shall consider whether it has authority to adopt the rule; the effect of the proposed rule on existing rules, programs, and practices; probable costs and cost factors of the proposed rule; and the impact of the rule on the public and regulated entities. The petitioner may include the following information within the request:

- (1) the statutory authority for the agency to promulgate the rule(s);
- (2) a statement of the effect of the proposed rule(s) on existing practices in the area involved, including cost factors for persons affected by the proposed rule(s);
- (3) a statement explaining the computation of the cost factors;
- (4) a description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s); and
- (5) documents and data supporting the proposed rule(s).

(d) Petitions that do not contain the information required by Paragraph (b) of this Rule shall be returned to the petitioner by the Director on behalf of the Commission.

*History Note: Authority G.S. 143B-282; 150B-20;
Eff. April 1, 2003;
Amended Eff. December 1, 2016; November 1, 2012;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0502 REVIEW BY A COMMITTEE OF THE COMMISSION

(a) The Chair of the Commission may refer complete petitions to the appropriate subject area Committee of the Commission for review and recommended action. Copies of petitions for rulemaking shall be distributed to the Commission members when referred to a Committee of the Commission.

(b) Within 10 days of the assignment of the complete petition, the Chair of the Committee assigned to review a submitted petition for rulemaking shall announce the date of a meeting to consider the petition.

(c) At least 15 days before the Committee meeting, notice of the Committee meeting shall be sent to the petitioner, members of the Commission, and persons who have requested notice of petitions for rulemaking.

(d) If the petition is referred to a Committee, the petitioner shall be afforded the opportunity to present the petition for rulemaking to the Committee. The Director, division staff or their legal counsel may make a presentation to the Committee.

(e) The Chair of the Committee shall allow one interested person to present the viewpoint of those who oppose initiating rulemaking. The Chair of the Committee may determine whether additional interested persons shall make oral presentations before the Committee.

(f) At least 10 days before the Committee meeting, interested persons shall request the opportunity to make a presentation to the Committee through the Director. The request shall:

- (1) state the interest of the person;
- (2) state the person's position on the petition for rulemaking; and
- (3) be accompanied by supporting materials.

(g) During the Committee's review, members of the Commission, other than Committee members, who are present may participate as a member of the Committee in discussions of the petition but may not vote on the recommended action on the petition.

*History Note: Authority G.S. 143B-282; 150B-20;
Eff. April 1, 2003;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0503 PRESENTATION TO THE COMMISSION

(a) Petitions for rulemaking shall be presented to the Commission for its consideration and determination at a meeting of the Commission within 120 days following the date of submittal of the petition to the appropriate Division pursuant to Rule .0501 of this Section. If the petition for rulemaking was reviewed by a Committee pursuant to Rule .0502 of this Section, the petition and the Committee's recommended action shall be presented through the Chair of the Committee

or other designated member of the Committee during the business session of the Commission. Unless the Chair of the Commission rules otherwise, discussion on the petition shall be limited to the members of the Commission, counsel to the Commission, the Director, or the Division's legal counsel and the petitioner or its legal counsel.

(b) For petitions not referred to a Committee, the Chair of the Commission shall allow one interested person to present the viewpoint of those who oppose initiating rulemaking. The Chair of the Commission may determine whether additional interested persons shall make oral presentations before the Commission. At least 10 days before the Commission meeting, interested persons shall request the opportunity to make a presentation to the Commission through the Director. The request shall:

- (1) state the interest of the person;
- (2) state the person's position on the petition for rulemaking; and
- (3) be accompanied by supporting materials.

(c) Within 120 days following submittal of the petition to the appropriate Division the Commission shall:

- (1) grant the petition in writing, notify the petitioner and initiate rulemaking proceedings in accordance with G.S. 150B-20; or
- (2) deny the petition in writing, stating the reason or reasons for the denial, and send the written denial to the person(s) who submitted the petition.

*History Note: Authority G.S. 143B-282; 150B-20;
Eff. April 1, 2003;
Readopted Eff. February 1, 2021.*

SECTION .0600 - DECLARATORY RULINGS

15A NCAC 02I .0601 ISSUANCE OF DECLARATORY RULING

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

*History Note: Authority G.S. 143B-282; 150B-4;
Eff. August 1, 2004;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0602 PROCEDURE FOR SUBMISSION OF PETITION

(a) All requests for a declaratory ruling shall be filed with the Director of the appropriate Division and a copy in electronic form shall also be sent to the Recording Clerk of the Commission:

Director
Division of Air Quality
1641 Mail Service Center

Raleigh, NC 27699-1641

Director
Division of Energy, Mineral, and Land Resources
1612 Mail Service Center
Raleigh, North Carolina 27699-1612

Director
Division of Mitigation Services
1652 Mail Service Center
Raleigh, NC 27699-1652

Director
Division of Waste Management
1646 Mail Service Center
Raleigh, North Carolina 27699-1646

Director
Division of Water Resources
1611 Mail Service Center
Raleigh, NC 27699-1611

Recording Clerk of the Commission
Directors Office
Division of Water Resources
1611 Mail Service Center
Raleigh, NC 27699-1611
EMCclerk@ncdenr.gov

(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:
 - (A) the validity of a rule; or
 - (B) the applicability of a rule, order or statute to a given factual situation; or
 - (C) a conflict or inconsistency within the Commission or the Department regarding interpretation of a law or rule adopted by the Commission;
- (4) arguments or data which demonstrate that the petitioner is aggrieved by the rule or statute or its potential application to the petitioner;
- (5) a statement of the consequences of a failure to issue a declaratory ruling in favor of the petitioner;
- (6) a draft of the proposed ruling; and
- (7) 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 statement of the specific facts to a given factual situation 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 request for a ruling to resolve a conflict or inconsistency within the Commission or the Department regarding interpretation of a law or rule adopted by the Commission shall include a written description identifying the conflict or inconsistency, the relevant Division(s) and program area(s), the interpretation provided by the agency, and the law or rule in question. A person may ask for multiple 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 Chair of the Commission.

*History Note: Authority G.S. 143B-282; 150B-4;
Eff. August 1, 2004;
Readopted Eff. February 1, 2021.*

15A NCAC 02I .0603 DISPOSITION OF REQUEST

- (a) The Chair of the Commission shall make a determination on the completeness of the request for declaratory ruling based on the requirements of this Section.
- (b) Before the Commission decides the merits of the request, the Chair of the Commission may:
- (1) request additional written submissions from the petitioner(s);
 - (2) request a written response from the Department or any other person;
 - (3) allow the petitioner to file a reply to the response submitted in Subparagraph (2) of this Paragraph; or
 - (4) request oral arguments from the petitioner(s) and Department staff or their legal counsel.
- (c) The Commission shall make a decision to grant or deny the request according to G.S. 150B-4.
- (d) The Commission shall deny the request upon making any of the following findings:
- (1) the request is not complete;
 - (2) the petitioner is not a person aggrieved;
 - (3) there has been a similar determination in a previous contested case or declaratory ruling;
 - (4) the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court;
 - (5) no genuine controversy exists as to the application of a statute, order, or rule to the factual situation presented;
 - (6) 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;
 - (7) the information provided by the petitioner, the Department, or any interveners does not support a determination that a rule is invalid; or
 - (8) there is no material conflict or inconsistency within the Commission or Department regarding the law or rule identified by the petitioner.

- (e) The Commission shall keep a record of each declaratory ruling, which shall include 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 of oral proceedings, or, in the absence of a transcript, 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, together with the reasons therefore.
- (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 construes the statute or rule which is the subject of the declaratory ruling in a manner that is 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 and the party requesting the ruling.

*History Note: Authority G.S. 143B-282; 150B-4;
Eff. August 1, 2004;
Readopted Eff. February 1, 2021.*