

Fiscal Analysis**Rule Citation Number:** 15A NCAC 2L .0106**Rule Topic:** Revision of Rule 15A NCAC 2L .0106 - Groundwater Corrective Action**DENR Division:** Division of Water Resources

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Impact Summary: State government: No
 Local government: No
 Private entities: No
 Substantial Impact: No
 Federal government: No

Necessity: Session Law 2014-122 (the Coal Ash Management Act of 2014) directed the Environmental Management Commission (EMC) to review its compliance boundary and corrective action rules in 15A NCAC 2L for clarity and consistency, and to report the results of its review to the Environmental Review Commission (ERC) by December 1, 2014. In its review, the Environmental Management Commission identified five clarity or consistency issues in Rule 15A NCAC 2L .0106 that require this rule to be revised: (1)The use of the terminology “non-permitted” in 15A NCAC 2L .0106 to refer to some activities that in fact have permits; (2)Disagreement between the EMC and a recent court ruling over the interpretation of “immediate action to eliminate the source or sources of contamination,” and the relevance of 15A NCAC 2L .0106(f) to such action; (3)whether, in the context of the corrective action rule, a compliance boundary is applicable to facilities that are truly permitted, but are considered “non-permitted” under 15A NCAC 2L .0106(e); (4)the omission of permits issued under Chapter 130A of North Carolina General Statutes from the definition of “permitted” activities under the corrective action rule (15A NCAC 2L .0106), even though such permits are given compliance boundaries under the compliance boundary rule (15A NCAC 2L .0107); and (5)various technical corrections and updates to reflect the current organizational structure of the Department of Environment and Natural Resources (DENR).

1. Summary

In accordance with Session Law 2014-122, the Environmental Management Commission (EMC) has conducted a review of its rules in 15A NCAC 2L for corrective action and

compliance boundaries. Revised rule's text is suggested in this report to clarify issues of the corrective action rule (15A NCAC 2L .0106).

The fastest options for clarifying these issues are either legislative clarifications or temporary rulemaking. However, there is a risk of unintended consequences if sweeping changes to the rules are undertaken without stakeholder involvement in a permanent rulemaking process. For this reason, it is recommended that the most pressing clarity issues identified in this report be addressed through permanent rulemaking by the EMC, unless the General Assembly directs the EMC to undertake temporary rulemaking. The EMC has directed staff in the Department of Environment and Natural Resources to present proposed rule revision language for permanent rulemaking at the EMC's meeting.

Due to the fact that the current proposal is a matter of rule text revision and not a composition of new rule, there are no quantifiable impacts of the proposed rulemaking according to this fiscal analysis. The earliest expected effective date of the revised rule is January 1, 2016.

2. Background

The rule proposed for revision, Rule 15A NCAC 2L .0106, establishes requirements for corrective action to control and restore groundwater that has become contaminated by any discharge, spilling, or other release of contamination. The impetus for revising this rule is linked closely to two related rules, 15A NCAC 2L .0107 and 15A NCAC 2L .0108, so it is necessary to provide a summary of those rules first.

Rule 15A NCAC 2L .0107 establishes a boundary around permitted disposal systems at and beyond which groundwater quality standards may not be exceeded. This compliance boundary only applies to facilities which have received a permit issued under the authority of G.S. 143-215.1 (e.g., wastewater and wastewater treatment residuals disposal sites) or G.S. 130A (e.g., septic systems and solid waste disposal sites). Depending on the date the facility was permitted, two categories of compliance boundary are established by 15A NCAC 2L .0107:

- For disposal systems individually permitted prior to December 30, 1983, the compliance boundary is established at a horizontal distance of 500 feet from the waste boundary or at the property boundary, whichever is closer to the source.
- For disposal systems individually permitted on or after December 30, 1983, a compliance boundary is established 250 feet from the waste boundary, or 50 feet within the property boundary, whichever point is closer to the source.

The purpose of the different compliance boundary distances is to allow older facilities, which may not have been engineered or constructed to modern standards, more leeway in managing the impacts of their waste disposal practices, while still prohibiting contamination from migrating offsite.

Rule 15A NCAC 2L .0108 establishes a review boundary halfway between the waste boundary and the compliance boundary. The purpose of the review boundary is to serve as a

sort of early warning monitoring point to prompt permitted facilities to take action before contamination reaches the compliance boundary.

The current corrective action rule, Rule 15A NCAC 2L .0106, makes a distinction between “permitted” and “non-permitted” activities, establishing different requirements for corrective action that persons engaged in permitted and non-permitted activities must undertake. Paragraph (e) of the corrective action rule specifies that “an activity conducted under the authority of a permit,” and subject to being treated as permitted for the purposes of corrective action, is one for which:

- a permit has been issued pursuant to G.S. 143-215.1;
- the permit was originally issued after December 30, 1983; and
- the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity.

“Permitted” activities by these criteria include wastewater treatment and disposal systems, such as systems that irrigate using wastewater, areas where residuals from wastewater treatment are applied to the land as fertilizer, and lagoons used as settling basins, to name a few. Such systems are used by both municipalities and private industry.

Activities not meeting the above criteria are considered to be “non-permitted” for the purposes of 15A NCAC 2L .0106(c) and 15A NCAC 2L .0106(d). This means that some facilities or persons holding active permits from DENR are considered “non-permitted” for the purposes of the corrective action rule, if their permits were issued prior to December 30, 1983 or were issued under statutes other than G.S. 143-215.1. These activities could include older wastewater treatment or disposal systems or other waste management activities, such as landfills, and may be operated by municipalities or private industry.

Paragraph (c) of the current corrective action rule requires persons conducting or controlling activities that are deemed “non-permitted,” upon finding that their activities have contaminated groundwater at levels above the groundwater standards, to:

- immediately notify the Division of the activity that has resulted in the increase and the contaminant concentration levels;
- take immediate action to eliminate the source or sources of contamination;
- submit a report to the Director assessing the cause, significance and extent of the violation; and
- implement an approved corrective action plan for restoration of groundwater quality.

On the other hand, Paragraph (d) of the current corrective action rule requires persons engaged in activities that are deemed “permitted” to implement corrective actions only when groundwater standards are exceeded at a review boundary or compliance boundary. If the groundwater standards exceedance occurs at a review boundary, the permittee must demonstrate that natural site conditions, facility design and operational controls will prevent a violation of standards at the compliance boundary; or they must implement a plan for alteration of existing site conditions, facility design or operational controls to prevent a violation at the compliance boundary. Such actions could include reducing the amount of waste applied to the land. When a permitted activity causes an exceedance of groundwater

standards at the compliance boundary, the permittee must assess the cause, significance and extent of the violation of standards at and beyond the compliance boundary and submit the results of the investigation and a plan and proposed schedule for corrective action.

Historically, DENR and the EMC have interpreted the requirement in Paragraph (c) of the corrective action rule to take “immediate action to eliminate the source or sources of contamination” as requiring responsible parties and DENR to follow detailed procedures prescribed in the entirety of 15A NCAC 2L. The specific corrective actions required to be undertaken prior to or concurrent with assessment activities are spelled out in 15A NCAC 2L .0106(f), which addresses actions requiring immediate action, such as prevention of fire, explosion, or the spread of noxious fumes, as well as those actions which may require a longer duration to undertake, or which may require assessment prior to action, such as removal, treatment, or control of primary and secondary sources of pollution. However, a 2014 ruling in the Wake County Superior Court determined that the EMC had erred in interpreting 15A NCAC 2L .0106(f) to provide clarification of the “immediate action” required by 15A NCAC 2L .0106(c).

In addition, the criteria used in Paragraph 15A NCAC 2L .0106(e) to distinguish “permitted” activities from “non-permitted” activities makes navigation of the rule difficult and confuses the applicability of other portions of the rule by calling some permitted facilities “non-permitted” for some purposes of 15A NCAC 2L .0106, while they remain “permitted” for purposes of other rules in 15A NCAC 2L.

With regard to the compliance boundary rule, it has been argued, in a request for declaratory ruling before the EMC and in a subsequent judicial review of that declaratory ruling, that compliance boundaries are only relevant for facilities or activities that are considered “permitted” in the context of 15A NCAC 2L .0106, and that compliance boundaries are not applicable to the corrective action requirements for facilities permitted prior to December 30, 1983. However, rule 15A NCAC 2L .0107 clearly establishes a compliance boundary around these older permitted facilities. In 2013, the General Assembly clarified this fact in the S.L. 2013-413 by limiting the EMC’s authority to require corrective action within the compliance boundary to particular circumstances. However, this limitation on the EMC’s corrective action authority was repealed by S.L. 2014-122.

The corrective action rule and compliance boundary rule have a potential conflict with regard to their respective applicability to permits issued by DENR. Both rules differentiate between permits issued before and after December 30, 1983. However, the compliance boundary rule establishes compliance boundaries around permits issued under G.S. 143-215.1 and those issued under G.S. Chapter 130A, while the corrective action rule includes only permits issued under G.S. 143-215.1 in its definition of “permitted” activities. The reason for this omission is not immediately clear and warrants further investigation.

In addition to the substantial issues, the rules throughout 15A NCAC 2L do not reflect the current organizational structure of the Department of Environment and Natural Resources. For example, the rules still refer to the Division of Environmental Management and its

Director, though this division was eliminated, and its responsibilities distributed to various other divisions of DENR, in 1997.

In summary, the Environmental Management Commission is pursuing this rulemaking in order to address the following clarity issues:

- Use of the terminology “non-permitted” in 15A NCAC 2L .0106 to refer to some activities that in fact have permits;
- Disagreement between the EMC and a recent court ruling over the interpretation of “immediate action to eliminate the source or sources of contamination,” and the relevance of 15A NCAC 2L .0106(f) to such action;
- Whether, in the context of the corrective action rule, a compliance boundary is applicable to facilities that are truly permitted, but are considered “non-permitted” under 15A NCAC 2L .0106(e)
- The omission of permits issued under Chapter 130A of North Carolina General Statutes from the definition of “permitted” activities under the corrective action rule (15A NCAC 2L .0106), even though such permits are given compliance boundaries under the compliance boundary rule (15A NCAC 2L .0107); and
- Various technical corrections and updates to reflect the current organizational structure of DENR.

Four options for modifying the corrective action rule were considered by the EMC:

- Rule revisions by legislative action;
- Temporary rulemaking;
- Permanent rulemaking initiated by the EMC; or
- Permanent rulemaking under the rules review requirements of S.L. 2013-413 (House Bill 74)

Permanent rulemaking would allow for the most comprehensive solution to issues of clarity and consistency identified in this report. In addition, permanent rulemaking, by its requirements for public comment, would help identify and prevent unintended consequences of rule revisions adopted by the EMC. The permanent rulemaking process would take approximately two years to complete.

3. Costs

(i.) Development Community and Local Governments

The proposed revision of Rule 15A NCAC 2L .0106 for corrective action will not require members of the development community or local government to deviate from current practices; as such, there will be neither a direct cost nor opportunity cost associated with new development, existing development, or redevelopment activities as a result of this proposed rules revision.

(ii.) Implementing Agencies

These amendments will not require the Division of Water Resources (DWR) or the Division of Waste Management at DENR to revise its existing procedures nor will they require recruiting additional staff. Therefore, this proposed rulemaking will have no economic impact to the implementing agency.

(iii.) Environment/Ecosystem

This current rule revision is intended to clarify existing rule language for the interested parties. It will not change the timeliness or extent of groundwater cleanups compared to current implementation of the existing rule. No new adverse environmental impacts or new environmental benefits are anticipated to result from the revised rule.

4. Benefits

(i.) Development Community and Local Governments

A better defined rule will aid any project manager in selecting appropriate cases for institutional controls and establishing enforceable mechanisms to ensure the reliability of such controls. In consequence, the effectiveness of these actions helps protect human health and the environment, meet the cleanup objectives and comply with laws and regulations. Those benefits would accrue to the remediating party, to those redeveloping or reusing the impacted properties, and to the economies of communities where the sites are located.

(iv.) Implementing Agencies

There are several issues in Rule 15A NCAC 2L .0106 that need clarification and consistency as outlined in the summary and background above. The revision of this rule would affect the NCDENR procedures positively due to the fact that a more straightforward and concise rule would make the comprehension of it more consistent across the state.

(v.) Environment/Ecosystem

This current rule revision is intended to clarify existing rule language for the interested parties. It will not change the timeliness or extent of groundwater cleanups compared to current implementation of the existing rule. No new adverse environmental impacts or new environmental benefits are anticipated to result from the revised rule.

5. Total Economic Impact

The economic impacts of the proposed amendments, both in terms of cost and benefit, are not monetarily quantifiable as measured from the baseline conditions. Consequently, there were no specific cost or benefit estimations to report in this fiscal analysis.