

G.S. 150B-21.3A Report for 15A NCAC Subchapter 01N, Drinking Water State Revolving Fund Rules

Agency - Environmental Quality, Department of
 Comment Period - September 18, 2015 - November 30, 2015
 Date Submitted to APO - March 21, 2016f

Subchapter	Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Required to Implement or Conform to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]	RRC Determination of Public Comments [150B-21.3A(c)(2)]	RRC Final Determination of Status of Rule for Report to APO [150B-21.3A(c)(2)]	OAH Next Steps
SUBCHAPTER 01N - DRINKING WATER STATE REVOLVING FUND RULES	SECTION .0100 - GENERAL PROVISIONS	15A NCAC 01N .0101	PURPOSE	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0102	DEFINITIONS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0103	APPLICABLE PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0200 - AVAILABILITY OF LOANS	15A NCAC 01N .0201	AVAILABILITY OF LOANS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0202	LOANS RESTRICTIONS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0203	ADMINISTRATIVE EXPENSES	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0300 - ELIGIBILITY REQUIREMENTS	15A NCAC 01N .0301	DETERMINATION OF ELIGIBILITY	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0302	ELIGIBLE PROJECTS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0303	ELIGIBLE PROJECT COSTS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0400 - APPLICATIONS	15A NCAC 01N .0401	FILING DEADLINES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0402	APPLICATION PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0500 - REVIEW AND ASSIGNMENT OF PRIORITIES	15A NCAC 01N .0501	PRIORITY REVIEW PERIOD	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0502	ASSIGNMENT OF PRIORITIES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0503	INTENDED USE PLAN	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0700 - AWARD, COMMITMENT AND DISBURSEMENT OF LOANS	15A NCAC 01N .0701	DETERMINATION OF AWARDS AND BYPASS PROCEDURES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0702	CERTIFICATION OF ELIGIBILITY	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0703	CRITERIA FOR LOAN ADJUSTMENTS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0704	DISBURSEMENT OF LOANS	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0705	TERMINATION OF LOANS	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0800 - LOAN REPAYMENTS	15A NCAC 01N .0801	INTEREST RATES	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code

G.S. 150B-21.3A Report for 15A NCAC Subchapter 01N, Drinking Water State Revolving Fund Rules

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		15A NCAC 01N .0802	REPAYMENT OF PRINCIPAL AND INTEREST	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following	Rule expired - remove from Code
	SECTION .0900 - INSPECTION AND AUDIT OF PROJECTS	15A NCAC 01N .0901	INSPECTION	Eff. April 1, 1999	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
		15A NCAC 01N .0902	AUDIT	Amended Eff. February 1, 2008	Unnecessary	Yes If yes, include the citation to the federal law	33 USC 1381-1388	Yes	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code

Hammond, Abigail M

From: Bromby, Craig A
Sent: Thursday, March 10, 2016 1:17 PM
To: Hammond, Abigail M
Cc: Everett, Jennifer; Tomaino, Vincent
Subject: 15A NCAC 01N

Ms. Hammond,

The rules governing the Drinking Water State Revolving Fund (DWSRF) have been determined by DEQ staff to be unnecessary, notwithstanding that they were denoted as conforming to or implementing federal law. EPA provides funds for drinking water infrastructure investments. These funds are provided requiring a match by the state at 20-25%. EPA adopted rules setting broad guidelines for eligibility and award of grants or loans. The state enters in an operating agreement with EPA involving the administration of the program. As part of that agreement, the state annually submits an Intended Use Plan (IUP) setting forth eligibility criteria and priorities for awarding the funds through grants or loans. To the degree that the establishment of criteria and priorities pursuant to the IUP and operating agreement are formulated for the purpose of receiving and distributing federal funds pursuant to the federal program, the 01N rules implement federal rules (*i.e.*, fulfill requirements under the program to allow the state to award and distribute the federal funds and state match).

The agency under which the rules were established was a predecessor board to the Commission for Public Health (CPH). However, the General Assembly in 2013 created the State Water Infrastructure Authority in which it vested the responsibility and authority to perform those functions with regard to the federal funding program.

The rules promulgated by the CPH are outdated and have not been consistent with practice and federal guidelines for several years. Because CPH no longer has any authority with respect to the DWSRF program, the rules are artifacts of a prior system that is no longer functional, and wholly unnecessary to retain in the Administrative Code.

Craig A. Bromby
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N.C. Department of Environmental Quality

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RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT REPORT. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: North Carolina Department of Environmental Quality

REPORT CITATION: 15A NCAC 01N

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Change the agency determination following public comment

COMMENT:

15A NCAC 01N contains 23 rules that were classified by the Department of Environment Quality as "unnecessary." The agency published the report and received a written comment from Will Hendrick of the Southern Environmental Law Center. See pages 5-10. The written comment states that the rules are necessary and should be classified as "necessary without substantive public interest." Further, the written comment argues that since the agency identified 33 USC-1381-1388 as the basis of the rules being "adopted to implement or conform to federal law," that the rules set forth in 15A NCAC 01N should not be allowed to expire.

The agency responded to the written comment as summarized below: (See pages 11-12)

Rule Citation	Rule Name	Response
15A NCAC 01N .0101	PURPOSE	None
15A NCAC 01N .0102	DEFINITIONS	None
15A NCAC 01N .0103	APPLICABLE PROCEDURES	Duplicative of federal rules
15A NCAC 01N .0201	AVAILABILITY OF LOANS	Duplicative of federal rules and impracticable
15A NCAC 01N .0202	LOANS RESTRICTIONS	Superfluous because of compliance with G.S. 153G-35
15A NCAC 01N .0203	ADMINISTRATIVE EXPENSES	Statutory authority has been repealed
15A NCAC 01N .0301	DETERMINATION OF ELIGIBILITY	Duplicative of state statute
15A NCAC 01N .0302	ELIGIBLE PROJECTS	Statutory authority has been repealed
15A NCAC 01N .0303	ELIGIBLE PROJECT COSTS	Superfluous because of compliance with G.S. 153G-35

Abigail M. Hammond
Commission Counsel

15A NCAC 01N .0401	FILING DEADLINES	Superfluous because of compliance with G.S. 153G-35
15A NCAC 01N .0402	APPLICATION PROCEDURES	Rulemaking is impracticable
15A NCAC 01N .0501	PRIORITY REVIEW PERIOD	Statutory authority has been repealed
15A NCAC 01N .0502	ASSIGNMENT OF PRIORITIES	Superfluous because of compliance with G.S. 153G-35
15A NCAC 01N .0503	INTENDED USE PLAN	Statutory authority has been repealed
15A NCAC 01N .0701	DETERMINATION OF AWARDS AND BYPASS PROCEDURES	Rulemaking is impracticable
15A NCAC 01N .0702	CERTIFICATION OF ELIGIBILITY	Statutory authority has been repealed
15A NCAC 01N .0703	CRITERIA FOR LOAN ADJUSTMENTS	Statutory authority has been repealed
15A NCAC 01N .0704	DISBURSEMENT OF LOANS	Duplicative of state statute and impracticable
15A NCAC 01N .0705	TERMINATION OF LOANS	Statutory authority has been repealed
15A NCAC 01N .0801	INTEREST RATES	Duplicative of state statute
15A NCAC 01N .0802	REPAYMENT OF PRINCIPAL AND INTEREST	Statutory authority has been repealed
15A NCAC 01N .0901	INSPECTION	Statutory authority has been repealed
15A NCAC 01N .0902	AUDIT	Duplicative of federal law and impracticable

Please note that the written comment of the Southern Environmental Law Center addresses the statutory construction of G.S. 150B-21.3A, by advancing the argument that G.S. 150B-21.3A(e) bars the expiration of the rules in 15A NCAC 01N from the Administrative Code. A copy of the rules in 15A NCAC 01N as presently set forth in the Administrative Code is attached for review. See pages 13-19. The written comment indicates that the rules “are exempt from automatic exemption,” which is a reference to G.S. 150B-21.3A(b). The columns titled “Required to Implement or Conform to Federal Regulations” and “Federal Regulation Citation” are added to the Excel spreadsheet report by staff of the Office of Administrative Hearings, as the Rules Review Commission (RRC) and RRC’s counsel lacks this information for each rule in the Administrative Code.

For 15A NCAC 01N, the agency did complete the report, classifying each rule as “unnecessary.” The agency also completed the columns titled “Required to Implement or Conform to Federal Regulations” by stating “Yes” to each rule; and “Federal Regulation Citation” by stating “33 USC 1381-1388” to each rule. The agency responded to the written comment on a rule-by-rule basis, continuing to assert the classification of “unnecessary.”

Based upon the agency’s response, staff concurs with the classification of “unnecessary.” If the rules are classified correctly, but are unable to expire from the Administrative Code based upon G.S.

Abigail M. Hammond
Commission Counsel

150B-21.3A(e), staff is concerned that obsolete and redundant rules will remain in the Administrative Code. Here are the relevant portions of G.S. 150B-21.3A:

§ 150B-21.3A. Periodic review and expiration of existing rules.

...

(b) Automatic Expiration. - Except as provided in subsection (e) of this section, any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission pursuant to subsection (d) of this section.

(c) Review Process. - Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:

...

- (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a). The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:
- a. The agency's initial determination.
 - b. All public comments received in response to the agency's initial determination.
 - c. The agency's response to the public comments.
 - d. A summary of the Commission's determinations regarding public comments.
 - e. A determination that all rules that the agency determined to be necessary and without substantive public interest and for which no public comment was received or for which the Commission determined that the public comment was without merit be allowed to remain in effect without further action.
 - f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.
 - g. A determination that all rules that the agency determined to be necessary with substantive public interest or that the Commission designated as necessary with public interest as provided in this subdivision shall be readopted as though the rules were new rules in accordance with this Article.

...

- (e) Rules to Conform to or Implement Federal Law. - Rules adopted to conform to or implement federal law shall not expire as provided by this section. The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection.

For your review, attached is a draft copy of the report as it will be provided to the Joint Legislative Administrative Procedure Oversight Committee if the report as submitted by the agency is approved by the Commission. See page 20. Please note that the last right-hand column titled "OAH Next Steps" indicates that each rule within 15A NCAC 01N shall "expire" and be removed from the Administrative Code. This action will occur after the consultation requirement of G.S. 150B-21.3A(c)(3). Please note that APO is scheduled to meet the first week of April 2016.

Recommendation:

Staff recommends finding that the comments of the Southern Environmental Law Center do not address the rules of this Subchapter, but the classification. Therefore, the written comment does not fit within the statutory definition of a "public comment" as it does not object to specific rules, but to the classification of the rules by the agency. Therefore, the Commission is not required to review the merits of the written comment. Staff does not recommend changing the classification of the rules of this Subchapter, but to approve the report as submitted by the agency.

Statutory standard for review:

§ 150B-21.3A. Periodic review and expiration of existing rules.

- (a) Definitions. - For purposes of this section, the following definitions apply:

...

- (5) Public comment. - Means written comments **objecting to the rule, in whole or in part**, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.

....

- (c) Review Process. - Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:

...

- (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. **If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a).**

SOUTHERN ENVIRONMENTAL LAW CENTER

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November 30, 2015

Jennifer Everett
DEQ Rule Comments
1601 Mail Service Center
Raleigh, NC 27699

RE: Initial Determination that Every Rule in 15A N.C. Admin. Code 01N is “Unnecessary”

Dear Ms. Everett,

The Southern Environmental Law Center submits these comments on behalf of the North Carolina Conservation Network in response to the initial determination by the North Carolina Department of Environmental Quality (“DEQ”) that all of the rules in Subchapter 01N of Chapter 15A of the North Carolina Administrative Code (“DWSRF Rules” or “the Rules”) are “unnecessary.” We appreciate the opportunity to participate in the rules review process,¹ and write to urge DEQ to reconsider its conclusion that rules governing access to, and the administration of, a fund containing millions of tax dollars (including federal funds and state matching funds), are “obsolete, redundant, or otherwise not needed.”²

I. The Rules Were Adopted to Implement and Conform to the Safe Drinking Water Act

The necessity of the Rules is strongly suggested by the motivation for their adoption. The Rules were adopted to govern the administration of a revolving loan fund, the creation of which was a prerequisite to the receipt of federal funding for drinking water infrastructure projects. The 1996 amendments to the federal Safe Drinking Water Act (“SDWA”) authorized the U.S. Environmental Protection Agency to make capitalization grants to states to enable the provision of financial assistance to public water systems for infrastructure improvements.³ To be eligible for this federal funding under the SDWA, states were required to establish a “drinking water treatment revolving loan fund.”⁴ Accordingly,

¹ Pursuant to statute, the agency has invited “the public to comment on the rules and the agency's initial determination.” N.C. Gen. Stat. § 150B-21.3A(c)(1).

² *Id.* § 150B-21.3A(a)(6).

³ *See* 42 U.S.C. § 300j-12(a)(1)(A).

⁴ 42 U.S.C. § 300j-12(a)(1)(B).

the North Carolina General Assembly established the Drinking Water State Revolving Fund (“the Fund”).⁵ The Fund has been capitalized since 1997.⁶

However, eligibility for federal funding under the SDWA was not ensured simply by establishing the Fund. Rather, eligibility depends on compliance with additional requirements of the SDWA and its implementing regulations.⁷ The DWSRF Rules govern loans to public water systems made from the Fund and are an important means of ensuring the requisite compliance.⁸ The Rules ensure conformity with federal requirements by both the Division of Water Infrastructure (“Division”), which administers loans made from the Fund,⁹ and applicants for loans from the Fund. The Rules also implement federal law by clarifying, elaborating upon, and providing for compliance with various SDWA requirements.

Notably, DEQ concedes that the Rules were adopted to implement or conform to federal law.¹⁰ This is particularly important in the context of the review of existing rules commanded by G.S. 150B-21.3A. Pursuant to that statute, rules deemed “unnecessary” will expire unless “adopted to conform to or implement federal law.”¹¹ Because the DWSRF Rules were adopted to implement or conform to federal law, they are exempt from automatic expiration. This fact draws into question the agency’s decision to label them “unnecessary” nonetheless. If the agency wishes to repeal these rules, it must undergo notice

⁵ N.C. Gen. Stat. § 159G-22(c) (“The [NC DWSRF] is established under and must be managed in accordance with section 130 of Title 1 of the federal Safe Drinking Water Act of 1996 as amended, 42 U.S.C. § 300J-12, to achieve the purposes of that act.”). The Fund “receives federal funds for public water systems and the State funds required to match the federal funds.” N.C. Gen. Stat. § 159G-22(c).

⁶ Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), *available at* http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015_03_26

⁷ 42 U.S.C. § 300j-12(a)(1)(B) (“To be eligible to receive a capitalization grant under this section, a State shall establish a drinking water treatment revolving loan fund . . . and comply with the other requirements of this Section.”) (emphasis added); *see also* 40 C.F.R. § 35.3510 (“To be eligible to receive a capitalization grant, a State must establish a Fund and comply with the other requirements of section 1452 of the [SDWA] and this subpart.”).

⁸ 15A N.C. Admin. Code 01N .0101.

⁹ “The Department of Environmental Quality, through the Division of Water Infrastructure, administers loans and grants made from the Drinking Water State Revolving Fund.” N.C. Gen. Stat. § 159G-30.

¹⁰ Despite opining that the rules are all “unnecessary,” the agency notes in its initial determinations that each of the Rules “Implements or Conforms to Federal Regulation.” *See* DEQ, G.S. 150B-21.3A Report for 15A NCAC Subchapter 01N, Drinking Water State Revolving Fund Rules (2015), *available at* http://portal.ncdenr.org/web/ogc/rules-review/subchapter?json=/c/document_library/get_file?p_1_id=1169848&folderId=21310265&name=DLFE-117258.js; *see also* DEQ, *Drinking Water State Revolving Fund (DWSRF) Overview*, <http://portal.ncdenr.org/web/wi/drinkingwater/srf> (last visited Nov. 30, 2015) (“15A NCAC 01N implements the DWSRF in North Carolina.”).

¹¹ *See* N.C. Gen. Stat. § 150B-21.3A.

and comment rulemaking pursuant to the N.C. Administrative Procedures Act.¹² It cannot, under the guise of rules review, simply strike an entire body of rules established to ensure compliance with federal law.

Moreover, we question the agency's underlying conclusion that rules adopted to implement or conform to federal law are "obsolete, redundant, or otherwise not needed."¹³ As explained below, the continued utility of the DWSRF Rules further counsels against labeling them "unnecessary." Because the Rules are critical to the operation of the Fund and have met with no public objection, we encourage the agency to label them as "necessary without substantive public interest."¹⁴

II. The Rules Are Not Obsolete

Rules ensuring the effective management and continued viability of the Fund are not obsolete. Because the Rules primarily address access to, and the conditions of, loans made from the Fund, any contention that they are obsolete is belied by the continued and anticipated provision of financial assistance through the Fund.

The Fund is the largest source of financing for drinking water infrastructure projects in North Carolina. The loan program offered under the Fund accounts for almost half of the annual disbursements from the Water Infrastructure Fund; in fiscal year 2013-2014, 46.35% of the funds awarded from the Water Infrastructure Fund came from the DWSRF.¹⁵ There is no indication that allocations to the Fund or reliance by public water systems on loans from the Fund will decrease in coming years. According to the 2015 Intended Use Plan (IUP), the Fund received 2.34% of the latest national appropriation.¹⁶ In

¹² See N.C. Gen. Stat. § 150B-18 ("A rule is not valid unless it is adopted in substantial compliance with this Article."); see also 150B-2(8a) (defining "rule" to include the repeal of a rule).

¹³ N.C. Gen. Stat. § 150B-21.3A(a)(6) (defining "unnecessary").

¹⁴ Labeling the rules "necessary without substantive public interest" would have a similar effect as labeling them "unnecessary." Compare N.C. Gen. Stat. § 150B-21.3A(c)(2) (providing that rules deemed "necessary without substantive public interest" and for which no public comment was received will remain in effect without further action") with *id.* § 150B-21.3A(e) ("Rules adopted to conform to or implement federal law shall not expire as provided by this section."). However, by labeling the rules "unnecessary" despite the motivation for their adoption, the agency would obligate itself to submit a report regarding the Rules each year to the Joint Legislative Administrative Procedure Oversight Committee. *Id.* § 150B-21.3A(e).

¹⁵ DEQ, Division of Water Infrastructure, *Annual Reports, Fiscal Year 2013-2014* (Sept. 20, 2014).

¹⁶ DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015), available at http://portal.ncdenr.org/c/document_library/get_file?uuid=8efbd789-5dfe-4c27-859e-363402f3aaef&groupId=14655572. According to the Director of the Division, the State typically receives "+/- 2.4%" of the allocations available to the States. Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), available at <http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015>

addition, there has been a recent increase in the amount of financial assistance provided to public water systems from the Fund. In fiscal year 2007-08, a total of \$33,233,880 was appropriated to the DWSRF by the federal and state governments.¹⁷ In contrast, the State plans to lend \$292,285,725 for drinking water infrastructure projects during the current funding cycle.¹⁸ In fiscal year 2013-2014 alone, the DWSRF offered loan funding totaling \$104,713,919.¹⁹

The growing need for financing for drinking water infrastructure further underscores the need for the Rules. The most recent survey of drinking water needs identified infrastructure needs in North Carolina totaling \$10 billion.²⁰ The high demand for improvements to North Carolina's drinking water supply infrastructure suggests the DWSRF Rules are needed now more than ever.²¹ Yet according to DEQ, infrastructure financing from the DWSRF "has only met a small percentage of the drinking water infrastructure need for public water supply systems in North Carolina."²² The Rules will only increase in importance and use if, as suggested by the General Assembly's Program Evaluation Division, the State commits to "using state loan programs and relying less on grants when determining state appropriations for water and wastewater infrastructure."²³

III. The Rules Are Not Redundant

Rules specific to the governance of North Carolina's DWSRF are not redundant. As noted above, and explicitly stated by the General Assembly, the Fund must be managed in compliance with federal

03 26 These allocations are made pursuant to "a formula that reflects the infrastructure needs of public water systems identified in the most recent Needs Survey submitted in accordance with section 1452(h) of the [SDWA]." 40 C.F.R. § 35.3515.

¹⁷ N.C. General Assembly, Program Evaluation Division, North Carolina's Water and Wastewater Infrastructure Funding Lacks Strategic Focus and Coordination 6 (Jan. 27, 2009).

¹⁸ DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015).

¹⁹ DEQ, Division of Water Infrastructure, *Annual Reports, Fiscal Year 2013-2014* 3 (Sept. 20, 2014).

²⁰ Kim H. Colson, Division of Water Infrastructure, Presentation to the Joint Meetings of the House Appropriations Committee on Agriculture, Natural and Economic Resources and Senate Appropriations Committee on Natural and Economic Resources (Mar. 26, 2015), available at

http://www.ncleg.net/gascripts/documentsites/browseDocSite.asp?nID=129&sFolderName=\2015%20Session\2015_03_26 ;

²¹ See NC State Water Infrastructure Commission, 2010 Annual Report (Dec. 15, 2010) ("The NC Rural Economic Development Center's Water 2030 Report estimated that over \$16,000,000,000 needed to be invested in North Carolina's drinking water, wastewater and stormwater systems between 2010 and 2030.").

²² DEQ, North Carolina Drinking Water State Revolving Fund, Intended Use Plan, Fiscal Year 2015, Amendment No. 1 2 (June 12, 2015).

²³ N.C. General Assembly, Program Evaluation Division, North Carolina's Water and Wastewater Infrastructure Funding Lacks Strategic Focus and Coordination (Jan. 27, 2009).

law.²⁴ However, the General Assembly also recognized that neither existing State nor federal law speaks fully to the specific governance of the Fund. Thus, pursuant to N.C. Gen.Stat. § 159G-35, DEQ was “directed to establish through negotiation with the United States Environmental Protection Agency the criteria for evaluating applications for loans and grants from the . . . DWSRF and the priority assigned to the criteria.”²⁵ The negotiated criteria and priorities must then be incorporated into a “Capitalization Grant Operating Agreement between the Department and the United States Environmental Protection Agency.”²⁶ Although State rules are incorporated into the Operating Agreement,²⁷ and the Agreement is the “principal instrument by which the State commits to manage the DWSRF program in accordance with federal law,”²⁸ the Agreement itself is not enforceable against third parties, such as loan applicants.²⁹ Under the North Carolina Administrative Procedures Act, “an agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement” that meets the definition of a rule unless the policy, guideline, or interpretive statement has been adopted as a rule in accordance with the Act.³⁰ As such, the DWSRF rules are necessary to ensure that the commitments made to the US EPA in the Operating Agreement are enforceable by the State of North Carolina.

IV. The Rules Are Not “Otherwise Not Needed”

Since the Rules are neither obsolete nor redundant, it is difficult, given the lack of any explanation provided by the agency, to speculate as to why, the agency may nonetheless view them as “otherwise not needed.” However, it bears mention that the creation of the State Water Infrastructure Authority (“SWIA”) does not render the Rules unnecessary. The SWIA was created in 2013 and empowered to, *inter alia*, “establish priorities for making loans and grants,” rank grant and loan applications, and “select the applications that are eligible to receive grants and loans.”³¹ However, the

²⁴ See, e.g., N.C. Gen. Stat. § 159G-36(a) (“Federal law governs loans and grants from the CWSRF and the DWSRF. An award of a loan or grant from one of these accounts must be consistent with federal law.”); N.C. Gen. Stat. 159G-32(a) (“Federal law determines whether a project is eligible for a loan or grant from the CWSRF and the DWSRF. A project must meet the eligibility requirements set under federal law.”).

²⁵ N.C. Gen. Stat. § 159G-35(a).

²⁶ *Id.*

²⁷ NC DENR, DWR, Public Water Supply Section, Drinking Water State Revolving Loan Fund Operating Agreement with U.S. Environmental Protection Agency Region IV, § C (July 18, 2013) (“To the extent possible, detailed information concerning State laws, rules and procedures of either NCDENR or the PWS Section will be incorporated.”).

²⁸ 40 C.F.R. § 35.3545.

²⁹ Although the State may legally bind itself to the terms of the Agreement, 40 C.F.R. § 35.3545(d)(1), it cannot enforce the agreement against third parties.

³⁰ N.C. Gen. Stat. § 150B-18; see also *id.* § 150B-2(8a) (“‘Rule’ means any agency regulation, standard, or statement of general applicability that implements or interprets an Act of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.”).

³¹ N.C. Gen. Stat. § 159G-71.

Division still retains a critical role in the review of loan applications.³² Moreover, the SWIA lacks rulemaking authority and, as explained above, the Rules are necessary to ensure compliance with federal law.

V. Conclusion

Elimination of the Rules would deprive the public of useful regulatory guidance designed to ensure that DWSRF funds are available and utilized to the maximum benefit of public health in North Carolina. Fortunately, because the Rules were adopted to implement and conform to the federal Safe Drinking Water Act, they will not automatically expire even if labeled “unnecessary” by the agency. Still, we encourage DENR to reconsider its decision to label these rules “unnecessary,” and, in recognition of their value as currently codified, classify them as “necessary without substantive public interest.”³³

Thank you in advance for your thoughtful consideration of these comments.

Respectfully,

Will Hendrick
Associate Attorney

DWH/lap

³² By law, the Division must (1) review all applications filed for a loan; (2) rank each application in accordance with the points assigned to the evaluation criteria; (3) make a written determination of an application’s rank; and (4) submit the determination for consideration by the SWIA. N.C. Gen. Stat § 159G-39(a).

³³ N.C. Gen. Stat. § 150B-21.3A(a)(4) (defining “necessary without substantive public interest”).

15A NCAC 01N – DRINKING WATER STATE REVOLVING FUNDS RULES

Commenter Name: Will Hendrick

Company/Organization: Southern Environmental Law Center

Comment was received in letter. Original letter is attached.

Agency Response:

The Division of Water Infrastructure of the Department of Environmental Quality (DEQ) determined the rules in Subchapter 01N to be “unnecessary,” within the meaning of that term as it appears in N.C. Gen. Stat. §150B-21.3A(a)(6). The bases for these determinations are that:

- The statute(s) cited as authority for rules .0203, .0302, .0304, .0501, .0503, .0702, .0703, .0705, .0802, and .0901 have been repealed.
- Rules .0301, .0801, and .0902 are duplicative of the authorizing statutes or statutes referenced within the text of the rule.
- Rule .0303 essentially duplicates the language in N.C. Gen. Stat. §153G-20(1a).
- Rule .0704 is substantively duplicative of the language in N.C. Gen. Stat. §153G-42.
- The applicable procedures referenced in rule .0103 are provided in federal rules.
- Criteria and priorities are set in the Capitalization Grant Operating Agreement with the Environmental Protection Agency (EPA), pursuant to N.C. Gen. Stat. §159G-35, rendering superfluous rule .0202, .0303, .0401, and .0502.
- Rules .0201, .0402, .0701, .0704, and .0902 are subsumed in the annual “intended use plan” submitted to EPA. The annual nature of the Intended Use Plans (IUP) makes rulemaking impracticable.
- The substance of Rule .0201(c) is thoroughly addressed in Part E of the Safe Drinking Water Act, 42 U.S.C. §300j, *et seq.*
- Rule .0902 is redundant to the federal Single Audit Act (P.L. 98-502, amended at P.L. 104-156) and the federal uniform grant administration regulations.

The commenter asserts that because the rules in Subchapter 01N were adopted to implement or conform to federal regulation, the rules do not expire pursuant to N.C. Gen. Stat. §150B-21.3A and cannot be categorized as unnecessary.

The commenter’s interpretation of N.C. Gen. Stat. §150B-21.3A is overly narrow and simplistic. As the comment points out, N.C. Gen. Stat. §150B-21.3A(e) provides that “[r]ules adopted to conform to or implement federal law shall not expire as provided by this section.” However, N.C. Gen. Stat. §150B-21.3A(b) refers explicitly to subsection (e), as an exception to the automatic expiration of rules that have not been timely reviewed by the rulemaking agency. Read as the commenter suggests, rules which “implement or conform to federal regulation” would be perpetual unless the agency affirmatively repealed the rule.

That interpretation would waste a good deal of agency time and resources weeding out old, out-of-date rules which otherwise would frustrates the intent of N.C. Gen. Stat. §150B-23A to clean up and revitalize the administrative code by sunseting rules which no longer perform a useful function informing the public of their rights and obligations under the laws as implemented by the agency.

DEQ's interpretation of N.C. Gen. Stat. §150B-21.3A(e) is that it was intended to prevent the inadvertent expiration of rules that have implications for programs required to conform to or to implement certain requirements under federal law. In the case of the 01N rules, the federal regulations will be effective irrespective of whether the 01N rules are in effect or not. The rules are categorized as "conform[ing] to or implementing federal law" because of the federal component of the Drinking Water State Revolving Fund program. However, unlike a rule necessary to implement requirements under federal law, these rules implemented a state program which received and disbursed federal funds. The structure for that purpose exists in the IUP annually submitted to EPA, and the federal rules governing the grant program. Therefore, the rules are unnecessary. If a rule is determined to be unnecessary, the federal component does not block expiration of that rule. The linkage of subsections (b) and (e) makes it clear that the "savings clause" for rules which "conform to or implement federal law" was intended to prevent expiration of those rules by inadvertence or failure by the agency to timely review those rules.

If the RRC was to determine that the language of N.C. Gen. Stat. §150B-21.3A(e) acted to prevent the expiration of the rules in 01N, the proper correction would be to the categorization as "required to implement or conform to federal law." These rules are not necessary to conform to or implement the federal grant program. They were adopted in response to N.C. Gen. Stat. §159G-44, which allowed, but did not compel, the adoption of rules consistent with federal law, for the administration of the grant program. They are now redundant, out-of-date, superseded by the annually-submitted IUP, or superfluous. To read N.C. Gen. Stat. §150B-21.3A(e) as compelling the agency to keep the rules in perpetuity, or go through a lengthy process for their repeal notwithstanding their superfluity, simply ignores the intent and worthy purpose of N.C. Gen. Stat. §150B-21.3A.

CHAPTER 01 - DEPARTMENTAL RULES**SUBCHAPTER 01N - DRINKING WATER STATE REVOLVING FUND RULES****SECTION .0100 - GENERAL PROVISIONS****15A NCAC 01N .0101 PURPOSE**

Loans for public water systems from the Drinking Water State Revolving Fund established by the Water Infrastructure Act S.L. 2005-454 (HB 1095) shall be made in accordance with this Subchapter.

*History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

15A NCAC 01N .0102 DEFINITIONS

The following definitions shall apply to this Subchapter:

- (1) "Act" means the N.C. Drinking Water Act, G.S. 130A-311 et. seq;
- (2) "Division" means the Division of Environmental Health, Department of Environment and Natural Resources;
- (3) "Fund" means the Drinking Water State Revolving Fund established by G.S. 159G-22;
- (4) "Intended Use Plan" (IUP) means an annual plan to identify the proposed uses of the amount available in the Fund;
- (5) "MCL" means maximum contaminant level which is the permissible level of a contaminant in water which is delivered to any user of a public water system; and
- (6) "Receiving agency" means the Division.

*History Note: Authority G.S. 159G-2; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

15A NCAC 01N .0103 APPLICABLE PROCEDURES

Loans from the Fund shall be made in accordance with 40 CFR Part 9 and 35, Subpart L which are hereby incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Free copies may be obtained from the U.S. Environmental Protection Agency by telephoning 1-800-426-4791. Copies are also available on-line at <http://www.deh.enr.state.nc.us/pws/srf/rules/072506-operating-agreement.doc> and <http://www.epa.gov/fedrgstr/EPA-WATER/2000/August/Day-07/w19783.htm>.

*History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

SECTION .0200 - AVAILABILITY OF LOANS**15A NCAC 01N .0201 AVAILABILITY OF LOANS**

- (a) Loans shall be available only for projects that appear on the state approved intended use plan submitted to the U.S. Environmental Protection Agency and that comply with the requirements of this Subchapter.
- (b) Proposed projects may be added to the IUP to address emergency situations. The qualifying criteria is that a serious public health hazard or a drought emergency is present or imminent for a public water supply system. Such actions will be reported in the Annual Report.
- (c) Fifteen percent of the annual allocation shall be available to public water systems which regularly serve fewer than 10,000 persons to the extent such funds can be obligated in accordance with Rule .0701 of this Subchapter.
- (d) During any fiscal year a maximum of five percent of the annual allocation may be used for loans for project planning purposes only.

History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008; August 1, 2004.

15A NCAC 01N .0202 LOANS RESTRICTIONS

- (a) Loans shall not be used for the acquisition of real property or interests therein, unless the acquisition is integral to a project authorized under this Subchapter and the purchase is from a willing seller.
- (b) Except as provided in Paragraph (c) of this Rule no assistance shall be provided to a public water system that does not have the technical, managerial, and financial capacity to ensure compliance with the requirements of the Act or to a public water system that is in significant non-compliance with any requirement of the Act or with a variance authorized under the Act as evidenced by administrative penalty, administrative order or court action against the water system. A determination of technical, managerial, and financial capacity shall be based upon a review of finances; compliance with applicable public health, environmental and utility laws; and the experience and certification level of the water system operator as evidenced by the submission of a water system management plan as required by Section .0400 of this Subchapter.
- (c) A public water system in significant non-compliance with the Act may receive assistance if the assistance shall ensure compliance with the Act. A public water system that does not have technical, managerial, and financial capacity may receive assistance if the owner or operator shall agree to undertake changes in operation of the water system that will ensure the system will achieve technical, managerial, and financial capacity over the long-term.
- (d) Each applicant shall establish a dedicated source of revenue or demonstrate that there is adequate security for repayment of the loan.
- (e) Funding shall be limited to the most cost-effective solution for the compliance or public health problem identified in a proposed project.
- (f) Funding shall be limited to the eligible portions of a project containing ineligible segments.
- (g) Funding shall not be available for federally owned public water systems.

History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.

15A NCAC 01N .0203 ADMINISTRATIVE EXPENSES

Agreement to a debt instrument by a loan applicant shall include payment of a two percent administrative fee which is an eligible project cost. These monies shall accrue to be used only for the reasonable costs of administering the Fund.

History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.

SECTION .0300 - ELIGIBILITY REQUIREMENTS

15A NCAC 01N .0301 DETERMINATION OF ELIGIBILITY

- (a) Eligibility of applicants shall be determined in accordance with G.S. 159G-31.
- (b) Applications shall be returned to ineligible applicants.
- (c) An application may not be filed after the award of a construction contract on a project, except when an applicant is subject to an administrative order or deadline issued by the Division or the project qualifies as an emergency situation.

History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.

15A NCAC 01N .0302 ELIGIBLE PROJECTS

(a) Projects that will facilitate compliance with the North Carolina Drinking Water Act or federal Safe Drinking Water Act or further health protection under the criteria of Rule .0602 of this Subchapter shall be eligible for funding under this Subchapter. Eligible projects include those that:

- (1) Rehabilitate or develop sources to replace contaminated sources of drinking water;
- (2) Install or upgrade treatment to meet state or federal regulations;
- (3) Install or upgrade eligible storage to prevent entry of microbiological contamination;
- (4) Install or replace transmission or distribution pipes to prevent contamination;
- (5) Consolidate or restructure water systems; or
- (6) Purchase capacity in another water system.

(b) Types of projects which are not eligible for funding are:

- (1) Dams or rehabilitation of dams;
- (2) Water rights, except if the water rights are owned by a system that is being purchased through consolidation as part of a capacity development strategy;
- (3) Reservoirs, except for finished water reservoirs and those reservoirs that are part of treatment process and are located on the property where the treatment facility is located;
- (4) Laboratory fees for monitoring;
- (5) Operation and maintenance expenses;
- (6) Projects needed mainly for fire protection; or
- (7) Projects primarily intended to serve future growth.

*History Note: Authority G.S. 159G-5; 159G-1;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

15A NCAC 01N .0303 ELIGIBLE PROJECT COSTS

(a) Project construction costs eligible for a loan under this Subchapter are limited to:

- (1) Planning, including system and needs assessment, the preparation of a local water supply plan and the preparation of a water system management plan;
- (2) Environmental assessment reports, including all federal cross-cutters;
- (3) Design;
- (4) Construction;
- (5) Legal, fiscal, and administrative costs;
- (6) Contingency costs; and
- (7) Land acquisition integral to the project and acquired from a willing seller.

(b) Loans may be up to 100 percent of allowable construction project costs.

*History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

15A NCAC 01N .0304 MAXIMUM LOAN AMOUNT

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Repealed Eff. August 1, 2004.*

SECTION .0400 – APPLICATIONS**15A NCAC 01N .0401 FILING DEADLINES**

Complete applications for loans shall be postmarked or delivered to the Division of Environmental Health on or before September 30 of each year in order to be considered for loan funds available during the following fiscal year except those

applications for emergency projects as defined in Rule .0201(b) of this Subchapter may be submitted at any time.

History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.

15A NCAC 01N .0402 APPLICATION PROCEDURES

- (a) Applications for loans shall be submitted on forms provided by the Division and shall be accompanied by all documents such as the Preliminary Engineering Report (PER), assurances, and other information required by the instructions for completing and filing the applications. Information concerning any grant or loan funds from any other source for which the applicant has applied shall be disclosed on the application.
- (b) Every application shall be accompanied by an adopted resolution or other documentation as required by G.S. 159G-37. The resolution or documentation shall be certified or attested to as a true and correct copy as adopted.
- (c) An applicant shall furnish additional information upon the request of the Division as required by these Rules.
- (d) A project shall not receive a priority rating unless the application contains sufficient information on the day of rating for the receiving agency to review and assign priority points.
- (e) An application may be withdrawn from consideration upon request of the applicant but if it is resubmitted it shall be considered as a new application subject to Rule .0401 of this Subchapter.

History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.

15A NCAC 01N .0403 PROJECT SCHEDULE AND RESOLUTION

History Note Authority G.S. 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Repealed Eff. February 1, 2008.

SECTION .0500 - REVIEW AND ASSIGNMENT OF PRIORITIES

15A NCAC 01N .0501 PRIORITY REVIEW PERIOD

The priority review period shall be from October 1 until June 30 of the following year.

History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.

15A NCAC 01N .0502 ASSIGNMENT OF PRIORITIES

- (a) During each review period the Division shall assign a priority rating to each eligible application for inclusion in the state intended use plan; the priority rating shall be determined in accordance with the rating criteria and points established pursuant to G.S. 159G-35.
- (b) The Division may establish a priority rating when two or more applications receive the same number of priority points. The project receiving more points for affordability shall receive the higher priority. If the affordability points awarded the projects are equal, the project with the smaller population shall receive the greater priority.
- (c) Only the eligible portions of a project shall receive a priority rating.
- (d) The Division may assign a different priority rating to each substantially independent part of a proposed project.
- (e) Any applications that are not awarded assistance during a review period shall be held over and considered for a second review in accordance with G.S. 159G-39(c).

History Note: Authority G.S. 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;

Eff. April 1, 1999;
Amended Eff. February 1, 2008.

15A NCAC 01N .0503 INTENDED USE PLAN

A state intended use plan containing the priority rating of each eligible project will be prepared by the Division. The intended use plan shall include a comprehensive priority list identifying which projects are intended to be funded in the current year and in future years. The projects that are expected to be funded in the current year shall be so noted. The priority rating of eligible projects shall be published and an opportunity for public hearing will be provided before funds are awarded.

History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.

SECTION .0600 - PRIORITY CRITERIA

- 15A NCAC 01N .0601 GENERAL CRITERIA**
- 15A NCAC 01N .0602 PUBLIC HEALTH AND COMPLIANCE**
- 15A NCAC 01N .0603 CONSOLIDATION**
- 15A NCAC 01N .0604 RELIABILITY**
- 15A NCAC 01N .0605 AFFORDABILITY**
- 15A NCAC 01N .0606 SOURCE PROTECTION AND MANAGEMENT**

History Note: Authority G.S. 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. August 1, 2004;
Repealed Eff. February 1, 2008.

SECTION .0700 - AWARD, COMMITMENT AND DISBURSEMENT OF LOANS

15A NCAC 01N .0701 DETERMINATION OF AWARDS AND BYPASS PROCEDURES

- (a) All funds appropriated for a fiscal year and all other funds accruing from loan principal repayments, interest payments, interest earned on funds, excess funds not awarded in the previous priority review period, and any other source shall be available for loans during the priority review period.
- (b) The funds available in a priority review period shall be awarded in the form of a binding commitment in descending order of priority rating upon EPA approval of that IUP considering Rule .0201 of this Subchapter to those eligible projects that are ready to proceed. A project is defined as ready to proceed when the following conditions have been met:
- (1) Project plans and specifications are approved by the Division;
 - (2) Any environmental review required is complete;
 - (3) One hundred percent funding necessary for the project is committed; and
 - (4) Authorization To Construct is issued by the Division.
- (c) Except as provided in Paragraph (d) of this Rule, the maximum principal amount of loan commitment from any fiscal year's allocation made to an applicant shall be three million dollars (\$3,000,000) for a construction project or twenty-five thousand dollars (\$25,000) for project planning purposes.
- (d) Any funds remaining after the initial allocation of Paragraphs (b) and (c) of this Rule shall be awarded in descending order of priority rating to those eligible projects in any approved IUP subject to the limitation of Paragraph (c) of this Rule for each 'pass' through the remaining available funding.

History Note: Authority G.S. 159G-36;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;

Amended Eff. February 1, 2008; August 1, 2004.

15A NCAC 01N .0702 CERTIFICATION OF ELIGIBILITY

- (a) The receiving agency shall create a certificate of eligibility for each applicant for which a loan has been made.
- (b) The certificate of eligibility shall indicate that the applicant meets all eligibility criteria and that all other requirements of the Act have been met.
- (c) The certificate of eligibility shall also indicate the amount and the fiscal year of the loan commitment.

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

15A NCAC 01N .0703 CRITERIA FOR LOAN ADJUSTMENTS

Upon receipt of bids, a loan commitment may be adjusted as follows:

- (1) The loan commitment may be decreased by the receiving agency provided; the project cost as bid is less than the estimated project cost;
- (2) The loan commitment may be increased a maximum of 10 percent by the receiving agency provided: the project cost as bid is greater than the estimated project cost; the project as bid is in accordance with the project for which the loan commitment was made; the receiving agency has reviewed the bids and determined that substantial cost savings would not be available through project revisions without jeopardizing the integrity of the project; and adequate funds are available in the Fund. Increases greater than 10 percent of the loan commitment require approval by the Local Government Commission.

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

15A NCAC 01N .0704 DISBURSEMENT OF LOANS

- (a) Disbursement of loan monies shall be made at intervals as work progresses and expenses are incurred. No disbursement shall be made until the receiving agency receives documentation of incurred costs. At no time shall disbursement exceed the allowable costs which have been incurred at that time.
- (b) No disbursement shall be made until the receiving agency receives documentation of compliance with applicable federal and state laws.
- (c) The receiving agency shall authorize the Controller's Office of the Department of Environment and Natural Resources to make loan disbursements.

*History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

15A NCAC 01N .0705 TERMINATION OF LOANS

Loan commitments may be terminated by the receiving agency when recipients do not meet project schedules, if they fail to award contracts within one year, or if they fail to comply with applicable federal requirements.

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

SECTION .0800 - LOAN REPAYMENTS

15A NCAC 01N .0801 INTEREST RATES

The interest rate to be charged on loans under this Subchapter shall be set in each priority review period at the lesser of four percent per annum or one half the prevailing national market rate as derived from the Bond Buyer's 20-Bond Index in accordance with G.S. 159G-40.

*History Note: Authority G.S. 159G-22; 159G-35; 159G-44;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*

15A NCAC 01N .0802 REPAYMENT OF PRINCIPAL AND INTEREST

- (a) The debt instrument setting the terms and conditions of repayment of loans under this Subchapter shall be established after the receipt of bids. Adjustments to the loan may be made only under Rule .0703 of this Subchapter.
- (b) The maximum maturity on any construction loan shall not exceed 20 years.
- (c) The maximum maturity on any project planning loan shall not exceed five years.
- (d) Interest on the debt instrument shall begin to accrue on the original date that a project's contracts are scheduled to be completed. Extensions of this deadline are not allowed.
- (e) All principal payments shall be made annually on or before May 1 or November 1. The first principal payment is due not earlier than six months after the date of completion of the project.
- (f) All interest payments shall be made semiannually on or before May 1 and November 1 of each year. The first interest payment is due not earlier than six months after the date of completion of the project.
- (g) All principal and interest payments shall be made payable to the Fund.

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

SECTION .0900 - INSPECTION AND AUDIT OF PROJECTS

15A NCAC 01N .0901 INSPECTION

Inspection of a project to which a loan has been committed may be made by the receiving agency to determine the percentage of completion of the project for disbursements, and for compliance with all applicable laws and rules.

*History Note: Authority G.S. 159G-5; 159G-15;
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999.*

15A NCAC 01N .0902 AUDIT

All projects to which a loan has been committed shall be audited in accordance with G.S. 159G-35 and G.S. 159-40.

*History Note: Authority G.S. 159G-22(c);
Temporary Adoption Eff. January 31, 1998;
Eff. April 1, 1999;
Amended Eff. February 1, 2008.*