

NCDENR

REGULATORY REFORM LEGISLATION PASSED IN 2011 REGULAR SESSION

Regulatory Reform Act of 2011 SL 2011-398 (S781)

I. Rulemaking (Section 1 – Section 14)

Senate Bill 781 makes extensive changes to the types of rules an Agency may lawfully adopt, and to the rulemaking process.

Only Rules are Enforceable, not Policies or Guidelines

Upon adoption, the S781 prohibits any agency from enforcing a policy, guideline or interpretive statement that meets the definition of a rule under G.S. 150B-2 unless it has been adopted as a rule. (The bill does not change the existing exemptions from the definition of a rule which include an exemption for technical and scientific guidelines.)

Limit on Rules that may be Adopted

As of October 1, 2011, agencies will only be allowed to adopt rules that are both expressly authorized by law and serve the public interest. Each agency must seek to reduce the burden imposed by its rules and, where appropriate, base rules upon scientific, technical, economic and other relevant information. Each agency must include references to such sources of information in its notice of text. Agencies must provide a cost/benefit analysis for all rules, and, where the rule would have a substantial economic impact, the agency must consider at least two alternatives to any rule. The fiscal note prepared as part of this cost benefit analysis will be subject to the same notice, comment, and public hearing as the rule itself. For environmental rules, if there is a federal rule regarding the same subject matter, no rule may be stricter than the federal rule unless the rule is required by one of the following:

- 1) A serious and unforeseen threat to public health, safety or welfare.
- (2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules.
- (3) A change in federal or state budgetary policy.
- (4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State.
- (5) A court order.

Includes Rules Already Adopted

Agencies must annually review all existing rules to eliminate rules that are “unnecessary, unduly burdensome,” or fail to comply with the new standards for

rulemaking. In addition to the requirement that each agency must review its own rules, OSBM is also required to solicit public comment on, and perform a review of existing rules and to submit its analysis and the public comments it deems relevant to the agency. The agency must review the OSBM's report, and respond to OSBM by January 31 of each year.

Requires Inter-Agency Rule Coordination

Agencies are required to determine whether its programs and policies overlap with that of another agency. If overlap exists, the agencies are required to coordinate to eliminate "unnecessary, unduly burdensome, or inconsistent" rules.

Fiscal Notes

Prior to publication of proposed text for a rule, an agency must first prepare a fiscal note for that rule, and submit the note particular entities if the rule meets any of the following conditions:

- i. it requires the expenditure of state funds (submit note to OSBM),
- ii. it affects environmental permitting of DOT (submit note to Board of Transportation and consider their comments),
- iii. it require the expenditure of local funds (submit the note to OSBM, the Fiscal Research Division of the General Assembly, the North Carolina Association of County Commissioners and North Carolina League of Municipalities),
- iv. it has a substantial economic impact (submit to OSBM).

The definition of substantial impact under this rule is "an aggregate financial impact on all persons affected of at least five hundred thousand dollars (\$500,000) in a 12-month period."

II. Contested Cases (Section 15 – Section 55.2)

S781 makes significant changes in the way administrative appeals will proceed. Under this bill, decisions by the OAH will no longer return to the agency or EMC for final decision. Instead the decision of OAH will be the final decision, subject to appeal to superior court. During the legislative process, EPA offered objections to final decision making authority being transferred to from DENR to OAH under certain federal programs. In response to this concern, S781 now requires OAH to seek EPA approval as a an agency responsible for administering programs under the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act. There is a deadline of December 31, 2011 for OAH to seek this approval. As to decisions under these federal statutes, the act will become effective when EPA approval is received by OAH or June 15, 2012, whichever occurs first. For administrative appeals outside the EPA programs, the new procedures under S781 become effective as of January 1, 2012.

III. Miscellaneous Provisions (Section 56 – Section 61.1)

S781 contains additional provisions including changes in current permit terms, requiring DENR to study existing processes, and other changes related to environmental regulation.

Declaratory Rulings (Section 56)

The legislation changes the procedures and timeframe for issuing declaratory rulings.

Regulation Review (Section 57)

S781 requires all state agencies by October 1, 2011 to deliver to the Joint Select Regulatory Reform Committee a list of all permanent rules adopted by the body that includes the following information for each rule:

1. Whether the rule is mandated by a federal law or regulation;
2. If the rule is not mandated by a federal law or regulation, whether there is a federal regulation that is analogous to the rule;
3. If there is a federal statute or regulation analogous to the rule, whether the rule is more stringent than the federal law or regulation.

CAMA Major Permits (Section 59)

This section exempts CAMA major permits from preparing an environmental document under the State Environmental Policy Act (SEPA).

Air and Water Permit Duration (Section 60)

The legislation limits permit terms to not more than 8 years. The bill specifically preserved the 5 year permit terms for Title V air quality permits and NPDES permit, which are set by federal law.

S781 also requires DENR to “review the types of permits issued by the Department and the rule-making agencies under the Department and recommend whether the duration of any of the types of permits should be extended beyond their duration under current law or rule.” DENR must “report its findings and recommendations to the Environmental Review Commission no later than February 1, 2012.”

Tiered Enforcement - Notices of Deficiency/Violation (Section 61)

S781 requires DENR to “develop a uniform policy for notification of deficiencies and violations for all of the regulatory programs” within DENR and to “establish different types of notification based on the potential or actual level of harm to public health, the environment, and the natural resources of the State.” In conducting this review, the Secretary is instructed to review the notification policies of the EPA “and the environmental regulatory programs of other states.” DENR must report results of this review to the “Environmental Review Commission and the Joint Select Regulatory Reform Committee no later than October 1, 2011” and implement the “uniform notification policy no later than February 1, 2012.”