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April 17, 2020

Duke Environmental Law & Policy Clinic
James P. Longest, Jr., Director
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Subject: Review of Petition for Rulemaking to Limit North Carolina's Carbon Dioxide Emissions to Protect a Stable Climate System and Preserve the Natural Resources of North Carolina submitted by Hallie Turner, Arya Pontula, and Emily Liu, Youth Petitioners

Dear Mr. Longest:

The Division of Air Quality (DAQ) received the subject petition (Petition) to adopt a rule to limit and reduce carbon dioxide (CO₂) emissions from Hallie Turner, Arya Pontula, and Emily Liu, Youth Petitioners (Petitioners), on February 10, 2020.

G.S. 150B-20 and the Environmental Management Commission (EMC) rules found in Title 15A North Carolina Administrative Code (NCAC), Subchapter 02I, Section .0500, govern petitions for rulemaking. Pursuant to 15A NCAC 02I .0501(b), a petition for rulemaking must 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.

In accordance with 15A NCAC 02I .0501(d), if the petition fails to contain the required information, then it must be returned to the petitioner by the Director on behalf of the Commission. The DAQ has reviewed the subject Petition to determine if it contains the required information specified in 15A NCAC 02I .0501(b). and its review is summarized below.

15A NCAC 02I .0501(b)(1): The text of the proposed rule(s) for adoption or amendment? No. There are multiple deficiencies regarding the Petition's completeness in accordance with 15A NCAC 02I .0501(b)(1). This Departmental rule is governed by the provisions of G.S. 150B-20 which state in part, "If a rule-making petition requests the agency to create or amend a rule, **the person must submit the proposed text of the requested rule change...**" (emphasis added)

First, in the Petition at p. 9, the text of subparagraph (d)(2) of Petitioners' proposed rule entitled "Carbon Dioxide Emissions Inventory and Budget" states in part, "At that time, the Commission shall



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consider further rulemaking or statutory changes needed to meet the Commission's Carbon Dioxide Emissions Targets. At that time, the Commission shall consider setting emissions targets proposed by the Division for other greenhouse gasses as well." Pursuant to 15A NCAC 02I .0501(b)(1), the petitioners are required to provide rules proposed for adoption or amendment. However, this portion of the rule discusses a future rulemaking but the Petition does not provide any text for that rulemaking.

Second, the term "rule" used in G.S 150B-20 is constrained by the definition provided in G.S. 150B-2. While the Petitioners provided proposed language for the EMC to adopt, it appears the language does not meet the definition of a "rule" pursuant to G.S. 150B-2(8a)a. This is evidenced by the Petitioners' text containing numerous statements concerning only the internal management of the agency that do not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency. Such statements are exempt from rulemaking under G.S. 150B-2(8a)a. This deficiency is further demonstrated by the Petitioners own description of the proposed text: "[T]he proposed rule is best characterized as a process rule that binds the Commission..." and "The Petition does not directly require any source to reduce carbon dioxide emissions" (Petition at p. 15).

Finally, the proposed language in subchapter (c)(1) of the proposed rule includes a description of how an emissions budget will be prepared:

Within ninety (90) days of publishing its initial North Carolina Carbon Dioxide Inventory, the Division shall publish a draft initial North Carolina Carbon Dioxide Budget outlining a plan to reduce emissions in order to meet the Carbon Dioxide Emissions Targets set by the Commission. The draft initial North Carolina Carbon Dioxide Budget shall outline a path to meet the reductions required at 2030 and 2050, guided by the initial North Carolina Carbon Dioxide Inventory.

These provisions state that the North Carolina Carbon Dioxide Budget shall outline a "plan" and a "path" to reduce emissions. This mandate of "outlining a plan" and a "path" provides no meaningful direction to the Division in proportion to the scope of the undertaking that must encompass stationary and mobile sources across the State. The Petition lacks necessary text that would provide specific guidance or criteria for action by the Division to accomplish the purported objectives of the proposed rule. Therefore, the Petition fails to provide the text in the proposed rule that is necessary to meet the requirement of 15A NCAC 02I .0501(b)(1).

15A NCAC 02I .0501(b)(2): A statement of the reasons for adoption or amendment of the proposed rule(s), or the repeal of an existing rule(s)? Yes. The Petitioners include in Section 3 of the Petition the following reasons for adopting the three proposed rules: 1) The best available science shows that anthropogenic CO₂ emissions are threatening to disrupt the global climate system; 2) Climate change is already harming forests, wetlands, estuaries, beaches, and other places of beauty in North Carolina; 3) If ignored climate change will continue to injure North Carolina's citizens, economy, and environment; 4) The best available science points to technologically-proven economical methods to reduce CO₂, thereby stabilizing the climate system, and protecting the planet and its inhabitants; 5) This is a time sensitive matter; 6) 21 other governmental jurisdictions have enacted similar emissions targets; and 7) This would support current voluntary efforts to encourage other governments to set comparable targets. The Division notes that the Petitioners' extensive summary of emissions-related impacts on climate concludes with a discussion of the necessity of emissions reductions. However, the proposed rules do not require any emission reductions.

15A NCAC 02I .0501(b)(3): A statement of the effect on existing rules or orders? No. There are deficiencies regarding the Petition's completeness in accordance with 15A NCAC 02I .0501(b)(3). On page 8 of the Petition, the proposed "Carbon Dioxide Emissions Inventory and Budget" text states, "The Division shall identify laws, rules, or policies that need to be adopted, repealed, or amended in order for

North Carolina Sources to meet the Commission's Carbon Dioxide Emissions Targets and the North Carolina Carbon Dioxide Budget." Further, on page 76 the Petitioners state in the narrative:

The proposed rule will not amend existing rules within the North Carolina Administrative Code. The rulemaking petition does not dictate how the Commission should meet the proposed carbon dioxide targets and budget. Future additions or amendments to the Administrative Code will depend upon the particular implementation strategies the Commission adopts, although these strategies are unlikely to include amendments to current rules. Rather, Petitioners anticipate that adopting a carbon dioxide rule or rules following future implementation of the proposed rule would require the Commission to add new provisions to existing subchapters within the Administrative Code.

Pursuant to 15A NCAC 02I .0501(b)(3), Petitioners are required to provide a statement on the effect on existing rules or orders. The Petitioners fail to meet this requirement due to the following reasons: 1) the proposed rule shifts the Petitioners' burden of determining the effect on existing rules or orders to the DAQ and 2) the Petition does not specify which of the Commission's rules would need to be revised for carbon sources to meet the emissions reductions required in the proposal. If applied, the rules as proposed are vague and ambiguous because they fail to meaningfully identify the sources that would be potentially affected, and how those affected sources would meet progress goals in order to demonstrate compliance. Additional amendments, adoptions, or repeals of rules in the current version of the Commission's rules, which are not specified in the Petition, would be necessary to achieve the regulatory requirements set forth in the proposed rules.


15A NCAC 02I .0501(b)(4): The name(s) and address(es) of the petitioner(s)? Yes. The name of an adult responsible party representing the Petitioners Hallie Turner, Arya Pontula, and Emily Liu and an address are included on pp. 1 and 105 of the Petition.

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15A NCAC 02I .0501(b)(5): A request to present the petition to the committee in accordance with Rule .0502 of this Section, if desired? Yes. In the cover letter transmitting the Petition, the Petitioners explicitly requested to present the Petition to the Air Quality Committee.

Because the Petition does not satisfy the provisions of 15A NCAC 02I .0501(b)(1) and (3), the Petitioners have not met all the criteria needed to proceed to the EMC. Therefore, the Division is hereby returning the original Petition as submitted. Additional information regarding the petition and rulemaking process under the Administrative Procedures Act, including standards used for review of rules by the Rules Review Commission, are available at <http://www.oah.state.nc.us/rules/>. For additional information or questions please feel free to contact me at (919) 707-8447 or michael.abraczinskas@ncdenr.gov.

Sincerely,



Michael A. Abraczinskas, Director
Division of Air Quality, NCDEQ

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MAA/mfd

c: Stan Meiburg, EMC Chair
Phillip Reynolds, EMC Counsel
Michael Pjetraj, DAQ Deputy Director
Lois Thomas, EMC Recording Clerk