

STATE OF NORTH CAROLINA

BEFORE THE ENVIRONMENTAL
MANAGEMENT COMMISSION

COUNTY OF WAKE

IN THE MATTER OF:

HALLIE MCKENZIE TURNER
PETITION FOR RULEMAKING

DECISION ON COMPLETENESS
OF PETITION FOR
RULEMAKING

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Hallie McKenzie Turner ("Petitioner") has, through her counsel, filed a Petition for Rulemaking for Promulgation of a Rule Based on the Best Available Climate Science to Limit North Carolina's Carbon Dioxide Emissions (the "Petition") dated December 5, 2014 with the North Carolina Environmental Management Commission (the "Commission"). As the Petition deals with air quality regulations, Petitioner properly filed the Petition with the Director of the North Carolina Department of Environment and Natural Resources, Division of Air Quality.

Pursuant to 15A NCAC 21.0502, the first step in the review of a petition such as this is a determination by the Commission's Chairman as to whether or not the petition is complete. Pursuant to 15A NCAC 21.0501(b), a petition is complete if it contains the following information:

- (1) the text of the proposed rule(s) conforming to the Codifier of Rules' requirements for publication of proposed rules in the North Carolina Register;
- (2) the statutory authority for the agency to promulgate the rule(s);
- (3) a statement of the reasons for adoption of the proposed rule(s);
- (4) a statement of the effect on existing rules or orders;
- (5) copies of any documents and data supporting the proposed rule(s);
- (6) a statement of the effect of the proposed rule(s) on existing practices in the area involved, including cost factors for persons affected by the proposed rule(s);
- (7) a statement explaining the computation of the cost factors;
- (8) a description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s); and
- (9) the name(s) and address(es) of the petitioner(s).

If a petition is determined not to be complete, it is to be returned to the petitioner by, in this case, the Director of the Division of Air Quality on behalf of the Chairman of the Commission.

In her Petition, Petitioner requests that the Commission commence rulemaking proceedings regarding a rule that would:

1. Require that carbon dioxide emissions peak in 2015;
2. Require reductions of carbon dioxide emissions of at least four percent per year beginning in 2016 and continuing until 2050;
3. Require the Commission to adopt a carbon dioxide emissions plan by January 2015;
4. Require the Commission to publish annual reports on statewide carbon dioxide emissions which shall include an accounting and inventory for each and every source of carbon dioxide emissions within the State verified by an independent third-party;
5. Require the Division to report to the Governor and appropriate committees of the General Assembly on an annual basis on total emissions of carbon dioxide for the preceding year and totals in each major source sector.

Petition at p. 4.

Petitioner admits that her "Petition does not mandate a particular method for achieving the four percent annual reduction in CO₂ emissions . . ." (Petition at p. 27) However, Petitioner recognizes that actions will have to be taken by current sources of carbon dioxide emissions in order to achieve the reductions set forth in the proposed rule. Those actions could include "phasing out coal-fired electric generation capacity in favor of less carbon-intensive methods" (Petition at p. 27), increased use of renewable energy projects, energy efficiency measures and energy conservation measures (Petition at p. 28), and use of carbon dioxide capture and sequestration (Petition at pp. 27-28). Implementation of some or all of these suggested methods would require the adoption of additional rules by the Commission requiring that sources of carbon dioxide emissions take specified actions or meet certain standards. In short, adoption of Petitioner's proposed rule would necessarily require future rule making by the Commission.

The determination of whether or not this Petition is complete hinges on whether the Commission has statutory authority to adopt the proposed rule. The scope of the Commission's authority derives from statutory grants of authority from the General Assembly. Petitioner correctly cites the various statutory sources for the Commission's authority at pages 5-7 of the Petition.

However, in 2012, the General Assembly imposed a specific limitation on the Commission's authority to adopt rules. General Statutes §150B-19.3 provides as follows:

- (a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the

environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the following:

- (1) A serious and unforeseen threat to the 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.

N.C.G.S. §150B-19.3(a) General Statutes §150B-19.3(b)(2) makes the provisions of this statute expressly applicable to the Commission.

Thus the question is whether or not there are federal laws or rules limiting carbon dioxide emissions. If there are and the rule proposed in the Petition imposes more restrictive standards, limitations or requirements than those federal laws or rules, Petitioner must show that the Commission has authority to adopt the proposed rule because one of the five standards for exceptions to the adoption of such more stringent rules set forth in N.C.G.S. §150B-19.3 applies. If no such showing is made, the Petition is incomplete for failure to establish that the Commission has statutory authority to adopt the proposed rule.

Petitioner addresses this issue in her Petition. Specifically, Petitioner states that “The rule proposed in this Petition does not presently conflict with §150B-19.3 because there are no federal rules in force that limit carbon dioxide emissions.” (Petition at 24) (Emphasis added.)

However, the statement in the bold type is not correct. Federal regulations are in place for limiting carbon dioxide emissions from motor vehicles. On May 7, 2010, EPA promulgated final rules establishing light-duty vehicle greenhouse gas emission standards and corporate average fuel economy standards. 75 Fed. Reg. 25324 (May 7, 2010). One of the primary greenhouse gases of concern to the United States Environmental Protection Agency (U.S. EPA) and the National Highway Traffic Safety Administration in these regulations was carbon dioxide. 75 Fed. Reg. at 25326. To address this, these regulations established “a set of fleet-wide average carbon dioxide (CO₂) emission standards for cars and trucks” which U.S. EPA described as “the first and most important” standard established in these rules. 75 Fed. Reg. at 25396. There is discussion throughout the preamble to these regulations as to how they are intended to and will achieve reductions in the emissions of carbon dioxide.

The establishment of the CO₂ emission standards for motor vehicles triggered the requirement for permitting of CO₂ emissions from industrial sources. In addition, during 2011 and 2012, U.S. EPA issued various rules implementing the Prevention of Significant Deterioration and Title V Operating Permit Greenhouse Gas (GHG) Tailoring Rule. These regulations also apply to carbon dioxide emissions. According to U.S. EPA's Fact Sheet on these rules:

Facilities that must obtain a PSD permit anyway, to cover other regulated pollutants, must also address GHG emissions increase of 75,000 tpy CO₂e or more.

All of these federal regulations apply to specific sources of carbon dioxide emissions and articulate specific standards applicable to and/or actions required to be taken by such sources. The federal regulations do not apply to all sources of carbon dioxide regulations. In contrast, Petitioner's proposed rule would apply to all sources of carbon dioxide regulations. To achieve the emission reduction standard set forth in subsection (a) of Petitioner's proposed rule, additional regulations would need to be adopted imposing additional requirements on parties not currently subject to federal regulations.

As the proposed rule would apply to parties not currently subject to federal regulation, it would impose "a more restrictive standard, limitation, or requirement than those imposed by federal law or rule" which have already been adopted on the subject matter of the Petition, namely carbon dioxide emissions. Thus, in order to establish that the Commission has statutory authority to adopt the proposed rule, Petitioner must show that one of the five exceptions set forth in N.C.G.S. §150b-19.3 exists.

Petitioner makes no such showing in her Petition. Petitioner makes no mention of a federal or state legislative action requiring adoption of the proposed rule, a change in federal or State budgetary policy, a federal regulation requiring adoption of the proposed rule, a court order or a serious or unforeseen threat to the public health, safety, or welfare. As to the last factor, I do not reach the issue as to whether or not the Petitioner has made the requisite showing of a "serious" threat as the information presented by the Petitioner clearly shows that any threat is not "unforeseen." Many of the studies and reports cited by Petitioner date back as far as 1989 (see Petition at p. 8, footnote 23) with others dated 2005, 2007, 2008 and 2009. (See generally Petition at pp. 9-20.) These cited reports establish that the issue of any threat posed by carbon dioxide emissions is not a new allegation but has been one that has been made for some time. As a result it cannot be classified as "unforeseen."

For the reasons set forth in this document, I conclude that the Petition is not complete as Petitioner has failed to establish that the Commission has statutory authority to adopt the proposed rule as required by 15A NCAC 21.0501(b)(2), and I instruct the Director of the Division of Air Quality to return the Petition to Petitioner's counsel.

This 14th day of January 2015.



Benne C. Hutson, Chairman
North Carolina Environmental Management
Commission