

**The Regulatory Reform Act of 2013:  
Key Provisions for Environmental Health Programs**  
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The North Carolina Regulatory Reform Act of 2013 (S.L. 2013-413, HB 74) was an omnibus bill that addressed the regulation of a wide range of issues, from the state's rule-making procedures, to the authority of local governments to regulate environmental issues, to specific state laws that provide for environmental health inspections and permitting. This document summarizes key provisions of the Regulatory Reform Act, arranged by topic area. For each topic, the section of the Regulatory Reform Act is cited and additional relevant documents are identified.

**Periodic Review & Expiration of Statewide Rules**

- S.L. 2013-413, section 3.(b) (codified at G.S. 150B-21.3A)
- NC Office of Administrative Hearings Flowchart: H 74 Periodic Review & Expiration of Rules
- Review Schedule for Rules of the Commission for Public Health

Many state agencies have the authority to adopt rules. A rule is a type of law that usually serves the purpose of fleshing out the details of general policies enacted by the General Assembly. The state legislature authorizes certain state agencies to adopt rules in particular areas and requires those agencies to follow rule-making procedures set out in the NC Administrative Procedure Act (G.S. Ch. 150B, Art. 2A). The North Carolina agency that makes most statewide public health rules is the Commission for Public Health. The Commission's rules are published in the North Carolina Administrative Code (NCAC) in Title 15A (most environmental health rules) and Title 10A (most other public health rules, including communicable disease, accreditation, and other topics).

The process for developing and adopting rules is complex and has multiple checks and balances built into it. While most of the process is carried out by the agencies of the state's executive branch, the General Assembly has the last word on rule-making: it can invalidate or change a rule through legislative action. It can also make changes to the rule-making process itself, and it did so in the Regulatory Reform Act. In the past, most rules remained in effect indefinitely, unless and until they were amended or repealed. While any rule could be given a "sunset" or expiration date, most rules did not expire and there was no mandatory process for periodically reviewing rules to ensure that they were up-to-date (though agencies could voluntarily review rules at any time). Section 3.(b) of the Regulatory Reform Act instituted a mandatory periodic review of statewide rules. Each state rule-making agency is required to review all of its rules at least once every 10 years. The schedule for reviewing rules is developed by the NC Rules Review Commission. Any rule that is not reviewed on schedule will automatically expire (with a limited exception for rules that were adopted to conform to or implement federal laws).

After reviewing its rules, an agency must prepare a report of initial determinations, in which each of the agency's rules must be categorized according to the definitions in the table below. The agency's initial

determinations must be made available for public comment. After the public comment period, the agency must review and prepare a brief response addressing the public comments. The agency must then submit a report to the Rules Review Commission, which reviews the report and makes its determinations about each rule. The Rules Review Commission’s determinations are not final until the Commission consults with the Joint Legislative Administrative Procedure Oversight Committee. Once the consultation requirement is satisfied, the category to which a rule was ultimately assigned determines whether the rule will expire, continue without further action, or be required to go through the rule-making process for re-adoption as if it were a new rule.

<b>Category</b>	<b>Definition</b>	<b>Result</b>
Necessary with substantive public interest	<p>Rule is necessary but one or more of the following apply:</p> <ul style="list-style-type: none"> <li>• Agency has received public comments on rule within past two years</li> <li>• Rule affects property interest of the regulated public</li> <li>• Agency knows or suspects any person may object to rule</li> </ul>	Rule must be readopted, following the rule-making process as if it were a new rule
Necessary without substantive public interest	Rules is necessary but none of the criteria for substantive public interest apply	Rule continues in effect without further action
Unnecessary	Rule is obsolete, redundant, or otherwise not needed	Rule expires

The North Carolina Office of Administrative Hearings has developed a flow chart for the rules review process (available at <http://www.ncoah.com/rules/H74PeriodicReviewandExpirationofRules-IndividualSteps.pdf>). The Commission for Public Health has a schedule for reviewing all of its rules by October 2018.

#### **Local Environmental Ordinances**

- S.L. 2013-413, section 10.2

This section of the Regulatory Reform Act imposed temporary limits on city or county ordinances regulating areas that are also regulated by state or federal laws adopted or enforced by specified environmental agencies. The environmental agencies covered by the law include the Commission for Public Health, but only when it is exercising its authority to regulate solid waste, public drinking water supplies, on-site wastewater, asbestos, and the lead-based paint hazard management program or renovation activities. The Environmental Management Commission is also covered. Among other things, the Environmental Management Commission adopts rules that govern local health department programs for inspecting and permitting private drinking water wells.

The section does not affect existing local ordinances on those matters, nor is it an outright prohibition on new ordinances: the law allows new city or county ordinances if they are approved by a unanimous vote of the city or county board members present and voting. Also, by its terms, the section does not appear to apply to local board of health rules adopted pursuant to G.S. 130A-39—the restraint seems to be only on city or county ordinances.

The temporary restraint on local ordinances has a sunset date of October 1, 2014. Between now and then, the Environmental Management Commission has been charged with studying the circumstances under which local governments should be allowed to regulate matters already regulated by state or federal environmental agencies.

## **Food and Lodging Programs**

### *Food Sanitation in Private Clubs*

- S.L. 2013-413, section 7 (codified at G.S. 130A-247(2))
- DPH Position Statement: Private Club Definition Changes (Oct. 23, 2013)

North Carolina local health departments have the duty to inspect and grade the sanitation of most establishments that prepare or serve food (G.S. 130A-248). Environmental health specialists carry out these inspections in accordance with state administrative rules and issue permits to establishments that receive passing sanitation grades. The general rule is that a food establishment may not operate if it has not been inspected and permitted. However, G.S. 130A-250 exempts some establishments from this requirement, including private clubs as defined in G.S. 130A-247.

Section 7 of the Regulatory Reform Act expanded this exemption by redefining the term “private club” for purposes of the food and lodging sanitation laws. Under prior law, a private club was defined solely as a nonprofit organization that maintains selective members, is operated by the membership, and does not provide food or lodging to anyone other than a member or a member’s guest. The Regulatory Reform Act retained this part of the definition but added a new part: “an organization that ... meets the definition of a private club set forth in G.S. 18B-1000(5).” Under G.S. 18B-1000(5), a private club is an establishment that is eligible for a permit to serve mixed drinks and other alcoholic beverages without having to meet quotas for food service that would otherwise apply under the state’s ABC laws, because it is not open to the general public but only to members and their guests. It need not be nonprofit or operated by the membership. The effect of this redefinition is to exempt bars that qualify as private clubs under the ABC laws from the food sanitation laws, regardless of the nature or extent of their food service operation.

The DPH position statement on this provision specifies that an establishment must have a *mixed beverages private club* permit to fall within the expanded definition of private club and be exempted from the food sanitation requirements.

### *Bed & Breakfast Homes*

- S.L. 2013-413, section 11 (codified at G.S. 130A-247(5a) and 130A-248)
- DPH Position Statement: Bed & Breakfast Home Definition (Sept. 27, 2013)

This section of the Regulatory Reform Act addresses food sanitation in bed and breakfast homes. Prior law authorized the regulation of “private homes offering bed and breakfast accommodations to eight or fewer persons per night.” State administrative rules implementing this law created the term “bed and breakfast home” and defined it as “a private home offering bed and breakfast accommodations to eight or fewer persons per night for a period of time of less than a week.” The rules then specified the standards such an establishment must meet to qualify for a food service permit. Bed and breakfast homes are not the same as bed and breakfast inns, which are subject to different state rules.

The caption of Section 11 is “Let Bed and Breakfasts Offer Three Meals Per Day”—in other words, not just breakfast. To achieve this, the law amended G.S. 130A-248 to replace the term “private homes offering bed and breakfast accommodations” with “bed and breakfast homes,” and then amended G.S. 130A-247 to provide a definition of “bed and breakfast homes” that supersedes the regulatory definition. This has the effect of permitting bed and breakfast homes to serve up to three meals per day. The changed definition of “bed and breakfast home” has another potential effect as well: the number of guests that may be served under an establishment’s food service permit has potentially increased. Under the regulatory definition, an establishment could qualify as a bed and breakfast home only if it served no more than eight total *guests*. Under the new statutory definition, an establishment with up to eight guest *rooms* may qualify as a bed and breakfast home. The new definition does not address the number of guests that may occupy a room.

The DPH position statement clarifies certain issues and explains how local health department employees who are responsible for ensuring compliance with food and lodging regulations should apply the new law. The statement points out that the change does not apply to bed and breakfast *inns*, which are still limited to serving only breakfast and are subject to stricter sanitation rules. However, a bed and breakfast inn might qualify for reclassification as a bed and breakfast *home*, if the inn has eight or fewer guest rooms and meets the other criteria in the new definition.

### *Carbon Monoxide Detectors in Lodging Establishments*

- S.L. 2013-413, section 19 (codified at G.S. 143-138 and 130A-248(g))
- DPH Position Statement: Carbon Monoxide Detectors in Lodging Establishments (Sept. 25, 2013)
- DPH Update: Carbon Monoxide Detectors in Lodging Establishments Clarification (Dec. 18, 2013)
- DPH Form: Assessment of Carbon Monoxide Risk Reduction in Lodging Establishments

Section 19 of the Regulatory Reform Act amended the state building code as well as provisions of the public health code that give local health departments the duty to inspect lodging establishments. The amendments require lodging establishments to install and maintain carbon monoxide detectors in

enclosed spaces (including sleeping rooms) that either (1) have a fossil fuel-burning heater or other appliance, or (2) share a wall, floor, or ceiling with an enclosed space that has one of those items.

By adding this requirement to the public health laws, the legislation had the effect of giving local health departments the responsibility to determine compliance with this provision, as part of the health department's inspection and permitting of lodging establishments. The legislation also directed the Building Code Council, the Department of Health and Human Services, and the Commission for Public Health to jointly study the new requirements to determine whether they are adequate to protect the public health.

The Division of Public Health's September 2013 position statement noted that the requirement for carbon monoxide detectors applies to lodging establishments, including hotels, motels, bed and breakfasts, and residential camps. However, it does not extend to other room-and-board institutions inspected by the local health department. If an environmental health specialist finds a regulated establishment to be out of compliance with the CO detector requirement, the specialist must immediately notify the person in charge of the establishment and issue a notice of intent to suspend the establishment's lodging facility permit. On December 18, 2013, DPH issued an update to answer questions and clarify issues arising from local health departments' enforcement of the new requirements for carbon monoxide detectors in lodging establishments.

#### **Smoking in Restaurants and Bars**

- S.L. 2013-413, section 23
- Final Rule: Clarification to the Definition of Enclosed Area, 10A N.C.A.C. 39C .0104

Smoking has been prohibited in the enclosed areas of most restaurants and bars in North Carolina since January 2010 (G.S. 130A-496). A restaurant or bar may choose whether to permit or prohibit smoking in areas that are not enclosed. The state law that established this prohibition defined the term "enclosed area" as "an area with a roof or overhead covering of any kind and walls or side coverings of any kind, regardless of the presence of openings for ingress and egress, on all sides or on all sides but one." (G.S. 130A-492(5)). However, this definition was not entirely clear and during the first few years that the law was in effect, there were numerous questions about matters such as the extent to which an area must be open to the outdoors to be considered not enclosed, whether wall or side coverings with openings (such as screens) could be used without rendering an area enclosed, etc.

Section 23 of the Regulatory Reform Act directed the Commission for Public Health to address this issue by adopting rules clarifying the definition of "enclosed area," in order to ensure consistent interpretation and enforcement of the law throughout the state. The Commission for Public Health proposed a rule and published it in the North Carolina Register on October 1, 2013. The public was invited to comment on the proposed rule by submitting written comments and/or speaking at a public hearing. The Commission received comments throughout the fall and adopted its final rule on December 3, 2013. The rule will take effect 30 days after the North Carolina General Assembly convenes for its

2014 legislative session, unless the General Assembly takes action to disapprove the rule. The 2014 legislative session will convene at noon on May 14, 2014.

### **Low-Flow Design Alternatives for On-Site Wastewater Systems**

- S.L. 2013-413, section 34
- DPH Position Statement: Low-Flow Design Alternatives for Wastewater Systems (Sept. 19, 2013)

Owners and other persons in charge of residences, businesses, and other places of public assembly must provide an approved wastewater system to ensure that human waste is collected, treated, and disposed in a manner that protects public health (G.S. 130A-335). Local health departments inspect on-site wastewater systems and issue permits for them to operate if they comply with applicable state regulations, which are found in Title 15A of the North Carolina Administrative Code.

Section 34 of the Regulatory Reform Act states that its purpose is to provide for low-flow design alternatives for on-site wastewater systems. It requires the Commission for Public Health to change a statewide rule affecting on-site wastewater systems serving different types of public places, ranging from schools to restaurants to campgrounds. When such establishments have an on-site system it must be capable of managing a minimum daily flow, which is specified in a table contained in 15A NCAC 18A .1949. The Regulatory Reform Act directed the Commission to amend the rule to exempt a system from the design flow standards if flow rates that are less than those shown in the table in the current rule can be achieved through an engineering design that uses low-flow fixtures or low-flow technologies. The design must be prepared, sealed, and signed by a licensed professional engineer. Recognizing that it will take some time for the rule to be amended and take effect, the legislature specified that an exemption for systems that meet the criteria described should be provided in the interim, beginning with the effective date of the Act (August 23, 2013).

On September 19, 2013, the North Carolina Division of Public Health issued a position statement to clarify certain issues and explain how local health department employees who are responsible for ensuring compliance with on-site wastewater regulations should apply the new law.

### **Private Drinking Water Well Permits**

- S.L. 2013-413, section 35 (codified at G.S. 87-97(e) and (e1))
- DPH Position Statement: Issuance of Private Drinking Water Well Permits (Aug. 30, 2013)

Section 35 of the Regulatory Reform Act amended G.S. 87-97, the law that requires local health departments to have a program for inspecting, testing, and permitting private drinking water wells. A local health department must issue a construction or repair permit for a well that meets health and safety requirements established in state or local rules. Effective August 23, 2013, this legislation imposes a new time limit on the local health department's actions: Upon receipt of an application to construct or repair a well, a local health department must determine whether the well can be constructed or repaired in compliance with applicable rules and issue or deny the permit within 30 days. If the

department does not act within 30 days, the permit will automatically issue. If the local health department believes the automatic issuance is incorrect, it may challenge it by filing a petition for a contested case under the North Carolina Administrative Procedure Act.

On August 30, 2013, DPH issued a position statement to clarify certain issues and explain how local health department employees who are responsible for ensuring compliance with private well regulations should apply the new law. Among other things, it advises local health departments to clearly document when a permit is issued automatically under this law without having had the site evaluation that would ordinarily precede the permit. In such a circumstance, the permit should include clear language stating that the site was not evaluated and it should state the potential implications of acting on a permit without a site evaluation—including the possibility that an improperly sited well might not pass a subsequent installation inspection, in which case the permit would likely be revoked.

Section 35 also directed the Commission for Public Health to adopt rules regarding permits for private drinking water wells that are proposed to be located within 1000 feet of a known source of release of contamination. The rules must provide for notice and information about the contamination source and any known risks associated with the construction and use of a private drinking water well on the site.