



TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

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| 1. Rule-Making Agency: Onsite Wastewater Contractors and Inspectors Certification Board | |
| 2. Rule citation & name: 21 NCAC 39 .0904 Waiver | |
| 3. Action: <input checked="" type="checkbox"/> Adoption <input type="checkbox"/> Amendment <input type="checkbox"/> Repeal | |
| 4. Was this an Emergency Rule: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Effective date: May 20, 2020 | |
| 5. Provide dates for the following actions as applicable: a. Proposed Temporary Rule submitted to OAH: May 12, 2020 b. Proposed Temporary Rule published on the OAH website: May 14, 2020 c. Public Hearing date: June 3, 2020 d. Comment Period: May 20, 2020 through June 11, 2020 e. Notice pursuant to G.S. 150B-21.1(a3)(2): May 12, 2020 f. Adoption by agency on: June 24, 2020 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]: | |
| 6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review. <input checked="" type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: Effective date: <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input type="checkbox"/> A recent federal regulation. Cite: Effective date: <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other: | |
| <p>Explain: On March 10, 2020, the Governor of North Carolina, by issuing Executive Order No. 116, declared a state of emergency to coordinate a response and enact protective measures to help prevent the spread of COVID-19. The COVID-19 is a respiratory disease that can result in serious illness or death. The COVID-19, previously unidentified in humans, spreads easily from person to person. Once an outbreak of the COVID-19 begins, it is difficult to contain. The World Health Organization, the Center for Disease Control and Prevention, and the United States Department of Health and Human Services have declared COVID-19 a public health threat and emergency. On March 12, 2020, the Governor of North Carolina and the NC Department of Health and Human Services recommended high risk persons stay at home, that schools implement plans for distance or e-learning, that employers and employees use teleworking technologies, and that mass gatherings should cancel, postpone, and modify these events or offer online streaming services. On March 14, 2020, the Governor of North Carolina issued Executive Order No. 117 that prohibited mass gatherings, closed schools, and urged social distancing.</p> | |

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required? The public health threat posed by COVID-19 requires immediate action to limit mass gatherings, increase social distancing, and limit exposure of high risks individuals. It is in the public's interest to immediately adopt rules that limit the Board's regulated audience's exposure to COVID-19 and allow for relaxed requirements during the time of this public health emergency.

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Connie Stephens

Phone: 336-202-3126

E-Mail: csstephens@ncowcib.info

Agency contact, if any:

Phone:

E-Mail:

10. Signature of Agency Head*:



* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: William R. Davis

Title: Chairman

E-Mail: RussDavis613@gmail.com

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Onsite Wastewater Contractors Board

RULE CITATION: 21 NCAC 39 .0904

DEADLINE FOR RECEIPT: Friday, July 10, 2020

NOTE WELL: *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, staff recommends that the following technical changes be made:

Please note that overall, I do not have concerns for when one of your licensees requests the waiver, but I am quite uncomfortable with this Rule as written as it pertains to the Board waiving a rule upon its own initiative. I do not think this is the intent, but I read this Rule as essentially allowing an agency to circumvent the APA, resulting in a repeal of a Rule without engaging in rulemaking.

G.S. 150B-19 allows an agency to “waive or modify a requirement set in a rule” only if a rule “establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.” As written, the factors provided in Items (1) through (7) of this Rule appear to apply when the Board receives a request from an outside party and does not address how the Board will determine whether to waive a rule “on its own initiative.” Please consider breaking “The Board may also waive any rule in this Chapter that is not statutorily required upon its own initiative” into a separate Paragraph (b) and provide some parameters as to when this will apply and how the Board will determine whether it is appropriate.

Not all of the factors provided appear to pertain to the Board. Was the intent for the Board to use the same factors as your licensees? Please review and revise as necessary.

If you intend for “notice and opposition” to be a factor that the Board will use when waiving a rule on its own initiative, how will you provide this notice?

How long will the waiver last? Because this language of this Rule as currently written is so broad and isn't really tied to anything, such as a State of Emergency declared by the Governor or the pandemic, I read this as allowing the Board to change their rules without notice under any circumstances whatsoever. To address this issue, and to tie your Rule back to the Temporary Findings of Need Form, please provide some additional information on the duration of the waiver.

Amber May
Commission Counsel
Date submitted to agency: July 9, 2020

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road,
Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: July 9, 2020

21 NCAC 39 .0904 is adopted under temporary procedures as follows:

21 NCAC 39 .0904 WAIVER OR EXTENSION

The Board may waive or extend any rule in this Chapter that is not statutorily required if a certificate holder submits a written request. The Board may also waive or extend any rule in 21 NCAC 39 that is not statutorily required upon its own initiative. Factors the Board shall use in determining whether to grant the waiver or extension are:

- (1) degree of disruption to the Board;
- (2) cost to the Board;
- (3) degree of benefit to the public;
- (4) whether the requesting party had control over the circumstances that required the requested waiver or extension;
- (5) notice to and opposition by the public;
- (6) need for the waiver or extension; and
- (7) previous requests for waivers or extensions submitted from the requesting party.

*History Note: Authority G.S. 90A-74; 150B-19(6);
Emergency Adoption Eff. May 20, 2020;
Temporary Adoption Eff. July 24, 2020.*