



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

August 16, 2018

Jennifer Everett, Rulemaking Coordinator
Department of Environmental Quality
Sent via email only: Jennifer.everett@ncdenr.gov

Re: Objection to Rules 15A NCAC 08F .0406 and 08G .0802

Dear Ms. Everett:

At its meeting today, the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule 15A NCAC 08F .0406 based upon lack of statutory authority and necessity, as well as ambiguity.

Specifically, the Commission found that throughout the Rule, the agency appears to be delegating to the Chairman or a committee of the Commission the authority to issue summary suspension of a certification pursuant to G.S. 150B-3(c) and to revoke or suspend a certification pursuant to G.S. 150B, Article 3A. However, the APA requires a majority of the Commission members to make these decisions. The agency has not cited to any authority to abrogate the requirements of the APA and allow the Chairman to issue these decisions without approval of the Commission.

In addition, it appears from Paragraph (c) that the agency is creating a disciplinary committee composed of at least four members of the 11-member body and this committee will hold a hearing and then make a recommendation to the Chairman, who will issue a decision. G.S. 150B-40(b) requires a majority of the agency to decide contested cases; if they cannot do so, they must request an ALJ from the Office of Administrative Hearings. The agency has not cited to any authority to allow them to delegate this decision making to the Chairman, even following a consultation with a minority of the members of the Commission.

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

Further, Paragraph (g) states that the decision of the Chairman becomes a final agency action unless the individual files a petition for a contested case. Therefore, the Rule is unclear as written, as it is not apparent what this Rule is doing if it is not establishing the process for filing a contested case with the agency.

The Commission also found that Subparagraphs (a)(1) through (3) merely recite G.S. 90A-47.5(a)(1) through (3) and therefore, this portion of the Rule is unnecessary.

The Commission objected to Rule 15A NCAC 08G .0802 based upon lack of statutory authority and ambiguity for the same reasons articulated in the objection to Rule 15A NCAC 08F .0406 regarding those grounds.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,



Amanda J. Reeder
Commission Counsel

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Water Pollution Control System Operators Certification Commission

RULE CITATION: 15A NCAC 08F .0406

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to this Rule because it is unclear as written and appears to contradict the requirements of G.S. 150B-3 and 150B, Article 3A. In addition, part of this Rule recites statute and is therefore unnecessary.

Throughout this Rule, the agency appears to be delegating to the Chairman of the Commission or a committee the authority to issue summary suspension of a certification pursuant to G.S. 150B-3(c) and to revoke or suspend a certification pursuant to G.S. 150B, Article 3A. (See Paragraphs (b), (c)(2), and (f) of this Rule). However, the APA requires a majority of the Commission members to make these decisions. The agency has not cited to any authority to abrogate the requirements of the APA and allow the Chairman to issue these decisions without approval of the Commission.

In addition, it appears from Paragraph (c) that the agency is creating a disciplinary committee composed of at least four members of the 11-member body. Staff is not sure that the operator required by Subparagraph (c)(1)(D) is required to be a member of the Commission, and therefore, believes the Rule is unclear as written. However, even if all of the individuals in Subparagraph (c)(1) are required to be on the Commission, that is still not a majority of the agency. And it appears that the committee will hold a hearing [see Paragraphs (d) and (e)], and then make a recommendation to the Chairman, who will issue a decision. G.S. 150B-40(b) requires a majority of the agency to decide; if they cannot do so, they must request an ALJ from the Office of Administrative Hearings. The agency has not cited to any authority to allow them to delegate this

Amanda J. Reeder
Commission Counsel

decision making to the Chairman, even following a consultation with a minority of the members of the Commission.

Staff notes that Paragraph (g) states that the decision of the Chairman becomes a final agency action unless the individual files a petition for contested case. Staff does not know what this Rule is doing if it is not establishing the process for filing a contested case with the agency. Specifically, what is the purpose of the process established by Paragraphs (c) through (f)? If this is an informal discipline process that does not follow G.S. 150B, staff does not believe that the agency has authority to establish this, as G.S. 90A-47.5 requires the agency to follow 150B in imposing discipline. Regardless of intent of the Paragraphs, staff believes the Rule is unclear as written.

Regarding necessity, Subparagraphs (a)(1) through (3) merely recite G.S. 90A-47.5(a)(1) through (3). The Rule states:

- (a) The Certification Commission, in accordance with the provisions of G.S. 150B and G.S. 90A-41, may suspend or revoke the certificate of a certified operator, or issue a written reprimand to an operator if it finds that the operator:
 - (1) engages in fraud or deceit in obtaining certification; or
 - (2) fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the performance of the duties of an operator in charge; or
 - (3) is incompetent or otherwise unable to properly perform the duties of an operator in charge.

G.S. 90A-47.5(a) states:

§ 90A-47.5. Suspension; revocation of certificate.

- (a) The Commission, in accordance with the provisions of Chapter 150B of the General Statutes, may suspend or revoke the certificate of any operator in charge who:
 - (1) Engages in fraud or deceit in obtaining certification.
 - (2) Fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the performance of the duties of an operator in charge.
 - (3) Is incompetent or otherwise unable to properly perform the duties of an operator in charge.

Therefore, staff recommends objection to this Rule because the agency lacks statutory authority to establish alternate requirements to those set forth in G.S. 150B, it recites statute verbatim in Paragraph (a), and is unclear as written.

§ 90A-47.5. Suspension; revocation of certificate.

(a) The Commission, in accordance with the provisions of Chapter 150B of the General Statutes, may suspend or revoke the certificate of any operator in charge who:

- (1) Engages in fraud or deceit in obtaining certification.
- (2) Fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the performance of the duties of an operator in charge.
- (3) Is incompetent or otherwise unable to properly perform the duties of an operator in charge.

(b) In addition to revocation of a certificate, the Commission may levy a civil penalty, not to exceed one thousand dollars (\$1,000) per violation, for willful violation of the requirements of this Part.

The clear proceeds of civil penalties levied pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995 (Reg. Sess., 1996), c. 626, s. 6(b); 1998-215, s. 46.)

§ 143B-301. Water Pollution Control System Operators Certification Commission – members; selection; removal; compensation; quorum; services.

(a) The Water Pollution Control System Operators Certification Commission shall consist of 11 members. Two members shall be from the animal agriculture industry and shall be appointed by the Commissioner of Agriculture. Nine members shall be appointed by the Secretary of Environmental Quality with the approval of the Environmental Management Commission with the following qualifications:

- (1) Two members shall be currently employed as water pollution control facility operators, water pollution control system superintendents or directors, water and sewer superintendents or directors, or equivalent positions with a North Carolina municipality;
- (2) One member shall be manager of a North Carolina municipality having a population of more than 10,000 as of the most recent federal census;
- (3) One member shall be manager of a North Carolina municipality having a population of less than 10,000 as of the most recent federal census;
- (4) One member shall be employed by a private industry and shall be responsible for supervising the treatment or pretreatment of industrial wastewater;
- (5) One member who is a faculty member of a four-year college or university and whose major field is related to wastewater treatment;
- (6) One member who is employed by the Department of Environmental Quality and works in the field of water pollution control, who shall serve as Chairman of the Commission;
- (7) One member who is employed by a commercial water pollution control system operating firm; and
- (8) One member shall be currently employed as a water pollution control system collection operator, superintendent, director, or equivalent position with a North Carolina municipality.

(b) Appointments to the Commission shall be for a term of three years. Terms shall be staggered so that three terms shall expire on 30 June of each year, except that members of the

Commission shall serve until their successors are appointed and duly qualified as provided by G.S. 128-7.

(c) The Commission shall elect a Vice-Chairman from among its members. The Vice-Chairman shall serve from the time of his election until 30 June of the following year, or until his successor is elected.

(d) Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

(e) The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, and nonfeasance according to the provisions of G.S. 143B-13.

(f) The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5 and G.S. 143B-15.

(g) A majority of the Commission shall constitute a quorum for the transaction of business.

(h) All clerical and other services required by the Commission shall be supplied by the Secretary of Environmental Quality. (1973, c. 1262, s. 43; 1977, c. 771, s. 4; 1989, c. 372, s. 10; c. 727, s. 196, 197; 1989 (Reg. Sess., 1990), c. 850, s. 1; c. 1004, s. 19(b); 1991, c. 623, ss. 1, 16; 1995 (Reg. Sess., 1996), c. 626, s. 5; 1997-443, s. 11A.119(a); 2015-241, ss. 14.30(u), (v).)

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

(d) This section does not apply to the following:

- (1) Revocations of occupational licenses based solely on a court order of child support delinquency or a Department of Health and Human Services determination of child support delinquency issued pursuant to G.S. 110-142, 110-142.1, or 110-142.2.

Amanda J. Reeder
Commission Counsel

- (2) Refusal to renew an occupational license pursuant to G.S. 87-10.1, 87-22.2, 87-44.2, or 89C-18.1, based solely on a Department of Revenue determination that the licensee owes a delinquent income tax debt. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1995, c. 538, s. 2(i); 1997-443, s. 11A.118(a); 1998-162, s. 8.)

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or

prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. (1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(1), 6(3), 6(4).)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Water Pollution Control System Operators Certification Commission

RULE CITATION: 15A NCAC 08F .0406

DEADLINE FOR RECEIPT: Thursday, August 9, 2018

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 our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

On the Submission for Permanent Rule form, please insert the new name in Box 2. Please note, you do not need to show it as a change by striking the old name – simply just state “Disciplinary Actions”

In (a), line 5, rather than saying “G.S. 150B-38” don’t you mean G.S. 150B, Article 3A?

Subparagraphs (a)(1) through (3) recite G.S. 90A-47.5. Why do you need them here?

Assuming you need to retain them, at the end of line 8, delete “or”

In (b), line 22, what do you mean by “the intention to... operator”?

In (c)(1), line 25, do you need to retain “at least”? I think here you need to state exactly who is on this committee in the Rule.

In (c)(1)(D), is this individual going to be a member of the Commission or a member of the public?

In (c)(2), what is the purpose of this? What guidance are you referring to?

In (d), line 34, what meeting is this?

In (d), line 33, state “... sent by certified mail to the last known address of the operator at least 15 days...” and then delete the “to the last known address of the operator” on line 34.

In (f), Page 2, line 7, delete “affected”

In (g), line 12, please state “G.S. 150B, Article 3A”

In (h), line 13, why do you need “of the examination” after proctor? I suggest deleting it.

On line 13, is the applicant excused or is he or she removed?

On line 15, insert a comma after “applicant”

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 26, 2018

On line 16, G.S. 90A-47 does not reference revocation. Did you mean 90A-47.5? Please note the same issue with Paragraph (i), line 20.

On line 16, is this the process set forth in the Rule?

In (i), line 17, how will this be determined? And I take it there is no time limit for this?

In the History Note, why are you citing to G.S. 90A-41, 150B-23 (which is Article 3 of the APA and not applicable to the agency), and 150B-52?

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 26, 2018

1 15A NCAC 08F .0406 is readopted as published in 32:18 NCR 1765 as follows:

2
3 **15A NCAC 08F .0406 ~~REVOCATION, RELINQUISHMENT OR INVALIDATION OF~~**
4 **CERTIFICATION DISCIPLINARY ACTIONS**

5 (a) The ~~Certification~~ Commission, in accordance with the provisions of ~~G.S. 150B~~ G.S. 150B-38 and ~~G.S. 90A-41~~
6 G.S. 90A-47.5, may suspend or revoke the certificate of a certified ~~operator, operator~~ or issue a written reprimand to
7 ~~an operator~~ if it finds that the operator:

- 8 (1) engages in fraud or deceit in obtaining certification; or
9 (2) fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the
10 performance of the duties of an ~~operator in charge~~; OIC; or
11 (3) is incompetent or otherwise unable to properly perform the duties of an ~~operator in charge~~. OIC.

12 ~~(b) Prior to the Certification Commission taking action on a proposed revocation, suspension, or civil penalty~~
13 ~~assessment, the operator shall be given an opportunity to submit a written statement and present oral argument before~~
14 ~~the Certification Commission at a regularly scheduled meeting. The operator shall be notified by the Certification~~
15 ~~Commission in writing at least 15 days prior to the meeting. This notification shall be delivered by first class mail to~~
16 ~~the operator's address that the Certification Commission has on file.~~

17 ~~(c) The Certification Commission may issue a written reprimand to an operator in accordance with G.S. 90A-41. The~~
18 ~~reprimand shall be delivered personally or by certified mail. A copy of the letter will be kept in the operator's file and~~
19 ~~a copy will be sent to the operator's employer. The operator will be given the opportunity to put a letter of rebuttal into~~
20 ~~the file when a reprimand has been issued.~~

21 (b) The Chairman of the Commission may issue notification of summary suspension in accordance with the provisions
22 of G.S. 150B-3, the intention to revoke or suspend the certification of an operator.

23 (c) The Chairman shall convene a disciplinary committee to review the circumstances of the proposed disciplinary
24 action(s).

- 25 (1) The disciplinary committee shall include at least:
26 (A) the Chairman of the Commission;
27 (B) the Vice Chairman of the Commission;
28 (C) both members of the Commission appointed by the Commissioner of Agriculture; and
29 (D) a certified operator, appointed by the Chairman, representing the same type of certification
30 considered for disciplinary action.

31 (2) The members of the disciplinary committee shall offer guidance to the Commission Chairman
32 regarding the actions that should be taken against an operator.

33 (d) Notification of the disciplinary committee meeting shall be sent by certified mail at least 15 days prior to the date
34 of the meeting, to the last known address of the operator. This notification shall contain the alleged facts or conduct
35 upon which the proposed revocation or suspension of the certification is based.

1 (e) The operator shall have an opportunity to submit a written response to the Chairman prior to the date of the
2 disciplinary committee meeting. The operator shall also be given the opportunity to make an oral statement before the
3 disciplinary committee.

4 (f) Within 10 business days of the conclusion of the disciplinary committee meeting, the Chairman shall issue the
5 decision of the disciplinary committee. If this decision is to issue a revocation or suspension, the Chairman shall advise
6 the operator of the effective date of the action and the facts or conduct upon which the action is based. The revocation
7 or suspension of a certification shall be delivered to the affected operator and the owner of the system(s) at which the
8 operator works by certified mail, at the last known address for the operator and owner on file with the Commission,
9 at least 20 days prior to the effective date of the revocation or suspension.

10 (g) The revocation or suspension becomes a final Commission action if the operator does not file a petition for a
11 contested case hearing in the Office of Administrative Hearings as provided in the Administrative Procedure Act, G.S.
12 150B.

13 (h) If an applicant is caught cheating on an examination by a proctor of the examination, the applicant shall be excused
14 from the examination, the examination shall not be graded, the fee for the examination shall be forfeited by the
15 applicant and any other certification(s) held by the applicant with the Commission shall be subject to revocation as set
16 forth in G.S. 90A-47 and in this Rule.

17 (i) If the Commission determines, after the examination has been graded, that an applicant cheated on an examination
18 and certification has been conveyed to the applicant, the certification obtained through the examination shall be
19 revoked and any other certification(s) held by the applicant with the Commission shall be subject to revocation as set
20 forth in G.S. 90A-47 and in this Rule.

21
22 *History Note: Authority G.S. 90A-41; 90A-47; 143B-300; 150B-3; 150B-23; 150B-38; 150B-52;*
23 *Temporary Adoption Eff. January 7, 1997;*
24 *Eff. August 1, ~~1998~~1998;*
25 *Readopted Eff. September 1, 2018.*

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Water Pollution Control System Operators Certification Commission

RULE CITATION: 15A NCAC 08G .0802

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to this Rule because it is unclear as written and appears to contradict the requirements of G.S. 150B-3 and 150B, Article 3A.

Throughout this Rule, the agency appears to be delegating to the Chairman of the Commission or a committee the authority to issue summary suspension of a certification pursuant to G.S. 150B-3(c) and to revoke or suspend a certification pursuant to G.S. 150B, Article 3A. (See Paragraphs (b), (c)(2), and (f) of this Rule). However, the APA requires at least a majority of the Commission members to make these decisions. The agency has not cited to any authority to abrogate the requirements of the APA and allow the Chairman to issue these decisions without approval of the Commission.

In addition, it appears from Paragraph (c) that the agency is creating a disciplinary committee composed of at least three members of the 11-member body. Staff is not sure that the operator required by Subparagraph (c)(1)(D) is required to be a member of the Commission, and therefore, believes the Rule is unclear as written. However, even if all of the individuals in Subparagraph (c)(1) are required to be on the Commission, that is still not a majority of the agency. And it appears that the committee will hold a hearing [see Paragraphs (d) and (e)], and then make a recommendation to the Chairman, who will issue a decision. G.S. 150B-40(b) requires a majority of the agency to decide; if they cannot do so, they must request an ALJ from the Office of Administrative Hearings. The agency has not cited to any authority to allow them to delegate this

Amanda J. Reeder
Commission Counsel

decision making to the Chairman, even following a consultation with a minority of the members of the Commission.

Staff notes that Paragraph (g) states that the decision of the Chairman becomes a final agency action unless the individual files a petition for contested case. Staff does not know what this Rule is doing if it is not establishing the process for filing a contested case with the agency. Specifically, what is the purpose of the process established by Paragraphs (c) through (f)? If this is an informal discipline process that does not follow G.S. 150B, staff does not believe that the agency has authority to establish this, as G.S. 90A-41 requires the agency to follow 150B in imposing discipline. Regardless of intent of the Paragraphs, staff believes the Rule is unclear as written.

Therefore, staff recommends objection to this Rule because the agency lacks statutory authority to establish alternate requirements to those set forth in G.S. 150B and is unclear as written.

Amanda J. Reeder
Commission Counsel

§ 90A-41. Revocation of certificate.

The Commission, in accordance with the procedure set forth in Chapter 150B of the General Statutes, may suspend or revoke a certificate or may issue a written reprimand to an operator if it finds that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 3; 1973, c. 1331, s. 3; 1979, c. 554, s. 2; 1987, c. 827, s. 1; 1991, c. 623, ss. 1, 8.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Water Pollution Control System Operators Certification Commission

RULE CITATION: 15A NCAC 08G .0802

DEADLINE FOR RECEIPT: Thursday, August 9, 2018

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 our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), line 5, and (b), line 7, don't you mean G.S. 150B, Article 3A?

Also, please insert a comma after the citation before "and this Rule."

In (b), lines 7-8, what do you mean by "the intention to... operator"?

In (c), line 9, this is not the proper way to change "an" to "a"

In (c)(1), line 11, do you need to retain "at least"? I think here you need to state exactly who is on this committee in the Rule.

In (c)(1)(D), is this individual going to be a member of the Commission or a member of the public?

In (c)(2), what is the purpose of this? What guidance are you referring to?

In (d), line 21, what meeting is this? The meeting of the disciplinary committee?

In (d), line 20, state "... sent by certified mail to the last known address of the operator at least 15 days..." and then delete the "to the last known address of the operator" on line 21.

In (f), line 31, delete "affected"

In (g), line 34, please insert a comma after "suspension"

On line 36, please state "G.S. 150B, Article 3A"

In (h), Page 2, line 1, why do you need "of the examination" after proctor? I suggest deleting it.

On line 1, is the applicant excused or is he or she removed?

On line 3, insert a comma after "applicant"

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 26, 2018

On lines 4 and 8, I do not understand the cross-reference to Rule .0801. Do you not mean this Rule?

In (i), line 5, how will this be determined? And I take it there is no time limit for this?

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

Amanda J. Reeder
Commission Counsel
Date submitted to agency: July 26, 2018

1 15A NCAC 08G .0802 is amended as published in 32:18 NCR 1765 as follows:

2
3 **15A NCAC 08G .0802 DISCIPLINARY ACTIONS**

4 (a) The Commission shall revoke or suspend the certification of an operator or issue a letter of reprimand to an
5 operator in accordance with the provisions of G.S. 90A-41, ~~150B-3~~ 150B, Article 3 and this Rule.

6 (b) The Chairman of the Commission may issue notification of summary suspension, in accordance with the
7 provisions of G.S. 150B, Article 3, the intention to revoke or suspend the certification of an operator or the intent to
8 issue a letter of reprimand.

9 (c) The Chairman shall convene a ~~n advisory committee~~ disciplinary committee to review the circumstances of the
10 proposed disciplinary action(s).

11 (1) The ~~advisory committee~~ disciplinary committee shall include at least:

12 (A) the Chairman of the Commission;

13 (B) the Vice Chairman of the Commission;

14 (C) the member of the Commission who represents the type of system at which the operator is
15 employed or another member of the Commission appointed by the Chairman of the
16 Commission; and

17 (D) a certified operator appointed by the Chairman.

18 (2) The members of the ~~advisory committee~~ disciplinary committee shall offer guidance to the
19 Commission chairman in regards to the actions that should be taken against an operator.

20 (d) Notification of the ~~advisory committee~~ disciplinary committee meeting shall be sent by certified mail at least 15
21 days prior to the date of the meeting, to the last known address of the operator. This notification shall contain the
22 alleged facts or conduct upon which the proposed revocation or suspension of the certification or letter of reprimand
23 is based.

24 (e) The operator shall have an opportunity to submit a written response to the Chairman prior to the date of the
25 ~~advisory committee~~ disciplinary committee meeting. The operator shall also be given the opportunity to make an oral
26 statement before the ~~advisory committee~~ disciplinary committee.

27 (f) Within 10 ~~working business~~ business days of the conclusion of the ~~advisory committee~~ disciplinary committee meeting,
28 the Chairman shall issue ~~a decision~~ the decision of the disciplinary committee. If this decision is to issue a revocation
29 or suspension or a letter of reprimand, the Chairman shall advise the operator of the effective date of the action and
30 the facts or conduct upon which the action is based. The revocation or suspension of a certification or the letter of
31 reprimand shall be delivered to the affected operator and the owner of the system(s) at which the operator works by
32 certified mail, at the last known address for the operator and owner on file with the Commission, at least 20 days prior
33 to the effective date of the revocation or suspension or letter of reprimand.

34 (g) The revocation, suspension or letter of reprimand becomes a final Commission action if the operator does not file
35 a petition for a contested case hearing in the Office of Administrative Hearings as provided in the Administrative
36 Procedure Act, G.S. 150B.

1 (h) If an applicant is caught cheating on an examination by a proctor of the examination, the applicant shall be excused
2 from the examination, the examination shall not be graded, the fee for the examination shall be forfeited by the
3 applicant and any other certification(s) held by the applicant with the Commission shall be subject to revocation as set
4 forth in G.S. 90A-41 and in ~~this Rule.~~ Rule .0801 of this Section.

5 (i) If the Commission determines, after the examination has been graded, that an applicant cheated on an examination
6 and certification has been conveyed to the applicant, the certification obtained through the examination shall be
7 revoked and any other certification(s) held by the applicant with the Commission shall be subject to revocation as set
8 forth in G.S. 90A-41 and in ~~this Rule.~~ Rule .0801 of this Section.

9

10 *History Note: Authority G.S. 90A-40; 90A-41; 143B-300; 150B, Article 3A; ~~150B-23;~~*

11 *Eff. April 1, 1999;*

12 *Amended Eff. December 1, 2006;*

13 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 26,*

14 *~~2015-2015;~~*

15 *Amended Eff. September 1, 2018.*