

REQUEST FOR TECHNICAL CHANGE

AGENCY: Irrigation Contractors' Licensing Board

RULE CITATION: All rules

**DEADLINE FOR RECEIPT: Friday, October 10, 2014**

***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, the staff determined that the following technical changes need to be made:

*For every Rule, you must follow the OAH formatting rules contained in 26 NCAC 02C.*

*On every Rule, include in the Introductory Statement the Volume and Issue Number of the Register where this was published, including the Page Numbers. (See Rule 26 NCAC 02C .0404)*

*Refer to Rule 26 NCAC 02C .0108 specifically, and note the following:*

- *10 point font;*
- *1.5 line spacing; and*
- *page numbers and resetting line numbers at 1 for each page for rules that span more than one page.*

*I strongly encourage you to use the version that OAH sent the agency when the rules were published in the Register. If you need them re-sent, please contact our office to request it.*

*On every Rule, include the full History Note, including the original effective date for the three amendments, as well as the proposed effective or amended effective dates for all four rules.*

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: September 26, 2014

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: Irrigation Contractors' Licensing Board

RULE CITATION: All Rules

RECOMMENDED ACTION:

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

COMMENT:

*The Board published these Rules in the June 16, 2014 Register. The 60 day comment period ended on August 15, 2014. According to the Submission for Permanent Rule Forms filed by the Board, the agency adopted these rules at its August 13, 2014 meeting. Therefore, the rules were adopted before the close of the comment period set by the Board and published in the NC Register. G.S. 150B-21.2(g) states, "An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed[.]"*

*Staff contacted the Board via email on September 23, 2014 to ask if the date on the forms was wrong; staff did not receive a response. Staff notes that the Board's meeting notices filed with the NC Secretary of State indicated the only meeting date in August was August 13, 2014.*

*Staff recommends the Commission object to these Rules, as they were not adopted in compliance with the Administrative Procedure Act because they were adopted prior to the close of the comment period.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Irrigation Contractors' Licensing Board

RULE CITATION: 21 NCAC 23 .0105

**DEADLINE FOR RECEIPT: Friday, October 10, 2014**

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In reviewing these rules, the staff determined that the following technical changes need to be made:

*Who will make the showing of the defamation or harassment? The Board, a complainant? How will this happen? In a hearing? This information needs to be added to the Rule.*

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

WITHDRAWN BY AGENCY

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: Irrigation Contractors' Licensing Board

RULE CITATION: 21 NCAC 23 .0105

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 cannot find that the agency has any authority to write this Rule. [See attached G.S. 89G-5, the cited authority for this Rule.] The Board may have intended this to be part of the Code of Professional Conduct, but that is not clear from this Rule, and it appears that the statute limits this to services performed in a professional setting, as set forth in subsection 15 of the statute. Alternatively, the Board may be trying to set forth reasons it will discipline licensees. [See G.S. 89G-5(5)] However, this is not clear from a review of the rule language.*

*In addition, the Rule states that it is unethical to defame competitors by falsely imputing competency to them. Staff does not understand how that constitutes defamation. Black's Law Dictionary defines the term as "holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community." (Black's Law Dictionary, Fifth Edition.) Further, staff does not understand what is intended by this statement as written, but suspects that the Board intended to state "incompetency," rather than "competency." This sentence is unclear as written.*

*Finally, the second sentence states a licensee may be disciplined by the Board upon a showing of defamation or harassment. The rule does not define harassment, which can be a very broad term. In addition, it does not say when the discipline will occur. Staff believes the second sentence is ambiguous.*

*Taken as a whole, staff does not believe the agency has authority for this Rule. Further, staff believes the text is ambiguous and unclear, and recommends objection to this Rule.*

**§ 89G-5. Powers and duties.**

The Board shall have the following powers and duties:

- (1) To administer and enforce the provisions of this Chapter.
- (2) To adopt, amend, or repeal rules to carry out the provisions of this Chapter.
- (3) To examine and determine the qualifications and fitness of applicants for licensure and licensure renewal.
- (4) To issue, renew, deny, restrict, suspend, or revoke licenses.
- (5) To reprimand or otherwise discipline licensees under this Chapter.
- (6) To receive and investigate complaints from members of the public.
- (7) To conduct investigations to determine whether violations of this Chapter exist or constitute grounds for disciplinary action against licensees under this Chapter.
- (8) To conduct administrative hearings in accordance with Chapter 150B of the General Statutes.
- (9) To seek injunctive relief through any court of competent jurisdiction for violations of this Chapter.
- (10) To collect fees required by G.S. 89G-10 and other monies permitted by law to be paid to the Board.
- (11) To require licensees to file and maintain an adequate surety bond or letter of credit.
- (12) To establish and approve continuing educational requirements for persons licensed under this Chapter.
- (13) To employ a secretary-treasurer and any other clerical personnel the Board deems necessary to carry out the provisions of this Chapter and to fix compensation for employees.
- (14) To maintain a record of all proceedings conducted by the Board and make available to licensees and other concerned parties an annual report of all Board actions.
- (15) To adopt and publish a code of professional conduct and practice for all persons licensed under this Chapter. The code shall establish minimum standards for water conservation in the practice of irrigation construction and contracting.
- (16) To publish a list of irrigation best management practices to be followed by licensed irrigation contractors.
- (17) To adopt a seal containing the name of the Board for use on licenses and official reports issued by the Board. (2008-177, s. 1; 2013-383, s. 3.)

Proposed Adoption

1 21 NCAC 23 .0105 is proposed for adoption as follows

2

3 **21 NCAC 23 .0105 ETHICS**

4 It shall be unethical to defame competitors by falsely imputing to them dishonorable conduct or  
5 competency. A licensee may be disciplined by the Board upon a showing of such defamation or  
6 harassment.

7

8 *Authority G.S. 89G-5*

WITHDRAWN BY AGENCY

REQUEST FOR TECHNICAL CHANGE

AGENCY: Irrigation Contractors' Licensing Board

RULE CITATION: 21 NCAC 23 .0206

**DEADLINE FOR RECEIPT: Friday, October 10, 2014**

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In reviewing these rules, the staff determined that the following technical changes need to be made:

*Erase the errant period on line 5 behind "pursuant to"*

*In Paragraph (a), do you intend to state that the agency will hear the cases or refer the cases pursuant to G.S. 150B-40(e)? If so, do you want to state when the agency will not hear the cases, or will that need to be on a case by case basis?*

*In Paragraph (b), who will determine if the affidavit is filed in good faith? The Board? Also, I take it this disqualification is only pertinent if the Board is conducting the hearing?*

*In (b), line 9, the original language is "and", not "an" You should use the original language, since "and" is correct.*

*Also in Paragraph (b), line 9, you refer to "timely manner" and on line 10, you speak "considered timely." Since you appear to mean the same thing, why not just state "if timely filed in good faith shall be ruled on..."? on line 8?*

*Properly indent Subparagraphs (b)(1) and (2).*

*In (b)(2), line 13, state "his or her belief..."*

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: September 26, 2014

Proposed Amendment

1 21 NCAC 23 .0206 is proposed for amendment as follows

2

3 **21 NCAC 23 .0206 CONDUCT OF HEARING**

4 (a) Hearings in contested cases shall be conducted by a majority of the Board or referred to the  
5 Office of Administrative Hearings pursuant to. ~~The chair shall serve as presiding officer unless~~  
6 ~~he is absent or disqualified, in which case the vice chair shall preside. Hearings shall be~~  
7 ~~conducted as prescribed in G.S. 150B-40.~~

8 (b) Disqualification. An affidavit seeking disqualification of any Board member, if filed in good faith  
9 an in a timely manner, shall be ruled on by the remaining members of the Board. An affidavit is  
10 considered timely if it is filed:

11 (1) Prior to the hearing; or

12 (2) As soon after the commencement of the hearing as the affiant becomes aware of facts  
13 which give rise to his belief that a Board member should be disqualified.

14 (c) Evidence. The admission of evidence in a hearing in a contested case shall be as prescribed in  
15 G.S. 150B-41.

16

17 *Authority G.S. 89G-5; 150B-38*



REQUEST FOR TECHNICAL CHANGE

AGENCY: Irrigation Contractors' Licensing Board

RULE CITATION: 21 NCAC 23 .0207

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In reviewing these rules, the staff determined that the following technical changes need to be made:

*In Paragraph (b), line 10, do you mean "shall" rather than "may"? Or are there times the Board itself will write the order?*

*On line 16, I believe "order" should be in lowercase to be consistent with line 13.*

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

WITHDRAWN BY AGENCY

Proposed Amendment

1 21 NCAC 23 .0207 is proposed for amendment as follows

2

3 **21 NCAC 23 .0207      DECISION OF BOARD**

4       (a) The form and content of the Board’s decision in a contested case shall be as prescribed by  
5           G.S. 150B-42(a), and its decision shall be served upon the parties in a manner consistent  
6           with the statute.

7       (b) At the conclusion of the hearing and deliberations, the Board shall announce its findings of  
8           fact and conclusions of law. If the Board concludes that the hearing respondent has violated  
9           a provision of the rules in this Chapter or of G.S. 89G, it shall announce the nature and  
10          extent of any sanction it orders be imposed upon the hearing respondent. The Board may  
11          then direct its legal counsel, the respondent's counsel, if represented, or such independent  
12          legal counsel as may be provided by the North Carolina Department of Justice for the  
13          purpose of advising the Board in the course of that hearing, to draft a proposed order  
14          consistent with its announcement. ~~The person tasked with drafting the order shall submit~~  
15          ~~the original to the Board’s administrator and a copy to all other counsel participating in the~~  
16          ~~hearing at least 10 days prior to the Board’s next regularly scheduled meeting. The Order~~  
17          shall be drafted in accordance with G.S. 150B-42.

18       (c) The official record of the hearing in a contested case shall contain those items specified in  
19           G.S. 150B-42(b).

20

21       *Authority G.S. 89G-5; 150B-38*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Irrigation Contractors' Licensing Board

RULE CITATION: 21 NCAC 23 .0505

**DEADLINE FOR RECEIPT: Friday, October 10, 2014**

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, the staff determined that the following technical changes need to be made:

*I take it you are primarily relying upon G.S. 89G-5(15) and (16) for this Rule? The law states, in relevant part:*

The Board shall have the following powers and duties:

- (15) To adopt and publish a code of professional conduct and practice for all persons licensed under this Chapter. The code shall establish minimum standards for water conservation in the practice of irrigation construction and contracting.
- (16) To publish a list of irrigation best management practices to be followed by licensed irrigation contractors.

*If so, I suggest adding that specific citation to the History Note. If not, please tell me what part of the law you are relying upon.*

*Change "must" to "shall" on Page 1, lines 4, 12, 15, 22 and Page 2, line 1.*

*In (a), I take it the "record drawing" is as referred to in Rules 21 NCAC 23 .0301 and .0511?*

*I take it Paragraph (c) is an exception to (b)?*

*In Paragraph (d), does your regulated public know what "cleanly" means?*

*In Paragraph (f), line 15, generally "minimum" is not favored in rules, as the rules set the minimum standard. Do you believe you need to retain the term here?*

*In Paragraph (h), I take it your regulated public knows what debris will and will not damage the pipe?*

*In Paragraph (i), is an "unavoidable obstacle" to be determined by your regulated public's professional judgment?*

*Also in (i), line 19, replace "which" with "that"*

Amanda J. Reeder  
Commission Counsel

Date submitted to agency: September 26, 2014

On Page 2, line 29, this is not the correct way to insert “connection.” Punctuation is part of a word. Therefore, when you delete “to applying the PVC cement”, you must also delete the period at the end of the sentence. It will read as follows: ~~“prior to applying the PVC cement.—connection.”~~ However, I do not think you meant to delete the “to”; as written, the sentence currently says, “prepared according to manufacturer’s recommendation prior connection.”

In Paragraph (m), I know PVC was spelled out in Paragraph (e). What does “PR” mean? Does your regulated public know?

On line 31, insert a period after “followed”

In Paragraph (n), this is not all of the language currently in the Code. If you mean to delete it, show the deletion. If you do not want it deleted, make sure you show that language.

In Paragraph (p), insert a comma after “water” on line 35.

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

Proposed Amendment

1 21 NCAC 23 .0505 is proposed for amendment as follows

2

3 **21 NCAC 23 .0505 TRENCHING AND PIPING**

4 (a) All portions of an irrigation system that do not meet the standards in this Rule must be noted on  
5 the record drawing.

6 (b) An irrigation contractor shall protect the root systems of the trees on the site by not trenching  
7 across the established root systems of existing trees and shrubs.

8 (c) When the irrigation contractor finds that it is necessary to trench into the root zone of an  
9 established plant, trenching shall be done so that the trench is at a right angle to the base of the  
10 tree or shrub.

11 (d) An irrigation contractor shall cut damaged roots cleanly at a right angle.

12 (e) Piping in irrigation systems must be designed and installed so that the flow of water in the pipe  
13 will not exceed a velocity of five feet per second for polyvinyl chloride (PVC), polyethylene (PE)  
14 and high density polyethylene (HDPE) pipe and seven feet per second for metal pipe.

15 (f) The main line and lateral line piping must be installed to provide a minimum of 12 inches  
16 between the top of the pipe and the natural grade.

17 (g) The bottom of the trench shall be smooth and provide a flat bed on which to rest the pipe.

18 (h) The irrigation contractor shall clean backfill material of any debris that may damage the pipe.

19 (i) If a utility, man-made structure or roots create an unavoidable obstacle which makes the 12 inch  
20 depth coverage requirement impractical, the piping shall be installed inside a larger section of  
21 pipe for added protection.

22 (j) When swing joints are used, the depth of the pipe must allow the swing joint to operate as  
23 designed.

Proposed Amendment

24 (k) All trenches and holes created during installation of an irrigation system must be backfilled and  
25 compacted to the final grade. The trench shall be compacted in lifts no greater than six inches  
26 to insure proper compaction.

27 (l) All new irrigation systems that are installed using PVC shall be ~~cleaned with a PVC pipe cleaner~~  
28 ~~or primer on male and female ends~~ prepared according to manufacturer's recommendations  
29 prior to applying the PVC cement connection.

30 (m) When the irrigation contractor uses PR 200 pipe, the manufacturer's directions shall be  
31 followed ~~primer shall not be used.~~

32 (n) The irrigation contractor shall use the manufacturer's approved lubricant

33 (o) The irrigation contractor shall use Teflon tape on all threaded fittings, wrapping the tape three  
34 times to insure a proper seal.

35 (p) When the irrigation system uses reclaimed water the irrigation contractor shall use purple pipe  
36 or mark the pipe with purple tape placed above all piping in the system. Tape must be within six  
37 inches of the top of the pipe. The irrigation contractor shall use purple valve box covers and  
38 purple quick coupler flaps and place an eight inch by eight inch sign with purple background  
39 stating "RECLAIMED WATER-DO NOT DRINK," and "AQUA DE RECUPERION-NO BEBER."

40

41 Authority G.S. 89G-5