



Engineering

Wayne Goodwin, Commissioner of Insurance
Rick McIntyre, Assistant State Fire Marshal

October 12, 2015

Abigail Hammond
Commission Counsel
NC Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27609-6714

**RE: 2011 NC Electrical Code
Article 300.9, Raceways in Wet Locations Above Ground**

Ms. Hammond:

This letter is in response to Rules Review Commission and Staff objections on August 21, 2015.

The RRC objected to this Rule for failure to comply with Part 2 of the Administrative Procedure Act, specifically by adopting a Rule that differs substantially from a proposed Rule published in the Register. The original proposal was published in the February 16, 2015 and a public hearing was held on March 10, 2015. Public comments were heard from both the industry that proposed the Rule, and regulatory interests. Based on public comment, the Building Code Council adopted a modified Rule on June 9, 2015 that is more specific than the proposed published rule, but less stringent than the previously adopted Rule. The interested parties were present at both the hearing and the adoption meeting. Staff presented the Building Code Council with the options to either publish the modified Rule in the NC Register for a December 2015 hearing or to withdraw the petition. The BCC directed Staff to publish the modified Rule in the NC Register for a December 2015 hearing and probable March 2016 adoption.

The BCC does not concede "failure to comply with the APA", but does not wish to contest the RRC decision. Staff will likely submit the modified Rule language for the May 2016 RRC agenda.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Gupton".

Barry Gupton, PE
Chief Code Consultant

cc: File



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August 21, 2015

Barry Gupton
Building Code Council
Sent via electronic mail to barry.gupton@ncdoi.gov

Re: Objection to Rule 2011 NC Electrical Code/Raceways in Wet Locations Above Ground, 300.9

Dear Mr. Gupton:

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

The Commission objected to this Rule for failure to comply with Part 2 of the Administrative Procedure Act, specifically by adopting a rule that differs substantially from a proposed rule published in the Register. The Council published the above-identified Rule in the NC Register, Volume 29, Issue 18, and proposed the deletion of one sentence and the addition of one sentence. The Rule, as adopted by the Council and submitted to the Rules Review Commission, did not reflect any of the published proposed changes and added an exception with three requirements. The Commission found that the change made to the text of the rule from the content proposed in the Register to the content as adopted by the Council creates a substantial change pursuant to G.S. 150B-21.2(g).

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,

Abigail M. Hammond
Commission Counsel

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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: Building Code Council

RULE CITATION: 2011 NC Electrical Code/Raceways in Wet Locations Above - 300.8

RECOMMENDED ACTION:

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 following text was proposed for amendment and published in the Register by the Building Code Council:

300.9 Raceways in Wet Locations Above Grade. Where raceways are installed in wet locations above grade, the interior of these raceways shall be considered a wet location. ~~Insulated conductors and cables installed in raceways in wet locations above grade shall comply with 310.10(C), unless all fittings and enclosures are approved for outdoors. Where condensation is known to be a problem the requirements of 300.7(A) shall apply.~~

The following text is what was adopted by the Building Code Council for amendment and submitted to the Rules Review Commission:

300.9 Raceways in Wet Locations Above Grade. Where raceways are in wet locations above grade, the interior of these raceways shall be considered to be a wet location. Insulated conductors and cables installed in raceway in wet locations above grade shall comply with 310.10(C).

Exception: The raceway shall not be considered a wet location if:

(1) The section of raceway routed in a wet location above grade does not exceed 1500 mm (5 ft) in length.

Abigail M. Hammond
Commission Counsel
Issued July 28, 2015

- (2) Any fittings or conduit bodies are watertight and listed for use in wet locations;
and
(3) Raceway is open at its termination point in a dry location.

The following standard as set forth in G.S. 150B-21.2 applies to the procedure of adopting a permanent rule:

(g) Adoption. - An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

Upon review of G.S. 150B-21.2(g)(2), it is unclear how the three specific exceptions set forth in the Rule adopted by the Building Code Council and submitted to the Rules Review Commission were addressed or could have been reasonably expected based upon the proposed language set forth in the Rule published in the Register.

SUMMARY:

Staff recommends objecting to this Rule based upon failure to comply with the APA, finding that adopted language set forth in 2011 NC Electrical Code/Raceways in Wet Locations Above - 300.8 is a substantial change as set forth in G.S. 150B-21.2(g) from the language as published in the Register

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Exception: The raceway shall not be considered a wet location if:

- (1) The section of raceway routed in a wet location above grade does not exceed 1500 mm (5 ft) in length;
- (2) Any fittings or conduit bodies are watertight and listed for use in wet locations; and
- (3) Raceway is open at its termination point in a dry location.

The delayed effective date of this Rule is January 1, 2016.

The Statutory authority for Rule-making is G. S. 143-136; 143-138.