

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: Environmental Management Commission

RULE CITATIONS: Rules 15A NCAC 02H .1019, .1042, .1043, .1044, .1045, .1050, .1051, .1052, .1053, .1054, .1055, .1056 (.1059, .1060 after technical change addition)

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:

The Environmental Management Commission (EMC) has adopted a set of rules addressing stormwater systems. Within twelve of the rules (fourteen rules after technical changes), the EMC references a "licensed professional" and the requirement to "seal" documents. The term "licensed professional" is defined in 15A NCAC 02H .1050(14) as follows:

LICENSED PROFESSIONAL. SCMs shall be designed by an individual who meets the North Carolina licensing requirements for the type of system proposed.

In response to a technical change request, the following revised language was submitted for 15A NCAC 02H .1050(14):

LICENSED PROFESSIONAL. SCMs shall be designed by an individual who meets the North Carolina professional licensing requirements for that demonstrate a competence to design the type of stormwater system proposed.

Both attempts to define "licensed professional" provides unclear notice of who would qualify under the EMC's definition. The State of North Carolina licenses a large number of professions and based upon the definition provided by the EMC, it is unclear who "meets the North Carolina licensing requirements for the type of system proposed." In the revised language, it is unclear who is making

the determination of “competence to design” and what the competence standards may be for consideration.

Further, in several of the Rules, there is a requirement that certain documents must be “sealed.” As written, it is unclear if the person who would qualify under the term “licensed professional” also has the statutory authority to “seal” documents. The broad definition of “licensed professional” set forth in 15A NCAC 02H .1050(14) creates an unclear term that is repeated in various other rules, creating a clarity problem in the rules pending for review.

Below is a summary of the terms “licensed professional” and “seal” as used throughout the Rules as adopted by the EMC:

“Licensed Professional”	
Rule	Page and line location
15A NCAC 02H .1019	Page 4, line 18
15A NCAC 02H .1043	Page 1, lines 16, 17, 19 Page 2, lines 11, 15, 17, 19, 21
15A NCAC 02H .1044	Page 1, lines 13, 35
15A NCAC 02H .1045	Page 2, lines 3, 30
15A NCAC 02H .1050	Page 2, lines 29 thru 30 (definition location)
15A NCAC 02H .1051	Page 1, lines 6, 11, 22
15A NCAC 02H .1052	Page 1, lines 8, 14
15A NCAC 02H .1053	Page 1, line 34
15A NCAC 02H .1054	Page 1, line 36
15A NCAC 02H .1055	Page 1, line 7, 12, 32
15A NCAC 02H .1056	Page 1, line 10
15A NCAC 02H .1059	Page 1, line 36 (technical change addition)
15A NCAC 02H .1060	Page 1, line 30 (technical change addition)
“Seal”	
Rule	Page and line location
15A NCAC 02H .1042	Page 2, lines 7, 9, 29 Page 3, line 3
15A NCAC 02H .1043	Page 2, lines 10, 20
15A NCAC 02H .1044	Page 1, lines 13, 28, 31, 35 Page 2, lines 2, 15, 25
15A NCAC 02H .1045	Page 2, lines 3, 30

SUMMARY:

The Environmental Management Commission (EMC) has adopted twelve rules (fourteen rules after technical changes) that use the term a “licensed professional” or reference a requirement to “seal” documents. The term “licensed professional,” as defined in 15A NCAC 02H .1050(14) is unclear. The lack of clarity of who may qualify as a “licensed professional” creates a concern that the individual required to “seal” documents may not have the statutory authority required to seal documents. Staff counsel recommends objection to the following rules for use of an unclear term:

Rules 15A NCAC 02H .1019, .1042, .1043, .1044, .1045, .1050, .1051, .1052, .1053, .1054, .1055, .1056 (.1059, .1060 after technical change addition)