



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

June 14, 2018

John Harriss, Rulemaking Coordinator
Commission on Pilotage and Navigation of the Cape Fear River and Bar
Sent via email only: john@harrissententerprises.com

Re: 04 NCAC 15 .0119, .0121, .0123, .0124, .0127, and .0128

Dear Mr. Harriss:

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

The Commission objected to Rule .0119 because it is unclear and ambiguous. In line 7 it is unclear whether the word "can" is permissive or mandatory. In addition, in the same line the phrase "at any time" seems to obscure the appropriate averaging period. Finally, the use of the word "may" in line 12 arrogates to the Commission the power to issue or not issue temporary licenses in its absolute, unguided discretion.

The Commission objected to Rule .0121 because it is unclear and ambiguous and is not within the statutory authority delegated to the agency. In line 28 it is unclear what "the various vessels traversing the same" means. Similarly, the sentence on lines 36-37 is ambiguous: is it intended to allow the association to act or to require that a termination recommendation by the association be supported by a majority vote of its members? Finally, there appears to be no statutory authority for the nepotism restriction in Subparagraph (g)(6).

The Commission objected to Rule .0123 because it is unclear and ambiguous. On line 7 the word "immediately" is not defined. In addition, on lines 7-8 the phrase "appropriate sketches and diagrams" is ambiguous.

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|----------------|----------------|---------------|----------------|---------------|---------------|
| Administration | Rules Division | Judges and | Clerk's Office | Rules Review | Civil Rights |
| 919/431-3000 | 919/431-3000 | Assistants | 919/431-3000 | Commission | Division |
| fax: 919/431- | fax: 919/431- | 919/431-3000 | fax: 919/431- | 919/431-3000 | 919/431-3036 |
| 3100 | 3104 | fax: 919/431- | 3100 | fax: 919/431- | fax: 919/431- |
| | | 3100 | | 3104 | 3103 |

The Commission objected to Rule .0124 because it is unclear and ambiguous. The use of the word "may" in lines 13 and 15 arrogates to the Commission the power to act in its absolute, unguided discretion.

The Commission objected to Rule .0127 because it is unclear and ambiguous. It is unclear whether the use of the word "will" is a statement of fact or a regulatory requirement.

The Commission objected to Rule .0128 because it is not within the statutory authority delegated to the agency. G.S. 76A-24 unambiguously authorizes the Commission to receive payments from the pilots' association and is silent regarding payments directly from "each pilot," as required by this Rule

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 action, please let me know.

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'J' followed by a horizontal line that tapers off to the right.

Jason Thomas
Commission Counsel

Cc: Cynthia Anthony (cynthia.anthony@ncdps.gov)

Burgos, Alexander N

Subject: FW: 04 NCAC 15 - Extended Period of Review
Attachments: 2018.06 - Cape Fear River Navigation Staff Opinion .0123.doc; 2018.06 - Cape Fear River Navigation Staff Opinion .0124.doc; 2018.06 - Cape Fear River Navigation Staff Opinion .0127.doc; 2018.06 - Cape Fear River Navigation Staff Opinion .0128.doc; 2018.06 - Cape Fear River Navigation Staff Opinion .0119.doc; 2018.06 - Cape Fear River Navigation Staff Opinion .0121.doc

From: Thomas, Jason S
Sent: Thursday, June 07, 2018 8:11 AM
To: bstiller@stiller-disbrow.com; john@harrissenterprises.com
Subject: RE: 04 NCAC 15 - Extended Period of Review

Please see the attached Staff Opinions, recommending that the RRC object to each of the rules submitted to it for review by your agency. Please let me know if a representative of the Commission on Navigation and Pilotage of the Cape Fear River and Bar will attend the meeting on June 14. The RRC invariably wishes to hear from the agency if an objection is recommended.

If you have any question or wish to discuss these rules, please do not hesitate to contact me.

Jason Thomas
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
919-431-3081

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From: Thomas, Jason S
Sent: Thursday, May 10, 2018 2:13 PM
To: 'bstiller@stiller-disbrow.com' <bstiller@stiller-disbrow.com>; 'john@harrissenterprises.com' <john@harrissenterprises.com>
Subject: RE: 04 NCAC 15 - Extended Period of Review

Last month, the Rules Review Commission (RRC) granted an extension of the period of review for rules submitted by the Commission of Navigation and Pilotage for the Cape Fear River and Bar (Commission). Pursuant to G.S. 150B-21.13, the RRC must approve, object to, or call a public hearing on these rules within 70 days after granting the extension. As a practical matter, this means that the RRC must act on the Commission's rules during its meeting on May 17, 2018, or June 14, 2018.

On March 23, 2018, I provided Mr. Harriss with Requests for Technical Changes, which included both simple grammatical suggestions and more serious questions regarding statutory authority. Mr. Harriss confirmed receipt of those Requests the following day. I had asked for responses to the Requests by April 6, 2018, but to date have not received any substantive responses. I understand that both of you have traveled extensively during this time.

Given the extent of the Requests, it appears unlikely that the responses to the Requests will be submitted in time for me to review them and prepare to present them to the RRC at its May meeting. Assuming I do not receive responses this week, I will advise the RRC that, pursuant to the extension, it need take no action on these rules at the May meeting. However, it is possible that RRC commissioners may have questions concerning the status of the work on these rules and may wish to take other action regarding them.

In order to prepare to present the rules for review by the RRC at its June 14, 2018, meeting, I must have responses to the Requests no later than June 6, 2018. If I do not have responses by that date, I will prepare staff opinions advising the RRC to object to the rules. I will provide you with copies of all such staff opinions as soon as I have prepared them.

Please contact me to inform me of the status of the responses to the Requests and do not hesitate to ask me questions you may have concerning the Requests or your rules. I will be happy to assist you in any way that I can.

Jason Thomas
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
919-431-3081

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

April 20, 2018

Via Email Only: bstiller@stiller-disbrow.com and john@harrissententerprises.com

Bonner Stiller, Rulemaking Coordinator

John Harriss, Rulemaking Coordinator

Commission of Navigation and Pilotage for the Cape Fear River and Bar

Re: Rules pending on Log of Permanent Rule Filings in 04 NCAC 15

Dear Messrs. Stiller and Harriss:

At its April 19, 2018 meeting, the Rules Review Commission extended the period of review on the rules referenced above in accordance with G.S. 150B-21.10 and G.S. 150B-21.13. The Commission extended the period of review to allow the Commission of Navigation and Pilotage for the Cape Fear River and Bar additional time to revise the rules in response to the technical change requests.

If you have any questions regarding the Commission's action, please do not hesitate to contact me directly at (919) 431-3081.

Sincerely,

Jason Thomas

Jason Thomas
Commission Counsel

Burgos, Alexander N

Subject: FW: [External] Re: Technical Change Requests - 04 NCAC 15

From: John Harriss [<mailto:john@harrissenterprises.com>]

Sent: Tuesday, April 10, 2018 12:15 PM

To: Thomas, Jason S <jason.thomas@oah.nc.gov>

Subject: [External] Re: Technical Change Requests - 04 NCAC 15

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to [Report Spam](#).

Mr. Thomas,

I am requesting that a review period extension be granted to the Cape Fear River Navigation and Pilotage Commission due to commission member travel and work schedules. Several of our members, including our Chairman, are currently traveling or will be traveling over the next few weeks and with the detail needed to address some of the requested changes and clarifications to the rules we would be unable to meet the current deadline. Our Commission plans to meet on the 17th of April and we can begin the review process at that time.

Please feel free to call me if there is any question concerning the proposed extension.

With Regards,

John J Harriss
President

George Harriss Enterprises, Inc
3905 Oleander Drive, Suite 2
Wilmington, NC 28403
910.520.3144 cell
910.395.4911 office
910.395.4913 fax
john@harrissenterprises.com

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REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 - Submission for Permanent Rule forms

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: *This request may extend to 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 our office to inquire concerning the staff recommendation.

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

In box 6 of the form for each of the rules, www.cfpilots.com is cited as the link to agency notice. This web site does not appear to exist. Do you mean www.cfpilot.com, without the "s"?

Does www.cfpilot.com serve as the commission's website? Who maintains this website? I can find no reference to the commission on the website. Do you have copies of the rulemaking notice that was required to be posted on the commission's website pursuant to G.S. 150B-19.1(c) and 150B-21.2(c)(1)?

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0119

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 that the Rules Review Commission object to the Rule because it is unclear and ambiguous. In Paragraph (a), lines 6-7 the Rule states:

Piloted vessel arrivals annually shall be determined by a five consecutive calendar year average and **can be calculated at any time** using the five previous calendar years.

This sentence is ambiguous in at least one respect: it is unclear whether the word “can” is permissive or mandatory. In addition, the phrase “at any time” seems to obscure the appropriate averaging period because it is unclear whether the phrase refers to the moment the calculation is made or to some other time chosen as the basis for the calculation. (For instance, could the calculation be performed on June 14, 2018, based on the five-year average ending June 1, 2008?)

In Paragraph (b), lines 11-13 the rule also states:

In such emergency, the Commission **may issue**, upon recommendation of a majority vote of the association, one or more limited licenses for such term as may be necessary.

Jason Thomas
Commission Counsel
Issued June 7, 2018

This sentence arrogates to the Commission the power to issue or not issue temporary licenses in its absolute, unguided discretion. It is unclear if any standards, factors, or circumstances govern whether the commission will issue limited licenses.

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule “is clear and unambiguous.” G.S. 150B-21.9(a)(2). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not clear and unambiguous.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0119

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: *This request may extend to 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 our office to inquire concerning the staff recommendation.

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

Lines 4-5 – delete everything to “following:” and begin Paragraph (a) with “The commission shall...”

Line 6 – add “subject to G.S. 76A-14” after “thereof”

Line 7 – what does “can be calculated at any time” mean? Could this sentence read: “Piloted vessel arrivals annually shall be determined by a five consecutive calendar year average using the five previous calendar years”?

Lines 7-9 – delete the sentence that begins “The then current...”

Line 11 – delete “extreme”

Line 11 – add “the” before “incapacity”

Line 11 – replace “by” with “of a pilot due to”

Line 12 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will issue limited licenses?

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

04 NCAC 15 .0119 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0119 NUMBER OF PILOTS

(a) The maintenance of efficient pilot service for the river and bar requires a number of pilots in accordance with the following: The commission shall license a number of pilots not to exceed one pilot per 98 piloted vessel arrivals annually or fraction thereof. Piloted vessel arrivals annually shall be determined by a five consecutive calendar year average and can be calculated at any time using the five previous calendar years. The then current active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-15.

(b) The apprentice system established in Rule .0121 of this Chapter shall be used to fill vacancies in the pilotage service except in the case of extreme emergency, such as incapacity by accident, sickness or death. In such emergency, the Commission may issue, upon recommendation of a majority vote of the association, one or more limited licenses for such term as may be necessary.

History Note: Authority G.S. 76A-1; 76A-5; 76A-13; 76A-14;

Eff. December 1, 1985;

Amended Eff. August 1, 2000;

Readopted Eff. May 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0121

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 that the Rules Review Commission object to the Rule because it is unclear and ambiguous and is not within the statutory authority delegated to the agency. In Paragraphs (e) and (f), lines 29-37, the Rule repeatedly states that the Commission "may" act:

(e) A limited license **may** be issued to an apprentice pilot by the commission upon a determination by a majority of the association that the applicant has demonstrated the knowledge and skill necessary to obtain a limited license. Prior to advancing from one limited license to the next, a majority of the association must sign the limited license, thus certifying progressive development of the knowledge and skill necessary for a limited license. The commission **may** issue the next limited license upon a determination by a majority of the association that the applicant has demonstrated the knowledge and skill necessary to obtain that limited license.

(f) An apprenticeship **may** be terminated at any time there is a finding by the commission that progress is not being made or any of the requirements set forth in Paragraph (a) have been violated. A majority of the association **may** recommend termination of an apprenticeship.

Jason Thomas
Commission Counsel
Issued June 7, 2018

The use of “may” arrogates to the Commission the power to act in its absolute, unguided discretion. It is unclear if any standards, factors, or circumstances govern whether the commission will act as described in these paragraphs.

In Paragraph (e), line 28 the Commission refers to “the various vessels traversing the same”:

(d) An apprentice pilot shall make such boarding and trips and perform such duties as directed by a pilot in order to master the waters of the river and bar to master the handling of the various vessels traversing the same.

This sentence is ambiguous because the phrase is neither defined nor described and no examples are provided to give meaning to the phrase.

In Paragraph (f), lines 36-37, the Rule states:

A majority of the association may recommend termination of an apprenticeship.

It is not clear whether this sentence is intended to allow the association to act or to require that a termination recommendation by the association be supported by a majority vote of its members.

In Subparagraph (g)(6), page 2, line 8 the Rule states:

In order to be considered for an appointment as a pilot ... the applicant shall not be a child, sibling, or grandchild of a pilot.

Counsel could find no authority for this sweeping restriction, and the Commission has not responded to Counsel's question regarding that authority.

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule “is within the authority delegated to the agency by the General Assembly” and “is clear and unambiguous.” G.S. 150B-21.9(a)(1), (2). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not clear and unambiguous and is not within the authority delegated to the agency by the General Assembly.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0121

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: *This request may extend to 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 our office to inquire concerning the staff recommendation.

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

Line 5 – replace “regionally accredited” with “regionally-accredited” and “four year” with “four-year”

Line 17 – add “or she” after “he”

Line 19 – add a comma before “including”

Line 19 – delete “, but not limited to”

Lines 20-22 and 24-26 – begin each of these lines with “the”

Line 20 – what does “rules of the road” mean?

Line 21 – replace “navigate” with “navigation” if that is what is meant

Line 23 – delete “of”

Line 28 – what does “master the waters” mean? Is this a term of art that is well-understood by your regulated public?

Line 28 – what does “various vessels” mean? Consider replacing “the various vessels traversing the same” with “the types of vessels that frequently traverse these waters, such as...” and then list a few examples.

Line 29 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will issue a limited license?

Line 31 – replace “must sign” with “must have signed”

Line 32 – delete “thus”

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

Line 33 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will issue a limited license?

Line 35 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will terminate an apprenticeship?

Lines 36-37 – It is not clear why this sentence is included in the rule. Do you mean:

The association shall recommend termination of an apprenticeship only if a majority vote of the association supports termination.

Page 2, line 2 – replace “must satisfy” with “must have satisfied”

Page 2, line 5 – replace “be” with “have been”

Page 2, line 8 – what statute authorizes the requirement that an applicant not be a child, sibling, or grandchild of a pilot?

Page 2, line 10 – replace “the apprentice” with “an apprentice”

Page 2, line 12 – add “or she” after “he” and add “or her” after “his”

Page 2, line 13 – replace “waiting for” with “the occurrence of”

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

04 NCAC 15 .0121 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0121 APPRENTICESHIP

(a) In order to be considered for an appointment as an apprentice pilot, an applicant shall:

- (1) provide evidence of graduation from a maritime college or regionally accredited four year college or university or hold a valid Third Mate's Unlimited Ocean license;
- (2) not have been convicted of a felony;
- (3) provide evidence of 20/20 visual acuity uncorrected or corrected by lens;
- (4) provide evidence of being able to distinguish colors by means of the Stilling Test or other equivalent test accepted by the Coast Guard;
- (5) provide three personal references;
- (6) provide evidence of passing a complete physical examination in the form required by the Coast Guard for the issuance of an original federal pilot's license; and
- (7) be a citizen and resident of North Carolina.

(b) If determined by a majority vote of the association that the applicant has demonstrated the knowledge and skill necessary to obtain a limited license and approved by a majority vote of the commission, the applicant shall be issued an Apprentice Pilot's Certificate. He shall be known as an apprentice pilot during apprenticeship.

(c) Under the direct supervision of a pilot, an apprentice pilot shall become proficient in all matters appertaining to the duties of a pilot including, but not limited to:

- (1) rules of the road;
- (2) use of compass and navigate aids;
- (3) set of various currents;
- (4) boarding of vessels in heavy weather;
- (5) bearing of noted objects;
- (6) number, shapes, and colors of buoys; and
- (7) use of radar and ranges.

(d) An apprentice pilot shall make such boarding and trips and perform such duties as directed by a pilot in order to master the waters of the river and bar to master the handling of the various vessels traversing the same.

(e) A limited license may be issued to an apprentice pilot by the commission upon a determination by a majority of the association that the applicant has demonstrated the knowledge and skill necessary to obtain a limited license. Prior to advancing from one limited license to the next, a majority of the association must sign the limited license, thus certifying progressive development of the knowledge and skill necessary for a limited license. The commission may issue the next limited license upon a determination by a majority of the association that the applicant has demonstrated the knowledge and skill necessary to obtain that limited license.

(f) An apprenticeship may be terminated at any time there is a finding by the commission that progress is not being made or any of the requirements set forth in Paragraph (a) have been violated. A majority of the association may recommend termination of an apprenticeship.

1 (g) In order to be considered for an appointment as a pilot:

2 (1) an applicant must satisfy all statutory requirements for a Full License;

3 (2) an applicant must hold a Pilot's License issued by the Coast Guard;

4 (3) an applicant must not have been convicted of a felony;

5 (4) an applicant must be approved by majority of the commission;

6 (5) there must be a vacancy in the number of pilots established pursuant to Rule .0119 of this Chapter;
7 and

8 (6) the applicant shall not be a child, sibling, or grandchild of a pilot.

9 (h) Upon the successful completion of the apprentice pilot training program and the requirements for a full licensed
10 pilot, the apprentice pilot shall then be placed on the apprentice pilots waiting list in the order in which they complete
11 all such requirements. When a vacancy occurs in the number of full licensed pilots, the apprentice next in line shall
12 be appointed to that vacancy. If he declines, his name shall be stricken from the waiting list. During this interim,
13 between the expiration of the limited license and waiting for a vacancy, the apprentice shall be required to make an
14 average of two boardings per month under the supervision of a full licensed pilot.

15
16 *History Note: Authority G.S. 76A-1; 76A-5; 76A-6; 76A-12; 76A-13;*

17 *Eff. December 1, 1985;*

18 *Amended Eff. August 1, 2000;*

19 *Readopted Eff. May 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0123

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 that the Rules Review Commission object to the Rule because it is unclear and ambiguous. In Paragraph (a), lines 7-8 the Rule states:

Within one hundred twenty hours of the pilot reaching his destination (the port inbound sea buoy outbound), the pilot shall submit to the commission a written narrative report including appropriate sketches and diagrams.

This sentence is ambiguous because the phrase "appropriate sketches and diagrams" is not defined or described and no example is provided to give the phrase meaning.

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule "is clear and unambiguous." G.S. 150B-21.9(a)(2). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not clear and unambiguous.

Jason Thomas
Commission Counsel
Issued June 7, 2018

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0123

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: This request may extend to 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 our office to inquire concerning the staff recommendation.

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

Line 4 – delete or define “Immediately”

Line 6 – replace “one hundred twenty” with “120”

Lines 7-8 – what does “appropriate sketches and diagrams” mean? How would a pilot know whether such diagrams are required?

Line 11 – why do you cite “76A-13 in the History Note? Consider deleting it if it does not provide authority for the Rule.

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

04 NCAC 15 .0123 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0123 INCIDENTS OR ACCIDENTS INVOLVING PILOTS

- (a) Immediately following any marine incident or accident involving a vessel in charge of a pilot, the pilot in charge of the vessel shall give an oral report to the commission chairman or other member if the chairman is not available. Within one hundred twenty hours of the pilot reaching his destination (the port inbound - sea buoy outbound), the pilot shall submit to the commission a written narrative report including appropriate sketches and diagrams.
- (b) The commission shall investigate such occurrence in accordance with G.S. 76A-5(d).

History Note: Authority G.S. 76A-1; 76A-5; 76A-13;
Eff. December 1, 1985;
Readopted Eff. May 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0124

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 that the Rules Review Commission object to the Rule because it is unclear and ambiguous. In Subparagraph (a)(4), lines 13 and 15, the Rule twice states that the Commission "may" act:

(a) All vessels carrying ammunition, liquified gas, or other explosive material designated class "A" by federal law or regulation:

- (4) **may** be permitted in case of emergency to sail during nighttime hours with the approval of the commission or its designated agent. Such a request with the emergency reasons shall be made immediately in writing to the commission. The commission or its designated agent **may** prescribe special conditions for such movement.

The use of "may" arrogates to the Commission the power to act in its absolute, unguided discretion. It is unclear if any standards, factors, or circumstances govern whether or how the commission will act as described in this subparagraph.

In Paragraph (b), lines 18-19, the Rule states:

Jason Thomas
Commission Counsel
Issued June 7, 2018

(b) All vessels not subject to Paragraph (a) may sail when ready at all hours, weather and tide conditions permitting, **in the sole discretion of the pilot.**

The phrase “in the sole discretion of the pilot” arrogates to the pilot the power to act in his or her absolute, unguided discretion. It is unclear if any standards, factors, or circumstances govern whether or how the pilot will act as described in this Paragraph.

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule “is clear and unambiguous.” G.S. 150B-21.9(a)(2). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not clear and unambiguous.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0124

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: This request may extend to 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 our office to inquire concerning the staff recommendation.

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

Lines 4-5 – what federal law or regulation is meant? Can such law or regulation be specified, or a few examples be given?

Line 6 – delete “the hours of”

Line 7 – add “either” before “one” and replace the “and” before “two” with “or”

Lines 8, 11, 12, and 16 – replace the period with a comma

Line 9 – add “either” before “one”

Line 10 – replace the “and” before “two” with “or”

Line 13 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will such a vessel to sail?

Line 15 – do you mean “may” or “shall”? If “may,” what standards, factors, or circumstances govern whether the commission will prescribe conditions?

Line 16 – add “and” after the semicolon

Line 19 – what does “in the sole discretion of the pilot” mean? Does another rule govern the exercise of this discretion?

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

04 NCAC 15 .0124 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0124 MOVEMENT OF VESSELS

(a) All vessels carrying ammunition, liquified gas, or other explosive material designated class "A" by federal law or regulation:

(1) that are inbound shall calculate their estimated time of arrival at the sea buoy between the hours of thirty minutes before sunup and one hour before sunset if designated for Sunny Point and two hours before sunset if designated for the Wilmington docks.

(2) that are outbound shall not sail earlier than thirty minutes before sunup and not later than one hour before sunset if bound from Sunny Point and two hours before sunset if bound from the Wilmington docks.

(3) shall sail only under such weather and tide conditions that will permit safe passage.

(4) may be permitted in case of emergency to sail during nighttime hours with the approval of the commission or its designated agent. Such a request with the emergency reasons shall be made immediately in writing to the commission. The commission or its designated agent may prescribe special conditions for such movement.

(5) shall obtain written permission from the Coast Guard before entering the Wilmington docks.

(b) All vessels not subject to Paragraph (a) may sail when ready at all hours, weather and tide conditions permitting, in the sole discretion of the pilot.

History Note: Authority G.S. 76A-1; 76A-5;

Eff. December 1, 1985;

Readopted Eff. May 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0127

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 that the Rules Review Commission object to the Rule because it is unclear and ambiguous. In Paragraph (b), line 6, the Rule states:

(b) Proposed rate revisions **will** be considered by the commission at the first regular meeting after March 1 of the year in which the rate revision is requested.

It is unclear whether this is a statement of fact or a regulatory requirement that the Commission has imposed on itself. Replacing "will" with "shall" will make it clear that this Paragraph is a requirement.

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule "is clear and unambiguous." G.S. 150B-21.9(a)(2). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not clear and unambiguous.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0127

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: This request may extend to 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 our office to inquire concerning the staff recommendation.

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

Line 6 – replace “will” with “shall”

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

04 NCAC 15 .0127 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0127 PILOTAGE RATES

(a) Requests for rate revisions shall be submitted in writing to the secretary of the commission before February 1 of the year in which the rate revision is requested.

(b) Proposed rate revisions will be considered by the commission at the first regular meeting after March 1 of the year in which the rate revision is requested.

(c) The public shall be notified of any rate revision and its effective date by at least the following methods:

(1) publication in all Wilmington area newspapers;

(2) posting at the State Ports Authority Building of the N.C. State Ports Authority at Wilmington; and

(3) written notification to the N.C. Shipping Association.

(d) Rate revisions shall be effective July 1 of the year in which the rate is revised by the commission.

History Note: Authority G.S. 76A-1; 76A-17;

Eff. December 1, 1985;

Readopted Eff. May 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: Commission on Navigation and Pilotage of the Cape Fear River and Bar

RULE CITATION: 04 NCAC 15 .0128

RECOMMENDED ACTION:

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

COMMENT: Staff recommends that the Rules Review Commission object to the Rule because it is not within the statutory authority delegated to the agency. This Rule requires each pilot to pay a percentage of his or her pilotage fees to the Commission:

Each pilot shall pay to the commission one-fourth of one percent of every pilotage fee received. Such payment shall be made on the 10th day of each quarter for the pilotage fees received the preceding quarter.

However, the statute authorizes the Commission to collect these fees from the pilots association:

§ 76A-24. Expenses of the Commission. **The pilots association shall pay to the Commission** according to rules prescribed by the Commission a percentage of pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars (\$3,000) at the end of the fiscal year shall be returned to the pilot association on a prorated basis determined and distributed by the Commission. The Commission, in carrying out its duties, may incur

Jason Thomas
Commission Counsel
Issued June 7, 2018

necessary legal and auditing expenses and expenses for its travel and investigation which in addition to the one hundred dollars (\$100.00) per meeting fee and other allowances provided by law shall be paid from the foregoing funds. (1981, c. 910, s. 1; 1983 (Reg. Sess., 1984), c. 1081, s. 4.)

The statute unambiguously authorizes the Commission to receive these payments from the pilots association and is silent regarding payments directly from “each pilot.”

The Administrative Procedures Act (APA) requires that the RRC determine whether a rule “is within the authority delegated to the agency by the General Assembly.” G.S. 150B-21.9(a)(1). Staff recommends that the Rules Review Commission object to the Rule because the Rule is not within the authority delegated to the agency by the General Assembly.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Cape Fear River Navigation and Pilotage Commission

RULE CITATION: 04 NCAC 15 .0128

DEADLINE FOR RECEIPT: Friday, April 6, 2018

PLEASE NOTE: *This request may extend to 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 our office to inquire concerning the staff recommendation.

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

What statute authorizes the commission to require pilots to pay this commission? G.S. 76A-24 states that the association is to pay the commission this sum.

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

Jason Thomas
Commission Counsel
Date submitted to agency: Thursday, March 22, 2018

04 NCAC 15 .0128 is readopted as published in 31:01 NCR 10 as follows:

04 NCAC 15 .0128 FEES

Each pilot shall pay to the commission one-fourth of one percent of every pilotage fee received. Such payment shall be made on the 10th day of each quarter for the pilotage fees received the preceding quarter.

*History Note: Authority G.S. 76A-1; 76A-24;
Eff. December 1, 1985;
Readopted Eff. May 1, 2018.*