

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.

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.

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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.

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.

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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.*

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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

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.

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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:

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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.

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.

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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.

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.

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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

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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.

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.*