

Burgos, Alexander N

Subject: FW: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828
Attachments: 21 NCAC 12A .0828.docx

From: Elizabeth A. Berger <eberger@hedrickgardner.com>
Sent: Wednesday, November 8, 2023 2:24 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Anna Baird Choi <achoi@hedrickgardner.com>
Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

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Good afternoon,

Attached please find amended rule 21 NCAC 12A .0828 with your suggested edits. We have attempted to incorporate all of your requests but if we have omitted anything, please let us know.

Thank you,

Elizabeth A. Berger | Paralegal
Hedrick Gardner Kincheloe & Garofalo LLP
4131 Parklake Ave., Suite 300 | Raleigh, NC 27612
Phone: 919-341-5147 | Fax: 919-832-9425
eberger@hedrickgardner.com | www.hedrickgardner.com



From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, November 8, 2023 2:01 PM
To: Anna Baird Choi <achoi@hedrickgardner.com>; Elizabeth A. Berger <eberger@hedrickgardner.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

An agency can use the word “may,” which grants discretion, if it provides criteria in the rule for when the discretion will be exercised. To wit, “to preserve the integrity of the testimony presented at the hearing.”

So either change “may” to “shall” OR use “may” with criteria.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939

Bill.Peaslee@oah.nc.gov

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21 NCAC 12A .0828 is amended with changes as published in 38:04 NCR 213-217 as follows:

21 NCAC 12A .0828 WITNESSES

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the Board's own motion, the presiding officer may exclude witnesses from the hearing room ~~so that they cannot hear the testimony of other witnesses~~ to preserve the integrity of the testimony presented at the hearing. At the request of a party, witness, or the Board, a witness may shall appear by videoconference, [electronically] via live face-to-face video. Requests to appear by videoconference are to be directed to the Board or the Board's attorney not less than two business days prior to the date of the hearing.

*History Note: Authority G.S. 87-11(b); 150B-38; 150B-40;
Eff. September 1, 1988;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016;
Recodified from 21 NCAC 12 .0828 Eff. January 2, ~~2020~~ 2020;
Amended Eff. December 1, 2023.*

Burgos, Alexander N

Subject: FW: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Wednesday, November 8, 2023 2:01 PM

To: Anna Baird Choi <achoi@hedrickgardner.com>; Elizabeth A. Berger <eberger@hedrickgardner.com>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

An agency can use the word “may,” which grants discretion, if it provides criteria in the rule for when the discretion will be exercised. To wit, “to preserve the integrity of the testimony presented at the hearing.”

So either change “may” to “shall” OR use “may” with criteria.

William W. Peaslee

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Burgos, Alexander N

Subject: FW: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

From: Anna Baird Choi <achoi@hedrickgardner.com>
Sent: Wednesday, November 8, 2023 1:53 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Elizabeth A. Berger <eberger@hedrickgardner.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

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Bill,
Before we send the rule itself, please confirm that these edits are acceptable:

...the presiding officer ~~may shall~~ exclude witnesses from the hearing room ~~so that they cannot hear the testimony of other witnesses to preserve the integrity of the testimony presented at the hearing.~~ At the request of a party, witness, or the Board, a witness ~~may shall~~ appear by videoconference,

Thank you,
Anna

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, November 8, 2023 12:35 PM
To: Anna Baird Choi <achoi@hedrickgardner.com>; Elizabeth A. Berger <eberger@hedrickgardner.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

Consider "...to preserve the integrity of the testimony presented at the hearing."

William W. Peaslee
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Bill.Peaslee@oah.nc.gov

From: Anna Baird Choi <achoi@hedrickgardner.com>

Sent: Wednesday, November 8, 2023 12:14 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Elizabeth A. Berger <eberger@hedrickgardner.com>; Rules, Oah <oah.rules@oah.nc.gov>

Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

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Bill,

Thank you for your email. Regarding rule .0828, I have been focused on the “may” in line 7 and thus revised it per your request.

I neglected to circle back with you on the “may” in line 6 and when we spoke by phone the other day, I did not have the rule in front of me. It reads “may” because the presiding officer will sequester witnesses upon good cause shown, just as a judge would do. The Board does not want to tie the hands of the Board to require the exclusion of witnesses just because a request is made, as the request may be frivolous.

Would it be an acceptable technical change to insert after . . . “upon the Board’s on motion and for good cause shown, the presiding officer shall exclude . . . “

Anna

Anna Baird Choi | Partner

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Wednesday, November 8, 2023 11:57 AM

To: Elizabeth A. Berger <eberger@hedrickgardner.com>; Anna Baird Choi <achoi@hedrickgardner.com>; Rules, Oah <oah.rules@oah.nc.gov>

Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

Good afternoon,

I can only assume that the Board is refusing to change “may” to “shall” on line 6 in rule .0828. Accordingly, I will be issuing a staff opinion recommending objection.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

Office of Administrative Hearings

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From: Elizabeth A. Berger <eberger@hedrickgardner.com>

Sent: Tuesday, November 7, 2023 5:23 PM

To: Anna Baird Choi <achoi@hedrickgardner.com>; Peaslee, William W <bill.peaslee@oah.nc.gov>; Rules, Oah <oah.rules@oah.nc.gov>

Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

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Good afternoon,

Please find attached revised rules 21 NCAC 12A .0202 and 21 NCAC 12A .0828.

Thank you,

Elizabeth A. Berger | Paralegal

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Phone: 919-341-5147 | Fax: 919-832-9425

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From: Anna Baird Choi <achoi@hedrickgardner.com>

Sent: Monday, November 6, 2023 5:01 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Elizabeth A. Berger <eberger@hedrickgardner.com>; Rules, Oah <oah.rules@oah.nc.gov>

Subject: Re: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

Good afternoon Bill,

Re: .0202, the word "waterproofing" was included in the published version. The typo in the version sent to you several weeks ago was on our end. Just clarifying in case that makes a difference.

Re: .0828, we will change "may" to "shall" and will resubmit.

With these edits, will you be recommending approval of all three rules?

As always, thank you for your time.

Anna

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Monday, November 6, 2023 4:45:09 PM
To: Elizabeth A. Berger <eberger@hedrickgardner.com>; Rules, Oah <oah.rules@oah.nc.gov>
Cc: Anna Baird Choi <achoi@hedrickgardner.com>
Subject: RE: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

Thank you for your email.

While your email states that Rule .0202 was not changed, it was. The word “waterproofing” was added to Page 4, Line 22.

It is my intention to recommend approval of Rule .0308 as revised.

Regarding Rule .0828, change “may” to “shall” in lines 6 and 7. Alternatively state the criteria the Board will use in making its determination.

Please reply by COB Tuesday November 7.

Thank you.

William W. Peaslee
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Bill.Peaslee@oah.nc.gov

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From: Elizabeth A. Berger <eberger@hedrickgardner.com>
Sent: Monday, November 6, 2023 3:02 PM
To: Rules, Oah <oah.rules@oah.nc.gov>
Cc: Peaslee, William W <bill.peaslee@oah.nc.gov>; Anna Baird Choi <achoi@hedrickgardner.com>
Subject: [External] General Contractor Rules 21 NCAC 12A .0202, .0308, and .0828

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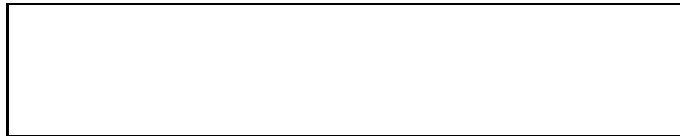
Good afternoon,

Please find attached the following regarding the Oct. 26th Request for Changes:

21 NCAC 12A .0202 – No changes
21 NCAC 12A .0308 – With changes
21 NCAC 12A .0828 – With changes

Thank you,

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Burgos, Alexander N

Subject: FW: [External] General Contractors - request for corrections

From: Anna Baird Choi <achoi@hedrickgardner.com>

Sent: Tuesday, October 31, 2023 4:18 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Elizabeth A. Berger <eberger@hedrickgardner.com>

Subject: RE: [External] General Contractors - request for corrections

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Bill,

I am not trying to create extra work for you. I'm simply responding the way I have in the recent past with current staff, including trying to accommodate your request to correct the rules in a manner you find acceptable. Otherwise, I'm just shooting in the dark.

I greatly appreciate that you find me an "accomplished attorney," but I have learned both as a past member of the RRC and as a rulemaking coordinator that what an agency lawyer may feel is acceptable language and what RRC counsel may feel is acceptable can often be two completely different things. That is why I am asking what you would find acceptable.

I understand you are busy so I will not expect a response. Thank you for your time; I will take it from here.

Anna

Anna Baird Choi | Partner

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HEDRICK GARDNER
KINCHELOE GAROFALO

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Tuesday, October 31, 2023 3:58 PM

To: Anna Baird Choi <achoi@hedrickgardner.com>

Cc: Elizabeth A. Berger <eberger@hedrickgardner.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] General Contractors - request for corrections

Respectfully, RRC counsel does not generally pre-review rules revisions filed in response to RFCs. Usually, agencies simply submit revised rules and we carry on. Sometimes that results in an objection. Sometimes not.

However, for you, I will take the time despite being swamped as we are an RRC counsel down. Please see my responses in blue.

William W. Peaslee
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Office of Administrative Hearings
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Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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From: Anna Baird Choi <achoi@hedrickgardner.com>
Sent: Tuesday, October 31, 2023 12:54 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Elizabeth A. Berger <eberger@hedrickgardner.com>
Subject: RE: [External] General Contractors - request for corrections

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Bill,
Not a problem. I was just sending it to you as I've done with RRC staff counsel in the past (including current counsel), assuming that the red text would be helpful to draw your attention to our responses. I will pull out your inquiries and the Board's response into this email to make it easier for you to respond:

Rule .0202:

Page 4, Line 22: "Bituminous" appears to be an adjective without a noun.
"Bituminous" describes "waterproofing."

My response arises from a typo in what we sent to you recently. The version of the rules filed with the Notice of Text and which were published in the NC Register are correct and include the word "waterproofing" which is the noun that is modified by the adjective "bituminous." We will make this revision once we send the final version to you and this should resolve your question. If not please let me know. Thank you for catching this typo.

The Submission for Permanent Rule (Form 0400) and the attached rule filed with the RRC for consideration is missing a noun, typo or not. Adding a noun would, of course, resolve the ambiguity.

Regarding your question re: "roofing system," on page 4, line 23, my previous experience in submissions with RRC counsel, including current counsel, is that such response is acceptable and will not result in a staff objection, though the agency should be prepared for the possibility of questions from the RRC. Is this your understanding?

In answer to your question, no. Nowhere in Chapter 150B does it state "clear and unambiguous 'to the regulated community'". In order to know what a "component part of a roofing system" one must know what the Board considers a "roofing system.". Left undefined one must guess, am I installing a component part? A quick google search of "roofing system components" renders a variety of answers none of which include "insulation". Of course, one presumably could ask the Board but that can lead to the possibility of inequitable answers and subjectivity. Or the Board could be clear in the rule.

Rule .0308:

Lines 5-6: Aren't all applicants "legal entities"?

What we were getting at is those applicants who are not "natural persons" such as corporations, partnerships, etc. We are open to a better way of describing this.

- Please advise re: how you would like for us to describe this if this is of concern to you.

You are an accomplished attorney. I do not need to write this for you should you feel a revision is warranted.

Lines 6-7: Are the references required for the owner of the sole proprietorship or the business? If it is a sole proprietorship, the applicant and sole proprietorship will be one in the same.

- Does this resolve your question?

While it is not objectionable, I thought the Board might want to resolve any lay questions about DBAs filed by an individual.

Rule .0802:

Line 5: Is there a particular manner in which the hearing shall be recorded?

We (and I believe all OLBs) use court reporters since a transcript must be available if the case is appealed via a PJR.

- Does this resolve your question?

If the Board does not care about the manner in which the hearing is recorded, so be it.

Line 7-9: Does the Board have discretion in granting the request? Can the Board compel someone to appear by video if they want to appear in person? As written, if the request is made, the Board must grant it. The Board's only authority to compel attendance at a hearing is under .0827 (subpoena rule). The Board can also proceed with a hearing if the adverse party has been properly served but does not attend.

- Does this resolve your question?

Occasionally in an RFC I will ask a question to confirm the Board's intention as the language will render an odd, and perhaps unforeseen, result. As written, a party could require the opposing party's witness to appear by video when both the opposing party and the witness want the witness to appear in person. If that is the desired result, so be it.

Line 8: "Electronically"? Is there any other kind of video conference?

If you feel "electronically" is unnecessary, we will remove it.

- Please advise re: whether you feel it is unnecessary.

Unless the Board has a specific reason for including the word, it is not necessary.

Thank you.

Hope this helps. Thank you.

Anna Baird Choi | Partner

Hedrick Gardner Kincheloe & Garofalo LLP.

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Burgos, Alexander N

Subject: FW: [External] General Contractors - request for corrections

From: Peaslee, William W
Sent: Tuesday, October 31, 2023 12:27 PM
To: Anna Baird Choi <achoi@hedrickgardner.com>
Cc: Elizabeth A. Berger <eberger@hedrickgardner.com>
Subject: RE: [External] General Contractors - request for corrections

Good morning

I hope this finds you well.

Pardon me for being direct but we are quite busy.

I'm sorry. I do not see any questions posed to me; however, generally, if there is a question posed within the RFC, ambiguity exists in the rule which should be resolved in the rule revision.

Here are two quick points. 1) The Board struck the word "waterproofing" accordingly "bituminous" describes nothing as currently written. I thought this was very clear in the RFC. Please review the Board's filing. 2) Generally, the RRC has not accepted the argument that "the regulated understands." The rule must be clear and unambiguous, not the understanding that the regulated have been trained to understand by the regulator in the absence of clarity in the rule.

I hope this helps. I look forward to seeing the Board's revisions.

Thank you.

William W. Peaslee
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From: Anna Baird Choi <achoi@hedrickgardner.com>
Sent: Tuesday, October 31, 2023 11:43 AM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Elizabeth A. Berger <eberger@hedrickgardner.com>
Subject: [External] General Contractors - request for corrections

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Good morning, Bill,

Attached are your requested corrections and the Board's responses in red. There are a couple of questions for you but where you made a suggested edit, the Board was fine with it.

Once we hear back from you, we'll prepare the revised rules.

Thanks,
Anna

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REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: Licensing Board of General Contractors

RULE CITATION: 21 NCAC 12A .0202

DEADLINE FOR RECEIPT:

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 email the reviewing attorney to inquire concerning the staff recommendation.

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

*Page 4, Line 22: "Bituminous" appears to be an adjective without a noun.
"Bituminous" describes "waterproofing."*

*Page 4, Line 23: Is "roofing system" defined anywhere?
"Roofing system" is a commonly understood term in the regulated public. Examples of other roofing systems are asphalt shingle, slate, Mansard, membrane, etc.*

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

William W. Peaslee
Commission Counsel

Date submitted to agency: October 26, 2023

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: Licensing Board of General Contractors

RULE CITATION: 21 NCAC 12A .0308

DEADLINE FOR RECEIPT:

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 email the reviewing attorney to inquire concerning the staff recommendation.

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

Lines 4-5: "as to the character reference's"? I would not say that is objectionable, but it is messy and could be improved.

Lines 4-5: Consider, if it meets the Board's intentions, "Each applicant shall submit to the Board three written evaluations from character references which attest [or state] the reference's knowledge of and experience with the applicant."

This works for the Board.

Lines 5-6: Aren't all applicants "legal entities"?

What we were getting at is those applicants who are not "natural persons" such as corporations, partnerships, etc. We are open to a better way of describing this.

Lines 5-6: Are these references in addition to references for the business applicant or in lieu of? In addition to.

Lines 5-6: Consider, if it meets the Board's intentions, "If the applicant is a firm, business, partnership, or corporation, references shall be provided for the qualifier, as defined in G.S. 87-10(b), and each signatory of the application."

That works for the Board.

Lines 6-7: Are the references required for the owner of the sole proprietorship or the business? If it is a sole proprietorship, the applicant and sole proprietorship will be one in the same.

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

William W. Peaslee
Commission Counsel

Date submitted to agency: October 26, 2023

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: Licensing Board of General Contractors

RULE CITATION: 21 NCAC 12A .0828

DEADLINE FOR RECEIPT:

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 email the reviewing attorney to inquire concerning the staff recommendation.

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

Lines 4: "Party" to what? Consider: "Any party to a hearing granted pursuant to 21 NCAC 12A .0819 may be..." Party as defined in GS 150B-2 as these hearings are contested case hearings under the APA.

Line 5: Is there a particular manner in which the hearing shall be recorded?
We (and I believe all OLBs) use court reporters since a transcript must be available if the case is appealed via a PJR.

Line 7-9: Does the Board have discretion in granting the request? Can the Board compel someone to appear by video if they want to appear in person? As written, if the request is made, the Board must grant it. The Board's only authority to compel attendance at a hearing is under .0827 (subpoena rule). The Board can also proceed with a hearing if the adverse party has been properly served but does not attend.

Line 8: "Electronically"? Is there any other kind of video conference?
If you feel "electronically" is unnecessary, we will remove it.

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

William W. Peaslee
Commission Counsel

Date submitted to agency: October 26, 2023

Burgos, Alexander N

From: Peaslee, William W
Sent: Thursday, October 26, 2023 2:21 PM
To: Anna Baird Choi
Cc: Burgos, Alexander N
Subject: RE: [External] RE: 21 NCAC 12A .0202, .0308, and .0828

November 9.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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From: Anna Baird Choi <achoi@hedrickgardner.com>
Sent: Thursday, October 26, 2023 2:19 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: 21 NCAC 12A .0202, .0308, and .0828

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Thanks Bill. When is the deadline to get the corrections back to you?

Anna

Anna Baird Choi | Partner
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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Thursday, October 26, 2023 1:59 PM
To: Anna Baird Choi <achoi@hedrickgardner.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 21 NCAC 12A .0202, .0308, and .0828

Good afternoon.

Attached please find a request for changes concerning the above captioned rules which will be consider at the November 2023 RRC meeting.

As always, if you have any questions please feel free to contact me.

William W. Peaslee
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