

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 CITATION: 15A NCAC 02H .1005

RECOMMENDED ACTION:

- X 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:

This rule was originally amended in early 2008 and approved by the Rules Review Commission. The rule received at least 10 letters requesting legislative review and was disapproved by the General Assembly in S.L. 2008-211. In that bill the General Assembly re-wrote the rule to supercede the existing rule. They authorized the Environmental Management Commission to adopt a substantially identical rule to the Session law. The substantially identical rule was not subject to review by the Rules Review Commission but was subject to legislative review. In 2012, EMC adopted a substantially identical rule. No bill was introduced in the General Assembly to disapprove the rule and the rule became effective July 3, 2012. Since that time, the agency has realized it made some errors in transforming the session law into a rule. The changes to this rule correct those errors to make the rule consistent with the session law.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

SESSION LAW 2008-211

SENATE BILL 1967

**AN ACT TO PROVIDE FOR IMPROVEMENTS IN THE MANAGEMENT OF
STORMWATER IN THE COASTAL COUNTIES IN ORDER TO PROTECT
WATER QUALITY.**

The General Assembly of North Carolina enacts:

SECTION 1.(a) Disapprove Rule. – Pursuant to G.S. 150B-21.3(b1), 15A NCAC 02H .1005 (Stormwater Requirements: Coastal Counties), as adopted by the Environmental Management Commission on 10 January 2008 and approved by the Rules Review Commission on 20 March 2008, is disapproved.

SECTION 1.(b) Supersede Rule. – 15A NCAC 02H .1005 (Stormwater Requirements: Coastal Counties), effective 1 September 1995, is superseded by this act. References in the North Carolina Administrative Code to 15A NCAC 02H .1005 shall be deemed to refer to the equivalent provisions of this act.

SECTION 2.(a) Definitions. – The following definitions apply to this act and its implementation:

- (1) The definitions set out in 15A NCAC 02H .1002 (Definitions).
- (2) The definitions set out in G.S. 143-212 and G.S. 143-213.
- (3) "Built upon area" has the same meaning as in Session Law 2006-246 and means that portion of a project that is covered by impervious or partially impervious surface including, but not limited to, buildings; pavement and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts. "Built upon area" does not include a wooden slatted deck, the water area of a swimming pool, or pervious or partially pervious paving material to the extent that the paving material absorbs water or allows water to infiltrate through the paving material.
- (4) "Permeable pavement" means paving material that absorbs water or allows water to infiltrate through the paving material. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, porous asphalt, and any other

material with similar characteristics. Compacted gravel shall not be considered permeable pavement.

- (5) "Residential development activities" has the same meaning as in 15A NCAC 02B .0202(54).
- (6) "Vegetative buffer" has the same meaning as in 15A NCAC 02H .1002(22) and means an area of natural or established vegetation directly adjacent to surface waters through which stormwater runoff flows in a diffuse manner to protect surface waters from degradation due to development activities.
- (7) "Vegetative conveyance" means a permanent, designed waterway lined with vegetation that is used to convey stormwater runoff at a non-erosive velocity within or away from a developed area.

SECTION 2.(b) Requirements for Certain Nonresidential and Residential Development in the Coastal Counties. – All nonresidential development activities that occur within the Coastal Counties that will add more than 10,000 square feet of built upon area or that require a Sedimentation and Erosion Control Plan, pursuant to G.S. 113A-57 or a Coastal Area Management Act (CAMA) Major Development Permit, pursuant to G.S. 113A-118 and all residential development activities within the Coastal Counties that require a Sedimentation and Erosion Control Plan, pursuant to G.S. 113A-57 or a Coastal Area Management Act (CAMA) Major Development Permit, pursuant to G.S. 113A-118 shall manage stormwater runoff as provided in this subsection. A development activity or project requires a Sedimentation and Erosion Control Plan if the activity or project disturbs one acre or more of land, including an activity or project that disturbs less than one acre of land that is part of a larger common plan of development. Whether an activity or project that disturbs less than one acre of land is part of a larger common plan of development shall be determined in a manner consistent with the memorandum referenced as "Guidance Interpreting Phase 2 Stormwater Requirements" from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006.

- (1) Development Near Outstanding Resource Waters (ORW). – Development activities within the Coastal Counties and located within 575 feet of the mean high waterline of areas designated by the Commission as Outstanding Resource Waters (ORW) shall meet the requirements of 15A NCAC 02H .1007 (Stormwater Requirements: Outstanding Resource Waters) and shall be permitted as follows:
 - a. Low-Density Option. – Development shall be permitted pursuant to 15A NCAC 02H .1003(d)(1) if the development meets all of the following requirements:
 - 1. The development has a built upon area of twelve percent (12%) or less. A development project with an overall density at or below the low-density threshold, but containing areas with a density greater than the overall

project density, shall be considered low-density as long as the project meets or exceeds the requirements for low-density development and locates the higher density development in upland areas and away from surface waters and drainageways to the maximum extent practicable.

2. Stormwater runoff from the development is transported primarily by vegetated conveyances. As used in this sub-sub-subdivision, "conveyance system" shall not include a stormwater collection system. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.
 3. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with and maintained in grass or any other vegetative or plant material. The Division of Water Quality may, on a case-by-case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B .0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.
- b. High-Density Option. – Development shall be permitted pursuant to 15A NCAC 02H .1003(d)(2) if the development meets all of the following requirements:
1. The development has a built upon area of greater than twelve percent (12%).
 2. The development has no direct outlet channels or pipes to Class SA waters unless permitted in accordance with 15A NCAC 02H .0126. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall

flow into and through these wetlands at a non-erosive velocity.

3. The development utilizes control systems that are any combination of infiltration systems, bioretention systems, constructed stormwater wetlands, sand filters, rain barrels, cisterns, rain gardens or alternative low impact development stormwater management systems designed in accordance with 15A NCAC 02H .1008 to control and treat the runoff from all surfaces generated by one and one-half inches of rainfall, or the difference in the stormwater runoff from all surfaces from the predevelopment and postdevelopment conditions for a one-year, 24-hour storm, whichever is greater. Wet detention ponds may be used as a stormwater control system to meet the requirements of this sub-sub-subdivision, provided that the stormwater control system fully complies with the requirements of this sub-subdivision. If a wet detention pond is used within one-half mile of Class SA waters, installation of a stormwater best management practice in series with the wet detention pond shall be required to treat the discharge from the wet detention pond. Secondary stormwater best management practices that are used in series with another stormwater best management practice do not require any minimum separation from the seasonal high water table. Alternatives as described in 15A NCAC 02H .1008(h) may also be approved if they meet the requirements of this sub-subdivision.
4. Stormwater runoff from the development that is in excess of the design volume must flow overland through a vegetative filter designed in accordance with 15A NCAC 02H .1008 with a minimum length of 50 feet measured from mean high water of Class SA waters.
5. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. Furthermore, stormwater

control best management practices (BMPs), or stormwater control structures, with the exception of wet detention ponds, may be located within this vegetative buffer. The Division of Water Quality may, on a case by case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B .0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

- c. Stormwater Discharges Prohibited. – All development activities, including both low- and high-density projects, shall prohibit new points of stormwater discharge to Class SA waters or an increase in the volume of stormwater flow through conveyances or increase in capacity of conveyances of existing stormwater conveyance systems that drain to Class SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to Class SA waters. The following shall not be considered a direct point of stormwater discharge:
 - 1. Infiltration of the stormwater runoff from the design storm as described in sub-sub-subdivision 3. of sub-subdivision b. of subdivision (1) of this subsection.
 - 2. Diffuse flow of stormwater at a non-erosive velocity to a vegetated buffer or other natural area, that is capable of providing effective infiltration of the runoff from the design storm as described in sub-sub-subdivision 3. of sub-subdivision b. of subdivision (1) of this subsection. Notwithstanding the other requirements of this section, the infiltration mandated in this sub-sub-subdivision does not require a minimum separation from the seasonal high-water table.
 - 3. The discharge from a wet detention pond that is treated by a secondary stormwater best management practice, provided that both the wet detention pond and the secondary stormwater best management practice meet the requirements of this sub-subdivision.

- d. Limitation on the Density of Development. – Development shall be limited to a built upon area of twenty-five percent (25%) or less.
- (2) Development Near Class SA Waters. – Development activities within one-half mile of and draining to those waters classified by the Commission as Class SA waters or within one-half mile of waters classified by the Commission as Class SA waters and draining to unnamed freshwater tributaries to Class SA waters shall meet the requirements of sub-subdivisions a., b., and c. of subdivision (1) of this subsection. The extent of Class SA waters is limited to those waters that are determined to be at least an intermittent stream based on a site stream determination made in accordance with the procedures that are delineated in the Division of Water Quality's "Identification Methods for the Origin of Intermittent and Perennial Streams" prepared pursuant to Session Law 2001-404.
- (3) Other Coastal Development. – Development activities within the Coastal Counties except those areas described in subdivisions (1) and (2) of this subsection shall meet all of the following requirements:
 - a. Low-Density Option: Development shall be permitted pursuant to 15A NCAC 02H .1003(d)(1) if the development meets all of the following requirements:
 - 1. The development has a built upon area of twenty-four percent (24%) or less. A development project with an overall density at or below the low-density threshold, but containing areas with a density greater than the overall project density, shall be considered low density as long as the project meets or exceeds the requirements for low-density development and locates the higher density in upland areas and away from surface waters and drainageways to the maximum extent practicable.
 - 2. Stormwater runoff from the development is transported primarily by vegetated conveyances. As used in this sub-sub-subdivision, "conveyance system" shall not include a stormwater collection system. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.
 - 3. The development contains a 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high

waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. The Division of Water Quality may, on a case-by-case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B .0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

- b. High-Density Option: Higher density developments shall be permitted pursuant to 15A NCAC 02H .1003(d)(2) if the development meets all of the following requirements:
 - 1. The development has a built upon area of greater than twenty-four percent (24%).
 - 2. The development uses control systems that are any combination of infiltration systems, wet detention ponds, bioretention systems, constructed stormwater wetlands, sand filters, rain barrels, cisterns, rain gardens or alternative stormwater management systems designed in accordance with 15A NCAC 02H .1008.
 - 3. Control systems must be designed to store, control, and treat the stormwater runoff from all surfaces generated by one and one-half inch of rainfall.
 - 4. Stormwater runoff from built upon areas that is directed to flow through any wetlands shall flow into and through these wetlands at a non-erosive velocity.
 - 5. A 50-foot-wide vegetative buffer for new development activities and a 30-foot-wide vegetative buffer for redevelopment activities. The width of a buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high waterline of tidal waters, perpendicular to the shoreline. The vegetative buffer may be cleared or graded, but must be planted with, and maintained in, grass or any other vegetative or plant material. Furthermore, stormwater control best management practices (BMPs), or stormwater control structures, with the exception of wet detention ponds, may

be located within this vegetative buffer. The Division of Water Quality may, on a case by case basis, grant a minor variance from the vegetative buffer requirements of this section pursuant to the procedures set out in 15A NCAC 02B .0233(9)(b). Vegetative buffers and filters required by this section and any other buffers or filters required by State water quality or coastal management rules or local government requirements may be met concurrently and may contain, in whole or in part, coastal, isolated, or 404 jurisdictional wetlands that are located landward of the normal waterline.

- (4) Requirements for Structural Stormwater Controls. – Structural stormwater controls required under this section shall meet all of the following requirements:
- a. Remove an eighty-five percent (85%) average annual amount of Total Suspended Solids.
 - b. For detention ponds, draw down the treatment volume no faster than 48 hours, but no slower than 120 hours.
 - c. Discharge the storage volume at a rate equal to or less than the predevelopment discharge rate for the one-year, 24-hour storm.
 - d. Meet the General Engineering Design Criteria set forth in 15A NCAC 02H .1008(c).
 - e. For structural stormwater controls that are required under this section and that require separation from the seasonal high-water table, a minimum separation of two feet is required. Where a separation of two feet from the seasonal highwater table is not practicable, the Division of Water Quality may grant relief from the separation requirement pursuant to the Alternative Design Criteria set out in 15A NCAC 02H .1008(h). No minimum separation from the seasonal highwater table is required for a secondary stormwater best management practice that is used in a series with another stormwater best management practice.
- (5) Certain Wetlands Excluded From Density Calculation. – For the purposes of this section, areas defined as Coastal Wetlands under 15A NCAC 07H .0205, as measured landward from the normal high waterline, shall not be included in the overall project area to calculate impervious surface density. Wetlands that are not regulated as coastal wetlands pursuant to 15A NCAC 07H .0205 and that are located landward of the normal high waterline may be included in the overall project area to calculate impervious surface density.

SECTION 2.(c) Requirements for Limited Residential Development in Coastal Counties. – For residential development activities within the 20 Coastal Counties that are located within one-half mile and draining to Class SA waters, that have a built

upon area greater than twelve percent (12%), that do not require a stormwater management permit under subsection (b) of this section, and that will add more than 10,000 square feet of built upon area, a one-time, nonrenewable stormwater management permit shall be obtained. The permit shall require recorded deed restrictions or protective covenants to ensure that the plans and specifications approved in the permit are maintained. Under this permit, stormwater runoff shall be managed using any one or combination of the following practices:

- (1) Install rain cisterns or rain barrels designed to collect all rooftop runoff from the first one and one-half inches of rain. Rain barrels and cisterns shall be installed in such a manner as to facilitate the reuse of the collected rain water on site and shall be installed in such a manner that any overflow from these devices is directed to a vegetated area in a diffuse flow. Construct all uncovered driveways, uncovered parking areas, uncovered walkways, and uncovered patios out of permeable pavement or other pervious materials.
- (2) Direct rooftop runoff from the first one and one-half inches of rain to an appropriately sized and designed rain garden. Construct all uncovered driveways, uncovered parking areas, uncovered walkways, and uncovered patios out of permeable pavement or other pervious materials.
- (3) Install any other stormwater best management practice that meets the requirements of 15A NCAC 02H .1008 to control and treat the stormwater runoff from all built upon areas of the site from the first one and one-half inches of rain.

SECTION 2.(d) Exclusions. – The requirements of this section shall not apply to any of the following:

- (1) Activities of the North Carolina Department of Transportation that are regulated in accordance with the provisions of the Department's National Pollutant Discharge Elimination System (NPDES) Stormwater Permit.
- (2) Development activities that are conducted pursuant to and consistent with one of the following authorizations, or any timely renewal thereof, shall be regulated by those provisions and requirements of 15A NCAC 02H .1005 that were effective at the time of the original issuance of the following authorizations:
 - a. State Stormwater Permit issued under the provisions of 15A NCAC 02H .1005.
 - b. Stormwater Certification issued pursuant to 15A NCAC 02H .1000 prior to 1 December 1995.
 - c. A Coastal Area Management Act Major Permit.
 - d. 401 Certification that contains an approved Stormwater Management Plan.
 - e. A building permit pursuant to G.S. 153A-357 or G.S. 160A-417.

- f. A site-specific development plan as defined by G.S. 153A-344.1(b)(5) and G.S. 160A-385.1(b)(5).
 - g. A phased development plan approved pursuant to G.S. 153A-344.1 or G.S. 160A-385.1 that shows:
 - 1. For the initial or first phase of development, the type and intensity of use for a specific parcel or parcels, including at a minimum, the boundaries of the project and a subdivision plan that has been approved pursuant to G.S. 153A-330 through G.S. 153A-335 or G.S. 160A-371 through G.S. 160A-376.
 - 2. For any subsequent phase of development, sufficient detail so that implementation of the requirements of this section to that phase of development would require a material change in that phase of the plan.
 - h. A vested right to the development pursuant to common law.
- (3) Redevelopment activities that result in no net increase in built upon area and provide stormwater control equal to the previous development.
 - (4) Development activities for which a complete Stormwater Permit Application has been accepted by the Division of Water Quality prior to the effective date of this act, shall be regulated by the provisions and requirements of 15A NCAC 02H .1005 that were effective at the time that this application was accepted as complete by the Division of Water Quality. For purposes of this subsection, a Stormwater Permit Application is deemed accepted as complete by the Division of Water Quality when the application is assigned a permit number in the Division's Basinwide Information Management System.
 - (5) Development activities for which only a minor modification of a State Stormwater Permit is required shall be regulated by the provisions and requirements of 15A NCAC 02H .1005 that were effective at the time of the original issuance of the State Stormwater Permit. For purposes of this subsection, a minor modification of a State Stormwater Permit is defined as a modification that does not increase the net area of built upon area within the project site or does not increase the overall size of the stormwater controls that have been previously approved for that development activity.
 - (6) Municipalities designated as a National Pollutant Discharge Elimination System (NPDES) Phase 2 municipality located within the 20 Coastal Counties until such time as the NPDES Phase 2 Stormwater Permit expires and is subject to renewal. Upon renewal of the NPDES Phase 2 Stormwater Permits for municipalities located within the 20 Coastal Counties, the Department shall review the permits to determine whether the permits should be amended to include the provisions of this section.

SECTION 2.(e) Exemptions From Vegetative Buffer Requirements. – The following activities are exempt from the vegetative buffer requirements of this section:

- (1) Development in urban waterfronts that meets the requirements of 15A NCAC 07H .0209(g),
- (2) Development in a new urban waterfront area that meets the requirements of Session Law 2004-117,
- (3) Those activities listed in 15A NCAC 07H .0209(d)(10)(A) through 15A NCAC 07H .0209(d)(10)(H),
- (4) Development of upland marinas that have received or are required to secure a Coastal Area Management Act Major Permit.

SECTION 2.(f) Compliance with Other Rules. – In addition to the requirements specified in this section, activities regulated under this section must also comply with any requirements of any other applicable law or rule.

SECTION 3. Rescission of Phase 2 Designations. – All designations of local governments within the 20 Coastal Counties as Phase 2 municipalities by the Environmental Management Commission under Section 5 of Session Law 2006-246 that occurred after 16 August 2006 are rescinded. The provisions of this section do not preclude any future designations of these areas as Phase 2 municipalities by the Environmental Management Commission under Section 5 of Session Law 2006-246.

SECTION 4. Additional Rule Making. – The Commission may adopt rules to replace the rules that are disapproved or superseded as provided in Section 1 of this act. If the Commission adopts rules pursuant to this section, notwithstanding G.S. 150B-19(4), the rules shall be substantively identical to the provisions of Section 2 of this act. The Commission may reorganize or renumber any of the rules to which this section applies at its discretion. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through G.S. 150B-21.14. Rules adopted pursuant to this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2).

SECTION 5. Construction of Act. –

- (1) Except as specifically provided in Section 4 of this act, nothing in this act shall be construed to limit, expand, or otherwise alter the authority of the Environmental Management Commission or any unit of local government.
- (2) This act shall not be construed to affect any delegation of any power or duty by the Commission to the Department or subunit of the Department.
- (3) As used in subsection (b) of Section 2 of this act, the phrase "common plan of development" shall be interpreted and implemented in a manner consistent with the memorandum referenced as "Guidance Interpreting Phase 2 Stormwater Requirements" from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006, and for these purposes the

memorandum shall be considered a part of this act and as such shall be printed as a part of the Session Laws.

SECTION 6. Application of Memorandum to Prior Session Law. – Subdivision (5) of Section 18 of S.L. 2006-246 reads as rewritten:

"(5) As used in Section 9 of this act, the phrase 'common plan of development or sale' shall be interpreted and implemented in a manner consistent with the memorandum referenced as 'Guidance Interpreting Phase II Stormwater Requirements' from the Director of the Division of Water Quality of the Department of Environment and Natural Resources to Interested Parties dated 24 July 2006, and for these purposes the memorandum shall be considered a part of this act and as such shall be printed as a part of the Session Laws."

SECTION 7. Provisions of Act Not Codified; Set Out As Note. – Notwithstanding G.S. 164-10, the Revisor of Statutes shall not codify any of the provisions of this act. The Revisor of Statutes shall set out the text of this act as a note to G.S. 143-214.7 and may make notes concerning this act to other sections of the General Statutes as the Revisor of Statutes deems appropriate.

SECTION 8. Effective Date. – Subsection (b) of Section 1 of this act and Sections 2 and 3 of this act become effective 1 October 2008. All other sections of this act are effective when this act becomes law.

In the General Assembly read three times and ratified this the 15th day of July, 2008.

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: HEARING AID DEALERS AND FITTERS BOARD

RULE CITATION: 21 NCAC 22F .0108

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:

Despite the certification on the form and introductory statement a notice of text for this rule has not been published in the North Carolina Register. G.S. 150B-21.2(a)(1) requires an agency to publish a notice of text in the Register before it adopts a permanent rule. No exception to the requirement has been cited

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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AGENCY: HEARING AID DEALERS AND FITTERS BOARD

RULE CITATION: 21 NCAC 22F .0120

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:

It is not clear what standards the Board will use in approving continuing education. It is also not clear how many clock hours of credit are required or what topic content categories are applicable for credit. There is no authority cited for setting these requirements outside of rulemaking.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been a licensed Hearing Aid Specialist for at least the preceding three years prior to appointment, shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All appointments made on or after July 1, 1981, shall be for terms of three years.

One member shall be appointed by the Governor who shall be a physician practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of three years.

One member, who shall be a person with hearing loss, shall be appointed by the Governor to represent the interest of hearing aid consumers. This initial appointment shall be for a term ending June 30, 2013. All appointments made on or after July 1, 2013, shall be for a term of three years.

One member shall be appointed by the Governor to represent the interest of the public at large. This member shall have no ties to the hearing aid business nor shall he be an audiologist. The Governor shall appoint the public member not later than July 1, 1981, to serve a term of three years.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive terms.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve the unexpired term of their predecessor in office and must be appointed from the same category as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

(b) The Board shall choose, at the first regular meeting and annually thereafter, one of its members to serve as president and one as secretary and treasurer. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of the annual meeting and any special meetings to be designated by the president. The secretary and treasurer of the Board shall keep a full record of its proceedings, including a current list of all licensees, which shall at all reasonable times be open to public inspection. The Board is authorized to employ an executive secretary and to provide such assistance as may be required to enable said Board to properly perform its duties.

(c) The Board shall:

- (1) Authorize all disbursements necessary to carry out the provisions of this Chapter;
- (2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;
- (3) Issue licenses to qualified persons who apply to the Board;
- (4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;
- (5) Suspend or revoke licenses pursuant to this Chapter;
- (6) Make and publish rules, including a code of ethics, that are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;
- (7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules that are made against any fitter and seller of hearing aids in North Carolina;
- (8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;
- (9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;
- (10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity whatsoever in connection with the sales and service of hearing aids;

- (11) Establish and enforce rules to guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;
- (12) Fund, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary;
- (13) Register persons serving as apprentices as set forth in G.S. 93D-9;
- (14) Have the power to set and collect fees in accordance with Chapter 150B of the General Statutes for the items listed in this subdivision and for other items for which this Chapter gives the Board the authority to set a fee:
 - a. For a continuing education make-up class provided by the Board, a fee not to exceed fifty dollars (\$50.00) per person for each day of instruction. The Board may not offer a make-up class that is longer than two days;
 - b. For a license examination preparation course provided by the Board, a fee not to exceed fifty dollars (\$50.00) per person for each day of instruction. The Board may not offer an examination preparation course that is longer than three days;
 - c. For approval of a continuing education program provider, a fee not to exceed forty dollars (\$40.00);
 - d. For verifying and recording attendance at a continuing education program not provided by the Board, a fee not to exceed fifteen dollars (\$15.00) per licensee per program;
 - e. For providing a voluntary two-day apprentice training workshop, a fee not to exceed one hundred dollars (\$100.00) per person, and for providing a three-day voluntary apprentice training workshop, a fee not to exceed one hundred fifty dollars (\$150.00) per person;
 - f. For administering an examination, a fee of three hundred dollars (\$300.00); and
 - g. For the registration of a Registered Sponsor not otherwise licensed under this Chapter, a fee of one hundred fifty dollars (\$150.00) per annum;
- (15) Adopt annually a balanced budget prior to the beginning of its fiscal year, against which expenditures shall be reviewed throughout the fiscal year to ensure that expenditures during the year do not exceed receipts for that year plus amounts held by the Board in reserve. Except for monies from charges for photocopying and similar charges, the Board's receipts shall consist of and be limited to funds derived from fees expressly authorized by law; and
- (16) Register any person holding a valid permanent license as an audiologist under Article 22 of Chapter 90 of the General Statutes, who holds a doctoral degree in Audiology and who makes an application to serve as a Registered Sponsor to apprentice as set forth in G.S. 93D-9, but who is not otherwise subject to licensure by the Board.

(d) Members of the Board shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. The expenses shall be paid from the fees and assessments received by the Board under the provisions of this Chapter. No part of these expenses or any other expenses of the Board, in any manner whatsoever, shall be paid out of the State treasury. All moneys received in excess of expense allowance and mileage, as above provided, shall be held by the secretary-treasurer as a special fund for meeting other expenses of the Board and carrying out the provisions of this Chapter.

The Board shall make an annual report of its proceedings in accordance with G.S. 93B-2. (1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1; 1981, c. 601, ss. 2-5; 1987, c. 827, s. 80; 1991, c. 592, s. 1; 2007-406, ss. 1, 2; 2011-311, ss. 3, 4.)

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Every licensed person who engages in the fitting and selling of hearing aids shall pay to the Board an annual license renewal fee in an amount set by the Board, not to exceed two hundred fifty dollars (\$250.00). The payment shall be made prior to the first day of April in each year. In case of default in payment the license shall expire 30 days after notice by the secretary-treasurer to the last known address of the licensee by registered mail, certified mail, or in a manner provided by G.S. 1A-1, Rule 4(j)(1)d. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of twenty-five dollars (\$25.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of a late penalty of fifty dollars (\$50.00) and the renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee. (1969, c. 999; 1975, c. 550, s. 3; 1979, c. 848; 1981, c. 601, s. 17; c. 990, s. 4; 1991, c. 592, s. 6; 2007-406, s. 4.)

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: HEARING AID DEALERS AND FITTERS BOARD

RULE CITATION: 21 NCAC 22I .0103

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:

In (e) it is not clear what standards of practice the Board considers to be "recognized."

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: HEARING AID DEALERS AND FITTERS BOARD

RULE CITATION: 21 NCAC 22J .0103

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:

In (3), it is not clear how the Board will determine if a person is a "nationally recognized celebrity."

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: N.C. BOARD OF PODIATRY EXAMINERS

RULE CITATION: 21 NCAC 52 .0613

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

x Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

There is no authority cited for the provision in Item (4) charging any fee for a duplicate license certificate or the provision in Item (7) charging a database listing fee.