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VIA EMAIL

Taylor Corpening
Department of Health and Human Services
809 Ruggles Drive
2701 Mail Service Center
Raleigh, NC 27699-2701
dhsr.rulescoordinator@dhhs.nc.gov

Re: Comments on 10A NCAC 15 .1801

Dear Ms. Corpening:

I represent Gregory Enterprises, which is a Burlington-based, family-owned partnership that does business as Inspector Nation. Inspector Nation currently provides a radon proficiency program to licensed home inspectors. Gregory Enterprises seeks to offer comments on the proposed 10A NCAC 15 .1801 (the “Rule”).

Gregory Enterprises is generally pleased with the proposed Rule, as it attempts to follow the narrowly crafted legislation that empowers the Department of Health and Human Services (the “Department”) to create this new Rule. That being said, a careful review of the Rule reveals that a few narrow changes should be made before it is adopted by the Department. Gregory Enterprises appreciates the Department’s consideration of these comments that suggest changes to the Rule.

BACKGROUND

As background, Inspector Nation is the largest home inspector organization in North Carolina. Of the approximately 1,740 home inspectors in North Carolina, about 1,530 receive their annual education and certification from Inspector Nation. In 2015, Inspector Nation started to offer certification for radon testing as part of its list of offerings to home inspectors. Previously, home inspectors were not certified to do radon testing. By certifying home inspectors, Inspector Nation has increased awareness and use of radon testing for homebuyers.

As a result of certifying home inspectors to test for radon, Inspector Nation is now the largest radon proficiency program in North Carolina. Over 280 radon-testing professionals are currently certified by Inspector Nation. In comparison, there are two competitors that offer radon-testing certification—the National Radon Proficiency Program and the National Radon Safety Board—which have, combined, only 75 certified professionals in North Carolina.

Gregory Enterprises lobbied for the enactment of Session Law 2023-91 (the “Law”). The Law resolves a long-standing dispute between Gregory Enterprises and the Department. Back in 2018, the Department notified Gregory Enterprises that the Department would no longer promote Inspector Nation’s radon proficiency program on its NC Radon website, NCRadon.org website—but the Department would continue to promote NRPP and NRSB on the website. To prevent this unfair treatment, Gregory Enterprises filed a lawsuit and obtained a temporary restraining order and, thereafter, a preliminary injunction.

The Department explained that its treatment of Gregory Enterprises was required by a funding grant issued to the Department by the Environmental Protection Agency (“EPA”). The grant awards federal funding to the Department’s radon program through the State and Tribal Indoor Radon Grants (“SIRG”) program. The SIRG grant includes a condition that (1) the Department must provide a public list of approved radon proficiency programs and (2) “in the absence of an existing state-run process established under a state’s regulatory requirements for credentialing of radon service providers,” the Department must list only NRPP and NRSB because they have been recognized in the past as “national radon proficiency programs.” According to the Department, because North Carolina did not have a “state-run process” for “credentialing of radon service providers,” the Department was required to list NRPP and NRSB and it could not list Inspector Nation—lest the Department risk losing the federal funding.

To solve this problem, Gregory Enterprises worked with Senators Galey and Lee to introduce a bill in the General Assembly that would create an objective, state-run approval process for radon proficiency programs in North Carolina. The bill was enacted into law as Session Law 2023-91.

COMMENTS

Session Law 2023-91 is a narrowly crafted piece of legislation that creates an approval standard for radon proficiency programs to address the SIRG grant’s condition. Importantly, the Session Law does not create a licensing regime or otherwise require a person to receive approval. In other words, this approval process is entirely optional—a company does not need to receive approval in order to offer a radon proficiency program in North Carolina.

Looking at Section 2(b) of Session Law 2023-91, the law requires the Department to adopt “radon proficiency program approval rules” that include two alternative criteria for approval. S.L. 2023-91, § 2(b). Specifically, the law creates two pathways for approval: a radon proficiency company can either (1) demonstrate compliance “with the international program approval standard through accreditation by a recognized accreditation body” (i.e., become ISO certified) or (2) satisfy a list of six requirements to the Department’s satisfaction (i.e., satisfying the Department’s requirements). *See id.*, § 2(b)(3). If a company complies with one of these two alternative criteria, the Department must approve the company. *See id.*, § 2(b)(3). The Department must publish a list of companies that have been approved. *See id.*, § 2(b)(4).

Subsection (i)(4) of the Rule requires a company to submit “Additional Attachments” with its application. These additional attachments include documents establishing ISO certification (i.e., category (i)(4)(A)) and documents showing the company has satisfied the Department’s alternative

criteria (i.e., categories (i)(4)(B) through (i)(4)(F)). Notably, a company would seek the Department's approval under the Rule by either becoming ISO certified or satisfying the Department's requirements. A company that is ISO certified, therefore, would not have the documents necessary to satisfy the Department's requirements; and a company that is seeking to satisfy the Department's requirements would have documents to establish it is ISO certified. As currently drafted, however, the Rule requires a company to submit both sets of documentation. Gregory Enterprises requests that Subsection (i)(4) be revised to show that a company should submit one or the other sets of documentation, not both.

In addition to this clarification, Gregory Enterprises believes there are three provisions in the Rule that exceed the power granted to the Department by Session Law 2023-91. These following Subsections of the Rule require revision.

- **Subsection (a).** “**No person shall offer services as a radon proficiency program unless registered with the Department.**” Under Subsection (a) of the Rule, a company cannot operate a radon proficiency program unless approved by and registered with the Department. Session Law 2023-91 does not require that a radon proficiency program be approved or registered. The approval process created by Session Law 2023-91 is entirely optional. As such, the Department does not have the power to require a company to obtain approval from the Department before offering a radon proficiency program.
- **Subsection (g).** “**Persons whose radon proficiency program registrations are revoked or expired . . . shall not offer services as a radon proficiency program with a revoked or expired registration.**” Similar to Subsection (a), Subsection (g) prohibits a company from operating a radon proficiency program unless it is currently approved by the Department. Again, Session Law 2023-91 does not require that a radon proficiency program be approved or registered.
- **Subsection (h).** “**Each registrant shall, upon notice of at least 48 hours, make available to the Department for inspection records maintained pursuant to this Rule.**” Subsection (h) requires approved companies to make themselves available to inspection by the Department. Session Law 2023-91 does not give the Department a plenary inspection power of all approved providers. Rather, Session Law 2023-91 gives the Department the limited power to “regular[ly] audit[]” companies that seek to satisfy the Department's alternative criteria. There is no corresponding power to inspect or audit companies that are ISO certified (and this is because such inspections by the Department are unnecessary, because ISO-accreditation bodies already thoroughly audit ISO-accredited companies).

Because these three provisions exceed the power granted to the Department, the provisions must be removed from the Rule. Not only are these provisions in excess of the power expressly granted to the Department in Session Law 2023-91, the provisions are not necessary to effectuate the law. Therefore, including these three provisions in the Rule would exceed the authority the General Assembly granted to the Department. *See, e.g., Whittington v. N. Carolina Dep't of Hum. Res.*, 100 N.C. App. 603, 614 (1990) (“[T]he General Statutes of the state must justify any authority which administrative agencies purport to exercise.”); *Boston v. N.C. Private Protective Servs. Bd.*, 96 N.C. App. 204, 207 (1989) (“An administrative agency is a creature of the statute creating it

and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority.”).

We have included a markup of the Rule with our suggested changes.

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Again, Gregory Enterprises believes the Rule, overall, is reflective of Session Law 2023-91. We have only identified this limited number of issues for the Department’s attention and correction. We thank you for your consideration of our comments and your attention to this matter.

Sincerely,



Craig Schauer

CHAPTER 15 - RADIATION PROTECTION

SECTION .1800 – STANDARDS FOR RADON PROFICIENCY PROGRAM APPROVAL

10A NCAC 15 .1801 REQUIREMENTS FOR REGISTRATION OF RADON PROFICIENCY PROGRAMS

~~(a) No person shall offer services as a radon proficiency program unless registered with the Department.~~

(b) In addition to the definitions found in Rule .0104 of this Chapter, the following definition shall apply to this Rule: "Radon proficiency program" means an organization that provides training, competency testing, and certification to an individual as a radon professional.

(c) Persons seeking initial registration, to amend a registration, or to renew a registration as a radon proficiency program shall:

(1) submit an application for registration to the agency at the addresses shown in Rule .0111(a) of this Chapter or as otherwise instructed by the agency. Applications for initial registration and applications to renew a registration shall be submitted with supporting information demonstrating that the requirements of Paragraph (d) of this Rule and S.L. 2023-91, s.2 are met. Applications to amend a registration shall be submitted with an attachment explaining the items to be amended; and

(2) comply with the provisions of Paragraph (i) of this Rule.

(d) The Department shall approve an application for initial registration or to renew a registration as a radon proficiency program that meets the criteria set out in S.L. 2023-91, s.2.

(e) Radon proficiency program registrations issued by the Department shall expire at midnight on the expiration date stated on the radon proficiency program registration. The Department shall not issue an initial or renewed registration expiring less than one year from the date of issuance.

(f) The Department shall deny an application for initial registration or to renew a registration as a radon proficiency program if the application fails to demonstrate compliance with Paragraph (d) of this Rule and S.L. 2023-91, s.2.

(g) Persons whose radon proficiency program registrations are revoked or expired may apply for registration in accordance with Paragraph (c) of this Rule and S.L. 2023-91, s.2 ~~and shall not offer services as a radon proficiency program with a revoked or expired registration.~~

~~(h) Each registrant shall, upon notice of at least 48 hours, make available to the Department for inspection records maintained pursuant to this Rule.~~

(i) Applications submitted to the Department for registration as a radon proficiency program shall contain the following information:

(1) Box 1, check the box next to the type of registration requested;

(2) Box 2, business physical address:

(A) name of the radiation proficiency program;

(B) phone number at the physical location;

(C) website associated with the radiation proficiency program;

(D) physical address of the business, including the street address, city, county, state, and zip code. The five digit zip code may be used if the nine digit zip code is not known;

(E) mailing address if different from Box 1. If the physical and mailing addresses are the same, the mailing address may be left blank: Mailing address of the business, including city, state, and zip code. The five digit zip code may be used if the nine digit zip code is not known; and

(F) name, phone number and email for the individual completing the form.

(3) Box 3, authorizing signature of individual responsible for the radon proficiency program:

(A) name of company or corporate office;

(B) full legal name. Middle initials may be used in lieu of the full middle name; and

(C) signature of the individual registering the radiation proficiency program on behalf of the business; and

(4) Additional Attachments to include with application:

(A) For Applications seeking approval under S.L. 2023-91, s.2, Part 3a: documents establishing compliance and periodic reaccreditation with the international program approval standard through accreditation by a recognized accreditation body or demonstration of current approval by the United States Environmental Protection Agency as a radon proficiency program;

(B) For Applications seeking approval under S.L. 2023-91, s.2, Part 3b:

i. list of a board members from various private and public sector stakeholders to make decisions regarding curriculum, testing, instructor qualifications, quality assurance and control, continuing education requirements, and procedures for the handling of complaints;

ii. minimum training requirements for radon professionals for each type of certification offered;

iii. examination requirements for each type of certification;

- iv. continuing education requirements for each type of certification; and
 - v. instructor names and qualifications demonstrating relevant knowledge and experience.
- (5) copies of the registration form are available free of charge by emailing the contacts listed at <https://www.ncdhhs.gov/divisions/health-service-regulation/north-carolina-radon-program/contacts>.