

## 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 for Public Health

RULE CITATION: All Rules submitted

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 objection to this Rule for failure to comply with the APA.*

*The Board published these Rules in the November 15, 2016 Register. The noticed comment period was November 15, 2016 to January 1, 2017, a total of 47 days. (The Notice of Text is attached.) G.S. 150B-21.2(f) states that an agency must accept comments for a period of at least 60 days. Therefore, the agency failed to comply with the APA.*

*Staff recommends the Commission object to these Rules, as they were not adopted in compliance with the Administrative Procedure Act.*

Amanda J. Reeder  
Commission Counsel

## TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to adopt the rules cited as 15A NCAC 18A .1821 -.1834 and repeal the rules cited as 15A NCAC 18A .1801-.1815, .1817-.1818, .2201-.2221 and .3001-.3016.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** <http://cph.publichealth.nc.gov/>

**Proposed Effective Date:** April 1, 2017

**Public Hearing:**

**Date:** December 5, 2016

**Time:** 10:00 a.m.

**Location:** Cardinal room, located at: 5605 Six Forks Road, Raleigh, NC

**Reason for Proposed Action:** *These rules govern overall sanitation requirements for lodging establishments in North Carolina. Currently, these rules are contained in three separate sections within the environmental health rules.*

- 15A NCAC 18A .1800 – SANITATION OF LODGING PLACES (Adopt and Repeal)
- 15A NCAC 18A .2000 – SANITATION OF BED AND BREAKFAST HOMES (Repeal)
- 15A NCAC 18A .3000 – BED AND BREAKFAST INNS (Repeal)

*These separate rules share many requirements that are repeated separately within each section. The proposed rule-making action consolidates the separate sections into one set of rules.*

**Comments may be submitted to:** Chris Hoke, JD, 1931 Mail Service Center, Raleigh, NC 27699-1931, phone (919)707-5006, email [chris.hoke@dhhs.nc.gov](mailto:chris.hoke@dhhs.nc.gov).

**Comment period ends:** January 1, 2017

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact ( $\geq \$1,000,000$ )
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

**NOTE:** Pursuant to G.S. 150B-21.17, the Codifier has determined that publication of the complete text of the rules proposed for repeal is impractical. The text of the repealed rules is accessible on the OAH Website: <http://www.ncoah.com>.

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Commission Counsel

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AGENCY: Commission for Public Health

RULE CITATION: 15A NCAC 18A .1834

RECOMMENDED ACTION:

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

COMMENT:

*Staff recommends objection to this Rule for lack of statutory authority and ambiguity.*

*This Rule establishes an informal review process and right to a contested case. The Rule does not cite to, and staff is not aware of, any statutory authority for the agency to do this.*

*Subparagraph (a)(2) states that if a permit holder disagrees with a decision of the local health department, the permit holder may initiate a contested case pursuant to G.S. 150B.*

*However, G.S. 150B-2(2) defines a "contested case" as:*

- (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute **between an agency and another person** that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

*And G.S. 150B-2(1a) defines "agency" as:*

- (1a) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's

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Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

*Staff is not aware of, and the agency does not provide, any statutory authority for a local department of health to be considered an “agency” such that they would be subject to contested cases pursuant to G.S. 150B.*

*It may be that the intent of the Rule is to allow a contested case following an adverse decision by the Commission for Public Health or the Department for Public Health, both of whom are agencies pursuant to G.S. 150B-2, but that is not how the Rule is written.*

*Further, staff notes that the Rule states that a permit holder may file a contested case when he or she disagrees with “the interpretation, application, or enforcement of the rules.” However, G.S. 15B-2(2) states that a contested case may be filed when it involves “rights, duties, or privileges.” It is unclear if a disagreement of “interpretation and application” will involve rights, duties, or privileges and thus creating the jurisdiction for a contested case.*

*Further, the statutory authority cited to by the agency makes no mention of any appeals following decisions in (a) by local health departments, even the informal review addressed by Paragraphs (d) through (f) of the Rule. There may be authority for the agency to create these appeals, but the agency has not provided any statutory authority for this Rule.*

*Therefore, staff recommends objection to this Rule for lack of statutory authority and ambiguity.*

**§ 130A-248. Regulation of food and lodging establishments.**

(a) For the protection of the public health, the Commission shall adopt rules governing the sanitation of establishments that prepare or serve drink or food for pay and establishments that prepare and sell meat food products or poultry products. However, any establishment that prepares or serves food or drink to the public, regardless of pay, shall be subject to the provisions of this Article if the establishment that prepares or serves food or drink holds an ABC permit, as defined in G.S. 18B-101, meets any of the definitions in G.S. 18B-1000, and does not meet the definition of a private club as provided in G.S. 130A-247(2).

(a1) For the protection of the public health, the Commission shall adopt rules governing the sanitation of hotels, motels, tourist homes, and other establishments that provide lodging for pay.

(a2) For the protection of the public health, the Commission shall adopt rules governing the sanitation of bed and breakfast homes, as defined in G.S. 130A-247, and rules governing the sanitation of bed and breakfast inns, as defined in G.S. 130A-247. In carrying out this function, the Commission shall adopt requirements that are the least restrictive so as to protect the public health and not unreasonably interfere with the operation of bed and breakfast homes and bed and breakfast inns.

(a3) The rules adopted by the Commission pursuant to subsections (a), (a1), and (a2) of this section shall address, but not be limited to, the following:

- (1) Sanitation requirements for cleanliness of floors, walls, ceilings, storage spaces, utensils, ventilation equipment, and other areas and items;
- (2) Requirements for:
  - a. Lighting and water supply;
  - b. Wastewater collection, treatment, and disposal facilities; and
  - c. Lavatory and toilet facilities, food protection, and waste disposal;
- (3) The cleaning and bactericidal treatment of eating and drinking utensils and other food-contact surfaces. A requirement imposed under this subdivision to sanitize multiuse eating and drinking utensils and other food-contact surfaces does not apply to utensils and surfaces provided in the guest room of the lodging unit for guests to prepare food while staying in the guest room.
- (3a) The appropriate and reasonable use of gloves or utensils by employees who handle unwrapped food;
- (4) The methods of food preparation, transportation, catering, storage, and serving;
- (5) The health of employees;
- (6) Animal and vermin control; and
- (7) The prohibition against the offering of unwrapped food samples to the general public unless the offering and acceptance of the samples are continuously supervised by an agent of the entity preparing or offering the samples or by an agent of the entity on whose premises the samples are made available. As used in this subdivision, "food samples" means unwrapped food prepared and made available for sampling by and without charge to the general public for the purpose of promoting the food made available for sampling. This subdivision does not apply to unwrapped food prepared and offered in buffet, cafeteria, or other style in exchange for payment by the general public or by the person or entity arranging for the preparation and offering of such unwrapped food. This subdivision shall not apply to open air produce markets nor to farmer market facilities operated on land owned or leased by the State of North Carolina or any local government.

The rules shall contain a system for grading establishments, such as Grade A, Grade B, and Grade C. The rules shall be written in a manner that promotes consistency in both the interpretation and application of the grading system.

(a4) For the protection of the public health, the Commission shall adopt rules governing the sanitation of limited food service establishments. In adopting the rules, the Commission shall not limit the number of days that limited food service establishments may operate. Limited food service establishment permits shall be issued only to political subdivisions of the State, establishments operated by volunteers that prepare or serve food in conjunction with amateur athletic events, or for establishments operated by organizations that are exempt from federal income tax under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code.

(a5) The Department of Health and Human Services may grant a variance from rules adopted pursuant to this section in accordance with the United States Food and Drug Administration Food Code 2009 if the Department determines that the issuance of the variance will not result in a health hazard or nuisance condition.

(a6) Notwithstanding any provision of this Part or any rules adopted pursuant to G.S. 130A-335(e), a permitted food stand may elect to provide tables and not more than eight seats for customers to use while eating or drinking on the premises. Addition of seats under this subsection shall not require further evaluation of the adequacy of the approved sanitary sewage system.

(b) No establishment shall commence or continue operation without a permit or transitional permit issued by the Department. The permit or transitional permit shall be issued to the owner or operator of the establishment and shall not be transferable. If the establishment is leased, the permit or transitional permit shall be issued to the lessee and shall not be transferable. If the location of an establishment changes, a new permit shall be obtained for the establishment. A permit shall be issued only when the establishment satisfies all of the requirements of the rules. The Commission shall adopt rules establishing the requirements that must be met before a transitional permit may be issued, and the period for which a transitional permit may be issued. The Department may also impose conditions on the issuance of a permit or transitional permit in accordance with rules adopted by the Commission. A permit or transitional permit shall be immediately revoked in accordance with G.S. 130A-23(d) for failure of the establishment to maintain a minimum grade of C. A permit or transitional permit may otherwise be suspended or revoked in accordance with G.S. 130A-23.

(b1) A permit shall expire one year after an establishment closes unless the permit is the subject of a contested case pursuant to Article 3 of Chapter 150B of the General Statutes.

(c) If ownership of an establishment is transferred or the establishment is leased, the new owner or lessee shall apply for a new permit. The new owner or lessee may also apply for a transitional permit. A transitional permit may be issued upon the transfer of ownership or lease of an establishment to allow the correction of construction and equipment problems that do not represent an immediate threat to the public health. Upon issuance of a new permit or a transitional permit for the same establishment, any previously issued permit for an establishment in that location becomes void. This subsection does not prohibit issuing more than one owner or lessee a permit for the same location if (i) more than one establishment is operated in the same physical location and (ii) each establishment satisfies all of the rules and requirements of subsection (g) of this section. For purposes of this subsection, "transitional permit" shall mean a permit issued upon the transfer of ownership or lease of an existing food establishment to allow the correction of construction and equipment problems that do not represent an immediate threat to the public health.

(c1) The Commission shall adopt rules governing the sanitation of pushcarts and mobile food units. A permitted restaurant or commissary shall serve as a base of operations for a pushcart. A

mobile food unit shall meet all of the sanitation requirements of a permitted commissary or shall have a permitted restaurant or commissary that serves as its base of operation. Pushcarts or mobile food units that are based from a permitted commissary or restaurant that is located on the premises of a facility which contains at least 3,000 permanent seats shall be allowed to prepare and serve food on the premises. Raw meat, poultry, and fish shall be prepared in a permitted commissary or restaurant in a pre-portioned or ready-to-cook form. Pushcarts or mobile food units that handle raw ingredients shall be equipped with a handwashing sink. All open food and utensils shall be provided with overhead protection or otherwise equipped with individual covers, such as domes, chafing lids, or cookers with hinged lids. Food equipment and supplies shall be located in enclosed areas and protected from environmental contamination when not in operation.

(d) The Department shall charge each establishment subject to this section, except nutrition programs for the elderly administered by the Division of Aging and Adult Services of the Department of Health and Human Services, establishments that prepare and sell meat food products or poultry products, temporary food establishments, limited food services establishments, and public school cafeterias, a fee of one hundred twenty dollars (\$120.00) for each permit issued. This fee shall be reassessed annually for permits that do not expire. The Commission shall adopt rules to implement this subsection. Fees collected under this subsection shall be used for State and local food, lodging, and institution sanitation programs and activities. No more than fifty dollars (\$50.00) of each fee collected under this subsection may be used to support State health programs and activities.

(d1) The Department shall charge a twenty-five dollar (\$25.00) late payment fee to any establishment subject to this section, except nutrition programs for the elderly administered by the Division of Aging of the Department of Health and Human Services, establishments that prepare and sell meat food products or poultry products, temporary food establishments, limited food services establishments, and public school cafeterias, that fails to pay the fee required by subsection (d) of this section within 45 days after billing by the Department. The Department may, in accordance with G.S. 130A-23, suspend the permit of an establishment that fails to pay the required fee within 60 days after billing by the Department. The Department shall charge a reinstatement fee of one hundred fifty dollars (\$150.00) to any establishment that requests reinstatement of its permit after the permit has been suspended. The Commission shall adopt rules to implement this subsection.

The clear proceeds of civil penalties collected pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d2) A local health department shall charge each temporary food establishment and each limited food services establishment a fee of seventy-five dollars (\$75.00) for each permit issued. A local health department shall use all fees collected under this subsection for local food, lodging, and institution sanitation programs and activities.

(e) In addition to the fees under subsection (d) of this section, the Department may charge a fee of two hundred fifty dollars (\$250.00) for plan review of plans for prototype franchised or chain facilities for food establishments subject to this section. All of the fees collected under this subsection may be used to support the State food, lodging, and institution sanitation programs and activities under this Part.

(e1) Plans for a franchised or chain food establishment that have been reviewed and approved by the Department shall not require further review and approval under this section by any local health department. The local health department may suggest revisions to a reviewed and approved plan to the Department. The local health department shall not impose any of the suggestion revisions on the owner or operator without written approval from the Department.

(f) Any local health department may charge a fee not to exceed two hundred fifty dollars (\$250.00) for plan review by that local health department of plans for food establishments subject to this section that are not subject to subsection (e) of this section. All of the fees collected under this subsection may be used for local food, lodging, and institution sanitation programs and activities. No food establishment that pays a fee under subsection (e) of this section is liable for a fee under this subsection.

(g) All hotels, motels, tourist homes, and other establishments that provide lodging for pay shall comply with the requirements of G.S. 143-138(b2)(2). Upon notification of a violation of G.S. 143-138(b2)(2) by the code official responsible for enforcing the NC State Building Code (Fire Prevention) in accordance with G.S. 143-138(b2)(4), the local health department is authorized to suspend a permit issued pursuant to this section in accordance with G.S. 130A-23. (1941, c. 309, s. 1; 1955, c. 1030, s. 1; 1957, c. 1214, s. 1; 1973, c. 476, s. 128; 1983, c. 891, s. 2; 1987, c. 438, s. 2; 1989, c. 551, ss. 1, 4; 1989 (Reg. Sess., 1990), c. 1064, s. 1; 1991, c. 226, s. 1; c. 656, ss. 1, 2; c. 733, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 7; 1993, c. 262, s. 2; c. 346, s. 1; c. 513, s. 13; 1995, c. 123, s. 13(a)-(d); c. 507, s. 26.8(b), (g); 1997-367, s. 1; 1997-443, s. 11A.118(a); 1997-479, s. 1; 2002-126, ss. 29A.15(a), 29A.16; 2003-340, ss. 1.5, 3; 2005-276, s. 6.37(s); 2009-451, s. 13.2(a)-(c); 2009-484, s. 2(b); 2011-145, s. 31.11A(a); 2011-391, s. 61A; 2011-394, s. 15(b); 2012-142, s. 10.15; 2012-187, s. 16.2; 2013-360, s. 12E.1(b)-(d), (f); 2013-413, ss. 11(b), 19(b), (c); 2014-120, s. 22(a), (b), (d); 2015-104, ss. 1, 2; 2015-246, s. 10; 2015-286, s. 3.8.)



1 15A NCAC 18A .1834 is adopted as published in 31:10 NCR 966-974 as follows:

2  
3 **15A NCAC 18A .1834 INFORMAL REVIEW PROCESS AND APPEALS PROCEDURE**

4 (a) If a permit holder disagrees with a decision of the local health department on the interpretation, application, or  
5 enforcement of the rules of this section the permit holder may:

6 (1) Request an informal review pursuant to Paragraphs (d) and (e) of this Rule; or

7 (2) Initiate a contested case in accordance with G.S. 150B.

8 (b) The permit holder is not required to complete the alternative dispute resolution prior to initiating a contested case  
9 in accordance with G.S. 150B.

10 (c) When a petition for a contested case is filed, the informal review process shall terminate.

11 (d) If the permit holder requests an informal review, the request shall be in writing and shall be postmarked or hand  
12 delivered to the local health department within seven days of notice of the decision giving rise to the review. The  
13 request shall state the issues in dispute. If the inspection giving rise to the informal review was conducted by the  
14 Environmental Health Supervisor in the county or area where the lodging establishment is located, or when the county  
15 or area has only one Registered Environmental Health Specialist assigned to inspect lodging establishments, the  
16 Environmental Health Regional Specialist assigned to that county or area shall conduct the local informal review. As  
17 soon as possible, but at least within 30 days of receipt of the request, the person conducting the review shall contact  
18 the permit holder, provide that permit holder an opportunity to be heard on the issues in dispute and issue a written  
19 decision addressing the issues raised in the appeal. Copies of the decision shall be mailed to the permit holder and to  
20 the State Health Director. That decision shall be binding for the purposes of future inspections of the establishment in  
21 question unless modified pursuant to Paragraph (e) of this Rule or by the State Health Director.

22 (e) Following receipt of the written decision of the Environmental Health Supervisor or his or her representative  
23 issued pursuant to Paragraph (d) of this Rule, the permit holder who initiated the informal review may appeal the  
24 resulting decision to an Informal Review Officer designated by the Department to be responsible for final decisions  
25 on appeals from throughout the state. Notice of such appeal shall be in writing, shall include a copy of the  
26 Environmental Health Supervisor's or his or her representative's decision, and shall be postmarked or hand-delivered  
27 to the local health department and to the Department within seven days of receipt of the written decision issued  
28 pursuant to Paragraph (a) of this Rule. Within 35 days of receipt of this appeal, the designated Informal Review Officer  
29 shall hold a conference in Wake County. At least 10 days prior to the conference, the Informal Review Officer shall  
30 provide notice of the time and place of this conference to the permit holder and the Environmental Health Supervisor  
31 for the county or area where the issue arose. Within 10 days following the date of the conference, the Informal Review  
32 Officer shall issue a written decision addressing the issues raised in the appeal and that decision shall be binding for  
33 purposes of future inspections of the establishment in question unless modified pursuant to Paragraph (g) of this Rule  
34 or by the State Health Director.

35 (f) If the decision on appeal at the local or state level results in a change in the score resulting from an inspection of  
36 an establishment, the regulatory authority shall post a new grade card reflecting that new score.

37 (g) Appeals of the decision of the designated Informal Review Officer shall be in accordance with G.S. 150B.

1 (h) Nothing in this Rule shall impact the right of a permit holder to a reinspection pursuant to Rule .1831 of this  
2 Section.

3  
4 *History Note: Authority G.S. 130A-248;*  
5 *Eff. July 1, 2017.*