**RULES REVIEW COMMISSION MEETING**

**MINUTES**

***June 19, 2013***

The Rules Review Commission met on Thursday, June 19, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Bob Rippy and Stephanie Simpson.

Staff members present were: Joe DeLuca and Amanda Reeder, Commission Counsel; Molly Masich, Dana Vojtko, Julie Edwards and Tammara Chalmers.

The meeting was called to order at 10:09 a.m. with Vice-Chairman Currin presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

**APPROVAL OF MINUTES**

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the May 16, 2013 meeting. There were none and the minutes were approved as distributed.

Commissioner Doran introduced Ashley Berger, an intern with her office.

Vice-Chairman Currin asked if there were any other visiting interns and Melissa Schoeman with the Department of Justice introduced herself.

**FOLLOW-UP MATTERS**

**Office of Information Technology Services**

09 NCAC 06A .0101, .0102, .0103; 06B 0101, .0102, .0103, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0301, .0302, .0303, .0304, .0305, .0306, .0307, .0308, .0309, .0310, .0311, .0312, .0313, .0314, .0315, .0316, .0401, .0402, .0403, .0404, .0405, .0501, .0502, .0503, .0504, .0505, .0601, .0602, .0603, .0701, .0702, .0703, .0801, .0901, .0902, .1001, .1002, .1003, .1004, .1005, .1006, .1008, .1101, .1102, .1103, .1104, .1105, .1106, .1107, .1108, .1109, .1110, .1111, .1112, .1114, .1115, .1117, .1118, .1120, .1121, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1301, .1302, .1303, .1304, .1305, .1402 – There has been no response from the agency and no action was taken on these rules.

**Board of Barber Examiners**

21 NCAC 06A .0103, .0303; 06C .0907, 06F.0101, .0116; 06H .0101; 06I .0105; 06J .0101; 06K .0104; 06L .0103; .0114, .0118, .0119; 06M .0101, .0102; 06N .0104, .0105, .0108, .0109, .0112; 06Q .0101, .0103; 06S .0101 - There has been no response from the agency and no action was taken on these rules.

**Hearing Aid Dealers and Fitters Board:**

21 NCAC 22F .0120, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209 – There has been no response from the agency as the rules are still in the public comment period. No action was taken on these rules.

**Board of Podiatry Examiners**

21 NCAC 52 .0211 - The Commission unanimously approved the re-written rule.

**LOG OF FILINGS**

Vice-Chairman Currin presided over the review of the log of permanent rules.

**Department of Commerce – Credit Union Division**

All rules were unanimously approved.

**Department of Cultural Resources**

07 NCAC 04N .0202 was unanimously approved.

**Commission for Public Health**

10A NCAC 41A .0101 was unanimously approved.

**Private Protective Services Board**

The rules were withdrawn at the request of the agency. They have been refiled for Commission review at the July meeting.

**Environmental Management Commission**

All rules were unanimously approved with the following exception:

15A NCAC 02B .0295 – The Commission objected to this rule based on ambiguity.

The Commission objected to Paragraph (c) of this rule based on ambiguity. On its face it requires that an applicant:

“shall submit to the Division a . . . mitigation proposal . . . . [that] shall include conservation easements . . . to ensure perpetual maintenance and protection of the site’s . . . functions, a non-wasting endowment or other financial mechanism for perpetual maintenance and protection, and a completion bond . . . .”

It would appear that the rule requires an applicant to submit with his proposal a signed conservation easement (if applicable), an endowment, and a completion bond, all of which could be quite costly. This is before the application is acted upon and could be rejected. However, it appears the agency does not intend to require fulfillment of all these conditions until after the application is approved. At the very least this creates some ambiguity in the way the rule reads and the way the agency has indicated that it intends to enforce the rule.

The Commission objected to Paragraph (g) of this rule based on ambiguity. In (g), page 6 line 12, it is unclear what constitutes a “forested riparian buffer.” There is no definition for “forested” and no definition for “riparian buffer.” Since attaining this condition is one of the purposes for or goals of engaging in either “enhancement” or “restoration” it has to be clear if it is attained or at least attainable.

In (g)(6)(B), page 7 lines 16 and 17, it is unclear whether in approving alternative plans the division is permitted to waive the requirements of (c) or merely the requirements in this sub-sub-paragraph. In either case the goal or purpose of this part of the rule, and what the alternative plan is to be measured against, must be made clear.

The Commission objected to Paragraphs (j) and (k) based on the same ambiguity. In (j) on page 9 of the rule, it is unclear whether an applicant can mix various mitigation possibilities in all cases. Paragraph (c)(1) – (3) (page 3 of the rule) appears to allow an applicant to use any of certain means to mitigate that damage:

(1) The applicant can take physical steps to repair or replace the damage at that site or another site;

(2) The applicant can pay money into a fund; or

(3) The applicant can donate real property to use as a conservation easement.

In (c) lines 19 – 22, the rule states that an applicant can propose “any of [the above] types of mitigation.” This belief that the rule appears to allow a mixture also reappears in (j)(1) lines 3 – 5. That part of the rule states that donation of real property interests may be used to either “partially or fully satisfy” the payment of a compensatory mitigation fee. That same sub-paragraph, in lines 8 and 9, goes on to say that if the value of the donated property is less than the required fee, the applicant shall “pay the remaining balance due.” However (j)(3)(C) requires that the size of the buffer of donated real property must equal the required mitigation area. That appears to limit the application of (c)(3) and (j)(1). The last line of sub-sub-paragraph (j)(3)(D) in line 1 at the top of page 10 also requires that “[r]estoration of the [donated] property shall be capable of fully offsetting the adverse impacts of the requested use.” (Emphasis added.) This also appears to limit the application of (c)(3) and (j)(1). At any rate both of these provisions certainly make the rule unclear as to whether or not using a mix applies in all cases.

This lack of clarity as to what mitigation means are available occurs again in (k)(2)(B) page 13, lines 4 through 6, where precise area requirements for restoration or enhancement projects are set out.

If the applicant is not permitted to use a mix of the allowed mitigations, then the rule needs to be rewritten to state that “the applicant shall use one of the following forms of mitigation” (or similar language) rather than “any of the following.”

Mr. DeLuca informed the Commission that three letters of objection had been filed for this rule, and the Commission could continue to receive these letters until the day after it approved the rule.

Jennifer Everett with the agency addressed the Commission.

**Coastal Resources Commission**

All rules were unanimously approved.

**Commission for Public Health**

15A NCAC 18C .0203 – The Commission unanimously approved Paragraph (a) of the rule. The Commission took no action on Paragraph (b) of the rule because S.L. 2011-394 requires the agency to adopt rules "substantively identical" to the session law and exempts those rules from the application of G.S. 150B-21.9 through 150B-21.14. Paragraph (b) is substantively identical to the rules in the session law. The session law further stated that the rule would become effective as provided in G.S. 150B-21.3(b1), as though ten or more letters of objection were received pursuant to G.S. 150B-21.3(b2), so the rule requires legislative review before it can be entered into the Code.

**G.S 150B-19.1(h) RRC CERTIFICATION**

**Home Inspector Licensure Board**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 11 NCAC 08 .1202, .1203, .1204, .1205.

Commissioner Dunklin left the room and was not present for the vote on these rules.

**Private Protective Services Board**

The Commission did not certify that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 07D .0501, .0502, .0503, .0504.

12 NCAC 07D .0501 - There is no authority cited for the provision in (a)(4) lines 16 and 17 that the military trained applicant for a polygraph license under G.S. 93B-15.1 have served as a “manager, supervisor, or administrator” performing polygraph examinations. The only requirement in the statute is that the applicant be a “military-trained applicant” who meets the four listed requirements in (a)(1) – (4). Being a “manager, supervisor, or administrator” is not one of those requirements. For the same reason there is no authority to require that a military spouse applying for licensure under G.S. 93B-15.1 have served as a “manager, supervisor, or administrator” performing polygraph examinations. That person’s requirements are in (b)(1) – (5).

12 NCAC 07D .0502, .0503, .0504 - The agency has not answered all the questions on the certification form and therefore the Commission is not able to certify that the agency has complied with G.S. 150B-19.1.

**Criminal Justice Education and Training Standards Commission**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 09B .0205, .0241; 09E .0104; 09F .0107; 09G .0415 and .0416.

**State Board of Education**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 16 NCAC 06G .0312.

**COMMISSION BUSINESS**

Molly Masich updated the Commission on H.B. 74.

Amanda Reeder updated the Commission on legislation being tracked by staff.

The meeting adjourned at 11:59 a.m.

The next scheduled meeting of the Commission is Thursday, July 18th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings / Rules Division.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission:

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Margaret Currin, Vice-Chair



