**RULES REVIEW COMMISSION**

**September 15, 2011**

**MINUTES**

The Rules Review Commission met on Thursday, September 15, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Addison Bell, Margaret Currin, Garth K. Dunklin, George Lucier, Pete Osborne, Stephanie Simpson, Curtis Venable, Ralph Walker and Faylene Whitaker.

Staff members present were: Commission Counsels Joe DeLuca and Bobby Bryan, Dana Vojtko, Julie Edwards and Tammara Chalmers

The meeting was called to order at 10:09 a.m. with Judge Walker presiding. He 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**

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the August 18, 2011 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

11 NCAC 08 .1006 – Home Inspector Licensure Board. The Commission approved the rewritten rule submitted by the agency.

12 NCAC 0720 .1303 – Private Protective Services Board. The Commission approved the rewritten rule submitted by the agency.

Prior to the review of the rule from the Environmental Management Commission, Commissioner Osborne recused himself and did not participate in any discussion or vote concerning these rules because he owns property on the Dan River.

15A NCAC 02B .0313 – Environmental Management Commission. Elizabeth Kountis from the Division of Water Quality addressed the Commission. The Commission approved the rewritten rule submitted by the agency.

The Commission received more than 10 written letters of objection to 15A NCAC 02B .0313. This Rule is now subject to legislative review and a delayed effective date.

21 NCAC 31 .0201, .0501, .0801 – Marriage and Family Therapy Licensure Board. The Commission approved the rewritten rules submitted by the agency contingent upon receiving a technical change. The technical change was received after the meeting.

**LOG OF FILINGS**

Chairman Walker presided over the review of the log of permanent rules.

**Department of Agriculture**

David McLeod with the Department of Agriculture addressed the Commission.

All rules were approved unanimously with the following exceptions:

02 NCAC 38 .0701 – The Commission objected to this Rule based on ambiguity. In Sub-item (1)(c), it is not clear what is meant by "anticipated" weather and ground moisture conditions.

02 NCAC 43L .0309 – The Commission objected to this Rule based on lack of statutory authority and ambiguity. In (a), it is not clear what the amount of the "established admission fee" is. Paragraphs (d) and (e) had established the fees, but they are being deleted. G.S. 150B-2(8a) specifically includes the establishment of a fee in the definition of "rule." Pursuant to G.S. 150B-18 a rule (thus any fee established) is not valid if it is not adopted in substantial compliance with the Administrative Procedure Act (APA). G.S. 106-6.1 gives the Board the authority to establish a rate schedule for facilities operated by the Department, subject to the provisions of Chapter 146 of the General Statutes. There does not appear to be anything in Chapter 146 that would remove the establishment of this fee from the requirement that it be adjusted as a rule.

**Office of the Commissioner of Banks**

04 NCAC 03C .1302 was approved by the Commission.

04 NCAC 03C .0807 and .1001, 16A, 16C, 16D, 16E, 16F (all the remaining rules in each subchapter except 16A.0301 and .0302 which are set out below) – The Commission extended the period of review on the above captioned rules in accordance with G.S. 150B-21.13.

The Commission did so in order to give the agency and RRC counsel an opportunity to see if some agreement could be reached on staff’s requested technical changes. If no agreement can be reached then the Commission Counsel at the October meeting will identify the rules he will recommend that the Commission object to and the basis for that recommendation.

Although the Commission had approved the two Subchapter 03C rules referred to above, that approval is always contingent on the technical changes being made as set out in G.S. 150B-21.10. The agency has not made those changes and the condition has not been complied with. Since the Commission extended the period of review on the remaining rules primarily because the requested technical changes had not been made, the approval is rescinded and those two rules are included within this group of rules for which the review period has been extended.

04 NCAC 16A .0301 - The Commission objected to this Rule based on lack of statutory authority. In (a) the rule requires a petitioner to “possess such an interest in the question to be ruled on that the petitioner’s need to have such a ruling ... shall be apparent from the petition.”

G.S. 150B-4 sets out the only statutory requirement for the status of a person seeking a declaratory ruling. The person must be a “person aggrieved.” G.S. 150B-2(6) defines a “person aggrieved” as “any person ... directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.” There is no authority cited for the agency’s changing this requirement. If that is not what is meant or intended by this rule, then the rule is unclear.

04 NCAC 16A .0302 - The Commission objected to this Rule based on lack of statutory authority and ambiguity. There is no authority cited for the Commissioner to wait 60 days to deny a request for a declaratory ruling as set out in (a). G.S. 150B-4(a1) requires the Commissioner to grant or deny the request within 30 days of receiving the petition.

For the same reason as set out in the recommendation to object to Rule .0301 there is no authority to deny a request because the “petitioner does not ... possess sufficient interest in the question to be ruled on” as set out in (b)(4). If a petitioner is a “person aggrieved” under the APA then by definition they have “sufficient interest” to petition and the agency must deny the petition for some other reason.

**Social Services Commission**

Commissioners Dunklin and Osborne were not present during this vote.

10A NCAC 70M .0403 was approved unanimously.

**Department of Insurance**

11 NCAC 13 .0308 was withdrawn by the agency.

**Commission for Public Health**

Commissioners Dunklin and Osborne were not present during this vote.

15A NCAC 18A .1970 was approved unanimously.

**Interpreter and Transliterator Licensing Board**

James Wellons representing the Board addressed the Commission.

21 NCAC 25 .0209 - The Commission objected to this Rule based on lack of statutory authority. There is no authority cited for the agency to refuse to renew the license of a licensee because of failure to pay a civil penalty. G.S. 90D-12 lists reasons that the Board may deny, suspend, revoke or refuse to license a licensee and failure to pay a civil penalty is not one of them. There is no authority cited to set renewal requirements beyond those set by the statute.

**Onsite Wastewater Contractors and Inspectors Certification Board**

Commissioner Venable was not present during this vote.

All rules were approved unanimously with the following exceptions:

21 NCAC 39 .0801 - The Commission objected to this Rule based on ambiguity. Paragraph (a) is too vague for anyone to know exactly what is required.

21 NCAC 39 .1003 was withdrawn by the agency.

**Board of Examiners for Plumbing, Heating and Fire Sprinkler Contractors**

All rules were approved unanimously.

**TEMPORARY RULES**

**Department of Cultural Resources**

07 NCAC 04N .0202 was approved unanimously.

**Wildlife Resources Commission**

All rules were approved unanimously.

**COMMISSION PROCEDURES AND OTHER BUSINESS**

The meeting adjourned at 12:18 p.m.

That afternoon between 1:00 and 3:00 p.m., Ms. Mary Shuping, the Ethics Training Director from the State Board of Ethics presented Commissioners Bell, Currin, Dunklin, Simpson, Venable, Walker and Whitaker their required ethics training. Mr. DeLuca as ethics liaison for the Commission also received training.

The next scheduled meeting of the Commission is Thursday, October 20 at 10:00 a.m.

Respectfully Submitted,

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Julie Edwards

Editorial Assistant

Minutes approved by the Rules Review Commission.

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Judge Ralph A. Walker/Chair

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Date

