RRC STAFF OPINION

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0603

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

X Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

COMMENT:

*The first issue is why there are two rules that appear to address substantially the same process and have sometimes similar as well as different requirements. This rule as well as Rule .0609 both address the issuance or denial of a selective vegetation removal permit. It appears these rules should be combined into one rule. Otherwise there is the possibility of confusing people as to what the actual requirements are as well as setting up the possibility in the future of creating conflicts in the two rules.*

*There is no authority cited for the provision in (a), lines 12 and 13, which gives the agency more than 30 days to approve or deny the selective vegetation removal permit. In fact, G.S. 136-133.2 explicitly states that if the applicant does not receive “written notice of approval or denial ... within the 30-day period, the application shall be deemed approved.”*

*The problem for the DOT is that the legislation created what appears to be an impossibility. G.S. 136-93(d) requires the agency to give municipalities “30 days to review and provide comments on the application” (for signs within their corporate limits) while the statute cited above requires them to act on the application – or it is deemed approved – within that same 30-day window.*

*Even though the legislature appears to create an impossibility it still requires the agency to fulfill both requirements: the requirement to allow municipalities 30-days to review the permit application and the requirement to act on the application itself within 30 days. The agency may not choose – does not have the authority – to fulfill one requirement at the expense of fulfilling the other requirement.*

*Counsel does note that he believes there are approaches that may allow the agency to give municipalities the 30-days required by the legislation while at the same time acting expeditiously on the application, even if not within the 30-days required under the same legislation. However that is for the agency to choose.*

 **"§ 136-93. Openings, structures, pipes, trees, and issuance of permits.**

(a) No opening or other interference whatsoever shall be made in any State road or highway other than streets not maintained by the Department of Transportation in cities and towns, nor shall any structure be placed thereon, nor shall any structure which has been placed thereon be changed or removed except in accordance with a written permit from the Department of Transportation or its duly authorized officers, who shall exercise complete and permanent control over such roads and highways. No State road or State highway, other than streets not maintained by the Department of Transportation in cities and towns, shall be dug up for laying or placing pipes, conduits, sewers, wires, railways, or other objects, and no tree or shrub in or on any State road or State highway shall be planted, trimmed, or removed, and no obstruction placed thereon, without a written permit as hereinbefore provided for, and then only in accordance with the regulations of said Department of Transportation or its duly authorized officers or employees; and the work shall be under the supervision and to the satisfaction of the Department of Transportation or its officers or employees, and the entire expense of replacing the highway in as good condition as before shall be paid by the persons, firms, or corporations to whom the permit is given, or by whom the work is done. The Department of Transportation, or its duly authorized officers, may, in its discretion, before granting a permit under the provisions of this section, require the applicant to file a satisfactory bond, payable to the State of North Carolina, in such an amount as may be deemed sufficient by the Department of Transportation or its duly authorized officers, conditioned upon the proper compliance with the requirements of this section by the person, firm, or corporation granted such permit. Any person making any opening in a State road or State highway, or placing any structure thereon, or changing or removing any structure thereon without obtaining a written permit as herein provided, or not in compliance with the terms of such permit, or otherwise violating the provisions of this section, shall be guilty of a Class 1 misdemeanor: Provided, this section shall not apply to railroad crossings. The railroads shall keep up said crossings as now provided by law.

(b) Except as provided in G.S. 136-133.1(g), no vegetation, including any tree, shrub, or underbrush, in or on any right-of-way of a State road or State highway shall be planted, cut, trimmed, pruned, or removed without a written selective vegetation removal permit issued pursuant to G.S. 136-133.2 and in accordance with the rules of the Department. Requests for a permit for selective vegetation cutting, thinning, pruning, or removal shall be made by the owner of an outdoor advertising sign or the owner of a business facility to the appropriate person in the Division of Highways office on a form prescribed by the Department. For purposes of this section, G.S. 136-133.1, 136-133.2, and 136-133.4, the phrase "outdoor advertising" shall mean the outdoor advertising expressly permitted under G.S. 136-129(a)(4) or G.S. 136-129(a)(5). These provisions shall not be used to provide visibility to on-premises signs.

(c) For outdoor advertising, vegetation cut or removal limits shall be restricted to a maximum selective vegetation cut or removal zone for each sign face pursuant to the provisions of G.S. 136-133.1. Page 2 Session Law 2011-397 SL2011-0397

(d) If the application for vegetation cutting, thinning, pruning, or removal is for a site located within the corporate limits of a municipality, the municipality shall be given 30 days to review and provide comments on the application if the municipality has previously advised the Department in writing of the desire to review such applications and the name of the local official to whom notice of such application should be directed."

**§ 136-133.2. Issuance or denial of a selective vegetation removal permit.**

Except as provided in G.S. 136-133.1(g), permits to remove vegetation may be granted for outdoor advertising locations that have been permitted for at least two years prior to the date of application. The Department shall approve or deny an application submitted pursuant to this section, including the fee required by G.S. 136-18.7 and all required documentation, within 30 days of the receipt of an application for a selective vegetation removal permit. If written notice of approval or denial is not given to the applicant within the 30-day period, then the application shall be deemed approved. If the application is denied, the Department shall advise the applicant, in writing, by registered or certified mail, return receipt requested, addressed to the party to be noticed, and delivering to the addressee, the reasons for the denial.

**RRC STAFF OPINION**

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0609

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

X Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*For the same reasons as stated in counsel’s opinion that the RRC should object to Rule .0603, the commissioners should object to this rule as well.*

**RRC STAFF OPINION**

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AGENCY: NC DEPARTMENT OF TRANSPORTATION

RULE CITATION: 19A NCAC 02E .0611

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

X Unclear or ambiguous

 Unnecessary

 Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

*There does not appear to be any authority cited for the provision in (f), page 3 lines 20 – 21, to require that any “beautification and replanting plan” submitted by an applicant to be prepared and sealed by a licensed landscape architect.*

*It is also unclear what standards the agency shall use to approve any designs that are submitted. There is no authority to set those standards outside rulemaking.*

*For that same reason there is no authority for the provision in (g)(3) page 4 where the agency requires that it approve all plant materials without setting out the approval standards.*