

RULES REVIEW COMMISSION MEETING
MINUTES
May 20, 2021

The Rules Review Commission met on Thursday, May 20, 2021 in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina, and via WebEx. The Commissioners held a WebEx meeting in accordance with the provisions of G.S. 143-318.13.

Commissioner Bob Rucho was present in the Commission Room. Commissioners present via WebEx were Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeanette Doran, Jeff Hyde, Randy Overton, and Paul Powell.

Staff members present were Alex Burgos and Commission Counsel Ashley Snyder, and Amanda Reeder. Commission Counsel Amber May was present via WebEx.

The meeting was called to order at 9:00 a.m. with Chair Doran presiding.

The Chair read the notice required by G.S. 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearance of conflicts of interest.

APPROVAL OF MINUTES

The Chair asked for any discussion, comments, or corrections concerning the minutes of the April 15, 2021 meeting. There were none and the minutes were approved as distributed.

Upon the call of the Chair, the minutes were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

The Chair notified the Commissioners that the following item on the agenda would be taken up out of order at the end of the agenda: Temporary rules for the Environmental Management Commission.

FOLLOW UP MATTERS

Department of Environmental Quality

01 NCAC 41C .0101, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209, .0210, .0211, .0301, .0302, .0303; 41D .0102, .0201, .0202, .0301, .and .0401 – Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

01 NCAC 41D .0101 and .0302 – Upon the call of the Chair, the Commission objected to the rules in accordance with G.S. 150B-21.10 by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

The RRC objected to the rules for lack of necessity. Specifically, the RRC found for Rule 41D .0101 that as written, the rule does not appear to set any requirements, but instead, partially recites two statutes. For Rule 41D .0302, the RRC found that as written, the Rule does not appear to set any requirements that are not governed by statute. As such, the RRC found that both rules were unnecessary.

Coastal Resources Commission

15A NCAC 07H .0401, .0404, .0405, .0406; 07J .0406 and .0409 – Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew

Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

15A NCAC 07J .0403, .0404, .0405, .0406, .0407, .0410; and 07K .0207 - Upon the call of the Chair, the Commission objected to the rules in accordance with G.S. 150B-21.10 by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

The Commission objected to 15A NCAC 07J .0403, .0404, and .0405 for failure to comply with the APA. The rules contain changes that were not published in the Register, were not subject to public comment, and were not included in the changes approved by the Coastal Resources Commission at adoption. Further, the changes rise to the level of a “substantial change” as defined in G.S. 150B-21.2(g) because they address a subject matter not addressed in the proposed rule or produce an effect that could not reasonably have been expected. The APA has no procedure to add “amendments” to a rule after publication of notice in the Register and after the agency’s final action to adopt a rule. G.S. 150B-21.2 specifically states: “When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part.” In short, the Commission objected for failure to comply with the APA because the rules contain changes that are substantial, did not meet the notice and comment requirements of the permanent rulemaking process, and that were not adopted by the agency.

The Commission objected to 15A NCAC 07J .0405 on the additional ground of lack of statutory authority based upon the \$400 fee added post-publication to Paragraph (d). The agency provided a 2001 MOA between the Division of Coastal Management and the Department of Environment and Natural Resources, which references G.S. 143-215.3D, as authority for the fee. G.S. 143-215.3D is not listed in the History Note as statutory authority for the Rule. Additionally, the statute grants the authority to establish a fee to the Secretary, not the Coastal Resources Commission. There was no indication in the filing before RRC that the Secretary adopted this Rule. Therefore, the Commission objected for lack of statutory authority.

The Commission objected to 15A NCAC 07J .0407 for lack of clarity. Subparagraph (e)(2) says the Division may suspend or revoke the right to a project if “there has been a change of conditions in the area, or facts that would justify denial of a permit due to additional impacts to coastal resources...”[.] It is unclear under what circumstances “facts” would justify permit denial or under what circumstances “impacts to coastal resources” would justify a permit denial.

The Commission objected to 15A NCAC 07J .0410 for lack of statutory authority. Commission staff could not locate, and the agency did not provide, authority for the agency, instead of a court, to order restoration of sites to pre-development conditions. 113A-126 allows court-ordered restoration.

The Commission objected to 15A NCAC 07K .0207 for ambiguity. It is unclear how the agency determines when alterations are “necessary” and “possible.” It is also unclear when a dune’s capacity as a protective barrier against flooding and erosion is “significantly” diminished.

Department of Transportation - Division of Motor Vehicles

Prior to the review of the rules from the Department of Transportation, Commissioner Bryan recused himself and did not participate in any discussion or vote concerning the rules because his family is involved in litigation with the agency.

19A NCAC 03C .0202, .0220, .0221, .0222, .0223, .0224, .0226, .0228, .0230, .0234, .0235, .0236, .0403, .0404, .0414, .0419, .0420, .0421, .0424, .0425, .0426, .0428, .0429, .0432, .0433, .0436, .0501, .0520, .0521; and 03E .0401 - Upon the call of the Chair, the rules were approved by roll-call

vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

19A NCAC 03C .0232 – The agency is addressing the technical change requests from the April meeting. No action was required by the Commission.

Board of Environmental Health Specialist Examiners

21 NCAC 62 .0407 and .0411 - The agency is addressing the technical change requests from the April meeting. No action was required by the Commission.

Building Code Council

Residential Code, N1101.13(R401.2) - Upon the call of the Chair, the Commission objected to the rule in accordance with G.S. 150B-21.10 by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

The RRC objected to this Rule for failure to comply with the APA. Specifically, the agency stated that no fiscal note was required for the Rule in its Notice of Text, published August 17, 2020. Pursuant to G.S. 150B-21.9(a), following a request from the public, the RRC sent the rule to the Office of State Budget Management (OSBM) to determine if the Rule created a substantial economic impact. In a letter dated May 6, 2021, OSBM stated that fiscal note was required for this Rule.

LOG OF FILINGS (PERMANENT RULES)

Sheriffs' Education and Training Standards Commission

Upon the call of the Chair, 12 NCAC 10B .0305 was approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Department of Transportation - Division of Motor Vehicles

Prior to the review of the rules from the Department of Transportation, Commissioner Bryan recused himself and did not participate in any discussion or vote concerning the rules because his family is involved in litigation with the agency.

19A NCAC 03F .0602; .0208, .0212, .0301; 03I .0303, .0402, .0501; 03J .0201, .0204, .0303, .0305, .0306, .0307, .0402, and .0601 - Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

19A NCAC 03I .0307 - Upon the call of the Chair, the period of review was extended by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

19A NCAC 03F .0201, .0202, and .0203 - Upon the call of the Chair, the Commission objected to the rules in accordance with G.S. 150B-21.10 by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

The Commission objected to 19A NCAC 03F .0201, .0202, and .0203 in accordance with G.S. 150B-21.10 for lack of necessity. G.S. 20-166.1(j) states: "The Division may periodically publish statistical information on motor vehicle accidents based on information in accident reports." These rules are purely informational, restating the information contained in the Division's statistical reports. Further, these rules do not affect the procedural or substantive rights of the public. As a result, the Commission

objected for lack of necessity because the contents of .0201, .0202, and .0203 do not meet the definition of a “rule” in 150B-2(8a).

Board of Dental Examiners

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Interpreter and Transliterater Licensing Board

Upon the call of the Chair, 21 NCAC 25 .0501 was approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Landscape Contractors' Licensing Board

Prior to the review of the rule from the Landscape Contractors' Licensing Board, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rule because her law firm provides a varied scope of legal services to the Board, some of which includes advice on rulemaking.

Upon the call of the Chair, 21 NCAC 28B .0601 was approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

Medical Board

Prior to the review of the rules from the Medical Board, Commissioner Atkins recused himself and did not participate in any discussion or vote concerning the rules because of a potential conflict.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

Board of Nursing

Prior to the review of the rules from the Board of Nursing, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rule because her law firm provides a varied scope of legal services to the Board, some of which includes advice on rulemaking.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

Onsite Wastewater Contractors and Inspectors Certification Board

Prior to the review of the rules from the Onsite Wastewater Contractors and Inspectors Certification Board, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rule because her law firm provides a varied scope of legal services to the Board, some of which includes advice on rulemaking.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

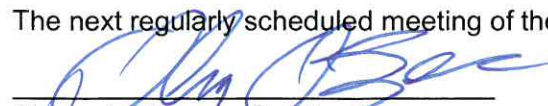
Real Estate Commission


Upon the call of the Chair, the period of review was extended by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

COMMISSION BUSINESS

The meeting adjourned at 9:55 a.m.

The next regularly scheduled meeting of the Commission is Thursday, June 17, 2021 at 9:00 a.m.



Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:
Jeanette Doran, Chair

Respiratory Care Board

Upon the call of the Chair, 21 NCAC 61 .0901 was approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Board of Examiners for Speech and Language Pathologists and Audiologists

Prior to the review of the rules from Board of Examiners for Speech and Language Pathologists and Audiologists, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rule because her law firm provides a varied scope of legal services to the Board, some of which includes advice on rulemaking.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

Building Code Council

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

LOG OF FILINGS (TEMPORARY RULES)**Pesticide Board**

Upon the call of the Chair, 02 NCAC 09L .0502 was approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Environmental Management Commission

Prior to the review of the rules from the Environmental Management Commission, Commissioner Bryan left the meeting and did not return.

The agency requested a waiver pursuant to G.S. 150B-21.1(a2) waiving the 210-day limitation found in G.S. 150B-21.1(a1). The waiver request was approved by a roll-call vote, ayes 7, noes 1 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: Jeanette Doran - 1.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Anna Baird Choi, Margaret Currin, Jeanette Doran, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 8. Voting in the negative: None.

Phillip Reynolds with the Department of Justice, and representing the agency, addressed the Commission.

Geoff Gisler, with the Southern Environmental Law Center, addressed the Commission.

Board of Funeral Service

Prior to the review of the rule from Board of Funeral Services, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rules because her law firm provides a varied scope of legal services to the Board, some of which includes advice on rulemaking.

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 7, noes 0 as follows: Voting in the affirmative: Andrew Atkins, Bobby Bryan, Margaret Currin, Jeff Hyde, Randy Overton, Paul Powell, and Bob Rucho – 7. Voting in the negative: None.

**Rules Review Commission Meeting May 20, 2021
Held Via WebEx**

Name	Agency
Ben Edwards	Mathis Consulting
Russ Davis	
Mary Maclean Asbill	Southern Environmental Law Center
Karen Higgins	DENR
Carl Martin	DOI
Bill Lane	DENR
Carrie Hollis	OSBM
Helen Landi	DOT
Sue Homewood	DENR
Brooks Pearson	Southern Environmental Law Center
Elizabeth Ouzts	
Melissa Vuotto	REC
Paul Wojoski	DENR
Stephanie Robinson	DOT
Laura Rowe	Treasurer
Dauna Bartley	Brocker Law
John Green	DOJ
Robert Privott	Home Builders Association
Geoff Gisler	ggisler@selcnc.org
Makeda Harris	mharris@ncha.org
Melanie Mabrey	Bd of Nurses
Angela Willis	DENR
Jennifer Everett	DEQ
Christopher Mclennan	DOJ
Carl Martin	DOI
Phillip Reynolds	EMC/Department of Justice
Connie Stephens	Onsite Wastewater
Bill Croft	Respiratory Care Bd
Diane Konopka	DOJ
Nahale Kalfas	Council of State Governments
Angela Ellis	Bd of Nursing
Calvin Kirven	Landscape Contractors' Licensing Board
Connie Stephens	Onsite Wastewater
Christopher Mclennan	DOJ
Carl Martin	DOJ

John Green	DOJ
Dan Dittman	DOI
Mike Lopazanski	DENR