



**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

Mailing address:  
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February 18, 2011

Nancy Pate  
1601 Mail Service Center  
Raleigh, NC 27699-1601

Re: 15A NCAC 02H .0903, .0907-.0908, .0922

Dear Ms. Pate:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule .0903 based on ambiguity. In (a)(9) page 2 line 3, it is unclear what is meant by “fundamentally different factors.” That same term is used as a key part of the definition in lines 4 and 5 where the definition reads: “These factors are those relating to an industrial user that are fundamentally different from the factors considered during development of a National Categorical Pretreatment Standard ...” (emphasis added). It is unclear what a term means when the agency uses the same terms to define the term.

The Commission objected to Rule .0907 based on lack of statutory authority and ambiguity. In (b)(2) line 33 it is unclear what constitutes a “substantial modification” to a pretreatment program. This is critical because a substantial modification requires an additional step of public notice and a comment period along with the addition of the comments to the record in deciding whether to allow the modification.

There is no authority cited to set the standards outside rulemaking.

The Commission objected to Rule .0908 based on ambiguity. In (e)(1), page 2 lines 21 and 22, the POTW (publicly owned treatment works) is required to submit two samples each year for certain parameters listed in its permit.

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In (e)(1)(A), page 2 lines 27, the division “may” waive the second sampling “for good cause shown.” This in reality is a vague standard and does not constitute the “specific guidelines” required by G.S. 150B-19(6). There is no authority cited to have such a waiver without specific guidelines.

In (f), page 3 lines 13 – 16, there is a requirement that certain records be retained. Originally the rule set a period of five years. That was proposed to be changed to “three years after the end of the effective period of the document.” That has been changed again to a period of time “as specified by the Director” and open to unilateral change at any time by the rulemaker. This makes the rule unclear as to how long the records must be retained. There is no authority cited to set this time outside rulemaking.

The Commission objected to Rule .0922 based on lack of statutory authority. There is no authority cited for the provision in (a) line 7 to require a local government to provide a hearing or require the appointment of a hearing officer for appeal of a civil penalty as well as the other unfavorable actions taken in (a) against an industrial user. In 143-215.6A(k) the legislature sets the conditions for such a hearing “if a local ordinance provides for a local administrative hearing” (emphasis added). It also notes the recourse (filing a civil action in superior court) someone has if there is no provision for a local hearing. There is no authority cited for the agency to specify what “the terms and conditions of a permit under appeal” shall be as they attempt to do in (a)(1) – (3) lines 18 – 27. Absent specific statutory authority to set out these terms only the General Assembly, and the courts interpreting the legislation, have the authority to specify what happens while any person is pursuing appeal of any agency’s or governing body’s decision. Finally, there is no authority cited for the provisions in (f) which attempt to specify the judicial review that is available or the procedures one must use to avail oneself of the opportunity for judicial review.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s action, please let me know.

Sincerely,

Joseph J. DeLuca, Jr.  
Commission Counsel

JJD:jbe



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February 17, 2011

Christina Apperson  
NC Medical Board  
1203 Front Street  
Raleigh, NC 27609

Re: 21 NCAC 32F .0103

Dear Ms. Apperson:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rule in accordance with G.S. 150B-21.10.

The Commission objected to Rule .0103 based on lack of necessity. This Rule is not necessary because its substance is already covered by statute, and neither statute cited as authority is currently in existence. The relevant statute for annual "registration fees," and that is the statutory terminology, is G.S. 90-13.2. All the registration fees, including those for limited volunteer licensees are in the statute. This objection applies to existing language in the Rule.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Robert A. Bryan, Jr.  
Commission Counsel

RAB:tdc

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February 17, 2011

Christina Apperson  
NC Medical Board  
1203 Front Street  
Raleigh, NC 27609

Re: 21 NCAC 32X .0104

Dear Ms. Apperson:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rule in accordance with G.S. 150B-21.10.

The Commission objected to Rule .0104 based on ambiguity. In (a) and (b) of the Rule, the Rule says that the Board will publish misdemeanor convictions involving a listed number of crimes. Among those listed are a number of crimes that are not misdemeanors. It is not clear what is meant by listing felonies as misdemeanors.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Robert A. Bryan, Jr.  
Commission Counsel

RAB:tdc

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February 17, 2011

Johnny Loper  
Board of Examiners in Optometry  
150 Fayetteville Street, Suite 2100  
Raleigh, NC 27601

Re: 21 NCAC 42B .0302

Dear Mr. Loper:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule .0302 based on ambiguity. In (h), it is not clear what standards the board will use in approving vendors or sponsors. The Rule otherwise deals with approving courses and there do not appear to be any standards for the approval of vendors or sponsors. In (k)(1), it is not clear what form is acceptable to the board. This objection applies to existing language in the Rule.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Robert A. Bryan, Jr.  
Commission Counsel

RAB:tdc

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February 17, 2011

Barry Gupton, PE  
Building Code Council  
322 Chapanoke Road, Suite 200  
Raleigh, NC 27603

Re: 2012 NC Energy Conservation Code 103.1, 105.1, 503.2.9

Dear Mr. Gupton:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule .103.1 based on lack of statutory authority. There is no authority cited for the last sentence in this Rule. If the statutes do not otherwise require documents to be prepared by a registered design professional, there is no authority cited for the Council to authorize a code official to require it.

The Commission objected to Rule .105.1 based on lack of statutory authority. There is no authority cited for the agency to adopt a rule limiting a court decree. The validity of the remainder of the code would depend on the court decision.

The Commission objected to Rule 503.2.9 based on ambiguity. The agency has submitted two versions of this section. They both apparently went through the same notice and hearing process and were adopted the same day with the same effective date. It is not clear which is the real set of requirements.

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Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Robert A. Bryan, Jr.  
Commission Counsel

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February 22, 2011

Barry Gupton, PE  
322 Chapanoke Road  
Suite 200  
Raleigh, NC 27603

Re: 2012 N.C. Residential Code, R302.2 and R313.1

Dear Mr. Gupton:

At its February 17, 2011 meeting the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to the 2012 N.C. Residential Code adoption as well as the two amendments to the 2009 code based on a failure to comply with the Administrative Procedure Act. The failure to comply was your failure to make the technical changes requested as set out in G.S. 150B-21.10.

The Commission also needs to determine whether the proposed amendments are actually intended to apply to the 2009 N.C. Residential Code or the 2012 code or both. There was both a proposed amendment to R313.1 and an amendment to the 2012 IRC Code for the 2012 N.C. Residential Code and it is not clear what rule is intended to be in the 2012 N.C. Residential Code.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Joseph J. DeLuca, Jr.  
Commission Counsel

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