

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: N.C. BANKING COMMISSION

RULE CITATION: 04 NCAC 03M .0101

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:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Extend the period of review

COMMENT:

In sub-item (10)(a) page 2 lines 17 - 20 the rule defines "material" to mean "facts or information ... that, IF KNOWN, would be likely to influence a decision [by the Commissioner] to grant, suspend, condition, limit, renew, or revoke a license" (Emphasis added). [Later this sub-chapter will require a person to make certain "material" disclosures.] This may be inartful writing but it seems to require the licensee or applicant to know what is in the Commissioner's mind and what information would lead him or her to take action.

This type of definition and subsequent requirement is usually expressed in the reasonable person standard. Indeed, that is the way I first read it and I did not consider the actual language of the rule and at least a possible interpretation of it – that one must 'know' what the commissioner thinks – until it was recently brought to my attention by a practitioner.

I think he's correct. The rule should be rewritten to express a reasonableness standard: "facts or information that a reasonable person knows or should know would be likely to influence a decision"

The same objection and analysis would apply in sub-item (10)(c) page 3 lines 1 – 3.

Counsel is of the opinion that this could be treated as a technical change since most people are likely to read the current rule as what a "reasonable person" would expect, at least the first few times they read it.

Joseph J. DeLuca, Jr.
Commission Counsel

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AGENCY: N.C. BANKING COMMISSION

RULE CITATION: 04 NCAC 03M .0205

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:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Extend the period of review

COMMENT:

In my original review of this rule I had questions about this condition. I resolved it by observing that as written the rule would require that some credit agency rate the person with a score of at least 600. As is often the case we don't become aware of possible ambiguities until practitioners raise issues. Mr. Bost is concerned that it is not clear what score from which credit agencies would actually be counted and whether the agency would interpret the rule the same as I am interpreting it.

In (a)(3)(A) line 31 it is unclear what is meant by "a credit score of 600 or greater." I understand that there are at least three major credit rating companies each with its own algorithm for determining a credit score. It is also possible that the scores for the identical history could be rated differently by each of those companies.

It is unclear whether this rule requires such a score from only one of the three, all three, or simply a majority. It is also unclear whether any other credit rating agencies scores are acceptable.

In a case of "be careful what you ask for" I am raising the issue. However I think that if the agency rewrote it to express a "credit score of 600 from one of the three major credit rating agencies" [or similar language, perhaps even naming the three agencies] that could be accepted as a technical change since it would not make a substantive change in the rule.

Joseph J. DeLuca, Jr.
Commission Counsel

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AGENCY: N.C. BANKING COMMISSION

RULE CITATION: 04 NCAC 03M .0604

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

Unclear or ambiguous

Unnecessary

Extend the period of review

COMMENT:

To the extent that this rule requires positive representations or disclosures it seems to be outside the statutes cited as authority for this rule. All the authority cited refers to misrepresentations or failures to disclose required information:

In the statutes cited as authority G.S. 53-244.111(1) makes it unlawful to "misrepresent or conceal the material facts ... make false promises ... pursue a course of misrepresentation."

Item (8) of that same statute makes it unlawful to "engage in any transaction, practice ... that is not in good faith or fair dealing or ... constitutes a fraud."

Finally G.S. 53-118(a) gives the Commissioner the authority to write rules "... to prohibit unfair or deceptive practices...."

The Commissioner did not cite item (15) of G.S. 53-244.111, directly related to solicitations (as is this rule), which makes it illegal to "engage in unfair, misleading, or deceptive advertising related to a solicitation for a mortgage loan."

The Commissioner has not cited any authority to require affirmative disclosures.

Counsel does note that while the Commissioner has not cited G.S. 53-244.020 as authority, it does "giv[e] the Commissioner broad administrative authority to administer, interpret, and enforce this Article and adopt rules implementing this Article in order to carry out the intentions of the General Assembly." That same statute goes on to say that it is the General Assembly's intention "that provisions of this Article be liberally construed to effect the purposes stated or clearly encompassed by this Article."

Joseph J. DeLuca, Jr.
Commission Counsel

I first read this rule as requiring the disclosures to prevent false or misleading solicitations as allowing this type of requirement. On closer reading of the statutes I do not see them as supporting this affirmative requirement. On the other hand I do see it as within the Commissioner's authority to forbid any sort of advertisement – such as “A rate of 2.4% is available for your home loan” – in order to prevent false or misleading statements on the envelope front. They could also have a rule requiring the disclosure in this rule whenever there is any other sort of statement included on the envelope.

That being said, unless the agency can cite more direct language giving it authority to address the forms that solicitations must take, counsel believes the agency has exceeded its rulemaking authority in this case.

Purely as an aside counsel does wonder how a solicitation could comply with this rule in some cases. The rule requires that the required disclosure on the front of the envelope must be in print “that is ... no smaller than the largest print used elsewhere” in the solicitation materials. This could make it quite difficult or impossible to print the disclosure on the envelope if headline style type were used anywhere in the materials sent. This might also run into conflict with any USPS rules concerning envelopes and addressing.

§ 53-244.020. Purpose and construction.

(a) Purpose. – A primary purpose of this Article is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators. Therefore, the General Assembly establishes within this Article an effective system of supervision and enforcement of the mortgage lending industry by giving the Commissioner of Banks broad administrative authority to administer, interpret, and enforce this Article and adopt rules implementing this Article in order to carry out the intentions of the General Assembly.

(b) Construction. – It is the intent of the General Assembly that provisions of this Article be liberally construed to effect the purposes stated or clearly encompassed by the Article. (2009-374, s. 2.)

§ 53-244.111. Prohibited acts.

In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any residential mortgage loan transaction:

- (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
- (2) To improperly refuse to issue a satisfaction of a mortgage.
- (3) To fail to account for or to deliver to any person any funds, documents, or other thing of value obtained in connection with a mortgage loan, including money provided by a borrower for a real estate appraisal or a credit report, which the mortgage lender, mortgage broker, mortgage servicer, or mortgage loan originator is not entitled to retain under the circumstances.
- (4) To pay, receive, or collect in whole or in part any commission, fee, or other compensation for brokering or servicing a mortgage loan in violation of this Article, including a mortgage loan brokered or serviced by any unlicensed person other than an exempt person.

- (5) To charge or collect any fee or rate of interest or to make or broker or service any mortgage loan with terms or conditions or in a manner contrary to the provisions of Chapter 24, 45, or 54 of the General Statutes.
- (6) To advertise mortgage loans, including rates, margins, discounts, points, fees, commissions, or other material information, including material limitations on the loans, unless the person is able to make the mortgage loans available to a reasonable number of qualified applicants.
- (7) To fail to disburse funds in accordance with a written commitment or agreement to make a mortgage loan.
- (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person in connection with the brokering or making or servicing of, or purchase or sale of, any mortgage loan.
- (9) To fail to pay promptly when due reasonable fees to a licensed appraiser for appraisal services that are:
 - a. Requested from the appraiser in writing by the mortgage broker or mortgage lender or an employee of the mortgage broker or mortgage lender; and
 - b. Performed by the appraiser in connection with the origination or closing of a mortgage loan for a customer or the mortgage broker or mortgage lender.
- (10) To broker a mortgage loan that contains a prepayment penalty if the principal amount of the loan is one hundred fifty thousand dollars (\$150,000) or less or if the loan is a rate spread home loan as defined in G.S. 24-1.1F.
- (11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. Nothing in this subdivision shall be construed to prohibit a mortgage lender, mortgage broker, or mortgage servicer from asking the appraiser to do one or more of the following:
 - a. Consider additional appropriate property information.
 - b. Provide further detail, substantiation, or explanation for the appraiser's value conclusion.
 - c. Correct errors in the appraisal report.
- (12) To fail to comply with the mortgage loan servicing transfer, escrow account administration, or borrower inquiry response requirements imposed by sections 6 and 10 of RESPA and regulations adopted thereunder.
- (13) To broker a rate spread adjustable rate mortgage loan without disclosing to the borrower the terms and costs associated with a fixed rate loan from the same lender at the lowest annual percentage rate for which the borrower qualifies.
- (14) To fail to comply with applicable State and federal laws and regulations related to mortgage lending or mortgage servicing.
- (15) To engage in unfair, misleading, or deceptive advertising related to a solicitation for a mortgage loan.
- (16) In connection with the brokering or making of a rate spread home loan as defined under G.S. 24-1.1F, no lender shall provide nor shall any broker receive any compensation that changes based on the terms of the loan. This

subdivision shall not prohibit compensation based on the principal balance of the loan.

- (17) For a mortgage servicer to fail to comply with the mortgage servicer's obligations under Article 10 of Chapter 45 of the General Statutes.
- (18) For a mortgage servicer to fail to provide written notice to a borrower upon taking action to place hazard, homeowner's, or flood insurance on the mortgaged property or to place such insurance when the mortgage servicer knows or has reason to know that the insurance is in effect.
- (19) For a mortgage servicer to place hazard, homeowner's, or flood insurance on a mortgaged property for an amount that exceeds either the value of the insurable improvements or the last known coverage amount of insurance.
- (20) For a mortgage servicer to fail to provide to the borrower a refund of unearned premiums paid by a borrower or charged to the borrower for hazard, homeowner's, or flood insurance placed by a mortgage lender or mortgage servicer if the borrower provides reasonable proof that the borrower has obtained coverage such that the forced placement is no longer necessary and the property is insured. If the borrower provides reasonable proof within 12 months of the placement that no lapse in coverage occurred such that the forced placement was not necessary, the mortgage servicer shall refund the entire premium.
- (21) For a mortgage servicer to refuse to reinstate a delinquent loan upon a tender of payment made timely under the contract which is sufficient in amount, based upon the last written statement received by the borrower, to pay all past due amounts, outstanding or overdue charges, and restore the loan to a nondelinquent status, but this reinstatement shall be available to a borrower no more than twice in any 24-month period.
- (22) For a person acting as a mortgage servicer to fail to mail, at least 45 days before foreclosure is initiated, a notice addressed to the borrower at the borrower's last known address with the following information:
 - a. An itemization of all past due amounts causing the loan to be in default.
 - b. An itemization of any other charges that must be paid in order to bring the loan current.
 - c. A statement that the borrower may have options available other than foreclosure and that the borrower may discuss the options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development (HUD).
 - d. The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
 - e. The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
 - f. The address, telephone number, and other contact information for the consumer complaint section of the Office of the Commissioner of Banks.

- (23) To fail to make all payments from any escrow account held for the borrower for insurance, taxes, and other charges with respect to the property in a timely manner so as to ensure that no late penalties are assessed or other negative consequences result regardless of whether the loan is delinquent, unless there are not sufficient funds in the account to cover the payments and the mortgage servicer has a reasonable basis to believe that recovery of the funds will not be possible. (2009-374, s. 2.)

§ 53-244.118. Rule-making authority; records.

(a) The Commissioner may adopt any rules that the Commissioner deems necessary to carry out the provisions of this Article, to provide for the protection of the borrowing public, to prohibit unfair or deceptive practices, to instruct mortgage lenders, mortgage brokers, mortgage servicers, or mortgage loan originators in interpreting this Article, and to implement and interpret the provisions of G.S. 24-1.1E, 24-1.1F, and 24-10.2 as they apply to licensees under this Article.

(b) The Commissioner shall keep a list of all applicants for licensure under this Article or claimants of exempt status under G.S. 53-244.050(g) that includes the date of application, name, place of residence, and whether the license or claim of exempt status was granted or denied.

(c) The Commissioner shall keep a current roster showing the names and places of business of all licensees that shows their respective mortgage loan originators and a roster of exempt persons required to file a notice under G.S. 53-244.050(g). The roster shall:

- (1) Be kept on file in the office of the Commissioner;
- (2) Contain information regarding all orders or other actions taken against the licensees and other persons; and
- (3) Be open to public inspection. (2009-374, s. 2.)

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70F .0202

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In (d) and (e) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

Paragraph (d)(4) prohibits convictions for felonies involving "a crime involving violence" but then adds that something – what is not clear – is "... not including other physical assault or battery." At the least this is unclear whether they mean to exclude "assault or battery" from within the meaning of "crime of violence" and include it as any felony in (e)(1) and (2) or exclude it from "any felony" in (d) that prohibits employment for any conviction for one of these offenses, no matter how remote. At the least if this is their intent they should remove "but not including other physical assault or battery" from (e)(4) and not confuse the issue.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70F .0203

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In (a) it is unclear what constitutes a plan of financing for the subject agencies that "assures" "sufficient funds" to carry out the purposes of the agency and provide the required child care and services. The emphasis on the ambiguity is in the quoted terms. The rulemaking agency could make an argument that it is clear what constitutes "sufficient funds" and one could judge whether those were "assured." Can anyone say that any source of funds is "assured" especially perhaps state funds to the extent that the child care agency were including those in its budget? I think this rule leaves too much to the judgment of the inspectors and rule enforcers.

However, counsel is even more concerned about the ambiguity in (b) that requires these agencies to develop "adequate resources" and manage them "prudently" as set out in the rule. It is unclear what constitutes "adequate resources" and "prudent" management of them.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70F .0207

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In (c) and (d) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

Paragraph (c)(4) prohibits convictions for felonies involving "a crime involving violence" but then adds that something – exactly what, is not clear – is "... not including other physical assault or battery." At the least this is unclear whether they mean to exclude "assault or battery" from within the meaning of "crime of violence" and include it as any felony in (e)(1) and (2) or exclude it from "any felony" in (d) that prohibits employment for any conviction for one of these offenses, no matter how remote. At the least if this is their intent they should remove "but not including other physical assault or battery" from (e)(4) and not confuse the issue.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70G .0501

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

It is unclear whether the agency intends to enforce (a) line 11, (b) line 19 and (c) line 28 by requiring a degree from a college that is still currently functioning. There have been colleges that conferred valid and accredited degrees prior to being merged into another school or closed down altogether. If that is not the intent of the agency, then the rule is unclear.

If it is the intent of the agency, this may be going beyond the statutory grant of authority to set "educational requirements" found in G.S. 131D-10.5(7) since it is possible that whatever the educational requirements currently are would have been met by the applicant at the time of completing those requirements, even though the educational institution may no longer be current.

§ 131D-10.5. Powers and duties of the Commission.

In addition to other powers and duties prescribed by law, the Commission shall exercise the following powers and duties:

- (1) Adopt, amend and repeal rules consistent with the laws of this State and the laws and regulations of the federal government to implement the provisions and purposes of this Article;
- (2) Issue declaratory rulings as may be needed to implement the provisions and purposes of this Article;
- (3) Adopt rules governing procedures to appeal Department decisions pursuant to this Article granting, denying, suspending or revoking licenses;
- (4) Adopt criteria for waiver of licensing rules adopted pursuant to this Article;
- (5) Adopt rules on documenting the use of physical restraint in residential child-care facilities;
- (6) Adopt rules establishing personnel and training requirements related to the use of physical restraints and time-out for staff employed in residential child-care facilities; and
- (7) Adopt rules establishing educational requirements, minimum age, relevant experience, and criminal record status for executive directors and staff employed by child placing agencies and residential child care facilities.
(1983, c. 637, s. 2; 2000-129, s. 2(a); 2007-30, s. 2; 2009-188, s. 2.)

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70H .0401

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

This rule has the same issues as the previous one.

It is unclear whether the agency intends to enforce (a) line 11, (b) line 19 and (c) line 28 by requiring a degree from a college that is still currently functioning. There have been colleges that conferred valid and accredited degrees prior to being merged into another school or closed down altogether. If that is not the intent of the agency, then the rule is unclear.

If it is the intent of the agency, this may be going beyond the statutory grant of authority to set "educational requirements" found in G.S. 131D-10.5(7) since it is possible that whatever the educational requirements currently are would have been met by the applicant at the time of completing those requirements, even though the educational institution may no longer be current.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70I .0302

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In (7) and (8) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

Paragraph (7)(D) prohibits convictions for felonies involving "a crime involving violence" but then adds that something – exactly what, is not clear – is "... not including other physical assault or battery." At the least this is unclear whether they mean to exclude "assault or battery" from within the meaning of "crime of violence" and include it as any felony in (8)(A) and (B) or exclude it from "any felony" in (7) that prohibits employment for any conviction for one of these offenses, no matter how remote. At the least if this is their intent they should remove "but not including other physical assault or battery" from (7)(D) and not confuse the issue.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70I .0404

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In (b) and (c) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

Paragraph (b)(4) prohibits convictions for felonies involving "a crime involving violence" but then adds that something – exactly what, is not clear – is "... not including other physical assault or battery." At the least this is unclear whether they mean to exclude "assault or battery" from within the meaning of "crime of violence" and include it as any felony in (c)(1) and (2) or exclude it from "any felony" in (b) that prohibits employment for any conviction for one of these offenses, no matter how remote. At the least if this is their intent they should remove "but not including other physical assault or battery" from (b)(4) and not confuse the issue.

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AGENCY: N.C. SOCIAL SERVICES COMMISSION

RULE CITATION: 10A NCAC 70I .0405

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

This rule has the same issues as previous ones concerning degree requirements.

It is unclear whether the agency intends to enforce (b) line 1, (g)(1) page 3 line 16 and (h)(1) page 3 line 27 and page 4 line 1 by requiring a degree from a college that is still currently functioning. There have been colleges that conferred valid and accredited degrees prior to being merged into another school or closed down altogether. If that is not the intent of the agency, then the rule is unclear.

If it is the intent of the agency, this may be going beyond the statutory grant of authority to set "educational requirements" found in G.S. 131D-10.5(7) since it is possible that whatever the educational requirements currently are would have been met by the applicant at the time of completing those requirements, even though the educational institution may no longer be current.

RRC STAFF OPINION

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AGENCY: N.C. ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02B .0250

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

Extend the period of review

COMMENT:

The standards to be used by the Director in (c) page 10 to approve the stream maps developed by local governments are unclear. There is no authority to set the approval standards outside rulemaking. If the standards are contained within this rule or other rules in this section, that is unclear as well.

It is beyond the agency's authority to order a local government to issue a specific final decision, i.e. either granting or denying an application as set out in (14)(a), (b) and (c) page 27. It also seems to be an unnecessary step since the "final" decision has in fact already been made by the EMC.

RRC STAFF OPINION

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AGENCY: N.C. ENVIRONMENTAL MANAGEMENT COMMISSION

RULE CITATION: 15A NCAC 02B .0252

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:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Extend the period of review

COMMENT:

It is unclear where property donated for mitigation purposes must be located.

This rule sets out the mitigation requirements for any type of allowed use requiring mitigation for the damage inflicted within a riparian buffer area, or any variance that requires mitigation. Item (4) of the rule specifies the location of any mitigation be "[a specified distance] from the Cape Fear River ... and within the watershed of Lake Randleman ..." without qualification for the specific mitigation option selected under (6). Item (6) specifies the three methods or options for mitigation including "(b) donation of real property ... [or] (c) restoration or enhancement of a ... riparian buffer."

This would make it appear that all mitigation must be within the geographic limitation set out in Item (4).

Item (9) addresses the mitigation option selected under (6)(c) for enhancing or restoring riparian buffers located elsewhere. It specifies in (9)(b) that the location of the restoration or enhancement must "comply with the requirements in Item (4) of this Rule" even though one would normally interpret this rule to require that location even without emphasizing it in (9)(b).

Item (8) addresses the mitigation option selected under (6)(b) for donating real property rather than enhancing or restoring forested property selected under (6)(c). Item (8)(c)(i) requires a location that is "within an area that is ... in the Basinwide Wetlands and Riparian Restoration Plan ... or ... at a site that is otherwise consistent with the goals outlined in the Basinwide

Joseph J. DeLuca, Jr.
Commission Counsel

Wetlands ... Plan.” It is not clear whether such a site would always be within the geographic limitation set out in Item (4). I would assume without knowing more that it could be outside that location especially given the language of the alternative location in (8)(c)(i), “or ... at a site that is otherwise consistent” with the goal [of] the Basinwide ... Plan.” It would seem to me that if the location allowed for donation of real property is not consistent with Item (4), both (4) and (8) should make that clear. If it must be consistent with Item (4) then that should be clarified in Item (8) as well, especially given the language of (9) repeating that the location must be as set out in (4).

Since the rule in (8) does not specify that the location can be outside the location mandated in (4) I have asked for a technical change to clarify this, especially if it is meant to be within the location set out in (4). In either case (inside or outside the location in (4)) since this is an existing rule and mostly existing language, it is possible that all persons both enforcing the rule and subject to it may be certain about the location(s) involved and not confused. However and even if this is the case, I believe a technical change should be made to clarify this specific point.

RRC STAFF OPINION

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AGENCY: N.C. COASTAL RESOURCES COMMISSION

RULE CITATION: 15A NCAC 07H .2304

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:

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:

In (c) line 13 the meaning of "significantly" in "significantly affect" is unclear. I have asked the agency to delete or define the term in a request for technical change since this is one of those terms covered under our definition of "technical changes." If they do so I shall not recommend any objection to the rule based on this ambiguity.

In line 14 of that same paragraph I have asked the agency to delete "unnecessarily" or define or clarify "unnecessarily endanger" adjoining projects. I would presume that there is always some element of risk or danger to adjoining properties whenever there is a bridge replacement. Based on this I would also assume that the agency does not intend to allow an applicant to argue that it is necessary to risk or endanger the adjoining property in order to complete the project. The agency must have some standard, definition, meaning that is already being applied to determine what risks are presented, whether they are necessary risks and what the actual risk or danger is to adjoining properties. Like the previous paragraph and recommendation, if the agency provides a rewritten rule, I would treat that as a technical change.

RRC STAFF OPINION

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AGENCY: N.C. COASTAL RESOURCES COMMISSION

RULE CITATION: 15A NCAC 07H .2305

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:

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:

In (b) lines 8 and 9 there are the same problems with "significantly affect" and unnecessarily endangers" as in the previous rule. In this rule I am more concerned about the "unnecessarily endangers" than the other one.

RRC STAFF OPINION

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AGENCY: WILDLIFE RESOURCES COMMISSION

RULE CITATION: 15A NCAC 10B .0126

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
 - ☐ Extend the period of review

COMMENT:

In (a), it is not clear what standards the Executive Director or his designee is to use in exercising his discretion to issue a permit to an entity that otherwise meets the requirements of this Rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: WILDLIFE RESOURCES COMMISSION

RULE CITATION: 15A NCAC 10B .0222

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
 - ☐ Extend the period of review

COMMENT:

This rule seems to contradict Rule 15A NCAC 10B .0302. This rule says there is no closed season for armadillo implying that all seasons are open. Rule .0302 limits the open season to a three or four month period. It is not clear what season is open for armadillo.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: WILDLIFE RESOURCES COMMISSION

RULE CITATION: 15A NCAC 10B .0302

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☐ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
 - ☐ Extend the period of review

COMMENT:

This rule seems to contradict Rule 15A NCAC 10B .0222. This rule limits the open season for armadillo to a three or four month period. Rule .0222 says there is no closed season for armadillo implying that all seasons are open. It is not clear what seasons are open for armadillo.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: WILDLIFE RESOURCES COMMISSION

RULE CITATION: 15A NCAC 10H .0304

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☒ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
 - ☐ Extend the period of review

COMMENT:

In (d)(2), it is not clear what standards the Executive Director is to use in granting a waiver that brings a licensee into compliance with all captivity rules and statutes. This amounts to a waiver provision without specific guidelines in violation of G.S. 150B-19(6).

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

RRC STAFF OPINION

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AGENCY: N.C. STATE PERSONNEL COMMISSION

RULE CITATION: 25 NCAC 01E .1010

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

Extend the period of review

COMMENT:

It seems to me that the provision in item (f) that requires an agency to grant leave with pay to an employee serving on a state board or commission might be misinterpreted to require the employee to take leave to engage in that service and thus is ambiguous. It is certainly ambiguous if requiring the employee to take leave is the intent. The rule as written puts the burden on the employing agency to grant such a leave request, not on the employee to take leave for such purpose. It does so by requiring that the agency "shall" grant such a request, not making it discretionary on the part of the agency the way the next rule does.

If the intent is to require an employee to take personal leave to serve on a state board or commission, counsel believes this is outside the agency's authority. Normally agency employees serving on state boards and commissions would not be allowed to receive any stipend for doing so. See G.S. 138-5(f) directing that state employees who also serve on state boards or commissions "shall receive no per diem compensation for their services [on the state board]. I would take this to mean that the General Assembly intended for the state employee to continue to receive his or her regular compensation and have the service on the state board considered as part of that service and paid for as part of the employee's compensation for his or her regular occupation. The General Assembly certainly could not have intended for an employee to in effect have to pay himself by either taking vacation leave or going without pay to serve on a state board when other people serving on that board are receiving compensation (as little as it is).

Joseph J. DeLuca, Jr.
Commission Counsel

§ 138-5. Per diem and allowances of State boards, etc.

(a) Except as provided in subsections (c) and (f) of this section, members of State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer shall be compensated for their services at the following rates:

- (1) Except as otherwise provided by this subdivision, compensation at the rate of fifteen dollars (\$15.00) per diem for each day of service. Members of the North Carolina Vocational Rehabilitation Council, the Statewide Independent Living Council, and the Commission for the Blind who are unemployed or who shall forfeit wages from other employment to attend Council or Commission meetings or to perform related duties, may receive compensation not to exceed fifty dollars (\$50.00) per diem for attending these meetings or performing related duties, as authorized by sections 105 and 705 of the Rehabilitation Act of 1973, P.L. 102-569, 42 U.S.C. § 701, et seq., as amended.
- (2) Reimbursement of subsistence expenses at the rates allowed to State officers and employees by subdivision (3) of G.S. 138-6(a).
- (3) Reimbursement of travel expenses at the rates allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a).
- (4) For convention registration fees, the actual amount expended, as shown by receipt.

(b) Except as provided in subsections (c) and (f) of this section, the schedules of per diem, subsistence, and travel allowances established in this section shall apply to members of all State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer, excluding those boards, commissions, committees and councils the members of which are now serving without compensation and excluding occupational licensing boards as defined in G.S. 93B-1; and all special statutory provisions relating to per diem, subsistence, and travel allowances are hereby amended to conform to this section.

(c) Repealed by Session Laws 1979, 2nd Session, c. 1137, s. 29.

(d) The subsistence reimbursement for actual lodging expenses provided in this section must be documented by a receipt of lodging expenses from a commercial establishment.

(e) Out-of-state travel on official business by members of State boards, commissions, committees and councils which operate from funds deposited with the State Treasurer shall be reimbursed only upon authorization obtained in the manner prescribed by the Director of the Budget.

(f) Members of all State boards, commissions and councils whose salaries or any portion of whose salaries are paid from State funds shall receive no per diem compensation from State funds for their services; provided, however, that members of State boards, commissions and councils who are also members of the General Assembly shall receive, when the General Assembly is not in session, subsistence and travel allowances at the rate set forth in G.S. 120-3.1(a)(2) through (a)(4). (1961, c. 833, s. 5; 1963, c. 1049, s. 1; 1965, c. 169; 1971, c. 1139; 1973, c. 1397; 1979, c. 838, s. 18; 1979, 2nd Sess., c. 1137, s. 29; 1983, c. 761, s. 24; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, s. 185; 1985, c. 757, s. 201(b); 1985 (Reg. Sess., 1986), c. 1014, s. 39(a); 1987, c. 738, s. 58(a), (b); 1999-237, s. 11.49.)

RRC STAFF OPINION

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AGENCY: N.C. STATE PERSONNEL COMMISSION

RULE CITATION: 25 NCAC 01E .1011

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:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Extend the period of review

COMMENT:

There are no standards in this rule or any citation to any other rule for the agency to use in deciding whether to grant or deny such a request for leave time and thus the rule is unclear.

To the extent that the State Personnel Commission wishes for the individual state agencies to use their own standards for making such a decision, that is unclear also.