

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: ALCOHOLIC BEVERAGE CONTROL COMMISSION

RULE CITATION: 04 NCAC 02S .0512

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:

There is no authority cited for much of what is in this rule. The agency has cited general authority to adopt rules to implement G.S. Chapter 18B, authority to inspect licensed premises, and authority to approve a hotel's policies and procedures for dispersing alcoholic beverages from a guest room cabinet. There is no authority cited to adopt rules about storage of spirituous liquor containers.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

Chapter 18B.
Regulation of Alcoholic Beverages.

Article 1.

General Provisions.

§ 18B-100. Purpose of Chapter.

This Chapter is intended to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter.

Except as provided in this Chapter, local ordinances establishing different rules on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, or requiring additional permits or fees, are prohibited. (1937, c. 49, s. 1; 1971, c. 872, s. 1; 1981, c. 412, s. 2.)

§ 18B-207. Rules.

The Commission shall have authority to adopt, amend, and repeal rules to carry out the provisions of this Chapter. Those rules shall become effective when adopted and filed pursuant to the provisions of Chapter 150B of the General Statutes. (1937, c. 49, s. 4; cc. 237, 411; 1945, c. 954; 1949, c. 974, s. 9; 1961, c. 956; 1963, c. 426, s. 12; c. 916, s. 2; c. 1119, s. 1; 1965, c. 1063; c. 1102, s. 3; 1967, c. 222, s. 2; c. 1240, s. 1; 1971, c. 872, s. 1; 1973, c. 28; c. 473, s. 1; c. 476, s. 133; c. 606; c. 1288, s. 1; cc. 1369, 1396; 1975, cc. 240, 453, 640; 1977, c. 70, ss. 15.1, 15.2, 16; c. 176, ss. 2, 6; 1977, 2nd Sess., c. 1138, ss. 3, 4, 18; 1979, c. 384, s. 1; c. 445, s. 5; c. 482; c. 801, s. 4; 1981, c. 412, s. 2; 1987, c. 827, s.1.)

§ 18B-502. Inspection of licensed premises.

(a) Authority. – To procure evidence of violations of the ABC law, alcohol law-enforcement agents, employees of the Commission, local ABC officers, and officers of local law-enforcement agencies that have contracted to provide ABC enforcement under G.S. 18B-501(f) shall have authority to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee. The inspection authorized by this section may be made at any time it reasonably appears that someone is on the premises. Alcohol law-enforcement agents are also authorized to be on the premises to the extent necessary to enforce the provisions of Article 68 of Chapter 143 of the General Statutes.

(b) Interference with Inspection. – Refusal by a permittee or by any employee of a permittee to permit officers to enter the premises to make an inspection authorized by subsection (a) shall be cause for revocation, suspension or other action against the permit of the permittee as provided in G.S. 18B-104. It shall be a Class 2 misdemeanor for any person to resist or obstruct an officer attempting to make a lawful inspection under this section. (1939, c. 158, s. 514; 1943, c. 400, s. 6; 1949, c. 974, ss. 11, 14; c. 1251, s. 4; 1951, c. 1056, s. 1; c. 1186, ss. 1, 2; 1953, c. 1207, ss. 2-4; 1957, c. 1440; 1961, c. 645; 1963, c. 426, ss. 1, 2, 4, 5, 12; 1967, c. 868; 1971, c. 872, s. 1; 1977, c. 70, s. 17; 1981, c. 412, s. 2; 1993, c. 539, s. 313; 1994, (Ex. Sess.), c. 24, s. 14(c); 1998-212, s. 19.11(f).)

§ 18B-1001. Kinds of ABC permits; places eligible.

When the issuance of the permit is lawful in the jurisdiction in which the premises are located, the Commission may issue the following kinds of permits:

- (1) On-Premises Malt Beverage Permit. – An on-premises malt beverage permit authorizes the retail sale of malt beverages for consumption on the premises and the retail sale of malt beverages in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship malt beverages in closed containers to individual purchasers inside and outside the State. The permit may be issued for any of the following:
 - a. Restaurants;
 - b. Hotels;
 - c. Eating establishments;
 - d. Food businesses;
 - e. Retail businesses;
 - f. Private clubs;
 - g. Convention centers;
 - h. Community theatres.The permit may also be issued to certain breweries as authorized by G.S. 18B-1104(7).
- (2) Off-Premises Malt Beverage Permit. – An off-premises malt beverage permit authorizes the retail sale of malt beverages in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship malt beverages in closed containers to individual purchasers inside and outside the State. The permit may be issued for any of the following:
 - a. Restaurants;
 - b. Hotels;
 - c. Eating establishments;
 - d. Food businesses;
 - e. Retail businesses.
- (3) On-Premises Unfortified Wine Permit. – An on-premises unfortified wine permit authorizes the retail sale of unfortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision. The permit may be issued for any of the following:
 - a. Restaurants;
 - b. Hotels;
 - c. Eating establishments;
 - d. Private clubs;
 - e. Convention centers;
 - f. Cooking schools;
 - g. Community theatres;
 - h. Wineries;

- i. Wine producers.
- (4) Off-Premises Unfortified Wine Permit. – An off-premises unfortified wine permit authorizes the retail sale of unfortified wine in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship unfortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses. The permit may be issued to the holder of a viticulture/enology course authorization under G.S. 18B-1114.4. A school obtaining a permit under this subdivision is authorized to sell wines manufactured during its viticulture/enology program at one non-campus location in a county where the permittee holds and offers classes on a regular full-time basis in a facility owned by the permittee. The permit may also be issued for a winery or a wine producer for sale of its own unfortified wine during hours when the winery or wine producer's premises is open to the public, subject to any local ordinance adopted pursuant to G.S. 18B-1004(d) concerning hours for the retail sale of unfortified wine. A winery obtaining a permit under this subdivision is authorized to sell wine manufactured by the winery at one additional location in the county under the same conditions specified in G.S. 18B-1101(5) for the sale of wine at the winery; provided, however, that no other alcohol sales shall be authorized at the additional location. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision.
- (5) On-Premises Fortified Wine Permit. – An on-premises fortified wine permit authorizes the retail sale of fortified wine for consumption on the premises, either alone or mixed with other beverages, and the retail sale of fortified wine in the manufacturer's original container for consumption off the premises. It also authorizes the holder of the permit to ship fortified wine in closed containers to individual purchasers inside and outside the State. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision. The permit may be issued for any of the following:
- a. Restaurants;
 - b. Hotels;
 - c. Private clubs;
 - d. Community theatres;
 - e. Wineries;
 - f. Convention centers.
- (6) Off-Premises Fortified Wine Permit. – An off-premises fortified wine permit authorizes the retail sale of fortified wine in the manufacturer's original container for consumption off the premises and it authorizes the holder of the permit to ship fortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for food businesses. The permit may also be issued for a winery for sale of its own fortified wine. Orders received by a winery by telephone, Internet, mail, facsimile, or other off-premises means of communication shall be shipped pursuant to a wine shipper permit and not pursuant to this subdivision.

- (7) Brown-Bagging Permit. – A brown-bagging permit authorizes each individual patron of an establishment, with the permission of the permittee, to bring up to eight liters of fortified wine or spirituous liquor, or eight liters of the two combined, onto the premises and to consume those alcoholic beverages on the premises. The permit may be issued for any of the following:
- a. Restaurants;
 - b. Hotels;
 - c. Private clubs;
 - d. Community theatres;
 - e. Congressionally chartered veterans organizations.
- (8) Special Occasion Permit. – A special occasion permit authorizes the host of a reception, party or other special occasion, with the permission of the permittee, to bring fortified wine and spirituous liquor onto the premises of the business and to serve the same to his guests. The permit may be issued for any of the following:
- a. Restaurants;
 - b. Hotels;
 - c. Eating establishments;
 - d. Private clubs;
 - e. Convention centers.
- (9) Limited Special Occasion Permit. – A limited special occasion permit authorizes the permittee to bring fortified wine and spirituous liquor onto the premises of a business, with the permission of the owner of that property, and to serve those alcoholic beverages to the permittee's guests at a reception, party, or other special occasion being held there. The permit may be issued to any individual other than the owner or possessor of the premises. An applicant for a limited special occasion permit shall have the written permission of the owner or possessor of the property on which the special occasion is to be held.
- (10) Mixed Beverages Permit. – A mixed beverages permit authorizes the retail sale of mixed beverages for consumption on the premises. The permit also authorizes a mixed beverages permittee to obtain a purchase-transportation permit under G.S. 18B-403 and 18B-404, and to use for culinary purposes spirituous liquor lawfully purchased for use in mixed beverages. The permit may be issued for any of the following:
- a. Restaurants;
 - b. Hotels;
 - c. Private clubs;
 - d. Convention centers;
 - e. Community theatres;
 - f. Nonprofit organizations; and
 - g. Political organizations.
- (11) Culinary Permit. – A culinary permit authorizes a permittee to possess up to 12 liters of either fortified wine or spirituous liquor, or 12 liters of the two combined, in the kitchen of a business and to use those alcoholic beverages for culinary purposes. The permit may be issued for either of the following:
- a. Restaurants;
 - b. Hotels.
 - c. Cooking schools.

A culinary permit may also be issued to a catering service to allow the possession of the amount of fortified wine and spirituous liquor stated above at the business location of that service and at the cooking site. The permit shall also authorize the caterer to transport those alcoholic beverages to and from the business location and the cooking site, and use them in cooking.

- (12) Mixed Beverages Catering Permit. – A mixed beverages catering permit authorizes a hotel or a restaurant that has a mixed beverages permit to bring spirituous liquor onto the premises where the hotel or restaurant is catering food for an event and to serve the liquor to guests at the event.

- (13) Guest Room Cabinet Permit. – A guest room cabinet permit authorizes a hotel having a mixed beverages permit or a private club having a mixed beverages permit and management contracts for the rental of living units to sell to its room guests, from securely locked cabinets, malt beverages, unfortified wine, fortified wine, and spirituous liquor. A permittee shall designate and maintain at least ten percent (10%) of the permittee's guest rooms as rooms that do not have a guest room cabinet. A permittee may dispense alcoholic beverages from a guest room cabinet only in accordance with written policies and procedures filed with and approved by the Commission. A permittee shall provide a reasonable number of vending machines, coolers, or similar machines on premises for the sale of soft drinks to hotel guests.

A guest room cabinet permit may be issued for any of the following:

- a. A hotel located in a county subject to G.S. 18B-600(f).
- b. A hotel located in a county that has a population in excess of 150,000 by the last federal census.
- c. A qualifying private club located in a county defined in G.S. 18B-101(13a)b.2.

- (14) Brew on Premises Permit. – A permit may be issued to a business, located in a jurisdiction where the sale of malt beverages is allowed, where individual customers who are 21 years old or older may purchase ingredients and rent the equipment, time, and space to brew malt beverages for personal use in amounts set forth in 27 C.F.R. § 25.205. The customer must do all of the following:

- a. Select a recipe and kettle.
- b. Weigh out the proper ingredients and add them to the kettle.
- c. Transfer the wort to the fermenter.
- d. Add the yeast.
- e. Place the ingredients in a fermentation room.
- f. Filter, carbonate, and bottle the malt beverage.

A permittee may transfer the ingredients from the fermentation room to the cold room and may assist the customer in all the steps involved in brewing a malt beverage except adding the yeast. A malt beverage produced under this subdivision may not contain more than six percent (6%) alcohol by volume.

- (15) Wine-Tasting Permit. – A wine-tasting permit authorizes wine tastings on a premises holding a retail permit, by the retail permit holder or his employee. A wine tasting consists of the offering of a sample of one or more unfortified wine products, in amounts of no more than one ounce for each sample, without charge, to customers of the business. Any person pouring wine at a wine tasting shall be at least 21 years of age.

- a. Representatives of the winery, which produced the wine, the wine producer, a wholesaler, or a wholesaler's employee may assist with the tasting. Assisting with a wine tasting includes:
 - 1. Pouring samples for customers.
 - 2. Checking the identification of patrons being served at the wine tasting.
 - b. When a representative of the winery that produced the wine, the wine producer, a wine wholesaler, or a wine wholesaler's employee assists in a wine tasting conducted by a retail permit holder:
 - 1. The retail permit holder shall designate an employee to actively supervise the wine tasting.
 - 2. A retail permit holder's employee shall not supervise more than three wine-tasting areas.
 - 3. No more than six wines may be tasted at any one tasting area.
 - 4. The wine tasting shall not last longer than four hours from the time designated as the starting time by the retail permit holder.
 - c. The retail permit holder shall be solely liable for any violations of this Chapter occurring in connection with the wine tasting. The Commission shall adopt rules to assure that the tastings are limited to samplings and not a subterfuge for the unlawful sale or distribution of wine, and that the tastings are not used by industry members for unlawful inducements to retail permit holders. Except for purposes of this subsection, the holder of a wine-tasting permit shall not be construed to hold a permit for the on-premises sale or consumption of alcoholic beverages. Any food business is eligible for a wine-tasting permit.
- (16) Wine Shop Permit. – A wine shop permit authorizes the retail sale of malt beverages, unfortified wine, and fortified wine in the manufacturer's original container for consumption off the premises, and authorizes wine tastings on the premises conducted and supervised by the permittee in accordance with subdivision (15) of this section. It also authorizes the holder of the permit to ship malt beverages, unfortified wine, and fortified wine in closed containers to individual purchasers inside and outside the State. The permit may be issued for retail businesses whose primary purpose is selling malt beverages and wine for consumption off the premises and regularly and customarily educating consumers through tastings, classes, and seminars about the selection, serving, and storing of wine. The holder of the permit is authorized to sell unfortified wine for consumption on the premises, provided that the sale of wine for consumption on the premises does not exceed forty percent (40%) of the establishment's total sales for any 30-day period. The holder of a wine-tasting permit not engaged in the preparation or sale of food on the premises is not subject to Part 6 of Article 8 of Chapter 130A of the General Statutes.
- (17) Winemaking on Premises Permit. – A permit may be issued to a business, located in a jurisdiction where the sale of unfortified wine is allowed, where individual customers who are 21 years old or older may purchase ingredients and rent the equipment, time, and space to make unfortified wine for personal use in amounts set forth in 27 C.F.R. § 24.75. Except for wine produced for testing equipment or recipes and samples pursuant to this subdivision, the

permit holder shall not engage in the actual production or manufacture of wine. Samples may be consumed on the premises only by a person who has a nonrefundable contract to ferment at the premises, and the samples may not exceed one ounce per sample. All wine produced at a winemaking on premises facility shall be removed from the premises by the customer and may only be used for home consumption and the personal use of the customer.

- (18) Malt Beverage Tasting Permit. – A malt beverage tasting permit authorizes malt beverage tastings on a premises holding a retail permit by the retail permit holder or his employee. A representative of the brewery whose beverages are being featured at the tasting shall be present at the tasting unless the wholesaler or a wholesaler's employee determines that no representative of the brewery needs to be present. A malt beverage tasting consists of the offering of a sample of one or more malt beverage products, in amounts of no more than two ounces for each sample, without charge, to customers of the business. Any persons pouring malt beverage at a malt beverage tasting shall be at least 21 years of age.
- a. Representatives of the brewery which produced the malt beverage, a wholesaler, or a wholesaler's employee may assist with the tasting. Assisting with a malt beverage tasting includes:
 - 1. Pouring samples for customers.
 - 2. Checking the identification of patrons being served at the malt beverage tasting.
 - b. When a representative of the brewery that produced the malt beverage, a malt beverage wholesaler, or a malt beverage wholesaler's employee assists in a malt beverage tasting conducted by a retail permit holder:
 - 1. The retail permit holder shall designate an employee to actively supervise the malt beverage tasting.
 - 2. A retail permit holder's employee shall not supervise more than three malt beverage tasting areas.
 - 3. No more than four malt beverages may be tasted at any one tasting area.
 - 4. The malt beverage tasting shall not last longer than four hours from the time designated as the starting time by the retail permit holder.
 - c. The retail permit holder shall be solely liable for any violations of this Chapter occurring in connection with the malt beverage tasting. The Commission shall adopt rules to assure that the tastings are limited to samplings and not a subterfuge for the unlawful sale or distribution of malt beverages, and that the tastings are not used by industry members for unlawful inducements to retail permit holders. Except for purposes of this subdivision, the holder of a malt beverage tasting permit shall not be construed to hold a permit for the on-premises sale or consumption of alcoholic beverages. Any food business is eligible for a malt beverage tasting permit.
- (19) Spirituous liquor tasting permit. – The holder of any distillery permit authorized by G.S. 18B-1105 may conduct a consumer tasting event on the premises of the distillery subject to the following conditions:
- a. Any person pouring spirituous liquor at a tasting shall be an employee of the distillery and at least 21 years of age.

- b. The person pouring the spirituous liquor shall be responsible for checking the identification of patrons being served at the tasting.
- c. Each consumer is limited to tasting samples of 0.25 ounce of each spirituous liquor which total no more than 1.5 ounces of spirituous liquor in any calendar day.
- d. The consumer shall not be charged for any spirituous liquor tasting sample.
- e. The spirituous liquor used in the consumer tasting event shall be distilled at the distillery where the event is being held by the permit holder conducting the event.
- f. A consumer tasting event shall not be allowed when the sale of spirituous liquor is otherwise prohibited.
- g. Tasting samples are not to be offered to, or allowed to be consumed by, any person under the legal age for consuming spirituous liquor.

The distillery permit holder shall be solely liable for any violations of this Chapter occurring in connection with the tasting. The Commission shall adopt rules to assure that the tastings are limited to samplings and not a subterfuge for the unlawful sale or distribution of spirituous liquor and that the tastings are not used by industry members for unlawful inducements to retail permit holders. (1945, c. 903, s. 1; 1947, c. 1098, ss. 2, 3; 1949, c. 974, s. 1; 1957, cc. 1048, 1448; 1963, c. 426, ss. 10, 12; c. 460, s. 1; 1971, c. 872, s. 1; 1973, c. 476, s. 128; 1975, c. 586, s. 1; c. 654, ss. 1, 2; c. 722, s. 1; 1977, c. 70, s. 19; c. 182, s. 1; c. 669, ss. 1, 2; c. 676, ss. 1, 2; c. 911; 1979, c. 348, ss. 2, 3; c. 683, ss. 5, 6, 11, 12; 1981, c. 412, s. 2; 1981 (Reg. Sess., 1982), c. 1262, ss. 16, 17, 22; 1983, c. 457, s. 3; c. 583, ss. 2-5; 1985, c. 89, ss. 1-3; c. 596, s. 1; 1987, c. 391, s. 2; c. 434, s. 1; 1989, c. 800, ss. 11, 12; 1991, c. 459, ss. 5, 6; c. 565, ss. 1, 7; c. 669, s. 1; 1991 (Reg. Sess., 1992), c. 920, s. 7; 1993, c. 508, s. 5; 1995, c. 466, s. 10; c. 509, ss. 16-18; 1997-443, s. 16.28; 1997-467, s. 3; 2001-262, s. 1; 2001-487, s. 49(a); 2003-402, s. 5; 2005-350, ss. 1, 2(a); 2006-222, s. 2.1; 2006-227, ss. 1, 9; 2006-264, s. 35.3; 2009-377, s. 2; 2009-539, s. 3; 2010-31, s. 14.12(c).)

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: ALCOHOLIC BEVERAGE CONTROL COMMISSION

RULE CITATION: 04 NCAC 02T .0713

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 (c), it is not clear what would constitute "substantial" advertising matter.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02F .0101

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:

Apparently the wrong agency took action in repealing this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This repeal was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the repeal. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

Part 6. Public Librarian Certification Commission.

§ 143B-67. Public Librarian Certification Commission – creation, powers and duties.

There is hereby created the Public Librarian Certification Commission of the Department of Cultural Resources with the power and duty to adopt rules and regulations to be followed in the certification of public librarians. The Commission is authorized to establish and require written examinations for certified public librarian applicants.

The Commission shall adopt such rules and regulations consistent with the provisions of this Chapter. All rules and regulations consistent with the provisions of this Chapter heretofore adopted by the Library Certification Board shall remain in full force and effect unless and until repealed or superseded by action of the Public Librarian Certification Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Cultural Resources. (1973, c. 476, s. 49; 1981 (Reg. Sess., 1982), c. 1359, s. 4.)

§ 143B-68. Public Librarian Certification Commission – members; selection; quorum; compensation.

The Public Librarian Certification Commission of the Department of Cultural Resources shall consist of five members as follows: (i) the chairman of the North Carolina Association of Library Trustees, (ii) the chairman of the public libraries section of the North Carolina Library Association, (iii) an individual named by the Governor upon the nomination of the North Carolina Library Association, (iv) the dean of a State or regionally accredited graduate school of librarianship in North Carolina appointed by the Governor and (v) one member at large appointed by the Governor.

The members shall serve four-year terms or while holding the appropriate chairmanships. Any appointment to fill a vacancy created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance, and nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem, and necessary travel expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of the Department through the regular staff of the Department. (1973, c. 476, s. 50.)

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02F .0102

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:

Apparently the wrong agency took action in repealing this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This repeal was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the repeal. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02F .0103

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:

Apparently the wrong agency took action in repealing this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This repeal was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the repeal. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES

RULE CITATION: 07 NCAC 02H .0102

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 are the "Library collection management procedures." There is no authority cited to require compliance with procedures that have not been adopted as rules.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / STATE LIBRARY

RULE CITATION: 07 NCAC 02H .0203

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:

It is not clear what standards are in the State Library's *Handbook for State Agencies*. There is no authority cited to set requirements outside rulemaking.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES

RULE CITATION: 07 NCAC 02H .0305

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) and (b), it is not clear what the Library's circulation procedures and policy are. There is no authority cited for establishing procedures and policy affecting the public outside rulemaking.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / STATE LIBRARY

RULE CITATION: 07 NCAC 02I .0202

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:

It is not clear what standards the Secretary will use in approving grants. There is no authority cited to set approval standards outside rulemaking.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02J .0101

RECOMMENDED ACTION:

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

COMMENT:

Apparently the wrong agency adopted this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This rule was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the adoption. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to adopt this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02J .0102

RECOMMENDED ACTION:

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

COMMENT:

Apparently the wrong agency adopted this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This rule was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the adoption. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to adopt this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / PUBLIC LIBRARIAN
CERTIFICATION COMMISSION

RULE CITATION: 07 NCAC 02J .0103

RECOMMENDED ACTION:

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

COMMENT:

Apparently the wrong agency adopted this rule. The cited authority for the rule is authority for the Public Librarian Certification Commission to adopt rules. This rule was proposed in the NC Register and submitted to the Rules Review Commission as a rule from the Department of Cultural Resources. There is no indication that the Public Librarian Certification Commission played any role in the adoption. It therefore did not comply with the Administrative Procedure Act and there is no authority cited for the Department to adopt this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0203

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 121-12. North Carolina Historical Commission.

(a) Protection of Properties on National Register. – It shall be the duty of the Historical Commission, meeting at such times and according to such procedures as it shall by rule prescribe, to provide an advisory and coordinative mechanism in and by which State undertakings of every kind that are potentially harmful to the cause of historic preservation within the State may be discussed, and where possible, resolved, giving due consideration to the competing public interests that may be involved. To this end, the head of any State agency having direct or indirect jurisdiction over a proposed State or state-assisted undertaking, or the head of any State department, board, commission, or independent agency having authority to build, construct, operate, license, authorize, assist, or approve any State or state-assisted undertaking, shall, prior to the approval of any State funds for the undertaking, or prior to any approval, license, or authorization, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is listed in the National Register of Historic Places established pursuant to Public Law 89-665, 16 U.S.C. 470.

Where, in the judgment of the Commission, an undertaking will have an effect upon any listed district, site, building, structure, area, or object, the head of the appropriate State agency shall afford the Commission a reasonable opportunity to comment with regard to such undertaking.

The Historical Commission shall act with reasonable diligence to insure that all State departments, boards, commissions, or agencies potentially affected by the provisions of this section be kept currently informed with respect to the name, location, and other significant particulars of any district, site, building, structure, or object listed or placed upon the National Register of Historic Places. Each affected State department or agency shall furnish, either upon its own initiative or at the request of the Historical Commission such information as may reasonably be required by the Commission for the proper implementation of this section.

(b) Criteria for State Historic Properties. – The Commission shall prepare and adopt criteria for the evaluation of State historic sites and all other real and personal property which it may consider to be of such historic, architectural, archaeological, or cultural importance as would justify the acquisition and ownership thereof by the State of North Carolina, or for the extension of any assistance or aid thereto by the State, acting by itself or in connection with any county, city, corporation, organization, or individual. The Commission shall cooperate to the fullest practical extent with any local historical organization and with any city or county historic district properties commission. In evaluating whether a building should be a State historic site, the Commission shall request and review plans for the use and maintenance of the building.

(c) Criteria for State Aid to Historic Properties. – The Commission shall also prepare and adopt criteria for the evaluation of all properties of historic or archaeological importance owned by, under option to, or being considered for acquisition by a county, city, historic properties commission, or other organization or individual for which State aid or assistance is requested from the Department of Cultural Resources. The Commission shall investigate, evaluate, and prepare a written report on all historic or archaeological property for which State aid or appropriations to be administered by the Department of Cultural Resources are proposed. If the property is a building, the Commission shall request and review the plans for the use, maintenance, operation, and purpose of the building and shall comment on the feasibility of the plans in the written report. This report, which shall be filed as a matter of record in the custody of the Department of Cultural Resources, shall set forth the following opinions or recommendations of the Commission:

- (1) Whether the property is historically authentic;

- (2) Whether it is of such educational, historical, or cultural significance as to be essential to the development of a balanced State program of historic and archaeological sites and properties;
- (3) The estimated total cost of the project under consideration and the apportionment of said cost among State and nonstate sources;
- (4) Whether practical plans have been or can be developed for the funding of the nonstate portion of the costs;
- (5) Whether practical plans have been developed for the continued staffing, maintenance and operation of the property without State assistance; and
- (6) Such further comments and recommendations that the Commission may make.

(c1) **Criteria for State Aid to Historical Museums.** – The Commission shall also prepare and adopt criteria for the evaluation of all interpretive, security or climate control programs or projects to be installed in nonprofit history museums for which State aid or assistance is requested from the Department of Cultural Resources. The Commission shall investigate, evaluate, and prepare a written report on all interpretive, security, or climate control programs or projects for which State appropriations to be administered by the Department of Cultural Resources are proposed. This report, which shall be filed as a matter of record in the custody of the Department of Cultural Resources, shall set forth the following opinions or recommendations of the Commission:

- (1) The statewide educational significance and the qualitative level of the program or project and whether the program or project is essential to the development of a State program of historical interpretation;
- (2) The local or regional need for such a program or project;
- (3) The estimated total cost of the program or project under consideration and the apportionment of said cost among State and nonstate sources;
- (4) Whether practical plans have been or can be developed for the funding of the nonstate portions of the costs;
- (5) Whether practical plans have been developed for the continued staffing, maintenance, and operating of the museum without State assistance; and
- (6) Such further comments and recommendations that the Commission may make.

(d) **Commission to Furnish Recommendations to Legislative Committees.** – The Commission through the Department of Cultural Resources shall furnish as soon as practicable to the chairman of each legislative committee to which is referred any bill seeking an appropriation of State funds to the Department of Cultural Resources for the purpose of acquiring, preserving, restoring, or operating, or otherwise assisting, any property having historic, archaeological, architectural, or other cultural value or significance, and to the chairman of each legislative committee to which is referred any bill seeking an appropriation of State funds to the Department of Cultural Resources for the purpose of assisting a history museum, at least five copies of a report on the findings and recommendations of the Commission relating to such property. (1973, c. 476, s. 48; 1975, c. 19, s. 40; 1979, c. 861, ss. 3-5; 1985 (Reg. Sess., 1986), c. 1014, s. 171(b); 1995, c. 324, s. 12.)

Part 4. North Carolina Historical Commission.

§ 143B-62. North Carolina Historical Commission – creation, powers and duties.

There is hereby created the North Carolina Historical Commission of the Department of Cultural Resources to give advice and assistance to the Secretary of Cultural Resources and to promulgate rules and regulations to be followed in the acquisition, disposition, preservation, and use of records, artifacts, real and personal property, and other materials and properties of historical, archaeological, architectural, or other cultural value, and in the extension of State aid to other agencies, counties, municipalities, organizations, and individuals in the interest of historic preservation.

- (1) The Historical Commission shall have the following powers and duties:
 - a. To advise the Secretary of Cultural Resources on the scholarly editing, writing, and publication of historical materials to be issued under the name of the Department.
 - b. To evaluate and approve proposed nominations of historic, archaeological, architectural, or cultural properties for entry on the National Register of Historic Places.
 - c. To evaluate and approve the State plan for historic preservation as provided for in Chapter 121.
 - d. To evaluate and approve historic, archaeological, architectural, or cultural properties proposed to be acquired and administered by the State.
 - e. To evaluate and prepare a report on its findings and recommendations concerning any property not owned by the State for which State aid or appropriations are requested from the Department of Cultural Resources, and to submit its findings and recommendations in accordance with Chapter 121.
 - f. To serve as an advisory and coordinative mechanism in and by which State undertakings of every kind that are potentially harmful to the cause of historic preservation within the State may be discussed, and where possible, resolved, particularly by evaluating and making recommendations concerning any State undertaking which may affect a property that has been entered on the National Register of Historic Places as provided for in Chapter 121 of the General Statutes of North Carolina.
 - g. To exercise any other powers granted to the Commission by provisions of Chapter 121 of the General Statutes of North Carolina.
 - h. To give its professional advice and assistance to the Secretary of Cultural Resources on any matter which the Secretary may refer to it in the performance of the Department's duties and responsibilities provided for in Chapter 121 of the General Statutes of North Carolina.
 - i. To serve as a search committee to seek out, interview, and recommend to the Secretary of Cultural Resources one or more experienced and professionally trained historian(s) for either the position of Deputy Secretary of Archives and History when a vacancy occurs, and to assist and cooperate with the Secretary in periodic reviews of the performance of the Deputy Secretary.
 - j. To assist and advise the Secretary of Cultural Resources and the Deputy Secretary of Archives and History in the development and

implementation of plans and priorities for the State's historical programs.

- (2) The Historical Commission shall have the power and duty to establish standards and provide rules and regulations as follows:
 - a. For the acquisition and use of historical materials suitable for acceptance in the North Carolina Office of Archives and History.
 - b. For the disposition of public records under provisions of Chapter 121 of the General Statutes of North Carolina.
 - c. For the certification of records in the North Carolina State Archives as provided in Chapter 121 of the General Statutes of North Carolina.
 - d. For the use by the public of historic, architectural, archaeological, or cultural properties as provided in Chapter 121 of the General Statutes of North Carolina.
 - e. For the acquisition of historic, archaeological, architectural, or cultural properties by the State.
 - f. For the extension of State aid or appropriations through the Department of Cultural Resources to counties, municipalities, organizations, or individuals for the purpose of historic preservation or restoration.
 - f1. For the extension of State aid or appropriations through the Department of Cultural Resources to nonstate-owned nonprofit history museums.
 - g. For qualification for grants-in-aid or other assistance from the federal government for historic preservation or restoration as provided in Chapter 121 of the General Statutes of North Carolina. This section shall be construed liberally in order that the State and its citizens may benefit from such grants-in-aid.
- (3) The Commission shall adopt rules and regulations consistent with the provisions of this section. All current rules and regulations heretofore adopted by the Executive Board of the State Department of Archives and History, the Historic Sites Advisory Committee, the North Carolina Advisory Council on Historical Preservation, the Executive Mansion Fine Arts Commission, and the Memorials Commission shall remain in full force and effect unless and until repealed or superseded by action of the Historical Commission. All rules and regulations adopted by the Commission shall be enforced by the Department of Cultural Resources. (1973, c. 476, s. 44; 1977, c. 513, s. 2; 1979, c. 861, s. 6; 1985 (Reg. Sess., 1986), c. 1014, s. 171(f); 1997-411, ss. 1-3; 2002-159, s. 35(k).)

§ 143B-63. Historical Commission – members; selection; quorum; compensation.

The Historical Commission of the Department of Cultural Resources shall consist of 11 members appointed by the Governor.

The members of the North Carolina Historical Commission shall include the members of the existing North Carolina Historical Commission who shall serve for a period equal to the remainder of their current terms on the Commission, plus four additional appointees of the Governor, two of whose appointments shall expire March 31, 1979, and two of whose appointments shall expire March 31, 1981. At the end of the respective terms of office of the members, their successors shall be appointed for terms of six years and until their successors are appointed and qualify. Of the members, at least five shall have professional training or

experience in the fields of archives, history, historic preservation, historic architecture, archaeology, or museum administration, including at least three currently involved in the teaching of history at the college or university level or in administering archives or historical collections or programs. Any appointment to fill a vacancy on the Commission created by resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance or nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

A majority of the Commission shall constitute a quorum for the transaction of business.

All clerical and other services required by the Commission shall be supplied by the Secretary of Cultural Resources. (1973, c. 476, s. 45; 1977, c. 513, s. 1.)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0204

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:

The authority cited for the repeal of this rule is authority for both the Department (G.S. 121-23) and the Historical Commission (G.S. 143B-62) to adopt rules. Since there is no indication that the Historical Commission was involved in the repeal of the rule, it apparently has not complied with the Administrative Procedure Act. To the degree that portions of this rule are subject to Historical Commission action, there is no authority cited for the Department to unilaterally repeal it.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 121-23. Department is custodian of underwater personal property of the State and may adopt rules concerning the property.

The Department of Cultural Resources is the custodian of shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts to which the State has title under G.S. 121-22. The Department of Cultural Resources may adopt rules necessary to preserve, protect, recover, or salvage any or all of these properties. (1967, c. 533, s. 2; 1973, c. 476, s. 48; 1993, c. 249.)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0702

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0703

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules in G.S. Chapter 70, Article 2 is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0704

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0705

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0706

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0707

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0708

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0709

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0710

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0711

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0712

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0713

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0714

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0715

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0716

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0717

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0718

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0801

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 121-5. Public records and archives.

(a) State Archival Agency Designated. – The Department of Cultural Resources shall be the official archival agency of the State of North Carolina with authority as provided throughout this Chapter and Chapter 132 of the General Statutes of North Carolina in relation to the public records of the State, counties, municipalities, and other subdivisions of government.

(b) Destruction of Records Regulated. – No person may destroy, sell, loan, or otherwise dispose of any public record without the consent of the Department of Cultural Resources, except as provided in G.S. 130A-99. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, mutilates, or destroys it shall be guilty of a Class 3 misdemeanor and upon conviction only fined at the discretion of the court.

When the custodian of any official State records certifies to the Department of Cultural Resources that such records have no further use or value for official and administrative purposes and when the Department certifies that such records appear to have no further use or value for research or reference, then such records may be destroyed or otherwise disposed of by the agency having custody of them.

When the custodian of any official records of any county, city, municipality, or other subdivision of government certifies to the Department that such records have no further use or value for official business and when the Department certifies that such records appear to have no further use or value for research or reference, then such records may be authorized by the governing body of said county, city, municipality, or other subdivision of government to be destroyed or otherwise disposed of by the agency having custody of them. A record of such certification and authorization shall be entered in the minutes of the governing body granting the authority.

The North Carolina Historical Commission is hereby authorized and empowered to make such orders, rules, and regulations as may be necessary and proper to carry into effect the provisions of this section. When any State, county, municipal, or other governmental records shall have been destroyed or otherwise disposed of in accordance with the procedure authorized in this subsection, any liability that the custodian of such records might incur for such destruction or other disposal shall cease and determine.

(c) Assistance to Public Officers. – The Department of Cultural Resources shall have the right to examine into the condition of public records and shall, subject to the availability of staff and funds, give advice and assistance to public officials and agencies in regard to preserving or disposing of the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which inventory shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Department of Cultural Resources, establishing a time period for the retention or disposal of each series of records. So long as such approved schedule remains in effect, destruction or disposal of records in accordance with its provisions shall be deemed to have met the requirements of G.S. 121-5(b).

The Department of Cultural Resources is hereby authorized and directed to conduct a program of inventorying, repairing, and microfilming in the counties for security purposes those official records of the several counties which the Department determines have permanent value, and of providing safe storage for microfilm copies of such records. Subject to the availability of funds, such program shall be extended to the records of permanent value of the cities, municipalities, and other subdivisions of government.

(d) Preservation of Permanently Valuable Records. – Public records certified by the Department of Cultural Resources as being of permanent value shall be preserved in the custody

of the agency in which the records are normally kept or of the North Carolina State Archives. Any State, county, municipal, or other public official is hereby authorized and empowered to turn over to the Department of Cultural Resources any State, county, municipal, or other public records no longer in current official use, and the Department of Cultural Resources is authorized in its discretion to accept such records, and having done so shall provide for their administration and preservation in the North Carolina State Archives. When such records have been thus surrendered, photocopies, microfilms, typescripts, or other copies of them shall be made and certified under seal of the Department, upon application of any person, which certification shall have the same force and effect as if made by the official or agency by which the records were transferred to the Department of Cultural Resources; and the Department may charge reasonable fees for these copies. The Department may answer written inquiries for nonresidents of the State and for this service may charge a search and handling fee not to exceed twenty-five dollars (\$25.00). The receipts from this fee shall be used to defray the cost of providing this service.

(e) Program Funding. – Fees credited to the Department under G.S. 161-11.6 shall be used to offset the Department's costs in providing essential records management and archival services for public records pursuant to Chapter 121 and Chapter 132 of the General Statutes. (1907, c. 714, s. 5; C.S., s. 6145; 1939, c. 249; 1943, c. 237; 1945, c. 55; 1953, c. 224; 1955, c. 543, s. 1; 1959, c. 1162; 1973, c. 476, s. 48; 1979, c. 361; c. 801, s. 95; 1981, c. 406, ss. 1, 2; 1993, c. 539, s. 916; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 13; 2001-427, s. 3(a); 2009-451, s. 20B.3(b).)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0802

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0805

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules in G.S. Chapter 70, Article 2 is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0806

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules in G.S. Chapter 70, Article 2 is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0807

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 121-4. Powers and duties of the Department of Cultural Resources.

The Department of Cultural Resources shall have the following powers and duties:

- (1) To accept gifts, bequests, devises, and endowments for purposes which fall within the general legal powers and duties of the Department. Unless otherwise specified by the donor or legator, the Department may either expend both the principal and interest of any gift or bequests or may invest such funds in whole or in part, by and with the consent of the State Treasurer.
- (2) To conduct a records management program, including the operation of a records center or centers and a centralized microfilming program, for the benefit of all State agencies, and to give advice and assistance to the public officials and agencies in matters pertaining to the economical and efficient maintenance and preservation of public records.
- (3) To preserve and administer, in the North Carolina State Archives, such public records as may be accepted into its custody, and to collect, preserve, and administer private and unofficial historical records and other documentary materials relating to the history of North Carolina and the territory included therein from the earliest times. The Department shall carefully protect and preserve such materials, file them according to approved archival practices, and permit them, at reasonable times and under the supervision of the Department, to be inspected, examined, or copied: Provided, that any materials placed in the keeping of the Department under special terms or conditions restricting their use shall be made accessible only in accordance with such terms or conditions.
- (4) To have materials on the history of North Carolina properly edited, published as other State printing, and distributed under the direction of the Department. The Department may charge a reasonable price for such publications and devote the revenue arising from such sales to the work of the Department.
- (5) With the cooperation of the State Board of Education and the Department of Public Instruction to develop, conduct, and assist in the coordination of a program for the better and more adequate teaching of State and local history in the public schools and the institutions of the community college system of North Carolina, including, as appropriate, the preparation and publication of suitable histories of all counties and of other appropriate materials, the distribution of such materials to the public schools and community college system for a reasonable charge, and the coordination of this program throughout the State.
- (6) To maintain and administer the North Carolina Museum of History, to collect and preserve therein important historical and cultural materials, and according to approved museum practices to classify, accession, house, and when feasible exhibit such materials and make them available for study.
- (7) To select suitable sites on property owned by the State of North Carolina, or any subdivision of the State, for the erection of historical markers calling attention to nearby historic sites and prepare appropriate inscriptions to be placed on such markers. The Department shall have all markers manufactured, and when completed, each marker shall be delivered to the Department of Transportation for payment and erection under the provisions of G.S. 136-42.2 and 136-42.3. The Secretary is authorized to appoint a highway historical

marker advisory committee to approve all proposed highway historical markers and to establish criteria for carrying out this responsibility.

- (8) In accordance with G.S. 121-9 of this Chapter, to acquire real and personal properties that have statewide historical, architectural, archaeological, or other cultural significance, by gift, purchase, devise, or bequest; to preserve and administer such properties; and, when necessary, to charge reasonable admission fees to such properties. In the acquisition of such property, the Department shall also have the authority to acquire nearby or adjacent property adjacent to properties having statewide significance deemed necessary for the proper use, administration, and protection of historic, architectural, archaeological, or cultural properties, or for the protection of the environment thereof.
- (9) To administer and enforce reasonable rules adopted and promulgated by the Historical Commission for the regulation of the use by the public of such historical, architectural, archaeological, or cultural properties under its charge, which regulations, after having been posted in conspicuous places on and adjacent to such State properties and having been filed according to law, shall have the force and effect of law and any violation of such regulations shall constitute a Class 3 misdemeanor.
- (10) To coordinate the objectives of the state-created historical and commemorative commissions with the other policies, objectives, and programs of the Department of Cultural Resources.
- (11) To organize and administer a junior historian program, in cooperation with the Department of Public Education, the public schools, and other agencies or organizations that may be concerned therein.
- (12) With the approval of the Historical Commission, to dispose of any accessioned records, artifacts, and furnishings in the custody of the Department that are determined to have no further use or value for official or administrative purposes or for research and reference purposes.
- (13) To promote and encourage throughout the State knowledge and appreciation of North Carolina history and heritage by encouraging the people of the State to engage in the preservation and care of archives, historical manuscripts, museum items, and other historical materials; the writing and publication of State and local histories of high standard; the display and interpretation of historical materials; the marking and preservation of historic, architectural, or archaeological structures and sites of great importance; the teaching of North Carolina and local history in the schools and colleges; the appropriate observance of events of importance to the State's history; the publicizing of the State's history through media of public information; and other activities in historical and allied fields.
- (14) With the approval of the Historical Commission, to charge and collect fees not to exceed cost for photographs, photocopies of documents, microfilm and other microforms and other audio or visual reproductions of public records or other documentary materials, objects, artifacts, and research materials; and for the restoration and preservation of documents and other materials important for archival or historical purposes.
- (15) To encourage and develop, in cooperation with the Department of Administration and in consultation with the Department of Transportation, the Department of Commerce, the Department of Environment and Natural

Resources, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and the Historic Preservation Foundation of North Carolina, Inc., a central clearinghouse for information on historic preservation for the benefit and use of public and private agencies and persons in North Carolina.

(16) Repealed by Session Laws 2004-203, s. 51, effective August 17, 2004.

(17) **(See Editor's note)** To enter into an agreement with a private nonprofit corporation for the management of facilities to provide food and beverages at the North Carolina Museum of History. Any net proceeds received by the private nonprofit corporation shall be devoted to the work of the Department. Any private nonprofit corporation entering into an agreement with the Department with regard to the management of the facilities may enter into further agreements with private persons or corporations concerning the operation of the facilities. The Department may enter into an agreement in regard to obtaining or installing equipment, furniture, and furnishings for such facilities. (Rev., ss. 4540, 4541; 1907, c. 714, s. 2; 1911, c. 211, s. 6; C.S., s. 6142; 1925, c. 275, s. 11; 1943, c. 237; 1945, c. 55; 1955, c. 543, s. 1; 1957, c. 330, s. 1; 1959, c. 68, s. 1; 1971, c. 345, s. 3; 1973, c. 476, s. 48; 1977, c. 464, s. 38; 1981, c. 721; 1989, c. 379; c. 727, s. 218(83); c. 751, s. 11; 1991, c. 757, s. 5; 1991 (Reg. Sess., 1992), c. 959, s. 30; 1993, c. 522, s. 8; c. 539, s. 915; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a); 2004-203, s. 51.)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 04R .0808

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:

Apparently the wrong agency repealed this rule. The authority cited to adopt rules is authority for the Historical Commission and not the Department of Cultural Resources. The agency that proposed this repeal in the NC Register and submitted the repeal to the Rules Review Commission was the Department. It does not appear that the Historical Commission has complied with the Administrative Procedure Act and the Department has no authority to repeal this rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0101

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0201

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

Also, in (d), it is not clear what standards have been established by the Department.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES

RULE CITATION: 07 NCAC 13 .0202

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 (e), it is not clear what the requirements in the "Guidelines" are. There is no authority cited to set requirements outside rulemaking.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES

RULE CITATION: 07 NCAC 13 .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:

Apparently the wrong agency adopted this rule. The cited authority does not grant rulemaking authority. It appears that the appropriate authority is G.S. 70-14 which gives authority to adopt rules to the Historical Commission. It does not appear that the Historical Commission has complied with the Administrative Procedure Act nor that the Department has the authority to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 70-13. Archaeological investigations.

(a) Any person may apply to the Department of Cultural Resources for a permit to conduct archaeological investigations on State lands. The application shall contain information the Department of Cultural Resources, in consultation with the Department of Administration, deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to an application under subsection (a) of this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Cultural Resources, in consultation with the Department of Administration, finds that:

- (1) The applicant is qualified to carry out the permitted activity;
- (2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;
- (3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;
- (4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;
- (5) The archaeological resources which are collected, excavated or removed from State lands and associated records and data will remain the property of the State of North Carolina and the resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution;
- (6) The activity pursuant to the permit is not inconsistent with any management plan applicable to the State lands concerned; and
- (7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities.

(c) A permit may contain any terms, conditions or limitations the Department of Cultural Resources, in consultation with the Department of Administration, deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If a permit issued under G.S. 70-13(a) may result in harm to, or destruction of, any religious or cultural site, as determined by the Department of Cultural Resources, in consultation with the Department of Administration, before issuing such permit, the Department of Cultural Resources, in consultation with the Department of Administration, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Cultural Resources, in consultation with the Department of Administration, shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

- (1) The location and schedule of the forthcoming investigation;
- (2) Background data concerning the nature of the study; and
- (3) The purpose of the investigation and the expected results.

(e) A permit issued under G.S. 70-13 may be suspended by the Department of Cultural Resources, in consultation with the Department of Administration, upon the determination that

the permit holder has violated any provision of G.S. 70-15(a) or G.S. 70-15(b). A permit may be revoked by the Department of Cultural Resources, in consultation with the Department of Administration, upon assessment of a civil penalty under G.S. 70-16 against the permit holder or upon the permit holder's conviction under G.S. 70-15. (1981, c. 904, s. 2; 1991, c. 461, s. 1.)

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

§ 70-15. Prohibited acts and criminal penalties.

(a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

(c) Any person who knowingly and willfully violates or employs any other person to violate any prohibition contained in G.S. 70-15(a) or G.S. 70-15(b) shall upon conviction, be fined not more than two thousand dollars (\$2,000) or imprisoned not more than six months, or both, in the discretion of the court.

(d) Each day on which a violation occurs shall be a separate and distinct offense. (1981, c. 904, s. 2.)

§ 121-4. Powers and duties of the Department of Cultural Resources.

The Department of Cultural Resources shall have the following powers and duties:

- (1) To accept gifts, bequests, devises, and endowments for purposes which fall within the general legal powers and duties of the Department. Unless otherwise specified by the donor or legator, the Department may either expend both the principal and interest of any gift or bequests or may invest such funds in whole or in part, by and with the consent of the State Treasurer.
- (2) To conduct a records management program, including the operation of a records center or centers and a centralized microfilming program, for the benefit of all State agencies, and to give advice and assistance to the public officials and agencies in matters pertaining to the economical and efficient maintenance and preservation of public records.
- (3) To preserve and administer, in the North Carolina State Archives, such public records as may be accepted into its custody, and to collect, preserve, and administer private and unofficial historical records and other documentary materials relating to the history of North Carolina and the territory included therein from the earliest times. The Department shall carefully protect and preserve such materials, file them according to approved archival practices, and permit them, at reasonable times and under the supervision of the Department, to be inspected, examined, or copied: Provided, that any materials placed in the keeping of the Department under special terms or

conditions restricting their use shall be made accessible only in accordance with such terms or conditions.

- (4) To have materials on the history of North Carolina properly edited, published as other State printing, and distributed under the direction of the Department. The Department may charge a reasonable price for such publications and devote the revenue arising from such sales to the work of the Department.
- (5) With the cooperation of the State Board of Education and the Department of Public Instruction to develop, conduct, and assist in the coordination of a program for the better and more adequate teaching of State and local history in the public schools and the institutions of the community college system of North Carolina, including, as appropriate, the preparation and publication of suitable histories of all counties and of other appropriate materials, the distribution of such materials to the public schools and community college system for a reasonable charge, and the coordination of this program throughout the State.
- (6) To maintain and administer the North Carolina Museum of History, to collect and preserve therein important historical and cultural materials, and according to approved museum practices to classify, accession, house, and when feasible exhibit such materials and make them available for study.
- (7) To select suitable sites on property owned by the State of North Carolina, or any subdivision of the State, for the erection of historical markers calling attention to nearby historic sites and prepare appropriate inscriptions to be placed on such markers. The Department shall have all markers manufactured, and when completed, each marker shall be delivered to the Department of Transportation for payment and erection under the provisions of G.S. 136-42.2 and 136-42.3. The Secretary is authorized to appoint a highway historical marker advisory committee to approve all proposed highway historical markers and to establish criteria for carrying out this responsibility.
- (8) In accordance with G.S. 121-9 of this Chapter, to acquire real and personal properties that have statewide historical, architectural, archaeological, or other cultural significance, by gift, purchase, devise, or bequest; to preserve and administer such properties; and, when necessary, to charge reasonable admission fees to such properties. In the acquisition of such property, the Department shall also have the authority to acquire nearby or adjacent property adjacent to properties having statewide significance deemed necessary for the proper use, administration, and protection of historic, architectural, archaeological, or cultural properties, or for the protection of the environment thereof.
- (9) To administer and enforce reasonable rules adopted and promulgated by the Historical Commission for the regulation of the use by the public of such historical, architectural, archaeological, or cultural properties under its charge, which regulations, after having been posted in conspicuous places on and adjacent to such State properties and having been filed according to law, shall have the force and effect of law and any violation of such regulations shall constitute a Class 3 misdemeanor.
- (10) To coordinate the objectives of the state-created historical and commemorative commissions with the other policies, objectives, and programs of the Department of Cultural Resources.

- (11) To organize and administer a junior historian program, in cooperation with the Department of Public Education, the public schools, and other agencies or organizations that may be concerned therein.
- (12) With the approval of the Historical Commission, to dispose of any accessioned records, artifacts, and furnishings in the custody of the Department that are determined to have no further use or value for official or administrative purposes or for research and reference purposes.
- (13) To promote and encourage throughout the State knowledge and appreciation of North Carolina history and heritage by encouraging the people of the State to engage in the preservation and care of archives, historical manuscripts, museum items, and other historical materials; the writing and publication of State and local histories of high standard; the display and interpretation of historical materials; the marking and preservation of historic, architectural, or archaeological structures and sites of great importance; the teaching of North Carolina and local history in the schools and colleges; the appropriate observance of events of importance to the State's history; the publicizing of the State's history through media of public information; and other activities in historical and allied fields.
- (14) With the approval of the Historical Commission, to charge and collect fees not to exceed cost for photographs, photocopies of documents, microfilm and other microforms and other audio or visual reproductions of public records or other documentary materials, objects, artifacts, and research materials; and for the restoration and preservation of documents and other materials important for archival or historical purposes.
- (15) To encourage and develop, in cooperation with the Department of Administration and in consultation with the Department of Transportation, the Department of Commerce, the Department of Environment and Natural Resources, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and the Historic Preservation Foundation of North Carolina, Inc., a central clearinghouse for information on historic preservation for the benefit and use of public and private agencies and persons in North Carolina.
- (16) Repealed by Session Laws 2004-203, s. 51, effective August 17, 2004.
- (17) **(See Editor's note)** To enter into an agreement with a private nonprofit corporation for the management of facilities to provide food and beverages at the North Carolina Museum of History. Any net proceeds received by the private nonprofit corporation shall be devoted to the work of the Department. Any private nonprofit corporation entering into an agreement with the Department with regard to the management of the facilities may enter into further agreements with private persons or corporations concerning the operation of the facilities. The Department may enter into an agreement in regard to obtaining or installing equipment, furniture, and furnishings for such facilities. (Rev., ss. 4540, 4541; 1907, c. 714, s. 2; 1911, c. 211, s. 6; C.S., s. 6142; 1925, c. 275, s. 11; 1943, c. 237; 1945, c. 55; 1955, c. 543, s. 1; 1957, c. 330, s. 1; 1959, c. 68, s. 1; 1971, c. 345, s. 3; 1973, c. 476, s. 48; 1977, c. 464, s. 38; 1981, c. 721; 1989, c. 379; c. 727, s. 218(83); c. 751, s. 11; 1991, c. 757, s. 5; 1991 (Reg. Sess., 1992), c. 959, s. 30; 1993, c. 522, s. 8; c. 539, s. 915; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a); 2004-203, s. 51.)

§ 121-24. Department authorized to establish professional staff.

The Department of Cultural Resources is also authorized to establish a professional staff for the purpose of conducting and/or supervising the surveillance, protection, preservation, survey and systematic underwater archaeological recovery of underwater materials as defined in G.S. 121-22 hereof. (1967, c. 533, s. 3; 1973, c. 476, s. 48.)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0303

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

In addition, in (a)(7), it is not clear what standards and guidelines have been issued by the State Archeologist. There is no authority cited to set them outside rulemaking.

In (a)(8), it is not clear what standards the State Archeologist is to use in determining that other qualifications are necessary.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0305

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0306

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0307

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0308

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0309

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0311

RECOMMENDED ACTION:

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

COMMENT:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

In (g), it is not clear what professional standards reports are required to meet.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0312

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0313

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0401

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 121-5. Public records and archives.

(a) State Archival Agency Designated. – The Department of Cultural Resources shall be the official archival agency of the State of North Carolina with authority as provided throughout this Chapter and Chapter 132 of the General Statutes of North Carolina in relation to the public records of the State, counties, municipalities, and other subdivisions of government.

(b) Destruction of Records Regulated. – No person may destroy, sell, loan, or otherwise dispose of any public record without the consent of the Department of Cultural Resources, except as provided in G.S. 130A-99. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, mutilates, or destroys it shall be guilty of a Class 3 misdemeanor and upon conviction only fined at the discretion of the court.

When the custodian of any official State records certifies to the Department of Cultural Resources that such records have no further use or value for official and administrative purposes and when the Department certifies that such records appear to have no further use or value for research or reference, then such records may be destroyed or otherwise disposed of by the agency having custody of them.

When the custodian of any official records of any county, city, municipality, or other subdivision of government certifies to the Department that such records have no further use or value for official business and when the Department certifies that such records appear to have no further use or value for research or reference, then such records may be authorized by the governing body of said county, city, municipality, or other subdivision of government to be destroyed or otherwise disposed of by the agency having custody of them. A record of such certification and authorization shall be entered in the minutes of the governing body granting the authority.

The North Carolina Historical Commission is hereby authorized and empowered to make such orders, rules, and regulations as may be necessary and proper to carry into effect the provisions of this section. When any State, county, municipal, or other governmental records shall have been destroyed or otherwise disposed of in accordance with the procedure authorized in this subsection, any liability that the custodian of such records might incur for such destruction or other disposal shall cease and determine.

(c) Assistance to Public Officers. – The Department of Cultural Resources shall have the right to examine into the condition of public records and shall, subject to the availability of staff and funds, give advice and assistance to public officials and agencies in regard to preserving or disposing of the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which inventory shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Department of Cultural Resources, establishing a time period for the retention or disposal of each series of records. So long as such approved schedule remains in effect, destruction or disposal of records in accordance with its provisions shall be deemed to have met the requirements of G.S. 121-5(b).

The Department of Cultural Resources is hereby authorized and directed to conduct a program of inventorying, repairing, and microfilming in the counties for security purposes those official records of the several counties which the Department determines have permanent value, and of providing safe storage for microfilm copies of such records. Subject to the availability of funds, such program shall be extended to the records of permanent value of the cities, municipalities, and other subdivisions of government.

(d) Preservation of Permanently Valuable Records. – Public records certified by the Department of Cultural Resources as being of permanent value shall be preserved in the custody

of the agency in which the records are normally kept or of the North Carolina State Archives. Any State, county, municipal, or other public official is hereby authorized and empowered to turn over to the Department of Cultural Resources any State, county, municipal, or other public records no longer in current official use, and the Department of Cultural Resources is authorized in its discretion to accept such records, and having done so shall provide for their administration and preservation in the North Carolina State Archives. When such records have been thus surrendered, photocopies, microfilms, typescripts, or other copies of them shall be made and certified under seal of the Department, upon application of any person, which certification shall have the same force and effect as if made by the official or agency by which the records were transferred to the Department of Cultural Resources; and the Department may charge reasonable fees for these copies. The Department may answer written inquiries for nonresidents of the State and for this service may charge a search and handling fee not to exceed twenty-five dollars (\$25.00). The receipts from this fee shall be used to defray the cost of providing this service.

(e) Program Funding. – Fees credited to the Department under G.S. 161-11.6 shall be used to offset the Department's costs in providing essential records management and archival services for public records pursuant to Chapter 121 and Chapter 132 of the General Statutes. (1907, c. 714, s. 5; C.S., s. 6145; 1939, c. 249; 1943, c. 237; 1945, c. 55; 1953, c. 224; 1955, c. 543, s. 1; 1959, c. 1162; 1973, c. 476, s. 48; 1979, c. 361; c. 801, s. 95; 1981, c. 406, ss. 1, 2; 1993, c. 539, s. 916; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 13; 2001-427, s. 3(a); 2009-451, s. 20B.3(b).)

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: DEPARTMENT OF CULTURAL RESOURCES / HISTORICAL COMMISSION

RULE CITATION: 07 NCAC 13 .0402

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:

Apparently the wrong agency adopted this rule. The statutory authority cited for the rule is authority for the Historical Commission to adopt rules. The agency that proposed these rules in the NC Register and that submitted the rules to the Rules Review Commission was the Department of Cultural Resources. There is no indication that the Historical Commission had any role in the rulemaking process. They have not complied with the Administrative Procedure Act. There is no authority cited for the Department to adopt the rule.

It is not clear how the fees in (d) are determined.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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: COMMISSION FOR PUBLIC HEALTH

RULE CITATION: 15A NCAC 13B .1604

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 (b)(1)(D), there is no authority cited for the Commission to authorize the Division to set requirements outside rulemaking.

Part (b)(2)(A) contains a waiver or modification provision without specific guidelines as prohibited by G.S. 150B-19(6). It is not clear when the Division would authorize permittee not to comply with the conditions of a permit.

The first sentence in (b)(2)(G) is a legal conclusion and outside the authority of the Commission to set by rule.

In (b)(2)(H), it is not clear what standards the Division will use in determining whether to approve.

In (b)(2)(K)(ii), it is not clear what standards the Division will use in extending the period of time for retaining records.

In (b)(2)(M)(iii), there is no authority cited for the Commission to adopt rules determining when a registered land surveyor must conduct a survey.

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

§ 130A-294. Solid waste management program.

(a) The Department is authorized and directed to engage in research, conduct investigations and surveys, make inspections and establish a statewide solid waste management program. In establishing a program, the Department shall have authority to:

- (1) Develop a comprehensive program for implementation of safe and sanitary practices for management of solid waste;
- (2) Advise, consult, cooperate and contract with other State agencies, units of local government, the federal government, industries and individuals in the formulation and carrying out of a solid waste management program;
- (3) Develop and adopt rules to establish standards for qualification as a "recycling, reduction or resource recovering facility" or as "recycling, reduction or resource recovering equipment" for the purpose of special tax classifications or treatment, and to certify as qualifying those applicants which meet the established standards. The standards shall be developed to qualify only those facilities and equipment exclusively used in the actual waste recycling, reduction or resource recovering process and shall exclude any incidental or supportive facilities and equipment;
- (4)
 - a. Develop a permit system governing the establishment and operation of solid waste management facilities. A landfill with a disposal area of 1/2 acre or less for the on-site disposal of land clearing and inert debris is exempt from the permit requirement of this section and shall be governed by G.S. 130A-301.1. The Department shall not approve an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill, excluding demolition landfills as defined in the rules of the Commission, except as provided in subdivisions (3) and (4) of subsection (b1) of this section. No permit shall be granted for a solid waste management facility having discharges that are point sources until the Department has referred the complete plans and specifications to the Environmental Management Commission and has received advice in writing that the plans and specifications are approved in accordance with the provisions of G.S. 143-215.1. If the applicant is a unit of local government, and has not submitted a solid waste management plan that has been approved by the Department pursuant to G.S. 130A-309.09A(b), the Department may deny a permit for a sanitary landfill or a facility that disposes of solid waste by incineration, unless the Commission has not adopted rules pursuant to G.S. 130A-309.29 for local solid waste management plans. In any case where the Department denies a permit for a solid waste management facility, it shall state in writing the reason for denial and shall also state its estimate of the changes in the applicant's proposed activities or plans that will be required for the applicant to obtain a permit.
 - b. Repealed by Session Laws 2007-550, s. 1(a), effective August 1, 2007.
 - c. The Department shall deny an application for a permit for a solid waste management facility if the Department finds that:
 1. Construction or operation of the proposed facility would be inconsistent with or violate rules adopted by the Commission.

2. Construction or operation of the proposed facility would result in a violation of water quality standards adopted by the Environmental Management Commission pursuant to G.S. 143-214.1 for waters, as defined in G.S. 143-213.
3. Construction or operation of the facility would result in significant damage to ecological systems, natural resources, cultural sites, recreation areas, or historic sites of more than local significance. These areas include, but are not limited to, national or State parks or forests; wilderness areas; historic sites; recreation areas; segments of the natural and scenic rivers system; wildlife refuges, preserves, and management areas; areas that provide habitat for threatened or endangered species; primary nursery areas and critical fisheries habitat designated by the Marine Fisheries Commission; and Outstanding Resource Waters designated by the Environmental Management Commission.
4. Construction or operation of the proposed facility would substantially limit or threaten access to or use of public trust waters or public lands.
5. The proposed facility would be located in a natural hazard area, including a floodplain, a landslide hazard area, or an area subject to storm surge or excessive seismic activity, such that the facility will present a risk to public health or safety.
6. There is a practical alternative that would accomplish the purposes of the proposed facility with less adverse impact on public resources, considering engineering requirements and economic costs.
7. The cumulative impacts of the proposed facility and other facilities in the area of the proposed facility would violate the criteria set forth in sub-sub-subdivisions 2. through 5. of this sub-subdivision.
8. Construction or operation of the proposed facility would be inconsistent with the State solid waste management policy and goals as set out in G.S. 130A-309.04 and with the State solid waste management plan developed as provided in G.S. 130A-309.07.
9. The cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community protected by Title VI of the federal Civil Rights Act of 1964.

(4a) Repealed by Session Laws 2007-550, s. 1(a), effective August 1, 2007.

(5) Repealed by Session Laws 1983, c. 795, s. 3.

(5a) Designate a geographic area within which the collection, transportation, storage and disposal of all solid waste generated within said area shall be accomplished in accordance with a solid waste management plan. Such designation may be made only after the Department has received a request from the unit or units of local government having jurisdiction within said

geographic area that such designation be made and after receipt by the Department of a solid waste management plan which shall include:

- a. The existing and projected population for such area;
- b. The quantities of solid waste generated and estimated to be generated in such area;
- c. The availability of sanitary landfill sites and the environmental impact of continued landfill of solid waste on surface and subsurface waters;
- d. The method of solid waste disposal to be utilized and the energy or material which shall be recovered from the waste; and
- e. Such other data that the Department may reasonably require.

(5b) Authorize units of local government to require by ordinance, that all solid waste generated within the designated geographic area that is placed in the waste stream for disposal be collected, transported, stored and disposed of at a permitted solid waste management facility or facilities serving such area. The provisions of such ordinance shall not be construed to prohibit the source separation of materials from solid waste prior to collection of such solid waste for disposal, or prohibit collectors of solid waste from recycling materials or limit access to such materials as an incident to collection of such solid waste; provided such prohibitions do not authorize the construction and operation of a resource recovery facility unless specifically permitted pursuant to an approved solid waste management plan. If a private solid waste landfill shall be substantially affected by such ordinance then the unit of local government adopting the ordinance shall be required to give the operator of the affected landfill at least two years written notice prior to the effective date of the proposed ordinance.

(5c) Except for the authority to designate a geographic area to be serviced by a solid waste management facility, delegate authority and responsibility to units of local government to perform all or a portion of a solid waste management program within the jurisdictional area of the unit of local government; provided that no authority over or control of the operations or properties of one local government shall be delegated to any other local government.

(5d) Require that an annual report of the implementation of the solid waste management plan within the designated geographic area be filed with the Department.

(6) Charge and collect fees from operators of hazardous waste disposal facilities. The fees shall be used to establish a fund sufficient for each individual facility to defray the anticipated costs to the State for monitoring and care of the facility after the termination of the period during which the facility operator is required by applicable State and federal statutes, regulations or rules to remain responsible for post-closure monitoring and care. In establishing the fees, consideration shall be given to the size of the facility, the nature of the hazardous waste and the projected life of the facility.

(7) Establish and collect annual fees from generators and transporters of hazardous waste, and from storage, treatment, and disposal facilities regulated under this Article as provided in G.S. 130A-294.1.

(a1) A permit for a solid waste management facility may be transferred only with the approval of the Department.

(b) The Commission shall adopt and the Department shall enforce rules to implement a comprehensive statewide solid waste management program. The rules shall be consistent with

applicable State and federal law; and shall be designed to protect the public health, safety, and welfare; preserve the environment; and provide for the greatest possible conservation of cultural and natural resources. Rules for the establishment, location, operation, maintenance, use, discontinuance, recordation, post-closure care of solid waste management facilities also shall be based upon recognized public health practices and procedures, including applicable epidemiological research and studies; hydrogeological research and studies; sanitary engineering research and studies; and current technological development in equipment and methods. The rules shall not apply to the management of solid waste that is generated by an individual or individual family or household unit on the individual's property and is disposed of on the individual's property.

(b1) (1) For purposes of this subsection and subdivision (4) of subsection (a) of this section, a "substantial amendment" means either:

- a. An increase of ten percent (10%) or more in:
 1. The population of the geographic area to be served by the sanitary landfill;
 2. The quantity of solid waste to be disposed of in the sanitary landfill; or
 3. The geographic area to be served by the sanitary landfill.
- b. A change in the categories of solid waste to be disposed of in the sanitary landfill or any other change to the application for a permit or to the permit for a sanitary landfill that the Commission or the Department determines to be substantial.

(2) A person who intends to apply for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall obtain, prior to applying for a permit, a franchise for the operation of the sanitary landfill from each local government having jurisdiction over any part of the land on which the sanitary landfill and its appurtenances are located or to be located. A local government may adopt a franchise ordinance under G.S. 153A-136 or G.S. 160A-319. A franchise granted for a sanitary landfill shall include all of the following:

- a. A statement of the population to be served, including a description of the geographic area.
- b. A description of the volume and characteristics of the waste stream.
- c. A projection of the useful life of the sanitary landfill.
- d. An explanation of how the franchise will be consistent with the jurisdiction's solid waste management plan required under G.S. 130A-309.09A, including provisions for waste reduction, reuse, and recycling.
- e. The procedures to be followed for governmental oversight and regulation of the fees and rates to be charged by facilities subject to the franchise for waste generated in the jurisdiction of the franchising entity.
- f. A facility plan for the sanitary landfill that shall include the boundaries of the proposed facility, proposed development of the facility site in five-year operational phases, the boundaries of all waste disposal units, final elevations and capacity of all waste disposal units, the amount of waste to be received per day in tons, the total waste disposal capacity of the sanitary landfill in tons, a description of environmental controls, and a description of any other waste management activities to be

conducted at the facility. In addition, the facility plan shall show the proposed location of soil borrow areas, leachate facilities, and all other facilities and infrastructure, including ingress and egress to the facility.

- (2a) A local government may elect to award a preliminary franchise. If a local government elects to award a preliminary franchise, the preliminary franchise shall contain, at a minimum, all of the information described in subdivisions a. through e. of subdivision (2) of this subsection plus a general description of the proposed sanitary landfill, including the approximate number of acres required for the proposed sanitary landfill and its appurtenances and a description of any other solid waste management activities that are to be conducted at the site.
- (3) Prior to the award of a franchise for the construction or operation of a sanitary landfill, the board of commissioners of the county or counties in which the sanitary landfill is proposed to be located or is located or, if the sanitary landfill is proposed to be located or is located in a city, the governing board of the city shall conduct a public hearing. The board of commissioners of the county or counties in which the sanitary landfill is proposed to be located or is located or, if the sanitary landfill is proposed to be located or is located in a city, the governing board of the city shall provide at least 30 days' notice to the public of the public hearing. The notice shall include a summary of all the information required to be included in the franchise, and shall specify the procedure to be followed at the public hearing. The applicant for the franchise shall provide a copy of the application for the franchise that includes all of the information required to be included in the franchise, to the public library closest to the proposed sanitary landfill site to be made available for inspection and copying by the public.
- (4) An applicant for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall request each local government having jurisdiction over any part of the land on which the sanitary landfill and its appurtenances are located or to be located to issue a determination as to whether the local government has in effect a franchise, zoning, subdivision, or land-use planning ordinance applicable to the sanitary landfill and whether the proposed sanitary landfill, or the existing sanitary landfill as it would be operated under the renewed or substantially amended permit, would be consistent with the applicable ordinances. The request to the local government shall be accompanied by a copy of the permit application and shall be delivered to the clerk of the local government personally or by certified mail. In order to serve as a basis for a determination that an application for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill is consistent with a zoning, subdivision, or land-use planning ordinance, an ordinance or zoning classification applicable to the real property designated in the permit application shall have been in effect not less than 90 days prior to the date the request for a determination of consistency is delivered to the clerk of the local government. The determination shall be verified or supported by affidavit signed by the chief administrative officer, the chief administrative officer's designee, clerk, or other official designated by the local government to make the determination and, if the local government states that the sanitary landfill as it would be operated under the new, renewed, or substantially amended

permit is inconsistent with a franchise, zoning, subdivision, or land-use planning ordinance, shall include a copy of the ordinance and the specific reasons for the determination of inconsistency. A copy of the determination shall be provided to the applicant when the determination is submitted to the Department. The Department shall not act upon an application for a permit under this section until it has received a determination from each local government requested to make a determination by the applicant; provided that if a local government fails to submit a determination to the Department as provided by this subsection within 15 days after receipt of the request, the Department shall proceed to consider the permit application without regard to a franchise, local zoning, subdivision, and land-use planning ordinances. Unless the local government makes a subsequent determination of consistency with all ordinances cited in the determination or the sanitary landfill as it would be operated under the new, renewed, or substantially amended permit is determined by a court of competent jurisdiction to be consistent with the cited ordinances, the Department shall attach as a condition of the permit a requirement that the applicant, prior to construction or operation of the sanitary landfill under the permit, comply with all lawfully adopted local ordinances cited in the determination that apply to the sanitary landfill. This subsection shall not be construed to affect the validity of any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance or to affect the responsibility of any person to comply with any lawfully adopted franchise, local zoning, subdivision, or land-use planning ordinance. This subsection shall not be construed to limit any opportunity a local government may have to comment on a permit application under any other law or rule. This subsection shall not apply to any facility with respect to which local ordinances are subject to review under either G.S. 104E-6.2 or G.S. 130A-293.

- (5) As used in this subdivision, "coal-fired generating unit" and "investor-owned public utility" have the same meaning as in G.S. 143-215.107D(a). Notwithstanding subdivisions (a)(4), (b1)(3), or (b1)(4) of this section, no franchise shall be required for a sanitary landfill used only to dispose of waste generated by a coal-fired generating unit that is owned or operated by an investor-owned utility subject to the requirements of G.S. 143-215.107D.

(b2) The Department shall require an applicant for a permit or a permit holder under this Article to satisfy the Department that the applicant or permit holder, and any parent, subsidiary, or other affiliate of the applicant, permit holder, or parent, including any joint venturer with a direct or indirect interest in the applicant, permit holder, or parent:

- (1) Is financially qualified to carry out the activity for which the permit is required. An applicant for a permit and permit holders for solid waste management facilities that are not hazardous waste facilities shall establish financial responsibility as required by G.S. 130A-295.2. An applicant for a permit and permit holders for hazardous waste facilities shall establish financial responsibility as required by G.S. 130A-295.04.
- (2) Has substantially complied with the requirements applicable to any activity in which the applicant or permit holder, or a parent, subsidiary, or other affiliate of the applicant, permit holder, or parent, or a joint venturer with a direct or indirect interest in the applicant has previously engaged and has been in

substantial compliance with federal and state laws, regulations, and rules for the protection of the environment as provided in G.S. 130A-295.3.

(b3) An applicant for a permit or a permit holder under this Article shall satisfy the Department that the applicant has met the requirements of subsection (b2) of this section before the Department is required to otherwise review the application.

(c) The Commission shall adopt and the Department shall enforce rules governing the management of hazardous waste. These rules shall establish a complete and integrated regulatory scheme in the area of hazardous waste management, implement this Part, and shall:

- (1) Establish criteria for hazardous waste, identify the characteristics of hazardous waste, and list particular hazardous waste.
- (1a) Establish criteria for hazardous constituents, identify the characteristics of hazardous constituents, and list particular hazardous constituents.
- (2) Require record keeping and reporting by generators and transporters of hazardous waste and owners and operators of hazardous waste facilities.
- (3) Require proper labeling of hazardous waste containers.
- (4) Require use of appropriate containers for hazardous waste.
- (5) Require maintenance of a manifest system to assure that all hazardous waste is designated for treatment, storage or disposal at a hazardous waste facility to which a permit has been issued.
- (6) Require proper transportation of hazardous waste.
- (7) Develop treatment storage and disposal standards of performance and techniques to be used by hazardous waste facilities.
- (8) Develop standards regarding location, design, ownership and construction of hazardous waste facilities; provided, however, that no hazardous waste disposal facility or polychlorinated biphenyl disposal facility shall be located within 25 miles of any other hazardous waste disposal facility or polychlorinated biphenyl disposal facility.
- (9) Require plans to minimize unanticipated damage from treatment, storage or disposal of hazardous waste; and a plan or plans providing for the establishment and/or operation of one or more hazardous waste facilities in the absence of adequate approved hazardous waste facilities established or operated by any person within the State.
- (10) Require proper maintenance and operation of hazardous waste facilities, including requirements for ownership by any person or the State, require demonstration of financial responsibility in accordance with this section and G.S. 130A-295.04, provide for training of personnel, and provide for continuity of operation and procedures for establishing and maintaining hazardous waste facilities.
- (11) Require owners or operators of hazardous waste facilities to monitor the facilities.
- (12) Authorize or require inspection or copying of records required to be kept by owners or operators.
- (13) Provide for collection and analysis of hazardous waste samples and samples of hazardous waste containers and labels from generators and transporters and from owners and operators of hazardous waste facilities.
- (14) Develop a permit system governing the establishment and operation of hazardous waste facilities.
- (15) Develop additional requirements as necessary for the effective management of hazardous waste.

- (16) Require the operator of the hazardous waste disposal facility to maintain adequate insurance to cover foreseeable claims arising from the operation of the facility. The Department shall determine what constitutes an adequate amount of insurance.
- (17) Require the bottom of a hazardous waste disposal facility to be at least 10 feet above the seasonal high water table and more when necessary to protect the public health and the environment.
- (18) Require the operator of a hazardous waste disposal facility to make monthly reports to the board of county commissioners of the county in which the facility is located on the kinds and amounts of hazardous wastes in the facility.

(d) The Commission is authorized to adopt and the Department is authorized to enforce rules where appropriate for public participation in the consideration, development, revision, implementation and enforcement of any permit rule, guideline, information or program under this Article.

(e) Rules adopted under this section may incorporate standards and restrictions which exceed and are more comprehensive than comparable federal regulations.

(f) Within 10 days of receiving an application for a permit or for an amendment to an existing permit for a hazardous waste facility, the Department shall notify the clerk of the board of commissioners of the county or counties in which the facility is proposed to be located or is located and, if the facility is proposed to be located or is located within a city, the clerk of the governing board of the city, that the application has been filed, and shall file a copy of the application with the clerk. Prior to the issuance of a permit or an amendment of an existing permit the Secretary or the Secretary's designee shall conduct a public hearing in the county, or in one of the counties in which the hazardous waste facility is proposed to be located or is located. The Secretary or the Secretary's designee shall give notice of the hearing, and the public hearing shall be in accordance with applicable federal regulations adopted pursuant to RCRA and with Chapter 150B of the General Statutes. Where the provisions of the federal regulations and Chapter 150B of the General Statutes are inconsistent, the federal regulations shall apply.

(g) The Commission shall develop and adopt standards for permitting of hazardous waste facilities. Such standards shall be developed with, and provide for, public participation; shall be incorporated into rules; shall be consistent with all applicable federal and State law, including statutes, regulations and rules; shall be developed and revised in light of the best available scientific data; and shall be based on consideration of at least the following factors:

- (1) Hydrological and geological factors, including flood plains, depth to water table, groundwater travel time, soil pH, soil cation exchange capacity, soil composition and permeability, cavernous bedrock, seismic activity, slope, mines, and climate;
- (2) Environmental and public health factors, including air quality, quality of surface and groundwater, and proximity to public water supply watersheds;
- (3) Natural and cultural resources, including wetlands, gamelands, endangered species habitats, proximity to parks, forests, wilderness areas, nature preserves, and historic sites;
- (4) Local land uses;
- (5) Transportation factors, including proximity to waste generators, route safety, and method of transportation;
- (6) Aesthetic factors, including the visibility, appearance, and noise level of the facility;
- (7) Availability and reliability of public utilities; and
- (8) Availability of emergency response personnel and equipment.

(h) Rules adopted by the Commission shall be subject to the following requirements:

- (1) Repealed by Session Laws 1989, c. 168, s. 20.
- (2) Hazardous waste shall be treated prior to disposal in North Carolina. The Commission shall determine the extent of waste treatment required before hazardous waste can be disposed of in a hazardous waste disposal facility.
- (3) Any hazardous waste disposal facility hereafter constructed in this State shall meet, at the minimum, the standards of construction imposed by federal regulations adopted under the RCRA at the time the permit is issued.
- (4) No hazardous waste disposal facility or polychlorinated biphenyl disposal facility shall be located within 25 miles of any other hazardous waste disposal facility or polychlorinated biphenyl disposal facility.
- (5) Repealed by Session Laws 2001-474, s. 23, effective November 29, 2001.
- (6) The following shall not be disposed of in a hazardous waste disposal facility: ignitables as defined in the RCRA, polyhalogenated biphenyls of 50 ppm or greater concentration, and free liquids whether or not containerized.
- (7) Facilities for disposal or long-term storage of hazardous waste shall have at a minimum the following: a leachate collection and removal system above an artificial impervious liner of at least 30 mils in thickness, a minimum of five feet of clay or clay-like liner with a maximum permeability of 1.0×10^{-7} centimeters per second (cm/sec) below said artificial liner, and a leachate detection system immediately below the clay or clay-like liner.
- (8) Hazardous waste shall not be stored at a hazardous waste treatment facility for over 90 days prior to treatment or disposal.
- (9) The Commission shall consider any hazardous waste treatment process proposed to it, if the process lessens treatment cost or improves treatment over then current methods or standards required by the Commission.
- (10) Prevention, reduction, recycling, and detoxification of hazardous wastes should be encouraged and promoted. Hazardous waste disposal facilities and polychlorinated biphenyl disposal facilities shall be detoxified as soon as technology which is economically feasible is available and sufficient money is available without additional appropriation.

(i) The Department shall develop a comprehensive hazardous waste management plan for the State and shall revise the plan on or before 1 July of even-numbered years. The Department shall report to the Environmental Review Commission on or before 1 October of each year on the implementation of the comprehensive hazardous waste management plan. The report shall include an evaluation of how well the State and private parties are managing and cleaning up hazardous waste. The report shall also include recommendations to the Governor, State agencies, and the General Assembly on ways to: improve waste management; reduce the amount of waste generated; maximize resource recovery, reuse, and conservation; and minimize the amount of hazardous waste which must be disposed of.

(j) Repealed by Session Laws 2007-107, s. 1.1(e), effective October 1, 2007.

(k) Each person who generates hazardous waste who is required to pay a fee under G.S. 130A-294.1, and each operator of a hazardous waste treatment facility which treats waste generated on-site who is required to pay a fee under G.S. 130A-294.1, shall submit to the Department at the time such fees are due, a written description of any program to minimize or reduce the volume and quantity or toxicity of such waste.

(l) Disposal of solid waste in or upon water in a manner that results in solid waste entering waters or lands of the State is unlawful. Nothing herein shall be interpreted to affect disposal of solid waste in a permitted landfill.

(m) Demolition debris consisting of used asphalt or used asphalt mixed with dirt, sand, gravel, rock, concrete, or similar nonhazardous material may be used as fill and need not be disposed of in a permitted landfill or solid waste disposal facility. Such demolition debris may not be placed in the waters of the State or at or below the seasonal high water table.

(n) The Department shall encourage research and development and disseminate information on state-of-the-art means of handling and disposing of hazardous waste. The Department may establish a waste information exchange for the State.

(o) The Department shall promote public education and public involvement in the decision-making process for the siting and permitting of proposed hazardous waste facilities. The Department shall assist localities in which facilities are proposed in collecting and receiving information relating to the suitability of the proposed site. At the request of a local government in which facilities are proposed, the Department shall direct the appropriate agencies of State government to develop such relevant data as that locality shall reasonably request.

(p) The Department shall each year recommend to the Governor a recipient for a "Governor's Award of Excellence" which the Governor shall award for outstanding achievement by an industry or company in the area of waste management.

(q) The Secretary shall, at the request of the Governor and under the Governor's direction, assist with the negotiation of interstate agreements for the management of hazardous waste.

(r) The Commission shall, in accordance with the procedures set forth in G.S. 160A-211.1 and G.S. 153A-152.1, review upon appeal specific privilege license tax rates that localities may apply to waste management facilities in their jurisdiction.

(s) The Department is authorized to enter upon any lands and structures upon lands to make surveys, borings, soundings, and examinations as may be necessary to determine the suitability of a site for a hazardous waste facility or hazardous waste disposal facility. The Department shall give 30 days notice of the intended entry authorized by this section in the manner prescribed for service of process by G.S. 1A-1, Rule 4. Entry under this section shall not be deemed a trespass or taking; provided, however, that the Department shall make reimbursement for any damage to land or structures caused by these activities. (1969, c. 899; 1973, c. 476, s. 128; 1975, c. 311, s. 4; c. 764, s. 1; 1977, c. 123; 1977, 2nd Sess., c. 1216; 1979, c. 464, s. 2; c. 694, s. 2; 1981, c. 704, s. 6; 1983, c. 795, ss. 3, 8.1; c. 891, s. 2; 1983 (Reg. Sess., 1984), c. 973, ss. 6, 7; c. 1034, s. 73; 1985, c. 582; c. 738, ss. 2, 3; 1985 (Reg. Sess., 1986), c. 1027, s. 31; 1987, c. 597; c. 761; c. 773, s. 1; c. 827, ss. 1, 250; c. 848; 1987 (Reg. Sess., 1988), c. 1111, s. 6; 1989, c. 168, ss. 15-22; c. 317; c. 727, s. 218(86); c. 742, s. 6; 1991, c. 537, s. 1; 1993, c. 86, s. 1; c. 273, s. 1; c. 365, s. 1; c. 473, ss. 1, 2; c. 501, s. 14; 1993 (Reg. Sess., 1994), c. 580, s. 1; c. 722, ss. 1, 2; 1995, c. 502, s. 1; c. 509, s. 70; 1995 (Reg. Sess., 1996), c. 594, ss. 6, 7; 1997-27, s. 2; 2001-357, s. 2; 2001-474, ss. 22, 23, 24, 25; 2002-148, s. 4; 2003-37, s. 1; 2006-256, ss. 1, 2, 3; 2007-107, ss. 1.1(b), 1.1(d), 1.1(e), 2.1(a); 2007-495, s. 14; 2007-550, s. 1(a).)

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: COMMISSION FOR PUBLIC HEALTH

RULE CITATION: 15A NCAC 13B .1635

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 Division will use in approving an alternative timeline. This is a modification provision without specific guidelines as prohibited by G.S. 150B-19(6).

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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. WELL CONTRACTORS CERTIFICATION COMMISSION

RULE CITATION: 15A NCAC 27 .0301

RECOMMENDED ACTION:

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

COMMENT:

(1) *There is no authority cited for the provision in (a) line 5 that requires that a person be a citizen or legal resident in order to be licensed as a well contractor. The authority that is cited (G.S. 87-98.6) is limited to establishing "minimum requirements of education, experience, and knowledge" for the type of certification the applicant is seeking.*

It may be that there is other state or federal authority to deny licensure to a person who is not a citizen or legal resident but that is not cited. There may also be other state or federal law which would deny someone, whether or not licensed, the legal authority to work. At the same time that authority may not be sufficient for this state agency to deny licensure to such a person.

It is also interesting to note that while a person might be a legal resident of the United States, that does not mean that they are necessarily entitled to work in the United States. For example a person holding a student visa is not automatically entitled to engage in work as well.

(2) *It is unclear what constitutes the "level specific" well contractor activities referred to in (d) lines 30 and 31 of this rule. There are four levels of well certification provided for in these rules, Levels A through D. Paragraph (d) of this rule requires the applicant to meet "the requirements specified in Rule .0702 ... in level specific well contractor activities." However that Rule .0702 in each of the paragraphs applicable to each of the levels requires the applicant to "submit proof of ... experience in [the appropriate] level specific well contractor activities specified in Rule .0301" thus setting up a circular situation that never does specify what the level specific activities or requirements actually are.*

I will note that Rule .0110(a)(1) – (4) does set out level specific activities. If these are the activities or requirements that are referred to in this rule and Rule .0702, then a technical change could easily correct these two rules.

§ 87-98.5. Types of certification; sole certification.

The Commission, with the advice and assistance of the Secretary, shall establish the appropriate types of certification for well contractors. Each certification type established by the Commission shall be the sole certification required to engage in well contractor activity in the State. (1997-358, s. 2.)

§ 87-98.6. Well contractor qualifications and examination.

The Commission, with the advice and assistance of the Secretary, shall establish minimum requirements of education, experience, and knowledge for each type of certification for well contractors and shall establish procedures for receiving applications for certification, conducting examinations, and making investigations of applicants as may be necessary and appropriate so that prompt and fair consideration will be given to each applicant. (1997-358, s. 2.)

§ 87-98.9. Fees; Well Construction Fund.

(a) Fees. – The Commission may set a fee for certification by examination, an annual fee for certification renewal, and a fee for temporary certification. The fee for certification by examination may not exceed one hundred dollars (\$100.00), the annual fee may not exceed two hundred dollars (\$200.00) per year, and the temporary certification fee shall not exceed one hundred dollars (\$100.00). A well contractor certificate is void if the well contractor fails to pay the annual fee within 30 days of the date the fee is due.

(b) Fund. – The Well Construction Fund is created as a nonreverting account within the Department. All fees collected pursuant to this Article shall be credited to the Fund. The Fund shall be used for the costs of administering this Article. (1997-358, s. 2.)

§ 143B-301.11. Creation, powers, and duties of the Commission.

(a) Creation and Duties. – The Well Contractors Certification Commission is created within the Department. The Commission shall:

- (1) Adopt rules with respect to the certification of well contractors as provided by Article 7A of Chapter 87 of the General Statutes.
- (2) Exercise quasi-judicial powers in accordance with the provisions of Chapter 150B of the General Statutes. The Commission shall make the final agency decision on any matter involving the certification of well contractors pursuant to Article 7A of Chapter 87 of the General Statutes and on civil penalties assessed for violations of that Article or rules adopted pursuant to that Article.
- (3) Adopt rules as may be required to secure a federal grant-in-aid for a program concerned with the certification of well contractors. This subdivision is to be liberally construed in order that the State and its citizens may benefit from federal grants-in-aid.

(b) Delegation. – The Commission may, by rule, delegate to the Secretary any of its powers, other than the power to adopt rules. (1997-358, s. 1.)

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001**

**SESSION LAW 2001-440
SENATE BILL 312**

AN ACT TO: (1) AMEND CERTAIN LAWS RELATING TO THE CERTIFICATION OF WELL CONTRACTORS AND TO INCREASE THE MAXIMUM CIVIL PENALTY THAT MAY BE ASSESSED FOR VIOLATIONS OF THE WELL CONTRACTORS CERTIFICATION ACT OR THE WELL CONSTRUCTION ACT; (2) CLARIFY THAT THE REQUIREMENTS OF G.S. 106-660

APPLY ONLY TO INSTALLATIONS THAT HANDLE, STORE, DISTRIBUTE, OR APPLY ANHYDROUS AMMONIA FOR FERTILIZER USE; (3) REQUIRE THAT SOLID WASTE THAT IS TO BE INCINERATED IN CERTAIN INCINERATORS BE VISUALLY INSPECTED IN ORDER TO PREVENT THE INCINERATION OF WASTE THAT MAY NOT BE LAWFULLY INCINERATED; AND (4) AMEND THE EXEMPTION OF CERTAIN ESTABLISHMENTS THAT PREPARE OR SERVE FOOD OR DRINK FROM REGULATION AS FOOD AND LODGING FACILITIES.

The General Assembly of North Carolina enacts:

SECTION 1.1. G.S. 87-98.4(a) reads as rewritten:

"(a) Certification Required. – No well contractor shall perform or offer to perform any well contractor activity without being certified under this Article. The Commission may specify the types of general construction activities or geophysical activities that are not directly related to locating, testing, or withdrawing groundwater; evaluating, testing, developing, draining, or recharging any groundwater reservoir or aquifer; or controlling, diverting, or otherwise causing the movement of water from or into any aquifer and are therefore not well construction activities."

SECTION 1.2. G.S. 87-98.7 reads as rewritten:

"§ 87-98.7. Issuance and renewal of certificates; ~~temporary certification~~certification; refusal to issue a certificate.

(a) Issuance. – An applicant, upon satisfactorily meeting the appropriate requirements, shall be certified to perform in the capacity of a well contractor and shall be issued a suitable certificate by the Commission designating the level of the person's competency. A certificate shall be valid for one year or until any of the following occurs:

- (1) The certificate holder voluntarily surrenders the certificate to the Commission.
- (2) The certificate is revoked or suspended by the Commission for cause.

(b) Renewal. – A certificate shall be renewed annually by payment of the annual fee. A person who fails to renew a certificate within ~~three months~~ 30 days of the expiration of the certificate must reapply for certification under this Article.

(c) Temporary Certification. – A person may receive temporary certification to construct a well upon submission of an application to the Commission and subsequent approval in accordance with the criteria established by the Commission and upon payment of a temporary certification fee. A temporary certification shall be granted to the same person only once per calendar year and may not be valid for a period in excess of 45 consecutive days. To perform additional well contractor activity during that same calendar year, the person shall apply for certification under this Article.

(d) Refusal to Issue a Certificate. – The Commission shall not issue a certificate under any of the following circumstances:

- (1) The applicant has not paid civil penalties assessed against the applicant under G.S. 87-94 for a violation of this Article, Article 7 of this Chapter, or any rule adopted to implement either of those Articles.
- (2) The applicant has not conducted all restoration activities ordered by the Department related to a violation by the applicant of Article 7 of this Chapter.
- (3) As determined by the Commission, the applicant has a history of not complying with this Article, Article 7 of this Chapter, or any rule adopted to implement either of those Articles."

SECTION 1.3. G.S. 87-98.12 reads as rewritten:

"§ 87-98.12. Continuing education ~~requirements~~requirements; exemption.

(a) In order to continue to be certified under this Article, a well contractor shall satisfactorily complete the number of hours of approved continuing education required by the Commission. The Commission shall establish the minimum number of hours of continuing education that shall be required to maintain certification,

shall specify the scope of required continuing education courses, and shall approve continuing education courses.

(b) A well contractor who is 70 years of age or more; who has engaged in well contractor activity for more than 20 years; who has no record of having violated any provision of this Article, Article 7 of this Chapter, or order issued pursuant to or rule adopted under this Article or Article 7 of this Chapter in the previous 10 years; and who meets all other requirements for certification under this Article is exempt from continuing education requirements adopted pursuant to this section."

SECTION 1.4. G.S. 87-94(a) reads as rewritten:

"(a) Any person who violates any provision of this Article, Article 7A of this Chapter, any order issued pursuant thereto, or any rule adopted thereunder, shall be subject to a civil penalty of not more than ~~one hundred dollars (\$100.00)~~ one thousand dollars (\$1,000) for each violation, as determined by the Secretary of Environment and Natural Resources. Each day of a continuing violation shall be considered a separate offense. No person shall be subject to a penalty who did not directly commit the violation or cause it to be committed."

SECTION 1.5. The Well Contractors Certification Commission may adopt temporary and permanent rules to implement the provisions of Sections 1.1 through 1.4 of this act and to alter the minimum requirements of education, experience, and knowledge for certification of well contractors adopted by the Commission pursuant to G.S. 87-98.6. Sections 1.1 through 1.4 of this act constitute a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Notwithstanding G.S. 150B-21.1(a)(2) and 26 NCAC 2C.0102(11), the Well Contractors Certification Commission may adopt temporary rules as provided in this section until 1 July 2002. Prior to the adoption of a temporary rule under this section, the Commission shall publish a notice of intent to adopt a temporary rule in the North Carolina Register. The notice shall set out the text of the proposed temporary rule and include the name and address of the person to whom questions and written comment on the proposed temporary rule may be submitted. The Commission shall accept written comment on the proposed temporary rule for at least 30 days after the notice of intent to adopt a temporary rule is published in the North Carolina Register.

In the interests of conserving paper counsel has redacted Sections 2, 3.1, 3.2, 3.3., 3.4, 3.5 and 4. These sections pertain to handling of fertilizer ammonia, disposal of small amounts of prohibited solid waste, incinerator permits, adoption of temporary rules in accordance with federal requirements, research programs and funding, and exemptions for certain nonprofit corporations. These sections are available upon request and will be available at the Commission meeting.

SECTION 5. This act is effective when it becomes law. Section 1.3 of this act expires 1 September 2008.

In the General Assembly read three times and ratified this the 4th day of October, 2001.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 7:42 p.m. this 15th day of October, 2001

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. WELL CONTRACTORS CERTIFICATION COMMISSION

RULE CITATION: 15A NCAC 27 .0702

RECOMMENDED ACTION:

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

COMMENT:

It is unclear what constitutes the "level specific well contractor activities as specified in Rule .0301" referred to in (d) lines 30 and 31 of this rule. There are four levels of well certification provided for in these rules, Levels A through D in (a) through (d). Each paragraph of this rule requires the applicant to meet "level specific well contractor activities specified in Rule .0301 of this Chapter...." However that Rule ..0301 in each of the paragraphs applicable to each of the levels requires the applicant to submit "proof of ... experience meeting the requirements specified in Rule .0702" thus setting up a circular situation that never does specify what the level specific activities or requirements actually are.

I will note that Rule .0110(a)(1) – (4) does set out level specific activities. If these are the activities or requirements that are referred to in this rule and Rule .0702, then a technical change could easily correct these two rules.

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. APPRAISAL BOARD

RULE CITATION: 21 NCAC 57D .0402

RECOMMENDED ACTION:

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

COMMENT:

There is no authority cited that allows the Appraisal Board to require an appraisal management company to pay appraisers a certain compensation, in this case compensation "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised" as set in (a). There also is no authority cited for the provision in (b) that allows the board to prohibit an appraisal company from charging a fee that would "exceed what is customary and reasonable ... in the market area." There is nothing in the cited authority that authorizes the Appraisal Board to be involved in the compensation between an appraiser and a management company other than requiring the management company to make a "timely payment."

Even if there were authority to require a certain level of payment as in (a) or forbid fees above a certain amount as in (b) it is not clear how the "customary and reasonable" level of payment or fee is determined. The agency cites as the reason for this rule that "[s]ome management companies will not pay sufficient fees to appraisers, and as a result, more experienced ... appraisers will not accept these assignments." Presumably whatever payments are accepted or fees agreed to would be determined by the marketplace, which would seem to make those less "sufficient fees" "customary and reasonable" at least for less experienced appraisers.

If the problem is that management companies are hiring incompetent appraisers then it seems the solution is to prohibit the companies from using incompetent appraisers and revoking their licenses when they do. They could also discipline appraisers from accepting assignments that exceed their competencies.

I have attached the entire new Article 2 of Chapter 93E, the North Carolina Appraisers Act.

Article 2.

Real Estate Appraisal Management Companies.

§ 93E-2-1. Registration required of real estate appraisal management companies; exceptions.

Beginning January 1, 2011, it shall be unlawful for any person, corporation, partnership, sole proprietorship, subsidiary, unit, or any other business entity in this State to do any of the following without first registering with the Board under the provisions of this Article:

- (1) Directly or indirectly engage or attempt to engage in business as an appraisal management company.
- (2) Advertise or make a representation that the person or entity is engaging in or conducting business as an appraisal management company.
- (3) In any way act as or provide the services of an appraisal management company. (2010-141, s. 1.)

§ 93E-2-2. Definitions.

- (a) The following definitions apply in this Article:

- (1) Appraisal management company. – A corporation, partnership, sole proprietorship, subsidiary, unit, or other business entity that utilizes an appraisal panel or fee panel and performs, directly or indirectly, appraisal management services.

An appraisal management company does not include any of the following:

- a. Any agency of the federal government or any State or municipal government.
- b. An appraiser who enters into an agreement, whether written or otherwise, with another appraiser for the performance of an appraisal, and upon completion of the appraisal, the appraisal report is signed both by the appraiser who completed the appraisal and the appraiser who requested the completion of the appraisal, except that an appraisal management company may not avoid the requirements of this Article by requiring that an employee of the appraisal management company who is an appraiser sign an appraisal report that is completed by an appraiser who is a member of the appraisal panel of the appraisal management company.
- c. Any state or federally chartered bank, farm credit system, savings institution, or credit union.
- d. Any licensed real estate broker performing only activities in accordance with Article 1 of this Chapter.
- e. Any officer or employee of an exempt entity described in this subdivision when acting in the scope of employment for the exempt entity.
- f. Any person licensed to practice law in this State, a court-appointed personal representative or trustee who orders an appraisal in connection with a bona fide client relationship in which the person directly contracts with an independent appraiser.
- (2) Appraisal management services. – Direct or indirect performance of any of the following functions on behalf of a lender, financial institution, client, or any other person:
 - a. Administer an appraiser panel.
 - b. Recruit, qualify, and/or verify licensing or certification of appraisers who are or may become part of an appraiser panel.
 - c. Negotiate fees and service level expectations with appraisers who are part of an appraiser panel.
 - d. Receive an order for an appraisal from one person and deliver the order for the appraisal to an appraiser that is part of an appraiser panel for completion.
 - e. Take and determine the status of orders for appraisals.
 - f. Conduct quality control of a completed appraisal performed by an appraiser who is part of an appraiser panel prior to the delivery of the appraisal to the person that ordered the appraisal.
 - g. Provide a completed appraisal performed by an appraiser who is part of an appraiser panel to one or more persons who have ordered an appraisal.
- (3) Appraisal review. – The act or process of developing and communicating an opinion about the quality of another appraiser's work that was performed as part of an appraisal assignment, except that an examination of an appraisal for grammatical, typographical, or other similar errors shall not be an appraisal review.

- (4) Appraiser panel or fee panel. – A network of licensed or certified appraisers who are independent contractors to the appraisal management company that have:
 - a. Responded to an invitation, request, or solicitation from an appraisal management company, in any form, to perform appraisals for persons that have ordered appraisals through the appraisal management company or to perform appraisals for the appraisal management company directly, on a periodic basis, as requested and assigned by the appraisal management company; and
 - b. Been selected and approved by an appraisal management company to perform appraisals for any client or the appraisal management company that has ordered an appraisal through the appraisal management company or to perform appraisals for the appraisal management company directly, on a periodic basis, as assigned by the appraisal management company.
- (5) Board. – The North Carolina Appraisal Board under Article 1 of this Chapter.
- (6) Employee. – An individual who has an employment relationship acknowledged by both the individual and the company and is treated as an employee for purposes of compliance with federal income tax laws.
- (7) Registrant. – A real estate appraisal management company registered pursuant to this Article.
- (b) The definitions contained in G.S. 93E-1-4 also apply in this Article. (2010-141, s. 1.)

§ 93E-2-3. Rule-making authority.

The Board shall have the authority to adopt rules that are reasonably necessary to implement, administer, and enforce the provisions of this Article. (2010-141, s. 1.)

§ 93E-2-4. Qualifications for registration; duties of registrants.

(a) Any person or entity desiring to be registered as an appraisal management company in this State shall make written application to the Board on forms prescribed by the Board setting forth the applicant's qualifications for registration. The application shall be accompanied by the applicable fee under G.S. 93E-2-6 and any other information the Board deems necessary pursuant to rules adopted by the Board. Upon receipt of a properly completed application and fee and upon a determination by the Board that the applicant is of good moral character, the Board shall issue to the applicant a certificate of registration authorizing the applicant to act as a real estate appraisal management company in this State.

- (b) The registration required by subsection (a) of this section shall include the following information:
 - (1) Legal name of the entity seeking registration.
 - (2) Business address of the entity seeking registration.
 - (3) Phone contact information of the entity seeking registration.
 - (4) If the entity is not a corporation that is domiciled in this State, the name and contact information for the company's agent for service of process in this State.
 - (5) The name, address, and contact information for any individual or any corporation, partnership, or other business entity that owns ten percent (10%) or more of the appraisal management company.
 - (6) The name, address, and contact information for the compliance manager.
 - (7) A certification that the entity has a system and process in place to verify that a person being added to the appraiser panel of the appraisal management company holds a license in good standing in this State pursuant to the North Carolina Appraisers Act if a license or certification is required to perform appraisals.
 - (8) A certification that the entity has a system in place to require that appraisers inform the appraisal management company of their areas of geographic competency, the types of properties the appraiser is competent to appraise, and the methodologies the appraiser is competent to perform.
 - (9) A certification that the entity has a system in place to review the work of all independent appraisers that are performing real estate appraisal services for the appraisal management company on a periodic basis to validate that the real estate appraisal services are being conducted in accordance with the Uniform Standards of Professional Appraisal Practice.
 - (10) A certification that the entity maintains a detailed record of each service request that it receives and the independent appraiser that performs the residential real estate appraisal services for the appraisal management company.
 - (11) An irrevocable Uniform Consent to Service of Process.

(12) Any other information required by the Board pursuant to G.S. 93E-2-3.

(c) Any registrant having a good faith belief that a real estate appraiser licensed in this State has violated applicable law or the Uniform Standards of Professional Appraisal Practice or engaged in unethical conduct shall promptly file a complaint with the Board.

(d) Registered appraisal management companies shall pay fees to an appraiser within 30 days of the date the appraisal is transmitted by the real estate appraiser to the registrant, except in cases of noncompliance with the conditions of the engagement. In such cases, the registrant shall notify the real estate appraiser in writing that the fees will not be paid.

(e) To qualify to be registered as an appraisal management company, each individual who owns, directly or indirectly, more than ten percent (10%) of the appraisal management company shall be of good moral character, as determined by the Board, and shall submit all information the Board deems necessary pursuant to the rules adopted by the Board. Additionally, each owner shall certify that he or she has never had a license to act as an appraiser refused, denied, cancelled, or revoked by the State of North Carolina or any other state.

(f) A registered appraisal management company shall not enter into any contracts or agreements with an independent appraiser for the performance of residential real estate appraisal services for properties located in this State unless the independent appraiser is licensed or certified in good standing pursuant to the North Carolina Appraisers Act. (2010-141, s. 1.)

§ 93E-2-5. Compliance manager.

Each appraisal management company registered under this Article shall designate a compliance manager who is responsible for ensuring the company operates in compliance with this Article. The compliance manager shall be a certified real estate appraiser on active status and in good standing, certified under Article 1 of this Chapter or under the comparable laws of another state. The appraisal management company shall file a form with the Board indicating the appraisal management company's designation of compliance manager and the individual's acceptance of the responsibility. An appraisal management company shall notify the Board of any change in the appraisal management company's compliance manager. Any appraisal management company that does not comply with this section shall have the appraisal management company's registration suspended pursuant to G.S. 93E-2-8 until the appraisal management company complies with this section. An individual operating an appraisal management company as a sole proprietorship shall be considered the compliance manager for purposes of this Article. (2010-141, s. 1.)

§ 93E-2-6. Fees and renewals.

(a) Each application for registration as an appraisal management company under this Article shall be accompanied by a registration fee in an amount set by the Board not to exceed three thousand five hundred dollars (\$3,500). Registration issued under this Article shall expire on June 30, 2012, and on June 30 of each year thereafter. The registration shall become invalid after that date unless renewed before the expiration date by filing an application with and paying to the Board a fee in an amount set by the Board not to exceed two thousand dollars (\$2,000).

(b) All registrations reinstated after the expiration date are subject to a late filing fee of twenty dollars (\$20.00) for each month or part thereof that the registration is lapsed, not to exceed one hundred twenty dollars (\$120.00). The late filing fee shall be in addition to the required renewal fee. In the event a registrant fails to reinstate the registration within six months after the expiration date, the registration shall expire and the registrant shall be required to file a new application for registration. Reinstatement of a registration shall not be retroactive.

(c) The Board may issue a replacement registration to the registrant upon payment of fifty dollars (\$50.00) to the Board. The Board may certify the registration history of an appraisal management company registered under this Article upon payment of a fee of one hundred dollars (\$100.00) to the Board. (2010-141, s. 1.)

§ 93E-2-7. Prohibited acts.

(a) No employee, director, officer, or agent of a registered appraisal management company or any other third party acting as joint venture partner or independent contractor shall influence or attempt to influence the development, reporting, result, or review of a real estate appraisal through coercion, extortion, collusion, compensation, inducement, intimidation, bribery, or in any other manner, including:

- (1) Withholding or threatening to withhold timely payment for a real estate appraisal report.
- (2) Withholding or threatening to withhold future business from a real estate appraiser or demoting or terminating or threatening to demote or terminate a real estate appraiser.
- (3) Expressly or impliedly promising future business, promotions, or increased compensation for a real estate appraiser.

- (4) Conditioning the ordering of a real estate appraisal report or the payment of a real estate appraisal fee, salary, or bonus on the opinion, conclusion, or valuation to be reached or on a preliminary estimate requested from a real estate appraiser.
 - (5) Requesting that a real estate appraiser provide an estimated, predetermined, or desired valuation in a real estate appraisal report or provide estimated values or comparable sales at any time before the appraiser's completion of the appraisal report.
 - (6) Providing to a real estate appraiser an anticipated, estimated, encouraged, or desired value for a subject property or a proposed or targeted amount to be loaned to the borrower. However, a real estate appraiser may be provided with a copy of the sales contract for purchase transactions.
 - (7) Providing to a real estate appraiser, or any entity or person related to the appraiser, stock or other financial or nonfinancial benefits.
 - (8) Allowing the removal of a real estate appraiser from a list of qualified appraisers used by any entity without prior written notice to the appraiser. The notice shall include written evidence of the appraiser's illegal conduct, substandard performance, or otherwise improper or unprofessional behavior or any violation of the Uniform Standards of Professional Appraisal Practice or State licensing standards.
 - (9) Any other act or practice that impairs or attempts to impair a real estate appraiser's independence, objectivity, or impartiality.
 - (10) Requesting or requiring a real estate appraiser to collect a fee from the borrower, homeowner, or any other person in the provision of real estate appraisal services.
 - (11) Altering, modifying, or otherwise changing a completed appraisal report submitted by an independent appraiser without the appraiser's written knowledge and consent.
 - (12) Using an appraisal report submitted by an independent appraiser for any other transaction.
 - (13) Requiring an appraiser to indemnify an appraisal management company or hold an appraisal management company harmless for any liability, damage, losses, or claims arising out of the services performed by the appraisal management company, and not the services performed by the appraiser.
 - (14) Requiring an appraiser to provide the company with the appraiser's digital signature or seal.
 - (15) Requiring or attempting to require an appraiser to prepare an appraisal if the appraiser, in the appraiser's own independent professional judgment, believes the appraiser does not have the necessary expertise for the assignment or for the specific geographic area and has notified the appraisal management company and declined the assignment.
 - (16) Requiring or attempting to require an appraiser to prepare an appraisal under a time frame that the appraiser, in the appraiser's own professional judgment, believes does not afford the appraiser the ability to meet all the relevant legal and professional obligations if the appraiser has notified the appraisal management company and declined the assignment.
- (b) Nothing in this section shall be construed as prohibiting an appraisal management company from requesting that a real estate appraiser:
- (1) Consider additional appropriate property information.
 - (2) Provide further detail, substantiation, or explanation for the real estate appraiser's value conclusion, through the registrant's established dispute process.
 - (3) Correct errors in the real estate appraisal report. (2010-141, s. 1.)

§ 93E-2-8. Disciplinary authority.

- (a) The Board may, by order, deny, suspend, revoke, or refuse to issue or renew a registration of an appraisal management company under this Article or may restrict or limit activities of a person who owns an interest in or participates in the business of an appraisal management company if the Board determines that an applicant, registrant, or any partner, member, manager, officer, director, compliance manager, or person occupying a similar status, performing similar functions, or directly or indirectly controlling the applicant or registrant has done any of the following:
- (1) Filed an application for registration that, as of its effective date or as of any date after filing, contained any statement that, in light of the circumstances under which it was made, is false or misleading with respect to any material fact.
 - (2) Violated or failed to comply with any provision of this Article or any rules adopted by the Board.

- (3) Been convicted of any felony or, within the past 10 years, been convicted of any misdemeanor involving mortgage lending or real estate appraisal or any offense involving breach of trust, moral turpitude, or fraudulent or dishonest dealing.
- (4) Been permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the real estate appraisal management business.
- (5) Been the subject of an order of the Board or any other state appraiser regulatory agency denying, suspending, or revoking the person's license as a real estate appraiser.
- (6) Acted as an appraisal management company while not properly licensed by the Board.
- (7) Failed to pay the proper filing or renewal fee under this Article.

(b) The Board may, by order, summarily postpone or suspend the registration of an appraisal management company pending final determination of any proceeding under this section. Upon entering the order, the Board shall promptly notify the registrant that the order has been entered and the reasons for the order. The Board shall calendar a hearing within 15 days after the Board receives a written request for a hearing. If a registrant does not request a hearing, the order shall remain in effect until the order is modified or vacated by the Board. If a hearing is requested, after notice of and opportunity for hearing, the Board may modify or vacate the order or extend the order until the Board makes its final determination.

(c) The Board may, by order, impose a civil penalty upon a registrant or any partner, officer, director, compliance manager, or other person occupying a similar status or performing similar functions on behalf of a registrant for any violation of this Article. The civil penalty shall not exceed ten thousand dollars (\$10,000) for each violation of this Article.

(d) In addition to other powers under this Article, upon finding that any action of a person is in violation of this Article, the Board may order the person to cease from the prohibited action. If the person subject to the order fails to appeal the order of the Board or the person appeals the order and the appeal is denied or dismissed and the person continues to engage in the prohibited action in violation of the Board's order, the person shall be subject to a civil penalty of up to twenty-five thousand dollars (\$25,000) for each violation of the order. The penalty provision of this section shall be in addition to and not in lieu of any other provision of law applicable to a registrant for the registrant's failure to comply with an order of the Board.

(e) Unless otherwise provided, all actions and hearings under this Article shall be governed by Article 3A of Chapter 150B of the General Statutes.

(f) When a registrant is accused of any act, omission, or misconduct that would subject the registrant to disciplinary action, the registrant, with the consent and approval of the Board, may surrender the registrant's registration and all the rights and privileges pertaining to the registrant for a minimum period of five years. A person who surrenders a registration shall not be eligible for or submit any application for registration during the period the registration is surrendered.

(g) If the Board has reasonable grounds to believe that an appraisal management company has violated the provisions of this Article or that facts exist that would be the basis for an order against an appraisal management company, the Board may at any time, either personally or by a person duly designated by the Board, investigate or examine the books, accounts, records, and files of any registrant or other person relating to the complaint or matter under investigation. The Board may require any registrant or other person to submit a criminal history record check and a set of that person's fingerprints in connection with any examination or investigation. Refusal to submit the requested criminal history record check or a set of fingerprints shall be grounds for disciplinary action. The reasonable cost of the investigation or examination shall be charged against the registrant.

(h) The Board shall have the power to issue subpoenas requiring the attendance of persons and the production of papers and records before the Board in any hearing, investigation, inquiry, or other proceeding conducted by the Board. Upon the production of any papers, records, or documents, the Board shall have the power to authorize true copies of the papers, records, or documents to be substituted in the permanent record of the matter in which the books, records, or documents shall have been introduced in evidence.

(i) Upon a request by the Board and with reasonable notice, an appraisal management company shall produce within this State all books and records related to real estate appraisal management services provided for properties located in North Carolina. (2010-141, s. 1.)

§ 93E-2-9. Records.

(a) The Board shall maintain a list of all applicants for registration under this Article that includes for each applicant the date of application, the name and primary business location of the applicant, and whether the registration was granted or refused.

(b) The Board shall maintain a current roster showing the names and places of business of all registered appraisal management companies that lists the appraisal management companies' respective officers and directors. The rosters shall: (i) be kept on file in the office of the Board; (ii) contain information regarding all orders or other action taken against the company, its officers, and other persons; and (iii) be open to public inspection.

(c) Every registered appraisal management company shall maintain the accounts, correspondence, memoranda, papers, books, and other records related to services provided by the appraisal management company as prescribed in rules adopted by the Board, including in electronic form. All records shall be preserved for five years unless the Board, by rule, prescribes otherwise for particular types of records.

(d) If the information contained in any document filed with the Board is or becomes inaccurate or incomplete in any material respect, the appraisal management company shall promptly file a correcting amendment to the information contained in the document. (2010-141, s. 1.)

§ 93E-2-10. Penalty; injunctive relief.

(a) Any person violating the provisions of this Article shall be guilty of a Class 1 misdemeanor.

(b) The Board may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Article or rules adopted by the Board. The superior court shall have the power to grant these injunctions whether criminal prosecution has been or may be instituted as a result of the violations or whether the person is the holder of a registration issued by the Board under this Article. (2010-141, s. 1.)

§ 93E-2-11. Criminal history record checks of applicants or registrants for registration as appraisal management companies.

(a) Definitions. – The following definitions shall apply in this section:

(1) Applicant. – A person applying for registration as an appraisal management company pursuant to G.S. 93E-2-4.

(2) Criminal history. – A history of conviction of a state or federal crime, whether a misdemeanor or felony, that bears on an applicant's fitness for registration to act as a real estate appraisal management company. The crimes include the criminal offenses set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act in Article 5 of Chapter 90 of the General Statutes and alcohol-related offenses, including sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(b) The Board may require that an applicant for registration as an appraisal management company or a registrant consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny registration to an applicant or registrant. The Board shall ensure that the State and national criminal history of an applicant or registrant is checked. The Board shall be responsible for providing to the North Carolina Department of Justice the fingerprints of the applicant or registrant to be checked, a form signed by the applicant or registrant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of

Justice in accordance with G.S. 114-19.30. The Board shall keep all information obtained pursuant to this section confidential. The Board shall collect any fees required by the Department of Justice and shall remit the fees to the Department of Justice for expenses associated with conducting the criminal history record check.

(c) If an applicant's or registrant's criminal history record check reveals one or more convictions listed under subdivision (a)(2) of this section, the conviction shall not automatically bar registration. The Board shall consider all of the following factors regarding the conviction:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.
- (7) The subsequent commission by the person of a crime listed in subdivision (a)(2) of this section.

If, after reviewing these factors, the Board determines that the applicant's or registrant's criminal history disqualifies the applicant or registrant for registration, the Board may deny registration of the applicant or registrant. The Board may disclose to the applicant or registrant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant or registrant. The applicant or registrant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) Limited Immunity. – The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying registration to an applicant or registrant based on information provided in the applicant's or registrant's criminal history record check. (2010-141, s. 1.)

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. BOARD OF COSMETIC ART EXAMINERS

RULE CITATION: 21 NCAC 14N .0113

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 what this rule requires now that "reapplication for" in (a) line 7 is being deleted.

Prior to this proposed change an applicant who had failed either portion of the examination had to reapply for the examination. Presumably in reapplying to take the examination the applicant would be reapplying to take the entire examination. And it was the "reapplication" that required the additional study in order for it to be accepted by the board. Now it is simply (the? an? permission to retake? successfully completed portion of an/the?) "examination" that "shall be accepted by the Board" and it is unclear what that is.

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. STATE BOARD OF OPTICIANS

RULE CITATION: 21 NCAC 40 .0214

RECOMMENDED ACTION:

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

COMMENT:

Counsel believes this rule is poorly written. It does not seem to be in chronological order and lacks cohesiveness and clarity. There are four different times and circumstances when the rule refers to dismissing a complaint as "unfounded or trivial." It would seem that at some point early in the process after a complaint has survived one or even two of the times when it could be dismissed as "unfounded or trivial" that it would or could no longer be considered and dismissed as "unfounded or trivial."

Counsel believes that the RRC should object to the rule on the basis of ambiguity and give the agency a chance to rewrite the rule in its entirety.

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. STATE BOARD OF OPTICIANS

RULE CITATION: 21 NCAC 40 .0323

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

X Extend the period of review

COMMENT:

Counsel finds it hard to believe that the agency would actually bar an applicant from training to be an optician for a failure to complete some application or form as required by (d): If any optician, [etc] ... submits incomplete ... information, then the Board shall bar them from training (emphasis added).

Counsel recommends extending the period of review to determine if that is the board's intent. If it is not their intent then they should be given a chance to rewrite the rule.